DISCUSSION NOTE

JUSTIFICATIONS AND EXCUSES: MUTUALLY EXCLUSIVE?

BY MARK MCBRIDE

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Mark McBride

VIRTUALLY EVERY PHILOSOPHER of the criminal law – with the exception of Doug Husak (2010) – answers this question, "yes." I want to join Husak in answering, "no." Indeed I want to use an *overdetermination* case of Husak's to illustrate a crippling problem for philosophers answering, "yes." Where I go beyond Husak – beyond, that is, his denial of mutual exclusivity – is in offering a novel positive account of the relationship between justifications and excuses: If one's conduct is justified, one's conduct is excused. The converse entailment, however, does not hold.

1. The Standard View and the Overdetermination Problem

1.1 We need a working set of definitions of justifications and excuses which capture, and explain, the essence of *the standard view*. (Inevitably, our working set of definitions, which are pitched at a high level of abstraction, will not be able to finesse the details of particular theorists' accounts.) On the standard view, say one's conduct is justified iff one's conduct, which may be prima facie wrongful, is not ultima facie wrongful.[1] And say one's conduct is excused iff one's wrongful conduct[2] is not blameworthy. Straightforwardly, on these definitions, justifications and excuses are mutually exclusive.

1.2 Now consider Husak's (298-9) overdetermination case:

> Suppose, for example, that a defendant is threatened with serious bodily harm unless he inflicts a somewhat greater harm on the next person to walk into his office. By chance, this next person happens to be a personal enemy who begins to attack the defendant. In this example, the defendant has two independent, sufficient reasons to inflict personal injury, each of which constitutes a defense from liability. His first reason, duress, is generally categorized as an excuse; his second reason, self-defense, is almost always categorized as a justification. (footnotes omitted)

[1] Standard theorists might instead propose: One's conduct is justified iff one's prima facie wrongful conduct is not ultima facie wrongful. Although my core claims would go through operating with this biconditional, insofar as we seek a fully general account of justified conduct, its right-hand side is palpably too strong. For example, my waking up in the morning is, suppose, a case of justified, though not prima facie wrongful, conduct. (Likewise for non-conduct, such as my believing that I have hands.) To be sure, a *claim* to justifiedness will *often* be odd in the absence of any suggestion of wrongfulness; but that oddness is best explained pragmatically (e.g. on grounds of relevance), rather than semantically. Sadly, it is a theme of the vast literature on justifications (and, *mutatis mutandis*, excuses) that the distinction between justifiedness and claims to justifiedness is often slurred over.

[2] Here, and in what follows, "wrongful conduct" is equivalent to "ultima facie wrongful conduct."

Like Husak, I view this as a crippling problem for the standard view: The defendant, assuming he acts on the basis of each sufficient reason,[3] appears to have both a justification and an excuse for inflicting personal injury. And, like Husak (299-302), I find no dialectical response on behalf of the standard view to be convincing: Genuine cases of overdetermination seem possible.[4]

2. The Solution

2.1 The solution is obvious. We should retain the standard definition of justifications, yet weaken that of excuses to: one's conduct is excused iff one's conduct is not blameworthy (whether wrongful or not).[5] Assuming that conduct which is not wrongful (i.e. justified conduct) is not blameworthy, we would then have justifications entailing excuses[6]; but not the converse entailment (on account of blameless wrongdoing).[7] Now, returning to Husak's problematic overdetermination case: A successful self-defense justification ensures the defendant's conduct is not wrongful. By itself, given our revised set of definitions and our assumption, this also excuses the defendant (from blame). The self-defense justification *itself*, thus, plays a complementary excusatory role.[8] And, on our revised account, this will be a general feature of justifications. Independently, however, a successful duress defense excuses the defendant from blame for what is here, ex hypothesi, not wrongful conduct.[9] Nonetheless, standard

[3] Neither reason would be a "but-for" cause of the defendant's action.

[4] A novel standard view response: Instead of there being a single act that is overdetermined, there are two acts, each individuated by its cause. Thus we have one act which is justified but not excused, and one which is excused but not justified, even though they are both acts of personal injury. I leave the plausibility of this response to the reader.

[5] Husak (292) does consider, without there committing on (cf. Husak 1992), a similar, though not fully general, revised set of definitions.

[6] Can we make this assumption and also allow Scanlon's (2008: 125) claim that "it can be appropriate to blame a person who has done what was in fact the right thing if he or she did it for an extremely bad reason"? Yes. What this person, if blameworthy, did wrong was doing the right thing *for the wrong reason*. (Though such wrongs will not usually be a proper concern of the criminal law, consider a putative self-defense case where the defendant is solely motivated by revenge.) To fail to make this assumption would enforce withdrawing my claim that justifications entail excuses but would not, given our revised set of definitions, jeopardize my allowing the defendant in Husak's problematic overdetermination case both a justification and an excuse for inflicting personal injury.

[7] There is, I recognize, room for debate over the scope, and indeed existence, of cases of blameless wrongdoing.

[8] The excusatory duress component of Husak's case, while a necessary feature of its status as an overdetermination case, is, of course, a contingent feature in general: Not all, indeed few, instances of self-defense are instances of duress.

