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Excusing Crime

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In both criminal law and everyday moral judgments the concept of excuse plays a crucial role. This is because the practice of blaming is intrinsically selective. It cannot survive if all harm-doers are to be blamed, any more than it can if none are. Excuse is one of those central concepts that serve to draw the line between the blameworthy and the blameless and so make a blaming system possible.

In this Essay I propose to examine the rationale and functioning of excuses in the legal system and to consider how far the law does and should follow ordinary moral conceptions in its definition of excusing conditions. Part I attempts to locate excuses in the network of rules and principles governing criminal liability, distinguishing them from other grounds of exculpation, such as justification, by their grounding in some disability of the defendant. Part II surveys the excuses allowed by the criminal law, grouping them into three categories of personal disability: involuntariness, reasonable deficiency, and nonresponsibility. Part III attempts to identify the principles that underlie the law's pattern of excuses, finding them in notions of voluntarism, both literal and metaphoric, that determine when blame is justified in ordinary moral discourse. Part IV then attempts a critical assessment of the legal excuses in each category, in an effort to determine how fully legal excuses conform to the requirements of just blaming, arguing, however, that not all departures from just blaming are necessarily unjustified.

I
Excuses and Other Defenses

My first task is to locate excuses among the possible grounds of exculpation. This requires that I sketch a kind of map of the terrain of legal defenses, a common move among criminal law theorists looking for the unities in their subject.[1] There are many equally defensible

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1. *See, e.g.*, Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091 (1985).

approaches to this task; I offer mine only for its convenience in making the points I want to make.

We must start with the criminal prohibition itself. Roughly speaking, a crime is a description of certain actions in certain circumstances (the actus reus), the doing of which with designated mental states (the mens rea) is punishable. So, for example, assault is the use of force against a person with the intention to injure him; burglary is breaking and entering a structure with intent to commit a felony therein; and so on. Sometimes no mens rea is required—the action or result is enough. These are instances of strict liability. I will say more about them later.

Then there are the various grounds of exculpation. One ground is simply that the person did not do the acts constituting the crime, or did not act with the required mens rea—for example, "I didn't point the gun"; or "I did, but I had no intention of shooting it." We may speak of this ground of exculpation as failure of the prima facie case. Another category of exculpation is different. Here, although I do not deny doing the action prohibited, I claim I may not be punished even so because I have grounds for exculpation. These grounds of exculpation I will refer to as defenses.

There are two kinds of defenses of this character. The first kind is not grounded on notions of moral guilt or innocence, but rather on policies of law enforcement—that the statute of limitations has run, for example, or that the police obtained the evidence to be used against me by unlawful methods. We may put this kind of defense aside. The other kind of defense constitutes a claim of personal innocence, which I may assert on one of two possible grounds.

One ground is justification. My claim here is that I did nothing wrong even though I violated the prohibition. This is so, I argue, because the crime's definition of the forbidden conduct is incomplete. The law allows what the crime as defined prohibits where circumstances, specified elsewhere in the law, make my action the right thing to do: I killed, but only to keep an assailant from killing me or another; I entered another's cabin in the wilderness, but only to obtain food and water to keep myself alive.

The other ground for asserting my innocence is excuse. Here again, I deny my culpability even while admitting the criminal harm, but not, as before, because I did the right thing after all. Rather, I argue, some disability in my freedom to choose the right makes it inappropriate to punish me.

II
LEGAL EXCUSES DESCRIBED

The disabilities of choice that ground excuse in our law seem to fall

into one of three groups, depending on the particular disability of which they take account.

A. *Involuntary Actions*

The first group of excuses includes situations in which in the most literal sense the person had no control over his bodily movements. Cases of physical compulsion are obvious examples; others are tumbling downstairs or being pushed. These are easy to deal with because we can see the external force being applied. But the law recognizes some excuses as belonging to this category even when the source of the lack of control is internal, as in the case of reflex movements or epileptic seizures.

If involuntariness is the touchstone of excuse, then literal involuntariness, of course, represents the paradigm case. But such extreme instances of involuntariness may also be viewed as raising a bar to liability more fundamental even than excuse—namely, that there is no *action* at all, only bodily movement, so that there is nothing to excuse. Under this view, which represents the conventional characterization of the involuntary act defense, the defense comes to an "I-didn't-do-it" defense, a failure of the prima facie case.

Thus, there are two ways to classify cases of physical compulsion or involuntariness. On the one hand, these cases can be interpreted as exculpatory because there was no actus reus, and hence no crime to excuse. This interpretation rests on the distinction between genuine human actions, which are susceptible of praise and blame, and mere events brought about by physical causes which happen to involve a human body. Such events can be harmful or harmless, but they are not human actions and therefore are not subject to moral judgment. On the other hand, there is bodily movement in these cases, and it may have done harm. To that extent the involuntary-act exculpation is not identical with the failure of the prima facie case. When a person denies doing the act the usual expectation is that if he didn't do it, someone else must have. When a person claims the involuntary-act defense he is conceding that his own body made the motion but denies responsibility for it. Therefore, however we characterize the involuntary-act exculpation, whether as a failure of the prima facie case or as a defeuse, the reason it exculpates belongs to the rationale of excuse: the defendant had no choice in the matter.

B. *Deficient but Reasonable Actions*

In the second group of excusing conditions there is power to choose in a literal sense—nothing prevents the person from making a choice—but the choice is so constrained by circumstances that ordinary law-abiding persons would not have chosen otherwise. The constraining circum-

stances are of two kinds. In the first, the constraint arises from defect of knowledge; in the second, from defect of will.

1. Cognitive Deficiency

The law's excuses based on reasonable lack of knowledge are commonly spoken of as cases of mistake or accident, the same terms used in blaming discourse outside the law. But to constitute an excuse it is not enough that the person lacked knowledge of some relevant feature of his action. His lack of knowledge must itself be excusable, in the sense that it would be reasonable for any person in his situation not to have known.

For example, if I shoot at a firing range target and kill a person sitting behind it, who I had no reason to think was there, I have killed by accident. If I shoot at an object in the forest reasonably thinking it is a game animal, when in fact it is a person dressed in animal costume, I have killed by mistake. In both cases, I had the choice not to shoot at all. But once it is accepted that shooting in the circumstances, as I reasonably took them to be, was a proper action, the accidental or mistaken killing was effectively beyond my control. Indeed, for this reason, Aristotle regarded an action taken under mistake as involuntary in the same sense that a compelled action is involuntary.[2]

Explaining accident and mistake as excuses is today somewhat unconventional. Like the involuntary-act defense, accident and mistake are more likely to be viewed as precluding liability not because of excuse, but because the elements of the crime have not been proven, resulting in a failure of the prima facie case. After all, homicidal crimes are defined to require a mens rea of at least culpable negligence. Under this view reasonable mistake and accident should be defenses, not because they excuse what otherwise would be a crime, but simply because they negate the required culpable mens rea, without which there is no crime to excuse. But such a view fails to distinguish different functions of a mens rea requirement in definitions of crimes.

Some mens rea requirements are essential elements in the definition of the wrong made criminal. Take loitering with criminal intent, or reckless driving: without the intent in the first case or recklessness in the second, there is only standing around or driving a car. Hence there is nothing to excuse, since we would not want the person to have acted otherwise. This is the case with all crimes, like loitering with intent and reckless driving, whose definition does not require occurrence of the ultimate harm the crime seeks to prevent. The concern of such crimes is the danger of further action or events that will produce the ultimate harm.

2. ARISTOTLE, NICHOMACHEAN ETHICS 1110a-1111b (W.D. Ross trans. 1915); Irwin, *Reason and Responsibility in Aristotle*, in ESSAYS ON ARISTOTLE'S ETHICS 133 (A. Rorty ed. 1980).

The mens rea serves to identify that danger. This is characteristically true of all inchoate crimes, both those explicitly inchoate, like attempt and conspiracy, and those implicitly so, like burglary and larceny.

Other mens rea requirements, on the other hand, are excuses in mens rea clothing. They are excusing conditions because they serve to deny blame for a harm done. That they are cast in the form of mens rea requirements does not change their character. Thus, in my shooting examples, my defense would not be put in terms of a formal excuse. It would be that I have not committed culpable homicide because that crime is defined to require that I intentionally or negligently kill, and I have not. Nonetheless, the reasons these particular mentes reae are required are the very reasons for excusing conditions: we could not expect a person to have chosen otherwise, even though we might wish he had done otherwise. This is why accident and mistake are excuses, despite their formal character as definitional mens rea requirements. Indeed, before the clarifying analysis of mens rea by the Model Penal Code, this was how accident and mistake were traditionally thought of.[3]

2. *Volitional Deficiency*

The law's excuses based on defect of will are not as well developed as those based on defect of knowledge. Duress is the best established defense of this kind, and even its status is not free of doubt. Duress is generally established when a person commits a crime under the command of another backed by such threats of physical injury that even a person of reasonable fortitude would have done the same. It is often subject to restrictions; for example, in some jurisdictions it is not available as a defense to major crime, and in some there must be a threat of immediate and serious bodily injury.[4] There is also authority for the view that duress is not available as an excuse at all, but only where the choice to commit the crime is justified as the choice of the lesser evil.[5] Nevertheless, partly due to the influence of the Model Penal Code, duress

3. The dual character of accident and mistake defenses may be seen in CAL. PENAL CODE § 26 (West 1987), enacted in 1872:

> All persons are capable of committing crimes except those belonging to the following classes: . . .
>
> *Three*—Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent. . . .
>
> *Five*—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or negligence.

