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CULPABILITY IN CREATING CRIMINAL NECESSITY

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CULPABILITY IN CREATING CRIMINAL NECESSITY

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ABSTRACT

Can an actor justify criminal conduct when he was criminally culpable in creating the conditions making it necessary? Virtually every American jurisdiction answers that he cannot and bars the necessity defense under those circumstances. Whereas scholars have uniformly condemned that response, this Article takes the very different view that the exclusion of the defense for purposeful, knowing, and reckless criminal conduct that directly causes the allegedly justified act represents a sound retributivist check on what is an otherwise cruder evaluation of whether conduct is socially valuable, worthy of praise or, in a word, justified. Criminal “created culpability” is circumstantial data that bears crucially on the criminal law’s retributivist function – that wrongful conduct deserves punishment, not praise – and its inverse relationship to justification. Failing to account for criminal created culpability renders the concept of justification itself defective because it ignores precisely what is at the heart of any plausible theory of justification: that under certain circumstances an otherwise criminal act is not wrongful and should not be punished. This Article explains the relationship between criminal created culpability and justification, and suggests a rebuttable presumption procedure to ensure that the retributivist concerns animating created culpability are incorporated and weighed appropriately in assessing whether conduct is justified.

* Associate-in-law, Columbia Law School. I am indebted to Kent Greenawalt, Philip Hamburger, Gerard Lynch, Patricia Seith, and James Stewart for comments and discussions.

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I. INTRODUCTION

Can an actor justify criminal conduct when he was criminally culpable in creating the conditions making it necessary? Virtually every American jurisdiction answers that he cannot and bars the necessity defense under those circumstances. Whereas scholars have uniformly condemned that response, this Article takes the very different view that criminal “created culpability”¹ is circumstantial data that bears crucially on the criminal law’s retributivist function – that wrongful conduct deserves punishment, not praise – and its inverse relationship to justification. Failing to account for criminal created culpability renders the concept of justification itself defective because it ignores precisely what is at the heart of any plausible theory of justification: that under certain circumstances an otherwise criminal act is not wrongful and should not be punished.

Consider the following case. A couple goes out for a night on the town. After stops at several bars and many drinks, they return to his home. What happens next is unclear. Jane claims that Joe broke off the side of a beer bottle and began to lunge mockingly at her with the jagged end. Joe enjoyed scaring her when he got drunk and would often swipe at her with broken bottles and other dangerous items – scissors, a razor blade, a kitchen knife. Sometimes, after a night of drinking, Joe would beat her as well. Jane firmly believes that when Joe chased her with a sharp object, he never intended to injure her; he just took pleasure in her fear. On this occasion, however, Jane claims that Joe stabbed her head with the bottle. Joe claims that he accidentally bumped Jane, causing her to fall and hit her head on the corner of a glass table. What is certain is that Jane now has a head wound that is bleeding profusely. Joe applies pressure to it but the bleeding continues. Joe has no land-line telephone and cannot find either of their cellular phones. He runs to a neighbor’s house for help, but to no avail. Jane is now soaked in blood. Joe carries her to his car and drives to the hospital. Joe is subsequently arrested for assault and battery and driving under the influence of alcohol. At trial, Joe’s only defense to the DUI charge is necessity – that he was faced with a “choice

¹ Created culpability can occur in situations where another defense – duress or self-defense, for example – is asserted. In this Article, unless otherwise noted, the phrase refers to the situation where an actor is criminally culpable for creating the conditions that give rise to his later claim of justification.

of evils”² and had to drive drunk to save Jane’s life – and the court must decide what effect Joe’s criminal created culpability (which he disputes) should have on the availability of the defense.³

With the exception of Professor Paul Robinson’s seminal article more than twenty years ago,⁴ the problem of created culpability has received almost no scholarly attention,⁵ though scholars generally follow Robinson’s view that it should almost never bar the defense.⁶ This neglect in the literature is particularly surprising in light of the fact that many American jurisdictions disagree, barring the defense when the actor was

² The phrase “choice of evils” has a distinguished pedigree as the name for the necessity, or general justification, defense at common law. See Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1527 n.1 (collecting sources that use the phrase).

³ These facts and issues are drawn with some adjustments from an appeal that I argued before the Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court, as a Middlesex Special Assistant District Attorney in Cambridge, Massachusetts. See *Commonwealth v. Kendall*, ___ N.E.2d ___, 2008 WL 801537 (Mass. 2008); *Commonwealth v. Kendall*, 69 Mass. App. Ct. 1102 (2007) (unpublished opinion). The views expressed in this Article are mine alone and do not represent the position of the Middlesex District Attorney’s Office.

⁴ Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985). This article considers Professor Robinson’s claims in some detail and argues for a different approach. It also examines Professor George Fletcher’s brief discussion of the problem. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 796-98 (1978).

⁵ cursory and oblique treatments of the problem, as either a necessity defense question or one about criminal law generally, appear in Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1413-1414 (2003); Stephen P. Garvey, *What’s Wrong With Involuntary Manslaughter*, 85 TEX. L. REV. 333, 354 (2006); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1341-1342 (1989); David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2387-2389 (1992); Stephen P. Garvey, *Passion’s Puzzle*, 90 IOWA L. REV. 1677, 1709-1710 (2005); Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2442-2443 (2007); and William Wilson, *Impaired Voluntariness: The Variable Standards*, 6 BUFF. CRIM. L. REV. 1011, 1030-1031 (2003).

⁶ See, e.g., Robinson, *supra* note ___, at 31-32; 2 P. ROBINSON, *CRIMINAL LAW DEFENSES* § 123(d)(1) (2007); FLETCHER, *supra* note ___, at 798; STANLEY M.H. YEO, *COMPULSION IN THE CRIMINAL LAW* 166 (1990). The limited “grand scheme” exception proposed by Professor Robinson, of which more below, applies when “the actor causes the triggering conditions for the purpose of (or with other lesser culpability as to) causing someone to engage in the justified conduct.” *Id.*

at all culpable in creating the necessity.⁷ The Model Penal Code gives an intermediate answer:

When the actor was negligent or reckless in bringing about the situation requiring a choice of harms or evils . . . the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.⁸

The Code does not state specifically that the necessity defense is unavailable where created culpability was purposeful or knowing.⁹ Yet in order to avoid the anomaly that a person who purposefully or knowingly creates a necessitous condition will always receive the defense, while a person who does so negligently will not,¹⁰ the Code is best interpreted as barring the defense when the defendant acted with the culpability required by the underlying offense – that is, when the degree of created culpability and that of the underlying offense match.¹¹ Like the Code, no jurisdiction that has addressed the question permits the necessity defense in cases of purposeful created culpability.¹²

But one must surely wonder why. Suppose that Joe, after having intentionally beaten or stabbed Jane, realizes what he has done (perhaps he feels remorseful, but not necessarily) and must choose between driving her to the

⁷ See *infra* at Part III.

⁸ Model Penal Code § 3.02(2) (1985).

⁹ The Commentary explains that the Code’s approach “precludes conviction of a purposeful offense when the actor’s culpability inheres in negligence or recklessness, while sanctioning liability for a crime for which that kind of culpability is otherwise sufficient to convict.” Model Penal Code § 3.02, Comment 2. Presumably, “that kind of culpability” refers to negligence or recklessness, not purpose.

¹⁰ See 2 ROBINSON, CRIMINAL LAW DEFENSES § 123(c)(3) (1984).

¹¹ WAYNE LAFAVE, CRIMINAL LAW 534 (4th ed. 2003) (“Thus, if he intentionally brings on the danger, he may be guilty of a crime of intention; if he was reckless, of a crime of recklessness; of negligence, of a crime of negligence.”). *But see* YEO, *supra* note __, at 187 (arguing that in the case of intentional created culpability, the Code is better interpreted as barring the defense for a reckless or negligent offense, but not for an intentional offense).

¹² See *infra* notes __, and accompanying text [survey of state approaches]; Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 242 (2007) (“All states exclude the necessity defense when the actor’s wrongdoing brought about the claimed necessity, though they differ in how they formulate this restriction.”).

hospital while intoxicated and watching her die. A powerful case could be made that it should not matter that he was culpable, whether purposefully or otherwise, in creating the necessity. The issue is not merely one of providing incentives for Joe to assist Jane, which, in any case, may be in his best interest lest he be charged with a crime of omission.¹³ If the necessity defense is unavailable in cases of created culpability, it appears that Joe is penalized for “doing the right thing” – that is, choosing to save Jane by driving drunk. If Joe drives to the hospital, shouldn’t he be entitled to the necessity defense?¹⁴

This Article argues that under certain circumstances defendants such as Joe should not receive the defense. It explains and defends the nearly universal intuition that the necessity defense should be barred in cases where the actor was consciously and criminally culpable (that is, when he acted purposely, knowingly, or recklessly) with respect to engaging in the conduct that directly caused¹⁵ the necessity.¹⁶ Barring the necessity defense in such cases reflects a sound check on what would otherwise be a cruder consequentialist calculus of balancing social harms to achieve maximum social welfare.¹⁷ The created culpability bar complicates – beneficially – the assessment of whether an actor is justified in breaking the law by introducing a crucial component of desert that gives the justification inquiry greater texture and a wider compass of the relevant circumstances.¹⁸ And yet, as useful as this retributivist check¹⁹ is in providing a richer contextual

¹³ See Model Penal Code § 2.01(1), (3) (providing that liability for an offense may be based on conduct that includes an omission to perform an act of which one is physically capable, if the omission is expressly made sufficient for liability by the law defining the offense).

¹⁴ See Robinson, *supra* note __ [CCOD], at 27 (“Where a forest fire has been set, for whatever reason, society wants any and all persons to set a firebreak and save a threatened town.”). The question in the text assumes that Joe can satisfy the other requirements of the defense in his jurisdiction.

¹⁵ The problem of causation is discussed *infra* at notes __, and accompanying text.

¹⁶ See *infra* at notes __, and accompanying text [MPC discussion].

¹⁷ John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 404-414 (1999).

¹⁸ It is not the only such check. The requirement in many jurisdictions that an actor must believe that his course of action will be effective in abating the danger likewise reflects a judgment that the actor’s moral culpability is a relevant factor in assessing whether the necessity defense should be available. See Parry, *supra* note __, at 417-418.

¹⁹ The created culpability bar might be explained, at least in part, on the consequentialist ground that the law should impose criminal liability only to punish deterrable conduct. Hoffheimer, *supra* note __, at 242.

analysis, it should not invariably trump all other considerations. Specifically, this Article claims that the defendant's purpose, knowledge, or recklessness in engaging in conduct that directly causes a choice of evils should create a rebuttable presumption that the defendant is barred from asserting the necessity defense. That presumption could be rebutted if the defendant offered some evidence that: (1) he did not purposely, knowingly, or recklessly engage in criminal conduct that directly caused the necessity, or (2) his purposeful, knowing, or reckless criminal conduct did not directly cause the necessity, or (3) the evil that he avoided clearly and substantially outweighed the evil that he chose. If the defendant could meet the burden of production to rebut the presumption on any of these three grounds, it would become the government's burden of persuasion to prove beyond a reasonable doubt that the defendant's conduct was not justified.

This Article begins by arguing that the intuition that created culpability should bar the necessity defense has intellectual roots in the traditional rule that an actor was entitled to the defense only if the cause of the necessity was divine or natural (Part II).²⁰ It next surveys the approaches to created culpability that have been adopted by various American jurisdictions and the arguments that have been proffered for the created culpability bar (Part III). The Article then examines Professor Robinson's influential article on created culpability in detail,²¹ criticizing his approach and discussing possible justifications for a bar in cases of created culpability. It argues that, as to purposeful, knowing, and reckless created culpability, the bar is best explained as a retributivist check – but not an absolute one – on what would otherwise be a less sophisticated exercise in balancing harms. Using the case of Joe and Jane, the Article outlines and defends its rebuttable presumption procedure (Part IV). The Article then briefly considers how the approach that it advocates for general justification would apply to the excuse of duress. It argues that the relevance of created culpability in cases of duress is a point of conceptual overlap between justifications and excuses that may have important implications for how we think about these two types of defenses

The deterrence rationale for created culpability is discussed *infra* at Part IV(B).

²⁰ The necessity defense is also a feature of tort law but this Article limits itself to the criminal context. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 197, 262 (1965).

²¹ Robinson, *supra* note __[CCOD].

(Part V).²² The Article concludes that whether or not its specific solution to the problem of created culpability is accepted, any adequate approach to the necessity defense must account, as none of the scholarship to date has, for the powerful retributivist intuition that culpably created conduct is not justified.

II. CREATED CULPABILITY AND THE DIVINE/NATURAL CAUSATION RULE

The concerns that animate the necessity defense itself are ancient – “responsive,” as Kent Greenawalt has observed, “to Aristotle’s observation that about some matters the law cannot speak both universally and correctly.”²³ The exclusion of the defense in cases of created culpability has deep intellectual roots as well. An early suggestion that the necessity defense should be unavailable in cases of created culpability can be inferred negatively from the historic requirement that in order for the defense to apply, the cause of the necessity must have been natural or divine, not man-made.²⁴ The distinctions drawn by Sir Francis Bacon in

²² Duress is paradigmatically an excuse, though there is limited disagreement on this point. See FLETCHER, *supra* note __[RCL], at 829-833; Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1349-67 (1989) (considering arguments for classifying duress as a justification or an excuse, and finding the latter more convincing). *But see* Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse – And Why It Matters*, 6 BUFF. CRIM. L. REV. 833 (2003).

²³ Kent Greenawalt, *Conflicts of Law and Morality – Institutions of Amelioration*, 67 VA. L. REV. 177, 187 (1983) (“however many specific justifications are provided, occasions will remain when application of a general rule of criminal liability will yield inappropriate results”) (quoting ARISTOTLE, *ETHICA NICHOMACHEA* Book X, Part 9 (W. Ross trans. 1925)); *see also* MARK C. MURPHY, *PHILOSOPHY OF LAW: THE FUNDAMENTALS* 134-135 (2007) (“[R]ules are always coarse-grained, and lawmakers would have a very difficult time writing into them all of the exceptions to them that they think justified and moreover, even if they were able to manage the task, the resulting rule would probably be so cumbersome that it would not be very helpful for day-to-day living.”).

²⁴ So, for example, Sir Matthew Hale’s maxim, *quod enim necessitas cogit defendit* (“what necessity compels, it defends”) emphasizes the compulsion of natural forces as a prerequisite of the necessity defense. SIR MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 26 (Charles M. Gray ed. 1971) [1713]; *see also* 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *30-31; *United States v. Bailey*, 444 U.S. 394, 410 (1980) (“[T]he defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor’s control rendered illegal conduct the lesser of two evils.”).

explaining his fifth common law maxim, *necessitas inducit privilegium quoad iura privata*,²⁵ contemplate that a necessity might arise from an act of God and that a person would be justified in breaking the law in such cases.²⁶ While it is generally true that the necessity defense may be invoked today even when the cause was not natural but manmade,²⁷ some states continue to require that a necessity arise naturally in order for the defense to obtain.²⁸

The divine/natural causation limitation on the necessity defense has been dismissed as an accident of history with no conceivable substantive merit,²⁹ but that assessment is overly hasty. When Bacon writes, “The law chargeth no man with default where his act is compulsorie, and not voluntary, and where there is not a consent and election,”³⁰ one can distinguish two very different rationales for the rule about divine or natural causation. First, the necessity caused by a divine or natural act is putatively irresistible by a human being. In such cases, it is unfair to punish a person for that which God or nature compelled her to do involuntarily.³¹ Professor Michael Hoffheimer, following the utilitarian criminal law scholar Glanville Williams,³² has recently criticized this “compulsion” rationale for the necessity defense as an outdated relic that “lack[s] substantial authority in the twentieth century.”³³ The objection is highly persuasive insofar as it questions a limitation on the compulsion rationale to cases in which the necessity was created *exclusively* by a divine or natural cause. Bacon himself recognized that a compulsion justification might arise where the necessity was created either “by act of God or of a stranger,” and he grouped these two

²⁵ FRANCIS BACON, THE ELEMENTS OF THE COMMON LAWS OF ENGLAND 29 (Legal Classics Library ed. 1997) [1596] (“necessity introduces a privilege with respect to private rights”).

