

CULPABILITY IN CREATING THE CHOICE OF EVILS

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ABSTRACT

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

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INTRODUCTION

Can an actor justify criminal conduct when he was criminally culpable in creating the conditions making it necessary? Virtually every American jurisdiction answers that he cannot and bars the necessity defense under those circumstances. Whereas many scholars have condemned that response, this Article takes the very different view that criminal “created culpability”¹ is circumstantial data that bears crucially on the criminal law’s retributivist function—that wrongful conduct deserves punishment, not praise—and its inverse relationship to justification. Failing to account for criminal created culpability renders the concept of justification itself defective because it ignores precisely what is at the heart of any plausible theory of justification: that under certain circumstances an otherwise criminal act is not wrongful and should not be punished.²

Consider the following case. A couple goes out for a night on the town. After stops at several bars and many drinks, they return to his home. What happens next is unclear. Jane claims that Joe broke off the side of a beer bottle and began to lunge mockingly at her with the jagged end. Joe enjoyed scaring her when he got drunk and would often swipe at

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

2. “Culpability” and “wrongfulness” are often used technically in the criminal law literature to describe, respectively, the actor’s state of mind and the nature of the act. Some excuse defenses, for example, “exclude from criminal culpability those who are unable to appreciate the wrongfulness of their acts,” even if others who acted in the same way—that is, wrongfully—would not be so excluded. Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 38 (2007). The questions of created culpability that are explored in this Article, however, generally assume that some *mens rea* requirement has been satisfied and focus both on that mental state and the nature of the act that gives rise to the necessity.

her with broken bottles and other dangerous items—scissors, a razor blade, a kitchen knife. Sometimes, after a night of drinking, Joe would beat her as well. Jane firmly believes that when Joe chased her with a sharp object, he never intended to injure her; he just took pleasure in her fear. On this occasion, however, Jane claims that Joe stabbed her in the head with the bottle. Joe claims that he accidentally bumped Jane, causing her to fall and hit her head on the corner of a glass table. What is certain is that Jane now has a head wound that is bleeding profusely. Joe applies pressure to it but the bleeding continues. Joe has no land-line telephone and cannot find either of their cellular phones. He runs to a neighbor's house for help, but to no avail. Jane is now soaked in blood. Joe carries her to his car and drives to the hospital. Joe is subsequently arrested for assault and battery and driving under the influence of alcohol. At trial, Joe's only defense to the DUI charge is necessity—that he was faced with a “choice of evils”³ and had to drive drunk to save Jane's life—and the court must decide what effect Joe's criminal created culpability (which he disputes) should have on the availability of the defense.⁴

With the exception of Professor Paul Robinson's seminal article more than twenty years ago,⁵ the problem of created culpability has received almost no scholarly attention,⁶ though scholars generally follow Robinson's view that it should almost never bar the defense.⁷ This neglect in the literature is particularly surprising in light of the fact that many American jurisdictions disagree, barring the defense when the actor was at all culpa-

3. The phrase “choice of evils” has a distinguished pedigree as the name for the necessity—or general justification—defense at common law. See Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1527 n.1 (2005) (collecting sources that use the phrase).

4. These facts and issues are drawn with some adjustments from an appeal that I argued before the Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court, as a Middlesex Special Assistant District Attorney in Cambridge, Massachusetts. See *Commonwealth v. Kendall*, 883 N.E.2d 269 (Mass. 2008); *Commonwealth v. Kendall*, No. 06-P-1569, 2007 WL 1437697 (Mass. Ct. App. July 25, 2007) (unpublished opinion). The views expressed in this Article are mine alone and do not represent the position of the Middlesex District Attorney's Office.

5. Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985). This Article considers Professor Robinson's claims in some detail and argues for a different approach.

6. Oblique treatments of the problem, as either a necessity defense question or one about criminal law generally, appear in: Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1341–42 (1989); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1413–14 (2003); Stephen P. Garvey, *What's Wrong With Involuntary Manslaughter*, 85 TEX. L. REV. 333, 354 (2006) [hereinafter Garvey, *Involuntary Manslaughter*]; Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1709–10 (2005); Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2442–43 (2007); David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2387–89 (1992); William Wilson, *Impaired Voluntariness: The Variable Standards*, 6 BUFF. CRIM. L. REV. 1011, 1030–31 (2003).

7. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 798 (1978); 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 123(d)(1) (1984); STANLEY M.H. YEO, *COMPULSION IN THE CRIMINAL LAW* 166 (1990); Robinson, *supra* note 5, at 31–32.

ble in creating the necessity.⁸ The Model Penal Code gives an intermediate answer:

When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils . . . the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.⁹

The Code does not state specifically that the necessity defense is unavailable where created culpability was purposeful or knowing.¹⁰ Yet in order to avoid the anomaly that a person who purposely or knowingly creates a necessitous condition will always receive the defense, while a person who does so negligently will not,¹¹ the Code is best interpreted as barring the defense when the defendant acted with the culpability required by the underlying offense—that is, when the degree of created culpability and that of the underlying offense match.¹² Like the Code, no jurisdiction that has addressed the question permits the necessity defense in cases of purposeful created culpability.¹³

But one must surely wonder why. Suppose that Joe, after having intentionally beaten or stabbed Jane, realizes what he has done (perhaps he feels remorseful, but not necessarily) and must choose between driving her to the hospital while intoxicated and watching her die. A powerful case could be made that it should not matter that he was culpable, whether purposely or otherwise, in creating the necessity. The issue is not merely one of providing incentives for Joe to assist Jane, which, in any case, may be in his best interest lest he be charged with a crime of omission.¹⁴ If the

8. See *infra* Part III.

9. MODEL PENAL CODE § 3.02(2) (1985).

10. The commentary explains that the Code's approach "precludes conviction of a purposeful offense when the actor's culpability inheres in recklessness or negligence, while sanctioning conviction for a crime for which that level of culpability is otherwise sufficient to convict." MODEL PENAL CODE § 3.02 cmt. 2 (1985). Presumably, "that level of culpability" refers to negligence or recklessness, not purpose. See *id.*

11. See 2 ROBINSON, *supra* note 7, § 123(c)(3).

12. WAYNE R. LAFAVE, CRIMINAL LAW 534 (4th ed. 2003) ("Thus, if he intentionally brings on the situation, he may be guilty of a crime of intention; if he was reckless, of a crime of recklessness; if negligent, of a crime of negligence."). But see YEO, *supra* note 7, at 187 (arguing that in the case of intentional created culpability, the Code is better interpreted as barring the defense for a reckless or negligent offense, but not for an intentional offense).

13. See *infra* notes Part II (survey of state approaches); see also Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 242 (2007) ("All states exclude the necessity defense when the actor's wrongdoing brought about the claimed necessity, though they differ in how they formulate this restriction."). Professor Hoffheimer's statement is not quite precise because a number of jurisdictions have not considered the question at all, and a number of others only exclude the defense for certain types of created culpability. See *infra* Part II.

14. See MODEL PENAL CODE § 2.01(1), (3) (1985) (providing that liability for an offense may be

necessity defense is unavailable in cases of created culpability, it appears that Joe is penalized for “doing the right thing”—that is, choosing to save Jane by driving drunk. If Joe drives to the hospital, should he not be entitled to the necessity defense?¹⁵

This Article argues that under certain circumstances defendants such as Joe should not receive the defense. It explains and defends the nearly universal intuition that the necessity defense should be barred in cases where the actor was consciously and criminally culpable (that is, when he acted purposely, knowingly, or recklessly) with respect to engaging in the conduct that directly caused¹⁶ the necessity.¹⁷ Barring the necessity defense in such cases reflects a sound check on what would otherwise be a coarser consequentialist calculus of balancing social harms to achieve maximum social welfare.¹⁸ The created culpability bar complicates—beneficially—the assessment of whether an actor is justified in breaking the law by introducing a crucial component of desert that gives the justification inquiry greater texture and a wider compass of the relevant circumstances.¹⁹ And yet, as useful as this retributivist check²⁰ is in providing a richer contextual analysis, it should not invariably trump all other considerations. Specifically, this Article claims that the defendant’s purpose, knowledge, or recklessness in engaging in conduct that directly causes a choice of evils should create a rebuttable presumption that the defendant is barred from asserting the necessity defense. That presumption could be overcome if the defendant offered some evidence that: (1) he did not purposely, knowingly, or recklessly engage in criminal conduct that directly caused the necessity; or (2) his purposeful, knowing, or reckless criminal conduct did not directly cause the necessity; or (3) the evil that he avoided clearly and

based on conduct that includes an omission to perform an act of which one is physically capable, if the omission is expressly made sufficient for liability by the law defining the offense); *see also* Commonwealth v. Levesque, 766 N.E.2d 50, 57 (Mass. 2002) (“Where a defendant’s failure to exercise reasonable care to prevent the risk he created is reckless and results in death, the defendant can be convicted of involuntary manslaughter. Public policy requires that ‘one who creates, by his own conduct . . . a grave risk of death or injury to others has a duty and obligation to alleviate the danger.’” (quoting *People v. Kazmarick*, 417 N.Y.S.2d 671 (N.Y. County Ct. 1979) (alteration in original))).

15. *See* Robinson, *supra* note 5, at 27 (“Where a forest fire has been set, for whatever reason, society wants any and all persons to set a firebreak and save a threatened town.”). The question in the text assumes that Joe can satisfy the other requirements of the defense in the jurisdiction in which he is charged.

16. The problem of causation is discussed *infra* Part III.C.

17. *See infra* Part III.

18. John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 404–14 (1999).

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

20. The created culpability bar might be explained, at least in part, on the consequentialist ground that the law should impose criminal liability only to punish deterrable conduct. Hoffheimer, *supra* note 13, at 242. The deterrence rationale for created culpability is discussed *infra* Part IV.B.

substantially outweighed the evil that he chose. If the defendant could meet the burden of production to rebut the presumption on any of these three grounds, it would become the government's burden of persuasion to prove beyond a reasonable doubt that the defendant's conduct was not justified.

This Article begins in Part I by arguing that the intuition that created culpability should bar the necessity defense has intellectual roots in the traditional, though now largely defunct, rule that an actor was entitled to the defense only if the cause of the necessity was divine or natural.²¹ In Part II, the Article surveys the approaches to created culpability that have been adopted by various American jurisdictions and the arguments that have been proffered for the created culpability bar. Part III examines Professor Robinson's influential article on created culpability in detail,²² criticizing his approach and discussing possible justifications for a bar in cases of created culpability. The Article argues that, as to purposeful, knowing, and reckless created culpability, the bar is best explained as a retributivist limitation—but not an absolute one—on what would otherwise be a less sophisticated exercise in balancing harms. Using the case of Joe and Jane, the Article outlines and defends a rebuttable-presumption procedure that ensures that the retributivist concerns applicable to created culpability are weighed appropriately. The Article then briefly considers in Part IV how the approach that it advocates for general justification would apply to the excuse of duress. It argues that the relevance of created culpability in cases of duress is a point of conceptual overlap between justifications and excuses that may have important implications for how we think about these two types of defenses.²³ The Article concludes that whether or not its specific solution to the problem of created culpability is accepted, any adequate approach to the necessity defense must account, as none of the scholarship to date has, for the powerful retributivist intuition that culpably created conduct is not justified.

I. CREATED CULPABILITY AND THE DIVINE/NATURAL CAUSATION RULE

The concerns that animate the necessity defense itself are ancient—"responsive," as Kent Greenawalt has observed, "to Aristotle's observation that about some matters the law cannot speak both universally and correctly."²⁴ The exclusion of the defense in cases of created culpability

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

22. Robinson, *supra* note 5.

23. Duress is paradigmatically an excuse, though there is limited disagreement on this point. *See* FLETCHER, *supra* note 7, at 829–33; Dressler, *supra* note 6, at 1349–67 (considering arguments for classifying duress as a justification or an excuse, and finding the latter more convincing). *But see* Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833 (2003).