This formulation follows Blackstone in including accident and mistake (along with duress, infancy, and insanity) as instances of excuse based on defect of will. 4 W. BLACKSTONE, COMMENTARIES *20-*32.

4. The various approaches to duress are reviewed in MODEL PENAL CODE AND COMMENTARIES § 2.09 commentary at 368-71 (1985).

5. W. LAFAVE & A. SCOTT, CRIMINAL LAW 432-33 (2d. ed. 1986).

in some circumstances is generally available as a defense, even when not justified by the lesser-evil principle.

C. *Nonresponsibility*

The excuses in my third category, unlike those in the first, do not involve involuntary actions. And unlike those in the second, they do not rest on circumstances that would lead a person of normal capacities to make the choice the defendant made. The grounds for excuse are simply that this particular person could not have been expected to act otherwise than as he did, given his own inadequate capacities for making judgments and exercising choice.

Our law is niggardly with excuses of this kind. The individual's difficulty in complying with the law is a common ground for mitigation, but it is rarely a ground for a total excuse. Infancy and legal insanity are the only two excuses of this kind the law allows, and since the juvenile court laws have made the defense of infancy in practice redundant, legal insanity is the only significant defense remaining in this category.[6]

While the basis for excuses in the second category is that the actor has shown himself no different from the rest of us, the basis of the insanity excuse is that he has shown himself *very* different from the rest of us. But how different, and in what respects? After all, those who commit atrocious crimes are certainly very different from the rest of us. That fact alone scarcely excuses them.

The various competing formulations of legal insanity seek to answer this question. The *M'Naghten* and Model Penal Code rules are the most common today. Both rely on the concept of mental disease to distinguish the legally nonresponsible person from the rest of us. *M'Naghten* asks whether as a result of mental disease the defendant was unable to know the nature of his act, or that the act was wrong.[7] The Model Penal Code expands *M'Naghten* to ask as well whether a mental disease prevented the defendant from conforming his conduct to the requirements of the law.[8] However formulated, the defense seeks to identify those who may not be regarded as moral agents, that is, persons who are not necessarily

6. A word needs to be said about intoxication. It is not an independent excuse: it is irrelevant that what the defendant did drunk he would not have done sober. It may provide the evidentiary basis for a mens rea or legal insanity defense, but it is the absence of mens rea or the condition of insanity that are defenses, not simply that the defendant is intoxicated. There is some authority for recognizing intoxication itself as an independent excuse if it is involuntary, but the Model Penal Code and most states allow the defense only if the incapacitation is of the kind and degree that would constitute a defense of legal insanity had it been caused by a mental disease. "The actor whose personality is altered by intoxication to a lesser degree is treated like others who may have difficulty in conforming to the law and yet are held responsible for violation." MODEL PENAL CODE AND COMMENTARIES § 2.08 commentary at 363 (1985).

7. M'Naghten's Case, 8 Eng. Rep. 718 (1843).

8. MODEL PENAL CODE § 4.01 (1985)

incapable of choice, but who are incapable of making choices that count as such because of impaired reasoning and judgment. I will say more about the theory of legal insanity later when I attempt to assess the adequacy of the law's excuses.[9]

III
WHY EXCUSES?

Why we have excuses is less obvious than why we have other defenses. Let us start with Jeremy Bentham's explanation. He saw the point of excuses to be that they identified situations in which conduct is nondeterrable, so that punishment would be so much unnecessary evil. For since only the nondeterrable are excused, withholding punishment offers no comfort to those who are deterrable.[10] The trouble is, as is now widely appreciated, that this does not follow, for punishing all, whether or not they happen to be deterrable, closes off any hope a deterrable offender might otherwise harbor that he could convince a jury that he was among the nondeterrable.[11] Moreover, without excuses, prosecutions would be faster and cheaper, convictions more reliable, and the deterrent threat more credible. Indeed, we have in our law a class of offenses, strict liability offenses, that dispenses with mens rea requirements on just these grounds. Have we not given up something of value for the increased effectiveness that strict liability arguably provides, something that is not captured in Bentham's rationale?[12]

Professor Hart, in one of his early essays, offered a different account of excuses. He argued that by confining liability to cases in which persons have freely chosen, excuses serve to maximize the effect of a person's choices within the framework of coercive law, thereby furthering the satisfaction people derive in knowing that they can avoid the sanction of the law if they choose.[13]

This rationale is an improvement over Bentham, inasmuch as Hart gives us a reason why we might want to put up with the loss of deterrence caused by excuses. But does this account capture the full force of a system of excuses? Suppose we preferred the risk of accidentally being victims of law enforcement to the increased risk of being victims of

9. *See infra* text accompanying notes 61-78.

10. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 160-62 (J. Burns & H.L.A. Hart ed. 1970); see discussion in H.L.A. HART, *Legal Responsibility and Excuses,* in PUNISHMENT AND RESPONSIBILITY 41-43 (1968). For a modern version of the utilitarian argument, see Spriggs, *A Utilitarian Reply to McCloskey,* in CONTEMPORARY UTILITARIANISM 261, 291-92 (M. Bayles ed. 1968).

11. *See Legal Responsibility and Excuses,* in H.L.A. HART, *supra* note 10, at 43; G. FLETCHER, RETHINKING CRIMINAL LAWS 813-17 (1978).

12. *Legal Responsibility and Excuses,* in H.L.A. Hart, *supra* note 10, at 40-44.

13. *Id.*, at 28-53.

crime. That would be a plausible choice, particularly for a public obsessed with rising crime rates. Would we then feel there was nothing more problematic in giving up excuses than that we would be trading one kind of satisfaction for another? I think not. Something is missing in this account.

Hart's account focuses on the interests and satisfactions of the great majority of us who never become targets of law enforcement—our security in knowing we will not be punished if we do not choose to break the law. What is missing is an account of the concern for the innocent person who is the object of a criminal prosecution. Hart's essay does refer to the satisfaction of the lawbreaker in knowing the price he must pay to get what he wants by breaking the law.[14] But it is doubtful that this is a satisfaction the law has any interest in furthering, for the point of the criminal law is surely to keep people from engaging in prohibited conduct, not to give them a choice between complying with the law or suffering punishment.[15] The law's concern is for the person accused who has not made a culpable choice to break the law, not with furthering the interests of persons who would like to.

To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent the person is injured by being blamed, unjust to him. It is this feature of our everyday moral practices that lies behind the law's excuses. Excuses, then, as Hart himself recognized in a later essay,[16] represent no sentimental compromise with the demands of a moral code; they are, on the contrary, of the essence of a moral code.

It may be argued that though this may be true of excuses in everyday moral judgment, it is not true of the criminal law, because it is not intrinsic to judgments of criminality in our society that they express a moral fault. But this view is surely mistaken. Certainly not all criminal conduct is independently immoral. In some cases the law attaches criminal penalties as well to conduct that, apart from its being prohibited, is not immoral.[17] But in either case criminal conviction charges a moral fault—if not the violation of a moral standard embodied in the criminal

14. *Id.* at 46-48.

15. *But see* G. NEWMAN, JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS 141-42 (1983):

> [T]he greatest consequence of this de-emphasis in prisons is that fewer persons will come under the direct control of the State (which is what we mean by prisons), and that the major portion of criminal punishment (that is, corporal punishment) will be conducted with the view that it is not criminals *per se* who are being punished at all, but free citizens who have exercised their right to break the law.
>
> In this way the most basic of all freedoms in a society is preserved: the freedom to break the law.

16. *Punishment and the Elimination of Responsibility,* in H.L.A. HART, *supra* note 10, at 174-77.

17. *See Legal Responsibility and Excuses,* in H.L.A. HART, *supra* note 10, at 37.

prohibition, then the fault of doing what the law has forbidden. The same principle that compels excuses in moral criticism also compels them in the criminal law.

Of course, one might escape excuses altogether by withdrawing the element of blame from a finding of criminality. Indeed, there are some—though not so many as there were a generation ago—who would prefer that the criminal law reject all backward-looking judgments of punishment, blame, and responsibility, and concern itself exclusively with identifying and treating those who constitute a social danger.[18] Whether it would be desirable to loosen punishment from its mooring in blame is a large and much discussed question.[19] I will confine myself here to two observations. First, such a dissociation would not likely succeed. People would continue to see state coercion as punishment, notwithstanding official declarations that the state's only interest is the individual's welfare and social protection. Second, it is very doubtful that we should want it to succeed, since blame and punishment give expression to the concept of personal responsibility which is a central feature of our moral culture.[20]

The three categories of legal excuses that I described in the previous Part suggest the common rationale behind excuses in both law and everyday moral judgments—namely, that justice requires the preclusion of blame where none is deserved. In the first category, the person is not to blame because he has no control over his movements; in the second, because though he breached a legal norm, he acted in circumstances so constraining that most people would have done the same; and in the third, because though there is action in breach of a norm in circumstances in which most people would *not* have done the same, the person, because of a fundamental deficiency of mind, is not a responsible moral agent.

What principle lies behind these categories of excuse? I find it convenient to develop an answer to this question in the next Part in the context of an assessment of legal excuses, but it may be helpful to state it briefly here. I suggest that the underlying principle is that of voluntarism, in two senses, literal and metaphorical.