²⁶ *Id.* at 32 (“So if a fire be taken in a street, I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire . . .”).

²⁷ Martin, *supra* note __, at 1534-35.

²⁸ See WISC. STAT. ANN. § 939.47 (2005) (limiting the defense to actions in response to “the pressure of natural physical forces”); see *infra* notes __, and accompanying text for other states’ approaches.

²⁹ See 2 ROBINSON, *supra* note __, § 124(e), at 55.

³⁰ BACON, *supra* note __, at 29.

³¹ Compulsion is an element of excuses such as duress or insanity, see FLETCHER, *supra* note __, at 802-807, but the inquiry here and in the following paragraph is about its effect on a claim of justified action.

³² *E.g.*, GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 178, at 587 (1953); GLANVILLE L. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1958).

³³ Hoffheimer, *supra* note __, at 241.

possibilities within a single conceptual category of necessity.³⁴ And, in fact, the nature and power of the compulsion – assuming that it is compulsion – is no different whether an actor creates a firebreak by burning another person’s property to stop a fire started by an arsonist or does so in response to a fire caused by a bolt of lightning.³⁵

Hoffheimer’s skepticism about the compulsion rationale does not exhaust the criticisms that might be made of it. Whether it makes sense to speak of compulsion at all is questionable where one action is *voluntarily* chosen from two or more actions that were available. Setting aside the situation where an action is performed either by reflex or entirely involuntarily,³⁶ true compulsion, in the sense of the inability to choose any course of action except one, arises comparatively infrequently in the pure necessity defense context.³⁷ If the sole

³⁴ BACON, *supra* note __, at 29, 31 (“The third necessitie is of the act of God, or of a stranger, as if I bee particular tenant for yeares of a house, and it be overthrowne by grand tempest, or thunder and lightning, or by sudden floods, or by invasion of enemies . . . [i]n all these cases, I am excused in wast.”).

³⁵ See Model Penal Code § 3.02, Comment 3 (“A claim of justification is possible when an actor responds to human threats of harm.”).

³⁶ See Model Penal Code § 2.01(2) (providing that a reflex or convulsion, among other conduct, is not voluntary). “[I]f either there bee an impossibility for a man to doe otherwise, or so great a perturbation of the judgement and reason as in presumption of law mans nature cannot overcome, such necessity carrieth a priviledge in itself.” BACON, *supra* note __, at 29. An action might be involuntary in this way if a person were physically forced to do something or incapable mentally of making a voluntary decision.

³⁷ I leave to the side situations where both a duress defense and a necessity defense exist alongside one another – for example, if X’s wife and child are being held hostage and the kidnappers demand that X must steal a valuable jewel in order to free them.

One common example of powerful compulsion is the prisoner who escapes from a burning prison, a situation commonly thought to constitute a necessity. See, e.g., *United States v. Kirby*, 74 U.S. 482, 487 (1869) (“[H]e is not to be hanged because he would not stay to be burnt.”). On the other hand, escape from prison in response to threats of violence is not always deemed “compelled”; whether the necessity defense is available in such cases often depends upon the defendant’s ability to satisfy other constraints on the necessity defense, such as the common requirements that the harm be “imminent” and that the defendant have availed himself of other reasonable, legal alternatives. See, e.g., *United States v. Bailey*, 444 U.S. 394 (1980) (jail escape in response to threats of violence was not “compelled”); *People v. Lovercamp*, 43 Cal. App. 3d 823, 832 (1974) (severely limiting the necessity defense in cases of prison escapes in response to threats of violence); *People v. Condley*, 69 Cal. App. 3d 515, 522 (1977) (“While absolute necessity caused by forces of nature (e.g., storms, fire, earthquake, etc.) may . . . justify the escape . . .

criterion for asserting the necessity defense is compulsion, homeless people who have no choice but to sleep in public areas presumably should have the defense against prosecution for violating a law against sleeping in public areas (they must sleep, and they have nowhere else to sleep).³⁸ The instinct to save one's life in self-defense is another similarly compelling example. But in most cases in which the necessity defense, as opposed to an excuse such as duress, is a live option, there will have been reasons for action and countervailing reasons that are weighed against the former in deciding on a course of conduct.³⁹ Professor George Fletcher, in discussing the relationship between excuses and voluntariness, distinguishes between "physical" and "moral or normative" compulsion,⁴⁰ and several cases and commentators speak of "moral compulsion" as sufficient grounds for asserting the necessity defense.⁴¹ One might point out that necessity is a justification, not an excuse, and therefore is concerned solely with the "rightness" of an act, not the actor's accountability (because of compulsion or otherwise) for a concededly wrongful act.⁴² But so far as the degree of moral compulsion affects one's choice among a group of possible "evil" actions, "[t]he assessment of voluntariness in the normative sense depends in a curious way on the competing interests as in cases of justification."⁴³ Whatever the cause – natural or manmade – of a fire, it is at best awkward to say that the person who creates the illegal firebreak has been "morally compelled" by circumstances to do so. It would be truer to say that the actor considered the factors in favor and against creating the illegal firebreak (some

necessity [occasioned by threats of violence] generally does not have such an effect.").

³⁸ Donald E. Baker, "Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless, 45 U. MIAMI L. REV. 417, 453 (1990-1991).

³⁹ For a thorough typology of acts that are "caused" by external forces, see Anders Kaye, *Resurrecting the Causal Theory of Excuses*, 83 NEB. L. REV. 1116-1126-31 (2005).

⁴⁰ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 802-807 (1978).

⁴¹ This is especially common where the necessity defense is sought in cases of civil disobedience. *E.g.*, *United States v. Dougherty*, 473 F.2d 1113, 1121 (D.C. Cir. 1972) (trial court declined to give necessity defense instruction where defendants argued that they were acting on "moral compulsion" to vandalize and deface private property as part of protest over the Vietnam War); Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1200 (1987) (arguing that where an actor has a moral compulsion to act, she should be entitled to the necessity defense).

⁴² FLETCHER, *supra* note __, at 759.

⁴³ *Id.* at 803. "[I]f the gap between the harm done and the benefit accrued becomes too great, the act is likely to appear voluntary and therefore inexcusable." *Id.* at 804.

of which may have been especially influential or powerful, for moral, personal, or other reasons) and came to a voluntary decision about a course of action.⁴⁴ Likewise, to say that a physician ought to be entitled to the necessity defense if she “felt compelled” to “risk a patient’s life” by giving the patient palliative care that would almost certainly result in the patient’s death⁴⁵ reflects an untenably simplistic, dualistic, and strained understanding of compulsion.⁴⁶

The second possible rationale for the rule about divine or natural causation depends on the question of culpability. An actor is without blame for a necessity caused by a divine, natural, or third-party act; conversely, it is appropriate to ascribe a measure of blame, though not necessarily to bar the defense, when the actor is himself the cause of the necessity. Bacon goes a step further, advocating a rule that the actor who culpably created the necessity is never entitled to the defense:

This [necessity] rule admitteth an exception when the Law doth intend some fault or wrong in the partie that hath brought himselfe into the necessitie: so that is *necessitas culpabilis*. This I take to bee the chiefe reason, why *seipsum defendendo* is not a matter of Justification, because the Law intends it hath a commencement upon an unlawfull cause[.]⁴⁷

⁴⁴ The question of the voluntariness of a choice is also not the same as the question of the legality of that choice. For a confusion of these two questions, see *United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995) (citation omitted) (“The [necessity] defense does not arise from a ‘choice’ of several courses of action It can be asserted only by a defendant who was confronted with . . . a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts.”).

⁴⁵ Roger S. Magnusson, *The Devil’s Choice: Rethinking Law, Ethics, and Symptom Relief in Palliative Care*, 34 J.L. MED. & ETHICS 559, 566 (2006) (calling for the necessity defense in cases where a physician risked a patient’s life through palliative measures proportionate to the patient’s suffering, but not where the physician intended the patient’s death).

⁴⁶ See Derrick Augustus Carter, *Knight in the Duel With Death: Physician Assisted Suicide and the Medical Necessity Defense*, 41 VILL. L. REV. 663, 700-701 (1996) (arguing implausibly that both duress and necessity contain “an element of compulsion that would force a suicide-assisting physician to violate the law”).

⁴⁷ BACON, *supra* note __, at 33. George Fletcher explains:

From roughly the thirteenth to the sixteenth century, the only form of self-defense recognized at common law was *se defendendo*, which came into consideration whenever a fight broke out and one party retreated as far as he could go before resorting to defensive force. If

Whether or not Bacon's absolute bar on the necessity defense in all cases of created culpability is warranted,⁴⁸ it is sufficient for the moment to note that the culpability rationale for the divine/natural causation rule differs considerably from the compulsion rationale. The compulsion rationale focuses on the necessity's overweening physical or psychological effect on the actor; the point is that natural and divine acts, and the necessities that they cause, overpower an individual's capacity for voluntary choice. The culpability rationale concerns the nature of the actor's role in creating the necessity, which is a moot inquiry where God or nature created it. The emphasis in the former is on the defendant's state of mind at the time that he was compelled to break the law. In the latter, it is on the defendant's culpability for acts preceding the necessitous act and their relationship with the lawbreaking conduct. This suggests a temporal difference as well: the compulsion rationale is exclusively concerned with the moment of necessitous choice, while the culpability rationale expands the relevant timeframe and circumstances to include acts that preceded the necessitous choice.

The two rationales do overlap, however, because the question of blameworthiness, like the question of compulsion, is connected with that of voluntariness: generally, blame is only appropriate where one's conduct *includes* a voluntary act, not where an action is involuntary in the strict sense discussed above.⁴⁹ And the idea that only conduct that "includes" a voluntary act can be culpable presents the question of what is an appropriately "inclusive" context in assessing culpability.⁵⁰ Notwithstanding this overlap, however, Professor Hoffheimer is in error when he argues that "[t]he requirement that the actor be free from fault can be understood as a variant of the older requirement that necessity is compelled by external

he then killed the aggressor, *se defendendo* had the effect of saving the defendant from execution, but it left in tact the other stigmatizing effects of the criminal law Killing *se defendendo* was called excusable homicide, for though the wrong of homicide had occurred, the circumstances generated a personal excuse that saved the manslayer from execution.

GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 131 (1998).

⁴⁸ In fact, this Article argues that it is not. *See infra* at Part IV.

⁴⁹ Model Penal Code § 2.01(1).

⁵⁰ Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2442-2443 (2007) ("Many culpability-in-causing cases invoke a sense of 'includes' that is neither temporal nor spatial.").

physical or natural forces.”⁵¹ Compulsion and blame are conceptually distinct rationales for the rule requiring divine or natural causation.

Even after the rejection in most jurisdictions of the requirement that the necessity defense could only apply in cases of divine or natural causation, the culpability rationale remained a highly salient and widely adopted limitation on the defense.⁵² The cogency of the created culpability bar is examined in detail in Part IV, but to understand its practical importance it will be helpful first to survey the range of current state and federal approaches to the question of created culpability.

III. CURRENT APPROACHES TO CREATED CULPABILITY

No jurisdiction that has considered the question of created culpability permits the necessity defense in cases where the actor purposely and culpably created the necessity. Those jurisdictions that have addressed the question often follow, with some modification, the New York Penal Law approach, which (like Francis Bacon) bars the defense whenever the actor was in any way at *fault* for “occasion[ing] or develop[ing]” the necessity.⁵³ Other jurisdictions follow the Model Penal Code,⁵⁴ but a fair number have not spoken on the question at all, and some have adopted conflicting approaches within the same jurisdiction. This section surveys the various state and federal approaches with respect to created culpability and the rationales offered in their support.

While most U.S. jurisdictions recognize some variety of the necessity defense,⁵⁵ a surprisingly high number impose the

⁵¹ Hoffheimer, *supra* note __, at 242.

⁵² See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1334-35 (1997) (“Rarely, if ever, does the criminal law embrace defendants who are to blame for creating their own defense.”).

⁵³ N.Y. Penal Law § 35.05(2), at 513 (“[C]onduct which would otherwise constitute an offense is justifiable and not criminal when . . . 2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor.”).

⁵⁴ See *supra* note __, and accompanying text.

⁵⁵ Professor Martin’s claim that “[e]very American jurisdiction, without exception, has adopted the necessity defense in its criminal jurisprudence,” is mistaken. Martin, *supra* note __, at 1535. Kansas has not. *City of Wichita v. Tilson*, 855 P.2d 911, 918 (Kan. 1993) (declining to

most rigorous type of bar, excluding the defense merely when the actor played any role in the creation of the necessity, or substantially contributed to its creation. Colorado requires that the actor not have engaged in *any conduct* giving rise to the necessity, which would certainly include actors who culpably created it.⁵⁶ Puerto Rico bars the defense if the actor “provoked” the necessity,⁵⁷ and California’s common law defense requires that the defendant prove by a preponderance of the evidence that he “did not substantially contribute to the creation of the emergency[.]”⁵⁸ Texas’s necessity statute, notwithstanding its lack of any created culpability provision, has likewise been interpreted by courts to bar the defense when an actor “provokes the difficulty, or is responsible for having placed himself in a position from which he attempts to extricate himself from committing a criminal offense.”⁵⁹ Finally, Wisconsin, which has also codified the defense,

recognize the defense); *City of Wichita v. Holick*, 151 P.3d 864, *7 (Kan. Ct. App. 2007) (Table) (“In *Tilson* our Supreme Court stated: ‘Whether the necessity defense should be adopted or recognized in Kansas may best be left for another day’ Fourteen years later, that day has not yet dawned.”). North Dakota also has not. *State v. Manning*, 716 N.W.2d 466, 468 (N.D. 2006) (court declined to address whether necessity defense is recognized in North Dakota). West Virginia recognizes duress, but not necessity. Compare *State v. Tanner*, 301 S.E.2d 160, 163 (W. Va. 1982) (duress) with *State v. Poling*, 531 S.E.2d 678, 684 (W. Va. 2000) (rejecting necessity defense). While Michigan does have the defense (as well as a “necessity” defense for duress), it only applies to particular offenses. *People v. Walker*, 422 N.W.2d 8, 10 (Mich. 1988) (“innocent possession” of a weapon). Nevada’s necessity defense caselaw only applies to the special case of prison escape. See *Jorgensen v. Nevada*, 688 P.2d 308 (Nev. 1984). And while South Dakota has a necessity defense in name, it is in practice exclusively applicable to situations of duress. See *State v. Duchenaux*, 671 N.W.2d 841, 843 (S.D. 2003) (requiring that in order for the defense to apply, the actor must have a fear of death or bodily harm so imminent that a reasonable person in his situation would have been unable to resist).

⁵⁶ Colo. Rev. Stat. Ann. § 18-1-702. Idaho imposes the same rule at common law. *State v. Tadlock*, 34 P.3d 1096, 1097 (Idaho Ct. App. 2001) (requiring that the “circumstances which necessitate the illegal act must not have been brought about by the defendant”).

⁵⁷ P.R. Laws Ann. tit. 33, § 3096.

⁵⁸ See Cal. Jury Instr. –Crim. 4.43(6). Even though they are labeled “necessity,” there is a question whether these instructions conflate the defense of duress and necessity. See also *Patton v. State*, 760 N.E.2d 672, 675 (Ind. Ct. App. 2002) (barring the defense for the actor’s “substantial[] contribut[ion] to the creation of the emergency”).