[9] We are assuming, recall, if conduct is not wrongful, it is not blameworthy. However, as this duress defense is, ex hypothesi, being run independently of the self-defense justification, the resultant finding that the defendant is excused from blame is non-trivial. Indeed, the point generalizes: We may often wish, or need, to assess conduct for excusedness independently of an assessment of its wrongfulness.

successful duress defenses will excuse the defendant from blame for wrongful conduct.[10]

Objection: My account is hostage to the characterization, and availability, of certain defenses. Suppose, for example, we characterize necessity as a *justification*. Now suppose that a seaman throws marijuana overboard in order to avoid capsizing, and that he claims to be justified on the basis of necessity when he is later charged with importing a controlled substance. What *excuse* is available to the seaman? Arguably, given these two suppositions and given current characterizations of defenses, no extant excuse is available. Reply: If necessity *indeed justifies* the seaman's action, our revised account will have necessity *itself* playing a complementary excusatory role. My account is, thus, flexible with respect to defense characterizations: We can allow that necessity is a justification consistently with no *distinct* extant excuse being available.[11] And answering this objection prompts a brief reflection on a point of method. Our starting point was a working set of definitions of justifications and excuses, pitched at a *general* level. We then considered Husak's overdetermination case – a thought-experiment which contained fairly uncontroversial classifications of a specific justification (self-defense) and a specific excuse (duress). And *specific* justifications and excuses are what criminal law practice trades in. Husak's case prompted conceptual revision of the relationship between justifications and excuses at a general level (cf. my coming consideration of etiquette). Finally, revision at a general level fed back into the theoretical operation of the criminal law: Specific justifications come to play a dual role of justifying *and excusing* conduct. Overall, as I see things, conceptual revision at a general level, while here prompted by reflection on extant characterizations of specific defenses, ought not to be rigidly bound thereby. At the same time, conceptual revision at a general level ought not to do thoroughgoing violence to extant characterizations of specific defenses. One might think of this method as endeavoring to reach a form of *reflective equilibrium* between the general and the specific in this domain.

2.2 I take it the foregoing solution to the overdetermination problem has not been adopted principally for fear of overinclusiveness of the resulting concept of excuse. But any such concern would be misplaced. As Husak (293) himself points out, one may aptly request an excuse – the aptness of such a request constituting prima facie evidence for the truth-conditions of the general category of an excuse – if one sneezes or coughs in public, yet there is no suggestion that one *must*[12] have thereby

[10] The justificatory self-defense component of Husak's case, while a necessary feature of its status as an overdetermination case, is, of course, a contingent feature in general: Not all, indeed few, instances of duress are instances of self-defense.

[11] The flexibility of my account is not boundless: We cannot allow both that necessity is a justification and that it fails to play a complementary excusatory role. But, if my account is right, such inflexibility is no loss.

[12] In sneezing or coughing around other people, one *may* have disturbed them and/or exposed them to the non-negligible chance of getting sick. But this need not be the case. Consistently with all this, one could allow that sneezing *without an excuse* is wrong, as it

committed a wrong.[13] (Of course, if the standard view is correct, and if one has not done anything wrong in sneezing or coughing, then it follows that one is mistaken in thinking that one may aptly ask for an excuse. But one person's *modus ponens* is another's *modus tollens*. I suggest we reason from aptly requesting an excuse in such circumstances, combined with the assumption that one has not done anything wrong, to coming to have reason to doubt the standard view.) Moreover – to counter fear of over-inclusiveness – in the domain of the criminal law one will only need to invoke an excuse in the event of a suggestion of the wrongfulness of one's conduct.

3. Practical Upshot(s)

My proposal about the relationship between justifications and excuses is, at root, a conceptual one. Ultimately its success will hang on how well it does in capturing those two concepts and situating them within their neighboring conceptual terrain – a task I have endeavored to begin in this note. Nonetheless, we might expect conceptual revision in this area of philosophy to have practical upshots. Let me, thus, explicitly note one concrete normative upshot – there are doubtless more – of my proposal for criminal procedure.[14] Husak (298, n.52) points out:

> Courts and commentators have long debated whether and under what circumstances two defenses are actually inconsistent. See the confusing discussion in *Henderson v. US* 237 F2d 169, 172 (1956), in which allegedly inconsistent defenses are said to be "permitted or not permitted ... depend[ing] upon the degree of inconsistency" – as though inconsistency could admit of degrees.

On our revised account, there would be no inconsistency, at a *conceptual* level,[15] in simultaneously running a justification and an excuse defense. Resultantly, no question of the impermissibility of running such defenses on account of their inconsistency could arise. Put differently, no positive reasons – e.g. fairness to defendants (cf. Husak 299-300) – need be invoked to render the running of such defenses permissible. Moreover, there would be no need to run such defenses in the alternative. Indeed recognition that, not only are justifications and excuses not mutually ex-

violates the rules of etiquette. But, in allowing this, it would not be the sneezing *per se* that constitutes the wrongness. Finally, we should recall (cf. n.2 *supra*) that by "wrong" we mean "ultima facie wrong."

[13] Thus, for example, my waking up in the morning will, suppose, count as excused conduct. (Likewise for non-conduct, such as my believing that I have hands.) To be sure, a *claim* to excusedness will *often* be odd in the absence of any suggestion of wrongfulness; but, again, that oddness is best explained pragmatically (e.g. on grounds of relevance), rather than semantically (cf. n.1 *supra*).

[14] To be sure, the coming upshot does not *principally* concern the "realit[y] of criminal practice" (Husak 299) – on which, standardly, a defendant may simultaneously plead a justification and an excuse defense – but rather *principally* concerns the *justification* of that reality (though cf. my coming point about running defenses in the alternative).

[15] Here, and in what follows, I stipulate away the possibility of inconsistencies at a *factual* level, with respect to the details of any particular defendant's defense case.

clusive, but that, additionally, justifications entail excuses, can only serve to bolster this concrete normative upshot.[16]

Mark McBride
Oxford University
Faculty of Philosophy
mark.mcbride@philosophy.ox.ac.uk

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