

Tempering Justice with Compassion

Stephen P. Garvey*

Tributes to scholars and their careers often testify to the honoree's virtues. A list of Josh's virtues would include decent, kind, gentle, caring, conscientious, and generous, to name just a few. Qualities like these spring immediately to mind when one reflects on Josh as a human being. They're also the qualities often mentioned when Josh's name comes up in conversation (and he's not around). Scholarly also comes to mind. So too do modesty and humility. Perhaps one way to respect Josh's modesty and humility is to focus on just two of his many virtues, and in particular on the two virtues most prominently on display in his work as a scholar of the criminal law.

My many encounters with Josh's scholarship have heretofore been piecemeal, focusing on this or that article when guidance was needed on the law, or insight was needed on the theory, of this or that doctrine. I'd never had occasion to study his work as a whole, looking for broader themes and connections running through contributions spanning nearly forty years. The opportunity to reflect on Josh's scholarly career gave me the perfect excuse to take the broad view, to try to see the forest. Or, rather than excuse, should I say justification? The question is apt, because the concepts of justification and excuse (especially excuse), and the difference between them, have long been central to Josh's thought.

On my reading, the two virtues most prominent in Josh's scholarship are justice and compassion. Josh is deeply committed to both. Justice permits the state to punish only those who are worthy of blame and punishment. Those unworthy of blame and punishment should be excused. But those who are unexcused, and thus worthy of blame and punishment, need not be punished to the full extent justice allows. For the justice to which Josh is committed, unlike the justice to which others are committed, doesn't exclude the possibility of compassion and mercy. On the contrary, the law should make as much room as possible for them. Josh's commitment to justice finds clear expression through his commitment to excuses, and to understand his theory of excuse, we should first attend to the distinction between excuses and justifications.¹

* Professor of Law, Cornell Law School.

¹ Highlighting large themes comes at a cost. Other themes get less attention than they deserve. I have in mind Josh's contributions to criminal procedure scholarship, especially his work on proportionality and capital punishment. See, e.g., Joshua Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17 (1979); Joshua Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrine*, 34 SW. L.J. 1063 (1981); Joshua Dressler et al., *Effect of Legal Education upon Perceptions of Crime Seriousness: A Response to Rummel v. Estelle*, 28 WAYNE L. REV. 1247 (1982). I also have in mind his work on omission liability. See Joshua Dressler, *Some*

Criminal law theorists, and good criminal lawyers, nowadays routinely distinguish excuses from justifications. Some defenses typically fall into one category, and others typically fall into the other category. This now-commonplace distinction wasn't always so common. Of course, as Josh observed some thirty years ago, criminal dispositions did in the distant past turn on the distinction between justified and excused conduct. The law treated you one way if you were justified, and another if you were excused. Over time, however, a "successful claim of excuse . . . [came to have] the same direct effect as a justification: acquittal of the defendant."² He continued:

Probably because of this, the interest of nineteenth and twentieth century lawyers and most legal scholars in the inherent differences between the two classes of exculpatory claims waned. Indeed, until recently, the absence of interest in the subject was nearly complete. American casebooks ignored the distinction; the topic received scant attention in American law journals; and treatise authors ignored the differences or, perhaps worse, suggested that the differences were of no concern to lawyers. In light of this, it is not surprising that courts often use the words "justification" and "excuse" interchangeably.³

That world is hard to imagine today. Along with George Fletcher and others, including Paul Robinson, Josh pioneered the effort to reinvigorate attention to the distinction, and to help us see why it mattered. If someone commits a crime under the conditions spelled out in a justification defense, like self-defense or necessity, then she was, all things considered, permitted to act as she did. If someone commits a crime without justification, but under conditions spelled out in an excuse, then although she wasn't permitted to act as she did, she's nonetheless not

Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws, 40 SANTA CLARA L. REV. 971 (2000).