⁵⁹ Tex. Penal Code Ann. § 9.22; *Leach v. State*, 726 S.W.2d 598, 600 (Tex. Ct. App. 1988); *Ford v. State*, 112 S.W.3d 788, 794 (Tex. Ct. App. 2003). Montana also bars the defense where the actor created the necessitous situation, even if without criminal culpability. *State v. Nelson*, 36 P.3d 405, 407 (Mont. 2001) (holding that a defendant who is to blame for a “self-created predicament” is not entitled to the defense).

continues to follow the natural causation requirement, which presumptively bars the defense in any case where human conduct created it.⁶⁰ For reasons explained both by the Commentary to the Model Penal Code and Professor Robinson, however, the no-conduct or any-provocation limitation is clearly inappropriate.⁶¹

The codifications in Delaware,⁶² Illinois,⁶³ and Missouri,⁶⁴ follow New York's requirement that the necessity not be occasioned or developed through any fault of the defendant.⁶⁵ This is the most common position with respect to created culpability in American jurisdictions. New Mexico does not distinguish between duress and necessity,⁶⁶ and while it has not adopted the created culpability limitation, one case indicates that its "reasonableness" requirement subsumes that limitation.⁶⁷ Perhaps most interesting are the recent observations of the Mississippi Supreme Court with respect to created culpability. In *Stodghill v. State*, late in the evening after the defendant and his girlfriend had been drinking, the woman began to have seizure-like symptoms.⁶⁸ Unwilling to

⁶⁰ WISC. STAT. ANN. § 939.47 (limiting the defense to actions in response to "the pressure of natural physical forces"); *State v. Hamdan*, 264 Wis. 2d 433, 454 (2003) ("The defense of necessity, by its plain language, exists only when a defendant acts in response to 'natural physical forces,' not human forces that pose potential dangers.").

⁶¹ Model Penal Code § 3.02(2), cmt. __ (observing that barring the necessity defense when the actor in any way contributed to its creation would exclude the defense for a man who broke the speed limit in order to drive his pregnant wife to the hospital); Robinson, *supra* note __ [CCOD], at 5-6 ("[I]f the actor's choice of paint color for his house so upsets his neighbor as to provoke an attack, the actor would presumably be left without the right to defend himself.").

⁶² Del. Code Ann. tit. 11 § 463; *Bodner v. State*, 752 A.2d 1169 1174 (Del. 2000).

⁶³ 720 Ill. Comp. Stat. 5/7-13.

⁶⁴ Mo. Rev. Stat. § 563.026(1). In *State v. Owen*, 748 S.W.2d 893 (Mo. Ct. App. 1988), the Missouri Court of Appeals curiously interpreted this provision to mean that where a defendant left the scene of a motor vehicle accident after having been grabbed by a police officer, which had caused the defendant to fear for his physical safety, he was at fault for creating the scenario giving rise to a charge of leaving the scene of a motor vehicle accident.

⁶⁵ Iowa's, Ohio's, South Carolina's, and Vermont's common law also bar the defense where the actor was culpable in any degree in creating the necessity. *State v. Walton*, 311 N.W.2d 113, 115 (Iowa 1981); *State v. Prince*, 595 N.E.2d 376, 379 (Ohio Ct. App. 1991); *State v. Sullivan*, 547 S.E.2d 183, 185 (S.C. 2001); *State v. Shotton*, 458 A.2d 1105, 1106 (Vt. 1983).

⁶⁶ *State v. Castrillo*, 814 P.2d 123, 128 (N.M. Ct. App. 1991)

⁶⁷ *State v. Castrillo*, 819 P.2d 1324, 1330 n.4 (N.M. 1991).

⁶⁸ 892 So.2d 236 (Miss. 2005).

wait for an ambulance, the defendant decided to drive the woman to the hospital and along the way was stopped by a police officer who called an ambulance for the woman and arrested the defendant for driving under the influence.⁶⁹ The defendant argued that he was entitled to the necessity defense, but the court found that he had not satisfied all of the elements under Mississippi law, which do not mention created culpability. The court then stated:

Other jurisdictions' tests for necessity add another prong which naturally addresses the alarming policy implications of finding that a defense of necessity exists in the case of drunken driving. In those jurisdictions, the defense of necessity also includes the burden of proving the emergency did not arise by any fault of the defendant Were we to add this prong to our test . . . it would bar the use of the defense in cases where an emergency is the consequence of careless or excessive intoxication.⁷⁰

Setting aside the technical point that in *Stodghill* the emergency (the woman's seizure-like symptoms) was not the consequence of the defendant's excessive intoxication, the more important criticism is that the court's understanding of "fault" seems to approximate "any contribution." "Careless or excessive intoxication" is not a criminally culpable offense. Neither the defendant nor his girlfriend was at fault – so far as the criminal law is concerned – for drinking alcohol. The necessity only arose when the woman became ill, well after she and the defendant had stopped drinking, and the defendant was then faced with a choice of evils. But created culpability seems inapplicable in this situation.⁷¹

Arizona's statutory provision with respect to created culpability is unique and perhaps closest to the approach advocated by this Article: "An accused person may not assert [the necessity defense] if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the

⁶⁹ Id.

⁷⁰ Id. (citations omitted). For further reflections on voluntary intoxication and its relationship to created culpability, see *infra* at notes __, and accompanying text.

⁷¹ See Robinson, *supra* note __[CCOD], at 16 ("[T]he imputation of recklessness is objectionable because even if the actor is reckless, or even purposeful, as to *getting intoxicated*, it does not follow that he is reckless as to causing [the underlying offense].").

proscribed conduct.”⁷² Florida and Maryland common law follow nearly the same rule, barring the defense where the defendant “intentionally or recklessly placed himself in a situation in which it would be probable that he would be forced to choose the criminal conduct.”⁷³ While this approach has its strengths, it has two problems. First, it does not specify that the type of created culpability that matters is criminal. Second, it would anomalously provide the defense to an actor who carefully plans a murder in which it was not probable that a necessity would arise, but bars the defense for the non-careful murderer. This remains the case even if “probable” is understood objectively, rather than from the point of view of the actor’s subjective culpability as to the necessity.

The necessity defense codifications of Arkansas,⁷⁴ Hawaii,⁷⁵ Maine,⁷⁶ Nebraska,⁷⁷ New Hampshire,⁷⁸ and Pennsylvania⁷⁹ follow the Model Penal Code’s approach to created culpability verbatim (or nearly so), barring the defense if the actor was reckless or negligent in bringing about the necessity provided that recklessness or negligence, respectively, are sufficient for the underlying offense. None of these formulations and the rare case law interpreting them discuss purposeful created culpability, but as in the analysis of the Code, they are best interpreted as barring the defense when the level of created culpability and that of the underlying offense match. Kentucky’s choice of evils statutory provision retains the general structure of the Code’s approach, but bars the defense where the actor was “wanton or reckless” as to created culpability, and where wantonness or recklessness suffices to establish culpability for the underlying offense. Nevertheless, the 1974 commentary to the Kentucky provision states contradictorily that the defense is unavailable whenever the actor’s created culpability is wanton or reckless,

⁷² Ariz. Rev. Stat. Ann. §13-417.

⁷³ *McCoy v. State*, 928 So.2d 503, 506 (Fla. Dist. Ct. App. 2006); *State v. Crawford*, 521 A.2d 1193, 1200-01 (Md. 1987).

⁷⁴ Ark. Code Ann. § 5-2-604. Notwithstanding this provision, the Supreme Court of Arkansas has held that the “any conduct” rule applies: “If appellant created the situation necessitating his conduct then he is not entitled to rely on the defense of justification.” *Peals v. State*, 266 Ark. 410, 418 (1979).

⁷⁵ Haw. Rev. Stat. § 703-302(2).

⁷⁶ Me. Rev. Stat. Ann. tit. 17-A, § 103(2).

⁷⁷ Neb. Rev. Stat. Ann. § 28-1407(2).

⁷⁸ N.H. Rev. Stat. Ann. § 627:3(II).

⁷⁹ 18 Pa. Cons. Stat. Ann. § 503(b).

irrespective of the culpability required for the underlying offense.⁸⁰

A significant number of jurisdictions have not addressed the question of created culpability at all.⁸¹ Georgia bars the self-defense justification in cases of created culpability, but does not speak to created culpability as to a necessity.⁸² Alaska,⁸³ New Jersey,⁸⁴ Utah,⁸⁵ and Wyoming⁸⁶ merely provide that the necessity defense is applicable to the extent permitted by the common law of those states, none of which discusses created culpability, and Alabama's justification statute similarly states that it does not preclude "further judicial, or statutory, development," while also providing that an actor who is otherwise justified but who injures a third party recklessly or negligently in the course of acting justifiably does not have the defense in a prosecution for such recklessness or negligence.⁸⁷ Oregon and Tennessee, whose codifications otherwise generally follow New York, do not include any language with respect to created culpability, and no cases in either state have specifically addressed the question.⁸⁸ Connecticut is somewhat unusual in that its common law does not speak to created culpability, but one court has specifically stated that the actor's

⁸⁰ Ky. Rev. Stat. Ann. § 503.030(2). The defense is never available for intentional homicide. *Id.* at § 503.030(1).

⁸¹ *E.g.*, State v. Lee, 782 So.2d 1063, 1067 (La. Ct. App. 2001) (one of Louisiana's very few necessity defense cases that does not involve a prison escape, and makes no mention of created culpability); Commonwealth v. Kendall, 2008 WL 801537 (Mass. Mar. 28, 2008) (a case that could have addressed created culpability, but did not); State v. Hudgins, 606 S.E.2d 443, 447 (N.C. Ct. App. 2005) (no discussion of created culpability); Jones v. City of Tulsa, 857 P.2d 814, 815-16 (Okla. Crim. App. 1993) (same); State v. Owen, 693 A.2d 670, 672 (R.I. 1997) (same); Humphrey v. Commonwealth, 553 S.E.2d 546, 550 (Va. Ct. App. 2001).

⁸² Alexis v. State, 541 S.E.2d 636, 640 (Ga. 2001).

⁸³ Alaska Stat. Ann. § 11.81.320. Alaska requires that the necessity either arise from a natural cause or, if it arises from a human cause, that the justified action be taken in defense of others or to prevent a crime from occurring. Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1078-79 (Ak. 1981).

⁸⁴ 24 Wash. App. 908, 913-14 (1979).

⁸⁵ N.J. Stat. Ann. § 2C:3-2.

⁸⁶ Utah Code Ann. § 76-2-401.

⁸⁷ Wyo. Stat. Ann. § 6-1-102.

⁸⁸ Ala. Code § 13A-3-21. In *Allison v. City of Birmingham*, 580 So. 2d 1377, 1380 (Ala. Crim. App. 1991), the Alabama Court of Criminal Appeals cited positively an article that referred to the requirement that "the actor must be without fault in bringing about the situation" for the defense to apply, but there are no Alabama decisions affirmatively adopting this requirement.

⁸⁹ Or. Rev. Stat. § 161.200; Tenn. Code Ann. § 39-11-609.

state of mind with respect to the allegedly necessitous act is never relevant to that act's justification.⁸⁹ Under this approach, it still remains unclear whether the actor who culpably creates the necessity and also intends the necessity would be as justified as the blameless actor.

A few jurisdictions have seemingly conflicting common law rules with respect to created culpability, but it is notable again that none expressly permits the defense in cases of purposeful created culpability. In *State v. Diana*, a 1979 medical necessity case, the Washington Court of Appeals held that the necessity defense was unavailable where the "compelling circumstances have been brought about by the accused."⁹⁰ In a more recent case involving possession of a handgun, however, the same court held that the necessity defense was limited by the rule about natural causation, which would implicitly bar the defense in any case of created culpability.⁹¹ Similarly, a 1971 decision of the Minnesota Supreme Court that appears to conflate the defenses of necessity and duress nevertheless states that "the defense of necessity or compulsion which will excuse a criminal act must be clear and conclusive and must arise without negligence or fault on the part of the defendant."⁹² But most of the recent Minnesota case law on the necessity defense does not address created culpability, and does not include it in the applicable test.⁹³

What surprisingly emerges from this hodgepodge of approaches and limitations is a virtual consensus among those states that have addressed created culpability that purposeful (and perhaps knowing) created culpability always bars the necessity defense. No jurisdiction affirmatively permits the defense under such circumstances. Yet none of the statutes and cases have articulated a theory of created culpability that adequately justifies and explains what seems to be the universal intuition that, at the least, purposeful and knowing created culpability should bar the defense.

⁸⁹ *State v. Messler*, 19 Conn. App. Ct. 432, 438 (1989).

⁹⁰ 24 Wash. Ct. App. 908, 913-14 (1979).

⁹¹ *State v. Gallegos*, 73 Wash. Ct. App. 644, 651 (1994).

⁹² *State v. Johnson*, 183 N.W.2d 541, 545 (Minn. 1971) ("the defense of necessity is not available, at least where the defendant could have avoided the emergency by taking advance precautions").

⁹³ *State v. Niska*, 514 N.W.2d 260, 263 n.1 (Minn. 1994); *State v. Rein*, 477 N.W.2d 716, 717 (Minn. Ct. App. 1991).

IV. JUSTIFYING THE CREATED CULPABILITY BAR FOR PURPOSEFUL, KNOWING, AND RECKLESS CRIMINAL CONDUCT

In this section, the Article considers and critiques Professor Paul Robinson's widely accepted approach to created culpability and, after discussing deterrence-based justifications for the created culpability bar, outlines and defends its desert-based justification for the bar in cases of purposeful, knowing, and reckless created culpability. It then argues that even those types of created culpability should not invariably bar the defense. Instead, purposeful, knowing, or reckless created culpability should give rise to a rebuttable presumption that the necessity defense is unavailable unless the defendant presents some evidence that (1) he did not purposely, knowingly, or recklessly engage in conduct that directly caused the necessity, or (2) his purposeful, knowing, or reckless conduct did not directly cause the necessity, or (3) the evil that he avoided clearly and substantially outweighed the evil that he chose. If the defendant could meet the burden of production on any of these three points, it would become the government's burden of persuasion to prove the absence of justification beyond a reasonable doubt.

A. Robinson's Approach to Created Culpability

The most exhaustive scholarly treatment of created culpability is Professor Robinson's seminal article, *Causing the Conditions of One's Own Defense: A Study in the Limit of Theory in Criminal Law Doctrine*.⁹⁴ Robinson's views about created culpability are recognized today as the "classical discussion"⁹⁵ of the problem and are well entrenched in the criminal law scholarship.⁹⁶

In examining the Model Penal Code's approach to created culpability, Professor Robinson raises four primary difficulties. The first two point out technical problems in the Code's approach, while the latter two are substantive

⁹⁴ Robinson, *supra* note ____.

⁹⁵ Stephen P. Garvey, *What's Wrong With Involuntary Manslaughter?*, 85 TEX. L. REV. 333, 354 n.72 (2006).