By literal voluntarism I mean the principle that requires choice as a

18. *See* B. WOOTTON, CRIME AND THE CRIMINAL LAW 51 (1963); B. WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY ch. 8 (1959).

19. *See Punishment and the Elimination of Responsibility,* in H.L.A. HART, *supra* note 10, at 177-85; H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 27 (1968); Hart, Book Review, 74 YALE L.J. 1325 (1965) (reviewing B. WOOTTEN, CRIME AND THE CRIMINAL LAW (1963)).

20. *See* Kadish, *The Decline of Innocence,* 26 CAMBRIDGE L.J. 273 (1968). This, of course, is not to embrace the retributive view that responsibility for law violation itself requires punishment, only that responsibility is necessary, but not sufficient, for punishment. *See* W.D. ROSS, THE RIGHT AND THE GOOD 60-61 (1930); *Prolegomenon to the Principles of Punishment,* in H.L.A. HART, *supra* note 10, at 9-10.

condition of blame: the person must have chosen to do the action and have had the capacity to choose otherwise. When this is not so there is no basis for attributing fault to the person, who is no less a victim of the event than those who have been injured by it.

This principle expresses the rationale of legal excuses of the first and third categories. This is most obvious in the first, because the very feature that marks these excuses is the absence of choice. But it is also true of the third, because there is here only the outward show of choice; the person's fundamental deficiency of mind makes it inappropriate to count his seeming choices as true choices.

Voluntarism in a metaphorical sense lies behind excuses of the second category. It is "metaphorical" because literally, the actor has made a choice to do an act that is criminal. But the choice is nonetheless not blameable because of two considerations: First, he has acted either under ignorance of significant features of the situation or under constraining pressures on his will; and second, those circumstances would have led even a reasonable, normally law-abiding person to act in the same way. This being so, his action does not merit blame because it fails to distinguish him from the common run of humankind. It may be said in these cases that the person had no *effective* choice or that no reasonable and upright person *could* have done otherwise.[21] But as I said, these usages are only metaphorically, not literally, accurate.

IV
LEGAL EXCUSES ASSESSED

So much for the sketch of the excusing conditions in our law and what seems to lie behind them. But what shall we say of the excuses the law does not allow? Is our legal system too ungenerous with excuses? Are there excuses good in morals that should be, but are not, good in law? Is the law always at fault in imposing blame where it is unjust to do so? These questions are the agenda for the remainder of my discussion of excuses. I will deal with the three categories of legal excuses in turn.

A. Involuntary Actions

Legal excuses of the first kind, involuntary actions, generally parallel moral excuses. A problem arises only when one asks whether this category can fairly be limited to movements produced by external physi-

21. Compare MODEL PENAL CODE § 2.09(1) (1985), where duress is defined as follows:

> It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation *would have been unable to resist.*

(emphasis added).

cal force and internal physiological reactions, or whether it should be extended to include conduct produced by psychological forces, like addiction, that seem to make resistance hopeless or very difficult. I will return to this issue when I reach the subject of addiction in my last category.

B. Deficient but Reasonable Actions

In the second class of excuses—those based on some deficiency of cognition or volition that is the common lot of humankind—we find significant gaps between what is legally and morally excusable. I will deal first with excuses based on lack of knowledge.

1. Cognitive Deficiency—Strict Liability

Strict liability imposes guilt without regard to whether the defendant knew or could reasonably have known some relevant feature of the situation. The defendant did an act that, judged from his or her perspective, is blameless: she drove a car; she rented her home in another city;[22] he presided over a pharmaceutical company that bought packaged drugs and cosmetics and reshipped them under its own label.[23] But the facts were not as they thought. The driver could not see a stop sign at the intersection, because it was obscured by a bush. The homeowner's otherwise respectable tenants decided to throw a marijuana party. The drugs and cosmetics the pharmaceutical company reshipped were mislabeled by the manufacturer and there was nothing the defendant officer could practically have done about it. These circumstances would surely be a defense to a charge of moral fault and usually, under the requirement of mens rea or the doctrine of reasonable mistake, they would be a legal defense as well. But in the three cases I described many jurisdictions would disallow the excuse of reasonable mistake because, it would be explained, these are instances of strict liability. If a principle is at work here, it is the principle of "tough luck."

Another gap is created by the rule that ignorance of the law is no excuse. This rule presents no problem where the law embodies a moral wrong. There is usually little injustice when the law turns a deaf ear to a defendant who claims that he did not know it was against the law to mug a stranger or steal from his employer's till.[24] It is another matter to deny a defense to a defendant, engaged in an otherwise lawful activity, who claims he was unaware of one of the numerous regulations governing the

22. Sweet v. Parsley, 1970 App. Cas. 132 (H.L. 1968).

23. United States v. Dotterweich, 320 U.S. 277 (1943).

24. There may be injustice, however, in rare cases of foreign defendants reared in an ethically alien culture. *See* Note, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986).

conduct of his business. If no reasonable person in the defendant's situation could be expected to know of the existence of the regulation (not likely, but still possible), he could not be morally faulted and neither, it would seem, should he be legally blamed. Yet, with few exceptions, the law gives the same answer: in the Latin the law often uses for lofty sentiments, *ignorantia legis neminem excusat.* Or, in not very lofty English, "tough luck" again.

The injustice of blaming a person despite reasonable mistake or reasonable ignorance of the law does not derive from the principle of voluntariness in its literal sense. In these cases, unlike the cases of involuntary actions, people's capacity to exercise choice is intact—literally they do choose to do what they do. And the fact that reasonable persons in their situation would have been as ignorant of the relevant facts or law as they were does not itself necessarily demonstrate a lack of opportunity to choose, rendering their acts involuntary in the Aristotelian sense. This is because it is always (or, at least, usually) theoretically possible for them to have found out. This is the point sometimes made in defense of strict liability. So it has been argned, for example, that though a person may have acted in altogether reasonable ignorance of the factual circumstances or law that made her action criminal, nothing compelled her in the first place to engage in the activity during which she faultlessly committed the harmful action. She could have chosen another line of activity, and might well have if, as is often the case, she was aware that the general line of activity, like the food and drug industry, for example, was subject to a myriad of strict liability regulations.[25]

The reason this argument is inadequate is that the source of the injustice is not the violation of the voluntarism principle in its literal sense, but that the person did nothing meriting blame in originally venturing into the general line of activity.[26] Driving a car, letting a premises, and running a drug packaging business are lawful and socially useful activities; they are unlike leagning oneself with a criminal group, for example. Engaging in these activities, therefore, cannot justly serve as a basis for blame. The defendant did only what it was reasonable to do. Later she did something harmful, but only in virtue of circumstances of which even a thoroughly reasonable person would have been ignorant. We may say that holding her liable in these circumstances would violate the voluntarism principle, but only in the sense that the opportunity to know, which otherwise would make her choice voluntary, is not one we

25. *See, e.g.*, Kelman, *Strict Liability: An Unorthodox View*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512 (S.H. Kadish ed. 1983); Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 735-39 (1960); Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1543-46 (1975).

26. *See* Johnson, *Strict Liability: The Prevalent View*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 25, at 1518.

regard as genuinely open, because it is right and reasonable for her not to act on it.

In strict liability and conventional ignorance-of-law doctrine, therefore, there is a gap between legal and moral blaming. Can it be justified? The usual attempt to do so rests on the need to protect the public interest, which would be imperiled by allowing the normal excuse. In defense of the doctrine that ignorance of law is no excuse, Holmes wrote:

> It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scale.[27]

The defense of strict liability runs along similar lines. So Justice Frankfurter, upholding the conviction of the pharmaceutical company president in the drug mislabelling case I referred to earlier, echoed the views of Holmes:

> [Strict liability] legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.[28]

I don't believe these responses are sufficient, even on their own terms. It is not at all obvious that eliminating the defenses of nonculpable mistake is necessary for social protection. Other legal systems allow the defenses and seem to get along well enough.[29] Moreover, there are other ways to improve enforcement. One is to shift the burden of proving reasonable mistake to the defendant.[30] Another is to impose criminal liability for negligence in failing to be aware of the law or the danger.[31] A third is to permit only civil sanctions.[32] These arguments are well known and well taken.

2. *Justifying Departures from the Blame Principle*

But this is a natural place to raise a question that has more theoreti-

27. O.W. HOLMES, THE COMMON LAW 48 (1881); *see also* J. SELDEN, TABLE TALK OF JOHN SELDEN 68 (1927) ("Ignorance of the Law excuses no man, not that all Men knowe the Law, but 'tis an excuse every man will plead & no man can tell how to confute him.").

28. United States v. Dotterweich, 320 U.S. 277, 281 (1943).

29. Germany does not employ strict liability. *See* H.-H. JESCHECK, STRAFRECHT IM DIENSTE DER GEMEINSCHAFT 320-22 (1980). It does allow the defense of reasonable mistake of law. *See* S.H. KADISH, S.J. SCHULHOFER & M.G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 314 (4th ed. 1983).

30. Regina v. City of Sault Ste. Marie, 85 D.L.R.3d 161 (Can. 1978); Proudman v. Dayman, 67 C.L.R. 536 (Austl. 1941); *see also* Kadish, Book Review, 78 HARV. L. REV. 907, 910-13 (1965).