The most flagrant omission, however, is accomplice liability. Josh's 1985 article on complicity is a seminal contribution to the literature. See Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985). Josh returned to complicity 23 years later. See Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427 (2008). Three of Josh's articles are especially conspicuous for combining in-depth historical and doctrinal analyses with theoretical insight. The 1985 article on complicity is one. The other two, on duress and provocation, are discussed below. See Joshua Dressler, *Exegesis on the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989) [hereinafter Dressler, *Exegesis on Duress*], and Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982) [hereinafter Dressler, *Rethinking Heat of Passion*]. Each of these articles includes abundant citations to the relevant caselaw. Few (if any) criminal law theorists writing today read and study the cases as Josh has, let alone with the same care.

² Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1158 (1987) (citations omitted) [hereinafter Dressler, *Justifications and Excuses*].

³ *Id.*

to blame, and punishment would thus be unjust. Thanks in large part to Josh's early work, today's casebooks (including his own)⁴ and treatises (including his own)⁵ now routinely divide defenses into justifications and excuses, and because the distinction is found in casebooks and treatises, one hopes they will increasingly come to be found in the arguments and pleadings of lawyers and in the opinions of judges.

With the conceptual distinction between justification and excuses in view, Josh's next step was to develop theories for them. Under what conditions should the law allow someone to commit what would otherwise have been a punishable crime? Under what conditions should the law withhold blame and punishment when someone, without justification, committed a crime? Although Josh has ventured into both the theory of justification and the theory of excuse,⁶ his most concerted efforts have been dedicated to articulating and defending a theory of excuse. Josh calls the theory of excuse he has developed, defended, and deployed over many years the *personhood principle*, or sometimes the choice theory.

At the center of the personhood principle is an account of the person as a being capable of free choice. If a person freely chooses (without justification) to commit a crime, he thereby becomes fairly liable to the reactive emotions. He becomes worthy of blame and vulnerable to state punishment. We rightly experience anger directed toward someone who freely chooses to commit a crime. Moreover, someone who freely chooses to commit a crime should experience anger directed toward himself. Such anger is otherwise known as guilt. A blameworthy choice is also a guilt-worthy choice. Indeed, as Josh long ago observed: "[G]uilt feelings by wrongdoers are good."⁷ Of course, blameworthiness and guilt don't attach to all choices to do wrong. They attach only to free choices. Those who make unfree choices should be excused for making them.

The personhood principle describes the conditions under which a choice to commit a crime isn't free, and thus under which a choice is free from blame. The personhood principle is also part of a theory of justice: It would be unjust to punish someone who didn't freely choose to commit the crime charged.⁸ The personhood

⁴ Josh's widely used casebook, *Cases and Materials on Criminal Law*, first appeared in 1994, and will soon appear in its eighth edition.

⁵ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (7th ed. 2015).

⁶ His thoughts on the theory of justification are most fully developed in Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 *UCLA L. REV.* 61 (1984), and Dressler, *Justifications and Excuses*, *supra* note 2, at 1163–65.

⁷ Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 *RUTGERS L.J.* 671, 689 (1988) [hereinafter Dressler, *Reflections*].

⁸ In his initial reflections on the theory of excuse, Josh detected a connection between the excuses and compassion. Subsequent conversations with Herbert Morris "convinced [him] that excuses are about justice, not compassion." Joshua Dressler, *Some Very Modest Reflections on Excusing Criminal Wrongdoers*, 42 *TEX. TECH. L. REV.* 247, 252 (2009) [hereinafter Dressler, *Some Very Modest Reflections*].

principle identifies two excusing conditions. The first is lack of capacity (or substantial capacity). The second is lack of fair opportunity. The personhood principle thus states: A person who chooses to commit a crime should be excused if his choice is unfree, and his choice is unfree if he either lacked *substantial capacity* to conform his conduct to the requirements of law; or if he had such capacity, he nonetheless lacked a *fair opportunity* to conform.⁹

Josh has put the personhood principle—as a moral principle or principle of justice—to use in two ways. First, he’s used it to identify the moral basis, or the most plausible moral basis, for existing legal defenses. Which branch of the personhood principle best explains or rationalizes the law of this or that defense as we know it? Second, having identified a defense’s moral basis, he’s used the principle to suggest reforms to the doctrine. Because this or that defense is grounded in this or that branch of the personhood principle, it would better conform to the principle if we make this or that change to the doctrine. The two defenses Josh has most often used the principle to illuminate and reformulate are duress and provocation.