⁹⁶ See, e.g., Dripps, *supra* note ___, at 1413; YEO, *supra* note ___, at 166 (adopting Robinson's approach); Norman J. Finkel, *Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 39 (1996).

criticisms. First, Robinson claims that there is ambiguity about what constitutes culpability in “causing” the necessitous conditions and the nature of the act that should count as a, or the, cause. Where a spark in a defective muffler creates a necessity to set an illegal firebreak, “[t]o which events in the chain of events creating the conditions of the defense must that culpability apply: recklessness as to having a defective muffler, or as to having a defective muffler that will start a forest fire that will then threaten a town and thereby create a need for justified conduct?”⁹⁷ Second, the Model Penal Code’s approach improperly assumes that the underlying offense will necessarily have a single and uniform level of culpability that could be neatly compared with the degree of created culpability.⁹⁸ Third, denying the defense is likely both to dissuade the actor from acting in a way that society would approve and to reduce his incentives for doing so.⁹⁹ Finally, denying the defense in cases of created culpability but not in cases where a third person could engage in the same conduct while working side-by-side the actor who has culpably created the necessity is anomalous.¹⁰⁰ “It is the nature of justified conduct,” Professor Robinson writes, “that it either is or is not justified – de[p]ending on whether it causes a net societal benefit – regardless of the particular state of mind, past or present, of the actor.”¹⁰¹

Professor Robinson urges an approach that would cleanly separate the acts of created culpability from those of the underlying offense. He would retain the defense for the underlying, “justified” conduct while punishing the actor separately for the actor’s earlier conduct in culpably creating the necessity.¹⁰² Robinson would treat differently the actor who not only has culpably created the necessity, but also has a culpable state of mind as to causing himself to engage in the justified conduct (for example, the actor who intentionally started the forest fire *for the purpose* of creating the

⁹⁷ Robinson, *supra* note __, at 18.

⁹⁸ *Id.* at 19. He raises an additional technical difficulty – that the Model Penal Code does not discuss intentional or purposeful created culpability – but that is resolved relatively easily by reading § 3.02(2) so as to avoid an anomalous conclusion. See *supra* note __, and accompanying text.

⁹⁹ *Id.* at 28.

¹⁰⁰ *Id.* Also seemingly anomalous is to deny the defense where the actor is responsible, in whatever degree, for the fire and himself sets the firebreak, while allowing the defense where the actor who culpably created the necessity directs a third party to set the firebreak, while he himself does nothing.

¹⁰¹ *Id.*

¹⁰² *Id.* at 27-28.

firebreak).¹⁰³ So-called “grand schemers” could be punished for engaging in the otherwise justified conduct (and would also be punished in cases where they directed a third person to engage in the justified conduct) but liability would be based on the conduct of causing the necessity with the accompanying scheming intent, not on the justified conduct subsequently performed.¹⁰⁴ Robinson’s core assumption – and that of many criminal law scholars¹⁰⁵ – is that justified conduct can never be blameworthy. Since society ought to encourage (or at least not deter) conduct that results in a social “net gain,” conduct that meets that criterion is always justified.¹⁰⁶

In assessing Robinson’s solution, it is valuable to examine how his approach fares when measured against his third and most compelling criticism of the Code: that denying the defense to actors who have purposely created the necessity punishes them for acting in a way that society approves, and that it creates disincentives for them and others to act that way.¹⁰⁷ If Robinson is truly wedded to his core assumption about the nature of justified conduct, it is difficult to see why he creates an exception for grand schemers. Provided that the core assumption is satisfied, it should make no difference that one had a culpable state of mind or “scheming intent” as to the justified conduct. If we take Robinson’s core assumption seriously, Joe would have a necessity defense to the drunk driving charge if he had intentionally beaten Jane on every one of five nights leading up to and including the night where he stabbed her, because saving Jane, whatever the circumstances that occasioned her head-wound, is a social “net gain.”¹⁰⁸ But, on Robinson’s account, Joe could be punished as a grand schemer in the unlikely event that he stabbed her for the purpose of driving her drunk to the hospital, even if it surely continues to be true that Jane’s survival is a social “net gain” and that his decision to drive while intoxicated was justified.

¹⁰³ *Id.* at 31.

¹⁰⁴ *Id.* at 31-32.

¹⁰⁵ See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 8 (2003) (“[T]he standard account among criminal law theorists . . . [is that a] defense is a justification if it renders the actor’s conduct not morally wrongful, whereas it is an excuse if it renders morally wrongful conduct not blameworthy.”). Professor Berman challenges this view in his excellent article.

¹⁰⁶ *Id.* at 27 (“Where conduct is justified because it avoids a net harm for society, it provides little basis on which to fasten blame and it is against society’s interest to deter it.”).

¹⁰⁷ Robinson, *supra* note __, at 28.

¹⁰⁸ I am assuming that most people would agree that the social net gain would be greater if Joe drove drunk to the hospital in order to save Jane than if he did not.

Robinson might respond that he is willing to expand the timeframe and consider the “relevance of context” for grand schemers because an actor’s reasons make a difference for an act’s criminality.¹⁰⁹ Even where the act creating the necessity is legal, Robinson claims that if it was done with a culpable state of mind as to engaging in what would otherwise be (and ultimately is) justified conduct, the actor should be punished for his grand scheme intention. Robinson hypothesizes that a member of the Palestine Liberation Organization enters a meeting of the Jewish Defense League held in a public place, intending, by his mere presence, to incite the attendees to assault him and thereby creating the necessity for him to injure others in self-defense.¹¹⁰ Robinson would hold the P.L.O. member liable for his intentional creation of the necessitous circumstances, but the use of force in self-defense remains, for him, fully justified.¹¹¹

One question that Robinson’s approach raises is precisely what illegal act is being punished. Entering a public place is not an *actus reus*. Robinson recognizes this¹¹² and would probably respond that the *actus reus* is entering a public space with the scheming intent of causing an altercation so as to create a necessity to injure in self-defense.¹¹³ He draws an analogy with criminal attempt: “[a]n actor who has tools in his possession can be convicted of attempt if he intends to use them to commit burglary.”¹¹⁴ That is persuasive, as far as it goes: in such a case, the actor could be convicted of attempted burglary, indisputably a culpable act (albeit one that never occurred) with a correspondingly culpable mental state (purpose). Robinson might then reply that conduct itself is not legal or illegal per se: “Almost any act, even a homicidal one, may be legal in certain situations; an execution is an obvious example, as is self-defense.”¹¹⁵ Robinson is again correct, but the key point to draw from this observation is that the conduct abating the necessity that was culpably created is indissolubly linked conceptually to the state of mind that led to it.¹¹⁶ In the

¹⁰⁹ *Id.* at 40.

¹¹⁰ *Id.* at 40-42.

¹¹¹ *Id.* at 42.

¹¹² *Id.* at 42.

¹¹³ *Id.* at 41-42.

¹¹⁴ *Id.* at 41.

¹¹⁵ *Id.* at 40.

¹¹⁶ “A completed crime ordinarily consists of: (1) a state of affairs the law is supposed to prevent, the ‘*actus reus*’ (for example, the unlawful taking of another’s property or an involuntary death at the hands of another); (b) some state of mind, the so-called ‘*mens rea*’ (for example, the intent to do great bodily harm or a failure to exercise reasonable care; and (c) a *certain connection* between *mens rea* and *actus reus* (for example, a theft

P.L.O. example, the *mens rea* (intending to cause the necessity of injuring others in self-defense) tracks and is connected to the completed *actus reus* (doing just that). From the perspective of deterrence, what the criminal law seeks to prevent is the scheming intent and the conduct to which it leads (assuming that it does lead to such conduct, as it does in Robinson's example).

Perhaps a more accurate picture might be that in the P.L.O. scenario the act of injuring others in self-defense is *not actually justified* – it is not true self-defense – because the act is colored by and connected to the P.L.O. member's prior (scheming) culpability. While it is true that at the moment that he is being physically attacked, the P.L.O. member is faced with a necessity that demands a choice between two evils, it is not the type of choice of evils that can result in justified conduct because it has been tainted by created culpability. One might say that the P.L.O. member did not intend to act in self-defense at all; he intended only to harm the J.D.L. members.

Robinson's adamancy that necessitous conduct must always by its nature be entirely justified, irrespective of the context, creates a problem for the grand schemer exception.¹¹⁷ His approach disjoins the grand schemer's culpability in creating the necessity from the necessitous act itself because it refuses under any circumstances to call that act culpable. Instead, it indulges in a legal fiction by using the language of attempt, in which the *actus reus* never comes to pass,¹¹⁸ even in circumstances when the *actus reus* in reality *did occur*. While Robinson urges, at least in the case of grand schemers, a more nuanced consideration of the entire set of circumstances that occasion the necessity, his general approach to created culpability betrays that ambition by drawing a Maginot line around the necessitous act itself, which can only be judged in

being the result of acting with the intent to deprive another of his property or a death that is a natural and probable outcome of what the actor knew himself to be doing)." Michael Davis, *Why Attempts Deserve Less Punishment Than Complete Crimes*, 5 LAW AND PHIL. 1, 15 (1986) (emphasis added).

¹¹⁷ There are in fact two distinct conceptual points here. The first point concerns the P.L.O. member's mental state throughout the scheming period and including the moment when he injures the J.D.L. members, and whether he is *ever* acting in self-defense. The second, and for this Article the more important, point concerns the relevance of context in evaluating whether the conduct at issue is justified, even if at the moment the P.L.O. member is injuring others, he believes that he is acting in self-defense.

¹¹⁸ Davis, *supra* note __, at 16 ("What makes an act a mere attempt is that the *actus reus* of the complete crime never occurs.").

isolation and in terms of net social gain. Robinson's contextual aspirations are in the end stymied by the cardinal rule that necessitous conduct must be, *ex hypothesi*, criminally blameless.

So far all that has been shown is that Professor Robinson's grand schemer exception is inconsistent with his general approach to justification. This inconsistency generates two possibilities. First, one might discard the exception for grand schemers and hold fast to the core principle that whether necessitous conduct is justified will never depend on created culpability, but only on an assessment of the net social gain of choosing one evil over another. That option, however, disregards precisely what is insightful about Robinson's grand schemer discussion: the relevance of the broader context in which a necessitous condition arose not only in the case of grand schemers, but for anyone who claims to have acted under a necessity.¹¹⁹ "[I]n order to assign responsibility appropriately, we need to view the individual's actions in a consistently broad 'time-frame' – to look not only at the *actus reus* defined by statute but also at the actions and decisions leading up to it."¹²⁰ The need for greater sensitivity to context (which might include temporal, spatial, and other situational considerations)¹²¹ gives rise to a related, more intuitive, and also more important, criticism of any approach that holds out Robinson's core principle – that necessitous conduct is by its nature always justified if it results in a net social gain – as the only relevant consideration.

When an actor culpably creates a necessity, there is a sense in which his situation is qualitatively different from the actor who is not culpable at all.¹²² A different and perhaps more accurate way of saying this is that the act itself has lost a significant part of its justified quality if performed by the

¹¹⁹ Robinson misses this point: "It is no doubt concern for the 'grand schemer' that creates a hesitation to provide an excuse when an actor has culpably caused the disability and excusing conditions." Robinson, *supra* note __ [CCOD], at 31 n.114. Concern about grand schemers may be part of what explains the reluctance to ignore created culpability, but the larger point about context relates generally to all actors who culpably create a necessity.

¹²⁰ David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2387 (1992).

¹²¹ *Id.*

¹²² See Norman J. Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability: Toward a Unifying Schema*, 19 LAW AND HUM. BEHAV. 447, 460 (1999) (reporting an empirical study showing that defendants responsible for their medical condition were more likely to be found culpable for the underlying offense than those who were not).

culpable actor who has created it. Putting it this way illuminates the fact that the diminished quality of the justification does not transform this kind of situation into an excuse. Typically, “[a]n actor pleading excuse, such as insanity, duress, or involuntary conduct, admits that what she did was wrong, but claims that some characteristic o[f] her condition leaves her blameless for the offense.”¹²³ In the case of the actor who culpably created the necessity, the action taken to abate the necessity is not exactly “wrong”; examined in isolation, it continues to be “the right thing to do,” but examined in context it may have lost its justified status depending upon the circumstances that precede it.¹²⁴ We can say, at the least, that we want to know the circumstances leading up to the necessity in order to evaluate properly whether it was justified, and not only in the case of grand schemers. In deciding how one feels about Joe’s decision to drive drunk to the hospital to save Jane’s life, it somehow makes a difference whether Joe had first stabbed Jane or instead was blameless, just as it makes a difference to Professors Robinson and Fletcher¹²⁵ whether an actor was a grand schemer. And if Joe did stab Jane, it also makes a difference whether Joe stabbed her purposely, recklessly, or negligently. What accounts for these intuitions – ones that seem to be shared by so many who have addressed the question?¹²⁶

B. Created Culpability and Deterrence

One answer might be that the consequentialist character of the necessity defense is at least somewhat at odds with our moral experience.¹²⁷ Care must be taken to

¹²³ Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1097 (1999).

¹²⁴ Fletcher writes: “So far as justification of lesser evils is considered an excuse, then it makes sense to require that the actor be free from blame in the entire transaction.” FLETCHER, *supra* note __, at 798. But recognizing created culpability as relevant does not transform the focus of the inquiry from the act to the actor; it simply means that a judgment about an act’s justification will depend on context.

¹²⁵ See FLETCHER, *supra* note __, at 797-98 (observing that the created culpability bar might be explained on the basis that “some hedge was necessary against persons deliberately creating a situation in which they would be able to commit an offense under the justification of lesser evils”).

¹²⁶ See *supra* at notes __, and accompanying text [jurisdictional approaches].

¹²⁷ Kent Greenawalt, *Natural Law and Political Choice: The General Justification Defense – Criteria for Political Action and the Duty to Obey the Law*, 36 CATH. U.L. REV. 1, 13-14 (1986).

distinguish precisely what type of consequentialist argument is inconsistent with the created culpability bar.¹²⁸ It is commonly acknowledged that, at least in Anglo-American jurisprudence, the necessity defense has firmly consequentialist roots.¹²⁹ The general assumption is that “the ultimate purpose of the law is to further the general welfare. In the criminal law, this means that rational judges should encourage welfare-maximizing conduct.”¹³⁰ The Model Penal Code privileges deterrence, the quintessentially consequentialist function of criminal law, as one of the crucial theories of punishment.¹³¹ But this consequentialist orientation would not necessarily foreclose a rule barring the defense in cases of created culpability. The law, the deterrence theorist might argue, is properly concerned to deter a person from engaging in conduct that she knows will lead, or that is highly likely to lead, to a choice of evils. In the Joe and Jane scenario, this deterrence argument admittedly seems quite weak,¹³² primarily because Joe might be in a much worse position if he allows Jane to die after creating the necessity, but other scenarios might present a stronger case for this type of deterrence argument.¹³³

¹²⁸ This Article considers only one consequentialist theory of punishment, deterrence. There obviously are others, such as rehabilitation, incapacitation, and “channeling aggressive energies into the orderly process of the criminal law,” but deterrence is the most relevant for assessing the created culpability bar from a consequentialist point of view. FLETCHER, *supra* note __, at 814.

¹²⁹ *E.g.*, FLETCHER, *supra* note __, at 790-791; Greenawalt, *supra* note __ [NLPC], at 3 (“The present dominant formulations [of the necessity defense] in American criminal codes are consequentialist[.]”); Martin, *supra* note __, at 1538.

¹³⁰ FLETCHER, *supra* note __, at 790.

¹³¹ Model Penal Code § 1.02(1), Explanatory Note (“the dominant theme is the prevention of offenses”). Deterrence, like retribution, is not technically a theory of punishment, since whether deterrence is justified depends upon whether a moral theory (such as consequentialism or deontology) assigns a justifying quality to it. Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 944 n.7 (2000). Nevertheless, this Article uses the term “theory of punishment” in the less technical and more common sense that includes functions of criminal law with strong connections to particular ethical theories of punishment.

¹³² It seems highly unlikely that a person intent on beating his girlfriend or chasing her with a broken bottle would be deterred by the knowledge that he would be barred from the necessity defense if his conduct resulted in her injury.

¹³³ Robinson’s P.L.O. example might be one such scenario. Perhaps the P.L.O. member would be deterred from carrying out his scheme if he knew that the necessity defense (or self-defense) would be unavailable to him.