31. C. HOWARD, STRICT RESPONSIBILITY 36, 79 (1963).

32. MODEL PENAL CODE § 2.02(1) (1985). *Cf.* H.-H. JESCHECK, *supra* note 29.

cal interest and that has to be addressed in an enterprise like this which attempts to assess legal blaming by the measure of moral blaming. Suppose these arguments were not right—that compromising the principle of blameworthiness was actually necessary to maintain a credible level of law enforcement. If this were the case, could punishment possibly be morally justified?

There are those who seem to say no, on the ground that no social gain can justify an injustice to an individual.[33] Again in lofty Latin, *fiat justitia, ruat coelum*. This response is appealing in many ways. It has the virtue of clarity and simplicity. All we need know to do the right thing is that some injustice will otherwise be done to an individual. But I doubt that the absolutism of this position is a part of our common intuition of what morality requires.

Surely an individual's claimed right not to be blamed in the absence of fault carries great weight, quite apart from its social uses. But it does not follow that this claim must prevail in all circumstances and whatever the costs. On one level, the very existence of a system of formal blame and punishment entails some compromise, since that system requires the establishment of the factual grounds for blaming. We know that a system of this kind will probably result in punishing some innocent people because of the inevitability of error. We can adopt procedures designed to minimize punishing the innocent, such as the requirement of proof beyond a reasonable doubt. But we know this will only reduce error, not preclude it, and we know that we could, if we chose, reduce the chance of error still further by, for example, requiring proof beyond a doubt, always allowing retrial where further evidence is adduced, and so on. We do not, because we think it necessary and right to accept some compromise with a commitment not to punish the innocent in the interest of the practical needs of a functioning criminal justice system.

Similar considerations govern the formulation of the substantive law of excuses. The criminal law, in contrast to social mores, must serve as a clear, explicit guide to lawful conduct. It must also discourage the belief that a "loophole" can always be found to escape prosecution. Further, it must be suited to fair and uniform application, and restrain as much as possible the biases of individual judges and jurors. Hence, instead of permitting any excuse that the court deems relevant, the law defines the elements of available excuses. It is the nature of such definitions that they cannot always accommodate subtle moral distinctions or novel situations. For these reasons the law sacrifices complete accord between moral and legal excuses.

33. *See, e.g.*, H.M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422-23 (1958).

Suppose that under a strict liability rule, the total amount of injustice would be slight, because it will be rare that an individual will have a good excuse for not knowing the law or for being unaware of some relevant factual feature of his action. Suppose also that the penalty is slight (a fine rather than imprisonment), and that a great deal is riding on compliance (for example, the safety of foods and drugs). I suggest that in these circumstances there is a reasonable argument that disallowing the excuse would not merely be the practical thing to do, it would be the right thing to do as well.

The argument is that though justice to the individual has great and usually determinative weight, it need not have absolute weight. We would expect John Stuart Mill, as a utilitarian theorist, to hold this view.[34] But one need not wholly embrace utilitarianism to conclude, as Professor Feinberg has, that a "practice can be right even though to some extent unjust, and that we can sometimes be *justified*, all things considered, in treating some persons to some extent unjustly."[35] This represents a general moral intuition and a common ground for practical judgment. In this view, justice is regarded as one among other prima facie social values. As such it must be weighed against such other values as social peace and security or the indispensable practical requirements of administering a system of law. While justice is a fundamental value, and hence usually paramount, it may on occasion be outweighed by these other values. What is right is what is right all things considered. This position finds support in constitutional adjudication, where even the fundamental guarantees of the Bill of Rights do not stand as absolutes.[36] In short, doing the right thing, all things considered, might justify—"rightify" would better convey the sense—some departure from the requirements of just blaming.

Another reason why justice for the individual is not an absolute is that it can conflict with the moral claims of other individuals. Consider,

34. *See* J.S. MILL, *Utilitarianism,* in MILL'S ETHICAL WRITINGS 337-38 (J. B. Schneewind ed. 1965):

> [J]ustice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others; though particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice. Thus, to save a life, it may not only be allowable, but a duty, to steal, or take by force, the necessary food or medicine, or to kidnap, and compel to officiate, the only qualified medical practitioner. In such cases, as we do not call anything justice which is not a virtue, we usually say, not that justice must give way to some other moral principle, but that what is just in ordinary cases is, by reason of that other principle, not just in the particular case. By this useful accommodation of language, the character of indefeasibility attributed to justice is kept up, and we are saved from the necessity of maintaining that there can be laudable injustice.

35. Feinberg, *Justice, Fairness and Rationality* (Book Review), 81 YALE L.J. 1004, 1005 (1972) (reviewing J. RAWLS, A THEORY OF JUSTICE (1971)).

36. Another analogy is the principle of the choice of the lesser evil as a defense to what otherwise would be a crime. *See* MODEL PENAL CODE § 3.02 (1985).

for example, the claim of the law-abiding for some reasonable governmental protection against crime.[37] A legal system so scrupulous that nearly every defendant was acquitted would not only be inefficient and ineffective, it would be unfair to the citizens who rely on it to articulate and enforce standards of conduct. Thus, there are moral as well as pragmatic reasons why a perfect correspondence between an individual's moral fault and criminal liability is not an absolute value.

3. *Volitional Deficiency—The Necessity-Coercion Principle*

I turn now to excuses based on reasonable deficiency of will. Here, too, there is an apparent gap between excuses allowed by the law and the requirements of just blaming. Professor Fletcher has done much to illuminate this gap,[38] which arises in situations in which the law affords no excuse for a defendant's act even though a person of reasonable, law-abiding capacities and inclinations would have chosen to violate the law. The common law and the law of most states excuse in only one situation of this kind: duress, where the coercive predicament facing the defendant arises from the threats of another; and even then, under the common law and the law of most jurisdictions, the act is excused only when the threat is immediate and the crime is not a homicidal one.[39] But, of course, coercive predicaments capable of breaking the will of persons of average fortitude can arise in other circumstances as well. To take familiar examples, consider the shipwrecked castaways who kill, reasonably concluding there is no other way to survive,[40] or a prisoner who escapes in the reasonable belief that it is the only way to avoid repeated sexual assaults and threats of violence.[41]

Our law, therefore, excuses only in some circumstances in which persons of common fortitude would break the law. Even the Model Penal Code, while eliminating the common law restrictions on duress,[42] declined to establish a necessity-coercion defense[43] which would generalize the principle underlying duress,[44] as some foreign and a few Ameri-

37. *See* Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 884-85 (1976).

38. *See* Fletcher, *supra* note 11, at 818-33.

39. *See* MODEL PENAL CODE AND COMMENTARIES § 2.02 commentary at 368-71 (1985).

40. Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884).

41. *E.g.*, People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974). Escape might be justified on the view that suffering the bad conditions is a greater evil than violating prison discipline. The question here is whether the prisoner would have an excuse if the court found escaping to be the greater evil. *See* Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355 (1979).

42. MODEL PENAL CODE § 2.09 (1985).

43. This awkward term is needed to distinguish the excuse of necessity based on coercion from the justification of choice of the lesser evil, which often is also termed necessity.

44. MODEL PENAL CODE AND COMMENTARIES § 2.02 and commentary at 377-79 (1985); *see* S.H. KADISH, S.J. SCHULHOFER & M.G. PAULSEN, *supra* note 29, at 797-98.

can jurisdictions have done.[45]

I conclude, therefore, that the narrow recognition of the necessity-coercion excuse creates a gap between what the law allows and what just blaming requires. But what principle of just blaming is violated? It is not simply the principle that blame may not be imposed in the absence of voluntary choice—not, at least, without qualification. It is true that the defense of duress is often explained in terms of the threat overpowering the will, rendering the person unable to choose otherwise.[46] But the sense of disability of will present in duress situations is plainly not the same as when we say that a physically or physiologically compelled movement is beyond the control of the person.[47] Why, then, is it unjust to blame a person in this situation? The answer is parallel to the answer I offered in the case of reasonable mistake: in yielding to a threat to which most of us would yield the person has not shown herself to be more blameable than the rest of us. All that distinguishes her is the accident that produced her predicament. As the Model Penal code commentary observes:

> [L]aw is ineffective in the deepest sense, indeed . . . it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust.[48]

It is not, then, that there is literally no choice in these cases, but that

45. The Criminal Codes of Queensland and Western Australia provide: "[A] person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise." QUEENSL. CRIM. CODE § 25; W. AUSTL. CRIM. CODE § 25; *see also* G. FLETCHER, *supra* note 11, at 833 (quoting the German Criminal Code); CALIF. JOINT LEG. COMMITTEE FOR REVISION OF THE PENAL CODE, PENAL CODE REVISION PROJECT § 520 (Tent. Draft No. 1, 1967) ("[I]t is an affirmative defense that the defendant engaged in the conduct otherwise constituting the offense in order to avoid death or great bodily harm to himself or another in circumstances where a person of reasonable firmness in his situation would not have done otherwise."). Three states (IND. CODE ANN. § 35-41-3-8 (West 1986); N.D. CENT. CODE § 12.1-05-10 (1985); TEX. CRIM. PROC. CODE ANN. § 8.05 (Vernon 1977)) have adopted a version of this proposal suggested by the Brown Commission. 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 276-77 (1970).

46. *See, e.g.*, MODEL PENAL CODE AND COMMENTARIES § 2.09 commentary at 373 (1985); Regina v. Hudson, [1971] 2 Q.B. 202, 207 (Crim. App. 1971) (duress consisted of "threats sufficient to destroy [the defendant's] will").