24. Kent Greenawalt, *Conflicts of Law and Morality—Institutions of Amelioration*, 67 VA. L.

has deep intellectual roots as well. An early suggestion that the necessity defense should be unavailable in cases of created culpability can be inferred negatively from the historic requirement that in order for the defense to apply, the cause of the necessity must have been natural or divine, not man-made.²⁵ The distinctions drawn by Sir Francis Bacon in explaining his fifth common law maxim, *necessitas inducit privilegium quoad iura privata*,²⁶ contemplate that a necessity might arise from an act of God and that a person would be justified in breaking the law in such cases.²⁷ While it is generally true that the necessity defense may be invoked today even when the cause was not natural but man-made,²⁸ some states continue to require that a necessity arise naturally in order for the defense to obtain.²⁹

The divine/natural causation limitation on the necessity defense has been dismissed as an accident of history with no conceivable substantive merit,³⁰ but that assessment is overly hasty. When Bacon writes, “The law chargeth no man with default where his act is compulsorie, and not voluntary, and where there is not a consent and election,”³¹ one can distinguish two very different rationales for the rule about divine or natural causation.

First, the necessity caused by a divine or natural act is putatively irresistible by a human being. In such cases, it is unfair to punish a person for that which God or nature compelled her to do involuntarily.³² Professor Michael Hoffheimer, following the utilitarian criminal law scholar Glan-

REV. 177, 187 (1981) (“[H]owever many specific justifications are provided, occasions will remain when application of a general rule of criminal liability will yield inappropriate results.” (citing ARISTOTLE, *ETHICA NICHOMACHEA* bk. X, pt. 9 (W. Ross trans., 1925))); *see also* MARK C. MURPHY, *PHILOSOPHY OF LAW: THE FUNDAMENTALS* 134–35 (2007) (“[R]ules are always coarse-grained, and lawmakers would have a very difficult time writing into them all of the exceptions to them that they think justified and moreover, even if they were able to manage the task, the resulting rule would probably be so cumbersome that it would not be very helpful for day-to-day living.”).

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

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

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

28. Martin, *supra* note 3, at 1534–35.

29. *See* WIS. STAT. ANN. § 939.47 (West 2005) (limiting the defense to actions in response to the “[p]ressure of natural physical forces”); *see also infra* notes 59–101 and accompanying text for other states’ approaches.

30. *See* 2 ROBINSON, *supra* note 7, § 124(e), at 55.

31. BACON, *supra* note 26, at 29.

32. Compulsion is an element of excuses such as duress or insanity, *see* FLETCHER, *supra* note 7, at 802–07, but the inquiry here and in the following paragraph is about its effect on a claim of justified action.

ville Williams,³³ has recently criticized this “compulsion” rationale for the necessity defense as an outdated relic that “lack[s] substantial authority in the twentieth century”³⁴ The objection is highly persuasive insofar as it questions a limitation on the compulsion rationale to cases in which the necessity was created *exclusively* by a divine or natural cause. Bacon himself recognized that a compulsion justification might arise where the necessity was created either “by act of God or of a stranger,” and he grouped these two possibilities within a single conceptual category of necessity.³⁵ And, in fact, the nature and power of the compulsion—assuming only for the moment that it is compulsion—is no different whether an actor creates a firebreak by burning another person’s property to stop a fire started by an arsonist or does so in response to a fire caused by a bolt of lightning.³⁶

Hoffheimer’s skepticism about the compulsion rationale does not exhaust the criticisms that might be made of it. Whether it makes sense to speak of compulsion at all is questionable where one action is *voluntarily* chosen from two or more actions that were available. Setting aside the situation in which an action is performed either by reflex or entirely involuntarily,³⁷ true compulsion, in the sense of the inability to choose any course of action except one, arises comparatively infrequently in the pure necessity defense context.³⁸ If the sole criterion for asserting the necessity

33. *E.g.*, GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 178, at 587 (1953); GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1957).

34. Hoffheimer, *supra* note 13, at 241.

35. BACON, *supra* note 26, at 29, 31 (“The third necessitie is of the act of God, or of a stranger, as if I bee particular tenant for yeares of a house, and it be overthrowne by grand tempest, or thunder and lightning, or by sudden floods, or by invasion of enemies . . . [i]n all these cases, I am excused in wast.”).

36. *See* MODEL PENAL CODE § 3.02 cmt. 3 (1985) (“A claim of justification is possible when an actor responds to human threats of harm.”).

37. *See* MODEL PENAL CODE § 2.01(2) (1985) (providing that a reflex or convulsion, among other conduct, is not voluntary). “[I]f either there bee an impossibility for a man to doe otherwise, or so great a perturbation of the judgement and reason as in presumption of law mans nature cannot overcome, such necessity carrieth a priviledge in itself.” BACON, *supra* note 26, at 29. An action might be involuntary in this way if a person were physically forced to do something or mentally incapable of making a voluntary decision.

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

One common example of powerful compulsion is the prisoner who escapes from a burning prison, a situation commonly thought to constitute a necessity. *See, e.g.*, *United States v. Kirby*, 74 U.S. 482, 487 (1868) (“[H]e is not to be hanged because he would not stay to be burnt.”). On the other hand, escape from prison in response to threats of violence is not always deemed compelled; whether the necessity defense is available in such cases often depends upon the defendant’s ability to satisfy other constraints on the necessity defense, such as the common requirements that the harm be imminent and that the defendant have availed himself of other reasonable, legal alternatives. *See, e.g.*, *United States v. Bailey*, 444 U.S. 394, 417 (1980) (jail escape in response to threats of violence was not “compelled”); *People v. Condley*, 138 Cal. Rptr. 515, 522 (Cal. Ct. App. 1977) (“While absolute necessity caused by forces of nature (e.g., storms, fire, earthquake, etc.) may . . . justify the escape . . . necessity [occasioned by threats of violence] . . . generally does not have such an effect.”);

defense is compulsion, homeless people who have no choice but to sleep in public areas presumably should have the defense against prosecution for violating a law against sleeping in public areas (they must sleep, and they have nowhere else to sleep).³⁹ The instinct to save one's life in self-defense is another similarly compelling example. Under such circumstances it is, as the Swiss natural lawyer Jean-Jacques Burlamaqui long ago observed, as if one is compelled to do what "Nature" demands.⁴⁰

But in most cases in which the necessity defense, as opposed to an excuse such as duress, is a live option, there will have been reasons for action and countervailing reasons that are weighed against the former in deciding on a course of conduct.⁴¹ Thus Blackstone distinguished a particular sub-type of necessity as altogether different from the compulsion sub-type:

There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection And that is, when a man has his choice of two evils set before him, and being under a necessity of chusing one, he chuses the least pernicious of the two.⁴²

People v. Lovercamp, 118 Cal. Rptr. 110, 116 (Cal. Ct. App. 1974) (severely limiting the necessity defense in cases of prison escapes in response to threats of violence).

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

40. JEAN-JACQUES BURLAMAQUI, 2 PRINCIPES DU DROIT DE LA NATURE ET DES GENS 377 (M. Dupin ed., 1820) (1747), available at <http://gallica.bnf.fr/ark:/12148/bpt6k93574g/f385.table>:

L'homme ne peut, quand même il le voudrait, se soustraire à une obligation si essentielle, ni fermer l'oreille à cette voix de la nature. . . . [C]haque individu doit préférer sa propre conservation à celle d'autrui, parce que Dieu lui en a confié le soin, et que chaque individu rendra compte du depot qui lui a été remis par le Souverain dispensateur.

Editor's note: This portion of Burlamaqui's work has not been published in an English translation. The author's translation of the passage is as follows:

Much as he might like to, man can neither withdraw himself from such an essential obligation, nor close his ear to the voice of nature. . . . Every individual must prefer his own preservation to that of others, because God has conferred onto him the care [of his own self], and each individual will give an accounting of the deposit which the Sovereign dispenser has placed in him.

For brief discussions of Burlamaqui's understanding of the natural right of self-defense, and of its influence on early Americans, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 922-23 & n.47 (1993), and David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 93-96 (2007). For Burlamaqui's more general influence, see BENJAMIN FLETCHER WRIGHT, JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 8 (1962).

41. Sir James Fitzjames Stephen, for example, recognized as much when he listed, among others, two separate categories of exception to the criminal law—one for compulsion and the following for necessity. JAMES FITZJAMES STEPHEN, *A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENTS)* 23-24 (4th ed. MacMillan & Co. 1887) (1877), available at <http://www.lareau-law.ca/Digest1.pdf>.

42. 4 BLACKSTONE, *supra* note 25, at *29-30. Blackstone writes that "reason" prevails upon the mind in such circumstances, so that the will is not exactly free. *Id.* Yet even he acknowledges that this is a kind of compulsion that is conceptually separable from the more usual "actual" compulsion. *Id.*

Professor George Fletcher, in discussing the relationship between excuses and voluntariness, distinguishes between “physical” and “moral or normative” compulsion,⁴³ and several cases and commentators speak of “moral compulsion” as sufficient grounds for asserting the necessity defense.⁴⁴ One might point out that necessity is a justification, not an excuse, and therefore is concerned solely with the “rightness” of an act, not the actor’s accountability (because of compulsion or otherwise) for a concededly wrongful act.⁴⁵ But so far as the degree of moral compulsion affects one’s choice among a group of possible “evil” actions, “[t]he assessment of voluntariness in the normative sense depends in a curious way on the competing interests as in cases of justification.”⁴⁶ Whatever the cause—divine, natural, or man-made—of a fire, it is at best awkward to say that the person who creates the illegal firebreak has been morally compelled by circumstances to do so. It would be truer to say that the actor considered the factors in favor of and against creating the illegal firebreak—some of which may have been especially influential or powerful, for moral, personal, or other reasons—and came to a voluntary decision about a course of action.⁴⁷ Likewise, to say that a physician ought to be entitled to the necessity defense if she “felt compelled” to “risk[] the patient’s life” by giving the patient palliative care that would almost certainly result in the patient’s death⁴⁸ reflects an untenably strained—even misleading—understanding of compulsion.⁴⁹

43. FLETCHER, *supra* note 7, at 802–07.

44. This is especially common where the necessity defense is sought in cases of civil disobedience. *E.g.*, *United States v. Dougherty*, 473 F.2d 1113, 1120–21 (D.C. Cir. 1972) (trial court declined to give necessity defense instruction where defendants argued that they were acting on moral compulsion to vandalize and deface private property as part of protest over the Vietnam War); Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1200 (1987) (arguing that where an actor has a moral compulsion to act, she should be entitled to the necessity defense).

45. FLETCHER, *supra* note 7, at 759.

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

47. The question of the voluntariness of a choice is also not the same as the question of the legality of that choice. For a confusion of these two questions, see *United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995) (“The defense of necessity does not arise from a ‘choice’ of several courses of action It can be asserted only by a defendant who was confronted with . . . a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts.” (quoting *United States v. Seward*, 687 F.2d 1270, 1276 (10th Cir. 1982))) (citation omitted) (alteration in original).

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

49. See Derrick Augustus Carter, *Knight in the Duel with Death: Physician Assisted Suicide and the Medical Necessity Defense*, 41 VILL. L. REV. 663, 700–01 (1996) (arguing implausibly that both duress and necessity contain “a commonality of compulsion that would force a suicide-assisting physician to violate the law”).

The second possible rationale for the rule about divine or natural causation depends on the question of culpability. An actor is without blame for a necessity caused by a divine, natural, or third-party act; conversely, it is appropriate to ascribe a measure of blame, though not necessarily to bar the defense, when the actor is himself the cause of the necessity. Hobbes, for example, does ascribe blame in cases of created culpability where the circumstances might otherwise call for a defense of duress, though he does not say explicitly whether created culpability ought to bar the defense altogether:

Where a man is captive, or in the power of the enemy (and he is then in the power of the enemy, when his person, or his means of living, is so,) *if it be without his own fault*, the Obligation of the Law ceaseth; because he must obey the enemy, or dye; and consequently such obedience is no Crime⁵⁰

Blackstone, likewise, indicates that homicide may be justified if it is the result of an “unavoidable necessity” and is undertaken “without any will, intention, or desire, and without any inadvertence or negligence, in the party killing, and therefore without any shadow of blame.”⁵¹ Burlamaqui, by contrast, recognizes that some writers believe that fault is a limiting criterion, but argues that fault is irrelevant because we ought to feel compassion for the victim of necessity, whatever his degree of fault.⁵² Bacon’s position may be the most extreme, as he expressly advocates a rule that the actor who culpably creates any kind of necessity is never entitled to the defense:

50. THOMAS HOBBS, *LEVIATHAN* 345 (C.B. MacPherson ed., Penguin Books 1968) (1651) (emphasis added). In speaking of such a situation as “no Crime,” it seems that Hobbes might favor a general justification defense rather than a duress defense, but this is of course entirely speculative.