The difficulty is that a number of scholars have seized upon the consequentialist orientation of the necessity defense to make much more far-reaching and sweeping claims about its nature and aims. So, for example, in his article entitled, “The Radical Necessity Defense,” Professor Shaun Martin, after arguing for the “communitarian nature” of the necessity defense, writes:

The necessity defense is thus a uniquely collective and act-utilitarian doctrine in an American jurisprudential landscape otherwise dominated by rights- and rule-utilitarian based principles. These philosophical underpinnings, yet again, are both inherently radical and provide a one-way ratchet towards certain types of transformative social change [T]he necessity doctrine is a social libertarian’s dream. Necessity inherently privileges any legal violation that provides an individual or social benefit without imposing corresponding harm on another person.¹³⁴

Perhaps less radically, though no less reductively, Judge Richard Posner has characterized the necessity defense in terms of a pure measurement of cost as proxy for social net gain, arguing that the necessity defense ought always to succeed “if there is a very great disparity between the cost of the crime to the victim and the gain to the injurer.”¹³⁵ One might think that given the disparate and frequently irreconcilable aims of the criminal law, no unswervingly utilitarian explanation of the necessity defense would be adequate. “On the contrary,” writes Professor Kutz, “Anglo-American criminal law theorists and treatise writers, including the authors of the [Code], are typically critical of the courts for giving the necessity defense so little force beyond its formal recognition.”¹³⁶ There is, in fact, a tendency in modern scholarship to mechanize and flatten the necessity defense inquiry by insisting on a rigid act-utilitarian balancing between

¹³⁴ Martin, *supra* note __, at 1549, 1557. Professor Martin’s absolutist view of the act-utilitarian character of the necessity defense is also evidenced by what he sees as the alternative – “that the traditional consequentialist assumptions that lie at the very heart of the necessity defense be discarded in favor of alternative fundamental principles.” *Id.* at 1555 n.26.

¹³⁵ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 7.6, at 252 (5th ed. 1998).

¹³⁶ Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 251 (2007).

two (or more) discrete actions, each of which yields a readily calculable social net gain when examined in isolation.¹³⁷

This monistic view of justification, unsurprisingly, faces many of the difficulties that a-contextual and reductive utilitarian systems of value confront. One of these is that unless one is prepared to accept a principle such as wealth-maximization as the fundamental and sole gauge of value,¹³⁸ or a form of “efficient breach” theory of criminal law,¹³⁹ consequentialist accounts of the necessity defense tend to use general and not especially informative value terms with insufficient explanation. Professors Wayne LaFave and Austin Scott, for example, write that “[t]he rationale of the necessity defense is . . . this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.”¹⁴⁰ But “higher” and “lesser” values depend for their assessment on a moral standard of measurement as, of course, do the vague phrases “the greater good for society” and “net social gain.”¹⁴¹

One can find traces of this difficulty in Comment 4 to the Model Penal Code’s section on the necessity defense, in which the commentator explicitly declines to discuss which harms the criminal law is intended to prevent or how to measure competing harms, and claims that this omission is inevitable because “[d]eep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative or how far desirable ends may justify otherwise offensive means.”¹⁴² Yet in discussing an example of

¹³⁷ Parry, *supra* note __, at 404-414. By “act-utilitarian,” I mean the moral theory that “an act is right insofar as its consequences for the general happiness are at least as good as any alternative available to the agent.” David O. Brink, *Mill’s Ambivalence About Rights*, at *2 (manuscript on file with author).

¹³⁸ See generally POSNER, *supra* note __.

¹³⁹ Kutz, *supra* note __, at 251-52 (“[O]n ‘economic’ theories of criminal law, where the point of the criminal norm is to block transactions that could, were they Pareto-improving, go through with mutual consent, the necessity defense would, indeed, exemplify the logic of the criminal law in general – a form of ‘efficient breach’ theory.”).

¹⁴⁰ 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.4, at 629 (2d ed. 1986).

¹⁴¹ Robinson, *supra* note __[CCOD], at 25. For criticism of less than careful use of the phrase, “the public good,” and the often unspoken assumptions that underlie it, see Marc O. DeGirolami, *Recoiling From Religion*, 43 SAN DIEGO L. REV. 619 (2006).

¹⁴² Model Penal Code § 3.02, Comment 4.

a mountain climber tied to a companion who has fallen off a cliff and must decide whether to cut the rope to save himself, the commentator implicitly makes a judgment about precisely which harms the criminal law is intended to punish when he argues that under all circumstances the mountaineer “must certainly be granted the defense that he accelerated one death slightly but avoided the only alternative, the certain death of both.”¹⁴³ Professor Hoffheimer argues convincingly that even under a generally consequentialist, deterrence-oriented standard of measurement, this reasoning bespeaks a scale of values that is hardly neutral:

[T]he commentator assumes that the harms prevented by the criminal law are those injuries avoided in a particular case. But the criminal law almost always seeks to avoid social harms other than those immediately caused by the actor. For example, while the law of theft seeks to prevent the loss of specific property, the imposition of criminal sanctions serves broader interests and avoids other harms that range from the destruction of commercial markets to the breakdown of social order that would result from the resort to self-help violence in the absence of effective criminal sanctions.¹⁴⁴

If the question is the consequentialist concern that the created culpability bar does not give Joe an incentive to “do the right thing” – that is, to drive Jane to the hospital while intoxicated – one might point out that the deterrent aims of the criminal law nevertheless can be at least minimally satisfied. Joe arguably will be deterred from beating Jane after he has been drinking or from recklessly chasing her with sharp objects, activities that are also obviously not “the right thing to do” and have a high probability of resulting in severe injury to Jane that would in turn give rise to a choice of evils. He might also be deterred from beating her purposefully. And others will be stimulated to similar, non-criminal behavior. This deterrent rationale also can explain why punishing grand schemers is proper. If the putative grand schemer knows that his scheme to make illegitimate use of the necessity defense would be

¹⁴³ *Id.* It is an interesting question whether the deterrence-minded commentator would have felt any differently if the cutting mountain climber had been a grand schemer.

¹⁴⁴ Hoffheimer, *supra* note __, at 225 n.203.

denied, it is at least possible that he would be deterred from culpably creating the necessity with scheming intent.¹⁴⁵

While the created culpability bar therefore *could* be consistent with a consequentialist approach to criminal law that prizes deterrence, four important qualifications are in order. First, the created culpability bar is difficult to reconcile with the view that the necessity defense should be understood in purely and exclusively act-utilitarian terms.¹⁴⁶ The created culpability bar is inconsistent with the idea that the criminal law's sole interest, so far as the necessity defense is concerned, is with Joe's moment of choice as Jane lies bleeding. Everyone agrees that society gains if Jane lives, and the act-utilitarian would argue that if we compare Joe's two choices – doing nothing or driving Jane to the hospital while intoxicated – Joe should never be deterred in any degree from making the choice with the greater social net gain, whether or not he culpably created the necessity. Second, even if the deterrent aims of the criminal law are understood more broadly to include the range of activities and behaviors that are more diffusely connected to any specific act, including those that bear on general deterrence, one would be hard pressed to argue that those considerations are sufficiently important to outweigh society's interest in promoting justified conduct.¹⁴⁷ It is doubtful, for example, that the possibility that others might be deterred from reckless conduct by a firm created culpability bar is powerful enough to overcome the competing consideration that society ought to protect and foster Joe's decision to drive Jane to the hospital, even if he is to blame for beating Jane.¹⁴⁸ Third, the argument from deterrence cannot account for any distinction between degrees of created culpability, other than on grounds of deterrence.¹⁴⁹ Fourth, and most importantly, the

¹⁴⁵ For this purpose, it makes no difference whether or not one accepts Professor Robinson's explanation for which "act" the grand schemer is being punished. Robinson, *supra* note __, at 40-42.

¹⁴⁶ Martin, *supra* note __, at 1549. It is also probably inconsistent with an economic theory of criminal law.

¹⁴⁷ See Hoffheimer, *supra* note __, at 242 ("The requirement that the actor be free from fault is only imperfectly explained by the utilitarian goal of restricting criminal sanctions to deterrable acts.").

¹⁴⁸ FLETCHER, *supra* note __, at 299 ("There comes a point where the deterrent efficacy of a sanction is so weak that one might properly think that competing values require that deterrence not be accepted as a justification.").

¹⁴⁹ *Id.* (noting that deterrence itself cannot specify the values that compete against it). I put to the side the common charge against deterrence that it could easily result in scapegoating the blameless, since even those committed to deterrence would (I think) balk at imposing *greater* punishment on actors who are blameless than on actors who

deterrence argument does not account for what seems to be at the heart of the objection about calling culpable conduct that created a necessity justified – that such conduct is wrongful in a way that a blameless choice of evils is not.

C. Created Culpability and Desert

A more promising possibility is that the created culpability bar could be explained on the basis of desert. In order to assess this argument, it is worthwhile to consider what it means to call necessitous conduct “justified.” Kent Greenawalt has argued persuasively that the ordinary English usage of the word “justified” means something akin to “warranted [T]o be justified is to have good, sound reasons for what one does or believes.”¹⁵⁰ Thus, “[a] person who seeks to justify her act is arguing not only that the act was not wrong, but that she did what the law, or the state, or morality, demanded of her, and indeed, that she should be applauded for her conduct.”¹⁵¹ The actor has “done all that he could do” under the circumstances, and culpability is inappropriate for someone who has acted as well as he can.¹⁵²

To call an act justified in the context of the necessity defense is likewise to express something about its elevated social or moral worth. Justified conduct in the criminal law is more than merely non-harmful¹⁵³; even on a dogmatically act-utilitarian calculus, it is conduct that must issue in some comparative net social good that society is interested in

culpably create a necessity, even if it could be shown that the social net benefit would thereby increase.

¹⁵⁰ Greenawalt, *supra* note __ [PBJE], at 1903. Since “justified” has no specialized legal meaning, Greenawalt considers its ordinary usage. *Id.* See also H.L.A. HART, *THE CONCEPT OF LAW* 174 (2d ed. 1996) (justified conduct is “a kind of conduct which the system is not concerned to prevent and may even encourage”).

¹⁵¹ Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self-Defense*, 28 B.C. L. REV. 459, 472 (1987).

¹⁵² HART, *supra* note __, at 173; see also Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, of Battered Women*, 81 N.C. L. REV. 211, 242-43 (2002).

¹⁵³ Joshua Dressler argues that it is not necessary that justified conduct be “affirmatively desirable or morally good,” only that it be “tolerable.” 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, 82-83 (1984). Even on this least demanding understanding of “harm,” however, “tolerable” conduct is surely morally preferable, and therefore in some sense morally superior, to intolerable conduct.

encouraging. Otherwise, why should society turn a blind eye to the fact that its criminal law has been violated?¹⁵⁴ “It is socially desirable,” writes Professor Fletcher, “to blow up a privately owned house in order to prevent the spread of a raging fire [N]ecessity legitimates an invasion against the rights of a totally innocent third party.”¹⁵⁵ That justified conduct is “socially desirable” means that it is conduct about which society – as represented by the jury – has expressed, or wishes to express, its approval.¹⁵⁶ As a legal status, therefore, justification necessarily implicates a community decision about the moral worth of an act: “in the special circumstances in which the offense (as defined by law) occurs, the action is no longer bad, but good.”¹⁵⁷ The expression of a judgment of justification has social value in two senses: a personal moral sense for the actor, and a more general moral sense in which society “upholds, advances, and renews community values and . . . signals changes or shifts in those values.”¹⁵⁸ That last sense of social value may appear primarily consequentialist, but Professor R.A. Duff has argued that expressive punishment also serves a profoundly retributivist function.¹⁵⁹

The question becomes just how elevated, or praiseworthy, or socially desirable, conduct must be to qualify for the status “justified,” and what side-constraints might bear on that assessment. Here, Greenawalt’s seminal article on the borders of justification and excuse complicates matters, but in a way that illuminates a crucial attribute of justification and that ultimately best explains the created culpability bar.¹⁶⁰ In exploring borderline cases of justification, Greenawalt

¹⁵⁴ See Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213 (1982) (“The harm caused by justified behavior remains a legally recognized harm which is to be avoided whenever possible[.]”).

¹⁵⁵ FLETCHER, *supra* note __ [BCCL], at 138; see also FLETCHER, *supra* note __ [RCL], at 799 (“In a case of justified conduct, the act typically reflects well on the actor’s courage or devotion to the public interest.”).

¹⁵⁶ See Joel Feinberg, *The Expressive Function of Punishment*, in FEINBERG, DOING AND DESERVING 95, 98-99 (1972).

¹⁵⁷ Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 485 (2006); see also Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1097 (1985) (“Justifications answer the general evaluative question of whether, all things considered, the world is better or worse than it was without the action in question.”).

¹⁵⁸ Parry, *supra* note __, at 440; see generally ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 60-64 (W.D. Hall trans., 1984) [1933].

¹⁵⁹ R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 28-30 (2001) (arguing that communicative punishment is society’s expression that it takes its criminal norms, and those who violate them, seriously).

¹⁶⁰ Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

considers the possibility that actors may behave in a way that is permissible but less than ideal: “A person may act in a manner that reflects what most people would do or that in some sense is ‘within his rights,’ although a different response would be morally preferable.”¹⁶¹ So, for example, if Al refuses to speak with Bruce after Bruce has betrayed Al’s confidence, Al’s conduct is “natural” or “understandable” even though that reaction might not be morally optimal.¹⁶² When it comes to classifying Al’s behavior, however, Greenawalt observes that “we may feel uncomfortable about calling Al’s behavior justified.”¹⁶³ If “justified” means something more than merely “not wrong” – something more akin to warranted, right, socially desirable, praiseworthy, and so on – then there is a difference in the degree of justification¹⁶⁴ between Carl, who forgives Bruce under the same circumstances, and Al, who holds a grudge.¹⁶⁵ Whether one believes that Al’s behavior is justified or not, Greenawalt writes, depends on the rigor of one’s personal and social ethical standards.¹⁶⁶ And one’s personal ethics may be very much more rigorous than what one demands of society, so that one might say: “From the standpoint of what Bruce and society could fairly expect of Al, what Al did was justified; from the standpoint of the perfectionist standards that should guide us all, he was only excused.”¹⁶⁷

Greenawalt’s crucial point is that the criminal law does not impose perfectionist ethical standards on people; it imposes only comparatively minimal ethical demands and it would be a mistake, as both a matter of principle and prudence, to define the limits of justification and excuse systematically because that would inevitably submerge a minority ethical view of what constitutes justified conduct and needlessly consume the resources of government in sorting out ethical niceties.¹⁶⁸

¹⁶¹ *Id.* at 1904.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Greenawalt writes that at these borderlands a justification shades into an excuse for some people and remains a justification for others. *Id.* But I believe that in cases of created culpability, it may be better to speak in terms of degrees of justification, since the conduct itself, not the personal characteristics of the actor, remains the focus. Focusing on conduct highlights the importance of context in evaluating degrees of justification.

¹⁶⁵ Some people might believe that holding a grudge is more justified than forgiveness under these circumstances, but the point is that assessments about degrees of justification are being made in either case.

¹⁶⁶ *Id.* at 1905.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1906.