Duress is a familiar legal defense, but its moral basis is obscure. When one person commits a crime against another in order to avoid a threatened harm at the

⁹ This formulation of the personhood principle is truncated. It states the principle only as it applies to a person’s capacity and fair opportunity to conform to the law. Josh gives a complete statement of the principle as follows:

Desert is based upon the principle that a specific blameworthy act can be imputed to the person . . . who is in court if, but only if, he had the capacity and fair opportunity to function in a uniquely human way, *i.e.*, freely to choose whether to violate the moral/legal norms of society.

“Free choice” exists if the actor has the substantial capacity and fair opportunity to: (1) understand the pertinent facts relating to his conduct; (2) appreciate that his conduct violates society’s moral or legal norms; and (3) conform his conduct to the law.

Dressler, *Reflections*, *supra* note 7, at 701; *see also* Dressler, *Some Very Modest Reflections*, *supra* note 8, at 253 (revisiting the topic in 2009 and “generally stand[ing] by what [he] wrote in 1988”).

Josh identifies insanity as a defense based a person’s lack of substantial capacity to appreciate he’s committing a crime, *or* to conform his conduct to the law. Insanity is thus an incapacity defense applicable to both (2) and (3). Because Josh identifies insanity as an incapacity defense applicable to (3), he endorses volitional or control tests for insanity. Other theorists reject such tests, limiting insanity to those who lack substantial capacity to appreciate they’re committing a crime. Recently, Josh has voiced support for Judge Bazelon’s “justly responsible” test as a test for insanity. *See* Dressler, *Some Very Modest Reflections*, *supra* note 8, at 257. His endorsement raises a question. If Bazelon’s test were to become the sole test for insanity, would existing law reflect any defense based on an actor’s lack of capacity to appreciate or conform to the law?

The relationship between the personhood principle and existing legal defenses raises another question. As we’ll see, Josh has identified duress as an unfair-opportunity defense based on a person’s lack of a fair opportunity to (3) conform to the law, and as just mentioned, he has identified (at least until recently) insanity as an incapacity defense based on a person’s lack of capacity to (2) appreciate the law, or (3) conform to the law. That leaves one piece missing. What (if any) legal defense is based on a person’s lack of a fair opportunity to (2) appreciate the law? The answer is reasonable mistake or ignorance of law, which Josh has long believed the law should recognize as a defense, despite the common law principle to the contrary. *See* Dressler, *Reflections*, *supra* note 7, at 707–08; Dressler, *Some Very Modest Reflections*, *supra* note 8, at 253.

hands of a third party, liability is sometimes deflected in the name of duress. Again, why it should is obscure. Some believe an actor who commits a crime under duress is permitted to commit it, which would make duress a justification. Not so, says Josh. The law of duress, he's long argued, fits the logic of excuse better than it does the logic of justification. According to Josh's theory of duress, which he first developed in 1985, duress should excuse when a defendant lacked a sufficiently fair opportunity to choose to conform his conduct to the requirements of law, and an opportunity to choose to conform is sufficiently unfair if the choice he makes, albeit a choice to commit a crime, is nonetheless, under the circumstances, a choice that "attain[s] or reflect[s] society's legitimate expectations of moral strength."¹⁰

Having identified duress's moral basis, Josh has long urged lawmakers to make the legal defense more coextensive with the personhood principle. For example, he argues that a defendant who kills another under serious threat should be permitted to have the jury at least consider a plea based on duress.¹¹ Here, Josh disagrees with the common law, which bars duress as a defense to murder, but agrees with the Model Penal Code, which does not. He likewise argues that the law should permit a defendant to submit a claim of duress to the jury when he commits a crime under a threat arising from force of circumstance, and not only from the agency of a third party. Here, Josh disagrees with both the common law and the MPC, both of which bar what's commonly known as "duress of circumstances" or "situational duress."¹²

Provocation is another familiar presence in the law. Unlike duress, which is typically a full defense, provocation is a partial defense. If a person intentionally