51. 4 BLACKSTONE, *supra* note 25, at *178. Blackstone’s example here is the state’s imposition of the death penalty where “the execution of public justice” requires a public official “to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country.” *Id.*

52. BURLAMAQUI, *supra* note 40, at 379–80:

Quelques auteurs exigent . . . qu’il n’y ait pas de la faute de celui qui court risque de périr [Cette condition] ne doit pas non plus être prise à la rigueur, comme si elle était toujours nécessaire; car supposé qu’un homme ait été prodigue ou négligent dans ses affaires, faudra-t-il pour cela le laisser mourir de faim? Ne devons-nous notre compassion qu’à ceux qui n’ont point contribué à leur misère?

Editor’s note: This portion of Burlamaqui’s work has not been published in an English translation. The author’s translation of the passage is as follows:

Some authors require . . . that he who risks death must not be at all at fault [This condition] ought not be taken rigorously, as if it were always necessary; for suppose that a man has been prodigal or negligent in his affairs, ought one let him starve to death on that account? Don’t we owe our compassion to more than only those who have not contributed at all to their misery?

This [necessity] rule admitteth an exception when the Law doth intend some fault or wrong in the partie that hath brought himselfe into the necessitie: so that is *necessitas culpabilis*. This I take to bee the chiefe reason, why *seipsum defendendo* is not [a] matter of Justification, because the Law intends it hath a commencement upon an unlawfull cause⁵³

Whether or not Bacon's absolute bar on the necessity defense in all cases of created culpability is warranted,⁵⁴ it is sufficient for the moment to note that the culpability rationale for the divine or natural causation rule differs considerably from the compulsion rationale. The compulsion rationale focuses on the necessity's overweening physical or psychological effect on the actor; the point is that natural and divine acts, and the necessities that they cause, overpower an individual's capacity for voluntary choice—a person cannot help but conform to “natural” necessity. The culpability rationale concerns the nature of the actor's role in creating the necessity, which is a moot inquiry where God or nature created it and implicates none of the same psychological or physical effects. The difference is temporal as well. The emphasis in the compulsion rationale is on the defendant's state of mind at the time that he was compelled to break the law—the moment of necessitous choice. In the culpability rationale, the relevant timeframe is expanded to include the defendant's culpability for acts and circumstances preceding the necessitous act and their relationship with the lawbreaking conduct.

The two rationales do overlap, however, because the question of blameworthiness, like the question of compulsion, is connected with that of voluntariness: generally, blame is only appropriate where one's conduct *includes* a voluntary act, not where an action is involuntary in the strict sense discussed above.⁵⁵ And the idea that only conduct that includes a voluntary act can be culpable presents the question of what is an appropriately “inclusive” context in assessing culpability.⁵⁶ Notwithstanding this overlap, however, Professor Hoffheimer is in error when he argues that

53. BACON, *supra* note 26, at 33. George Fletcher explains:

From roughly the thirteenth to the sixteenth century, the only form of self-defense recognized at common law was *se defendendo*, which came into consideration whenever a fight broke out and one party retreated as far as he could go before resorting to defensive force. If he then killed the aggressor, *se defendendo* had the effect of saving the defendant from execution, but it left in tact the other stigmatizing effects of the criminal law Killing *se defendendo* was called excusable homicide, for though the wrong of homicide had occurred, the circumstances generated a personal excuse that saved the manslayer from execution.

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

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

55. See MODEL PENAL CODE § 2.01(1) (1985).

56. See Husak, *supra* note 6, at 2442–43 (“Many culpability-in-causing cases invoke a sense of ‘includes’ that is neither temporal nor spatial.”).

“[t]he requirement that the actor be free from fault can be understood as a variant of the older requirement that necessity is compelled by external physical or natural forces.”⁵⁷ Compulsion and blame are conceptually distinct rationales for the rule requiring divine or natural causation. And even after the rejection in most jurisdictions of the requirement that the necessity defense could only apply in cases of divine or natural causation, the culpability rationale remained a highly salient and widely adopted limitation on the defense.⁵⁸

The cogency of the culpability rationale for the created culpability bar is examined in detail in Part III, but to understand its practical importance it will be helpful first to survey the range of current state and federal approaches to the question of created culpability.

II. CURRENT APPROACHES TO CREATED CULPABILITY

No jurisdiction that has considered the question of created culpability permits the necessity defense in cases where the actor purposely and culpably created the necessity. Those jurisdictions that have addressed the question often follow, with some modification, the New York Penal Law approach, which (like Francis Bacon) bars the defense whenever the actor was in any way at fault for “occasion[ing] or develop[ing]” the necessity.⁵⁹ Other jurisdictions follow the Model Penal Code,⁶⁰ but a fair number have not spoken on the question at all, and some have adopted conflicting approaches within the same jurisdiction. This part surveys the various state and federal approaches with respect to created culpability and the rationales offered in their support.

While most U.S. state jurisdictions recognize some variety of the necessity defense,⁶¹ a surprisingly high number impose the most rigorous

57. Hoffheimer, *supra* note 13, at 242.

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

59. N.Y. PENAL LAW § 35.05(2), at 513 (McKinney 2004) (“[C]onduct which would otherwise constitute an offense is justifiable and not criminal when . . . 2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor.”).

60. See *supra* note 9 and accompanying text.

61. Professor Martin’s claim that “[e]very American jurisdiction, without exception, has adopted the necessity defense in its criminal jurisprudence,” is mistaken. See Martin, *supra* note 3, at 1535. Kansas has not. See *City of Wichita v. Tilson*, 855 P.2d 911, 918 (Kan. 1993) (declining to recognize the defense); *City of Wichita v. Holick*, No. 95,240, 2007 WL 518988, at *7 (Kan. Ct. App. Feb. 16, 2007) (“In *Tilson*, our Supreme Court stated: ‘Whether the necessity defense should be adopted or recognized in Kansas may best be left for another day.’ Fourteen years later, that day has not yet dawned.”) (citations omitted). North Dakota also has not. *State v. Manning*, 716 N.W.2d 466, 468 (N.D. 2006) (court declined to address whether necessity defense is recognized in North Dakota). West Virginia recognizes duress, but not necessity. Compare *State v. Tanner*, 301 S.E.2d 160, 163 (W. Va. 1982) (duress), with *State v. Poling*, 531 S.E.2d 678, 684 (W. Va. 2000) (rejecting necessity defense). While Michigan does have the defense (as well as a “necessity” defense for duress), it only

type of bar, excluding the defense when the actor played merely *any role* in the creation of the necessity, or substantially contributed to its creation. Colorado requires that the actor not have engaged in *any conduct* giving rise to the necessity, which would certainly include actors who culpably created it.⁶² Puerto Rico bars the defense if the actor “provoked” the necessity,⁶³ and California’s common law defense requires that the defendant prove by a preponderance of the evidence that he “did not substantially contribute to the creation of the emergency.”⁶⁴ Texas’s necessity statute, notwithstanding its lack of any created culpability provision, has likewise been interpreted by courts to bar the defense when an actor “provokes the difficulty, or is responsible for having placed himself in the position from which he attempts to extricate himself from committing a criminal offense.”⁶⁵ Finally, Wisconsin, which has also codified the defense, continues to follow the natural causation requirement, which presumptively bars the defense in any case where human conduct created it.⁶⁶ For reasons explained both by the Commentary to the Model Penal Code and Professor Robinson, however, the no-conduct or any-provocation limitation is clearly inappropriate.⁶⁷

applies to particular offenses. *See* *People v. Walker*, 422 N.W.2d 8, 10 (Mich. Ct. App. 1988) (“innocent possession” of a weapon), *overruled on other grounds by* *People v. Mitchell*, 575 N.W.2d 283 (Mich. 1998). Nevada’s necessity-defense case law only applies to the special case of prison escape. *See Jorgensen v. State*, 688 P.2d 308, 309 (Nev. 1984). And while South Dakota has a necessity defense in name, it is in practice exclusively applicable to situations of duress. *See State v. Duchenaux*, 671 N.W.2d 841, 844 (S.D. 2003) (requiring that in order for the defense to apply, the actor must have a fear of death or bodily harm so imminent that a reasonable person in his situation would have been unable to resist). Finally, it remains an “open question whether federal courts ever have authority to recognize a necessity defense not provided by statute,” *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 490 (2001), though a number of federal appeals courts have recognized a limited non-statutory version of the defense for a federal cause of action. *See, e.g., United States v. White*, 552 F.3d 240, 247 (2d Cir. 2009); *United States v. Maxwell*, 254 F.3d 21, 27 (1st Cir. 2001). *See generally* Stephen S. Schwartz, Note, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259 (2008).

62. COLO. REV. STAT. ANN. § 18-1-702 (West 2004). Idaho imposes the same rule at common law. *State v. Tadlock*, 34 P.3d 1096, 1097 (Idaho Ct. App. 2001) (requiring that the “circumstances which necessitate the illegal act must not have been brought about by the defendant”).

63. P.R. LAWS ANN. tit. 33, § 3096 (2001).

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

65. *Leach v. State*, 726 S.W.2d 598, 600 (Tex. Ct. App. 1987); *see also* TEX. PENAL CODE ANN. § 9.22 (Vernon 2003); *Ford v. State*, 112 S.W.3d 788, 794 (Tex. Ct. App. 2003). Montana also bars the defense where the actor created the necessitous situation, even if without criminal culpability. *State v. Nelson*, 36 P.3d. 405, 407 (Mont. 2001) (holding that a defendant who is to blame for a “self-created predicament” is not entitled to the defense).

66. WIS. STAT. ANN. § 939.47 (West 2005) (limiting the defense to actions in response to the “[p]ressure of natural physical forces”); *State v. Hamdan*, 665 N.W.2d 785, 795 (Wis. 2003) (“[T]he defense of necessity, by its plain language, exists only when a defendant acts in response to ‘natural physical forces,’ not human forces that pose potential dangers.”).

67. MODEL PENAL CODE § 3.02(2) cmt. 5, n.27 (1985) (observing that barring the necessity defense when the actor in any way contributed to its creation would exclude the defense for a man who

The codifications in Delaware,⁶⁸ Illinois,⁶⁹ and Missouri⁷⁰ follow New York's requirement that the necessity not be occasioned or developed through any fault of the defendant.⁷¹ This is the most common position with respect to created culpability in American jurisdictions. New Mexico does not distinguish between duress and necessity,⁷² and while it has not adopted the created culpability limitation, one case indicates that its "reasonableness" requirement subsumes that limitation.⁷³ Perhaps most interesting are the recent observations of the Mississippi Supreme Court with respect to created culpability. In *Stodghill v. State*,⁷⁴ late in the evening after the defendant and his girlfriend had been drinking, the woman began to have seizure-like symptoms. Unwilling to wait for an ambulance, the defendant decided to drive the woman to the hospital and along the way was stopped by a police officer who called an ambulance for the woman and arrested the defendant for driving under the influence of alcohol. The defendant argued that he was entitled to the necessity defense, but the court found that he had not satisfied all of the elements under Mississippi law, which do not include created culpability. The court then stated:

Other jurisdictions' tests for necessity add another prong which naturally addresses the alarming policy implications of finding that a defense of necessity exists in the case of drunken driving. In those jurisdictions, the defense of necessity also includes the burden of proving the emergency did not arise by any fault of the defendant. Were we to add this prong to our test . . . it would bar the use of the defense in cases where an emergency is the consequence of careless or excessive intoxication.⁷⁵

broke the speed limit in order to drive his pregnant wife to the hospital); Robinson, *supra* note 5, at 5-6 ("[I]f the actor's choice of paint color for his house so upsets his neighbor as to provoke an attack, the actor would presumably be left without the right to defend himself.").

68. DEL. CODE ANN. tit. 11, § 463 (2007); *Bodner v. State*, 752 A.2d 1169, 1174 (Del. 2000).

69. 720 ILL. COMP. STAT. ANN. 5/7-13 (West 2002).

70. MO. REV. STAT. § 563.026(1) (1999). In *State v. Owen*, 748 S.W.2d 893, 895 (Mo. Ct. App. 1988), the Missouri Court of Appeals curiously interpreted this provision to mean that where a defendant left the scene of a motor vehicle accident after having been grabbed by a police officer, which had caused the defendant to fear for his physical safety, he was at fault for creating the scenario giving rise to a charge of leaving the scene of a motor vehicle accident.

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

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

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

74. 892 So. 2d 236 (Miss. 2005).

75. *Id.* at 239 (citations omitted). For further reflections on voluntary intoxication and its relationship to created culpability, see *infra* notes 235-37 and accompanying text.