47. This was Aristotle's view. Speaking of actions under threats he says:

> Now the man acts voluntarily; for the principle that moves the instrumental parts of the body in such actions is in him, and the things of which the moving principle is in a man himself are in his power to do or not to do. Such actions, therefore, are voluntary, but in the abstract perhaps involuntary; for no one would choose any such act in itself.

ARISTOTLE, *supra* note 2, at 1110a.

48. MODEL PENAL CODE AND COMMENTARIES § 2.09 commentary at 374-75 (1985).

there is no effective choice given the limits of moral fortitude, not just of the defendant, but of humankind generally. In other words, the choice exhibits no defect of character meriting blame.

The law, then, departs from the requirements of just blaming by failing to include a general necessity-coercion defense. As with other such departures, however, it is potentially justifiable on an "all things considered" view of rightness.[49] The case would have to be that a general necessity-coercion defense would open nearly every prosecution to the claim that even reasonable and lawful persons would have done the same in the defendant's circumstances, and that this burden, with its potential for delay and jury mistakes, is too great for the criminal justice system to bear. Moreover, even when properly applied, the defense might be thought, as in the prison escape cases, to provide too great a weakening of the deterrent discipline of the criminal law.[50] The central issue is whether these considerations warrant condemning people who behave no differently than most of us would in the extraordinary situations in which they find themselves. I am not inclined to think so, but there is little ground for certitude.

4. The Adequacy of the Reasonableness Standard

I turn now to a different challenge to excuses in this second category: not that the standard of common humanity is rejected, but that it is inadequate. The argument is that the standard of what most of us are capable of, or would do, is unjust, because it fails to take into account what the particular defendant was capable of.[51] So, for example, a person might raise the following defense to a charge of being an accessory to a burglary: "I only helped out because the other fellow, a person of violent reputation, threatened to seek me out one day and bloody my nose if I refused. Though I concede that a person of reasonable fortitude would have refused anyway, I am not such a person. I am a coward, and weakness in the face of physical danger is just what distinguishes us."[52]

Or he claims self-defense: "I concede that a person with normal judgment and nerves would never have mistaken the gesture of the deceased as the start of a deadly attack. But I did make that mistake,

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49. *See supra* text accompanying notes 34-36.

50. *See* MACAULAY AND OTHER INDIAN LAW COMM'RS., A PENAL CODE 82-84 (London 1838).

51. For a strong statement of the case for individualization, see Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974).

52. Professor Williams has doubted the desirability of confining the duress defense to cases in which the defendant acted reasonably. *See* G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 633 (2d ed. 1983). For a contrary view see MODEL PENAL CODE AND COMMENTARIES § 2.09 commentary at 373-74 (1985).

because I am a nervous, fearful, and apprehensive person. I should therefore be excused."

I fear these examples may not be sufficiently sympathetic. Let me try to do better with an actual case.[53] Defendants are charged with involuntary manslaughter in the death of their infant. Their lawyer argues: Yes, my clients should have realized their child was seriously ill and needed medical attention. It would have been obvious to you or me, but my clients are not like us. They are Native Americans, living on a reservation, with little formal education and little acquaintance with modern medicine. They loved the baby, staying up with it night after night trying to comfort it. They were crushed by its death. But they never realized how badly the baby needed medical attention; they thought it was only a toothache. If only they had known. Most people would have; but they didn't. They should be excused.

One response to these claims might be the all-things-considered view of what is right; namely, that allowing defects of self-discipline and judgment to excuse would cut too wide a swath through the criminal law, which has to coerce people of all degrees of capacities and varieties of inclination to conform. Indeed, this is the usual defense of the objective standard—the standard of what can be expected of reasonable persons—that our law imposes on excusing conditions.[54] But I want to take a different tack: I want to argue that in these cases the law does not commit injustice in imposing blame.

The first point to be made is that in applying its objective standard, the law does not abstract all of the circumstances in which the defendant acted. To some extent it does individualize. A relevant physical defect of the defendant—that she was blind or deaf, for example—surely would be seen as part of the circumstances in which we imagine the ordinary person to be acting when the law asks what her response would be. So would some less obvious features of the actor's situation. Suppose in my duress case the defendant were in such poor health that the threat of a bloody nose took on more than its usual significance; or suppose that in the mistaken self-defense case, the defendant had recently received anonymous threats. These circumstances, presumably, would be seen as a part of the situation facing our reasonable person when we consider how she would act.[55]

Now the line is hazy between those special circumstances that are relevant and those that are not, but surely it is a very different thing to individualize completely. For that would be to abandon altogether the very point of excusing in the second category of excuses I have described.

53: State v. Williams, 4 Wash. App. 908, 484 P.2d 1167 (1971).

54. *See* O.W. HOLMES, *supra* note 27, at 48-57, 108-10.

55. *See* MODEL PENAL CODE AND COMMENTARIES § 2.02 commentary at 242 (1985).

What could be expected of the ordinary run of individuals would be irrelevant. All that would count would be the behavior of this very person. But what, then, could be the reason for excusing him? That he is the kind of person he is? That, in the duress case, the defendant is unnaturally cowardly? That, in the mistaken self-defense case, the defendant is unnaturally apprehensive? These are most peculiar excuses. Presumably, to say that a person is cowardly, or apprehensive, or whatever, is to say that his actions tend to be deficient in certain ways. It is certainly not to say that the person has no choice but to act in those ways. That he has once again acted in this way is the very ground for blaming him. It could hardly serve as an excuse. Such defenses are not accorded in moral judgments any more than in legal ones.[56]

Nonetheless there is a case for considering the deficiencies of the particular defendant in one circumstance: where negligence is the basis of liability. So, for example, Professor Hart has argued that while punishing for negligence may justly rest on an objective standard (which he prefers to describe as an invariant standard of care), the law is obliged in justice to adopt an individualized condition of liability.[57] That is, while it is not necessary, to justify blaming the defendant, to show that she was aware of the objectively unreasonable risk her action created, it is necessary to show that she could have been aware and could have taken the necessary precautions. Only if this is so do we avoid the injustice of holding liable "unfortunate individuals who, through lack of intelligence, powers of concentration or memory, or through clumsiness," could not have acted in conformity with the required standard.[58]

This is an appealing argument. The case of the backward parents who failed to realize their child's need for medical attention vividly illustrates its force. Nonetheless, Hart's argument cannot easily escape the objection I just raised to a requirement of a completely individualized standard in all situations. If we excuse parents for ignorance of the medical needs of their child on the ground that they are ignorant people, must we not also excuse a person for yielding to a trivial threat of future harm on the ground that he is a cowardly person? If it is a defense to a crime of negligence that the defendant couldn't have known and taken care

56. There is, of course, the great issue of whether we are responsible for our characters: whether our characters are made for us rather than by us. But I don't think I am obliged to take a position on the issue, since my subject is a comparison of moral and legal blame. All I need point out is that to the extent we are not so responsible, the ground beneath the whole concept of blame, moral as well as legal, is eroded.

57. *Negligence,* Mens Rea *and Criminal Responsibility,* in H.L.A. HART, *supra* note 10, at 152-57.

58. *Id.* at 154. The German law of criminal negligence seems close to what Professor Hart argues ours should be. *See* The Case of the Gable Wall (Giebelmauer), 56 RGSt 343, 349 (1922); H.-H. JESCHECK, LEHRBUCH DES STRAFRECHTS 379 (1969); Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis,* 119 U. PA. L. REV. 401, 406 (1971).

because that's the kind of person he is, why would it not also be a defense to a crime of intention that the defendant could not help choosing to act as he did because that is the kind of person *he* is: aggressive, self-centered, brutal, and so on?

If this objection is to be met, it would have to be by distinguishing between incapacities of cognition and incapacities of volition. An argument for such a distinction would be the following: We can accept that some people can't help being deficient in intelligence, power of concentration, or memory, and that this deficiency, despite all the good will in the world, may keep them from adverting to a danger that others would attend to. To excuse such people for actions they could not have helped does not seriously erode the concept of blame. On the other hand, we do not accept that otherwise normal people who are uncompelled cannot control their intentional actions. That would be incompatible with the way we view human actions. That the defendant is the kind of person who has yielded to his antisocial inclinations in the past does not show him to be incapable of resisting on this occasion. To hold otherwise would undermine the practice of blaming altogether, in common moral discourse as well as in law.

This distinction, then, would lead to the conclusion that the law commits no injustice by refusing excuses of incapacity for intentional crimes, but that it is a condition of just liability for unintentional crimes that the capacity of this defendant to have known and done otherwise be open to inquiry in every case. But before we too quickly judge the law deficient in not allowing such a defense to unintentional crimes, we should understand the practical difficulties in administering it.

For example, in the infant neglect case, how could it be shown that the parents were unable to know enough to call a doctor? They did not, this time. But in the actual case, they had visited a doctor some months before. And they knew their baby was sick. No doubt they didn't appreciate how sick the baby was. But what does it mean to say they could not have? Would the excuse simply function as a message to the jury to acquit in any case of criminal negligence when they sympathize enough with the defendants? And could the excuse be confined to sympathetic cases like the infant neglect case? Consider the case of unreasonably mistaken self-defense I put earlier. Would we be obliged to allow as an excuse that the defendant's abnormal fearfulness (which he would show, presumably, by a long record of such behavior) disabled him from discriminating a hostile gesture from a friendly wave?[59] We might want to

59. *Cf.* People v. Goetz, 68 N.Y.2d 96, 111, 497 N.E.2d 41, 50, 506 N.Y.S.2d 18, 27 (1986): To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or

say that such a defect of judgment in deciding to shoot and kill someone is blameworthy. But could it be distinguished from the infant neglect case? Isn't deficient judgment in appraising reality at issue in both cases?