¹⁰ Dressler, *Exegesis on Duress*, *supra* note 1, at 1334. Quoting R.A. Duff, Josh offers an equivalent formulation: Would "a person with the kind of commitment to the values protected by the law (and violated by his action), and with the kind and degree of courage we can properly demand of citizens . . . have been thus affected by such a threat," i.e., would such a person have committed the crime with which the defendant is charged? Joshua Dressler, *Duress*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* 269, 286 (John Deigh & David Dolinko eds., 2011) (quoting R.A. Duff, *Rule Violations and Wrongdoings*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 63, 64 (Stephen Shute & A.P. Simester eds., 2002) (emphasis added)) [hereinafter Dressler, *Duress*].

¹¹ Dressler, *Exegesis on Duress*, *supra* note 1, at 1334, 1370–74; Dressler, *Duress*, *supra* note 10, at 287–88.

¹² Dressler, *Exegesis on Duress*, *supra* note 1, at 1334, 1374–76; Dressler, *Duress*, *supra* note 10, at 291–92. Josh has long argued in favor of duress as the best doctrinal solution to cases involving battered spouses who kill their sleeping abusers. See, e.g., Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 *OHIO ST. J. CRIM. L.* 457, 470 (2006); Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 259 (Stephen Shute & A.P. Simester eds., 2002). He's also argued it provides the best way to explain why Dudley and Stephens shouldn't have been convicted for murdering Richard Parker. See Joshua Dressler, *Reflections on Dudley and Stephens and Killing the Innocent: Taking a Wrong Conceptual Path*, in *THE SANCTITY OF LIFE AND THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS* 126–27 (Dennis J. Baker & Jeremy Horder eds., 2013).

kills another in the heat of passion upon adequate provocation, he's guilty at common law of manslaughter, whereas absent the provocation, he'd be guilty of murder. The moral basis for the provocation doctrine is, compared to duress, probably even more obscure. Once again, some believe a person is "partially permitted" to kill if he kills under the conditions defining provocation. On this view, the provoked killer is guilty of manslaughter, not murder, because the provoked killer, compared to the unprovoked killer, is guilty of a lesser wrong, perhaps because his motives were more worthy (though not worthy enough for a full defense) or because the provocateur deserved to be punished for his provocation (though not with death and not at the hands of the defendant). Either way, killing a provocateur isn't as bad as killing someone who didn't provoke a lethal response.

Josh had long resisted this partial justification theory of provocation. The doctrine of provocation, probably more than any other, has for Josh been a source of longstanding fascination. His first article on provocation appeared thirty-five years ago, in 1982. His latest, with three others in between, appeared in 2009.¹³ The theory's basic elements have remained more or less constant. Provocation, according to Josh, is a partial excuse made available to someone who intentionally kills another when, as a result of adequate provocation,¹⁴ his capacity to conform his conduct to the requirements of law is partially impaired, and his capacity to conform is partially impaired when his capacity to control his provocation-induced anger is partially impaired. His capacity to control his conduct (and thereby conform to the law) isn't *completely* undermined.¹⁵ The provoked killer still has *some* capacity for self-control, but not as much as he would have had without the provocation.¹⁶ Exercising and achieving self-control under the circumstances was hard, but not impossible.

¹³ See Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 422–24 (initial statement of the theory); Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467 (1988) (responding to Finbarr McAuley's partial justification theory); Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995) (responding to Robert Mison's utilitarian critique); Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 962 (2002) (responding to "the feminist argument for abolishing the defense") [hereinafter Dressler, *Why Keep Provocation?*]; Joshua Dressler, *Provocation: Explaining and Justifying the Defense in Partial Excuse, Loss of Self-Control Terms*, in CRIMINAL LAW CONVERSATIONS 319 (Paul H. Robinson et al. eds., 2009).

¹⁴ Josh initially believed the anger (or other emotion) in which the provoked killer killed must have been excusable (but inappropriate) anger. In his later writing, Josh says he's come to believe the anger in which the provoked killer kills *can* sometimes be understood as appropriate. The defense should be available, however, as long as the accused's anger is at least excusable. See Dressler, *Why Keep Provocation?*, *supra* note 13, at 959, 972.