Setting aside the technical point that in *Stodghill* the emergency (the woman's seizure-like symptoms) was not the consequence of the *defendant's* excessive intoxication, the more important criticism is that the court's understanding of "fault" seems to approximate "any contribution." "[C]areless or excessive intoxication" is not a criminally culpable offense. Neither the defendant nor his girlfriend was at fault—so far as the criminal law is concerned—for drinking alcohol, even in copious quantity. The choice of evils only arose when the woman became ill, well after she and the defendant had stopped drinking, and the defendant was then faced with a choice of evils. But created culpability seems inapplicable in this situation.⁷⁶

Arizona's statutory provision with respect to created culpability is unique and perhaps closest to the approach advocated in this Article: "An accused person may not assert the [necessity] defense . . . if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct."⁷⁷ Florida and Maryland common law follow nearly the same rule, barring the defense where the defendant "intentionally or recklessly place[d] himself in a situation in which it would be probable that he would be forced to choose the criminal conduct."⁷⁸ While this approach has its strengths, it has two problems. First, it does not specify that the type of created culpability that matters is criminal. Second, it would anomalously provide the defense to an actor who carefully plans a murder in which it was not probable that a necessity would arise, but bars the defense for the non-careful murderer. This remains the case even if "probable" is understood objectively rather than from the point of view of the actor's subjective culpability as to the necessity.

The necessity defense codifications of Arkansas,⁷⁹ Hawaii,⁸⁰ Maine,⁸¹ Nebraska,⁸² New Hampshire,⁸³ and Pennsylvania⁸⁴ follow the Model Penal Code's approach to created culpability verbatim (or nearly so), barring the

76. See Robinson, *supra* note 5, at 16 ("[T]he imputation of recklessness is objectionable because even if the actor is reckless, or even purposeful, as to *getting intoxicated*, it does not follow that he is reckless as to causing the [underlying offense].").

77. ARIZ. REV. STAT. ANN. § 13-417 (2001).

78. McCoy v. State, 928 So. 2d 503, 506 (Fla. Dist. Ct. App. 2006) (quoting W.E.P., Jr. v. State, 790 So. 2d 1166, 1172 n.4 (Fla. Dist. Ct. App. 2001)); see also State v. Crawford, 521 A.2d 1193, 1200-01 (Md. 1987).

79. ARK. CODE ANN. § 5-2-604 (2006). Notwithstanding this provision, the Supreme Court of Arkansas has held that the "any conduct" rule applies: "If appellant created the situation necessitating his conduct then he is not entitled to rely upon the defense of justification." Peals v. State, 584 S.W.2d 1, 5 (1979).

80. HAW. REV. STAT. ANN. § 703-302(2) (LexisNexis 2007).

81. ME. REV. STAT. ANN. tit. 17-A, § 103(2) (2006).

82. NEB. REV. STAT. § 28-1407(2) (1995).

83. N.H. REV. STAT. ANN. § 627:3(II) (2007).

84. 18 PA. CONS. STAT. ANN. § 503(b) (West 1998).

defense if the actor was reckless or negligent in bringing about the necessity provided that recklessness or negligence, respectively, are sufficient for the underlying offense. None of these formulations and the rare case law interpreting them discuss purposeful created culpability, but as in the analysis of the Code, they are best interpreted as barring the defense when the level of created culpability and that of the underlying offense match. Kentucky's choice of evils statutory provision retains the general structure of the Code's approach but bars the defense where the actor was wanton or reckless as to created culpability, and where wantonness or recklessness suffices to establish culpability for the underlying offense. The 1974 commentary to the Kentucky provision adds that the defense is unavailable whenever the actor's created culpability is wanton or reckless, irrespective of the culpability required for the underlying offense.⁸⁵

A significant number of jurisdictions have not addressed the question of created culpability at all.⁸⁶ Georgia bars the self-defense justification in cases of created culpability, but does not speak to created culpability as to a necessity.⁸⁷ Alaska,⁸⁸ New Jersey,⁸⁹ Utah,⁹⁰ and Wyoming⁹¹ merely provide that the necessity defense is applicable to the extent permitted by the common law of those states, none of which discusses created culpability, and Alabama's justification statute similarly states that it does not preclude "further judicial, or statutory, development," while also providing that an actor who is otherwise justified but who injures a third party recklessly or negligently in the course of acting justifiably does not have the defense in a prosecution for such recklessness or negligence.⁹² Oregon and Tennessee, whose codifications otherwise generally follow New York, do not

85. KY. REV. STAT. ANN. § 503.030(2) (1999). The defense is never available for intentional homicide. *Id.* § 503.030(1).

86. *See, e.g.*, *State v. Lee*, 782 So. 2d 1063, 1067 (La. Ct. App. 2001) (one of Louisiana's very few necessity defense cases that does not involve a prison escape, *Lee* makes no mention of created culpability); *Commonwealth v. Kendall*, 883 N.E.2d 269 (Mass. 2008) (a case that could have addressed created culpability, but did not); *State v. Hudgins*, 606 S.E.2d 443, 447 (N.C. Ct. App. 2005) (no discussion of created culpability); *Jones v. City of Tulsa*, 857 P.2d 814, 815-16 (Okla. Crim. App. 1993) (same); *State v. Owen*, 693 A.2d 670, 672 (R.I. 1997) (same); *Humphrey v. Commonwealth*, 553 S.E.2d 546, 550 (Va. Ct. App. 2001).

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

88. ALASKA STAT. § 11.81.320 (2008). Alaska requires that the necessity either arise from a natural cause or, if it arises from a human cause, that the justified action be taken in defense of others or to prevent a crime from occurring. *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073, 1078-79 (Alaska 1981).

89. N.J. STAT. ANN. § 2C:3-2 (West 2005).

90. UTAH CODE ANN. § 76-2-401 (2003).

91. WYO. STAT. ANN. § 6-1-102 (2007).

92. ALA. CODE § 13A-3-21 (2006). In *Allison v. City of Birmingham*, 580 So. 2d 1377, 1380 (Ala. Crim. App. 1991), the Alabama Court of Criminal Appeals cited positively an article that referred to the requirement that "the actor must be without fault in bringing about the situation" for the defense to apply, but there are no Alabama decisions affirmatively adopting this requirement (quoting *Debbe A. Levin, Note, Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501, 504 (1979)).

include any language with respect to created culpability, and no cases in either state have specifically addressed the question.⁹³ Connecticut is somewhat unusual in that its common law does not speak to created culpability, but one court has specifically stated that the actor's state of mind with respect to the allegedly necessitous act is never relevant to that act's justification.⁹⁴ Under this approach, it still remains unclear whether the actor who culpably creates the necessity and also intends the necessity would be justified or excused.

A few jurisdictions have seemingly conflicting common law rules with respect to created culpability, but it is notable again that none expressly permits the defense in cases of purposeful created culpability. In *State v. Diana*,⁹⁵ a 1979 medical necessity case, the Washington Court of Appeals held that the necessity defense was unavailable where the "compelling circumstances have been brought about by the accused."⁹⁶ In a more recent case involving possession of a handgun, however, the same court held that the necessity defense was limited by the rule about natural causation, which would implicitly bar the defense in any case of created culpability.⁹⁷ Similarly, a 1971 decision of the Minnesota Supreme Court that appears to conflate the defenses of necessity and duress nevertheless states that "the [defense of] necessity or compulsion which will excuse a criminal act must be clear and conclusive and must arise without negligence or fault on the part of the defendant."⁹⁸ But most of the recent Minnesota case law on the necessity defense does not address created culpability and does not include it in the applicable test.⁹⁹

What surprisingly emerges from this hodgepodge of approaches and limitations is a virtual consensus among those states¹⁰⁰ that have addressed created culpability that purposeful (and perhaps knowing) created culpability always bars the necessity defense. No jurisdiction affirmatively permits the defense under such circumstances. Yet none of the statutes and cases have articulated a theory of created culpability that adequately justifies and explains what seems to be the universal intuition that, at the least, purposeful and criminal created culpability should bar the defense.

93. See OR. REV. STAT. § 161.200 (2003); TENN. CODE ANN. § 39-11-609 (2006).

94. *State v. Messler*, 562 A.2d 1138, 1139 (Conn. App. Ct. 1989).

95. 604 P.2d 1312 (Wash. Ct. App. 1979).

96. *Id.* at 1316.

97. *State v. Gallegos*, 871 P.2d 621, 625 (Wash. Ct. App. 1994).

98. *State v. Johnson*, 183 N.W.2d 541, 544 (Minn. 1971) ("The defense of necessity is not available, at least where the defendant could have avoided the emergency by taking advance precautions.").

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

100. As indicated earlier, it is unclear whether the necessity defense is recognized under federal common law. See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001).

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

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

A. Robinson's Approach to Created Culpability

The most exhaustive scholarly treatment of created culpability is Professor Robinson's seminal article, *Causing the Conditions of One's Own Defense: A Study in the Limit of Theory in Criminal Law Doctrine*.¹⁰¹ Robinson's views about created culpability are recognized today as the "classical discussion"¹⁰² of the problem and are well entrenched in the criminal law scholarship.¹⁰³

In examining the Model Penal Code's approach to created culpability, Professor Robinson raises four primary difficulties. The first two point out technical problems in the Code's approach, while the latter two are substantive criticisms. First, Robinson claims that there is ambiguity about what constitutes culpability in "causing" the necessitous conditions and the nature of the act that should count as a, or the, cause. Where a spark in a defective muffler creates a necessity to set an illegal firebreak, "To which events in the chain of events creating the conditions of the defense must that culpability apply: recklessness as to having a defective muffler, or as to having a muffler that will start a forest fire that will then threaten a

101. Robinson, *supra* note 5.

102. Garvey, *Involuntary Manslaughter*, *supra* note 6, at 354 n.72.

103. See, e.g., YEO, *supra* note 7, at 166 (adopting Robinson's approach); Dripps, *supra* note 6, at 1413; Norman J. Finkel, *Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 39 (1996).

town and thereby create the need for justified conduct?”¹⁰⁴ Second, the Model Penal Code’s approach improperly assumes that the underlying offense will necessarily have a single and uniform level of culpability that could be neatly compared with the degree of created culpability.¹⁰⁵ Third, denying the defense is likely both to dissuade the actor from acting in a way that society would approve and to reduce his incentives for doing so.¹⁰⁶ Finally, denying the defense in cases of created culpability but not in cases where a third person could engage in the same conduct while working side-by-side the actor who has culpably created the necessity is anomalous.¹⁰⁷ “It is the nature of justified conduct,” Professor Robinson writes, “that it either is or is not justified—depending on whether it causes a net societal benefit—regardless of the particular state of mind, past or present, of the actor.”¹⁰⁸

Professor Robinson urges an approach that would cleanly separate the acts of created culpability from those of the underlying offense. He would retain the defense for the underlying, “justified” conduct while punishing the actor separately for the actor’s earlier conduct in culpably creating the necessity.¹⁰⁹ Robinson would treat differently the actor who not only has culpably created the necessity, but also has a culpable state of mind as to causing himself to engage in the justified conduct (for example, the actor who intentionally started the forest fire *for the purpose* of creating the firebreak).¹¹⁰ So-called “grand schemers” could be punished for engaging in the otherwise justified conduct (and would also be punished in cases where they directed a third person to engage in the justified conduct), but liability would be based on the conduct of causing the necessity with the accompanying scheming intent, not on the justified conduct subsequently performed.¹¹¹ Robinson’s core assumption—and that of many criminal law scholars¹¹²—is that justified conduct can never be blameworthy. Since so-

104. Robinson, *supra* note 5, at 18.

105. *Id.* at 19; *see also* Kenneth W. Simons, *Exploring the Intricacies of the Lesser Evils Defense*, 24 LAW & PHIL. 645, 656 (2005) (making the same observation). Robinson raises an additional technical difficulty—that the Model Penal Code does not discuss intentional or purposeful created culpability—but that is potentially resolved by reading § 3.02(2) so as to avoid an anomalous conclusion. *See supra* note 12 and accompanying text.

106. Robinson, *supra* note 5, at 28.

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

108. *Id.*

109. *Id.* at 27–28.

110. *Id.* at 31.

111. *Id.* at 31–32. This exception mirrors the Model Penal Code’s exception for the use of deadly force in self-defense where “the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter.” MODEL PENAL CODE § 3.04(2)(b)(i) (1985).