These kinds of practical difficulties were no doubt in the minds of the Model Penal Code framers when they concluded that "the heredity, intelligence or temperament of the actor would not be held material in judging negligence."[60] Further, these practical problems reveal that the moral distinction between ability to know and ability to will is not entirely clear. Someone's purposes and concerns can influence how he develops and uses his cognitive abilities, and how hard he tries to overcome his intellectual shortcomings. In this sense, his intentions may be relevant even in unintentional crimes. In view of both the practical and moral complexities raised by an excuse of incapacity to know better, it is understandable that our law does not recognize it.

C. *Nonresponsibility*

This brings us to the last category of excuses: cases of nonresponsibility, represented primarily by the defense of legal insanity. To assess the justification for and the adequacy of the excuse of legal insanity it is necessary to explicate further the principle of justice that lies behind it.

1. *A Rationale of Nonresponsibility*

The modern tests of legal insanity are varied and controversial, but they all rest on the view that the claim of incapacity to comply with the law because of defects of understanding or self-control[61] is an excuse only if it is the result of a mental disease. Here, then, it is precisely the individual's personal incapacities that serve as the basis of the excuse, whereas, in other cases, saving cases of physical and physiological compulsion, the law declines to permit individualized inquiries into the capacities of the defendant. Why should the presence of mental disease make all this difference?

One answer is a wholly practical one. We can not allow personal incapacity as an excuse generally without unduly compromising the deterrent effectiveness of the law. Proof would be too speculative and uncertain, acquittals would be invited based on the jury's subjective atti-

perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.

60. MODEL PENAL CODE AND COMMENTARIES § 2.02 commentary at 242 (1985).

61. I am, of course, assuming a concept of legal insanity that extends to volitional as well as cognitive incapacities. The original *M'Naghten* rule and rules recently developed to tighten the defense eliminate the volitional feature of the defense. *See* United States v. Lyons, 731 F.2d 243, 248 (5th Cir.), *cert. denied,* 469 U.S. 930 (1984); Bonnie, *The Moral Basis of the Insanity Defense,* 69 A.B.A. J. 194 (1983). I will return shortly to the case for eliminating volitional incapacity as a feature of the insanity defense.

tudes toward the defendant, there would be too great a chance of erroneous acquittals, and less incentive would be given potential violators to make every effort to comply. Narrowing the excuse to those who can be identified, through medical testimony, as having a mental disease helps to meet these practical concerns. There is support for this explanation in the efforts from time to time (and certainly in these times) to limit or abolish the defense, precisely on the ground that the requirement of a mental disease is inadequate to meet these concerns.[62]

Without denying that this practical explanation plays a part, I suggest it is not the heart of the matter. The explanation seems to accept that the reason for disallowing an unqualified defense that the defendant could not understand or control his conduct is wholly a matter of expediency. But neither in moral judgments nor in legal ones do we ask of a person who wrongs another whether he could have helped choosing to do so. Being responsible for our characters means that we are responsible for our choices, even if in some sense they have their causes, like any other events, in the world.[63]

What, then, is different about a person whose disabilities result from mental disease? The answer, I believe, is that the concept of mental disease serves to identify so complete a breakdown of the normal human capacities of judgment and practical reason that the afflicted person cannot fairly be held liable. That concept, it should be emphasized, is not synonymous with the varieties of mental illness identified for therapeutic purposes. Categories developed with regard to whether and how a person can be helped by psychiatry are not designed to determine whether a person may be justly punished. They have some evidentiary relevance to the questions of judgment and moral responsibility which are the law's concern, but that is all.

Though the prevailing tests of legal insanity speak in one way or another of inability of the defendant, because of mental disease, to know the nature or wrongfulness of his action or (sometimes) to choose to comply with the law, it is apparent that "know" and "choose" in these tests mean more than what those terms signify in casual discourse. Many defendants acquitted on grounds of legal insanity, particularly those with psychoses, "knew" what they were doing and "meant" to do it in a literal sense.

Consider the facts of a famous California case, *People v. Wolff*:[64] A schizophrenic teenager, after previous failed attempts, killed his mother with an axe because he saw her as an obstacle to fulfilling his bizarre

62. *See generally* Slovenko, *The Insanity Defense in the Wake of the Hinckley Trial,* 14 RUTGERS L.J. 373 (1983).

63. *See* Moore, *supra* note 1, at 1092.

64. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

sexual fantasies. He kept a list of seven girls he had not met whom he planned to chloroform and kidnap and bring back to his home, where he would rape them and photograph them nude. In such a case, surely the defendant knows well enough what he is doing and acts with deliberate choice. But he may nonetheless be excused if his disease of the mind has so far impaired his rationality that he has ceased to be a moral agent.[65] As Professor Moore puts it:

> [S]everely diminished rationality preclude[s] responsibility . . . because our notions of who is eligible to be held morally responsible depend on our ability to make out rather regularly practical syllogisms for actions. One is a moral agent only if one is a rational agent. Only if we can see another being as one who acts to achieve some rational end in light of some rational beliefs will we understand him in the same fundamental way that we understand ourselves and our fellow persons in everyday life. We regard as moral agents only those beings we can understand in this way.[66]

Seen in this way, it is apparent why the excuse of legal insanity is fundamental. No blaming system would be coherent if it imposed blame without regard to moral agency. We may become angry with an object or an animal that thwarts us, but we can't blame it.

Of course, being beyond the reach of moral responsibility, not being a moral agent, is not the same as being nonhuman. The acts of insane people are usually ambiguous between deliberate actions and pointless, unreasoned behavior; they are not mere events, like rocks falling. Insane people are *just* beyond responsibility, and that is why they are so disturbing. Nevertheless, blaming them commits an anomaly (we would say an "injustice" as applied to people) similar to that entailed in blaming a rock for falling or a dog for barking.

This, then, explains the distinctive and fundamental character of the defense of legal insanity. It also explains the central objection to recently revived proposals to abolish the defense:[67] To do so would open a dramatic gap between moral and legal requirements of blaming. Whether

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65. The California Supreme Court reversed a first degree murder conviction on the ground that "the true test [of premeditation and deliberation] must include consideration of the somewhat limited extent to which this defendant could *maturely and meaningfully reflect* upon the gravity of his contemplated act." *Id.* at 821, 394 P.2d at 975, 40 Cal. Rptr. at 287. In view of the psychiatric evidence of the defendant's diminished capacity, the court concluded that the defendant could not be found to have met this test. *Id.* It declined to reverse a second degree murder conviction, however, because of the absence of a volitional disability feature in the California definition of legal insanity, which the court felt it had no authority to revise without legislative authorization. *Id.* at 803, 394 P.2d at 963, 40 Cal. Rptr. at 275.

66. M. MOORE, LAW AND PSYCHIATRY 244-45 (1984). Although Professor Moore develops the argument most fully, others also have identified the defense of legal insanity with incapacity for rational conduct. *E.g.*, H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 175-215 (1972); Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 782 (1985).

67. *See* N. MORRIS, MADNESS AND THE CRIMINAL LAW 53-87 (1982).

abolishing the defense could nonetheless be justified by an all-things-considered view of what is right[68] is another question, although, for reasons that are beyond the purview of these comments, I doubt that the case can be made.[69]

2. *Volitional Disability*

I have so far discussed the moral significance of the legal insanity defense without attending to its proper formulation, just as I have with respect to the other excuse defenses. But one long-standing and basic issue in defining the defense has received considerable attention as part of the current reassessment of the defense and therefore merits comment. This is whether the insanity defense should extend beyond cases in which a mental disease has impaired a person's cognitive abilities to cases in which it has impaired his ability to control his conduct.

One reason not to extend legal insanity to cases of volitional disability is the practical difficulty of administering an insanity defense so extended. It has been urged with force that there is no way objectively to establish that a person could not refrain from a criminal action, rather than would not,[70] and that therefore such a test "involves an unacceptable risk of abuse and mistake."[71] These considerations may justify eliminating that feature of the defense, particularly if most cases of substantial volitional impairment are accompanied by cognitive impairment sufficient to establish the defense independently.[72] They do not, however, settle the question I am most concerned with here: whether legal insanity must include a volitional disability feature in order to meet the moral requirement of blaming.

This question involves the defensibility of treating cognitive and volitional disabilities differently for the purpose of assessing blame. I considered this issue earlier in connection with Professor Hart's argument for an individualized standard of negligence.[73] He argued, it will be recalled, that the requirements of just blaming compel allowing an inquiry in each case into the cognitive capacity of the defendant. I concluded that this argument could not succeed without making the case for

68. Professor Hart's concession that it might be desirable to eliminate the defense can only be understood on this ground, given his otherwise consistent defense of the blame principle. *See Changing Conceptions of Responsibility,* in H.L.A. HART, *supra* note 10, at 204-05.

69. *See* Kadish, *supra* note 20; Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of Powell v. Texas,* 69 COLUM. L. REV. 927, 944 (1969).

70. *See* United States v. Lyons, 731 F.2d 243, 248 (5th Cir.) (en banc), *cert. denied,* 469 U.S. 930 (1984); AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE 11 (1982); Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious,* 68 VA. L. REV. 971 (1982).