Yet if degrees of justification can be recognized in ordinary ethical evaluation, they *might* also be recognized by the criminal law. To recognize that there are differences in degrees of justification is not necessarily to insist that rigid lines of demarcation be drawn between justified and unjustified conduct. It is also not to insist on a perfectionist ethic for criminal law. That we feel differently about Al's behavior than Carl's is meaningful: it shows that an act can be more or less justified – more or less praiseworthy, or warranted, or socially desirable – depending on the circumstances that attend it. If Greenawalt is correct that “we may feel uncomfortable” about calling Al's behavior justified, other circumstantial distinctions might make a much more substantial difference to our level of comfort about designating conduct as justified. For example, it might make a considerable difference in our assessment of Al's conduct whether Bruce intentionally betrayed Al's confidence in order to steal all of his life savings or murder his family, or instead negligently revealed a secret about Al, thinking that it would come to nothing, but with the result that Dave, Al's boss, learned an embarrassing piece of information about Al. We might feel that Al's refusal to speak with Bruce is much more justified in the limited sense of justification discussed above – that Al is more “within his rights,” or that his conduct is more natural or understandable – in the first situation than the second, even if we also feel that under a perfectionist approach only Carl's conduct – forgiveness – is truly justified.¹⁶⁹ On the other hand, we might feel that Al's reaction is less justified, in the limited sense of “understandable,” if Bruce's betrayal of Al was in response to some terrible misdeed of Al's.

These circumstances obviously can be multiplied in infinite cycles of complexity, and none of this is to insist that these are all differences that the criminal law ought to recognize in assessing whether conduct is justified. Greenawalt is certainly right to argue that the difference between the justifiability of Al and Carl's conduct is not of the kind that the criminal law should acknowledge because it should not demand a perfectionist ethic of forgiveness.¹⁷⁰ But even if the criminal law should not recognize the Al/Carl difference, the crucial point is that there may be other

¹⁶⁹ Again, it is important to emphasize that these circumstantial differences speak to shades of justification, not to the distinction between justification and excuse. Neither Al's nor Carl's conduct is “wrongful,” but nevertheless excused because of some attribute or personal quality specific to Al or Carl.

¹⁷⁰ *Id.*

circumstantial distinctions that it *should* acknowledge in assessing whether conduct is justified.

Whether the criminal law should acknowledge a circumstantial distinction depends neither on any procrustean *idée fixe* that conduct must be assessed at the snapshot moment when it occurs and can only be either justified or not, nor on any artificially delimiting act-utilitarian standard of measurement, but instead on what and how substantially the particular circumstance bears on the question of justification.¹⁷¹ That the criminal law should recognize certain circumstantial facts as relevant to the determination of whether conduct is justified does not necessarily move the criminal law in a perfectionist direction. It moves it in a complicating direction. Additional circumstantial data might tend toward a more perfectionist ethic of criminal law, but they might also simply reflect a more sensitive account of a non-perfectionist criminal law ethic. The additional data might, moreover, be difficult to reconcile with the other factors relevant in assessing whether conduct is justified.

Created culpability is complicating circumstantial data of this kind. Whether justified conduct is understood as “warranted”¹⁷² or praiseworthy or “good”,¹⁷³ or instead less ambitiously as “understandable”¹⁷⁴ or “natural,”¹⁷⁵ the actor has earned that designation for his conduct by acting (or failing to act) in a certain way. The conduct deserves to be called justified given the circumstances in which it was performed.¹⁷⁶ Created culpability is part of that context. Considering created culpability complicates the assessment of necessitous choice by introducing doubt about whether the actor has earned that label for his conduct, or whether he has earned it in the same way or in the same degree as the actor who has culpably created the necessity. This point about desert – about having earned for one’s conduct the designation “justified” –

¹⁷¹ See Parry, *supra* note __, at 444 (“The categories of justification and excuse supply us with a set of questions we can ask about particular claims, but the point is to ask those questions, reach a result, and then use the categories to describe the result, rather than to choose a category before analyzing the claim.”).

¹⁷² *Id.* at 1903.

¹⁷³ Sangero, *supra* note __, at 485.

¹⁷⁴ Greenawalt, *supra* note __, at 1904.

¹⁷⁵ *Id.*

¹⁷⁶ Even a homicidal act, as Professor Robinson rightly noted, can only be assessed as justified or wrongful through the prism of context. See Robinson, *supra* note __, at 40.

distinguishes the Al/Carl situation.¹⁷⁷ Al and Carl, notwithstanding what the moral perfectionist might think about the justifiability of their respective reactions to Bruce's betrayal, have in common that their conduct is presumptively more deserving of being deemed justified because neither was at fault for the situation that led to their conduct. The actor who has culpably created the necessity is responsible for the necessitous conduct in question in a way that Al and Carl can never be because neither of them is to blame for Bruce's betrayal.¹⁷⁸

Nevertheless, that distinction still leaves unresolved the question why culpable responsibility and the lack of justified desert that it implies should make enough of a difference to interest (or why it is the type of difference that should interest) the criminal law, while other ethical concerns that also are arguably relevant to the assessment of justification in ordinary ethical evaluation (forgiveness, for example, as in the Al/Carl example) should not. The answer is that culpable responsibility – that is, the desert that derives from fault – is one of the primary, if not the crucial, concerns of the criminal law.¹⁷⁹ Fault is integral to the justifiability – the warrantedness – of punishment,¹⁸⁰ and any adequate theory of punishment must account for what Professor Fletcher has called “the traditional metaphysics of retribution: that

¹⁷⁷ Greenawalt, *supra* note __, at 1904.

¹⁷⁸ There is an analogy here to what Professor David Luban has called “contrived ignorance.” David Luban, *Contrived Ignorance*, 87 *GEO. L.J.* 957 (1999). Luban considers the case of an actor who is willfully ignorant as to a fact (that is, who “screens” himself from that fact) and then later unknowingly commits misdeeds that are connected to his willful ignorance. He argues that it is a mistake to “treat[] the actor at the time of the unwitting misdeeds as if he were a different person from the actor at the time of the screening actions [T]he later self is not entirely innocent. The later self at least knows that he performed the screening actions at an earlier time. He is on notice that the sword of potential wrongdoing dangles over his head.” *Id.* at 972.

¹⁷⁹ See, e.g., Huigens, *supra* note __ [DED], at 945 (“Fault – also known as desert, culpability, or blameworthiness – is the distinctive feature of the criminal law”);

¹⁸⁰ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 262-63 (1980) (“Sanctions are punishment because they are required in reason to avoid injustice, to maintain a rational order of proportionate equality, or fairness, as between members of the society. For when someone, who really could have chosen otherwise, manifests in action a preference (whether by intention, recklessness, or negligence) for his own interests, his own freedom of choice and action, as against the common interests of the legally defined common way-of-action, *then in and by that very action* he gains a certain sort of advantage over those who have restrained themselves, restricted their pursuit of their own interests, in order to abide by the law.”) (emphasis added).

somehow the punishment must address the crime and seek to negate its occurrence.”¹⁸¹ Likewise, any plausible theory of justification, or warranted action, must explain why fault – and therefore punishment – is inappropriate in the face of “socially desirable” conduct.¹⁸² By contrast, the criminal law is not commonly thought to be as interested in forgiveness, mercy, charity, compassion and many other perfectionist moral ideals that also might bear more generally on the question of justification.¹⁸³ “[G]enuine punishment has always been grounded in a robust conception of wrongdoing that features fault and the desert that fault implies.”¹⁸⁴ The same is true, inversely, for justification.

Ignoring created culpability where it exists is therefore a substantial, perhaps uniquely powerful, affront to the retributivist function of criminal law because it consciously and completely discounts the question of blame at the heart of criminal law and its inverse relationship to warranted, or justified, conduct. One need not be committed to retributivism as the sole, or even the primary, function of criminal law to acknowledge that failing utterly to account for created culpability in one’s theory of justification leaves a deficit that is qualitatively different from failing to account for forgiveness or other ideals that are less focal for criminal law. The problem of not accounting for created culpability is therefore not at all the same as the difficulty that any perfectionist theory of justification faces. Perfectionist understandings of justification are highly likely to be disappointed (and disappointing) when it becomes clear that it is impossible to cram all of the lofty moral ideals that we might like into our legal standard of justification, because to do so would impose an intolerably rigorous set of social demands and a detailed moral system with which many people will disagree.¹⁸⁵ Professor Parry’s argument that when faced with a claim of justification, a jury

¹⁸¹ GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 33 (1998).

¹⁸² *Id.* at 138.

¹⁸³ *See, e.g.*, Greenawalt, *supra* note __, at 1906; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1431 (2004) (arguing that mercy and compassion are fundamentally incompatible with the liberal democratic norms of criminal law); Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 329 (2007) (“Though forgiveness and mercy matter greatly in social life, they play fairly small roles in criminal procedure.”). Professor Bibas notes this fact, and then proceeds to argue for a more central role for mercy in criminal procedure.

¹⁸⁴ Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 HARV. J.L. & PUB. POL’Y 33, 40 (2003).

¹⁸⁵ *See* Greenawalt, *supra* note __, at 1905 (“Basic definitions of criminal law leave untouched many actions that fall below even modestly rigorous standards of moral acceptability.”).

should be entirely free to explore “the range of moral questions posed” and “the questions that resonate most strongly in that case” risks just such an amorphous, arbitrary and idealized understanding of justification.¹⁸⁶ A perfectionist approach to justification, moreover, would render it conceptually impossible to engage in conduct that is morally superior to the justified conduct.¹⁸⁷ Acknowledging that created culpability is a criterion relevant to the assessment of justification is qualitatively different from insisting on a perfectionist theory of justification. To discount what makes us “feel uncomfortable”¹⁸⁸ about created culpability – that is, concerns about the blameworthiness of conduct that is circumstantially connected to necessitous choice – renders the idea of justified conduct itself *defective* in a way that ignoring other circumstances and values does not.

Still, of itself, the fact that the culpable actor’s fault in creating the necessity is a specially powerful retributivist datum for evaluating whether an act is justified does not say anything about precisely when it should actually affect whether the criminal law recognizes conduct as justified. The question now is about the degree or type of “connection” between the culpable conduct that created the necessity to the necessitous act that is sufficient to make a difference.¹⁸⁹ One might adopt the New York Penal Law approach and simply say that an actor who is at fault in any degree is barred from the defense.¹⁹⁰ But the New York position is not sufficiently sensitive to the competing concerns at issue in any assessment of a necessitous situation. There are of course difficulties of line-drawing here that are exacerbated by the rivalrous and even incompatible goods that are promoted in retributivist and deterrent theories of punishment.¹⁹¹ Just as the deterrent

¹⁸⁶ Parry, *supra* note __, at 403.

¹⁸⁷ Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233, 1251 (1993) (“Suppose, for example, police officer X enters a house to investigate reported gun fire. X encounters a six-year old Y who has found a loaded gun and killed his sister, apparently unaware that they are not playing a game. When X enters the room, Y laughs, points the gun at X, and begins to pull the trigger. X may justifiably shoot Y in self-defense, but if X refrains from shooting, choosing instead to risk lethal injury to himself rather than harming the dangerous but innocent Y, most observers would praise X for rising above the standard set by the law.”).

¹⁸⁸ Greenawalt, *supra* note __, at 1904.

¹⁸⁹ Davis, *supra* note __, at 15.

¹⁹⁰ N.Y. Penal Law § 35.05(2).

¹⁹¹ Huigens, *supra* note __ [DED], at 956 (“The concept of fault, and in particular the idea of mens rea – the conception of fault as an intentional state on the occasion of wrongdoing – is an essentially retributivist idea.

efficacy of punishment may become weak enough that competing values can overpower it,¹⁹² so too the degree of created culpability and its nexus to the necessitous conduct may be weak and attenuated enough to yield to competing values (for example, the consequentialist benefit of performing the necessitous act itself).

We might imagine a range of created culpability. The range reflects the types of created culpability and how closely they connect to the allegedly justified act. At one end of the range is the actor who purposely and culpably created the necessity, at the other is the blameless actor, and the middle of the range is comprised of the other *mens rea* categories recognized by the Model Penal Code: knowledge, recklessness, and negligence.¹⁹³ The most controversial aspect of the range is that purposeful, knowing, reckless, and negligent created culpability may be imputed to the creation of the necessity based on the nature of the connection between the culpable conduct creating the necessity and the allegedly justified act. Subjective consciousness of created culpability with respect to the choice of evils itself, while relevant to proving the appropriate level of created culpability, is never dispositive. So, for example, an actor who meticulously plans to murder his wife by stabbing her to death and carries out the stabbing after having drunk enough to exceed the legal limit for operating under the influence of alcohol, but who non-negligently fails to kill her and is faced with the necessity (because of a sudden sense of remorse, or because he realizes that he might be charged with a crime of omission if he lets her die, or for whatever other reason) of having to drive her while intoxicated to the hospital, would have purposely created the necessity of having to drive drunk. He has purposely created the necessity irrespective of what his subjective intentions were with respect to creating the necessity to drive drunk.¹⁹⁴ His purpose to

Deterrence theory differs on this point. If the promotion of social welfare is the justifying purpose of punishment, then punishment need not turn on any particular aspect of the wrongdoer or her wrongdoing.”).

¹⁹² FLETCHER, *supra* note __, at 299.

¹⁹³ Model Penal Code § 2.02. Strict liability and the “extreme indifference” category of *mens rea* for murder are not included. I have modeled the degrees of created culpability on the Code’s *mens rea* provisions because they are clear and easy to understand by comparison with many of the older common law mental states. But I am not necessarily wedded to these particular categories. The point of this exercise is to distinguish the type of created culpability that should bar the necessity defense.

¹⁹⁴ Focusing exclusively on the actor’s state of mind with respect to creating the necessity itself anomalously denies the justification defense for the actor who was reckless as to the created conduct as well as to

create the necessity to drive drunk is imputed whether or not (as is highly unlikely) it was part of his murderous plan.

Under this system – which could be called “imputed created culpability” – the degrees of created culpability would be expressed as follows:

- A person purposely creates a necessity (1) when it is his conscious object to engage in conduct that is a criminal offense, and (2) when that conduct is the direct cause of the necessity. It need only be his conscious object to engage in the criminal conduct that directly causes the necessity; it need not be his conscious object to create the necessity itself.¹⁹⁵
- A person knowingly creates a necessity (1) when he is aware that it is practically certain, or highly probable, that his conduct is of the nature of a criminal offense, and (2) when that conduct is the direct cause of the necessity.¹⁹⁶ He need only be aware that it is practically certain, or highly probable, that his conduct is of the nature proscribed by the criminal law; he need not be aware that it is practically certain, or highly probable, that his conduct will create the necessity itself.
- A person recklessly creates a necessity (1) when he consciously disregards a substantial and unjustifiable risk that a criminal offense will result from his conduct, and (2) when that conduct is the direct cause of a necessity. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.¹⁹⁷ He need only consciously disregard a substantial

creating the necessity, but permits it for the actor who carefully planned the culpable conduct and was not culpable in any degree as to creating the necessity. *See* Ariz. Rev. Stat. Ann. § 13-417.

¹⁹⁵ *See* Model Penal Code § 2.02(2)(a).

¹⁹⁶ *See* Model Penal Code §§ 2.02(2)(b), 2.02(7).

¹⁹⁷ *See* Model Penal Code § 2.02(2)(c).

and unjustifiable risk that a criminal offense will result from his conduct; he need not disregard a substantial and unjustifiable risk that his conduct will create the necessity itself.

- A person negligently creates a necessity (1) when he should be aware of a substantial and unjustifiable risk that an offense will result from his conduct, and (2) when his conduct is the direct cause of the necessity. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.¹⁹⁸ He need only be negligently unaware of a substantial and unjustifiable risk that a criminal offense will result from his conduct; he need not be negligently unaware that his conduct will create the necessity itself.

Each of these provisions speaks in terms of culpable conduct that is the "direct cause of the necessity." Three additional provisions, all of which are modeled, with some alterations, on the Code's causation principles, are necessary to explain what "direct cause" means in this context:

- A necessity is the direct cause of culpable conduct when the culpable conduct is an antecedent but for which the necessity in question would not have occurred.¹⁹⁹
- Purposely or knowingly culpable conduct can only directly cause a necessity if either (1) the necessity is within the purpose or contemplation of the actor,²⁰⁰ or (2) the necessity is not too remote or accidental in its relationship to the purposely or knowingly culpable conduct to have a [just] bearing on the defense of justification.²⁰¹

¹⁹⁸ See Model Penal Code § 2.02(2)(d).