112. *See, e.g.*, Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1,

ciety ought to encourage (or at least not deter) conduct that results in a social “net gain,” conduct that meets that criterion is always justified.¹¹³

In assessing Robinson’s solution, it is valuable to examine how his approach fares when measured against his third and most compelling criticism of the Code: that denying the defense to actors who have purposely created the necessity punishes them for acting in a way that society approves, and that it creates disincentives for them and others to act that way.¹¹⁴ If Robinson is truly wedded to his core assumption about the nature of justified conduct, it is difficult to see why he would treat grand schemers differently. Provided that the core assumption is satisfied, it should make no difference that one had a culpable state of mind or “scheming intent” as to the justified conduct. If we take Robinson’s core assumption seriously, Joe would have a necessity defense to the drunk driving charge if he had intentionally beaten Jane on every one of five nights leading up to and including the night where he stabbed her because saving Jane, whatever the circumstances that occasioned her head-wound, is a social net gain.¹¹⁵ But, on Robinson’s account, Joe could be punished as a grand schemer in the unlikely event that he stabbed her for the purpose of driving her drunk to the hospital, even if it surely continues to be true that Jane’s survival is a social net gain and that his decision to drive while intoxicated was justified.¹¹⁶ Robinson might respond that he is willing to expand the timeframe and consider the “relevance of context” for grand schemers because an actor’s reasons make a difference for an act’s criminality.¹¹⁷ Even where the act creating the necessity is legal, Robinson claims that if it was done with a culpable state of mind as to engaging in what would otherwise be (and ultimately is) justified conduct, the actor should be punished for his grand scheme intention. Robinson hypothesizes that a member of the Palestine Liberation Organization enters a meeting of the Jewish Defense League held in a public place, intending, by his mere presence, to incite the attendees to assault him and thereby create the necessity for him to injure others in self-defense.¹¹⁸ Robinson would hold the PLO member liable for his intentional creation of the necessitous circum-

7–8 (2003) (“[T]he standard account among criminal law theorists . . . [is that a] defense is a justification if it renders the actor’s conduct not morally wrongful, whereas it is an excuse if it renders morally wrongful conduct not blameworthy.”). Professor Berman challenges this view in his article.

113. Robinson, *supra* note 5, at 27 (“Where conduct is justified because it avoids a net harm for society, it provides little basis on which to fasten blame and it is against society’s interest to deter it.”).

114. *Id.* at 28.

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

116. Of course, on Robinson’s view Joe could also be punished for assault and battery with a deadly weapon or its jurisdictional equivalent.

117. *Id.* at 40.

118. *Id.* at 40–42.

tances, but the use of force in self-defense remains, for him, fully justified.¹¹⁹

One question that Robinson's approach raises is precisely what illegal act is being punished. Entering a public place is not an *actus reus*. Robinson recognizes this¹²⁰ and would probably respond that the *actus reus* is entering a public space with the scheming intent of causing an altercation so as to create a necessity to injure in self-defense.¹²¹ He draws an analogy with criminal attempt: "An actor who has tools in his possession can be convicted of attempt if he intends to use them to commit a burglary."¹²² That is persuasive, as far as it goes; in such a case, the actor could be convicted of attempted burglary, indisputably a wrongful act (albeit one that never issued in a completed harm) with a correspondingly culpable mental state (purpose). Robinson might then reply that conduct itself is not legal or illegal per se: "Almost any act, even a homicidal one, may be legal in certain situations; an execution is an obvious example, as is self-defense."¹²³ Robinson is again correct, but the key point to draw from this observation is that the conduct abating the necessity that was culpably created is indissolubly linked conceptually to the state of mind that led to it.¹²⁴ In the PLO example, the *mens rea* (intending to cause the necessity of injuring others in self-defense) tracks and is connected to the completed *actus reus* (doing just that). From the perspective of deterrence, what the criminal law seeks to prevent is the scheming intent and the conduct to which it leads (assuming that it does lead to such conduct, as it does in Robinson's example).

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

119. *Id.* at 42.

120. *Id.* at 42.

121. *Id.* at 41–42.

122. *Id.* at 41.

123. *Id.* at 40.

124. See Michael Davis, *Why Attempts Deserve Less Punishment Than Complete Crimes*, 5 LAW & PHIL. 1, 15 (1986) ("A complete crime ordinarily consists of: (1) a state of affairs the law is supposed to prevent, the '*actus reus*' (for example, the unlawful taking of another's property or an involuntary death at the hands of another); (b) some state of mind, the so-called '*mens rea*' (for example, the intent to do great bodily harm or a failure to exercise reasonable care); and (c) a *certain connection* between *mens rea* and *actus reus* (for example, a theft being the result of acting with the intent to deprive another of his property or a death that is a natural and probable outcome of what the actor knew himself to be doing).") (emphasis added).

intend to act in self-defense at all; he intended only to harm the JDL members. Or, one might say that the PLO member's motivations are mixed.¹²⁵

Robinson's adamancy that necessitous conduct must always by its nature be entirely justified, irrespective of the context, creates a problem for his view of the grand schemer. His approach disjoins the grand schemer's culpability in creating the necessity from the necessitous act itself because it refuses under any circumstances to call that act culpable. Instead, it indulges in a legal fiction by using the language of attempt, in which the *actus reus* of the underlying offense never comes to pass,¹²⁶ even in circumstances when the *actus reus* in reality *did occur*. While Robinson urges, at least in the case of grand schemers, a more nuanced consideration of the entire set of circumstances that occasion the necessity, his general approach to created culpability betrays that ambition by drawing a Maginot line around the necessitous act itself, which can only be judged in isolation and in terms of net social gain. Robinson's contextual aspirations are in the end stymied by the cardinal rule that necessitous conduct must be, *ex hypothesi*, criminally blameless.

So far all that has been shown is that Professor Robinson's grand schemer analysis is inconsistent with his general approach to justification. This inconsistency generates two possibilities. First, one might discard Robinson's grand schemer discussion and hold fast to the core principle that whether necessitous conduct is justified will never depend on created culpability but only on an assessment of the net social gain of choosing one evil over another. That option, however, disregards precisely what is insightful about Robinson's grand schemer discussion: the relevance of the broader context in which a necessitous condition arose not only in the case of grand schemers but also for anyone who claims to have acted under a necessity.¹²⁷ "[I]n order to assign responsibility appropriately, we need to view the individual's actions in a consistently broad 'time-frame'—to look not only at the *actus reus* defined by statute but also at the actions and decisions leading up to it."¹²⁸ The need for greater sensitivity to context

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

126. Davis, *supra* note 124, at 16 ("What makes an act a mere attempt is that the *actus reus* of the complete crime never occurs.").

127. Robinson misses this point: "It is no doubt the concern for the 'grand schemer' that creates a hesitation to provide an excuse when an actor has culpably caused the disability and excusing conditions." Robinson, *supra* note 5, at 31 n.114. Concern about grand schemers may be part of what explains the reluctance to ignore created culpability, but the larger point about context relates generally to all actors who culpably create a choice of evils.

128. Luban et al., *supra* note 6, at 2387.

(which might include temporal, spatial, and other situational considerations)¹²⁹ gives rise to a related, more intuitive, and also more important, criticism of any approach that holds out Robinson's core principle—that necessitous conduct is by its nature always justified if it results in a net social gain—as the only relevant consideration.

When an actor culpably creates a choice of evils, there is a sense in which his situation is qualitatively different from the actor who is not culpable at all.¹³⁰ A different and perhaps more accurate way of saying this is that the act itself has lost a significant part of its justified quality if performed by the culpable actor who has created it. Putting it this way illuminates the fact that the diminished quality of the justification does not transform this kind of situation into an excuse. Typically, “[a]n actor pleading excuse, such as insanity, duress, or involuntary conduct, admits that what she did was wrong, but claims that some characteristic o[f] her condition leaves her blameless for the offense.”¹³¹ In the case of the actor who culpably created the necessity, the action taken to abate the necessity is not exactly “wrong”; examined in isolation, it continues to be “the right thing to do,” but examined in context it may have lost its justified status depending upon the circumstances that precede it.¹³² We can say, at the least, that we want to know the circumstances leading up to the necessity in order to evaluate properly whether it was justified, and not only in the case of grand schemers. In deciding how one feels about Joe's decision to drive drunk to the hospital to save Jane's life, it somehow makes a difference whether Joe had first stabbed Jane or instead was blameless, just as it makes a difference to Professors Robinson and Fletcher¹³³ whether an actor was a grand schemer. And if Joe did stab Jane, it also makes a difference whether Joe stabbed her purposely, recklessly, or negligently. Naturally, the mere fact that these intuitions are shared by so many jurisdictions that have addressed the question¹³⁴ is not itself a reason to endorse

129. *Id.*

130. See Norman J. Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability: Toward a Unifying Schema*, 19 *LAW & HUM. BEHAV.* 447, 460 (1995) (reporting an empirical study showing that defendants responsible for their medical condition were more likely to be found culpable for the underlying offense than those who were not).

131. Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 *N.C. L. REV.* 1095, 1097 (1998).

132. See FLETCHER, *supra* note 7, at 798 (“So far as justification of lesser evils is considered an excuse, then it makes sense to require that the actor be free from blame in the entire transaction.”). But recognizing created culpability as relevant does not transform the focus of the inquiry from the act to the actor; it simply means that a judgment about an act's justification will depend on context—that is, other acts and circumstances than the ultimate act.

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

134. See *supra* Part II.

them.¹³⁵ But the intuitions do call for an attempt at explanation, if not justification.

B. Created Culpability and Deterrence

One answer might be that the consequentialist character of the necessity defense is at least somewhat at odds with our moral experience.¹³⁶ Care must be taken to distinguish precisely what type of consequentialist argument is inconsistent with the created culpability bar.¹³⁷ It is commonly acknowledged that, at least in Anglo-American jurisprudence, the necessity defense has firmly consequentialist roots.¹³⁸ The general assumption is that “the ultimate purpose of the law is to further the general welfare. In the criminal law, this means that rational judges should encourage welfare-maximizing conduct.”¹³⁹ The Model Penal Code privileges deterrence, the quintessentially consequentialist function of criminal law, as one of the crucial theories of punishment.¹⁴⁰ But this consequentialist orientation would not necessarily foreclose a rule barring the defense in cases of created culpability. The law, the deterrence theorist might argue, is properly concerned to deter a person from engaging in conduct that she knows will lead, or that is highly likely to lead, to a choice of evils. In the Joe and Jane scenario, this deterrence argument admittedly seems quite weak, primarily because Joe might be in a much worse position if he allows Jane to die after creating the necessity,¹⁴¹ but other scenarios might present a stronger case for this type of deterrence argument.¹⁴²

135. Some early retributivists did justify the criminal law’s sanction on the basis of this type of community sentiment alone. See, e.g., 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80–82 (London, MacMillan 1883). For a contemporary defense of the view that popular views are relevant to both retributivist and consequentialist theories of punishment, see generally PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

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

137. This Article considers only one consequentialist theory of punishment, deterrence. There obviously are others, such as rehabilitation, incapacitation, and “channeling aggressive energies into the orderly process of the criminal law,” but deterrence is the most relevant for assessing the created culpability bar from a consequentialist point of view. FLETCHER, *supra* note 7, at 814.

138. E.g., *id.* at 790–91; Greenawalt, *supra* note 136, at 3 (“The present dominant formulations [of the necessity defense] in American criminal codes are consequentialist . . .”); Martin, *supra* note 3, at 1538.

139. FLETCHER, *supra* note 7, at 790.

140. MODEL PENAL CODE § 1.02(1) explanatory note (1985) (“[T]he dominant theme is the prevention of offenses . . .”). Deterrence, like retribution, is not technically a theory of punishment, since whether deterrence is justified depends upon whether a moral theory (such as consequentialism or deontology) assigns a justifying quality to it. Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 944 n.7 (2000). Nevertheless, this Article uses the term “theory of punishment” in the less technical and more common sense that includes functions of criminal law with strong connections to particular ethical theories of punishment.