71. Bonnie, *supra* note 61, at 196-97.

72. *Id.*

73. *See supra* text accompanying notes 57-60.

treating negligent and intentional conduct differently. While just blaming might require proof of the defendant's capacity to know, it could not require proof of his capacity to have intended other than he did without seriously threatening the whole concept of moral blame.

In the context of the legal insanity defense we again face the cogency of this distinction between cognitive and volitional capacity. In defining legal insanity, are we equally constrained to disallow inquiry into the capacity of the person to control his intentional, uncompelled conduct? There is perhaps some support for an affirmative answer in the traditional formulation of the insanity defense, still vigorously defended in some quarters, which allows inquiry into the ability of the defendant to know what he was doing, but not into his ability to do other than what he chose to do. But there is also ground to believe that for purposes of defining legal insanity, an inquiry into volitional capacity has a special claim.

The idea that a normal actor, who commits a crime intentionally and under no physical or physiological compulsion, might have been unable to choose to act otherwise threatens to undermine blame at its foundation.[74] But the notion is less threatening as applied to those suffering from a mental disease,[75] not simply in the sense of a medically recognized psychological disorder, but as reflecting the common sense moral judgment that the person lacks the minimal capacities for rational action required to be a moral agent.[76]

It seems apparent that distorted reality perceptions are not the only ground on which we may come to such a judgment. Bizarre, senseless, and unintelligible motivations may manifest lack of moral agency even where the person is literally aware of what he is doing. The teenage schizophrenic in the *Wolff* case is an example.[77] Lack of the minimal capacity for rational action required for moral agency may be manifested not ouly by the inability to know the nature and wrongfulness of one's actions, but also by the performance of knowing and intentional actions

74. *See* State v. Sikora, 44 N.J. 453, 475-79, 210 A.2d 193, 205-07 (1965) (Weintraub, C.J., concurring).

75. *See* United States v. Lyons, 739 F.2d 994, 997-98 (5th Cir. 1984) (Rubin, J., dissenting):

> Our concept of responsibility . . . is not limited to observable behavior: it embraces *meaningful* choice, and necessarily requires inferences and assumptions regarding the defendant's unobservable mental state. . . . The difference between the concepts of excusing circumstances such as coercion and the insanity defense is that the former is based on objective assumptions about human behavior and is tested against hypothetical-objective standards such as "the reasonable person." "The insanity defense [on the other hand] marks the transition from the adequate man the law demands to the inadequate man he may be."

(emphasis in original) (quoting A. GOLDSTEIN, THE INSANITY DEFENSE 18 (1967)).

76. *See* M. MOORE, *supra* note 66, at 244-45.

77. *See supra* notes 64-65 and accompanying text. The court thought otherwise, however. People v. Wolff, 61 Cal. 2d 795, 807, 394 P.2d 959, 966, 40 Cal. Rptr. 271, 278 (1964).

that are motivated by bizarre and unintelligible purposes.[78]

In this sense volitional incapacity is a morally relevant element of a concept of legal insanity. I should want to distinguish it, however, from a different sense of volitional incapacity that is not grounded on the standard of general capacity to be a moral agent, but on the more literal notion of a "psychic" compulsion, a desire so strong and urgent that the person is unable to resist it. Here is where the greatest difficulties lie in determining whether a person was unable to resist or simply did not resist and, indeed, in even knowing what the distinction means. A jury can judge whether a person was physically compelled by another or physiologically compelled by a reflex. But (putting drug addiction aside for the moment) how can a jury distinguish between a psychic compulsion and a strong desire that the person lacks the character to resist? Indeed, how is the psychiatrist to know? Using Greek nouns to describe repetitive stealing or fire setting is hardly an explanation. I do not believe that the proper ground of excuse in these cases is the person's inability to choose not to steal or not to set fires. Such persons choose not to do such acts on many occasions. Nor, in *Wolff,* was it that the young man was unable to choose not to kill his mother. Indeed, he held back on an earlier occasion when it appeared too risky. The ground of excuse is not inability to choose, but rather the senseless and absurd character of the behavior—its bizarre repetitiveness in the first case, its wildly unrealistic motivation in the second. In other words, it is not that the defendant is not capable of choosing, but that his choosing is so irrational that he manifests a lack of moral agency.

3. *Expansion of Nonresponsibility—Social Deprivation and Addiction*

I have so far tried to make the case for the fundamental importance of the defense of legal insanity and against proposals to eliminate it. I turn now to arguments that take the opposite view: not that the defense should be abolished, but that the concept of legal nonresponsibility must be expanded beyond legal insanity if legal and moral blame are to be brought into line.

One such proposal is to establish a defense of social deprivation.[79] The argument proceeds this way: If the law recognizes that mental dis-

78. *Cf.* H. FINGARETTE, *supra* note 66, at 240:

> [T]he reference in the original M'Naghten rule to the defect as one involving knowledge (cognition) is not of the essence so far as the central meaning of criminal insanity is concerned. The defect of reason may show up primarily as a cognitive, a volitional, an emotional, or a behavior-control defect, or for that matter as any other specific mental sort of defect or any combination of defects.

79. *See* United States v. Alexander, 471 F.2d 923, 960-61 (D.C. Cir.) (Bazelon, J.), *cert. denied,* 409 U.S. 1044 (1972); Bazelon, *The Morality of the Criminal Law,* 49 S. CAL. L. REV. 385 (1976); Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?,* 3 LAW & INEQUAL.: J. THEORY & PRAC. 9 (1985).

ease can have the effect of so far interfering with the capacity of the defendant to conform that he is excused, why should it not recognize other influences that have the same effect? Consider a defendant who has, from birth, led a life of grinding poverty and deprivation, who suffered from defective parenting and little family support, who spent his childhood and youth mostly in the streets under the tutelage of older youngsters similarly situated, and who, naturally enough, turned to crime. This demonstrably criminogenic background, it is argued, itself should serve as the basis for an excuse, without a need to show that this history of cultural deprivation produced a mental disease. In short, a defendant who has been subjected to such a life may have as little effective control over his conduct as one with a mental disease.

Courts have resisted this line of argument,[80] and I think with good reason. One strong counterargument is practical: The defense would be difficult to administer, it would weaken the law's deterrent effect, and, once recognized, it would be hard to justify punishing anyone, for even evil has its causal roots somewhere. But I am here concerned with the defense as a matter of principle, that is, whether the principle of just blaming requires it.

Social deprivation may well establish a credible explanation of how the defendant has come to have the character he has. But it not does establish a moral excuse any more than a legal one, for there is a difference between explaining a person's wrongful behavior and explaining it away. Explanations are not excuses if they merely explain how the defendant came to have the character of someone who could do such a thing. Otherwise, there would be no basis for moral responsibility in any case where we knew enough about the person to understand him. And that would mean every case, because ignorance about a person could hardly stand as a justification for blaming him.[81]

The reason the argument fails to make out a moral excuse, as insanity does, is that it fails to establish the breakdown of rationality and judgment that is incompatible with moral agency. It may be conceded that cultural deprivation contributed to making the defendant what he is (though, of course, only some people so brought up end up committing crimes). But what is he? He is a person with wrong values and inclinations, not a human being whose powers of judgment and rational action have been so destroyed that he must be dealt with like an infant, a machine, or an animal. Those who propose this defense are plainly moved by compassion for the downtrodden, to whom, however, it is

80. *See, e.g.*, United States v. Brawner, 471 F.2d 969 (1972).

81. *See* Moore, *supra* note 1, at 1092-93.

nonetheless an insult.[82]

The strongest case for the social deprivation defense is that a state which fosters or tolerates such deprivation forfeits its right to condemn its victims. But the question "Who has the legitimate authority to judge and punish?" is a different question from "Who should be blamed for individual crimes?" The social deprivation defense may be a fair vehicle for accusing the society responsible for the deprivation, but it is not a ground for excusing the deprived defendant, because by itself it fails to establish the defendant's lack of responsibility.

Other proposals to expand the concept of legal irresponsibility are tied to special conditions which, it is argued, substantially impair the capacity of the person to conform in certain ways. On this basis narcotics addiction has been urged as a defense to narcotics crimes,[83] and even to other crimes driven by the need to support the addiction;[84] chronic alcoholism has been raised as a defense to crimes involving public drunkenness;[85] and compulsive gambling has been raised as a defense to theft offenses.[86] Very rarely have courts been receptive.[87]

Courts have chiefly emphasized the threat to the social control functions of the criminal law that allowing these defenses would pose.[88] This is plausible enough, considering that drugs and alcohol figure prominently in the commission of many of the crimes the public fears most. Perhaps these concerns justify departing from the requirement of moral blame, as I said earlier. But the issue that concerns me here is whether denial of the excuse in those cases is indeed a violation of those requirements.

It has been argued that the principles of responsibility and blame underlying the legal insanity defense require a legal defense of addic-

82. *See* Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1267-68 (1976).

83. United States v. Moore, 486 F.2d 1139 (D.C. Cir.) (en banc) (plurality opinion), *cert. denied*, 414 U.S. 980 (1973); People v. Davis, 33 N.Y.2d 221, 306 N.E.2d 787, 351 N.Y.S.2d 663 (1973), *cert. denied*, 416 U.S. 973 (1974).