¹⁵ Josh suggested in his first article on provocation that if a provoked killer's capacity for self-control was completely undermined, then he should be fully excused. See Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 465–66.

¹⁶ Might provocation's moral basis be found, not in the provoked killer's partial incapacity to conform, but rather in his unfairly diminished opportunity to conform? Josh has entertained this

Some progressive scholars abhor provocation. The doctrine, as they see it, wrongly lets homophobes and misogynists get away with murder. When a straight man kills a gay man who makes a non-violent sexual advance, or when a man kills a woman who is about to leave him, some formulations of the provocation doctrine would allow jurors to return a manslaughter verdict when the only verdict they should be permitted to return (according to the critics) is murder. This progressive critique, as Josh understands it, is a consequentialist critique. The provocation doctrine, according to the critics, causes more harm than good. It devalues the lives of women and gay men, and leaves them inadequately protected. Even if the defendant's capacity for self-control was impaired, murder liability is the only way to properly value and adequately protect the lives of women and gay men.

Josh is committed to progress, but he's also committed to the personhood principle.¹⁷ If a man kills a woman or gay man because his capacity to conform to the law has, as a result of excusable anger, been partially impaired, he should be punished, but as a matter of justice, he should be punished less than he would have been had his capacity to conform been unimpaired. For Josh, progress should not come at the cost of justice. If all it takes to defeat an excuse is on-balance harm contingent on providing it, or on-balance good contingent on denying it, then no excuse will be safe. If the excuses are grounded in a consequentialist calculus, then all the excuses, from duress to insanity, as well as provocation, would only be as secure as the shifting balance of consequences on which they rest.¹⁸

The personhood principle forms a fixed point in Josh's philosophy, but it comes with a counterpoint. Josh is a compassionate man, and he's long struggled to find a place in his philosophy for both justice and compassion. Some might believe his struggle is bound to fail, because compassion expressed in action is mercy, and mercy just doesn't mix with justice. Indeed, mercy conflicts with justice. It entails being unjustly lenient, and for some, too little punishment is just as unjust as too much. Moreover, insofar as mercy occasions injustice, some believe it has no place in the criminal law. The state's only job, when it comes to punishing crimes, is to do justice. It has no business being in the mercy business. Mercy is a virtue, but not one to which the state should aspire.

proposal, but ultimately remains unpersuaded. *See id.* at 463–64; Dressler, *Why Keep Provocation?*, *supra* note 13, at 974 n.68.

¹⁷ Few readers probably realize it, but Josh's first article, published in 1978, condemned the law for allowing gay teachers to be routinely fired. *See* Joshua Dressler, *Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession*, 9 RUTGERS-CAMDEN L.J. 399, 400 (1978). Josh would turn his attention again to gay rights in Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, CIV. LIB. REV., Jan.–Feb. 1979, at 19, and in Joshua Dressler, *Survey of School Principals Regarding Alleged Homosexual Teachers in the Classroom: How Likely (Really) is Discharge?*, 10 DAYTON L. REV. 599 (1985).

¹⁸ *See, e.g.*, Dressler, *Why Keep Provocation?*, *supra* note 13, at 966.

Josh thoughtfully rejects this skepticism.¹⁹ Mercy, he argues, has an important role to play in the criminal justice system. The real question is where it should play that role. The excuses, Josh has argued, are not the right place. Compassion and mercy should be able to find expression in the criminal law, but compassion can't provide the moral basis for excuse. On the contrary, if the criminal law were to embrace a theory of excuse based on compassion, Josh invites us to ask where it will lead. Consider, for example, the brainwashed defendant, or the defendant born and raised in a rotten social background. Josh has written about both.²⁰ When a defendant is brainwashed, he's coercively transformed from the person he was into the person who committed the crime. Who wouldn't feel compassion for him? When a defendant comes from a rotten social background, his unjust environment shapes him into the person who committed the crime. Again, who wouldn't feel compassion? There but for the grace of God go I.