141. It also seems highly unlikely that a person intent on beating his girlfriend or chasing her with a broken bottle would be deterred by the knowledge that he would be barred from the necessity defense

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

The necessity defense is thus a uniquely collective and act-utilitarian doctrine in an American jurisprudential landscape otherwise dominated by rights- and rule-utilitarian based principles. These philosophical underpinnings, yet again, are both inherently radical and provide a one-way ratchet towards certain types of transformative social change. . . . [T]he necessity doctrine is a social libertarian’s dream. Necessity inherently privileges any legal violation that provides an individual or social benefit without imposing corresponding harm on another person.¹⁴³

Perhaps less radically, though no less reductively, Judge Richard Posner has characterized the necessity defense in terms of a pure measurement of cost as proxy for social net gain, arguing that the necessity defense ought always to succeed “if there is a very great disparity between the cost of the crime to the victim and the gain to the injurer.”¹⁴⁴ One might think that given the disparate and frequently irreconcilable aims of the criminal law, no unswervingly utilitarian explanation of the necessity defense would be adequate. “On the contrary,” writes Professor Kutz, “Anglo-American criminal law theorists and treatise writers, including the authors of the [Code], are typically critical of the courts for giving the necessity defense so little force beyond its formal recognition.”¹⁴⁵ There is, in fact, a tendency in modern scholarship to mechanize and flatten the necessity defense inquiry by insisting on a rigid act-utilitarian balancing between two (or more) discrete actions, each of which yields a readily calculable social net gain when examined in isolation.¹⁴⁶

if his conduct resulted in her injury and the necessity to drive her drunk to the hospital.

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

143. Martin, *supra* note 3, at 1549, 1557. Professor Martin’s absolutist view of the act-utilitarian character of the necessity defense is also evidenced by what he sees as the alternative—“that the traditional consequentialist assumptions that presently lie at the very heart of the necessity defense be discarded in favor of alternative fundamental principles.” *Id.* at 1555 n.126.

144. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 7.6, at 262 (5th ed. 1998).

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

146. See Parry, *supra* note 18, at 404–14. By “act-utilitarian,” I mean the moral theory that “[a]n act is right insofar as its consequences for the general happiness are at least as good as any alternative available to the agent.” David O. Brink, *Mill’s Ambivalence About Rights* 2 (Apr. 9, 2007) (unpub-

This monistic view of justification, unsurprisingly, faces many of the difficulties that acontextual and reductive utilitarian systems of value confront. One of these is that unless one is prepared to accept a principle such as wealth-maximization as the fundamental and sole gauge of value,¹⁴⁷ or a form of “efficient breach” theory of criminal law,¹⁴⁸ consequentialist accounts of the necessity defense tend to use general and not especially informative value terms with insufficient explanation. Professors Wayne LaFave and Austin Scott, for example, write: “The rationale of the necessity defense is . . . this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.”¹⁴⁹ But “higher” and “lesser” values depend for their assessment on a moral standard of measurement as, of course, do the vague phrases “the greater good for society” and “net social gain.”¹⁵⁰

One can find traces of this difficulty in Comment 4 to the Model Penal Code’s section on the necessity defense, in which the commentator explicitly declines to discuss which harms the criminal law is intended to prevent or how to measure competing harms, and claims that this omission is inevitable because “[d]eep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative or how far desirable ends may justify otherwise offensive means.”¹⁵¹ Yet in discussing an example of a mountain climber, tied to a companion who has fallen off a cliff, who must decide whether to cut the rope to save himself, the commentator implicitly makes a judgment about precisely which harms the criminal law is intended to punish when he argues that under all circumstances the mountaineer “must certainly be granted the defense that he accelerated one death slightly but avoided the only alternative, the certain death of both.”¹⁵² Professor Hoffheimer argues convincingly that even under a generally consequentialist, deterrence-oriented standard of measurement, this reasoning bespeaks a scale of values that is hardly neutral:

lished manuscript, on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979081.

147. See generally POSNER, *supra* note 144.

148. Kutz, *supra* note 145, at 251–52 (“[O]n ‘economic’ theories of criminal law, where the point of the criminal norm is to block transactions that could, were they Pareto-improving, go through with mutual consent, the necessity defense would, indeed, exemplify the logic of the criminal law in general—a form of ‘efficient breach’ theory.”).

149. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.4, at 629 (2d ed. 1986).

150. See Robinson, *supra* note 5, at 25. For criticism of less than careful use of the phrase, “the public good,” and the often unspoken assumptions that underlie it, see Marc O. DeGirolami, *Recoiling From Religion*, 43 SAN DIEGO L. REV. 619 (2006).

151. MODEL PENAL CODE § 3.02 cmt. 4 (1985).

152. *Id.* § 3.02 cmt. 3. It is an interesting question whether the deterrence-minded commentator would have felt any differently if the cutting mountain climber had been a grand schemer.

[T]he commentator assumes that the harms prevented by the criminal law are those injuries avoided in a particular case. But the criminal law almost always seeks to avoid social harms other than those immediately caused by the actor. For example, while the law of theft seeks to prevent the loss of specific property, the imposition of criminal sanctions serves broader interests and avoids other harms that range from the destruction of commercial markets to the breakdown of social order that would result from the resort to self-help violence in the absence of effective criminal sanctions.¹⁵³

If the question is the consequentialist concern that the created culpability bar does not give Joe an incentive to “do the right thing”—that is, to drive Jane to the hospital while intoxicated—one might point out that the deterrent aims of the criminal law nevertheless might be at least minimally satisfied. Joe arguably will be deterred from beating Jane after he has been drinking or from recklessly chasing her with sharp objects, activities that are also obviously not “the right thing to do” and have a high probability of resulting in severe injury to Jane that would in turn give rise to a choice of evils. He might also be deterred from beating her purposely, although this seems somewhat doubtful. And others may be stimulated to similar, non-criminal behavior. A more convincing case might be made that the deterrence rationale can explain why punishing grand schemers is proper. If the putative grand schemer knows that his scheme to make illegitimate use of the necessity defense would be denied, it is at least possible that he would be deterred from culpably creating the necessity with scheming intent.¹⁵⁴

While the created culpability bar therefore *might* be theoretically consistent with a consequentialist approach to criminal law that prizes deterrence, four important qualifications are in order. First, the created culpability bar is difficult to reconcile with the view that the necessity defense should be understood in purely and exclusively act-utilitarian terms.¹⁵⁵ The created culpability bar is inconsistent with the idea that the criminal law’s sole interest, so far as the necessity defense is concerned, is with Joe’s moment of choice as Jane lies bleeding. Everyone agrees that society gains if Jane lives, and the act-utilitarian would argue that if we compare Joe’s two choices—doing nothing or driving Jane to the hospital while intoxicated—Joe should never be deterred in any degree from making the choice with the greater social net gain, whether or not he culpably created

153. Hoffheimer, *supra* note 13, at 225 n.203.

154. For this purpose, it makes no difference whether or not one accepts Professor Robinson’s explanation for which “act” the grand schemer is being punished. See Robinson, *supra* note 5, at 40–42.

155. See Martin, *supra* note 3, at 1549. It is also probably inconsistent with an economic theory of criminal law.

the necessity. Second, even if the deterrent aims of the criminal law are understood more broadly to include the range of activities and behaviors that are more diffusely connected to any specific act, including those that bear on general deterrence, one would be hard pressed to argue that those considerations are sufficiently important to outweigh society's interest in promoting justified conduct.¹⁵⁶ It is doubtful, for example, that the possibility that others might be deterred from reckless conduct by a firm created culpability bar is powerful enough to overcome the competing consideration that society ought to protect and foster Joe's decision to drive Jane to the hospital, even if he is to blame for stabbing Jane.¹⁵⁷ Third, the argument from deterrence cannot account for any distinction between degrees of created culpability, other than on grounds of deterrence.¹⁵⁸ Fourth, and most importantly, the deterrence argument does not account for what seems to be at the heart of the objection about calling culpable conduct that created a necessity justified—that such conduct is wrongful in a way that a blameless choice of evils is not.

C. Created Culpability and Desert

A more promising possibility is that the created culpability bar could be explained on the basis of desert, or more precisely, the absence of desert. In order to assess this argument, it is worthwhile to consider what it means to call necessitous conduct "justified." Kent Greenawalt has argued persuasively that the ordinary English usage of the word "justified" means something akin to "warranted [T]o be justified is to have sound, good reasons for what one does or believes."¹⁵⁹ Thus, "A person who seeks to justify her act is arguing not only that the act was not wrong, but that she did what the law, or the state, or morality, demanded of her, and indeed, that she should be applauded for her conduct."¹⁶⁰ The actor

156. See Hoffheimer, *supra* note 13, at 242 ("The requirement that the actor be free from fault is only imperfectly explained by the utilitarian goal of restricting criminal sanctions to deterrable acts.").

157. FLETCHER, *supra* note 7, at 299 ("There comes a point where the deterrent efficacy of a sanction is so weak that one might properly think that competing values require that deterrence not be accepted as a justification.").

158. *Id.* (noting that deterrence itself cannot specify the values that compete against it). I put to the side the common charge against deterrence that it could easily result in scapegoating the blameless, since even those committed to deterrence would (I think) balk at imposing *greater* punishment on actors who are blameless than on actors who culpably create a necessity, even if it could be shown that the social net benefit would thereby increase.

159. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1903 (1984). Since "justified" has no specialized legal meaning, Greenawalt considers its ordinary usage. *Id.*

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

has “done all that he could do” under the circumstances, and punishment is inappropriate for someone who has acted as well as he can.¹⁶¹

To call an act justified in the context of the necessity defense is likewise to express something about its elevated social or moral worth.¹⁶² Justified conduct in the criminal law is more than merely non-harmful;¹⁶³ even on an act-utilitarian calculus, it is conduct that must issue in some comparative net social good that society is interested in encouraging. Otherwise, why should society turn a blind eye to the fact that its criminal law has been violated?¹⁶⁴ “It is socially desirable,” writes Professor Fletcher, “to blow up a privately owned house in order to prevent the spread of a raging fire. . . . [N]ecessity legitimates an invasion against the interests of a totally innocent party”¹⁶⁵ That justified conduct is “socially desirable” means that it is conduct about which society—as represented by the jury—has expressed, or wishes to express, its approval.¹⁶⁶ As a legal status, therefore, justification necessarily implicates a community decision about the moral worth of an act: “[I]n the special circumstances in which the offense (as defined by law) occurs, the action is no longer bad, but good.”¹⁶⁷ The expression of a judgment of justification has social value in two senses: a personal moral sense for the actor, and a more general moral sense in which society “upholds, advances, and renews community val-

161. H.L.A. HART, *THE CONCEPT OF LAW* 178 (2d ed. 1994); see also Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Women*, 81 N.C. L. REV. 211, 242–43 (2002).

162. Just how elevated is an important question that has received a broad range of answers. H.L.A. Hart, for example, consistently gave an ambiguously reticent answer, but one that nonetheless gave “justification” a positive valence. See, e.g., HART, *supra* note 161, at 179 (arguing that justified conduct is “a kind of conduct which the system is not concerned to prevent and may even encourage”); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 13 (1968) (“In the case of ‘justification’ what is done is regarded as something which the law does not condemn, or even welcomes.”). The latter statement is followed by an inscrutable footnote wherein Hart observes: “In 1811 Mr. Purcell of Co. Cork, a septuagenarian, was knighted for killing four burglars with a carving knife.” *Id.* at 13 n.16.

163. Joshua Dressler argues that it is not necessary that justified conduct be “affirmatively desirable or morally good,” only that it be “tolerable.” Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 UCLA L. REV. 61, 82–83 (1984). Even on this least demanding understanding of “harm,” however, “tolerable” conduct is surely morally preferable, and therefore in some sense morally superior, to intolerable conduct.

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

165. FLETCHER, *supra* note 53, at 138; see also FLETCHER, *supra* note 7, at 799 (“In a case of justified conduct, the act typically reflects well on the actor’s courage or devotion to the public interest.”).

166. See Joel Feinberg, *The Expressive Function of Punishment*, reprinted in JOEL FEINBERG, *DOING AND DESERVING* 95, 98–99 (1970).

167. Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 485 (2006); see also Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1096 (1985) (“Justifications answer the general evaluative question of whether, all things considered, the world is better or worse than it was without the action in question.”).

ues and . . . signals changes or shifts in those values.”¹⁶⁸ That last sense of social value may appear primarily consequentialist, but Professor R.A. Duff has argued that expressive punishment also serves a profoundly retributivist function.¹⁶⁹

The question becomes just how elevated, or praiseworthy, or socially desirable, conduct must be to qualify for the status “justified,” and what side-constraints might bear on that assessment. Here, Greenawalt’s seminal article on the borders of justification and excuse complicates matters, but in a way that illuminates a crucial attribute of justification and ultimately best explains the created culpability bar.¹⁷⁰ In exploring borderline cases of justification, Greenawalt considers the possibility that actors may behave in a way that is permissible but less than ideal: “A person may act in a manner that reflects what most people would do or that in some sense is ‘within his rights,’ although a different response would be morally preferable.”¹⁷¹ So, for example, if Al refuses to speak with Bruce after Bruce has betrayed Al’s confidence, Al’s conduct is “natural” or “understandable” even though that reaction might not be morally optimal.¹⁷² When it comes to classifying Al’s behavior, however, Greenawalt observes that “we may feel uncomfortable about calling Al’s behavior justified.”¹⁷³ If “justified” means something more than merely “not wrong”—something more akin to warranted, right, socially desirable, praiseworthy, and so on—then there is a difference in the degree of justification¹⁷⁴ between Carl, who forgives Bruce under the same circumstances, and Al, who holds a grudge.¹⁷⁵ Whether one believes that Al’s behavior is justified or not, Greenawalt writes, depends on the rigor of one’s personal and social ethical standards.¹⁷⁶ And one’s personal ethics may be very much more rigorous than what one demands of society, so that one might say: “From the standpoint of what Bruce and society could fairly expect of Al, what Al

168. Parry, *supra* note 18, at 440; see generally ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 60–64 (W.D. Halls trans., Free Press 1984) (1893).

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

170. See Greenawalt, *supra* note 159, at 1897.

171. *Id.* at 1904 (footnote omitted).

172. *Id.*

173. *Id.* (emphasis omitted).

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

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

176. *Id.* at 1905.

did was justified; from the standpoint of the perfectionist standards that should guide us all, he was only excused.”¹⁷⁷

Greenawalt’s crucial point is that the criminal law does not impose perfectionist ethical standards on people; it imposes only comparatively minimal ethical demands, and it would be a mistake, as both a matter of principle and prudence, to define the limits of justification and excuse systematically because to do so would inevitably submerge a minority ethical view of what constitutes justified conduct and needlessly consume the resources of government in sorting out ethical niceties.¹⁷⁸

Yet if degrees of justification can be recognized in ordinary ethical evaluation, they *might* also be recognized by the criminal law. To recognize that there are differences in degrees of justification is not necessarily to insist that rigid lines of demarcation be drawn between justified and unjustified conduct. It is also not to insist on a perfectionist ethic for criminal law. That we feel differently about Al’s behavior than Carl’s is meaningful: it shows that an act can be more or less justified—more or less praiseworthy, or warranted, or socially desirable—depending on the circumstances that attend it. If Greenawalt is correct that “we may feel uncomfortable” about calling Al’s behavior justified, other circumstantial distinctions might make a much more substantial difference to our level of comfort about designating conduct as justified. For example, it might make a considerable difference in our assessment of Al’s conduct whether Bruce intentionally betrayed Al’s confidence in order to steal all of his life savings or murder his family, or instead negligently revealed a secret about Al, thinking that it would come to nothing, but with the result that Dave, Al’s boss, learned an embarrassing piece of information about Al. We might feel that Al’s refusal to speak with Bruce is much more justified in the limited sense of justification discussed above—that Al is more “within his rights,” or that his conduct is more natural or understandable—in the first situation than the second, even if we also feel that under a perfectionist approach only Carl’s conduct—forgiveness—is truly justified.¹⁷⁹ On the other hand, we might feel that Al’s reaction is less justified, in the limited sense of “understandable,” if Bruce’s betrayal of Al was in response to some terrible misdeed of Al’s.

These circumstances obviously can be multiplied in infinite cycles of complexity, and none of this is to insist that these are all differences that the criminal law ought to recognize in assessing whether conduct is justi-

177. *Id.*

178. *See id.* at 1906.

179. Again, it is important to emphasize that these circumstantial differences speak to shades of justification, not to the distinction between justification and excuse. Neither Al’s nor Carl’s conduct is “wrongful” but nevertheless excused because of some attribute or personal quality specific to Al or Carl (that would make Al or Carl’s conduct excused, rather than justified).

fied.¹⁸⁰ Greenawalt is certainly right to argue that the difference between the justifiability of Al and Carl's conduct is not of the kind that the criminal law should acknowledge because it should not demand a perfectionist ethic of forgiveness.¹⁸¹ But even if the criminal law should not recognize the Al/Carl difference, the crucial point is that there may be other circumstantial distinctions that it *should* acknowledge in assessing whether conduct is justified.

Whether the criminal law should acknowledge a circumstantial distinction in the context of assessing whether conduct is justified depends neither on any procrustean *idée fixe* that conduct must be assessed at the snapshot moment when it occurs and can only be either justified or not, nor on any artificially delimiting act-utilitarian standard of measurement. It depends on whether and how substantially the particular circumstance bears on the question of justification, as measured along a number of different axes—to name only a few, deterrence, costliness, effectiveness, and desert.¹⁸² That the criminal law should recognize certain circumstantial facts as relevant to the determination of whether conduct is justified does not necessarily move the criminal law in a perfectionist direction. It moves it in a complicating direction. Additional circumstantial data might tend toward a more perfectionist ethic of criminal law, but they might also simply reflect a more sensitive account of a non-perfectionist criminal law ethic. The additional data might, moreover, be difficult to reconcile with—perhaps even be incompatible with—the other factors relevant in assessing whether conduct is justified.

Created culpability is complicating circumstantial data of this kind. Whether justified conduct is understood as “warranted”¹⁸³ or praiseworthy or “good,”¹⁸⁴ or instead less ambitiously as “understandable”¹⁸⁵ or “natural,”¹⁸⁶ the actor has earned that designation for his conduct by acting (or failing to act) in a certain way. The conduct deserves to be called justified

180. See Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 647 (2000) (“[M]any of the wrongs addressed by private blaming practices are obviously quite different from those addressed by the criminal law. Lies, ingratitude, and thoughtlessness are hardly the proper domain of criminal prohibitions.”).

181. See *id.* There may be other reasons—of effectiveness or costliness, for example—as well. See HART, *supra* note 162, at 7 (“There are indeed many forms of undesirable behavior which it would be foolish (because ineffective or too costly) to attempt to inhibit by use of the law and some of these may be better left to educators, trades unions, churches, marriage guidance counselors or other non-legal agencies.”).

182. See Parry, *supra* note 18, at 444 (“The categories of justification and excuse supply us with a set of questions we can ask about particular claims, but the point is to ask those questions, reach a result, and then use the categories to describe the result, rather than to choose a category before analyzing the claim.”).

183. See Greenawalt, *supra* note 159, at 1903.

184. Sangero, *supra* note 167, at 485.

185. See Greenawalt, *supra* note 159, at 1904.

186. See *id.*

given the circumstances in which it was performed.¹⁸⁷ Created culpability is part of that context. Considering created culpability complicates the assessment of necessitous choice by introducing doubt about whether the actor has earned that label for his conduct, or whether he has earned it in the same way or in the same degree as the actor who has not culpably created a necessity. This point about desert—about having earned for one's conduct the designation “justified”—distinguishes the Al/Carl situation.¹⁸⁸ Al and Carl, notwithstanding what the moral perfectionist might think about the justifiability of their respective reactions to Bruce's betrayal, have in common that their conduct is presumptively more deserving of being deemed justified because neither was at fault for the situation that led to their conduct. The actor who has culpably created the necessity is responsible for the necessitous conduct in question in a way that Al and Carl can never be because neither of them is to blame, criminally or otherwise, for Bruce's betrayal.¹⁸⁹

Nevertheless, that distinction still leaves unresolved the question why culpable responsibility and the lack of justified desert that it implies should make enough of a difference to interest (or why it is the type of difference that should interest) the criminal law, while other ethical concerns that also are arguably relevant to the assessment of justification in ordinary ethical evaluation (forgiveness, for example, as in the Al/Carl example) should not. The answer is that culpable responsibility—that is, the desert that derives from fault—is one of the primary, if not the crucial, concerns of the criminal law.¹⁹⁰ Fault is integral to the justifiability—the warrantedness—of punishment,¹⁹¹ and any adequate theory of punishment must ac-

187. Even a homicidal act, as Professor Robinson rightly noted, can only be assessed as justified or wrongful through the prism of context. See Robinson, *supra* note 5, at 40.

188. See Greenawalt, *supra* note 159, at 1904.

189. There is an analogy here to what Professor David Luban has called “contrived ignorance.” David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999). Luban considers the case of an actor who is willfully ignorant as to a fact (that is, who “screens” himself from that fact) and then later unknowingly commits misdeeds that are connected to his willful blindness. Luban argues that it is a mistake to “treat[] the actor at the time of the unwitting misdeeds as if he were a different person from the actor at the time of the screening actions. . . . [T]he later self is not *entirely* innocent. The later self at least knows that he performed the screening actions at an earlier time. He is on notice that the sword of potential wrongdoing dangles over his head.” *Id.* at 972. The analogy is admittedly imperfect because, setting aside the case of the grand schemer, the actor who is criminally culpable for creating a choice of evils may or may not “know” anything (even if “know” is taken objectively) about the consequences of his act.

190. See, e.g., Huigens, *supra* note 140, at 945 (“Fault—also known as desert, culpability, or blameworthiness—is the distinctive feature of the criminal law.”).

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

count for what Professor Fletcher has called “the traditional metaphysics of retribution: that somehow the punishment must address the crime and seek to negate its occurrence.”¹⁹² Likewise, any plausible theory of justification, or warranted action, must explain why fault—and therefore punishment—is inappropriate in the face of “socially desirable” conduct.¹⁹³ By contrast, the criminal law is not commonly thought to be as interested in forgiveness, mercy, charity, compassion, and many other perfectionist moral ideals that also might bear more generally on the question of justification.¹⁹⁴ “[G]enuine punishment has always been grounded in a robust conception of wrongdoing that features fault and the desert that fault implies.”¹⁹⁵ The same is true, inversely, for justification.

Ignoring created culpability where it exists is therefore a substantial, and perhaps uniquely powerful, affront to the retributivist function of criminal law because it consciously and completely discounts the question of blame at the heart of criminal law and its inverse relationship to warranted, or justified, conduct. One need not be committed to retributivism as the sole, or even the primary, function of criminal law to acknowledge that failing utterly to account for created culpability in one’s theory of justification leaves a deficit that is qualitatively different from failing to account for forgiveness or other ideals that are less focal for criminal law. The problem of not accounting for created culpability is therefore not at all the same as the difficulty that any perfectionist theory of justification faces. Perfectionist understandings of justification are highly likely to be disappointed (and disappointing) when it becomes clear that it is impossible to cram all of the lofty moral ideals that we might like into our legal standard of justification, because to do so would impose an intolerably rigorous set of social demands and a detailed moral system with which many people will disagree.¹⁹⁶ Professor Parry’s argument that when faced with a claim of justification, a jury should be entirely free to explore “the range of moral questions posed” and “the questions that resonate most strongly in that case” risks just such an amorphous, arbitrary, and idealized understanding of justification.¹⁹⁷ A perfectionist approach to justification, more-

interests, in order to abide by the law.”) (emphasis added).

192. FLETCHER, *supra* note 53, at 33.

193. *Id.* at 138.

194. See, e.g., Greenawalt, *supra* note 159, at 1906; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1431 (2004) (arguing that mercy and compassion are fundamentally incompatible with the liberal democratic norms of criminal law); see also Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 329 (2007) (“Though forgiveness and mercy matter greatly in social life, they play fairly small roles in criminal procedure.”). Professor Bibas notes this fact and then proceeds to argue for a more central role for mercy in criminal procedure.

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

196. See Greenawalt, *supra* note 159, at 1905 (“Basic definitions of criminal law leave untouched many actions that fall below even modestly rigorous standards of moral acceptability . . .”).

197. Parry, *supra* note 18, at 403.

over, would render it conceptually impossible to engage in conduct that is morally superior to the justified conduct.¹⁹⁸ But acknowledging that created culpability is a criterion relevant to the assessment of justification is qualitatively different from insisting on a perfectionist theory of justification. To discount what makes us “feel uncomfortable”¹⁹⁹ about created culpability—that is, concerns about the blameworthiness of conduct that is circumstantially connected to necessitous choice—renders the idea of justified conduct itself *defective* in a way that ignoring other circumstances and values does not.