84. Commonwealth v. Sheehan, 376 Mass. 765, 383 N.E.2d 1115 (1978).

85. Powell v. Texas, 392 U.S. 514 (1968).

86. United States v. Torniero, 735 F.2d 725 (2d Cir. 1984), *cert. denied*, 169 U.S. 1110 (1985); United States v. Gould, 741 F.2d 45 (4th Cir. 1984); United States v. Llewellyn, 723 F.2d 615 (8th Cir. 1983).

87. *See* Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); State v. Lafferty, 192 Conn. 571, 472 A.2d 1275 (1984); *see also* Annotation, *Drug Addiction or Related Mental State As a Defense to a Criminal Charge*, 73 A.L.R.3D 16 (1976).

88. *See, e.g., Moore*, 486 F.2d at 1147-48 (Wilkey, J.) (plurality opinion) ("[T]he particular nature of the problem of heroin traffic makes certain policies necessary that should not be weakened by the creation of this defense.").

tion.[89] One defense of this view is that the crimes of an addict are symptoms of a sickness and therefore require treatment, not punishment.[90] But this is surely a non sequitur. To find that criminal conduct is causally related to persistent patterns of behavior which are to some extent medically treatable (for this is what sickness here presumably connotes) does not establish that punishment is unjust. Being "sick" in this sense does not mean or imply that the person is irresponsible and not morally culpable.[91] Just as a psychiatric diagnosis of mental illness does not itself establish a defense of legal insanity, neither does a diagnosis of addiction establish that the addict is not responsible for his actions. The concept of disease of the mind as it functions in the insanity defense does not simply represent a medical treatment category. As I said before, it is rather a judgment that the person suffers from such a persistent distortion of his powers of judgment and practical reasoning that he lacks moral agency.

It is hard to see how addiction could qualify as a disease of the mind in the sense of a condition negating moral agency. There is nothing irrational in the conduct of a person who engages in addictive behavior. Distortion of reality is not a necessary feature of addiction. Nor is there anything bizarre or unintelligible in the desire to achieve either the gratification the conduct affords (gratification that nonaddicted people seek in large numbers in drink, drugs, or gambling) or in the avoidance of the negative effects of not gratifying the desire.

What distingnishes addiction is that it constitutes a powerful motivation to engage in certain kinds of conduct. The argument for a defense of irresponsibility is better seen, therefore, as a claim that the motivation of the addict goes so far beyond strong temptation, which itself can hardly constitute a full excuse in morals or law, that it must be thought of as utterly overwhelming behavior controls. The argument that such overwhelming motivation should constitute an excuse could proceed by analogy to two well-established grounds of exculpation—the defense of an involuntary act, and the excuse of duress or, more generally, the necessity-coercion principle.

There is some looseness in the concept of an involuntary act. Even the Model Penal Code eschews a definition and resorts to an enumeration of examples, plus a general reference to other bodily movements that are not "a product of the effort or determination of the actor, either conscious or habitual."[92] But the characteristic actions of an addict could

89. *See, e.g., Powell,* 392 U.S. at 559-61 (Fortas, J., dissenting); *Moore,* 486 F.2d at 1235-50, 1258-60 (Wright, J., dissenting).

90. *See, e.g., Moore,* 486 F.2d at 1178-80 (Leventhal, J. concurring) (stating and rejecting argument); *Torniero,* 735 F.2d at 730-32 (same).

91. M. MOORE, *supra* note 66, at 124-26.

92. MODEL PENAL CODE § 2.01 (1985).

hardly be made to fit. They are movements he chooses to make to achieve his purposes and therefore have nothing in common with falling or being pushed or with reflexive or convulsive movements, or even with sleepwalking or hypnotic movements.[93] There is a substantial difference between those movements and the complex and varied activities involved in obtaining and using alcohol and other drugs. There are enough conscious, purposive actions in the characteristic behavior of addicts (including abstinence when the motivation is great enough) that it cannot possibly be considered involuntary. The same objections apply a fortiori to crimes, such as theft, committed to support addiction, which are even less like mere reflexes than crimes of possession and use.

A second possible argument is one which draws support from the principle of duress. Just as a defendant may be excused if he commits a crime under the imminent threat of bodily injury by another, so, it may be argued, should the addict be excused if he commits a crime in order to avoid the acute suffering of withdrawal. While duress is technically distinguishable because it is limited to threats by another person, in principle the excuse can hardly be so contained. Indeed, the defense of necessity-coercion, better recognized in other legal systems than our own, constitutes just such an extension.[94]

Nevertheless, the argument for an addiction defense based on the rationale of the necessity-coercion principle confronts significant difficulties. That principle, it will be recalled, does not excuse simply because the will of the defendant was overwhelmed by pressures he lacked the fortitude to resist.[95] There is always an objective qualification, which requires that in like circumstances a person of reasonable firmness would not have resisted, and that the defendant was not at fault in producing his predicament.[96] The addiction defense fails both of these requirements.

As to the latter, anyone can suddenly and without fault become the victim of a terrorist's threats. Not so a victim of addiction. Save in the rarest of cases, he must have voluntarily consumed narcotics over a period of time before becoming addicted. Therefore his problem is almost always in some sense of his own making. However powerful the pressures once the person becomes addicted, they were not present in the steps along the way.

Concerning the former, the first difficulty is the same as that just discussed—persons of reasonable firmness do not become addicted.

93. Fain v. Commonwealth, 78 Ky. 183 (1879); MODEL PENAL CODE AND COMMENTARIES § 2.01 commentary at 220-21 (1985).

94. *See supra* note 45.

95. MODEL PENAL CODE AND COMMENTARIES § 2.09 commentary at 374-76 (1985).

96. *Id.* at 379-80.

Therefore the standard would have to be construed to refer to the *addicted* person of reasonable firmness. But even if this much concession were made to an individualized standard, there is the further difficulty of demonstrating this standard is met. The evidence makes it appear doubtful that it could be.

The once popular view was that the addict was enslaved to his habit, irresistibly hooked in ways beyond his capacity to alter, and in the thrall of the body-and-soul-wracking experiences of withdrawal. Recent reviews of what is known about narcotic addiction tell a different story.[97] The great majority of heroin addicts do not experience extraordinary suffering when they stop using drugs. And even in classic form, withdrawal symptoms seem closer to those of the one-week flu than to the horrors of the popular myth.[98] Further, the distress of withdrawal can be kept relatively moderate and bearable by gradual withdrawal under professional care, which is widely available.[99] Recent data concerning patterns of addiction and withdrawal also refute the bondage myth. Addiction is not an inevitable result of use. There appears to be a sizable population of non-addicted but regular heroin users who succeed in controlling its use and leading normal lives.[100] Nor does addiction appear to be either continuous or permanent. Many addicts succeed in giving up heroin at an early stage and never return to using it.[101] Finally, social and psychological inducements to begin and to continue using narcotics appear to have a large role in accounting for addiction patterns.[102]

Of course, to show that the theory of existing legal excuses does not support an addiction defense does not show that exculpating addicts is not a requirement of moral blame. That theory may be insupportable or wholly a reflection of practical requirements of law enforcement. But I believe neither is the case.

Sometime during the gradual process of conditioning himself to drugs—before the addiction reached its greatest force—the addict could have desisted, but did not. These early voluntary actions constitute a sufficient predicate for blaming him. There may well be ground for miti-

97. H. FINGARETTE & A. HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 155-72 (1979); J. KAPLAN, THE HARDEST DRUG—HEROIN AND PUBLIC POLICY 15-51 (1983); Fingarette, *Addiction and Criminal Responsibility,* 84 YALE L.J. 413, 427 (1975).

98. J. KAPLAN, *supra* note 97, at 21-22, 35.

99. *Id.* at 35; *see also* Fingarette, *supra* note 97, at 436-37 (treatment facilities are increasingly available).

100. J. KAPLAN, *supra* note 97, at 33.

101. *Id.* at 37.

102. *Id.* at 43-51; Fingarette, *supra* note 97, at 431-33. The phenomenon of alcohol addiction presents a pattern different in many ways from narcotics addiction, but affords even less ground for the claim of compulsion. *See* H. FINGARETTE & A. HASSE, *supra* note 97, at 173-90; Fingarette, *The Perils of* Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism," 83 HARV. L. REV. 793 (1970).

gation in a long lapse of time between the voluntary action and the addiction, or in the unawareness of the defendant that his actions would lead to addiction. But this is not to say there are no grounds for blame.

As for the requirement of an objective standard, I have already tried to develop the case for it.[103] A wholly individualized standard would look only to the condition of the defendant-addict before the court. But what would be the question: Could this defendant have resisted committing the crime? But no one compelled him, and he was not incapable of choice. Was it too hard for this defendant to resist in light of his desires and fears? But absent some objective measure of "too hard," what could the measure be? Presumably it would have to be the capacity of this individual to prefer to choose doing the right thing, under varying conditions of temptation and pressure. But this is simply a way of talking about character, and it would lead to the paradoxical result that the worse the person's character, the stronger the case for excusing his conduct. We need some standard of responsibility external to the make-up of the person to maintain our practices of blame. The law's objective standard, therefore, has significant roots in the very logic of blaming itself.

I must emphasize that I am speaking only of excuse as a complete negation of blame. Of course there is room for compassion and mitigation based on special elements in the background of the individual. The difference is that compassion and mitigation are not incompatible with blame. Excuse is.

103. *See supra* text accompanying notes 51-60.