¹⁹⁹ See Model Penal Code § 2.03(1)(a). "Direct causation" is therefore not proximate causation.

²⁰⁰ This represents the grand schemer.

²⁰¹ See Model Penal Code § 2.03(2). The formulations here omit the Code's requirement that the actual result involve "the same kind of

- Recklessly or negligently culpable conduct can only directly cause a necessity if either (1) the necessity is within the risk of which the actor is aware, or, in the case of negligence, of which he should be aware, or (2) the necessity is not too remote or accidental in its relationship to the recklessly or negligently culpably created conduct to have a [just] bearing on the defense of justification.²⁰²

Given this framework, my suggestion is that the type of created culpability that should defeat a claim of justification – the type, that is, that has a “just bearing on the defense of justification” because it reflects the appropriate retributivist nexus between created culpability and justified conduct – ought to include those mental states where the actor was at least *conscious of a substantial and unjustifiable risk* that his conduct would result in a criminal offense, and where that culpable conduct *directly caused* the necessity that occasioned the allegedly justified conduct. This baseline would bar the necessity defense for purposely, knowingly, and recklessly culpable conduct that created a necessity. It would not bar the defense for actors who were negligently culpable in creating a necessity, because negligently culpable actors have not consciously chosen any culpable conduct.²⁰³ It would also not bar the defense in any case where the necessity was not “directly caused” by the actor’s criminally culpable conduct.

Setting the dividing line between reckless and negligent created culpability is consistent with the important retributivist principle that “moral culpability is, and criminal liability should be, based on a *conscious choice to do wrong.*”²⁰⁴

injury or harm as that designed or contemplated,” or, in the case of reckless and negligent created culpability, “the same kind of injury as the probable result,” since the choice of evils is unlikely ever to involve the same types of harm as the culpably created harm.

²⁰² See Model Penal Code § 2.03(3).

²⁰³ Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended*, 1 OHIO ST. J. CRIM. L. 179, 181 n.5 (2003).

²⁰⁴ *Id.* at 188. Professor Simons argues that recklessness under the Code contains both a subjective and an objective component, and that while the actor must be subjectively aware of a substantial risk, he need only be objectively aware that the risk is unjustifiable. *Id.* at 189. Still, Simons points out that the objective assessment about whether an act is unjustifiable will depend at least in part on a subjective inquiry about what was known to the actor. *Id.* at 189 n.32 (citing David M. Treiman,

That is one explanation, albeit one not necessarily in keeping with the Code's consequentialist orientation, for the rule that where a statute does not expressly set a level of culpability, the Code provides that the default *mens rea* standard should be recklessness, not negligence.²⁰⁵ In like manner, justified conduct should not be based on or directly caused by – that is, be the cause in fact and not be too remote or accidental in its relationship to – consciously chosen, wrongful conduct. Conduct that includes, because it is directly caused by, a voluntary, wrongful act, is culpable, not justified.²⁰⁶

If one assumes that created culpability is the type of contextual circumstance that speaks particularly powerfully to the retributivist concerns applicable to justification,²⁰⁷ then it is reasonable to bar the defense where the actor has not earned, or does not deserve, the designation “justified” for his conduct in the face of a necessity that is the direct cause of his consciously chosen, criminally culpable conduct. For purposes of evaluating whether conduct is justified, it is therefore appropriate to *impute* a measure of culpability to conduct that is the direct result of consciously chosen, criminally culpable conduct. Likewise, an actor who is knowingly or recklessly culpable as to conduct that directly causes a necessity does not act justifiably in response to the necessity; he acts with the culpability that attends his consciously chosen, criminally culpable conduct, provided that his conduct “is not too remote or accidental in its relationship” to the necessitous conduct to have a “just bearing on the defense of justification.” On the other hand, the negligently culpable actor whose conduct created a necessity does not deserve the censure owed to an actor who consciously chose culpable conduct. Even if the negligently culpable actor's conduct directly causes the necessity, the retributivist nexus between his negligent conduct and the necessitous act is weaker than in the other types of culpability. The negligently culpable actor whose conduct directly causes a necessity may deserve other, less severe kinds of social censure – civil liability, for example – but retributivist concerns are far less powerful in his case and so it is unjust to

Recklessness and the Model Penal Code, 9 AM. J. CRIM. L. 281, 365-67 (1981)).

²⁰⁵ Model Penal Code § 2.02(3); see Simons, *supra* note __, at 189.

²⁰⁶ Model Penal Code § 2.01(1) (“A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is fully capable.”). The voluntary act requirement is of course also consistent with strict liability crimes for which there is no *mens rea* requirement. The Code does not emphasize, as this Article does, the particular importance of *wrongful*, voluntary acts for the criminal law.

²⁰⁷ See *supra* notes __, and accompanying text.

impute created culpability to his conduct even when it directly causes the necessity.

Perhaps the core criticism of imputed created culpability is that it imputes culpability for a necessitous condition that was directly caused by conduct that the actor consciously chose (purposely, knowingly, or recklessly), but where the actor did not necessarily consciously choose (purposely, knowingly, or recklessly) the necessitous condition and therefore should not be blamed for any conduct in response to that condition.²⁰⁸ There are two possible objections that underlie this criticism.

The first is that criminal culpability should never be imputed where an actor is not culpable as to a particular act (here, the allegedly justified act). This objection assumes that the circumstances attending any particular act are never relevant to the assessment of whether that act is wrongful or justified. But if one accepts this Article's two claims that those circumstances can be relevant, and that certain types of circumstance – notably, ones that deeply implicate questions of desert – should be relevant in evaluating whether conduct is culpable or justified,²⁰⁹ then this objection is defeated.

The second, and more substantial, objection is that imputed created culpability requires the fact finder to resolve the difficult question of whether criminally culpable conduct “directly caused” a necessity.²¹⁰ Robinson similarly criticizes the Code's commentary because it speaks in terms of culpability that “inheres in recklessness or negligence,” and this, as he points out, does not clarify precisely which acts in the causal chain of creation need be reckless or negligent.²¹¹ It is true that questions of causation can be complex, but the evidentiary difficulties that they present are to an extent mitigated by the demanding requirement that the culpable conduct be both the but-for cause of the necessity and not “too remote or accidental in its relationship to have a just bearing” on the allegedly justified act. The question arises, however, whether a necessity that is caused by culpable conduct in combination with non-culpable conduct is “directly caused” by

²⁰⁸ Again, “not necessarily” because the actor might, but need not, have intended the necessitous condition.

²⁰⁹ See *supra* at notes __, and accompanying text [desert discussion].

²¹⁰ See Robinson, *supra* note __[CCOD], at 9, 18, for similar criticisms of the Code's approach.

²¹¹ Model Penal Code § 3.02, cmt. 2; Robinson, *supra* note __[CCOD], at 18.

the culpable conduct. In the Joe/Jane scenario, the necessity was caused (if one accepts Jane's account) by Joe purposely, knowingly, or recklessly stabbing Jane with a broken bottle, in combination with Joe's intoxication, the absence of a land-line telephone in Joe's trailer, his failure to find their cellular phones, and his neighbor's unresponsiveness to his cries for help. But there is little question that the stabbing directly caused the necessity. It is conduct that was the but-for cause of the allegedly justified act and that is not at all too remote or accidental to have a just bearing on the alleged justification. Indeed, the stabbing bears *crucially* on whether Joe's subsequent behavior deserves to be called justified.²¹² The fact that Joe was drunk might also be deemed a but-for cause of the necessity: but for the fact that Joe was drunk, no necessity would have arisen. But the act of becoming intoxicated is, in the first place, not culpable, and, in the second, it has a far more remote and accidental relationship than the stabbing to the judgment about whether Joe's conduct deserves to be called justified.²¹³ Without the stabbing, there would be no question that Joe's choice to drive Jane to the hospital while intoxicated would deserve to be called "justified conduct" in a way that it would not deserve if he had stabbed her. On the other hand, if one accepts Joe's account, the necessity was caused by his negligent bumping of Jane in combination with all of the same attendant factors. Under the imputed created culpability approach, Joe would not be barred from the necessity defense because (1) he performed no consciously chosen, culpable act that was the but-for cause of the necessity, and (2) his negligent bumping was too remote and accidental (it was, in fact, an accident) in its relationship to the allegedly justified act to have a just bearing on the question of whether the act deserves to be called justified.

²¹² There is an extensive literature on but-for causation in tort and criminal law. See, e.g., Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113 (2008); Moore, *supra* note __[C&E]; David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765 (1997); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Fleming James, Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761 (1951). For purposes of deciding whether culpable conduct directly causes a necessity, this Article advocates what Professor Johnson has called the "wrongful aspect" approach to but-for causation because of its inverse relationship with justification. That is, upon a challenge by the defendant on the question of direct causation, the government must prove beyond a reasonable doubt that the wrongful aspect of the defendant's conduct – the culpable conduct – was the but-for cause of the necessity. Johnson, *supra* note __, at 126.

²¹³ See Robinson, *supra* note __[CCOD], at 16.

None of this is to deny that complex questions of causation, as well as difficulties in ascertaining an actor's mental state at the time of the created conduct, will inevitably arise.²¹⁴ Yet establishing causation and mental states always present difficulties of proof,²¹⁵ and this Article's rebuttable presumption procedure, outlined in the following subsection, will make the government's evidentiary burden more feasible while avoiding potential constitutional pitfalls by allocating the burden of persuasion on the question of created culpability to the government.²¹⁶

Imputed created culpability also fares well when measured against Professor Robinson's other criticisms of the Code's approach. First, imputed created culpability dissolves Robinson's offense/element criticism of the Code's approach: that is, that the Code improperly assumes that there is a single culpable mental state for each offense that can be measured against the applicable type of created culpability.²¹⁷ Imputed created culpability is concerned only with culpability as to the conduct that directly causes the necessity, not with comparing that type of created culpability against the type of culpability for the underlying offense or that of any element of the underlying offense.

Second, Robinson's "third party" or "correspondence thesis"²¹⁸ objection – that it is "anomalous" to deny the defense to an actor who has culpably created a necessity but not to a third party engaging in the same conduct side-by-side the

²¹⁴ See generally Johnson, *supra* note __, at 124-32 for a review of a variety of problems in establishing but-for causation.

²¹⁵ Causal requirements for satisfying the necessity defense are in fact quite common. See, e.g., *State v. Drummy*, 18 Conn. App. 303, 309 (1989) (requiring that a "direct causal relationship may be reasonably anticipated to exist between defendant's action and the avoidance of the harm"); see Robinson, *supra* note __[CCOD], at 58 for problems of proof as to mental states.

²¹⁶ See *infra* at Part IV(D). On the unconstitutionality of shifting the burden of proof to the defendant, see *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977).

²¹⁷ See Model Penal Code § 3.02(2). The Code's presumption that every offense has a single culpability requirement "is most unusual coming as it does from draftsmen who were pioneers in providing the theoretical insight that offenses do not have one required level of culpability, but rather may have a different culpability requirement as to each objective element of the offense." Robinson, *supra* note __[CCOD], at 19.

²¹⁸ Heidi Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2205 (1990) ("The correspondence thesis . . . holds that the justifiability of an action determines the justifiability of permitting or preventing that action."). The correspondence thesis rests on the intuition that an action cannot be simultaneously right and wrong. *Id.*

actor²¹⁹ – loses its sting if one acknowledges that the circumstances of created culpability can and sometimes should make a difference in determining whether conduct is justified. Even where an actor and a third party share the same objective beliefs about a necessitous situation, it will not necessarily be the case that where the third party is justified in acting, the actor must as a matter of logical coherence be justified as well.²²⁰ Whether it is the case will depend at least in part on those salient circumstances that lead up to the necessity, including the question of created culpability. If, after Joe and his friend Fred return from an evening of heavy drinking with Jane, both of them chase Jane with knives and purposely, knowingly, or recklessly stab her, then their situations may be parallel with respect to the created culpability that may fairly be imputed to them.²²¹ But if an intoxicated Fred only appears after the stabbing, is faced with the same necessitous situation – i.e., Jane bleeding profusely from a head wound – and drives her drunk to the hospital, then Fred has a different, and more powerful, claim on the necessity defense than Joe.

Finally, a word on voluntary, or “self-induced”²²² intoxication and its relationship to imputed created culpability is necessary. Under the imputed created culpability analysis, voluntary intoxication that leads to the creation of a necessity only bars the defense if the actor became voluntarily intoxicated (1) for the purpose of engaging in culpable conduct

²¹⁹ Robinson, *supra* note __, at 28-29.

²²⁰ See Berman, *supra* note __, at 62-64 (arguing that there is no necessary logic of justifications that compels the conclusion that if a third party acts justifiably it must also be the case that the primary actor is justified, and that “we should be thinking in terms of reasons for treating the primary and third party differently, and not for conceptual truths”); see also Greenawalt, *supra* note __ [PBJE], at 1903 (“Although the conclusion that someone is justified often bears importantly on judgments about the permissible actions of others, those judgments are analytically separate from the initial conclusion.”).

²²¹ Whether they are parallel will depend on what can be imputed to Joe and Fred’s respective types of created culpability. It might be that Joe got drunk knowing that whenever he gets drunk it is virtually certain, or highly probable, that he chases Jane with a knife or beats her, and that conduct was the direct cause of the necessity. Joe would therefore have acted with knowing created culpability. On the other hand, Fred might merely be reckless about the chance that by becoming drunk he would chase Jane with a knife.

²²² Model Penal Code § 2.08(5)(b) (“[S]elf-induced intoxication’ means intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime[.]”).

that was the direct cause of the allegedly justified act; (2) aware that it was practically certain, or highly probable, that he would engage in the culpable conduct that was the direct cause of the allegedly justified act; or (3) in conscious disregard of a substantial and unjustifiable risk that he would engage in the culpable conduct that was the direct cause of the justified act. Imputed created culpability does not bar the defense where an actor should have been, but was not, aware that by becoming voluntarily intoxicated, there was a substantial and unjustifiable risk that he would engage in the conduct that was the direct cause of the allegedly justified act.²²³ Imputed created culpability thus follows the Code's provision that "[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."²²⁴ But imputed created culpability goes further, and appropriately so. Suppose that Joe goes to the bar intending (1) to get drunk, so that (2) he will beat Jane, and (3) that beating is the direct cause of the choice of evils and Joe's allegedly justified decision to drive Jane to the hospital while drunk. If the evidence suggests that at the time he beat Jane, Joe was unaware of his conduct and that conduct directly caused the necessity, under the Code's approach to self-induced intoxication, Joe would have acted only with reckless created culpability; under imputed created culpability, he would have acted with purpose.²²⁵ Likewise, if Joe knows that he always beats Jane after getting drunk, or that it is practically certain that he will do so, and that beating is the direct cause of the necessity, under the Code's approach to self-induced intoxication he would only be reckless as to creating the necessity, while under imputed created culpability he would be knowingly culpable. In either case, however, he would be barred from the defense. The rationale for the position taken by imputed created culpability is essentially retributive. A person who becomes intoxicated in order to, knowing that it is highly probable that, or consciously disregarding a substantial and unjustifiable risk that, he will engage in culpable conduct, is not justified by acting in the face of a necessity that was directly caused by his culpable conduct.

²²³ And of course it does not bar the defense when the actor was not culpable at all by becoming voluntarily intoxicated. *See, e.g.,* *People v. Kucavik*, 367 Ill. App. 3d 176, 179 (2006) (holding that a defendant charged with driving under the influence was entitled to a necessity defense instruction where she presented evidence that she not at fault for creating the situation in which she drove while intoxicated).