No one understands these compassionate sentiments better than Josh. Nonetheless, compassion, he warns, can lead us astray. When someone commits a crime, our compassion can often be elicited if we attend to the crime's causes. Of course, some causes may elicit compassion more readily than others. We're more apt to experience compassion for someone from a rotten social background than we are for someone from a spoiled rotten background. Still, compassion, Josh observes, can slide into causation. Compassion can lead us to embrace a theory of excuse based on causation; to wit: A choice should be excused if it was caused. Yet if determinism is true, all choices are caused, and if all caused choices are excused, then all choices are excused. To understand all is to excuse all.

No, excuses are rooted in justice, not compassion. Compassion will need to find expression elsewhere. Josh once thought compassion's place was at sentencing. Once a defendant's conviction had been justly secured, once any claim of excuse had been justly denied, and once he thereby became vulnerable to state punishment, then, but only then, should compassion take the stage. Judges should be allowed, or perhaps required, to consider a defendant's plea for compassion. Facts like coercive indoctrination and rotten social backgrounds, which have no just bearing on guilt or innocence, should nonetheless be heard for mercy's sake when the state decides how great a burden the defendant must bear for his crime. Thus, once upon a time, sentencing was the home Josh found for compassion and mercy.

That was once upon a time, but times change. The changing times have brought changes to how we sentence. Judges once had discretion, which not only

¹⁹ See Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1472 (1990) ("I think it is safe to say that most of us . . . want a penal system that allows for both justice and mercy. And, since we cannot fully have both, we treat justice as the primary goal, but one which we are prepared to compromise in unusual circumstances out of compassion for the person who must suffer our justice.").

²⁰ Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335 (1979) (brainwashing); Dressler, *Exegesis on Duress*, *supra* note 1, at 1377-85 (rotten social background); Dressler, *Duress*, *supra* note 10, at 292-93 (same).

allowed them to do justice, but to temper justice with mercy. Alas, the discretion needed for justice and mercy can all too easily become, in human hands, a vehicle for caprice and discrimination. Believing judges had failed to use their discretion wisely, resulting in too much caprice and discrimination, lawmakers removed it.²¹ Sentencing, which once depended on the practical wisdom of a judge, has increasingly come to depend on the numbers of a grid. Of course, that's an over-generalization, but it makes the point. Insofar as sentencing by the numbers has squeezed compassion and mercy from sentencing, can the law find for them a new home?

Josh's recent thoughts on this problem have led him back to the excuses. The excuses in law tend to be all or nothing. Either you're excused, or you're not. Yet the excuses in morality are seldom all or nothing. They're usually a matter of more or less. Sometimes they reduce blame without eliminating it. Provocation, of course, is the most prominent example in law. If sentencing no longer makes room for compassion and mercy, or if sentencing can make room for compassion and mercy only if caprice and discrimination come along, then perhaps, Josh has suggested, the best we can do is to tailor justice as closely as we can to the individual. One way for the law to tailor justice would be to adopt two generic partial excuses, one based on diminished capacity, and the other based on diminished opportunity. These new defenses, which Josh has endorsed,²² wouldn't make the law of excuses merciful, but they might at least make it more just.

When Josh wants to pay someone a high compliment, and especially when he wants to commend their character, he's apt to call them a *mensch*. The compliment is offered as a sign of respect and endearment. Not knowing exactly what a *mensch* was, I looked it up. A *mensch*, I learned, is a person of integrity and honor. Integrity and honor require commitment. A person of integrity is true to his commitments, even when it would be easier to be faithless. A person of honor gains it because he lives up to his commitments. Josh is committed to justice and compassion; he's been true to, and lived up to, those twin commitments in his scholarly writing for forty years; and he's urged us all to create a criminal law likewise committed to both. He's a real *mensch*.

²¹ Dressler, *Some Very Modest Reflections*, *supra* note 8, at 254; Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 856 (2005).

²² Dressler, *Some Very Modest Reflections*, *supra* note 8, at 256 ("I advocate recognition of a diminished-rationality/diminished-opportunity verdict as another step in the right direction.").