²²⁴ Model Penal Code § 2.08(2).

²²⁵ Compare the analysis of the same problem in *Robinson*, *supra* note ___[CCOD], at 35.

This Article has explained why the line between reckless and negligent culpably created conduct appropriately reflects the retributivist concerns that impact the evaluation of whether conduct is justified. But the critic who believes that the recklessly culpable actor who created the necessity should be afforded the defense need not reject the general approach to created culpability advocated in this Article. She might accept the retributivist analysis that animates this Article's discussion of created culpability, but nevertheless feel more comfortable drawing the line between knowing and reckless created culpability, or instead between purposeful and knowing created culpability. Such differences of opinion as to line-drawing do not undermine the premises of the overall framework within which created culpability should be evaluated.

D. Easing the Bar: The Rebuttable Presumption

While imputed created culpability offers a coherent approach to the problem of created culpability and adequately explains why certain kinds of created culpability should bar the necessity defense, it presents at least two major difficulties in addition to the problem of causation discussed earlier. First, and since questions of proof both as to causation and the actor's mental state at the time he created the necessity loom large, establishing a procedure for which party should bear the burdens of production and persuasion as to the causation and mental state components of created culpability will ease these evidentiary problems. Second, it is likely that in certain situations barring the defense in cases of consciously chosen created culpability strikes an inappropriate balance between the competing functions of the criminal law and is insufficiently sensitive to the social value of the necessitous act.

The evidentiary difficulties as to causation and culpability faced by the government might be resolved by the mechanism of a rebuttable presumption.²²⁶ If the government could meet a threshold showing on the question of culpability as to the underlying offense, a defendant who wished to assert the affirmative defense of justification would be presumed to have culpably created the necessity. The defendant could rebut

²²⁶ See Robinson, *supra* note __[CCOD], at 58-60 (listing a variety of rebuttable presumptions as possible solutions to the problems of proof suggested by Robinson's approach to created culpability).

the presumption by presenting some evidence (that is, meeting the minimal burden of production)²²⁷ that (1) he did not purposely, knowingly, or recklessly engage in conduct that directly caused the necessity, or (2) his purposeful, knowing, or reckless conduct did not directly cause the necessity. If the defendant met that burden of production, the presumption would be rebutted, and it would become the government's burden of persuasion to prove beyond a reasonable doubt that the defendant was not justified. This procedure appropriately allocates the burden of persuasion as to the existence of created culpability, and therefore the absence of justification, to the government. As Professor Huigens has explained:

[E]ven though we impose the burdens of pleading and production on the defense, the burden of persuasion on justification defenses rests with the prosecution . . . The prosecution bears the burden of proving that a crime has occurred, and a crime consists of a violation of the prohibitory norm. The absence of justification is part of the prohibitory norm, even though we enact it into law separately from the offense for the sake of clarity and convenience.²²⁸

The rebuttable presumption also has the salutary effect of narrowing the scope of the challenge to the direct causation and culpability components of created culpability. In response to the defendant's showing, the government's burden of proof becomes more feasible because it can focus specifically on those aspects of causation and culpability that the defendant disputes.²²⁹ Yet once the defendant meets the relatively minimal burden of production, the burden of persuasion always

²²⁷ By contrast, some jurisdictions require that the defendant produce "substantial evidence" of a necessity in order to meet the burden of production. *See, e.g.*, *State v. Williams*, 93 Wash. Ct. App. 340, 348 (1998).

²²⁸ Kyrion Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 425 (2002).

²²⁹ Massachusetts uses a similar procedure in requiring that a defendant who asserts the necessity defense must present "some evidence" as to each element of the defense which, in Massachusetts, include that the defendant have been faced with a clear and imminent danger and that there have been no legal alternative that would have been effective in abating the danger. *Commonwealth v. Pike*, 428 Mass. 393, 400 (1998).

remains on the government to prove the absence of justification, thus avoiding any constitutional challenges.²³⁰

The second difficulty is that the imputed created culpability framework does not account for the situation where the necessitous act is sufficiently socially valuable that it *should* be deemed justified even in the face of created culpability. It is worth emphasizing here that the aim of acknowledging created culpability is not to banish or “discard” all consequentialist concerns relevant to the assessment of justification and replace them with others.²³¹ It is merely to ensure that there is an appropriate place for integrating retributivist (and some deterrence-related) concerns into the evaluation of whether conduct is justified.²³² Even if one acknowledges that created culpability is relevant in that assessment, that need not mean that created culpability always ought to trump the social value of the justified act.

Returning once more to the Joe/Jane scenario, even if Joe culpably created the necessity giving rise to the DUI charge, in that he stabbed Jane (purposely, knowingly, or recklessly), Joe might assert that his decision to drive drunk to the hospital was sufficiently justified – socially valuable, warranted, desirable, and so on – to overcome the fact of his created culpability, because he saved Jane’s life by doing so. This claim would require the jury to weigh the choice of evils and determine whether the action that Joe took was sufficiently socially desirable to outweigh *both* the fact that Joe culpably created the necessity (if they believe Jane) and that he committed the underlying offense. While the jury regularly engages in this type of balancing in evaluating claims of justification,²³³ that balancing generally involves a simple comparison between the social desirability of the evil that was chosen and the evil that was avoided. But in the case of the defendant who culpably created the necessity, the jury must also account for the created culpability, which in the ordinary course would sometimes bar the defense altogether. It is therefore appropriate to impose a higher burden of production threshold for defendants who culpably create a necessity: that the evil that the defendant chose clearly and substantially

²³⁰ Compare the three rebuttable presumption approaches proposed by Professor Robinson in Robinson, *supra* note __[CCOD], at 58-60, each of which poses constitutional problems.

²³¹ *Cf.* Martin, *supra* note __, at 1555 n.26.

²³² Parry, *supra* note __, at 439.

²³³ Assuming, of course, that the other jurisdiction-specific elements of justification have been satisfied.

outweighed the evil that he avoided.²³⁴ Under this rule, it is possible that the jury would find that, under the circumstances, Joe's driving Jane to the hospital was justified because of her urgent need for medical attention, despite Joe's created culpability and the possibility that he might have injured others by driving while intoxicated. It is also possible that the jury would not find that Joe's conduct was justified. But in either case, the jury appropriately considers the question of created culpability in making its determination.

This element could be integrated into the rebuttable presumption procedure: upon a showing that the defendant was culpable as to the underlying offense, the defendant who culpably created a necessity (that is, the defendant who could not present "some evidence" that he did not purposely, knowingly, or recklessly create a necessity) but who wished to assert the necessity defense would present some evidence that his necessitous choice was justified because it clearly and substantially outweighed the evil that he avoided. That evidence would rebut the presumption and the government would then be required to prove beyond a reasonable doubt that the defendant was not justified – that is, that the defendant's choice of evils did not clearly and substantially outweigh the evil that he avoided.

In sum, the rebuttable presumption would require that the defendant who wished to assert a defense of necessity come forward with some evidence that: (1) he did not purposely, knowingly, or recklessly engage in conduct that directly caused the necessity, or (2) his purposeful, knowing, or reckless conduct did not directly cause the necessity, or (3) the evil that he avoided clearly and substantially outweighed the evil that he chose. The defendant's proffer on any of these three elements would create a jury question on the issue of justification, to be proven beyond a reasonable doubt by the government.

V. CREATED CULPABILITY AND DURESS

This section considers briefly how the approach to culpability in creating a choice of evils advocated in this Article

²³⁴ *Cf.* N.Y. Penal Law § 35.05(2) (requiring that the evil chosen "clearly outweigh" the evil avoided); Tenn. Code Ann. § 39-11-609 (same). I include both "clearly" and "substantially," rather than one or the other, to reinforce the idea that the evil action that is chosen must outweigh not only the competing evil but also the fact of the actor's created culpability.

might apply to the defense of duress. The comparison is useful because it points to a confusion in the common distinctions between justification and excuse that illuminates the need to account for created culpability in evaluating whether conduct deserves to be called either justified or excused.

Unlike the necessity defense, duress is traditionally regarded an excuse.²³⁵ It usually applies when an actor is coerced by threats to the point where a “person of reasonable firmness in his situation would have been unable to resist.”²³⁶ The retributivist concerns about whether conduct should be deemed justified appear somewhat less powerful in the context of duress because excused conduct bears no imprimatur of social desirability, warrantedness, or praiseworthiness. Nevertheless, the important point of contact between the two defenses is that both require an assessment of the circumstances that attend the act in question in order to evaluate whether they ought to apply. Excused conduct is in the ordinary course wrongful and blameworthy, but blame is in the specific circumstances deemed inappropriate. Justified conduct is neither wrongful nor blameworthy, and the only way to evaluate whether the conduct does not meet those two criteria is to examine the specific attendant circumstances.

All jurisdictions that bar the necessity defense where an actor culpably created its conditions also do so for duress.²³⁷ In marked contrast with the necessity defense context, however, some criminal law scholars agree that culpably created conduct should almost always bar the defense of duress.²³⁸ The Model

²³⁵ *E.g.*, Dressler, *supra* note __[ELD], at 1349-67.

²³⁶ Model Penal Code § 2.09; FLETCHER, *supra* note __[RCL], at 831; *United States v. Bailey*, 444 U.S. 394, 409 (1980) (duress excuses criminal conduct where “the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law”); JOEL FEINBERG, HARM TO OTHERS 108 (1984) (“[T]o plead excuse is in effect to admit that one’s action ‘wasn’t a good thing to have done, but to argue that it is not quite fair to say baldly,’ or without qualification, that one did the thing at all, that it was one’s action.”).

²³⁷ See *supra* notes __, and accompanying text [jurisdictions that follow the N.Y. approach]. In part this is because many jurisdictions treat any distinction between duress and necessity as practically unimportant. Dressler, *supra* note __, at 1348.

²³⁸ *Id.* at 1341-42 (footnotes omitted); *cf.* FLETCHER, *supra* note __[RCL], at 798 (“So far as justification of lesser evils is considered an excuse, then it makes sense to require that the actor be free from blame in the entire transaction.”); *but see* Robinson, *supra* note __[CCOD], at 29 (“As with justifications, there is a fundamental flaw in an approach that denies an excuse because the actor culpably causes the conditions of his own

Penal Code likewise takes the view that an actor who purposely, knowingly, or recklessly creates the circumstances leading to his claim of duress is denied the defense, while the similarly culpable negligent actor is only denied the defense when negligence suffices for the underlying offense.²³⁹ Professor Dressler explains:

[D]uress probably may not be pleaded by one who is at fault for placing himself in the coercive situation. For example, a person who joins a terrorist organization and later is coerced to commit a crime is denied the defense. Like the usually implicit rule that a crime be unlawful, the requirement that the coerced actor come to the situation free from fault is consistent with the nature of the defense as an excuse. A person should not be permitted to plead blamelessness, as an excuse implies, if he was culpably responsible for the predicament in which he found himself.²⁴⁰

But this reasoning, while persuasive, does not identify anything distinctive about duress as compared with justification. There is nothing illogical in supposing that an actor who voluntarily joins a terrorist organization can later be coerced to commit a terrorist act. Perhaps the actor changed his mind, or perhaps he was never prepared, even when he joined the organization, to commit the terrorist act. He might still be threatened with death should he refuse to blow up a building. Likewise, Joe's decision to drive Jane to the hospital might have been the result of a genuine change of heart or sense of remorse after he intentionally stabbed her.

The created culpability bar in cases of duress has a different explanation – one that mirrors the reasons for its exclusion in cases of justification. The actor who joins a terrorist organization is unexcused for a coerced criminal act *not* because there is nothing unique or particular about his personal circumstances that left him vulnerable to being coerced in such a way that a person of reasonable firmness could not have resisted (he was threatened with torture, his

excuse. Just as causing one's defense does not alter the justified nature of otherwise justified conduct, it does not erase the excusing conditions that exculpates (sic) the actor from the offense conduct.”).

²³⁹ Model Penal Code § 2.09(2); *see also* State v. B.H., 870 A.2d 273, 287 (N.J. 2005) (“[T]he [duress] defense will fail if the defendant acted recklessly.”).

²⁴⁰ Dressler, *supra* note __, at 1341-42 (footnotes omitted).

family was threatened, he is especially fragile, etc.).²⁴¹ The reluctant terrorist's will may well have been overpowered in precisely the same fashion as if he had never joined the terrorist organization.²⁴² Rather, he is unexcused because he does not *deserve* to be excused given his created culpability. Whether an otherwise wrongful act is excused depends in part upon those salient circumstances – circumstances that are relevant universally, and irrespective of the special qualities of an individual actor – that attend the act. Likewise, whether an otherwise wrongful act is justified also depends upon an evaluation of the pertinent circumstances.

Deciding whether and which specific circumstances are relevant, and whether they are sufficiently material to affect the availability of one or another defense, is not a question of identifying anything inherently or logically necessary in the concepts of excuse or justification. Rather, for both duress and necessity, it is a matter of determining whether a particular circumstance bears on the issue of justification or excuse sufficiently powerfully, given the aims of the criminal law, that it should not be ignored.²⁴³ Retributivist concerns are relevant in evaluating whether a claim of duress should in fact be excusable, or whether instead we have a “moral right”²⁴⁴ to punish an actor in a situation that might, had the actor been blameless for its creation, have constituted duress. The importance of created culpability transcends the distinctions between justification and excuse and partially destabilizes the usual, neat conceptual divisions between these defenses.

VI. CONCLUSION

²⁴¹ See Stephen J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 167 (2006) (“If a defendant establishes an excuse, society still condemns the act, but finds a reason why that particular defendant need not be punished – the defendant’s insanity, for example.”).

²⁴² See FLETCHER, *supra* note __[RCL], at 831. Professor Huigens has suggested that a paradigm case of duress exists where a father is compelled to shoot five children by a man who is aiming a gun at the father’s daughter and threatens to shoot her if the father refuses. Kyron Huigens, *Duress is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303, 312-13 (2004). “The only conceivable ground on which Dad could be acquitted is an excuse premised on the notion that no one who would presume to punish Dad would have the fortitude to watch his own child die were he in a position to prevent it, and that therefore no one who would presume to punish Dad has a moral right to do so.” *Id.*

²⁴³ See *supra* notes __, and accompanying text [desert discussion].

²⁴⁴ *Id.*

The intuition that culpable creation of a necessity bears importantly on the question of justification is so powerful that it is reflected in the law of virtually every jurisdiction that has addressed it. While the created culpability bar can be in small measure explained by its potential to deter socially undesirable conduct, the most convincing rationale for it is essentially retributivist: justified conduct – that is conduct that is warranted, socially desirable, praiseworthy, and so on – should not derive from and be closely connected to wrongful, and therefore blameworthy, conduct. A person who acts wrongfully does not become a different person when she then acts in response to a choice of evils of her own wrongful making. An allegedly justified act in response to the actor's culpable conduct in creating it is qualitatively different from, and substantially less meritorious than, the same act performed by a blameless actor.

This Article has defended the bar on the necessity defense for purposeful, knowing, and reckless conduct that is criminal and that directly causes the allegedly justified act. It has explained the reasons for retaining the defense for negligent conduct that creates a necessity. And it has offered both a theory of the type of criminally culpable conduct that exhibits a sufficient causative nexus between the culpably created act and the allegedly justified act, and a rebuttable presumption procedure for ensuring that created culpability can be weighed appropriately, alongside more straightforwardly consequentialist factors, in evaluating whether conduct is justified.

Yet even if reasonable minds may differ about this Article's specific recommendations with respect to line drawing or the particular procedural techniques for managing questions of proof that it suggests, any adequate theory of justification must account for the core problem of criminal created culpability in a manner that addresses the powerful retributivist concerns animating it. To ignore that problem is to render the concept of justification itself defective and undeserving the name.