Still, of itself, the fact that the culpable actor’s fault in creating the necessity is a specially powerful retributivist datum for evaluating whether an act is justified does not say anything about precisely when it should actually affect whether the criminal law recognizes conduct as justified. The question now is about the degree or type of “connection” between the culpable conduct that created the choice of evils to the necessitous act that is sufficient to make a difference.²⁰⁰ One might adopt the New York Penal Law approach and simply say that an actor who is at fault in any degree is barred from the defense.²⁰¹ But the New York position is not sufficiently sensitive to the competing concerns at issue in any assessment of a choice of evils. There are of course difficulties of line-drawing here that are exacerbated by the rivalrous and even incompatible goods that are promoted in retributivist and deterrent theories of punishment.²⁰² Just as the deterrent efficacy of punishment may become weak enough that competing values can overpower it,²⁰³ so too the degree of created culpability and its nexus to the necessitous conduct may be weak and attenuated enough to yield to competing values (for example, the consequentialist benefit of performing the necessitous act itself).

We might imagine a range of created culpability. The range reflects the types of created culpability and how closely they connect to the allegedly justified act. At one end of the range is the actor who purposely and

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

199. Greenawalt, *supra* note 159, at 1904.

200. Davis, *supra* note 124, at 15.

201. N.Y. PENAL LAW § 35.05(2) (McKinney 2004).

202. Huigens, *supra* note 140, at 956 (“The concept of fault, and in particular the notion of mens rea—the conception of fault as an intentional state on the occasion of wrongdoing—is an essentially retributivist idea. Deterrence theory differs on this point. If the promotion of social welfare is the justifying purpose of punishment, then punishment need not turn on any particular aspect of the wrongdoer or her wrongdoing.”).

203. See FLETCHER, *supra* note 7, at 299.

culpably created the necessity, at the other is the blameless actor, and the middle of the range is comprised of the other *mens rea* categories recognized by the Model Penal Code: knowledge, recklessness, and negligence.²⁰⁴ The most controversial aspect of the range is that purposeful, knowing, reckless, and negligent created culpability may be imputed to the creation of the necessity based on the nature of the connection between the culpable conduct creating the necessity and the allegedly justified act. Subjective consciousness of created culpability with respect to the choice of evils itself, while relevant to proving the appropriate level of created culpability, is never dispositive. So, for example, an actor who meticulously plans to murder his wife by stabbing her to death and carries out the stabbing after having drunk enough to exceed the legal limit for operating under the influence of alcohol, but who non-negligently fails to kill her and is faced with the choice of evils (because of a sudden sense of remorse, or because he realizes that he might be charged with a crime of omission if he lets her die, or for whatever other reason) of having to drive her while intoxicated to the hospital, would have purposely created the necessity of having to drive drunk. He has purposely created the necessity irrespective of what his subjective intentions were with respect to creating the necessity to drive drunk.²⁰⁵ His purpose to create the necessity to drive drunk is imputed whether or not (as is highly unlikely) it was part of his murderous plan.

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

- An actor purposely creates a necessity (1) when it is his conscious object to engage in conduct that is a criminal offense, and (2) when that conduct is the direct cause of the necessity.²⁰⁶ It need only be the actor’s conscious object to engage in the criminal conduct that directly causes the necessity; it need not be his conscious object to create the necessity itself.

- An actor knowingly creates a necessity (1) when he is aware that it is practically certain, or highly probable, that his conduct is

204. MODEL PENAL CODE § 2.02 (1985). I have modeled the degrees of created culpability on the Code’s basic *mens rea* provisions because they are clear and easy to understand by comparison with many of the older common law mental states. But I am not necessarily wedded to these particular categories. The point of this exercise is to distinguish generally the type of created culpability that should bar the necessity defense.

205. Focusing exclusively on the actor’s state of mind with respect to creating the necessity itself anomalously denies the justification defense for the actor who was reckless as to the created conduct as well as to creating the necessity, but permits it for the actor who carefully planned the culpable conduct and was not culpable in any degree as to creating the necessity. *See* ARIZ. REV. STAT. ANN. § 13-417 (2003).

206. *See* MODEL PENAL CODE § 2.02(2)(a) (1985).

of the nature of a criminal offense, and (2) when that conduct is the direct cause of the necessity.²⁰⁷ The actor need only be aware that it is practically certain, or highly probable, that his conduct is of the nature proscribed by the criminal law; he need not be aware that it is practically certain, or highly probable, that his conduct will create the necessity itself.

- An actor recklessly creates a necessity (1) when he consciously disregards a substantial and unjustifiable risk that a criminal offense will result from his conduct, and (2) when that conduct is the direct cause of the necessity. “The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”²⁰⁸ The actor need only consciously disregard a substantial and unjustifiable risk that a criminal offense will result from his conduct; he need not disregard a substantial and unjustifiable risk that his conduct will create the necessity itself.

- An actor negligently creates a necessity (1) when he should be aware of a substantial and unjustifiable risk that an offense will result from his conduct, and (2) when his conduct is the direct cause of the necessity. “The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”²⁰⁹ The actor need only be negligently unaware of a substantial and unjustifiable risk that a criminal offense will result from his conduct; he need not be negligently unaware that his conduct will create the necessity itself.

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

207. *See id.* § 2.02(2)(b), (7).

208. *Id.* § 2.02(2)(c).

209. *Id.* § 2.02(2)(d).

- A necessity is the direct cause of culpable conduct when the culpable conduct is an antecedent but for which the necessity in question would not have occurred.²¹⁰
- Purposely or knowingly culpable conduct can only directly cause a necessity if either (1) the necessity is within the purpose or contemplation of the actor,²¹¹ or (2) the necessity is not too remote or accidental in its relationship to the purposely or knowingly culpable conduct to have a just bearing on the defense of justification.²¹²
- Recklessly or negligently culpable conduct can only directly cause a necessity if either (1) the necessity is within the risk of which the actor is aware, or, in the case of negligence, of which he should be aware, or (2) the necessity is not too remote or accidental in its relationship to the recklessly or negligently culpably created conduct to have a just bearing on the defense of justification.²¹³

Given this framework, my suggestion is that the type of created culpability that should defeat a claim of justification—the type, that is, that has a “just bearing on the defense of justification” because it reflects the appropriate retributivist nexus between created culpability and justified conduct—ought to include those mental states where the actor was at least *conscious of a substantial and unjustifiable risk* that his conduct would result in a criminal offense, and where that culpable conduct *directly caused* the necessity that occasioned the allegedly justified conduct. This baseline would bar the necessity defense for purposely, knowingly, and recklessly culpable conduct that directly caused a necessity. It would not bar the defense for actors who were negligently culpable in creating a necessity, because negligently culpable actors have not consciously chosen any criminally culpable conduct.²¹⁴ It would also not bar the defense in any case where the necessity was not “directly caused” by the actor’s criminally culpable conduct.

210. See *id.* § 2.03(1)(a).

211. This represents the grand schemer.

212. See *id.* § 2.03(2)–(3). The formulations here omit the Code’s requirement that the actual result involve “the same kind of injury or harm as that designed or contemplated,” *id.* § 2.03(2)(b), or, in the case of reckless and negligent created culpability, “the same kind of injury or harm as the probable result,” *id.* § 2.03(3)(b), since the choice of evils is unlikely ever to involve the same types of harm as the culpably created harm. “Direct” causation is therefore similar to proximate causation, though the emphasis is on whether the fact finder deems the exclusion of the defense “just.”

213. See *id.* § 2.03(3).

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

Setting the dividing line between reckless and negligent created culpability is consistent with the important retributivist principle that “moral culpability is, and criminal liability should be, based on a *conscious choice to do wrong*.”²¹⁵ That is one explanation, albeit one not necessarily in keeping with the Code’s consequentialist orientation, for the rule that where a statute does not expressly set a level of culpability, the Code provides that the default *mens rea* standard should be recklessness, not negligence.²¹⁶ In like manner, justified conduct should not be based on or directly caused by—that is, be the cause-in-fact and not be too remote or accidental in its relationship to—consciously chosen, wrongful conduct. Conduct that includes, because it is directly caused by, a voluntary and criminally culpable act is wrongful, not justified.²¹⁷

If one assumes that created culpability is the type of contextual circumstance that speaks particularly powerfully to the retributivist concerns applicable to justification,²¹⁸ then it is reasonable to bar the defense where the actor has not earned, or does not deserve, the designation “justified” for his conduct in the face of a choice of evils that is the direct cause of his consciously chosen, criminally culpable conduct. For purposes of evaluating whether conduct is justified, it is therefore appropriate to *impute* a measure of culpability to conduct that is the direct result of consciously chosen, criminally culpable conduct. Likewise, an actor who is knowingly or recklessly culpable as to conduct that directly causes a necessity does not act justifiably in response to the necessity; he acts with the culpability that attends his consciously chosen, criminally culpable conduct, provided that his conduct “is not too remote or accidental in its relationship” to the necessitous conduct to have a “just bearing on the defense of justification.”²¹⁹ On the other hand, the negligently culpable actor whose conduct created a choice of evils does not deserve the censure owed to an actor who consciously chose culpable conduct. Even if the negligently culpable actor’s conduct directly causes the necessity, the retributivist nexus between his negligent conduct and the necessitous act is weaker than in the other types of culpability. The negligently culpable actor whose conduct

215. *Id.* at 188. Professor Simons argues that recklessness under the Code contains both a subjective and an objective component, and that while the actor must be subjectively aware of a substantial risk, he need only be objectively aware that the risk is unjustifiable. *Id.* at 189. Still, Simons points out that the objective assessment about whether an act is unjustifiable will depend at least in part on a subjective inquiry about what was known to the actor. *Id.* at 189 n.32 (citing David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 365–67 (1981)).

216. MODEL PENAL CODE § 2.02(3) (1985); *see also* Simons, *supra* note 214, at 189.

217. MODEL PENAL CODE § 2.01(1) (1985) (“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”). The voluntary act requirement is of course also consistent with strict-liability crimes for which there is no *mens rea* requirement. The Code does not emphasize, as this Article does, the particular importance of *wrongful*, voluntary acts for the criminal law.

218. *See supra* notes 196–200 and accompanying text.

219. *See supra* notes 212–13 and accompanying text.

directly causes a necessity may deserve other, less severe kinds of social censure—civil liability, for example—but retributivist concerns are far less powerful in his case; it is unjust to impute created culpability to his conduct even when it directly causes the necessity.

Perhaps the core criticism of imputed created culpability is that imputing culpability for a necessitous condition that was directly caused by conduct that the actor consciously chose makes sense, but why should we impute culpability where the actor did not consciously choose to confront the choice of evils? Why should the actor be blamed, the argument would go, for any conduct in response to *that* condition.²²⁰ There are two possible objections that underlie this criticism.

The first is that criminal culpability should never be imputed where an actor is not culpable as to a particular act—here, the allegedly justified act. This objection assumes that the circumstances attending any particular act are never relevant to the assessment of whether that act is wrongful or justified. But if one accepts this Article's two claims that those circumstances may be relevant, and that certain types of circumstance—notably, ones that deeply implicate questions of desert—should be relevant in evaluating whether conduct is culpable or justified,²²¹ then this objection is defeated.

The second possible objection is that imputed created culpability requires the fact finder to resolve the difficult question of whether criminally culpable conduct “directly caused” a necessity.²²² Robinson similarly criticizes the Code's commentary because it speaks in terms of culpability that “‘inheres in recklessness or negligence,’” and this, as he points out, does not clarify precisely which acts in the causal chain of creation need be reckless or negligent.²²³ It is true that questions of causation can be complex, but the evidentiary difficulties that they present are to an extent mitigated by the demanding requirement that the culpable conduct be both the but-for cause of the necessity and not “too remote or accidental in its relationship . . . to have a just bearing” on the allegedly justified act.²²⁴ The question arises, however, whether a necessity that is caused by culpable conduct in combination with non-culpable conduct is “directly caused” by the culpable conduct. In the Joe/Jane scenario, the necessity was caused (if one accepts Jane's account) by Joe purposely, knowingly, or recklessly stabbing Jane with a broken bottle, in combination with Joe's intoxication, the absence of a land-line telephone in Joe's trailer, his failure to find their cellular phones, and his neighbor's unresponsiveness to his cries for help.

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

221. See *supra* Part III.C.

222. For similar criticisms of the Code's approach, see Robinson, *supra* note 5, at 9, 18.

223. Robinson, *supra* note 5, at 18 (quoting MODEL PENAL CODE § 3.02 cmt. 2 (1985)).

224. See *supra* notes 212–13 and accompanying text.

But there is little question that the stabbing directly caused the necessity. It is conduct that was the but-for cause of the allegedly justified act and that is not at all too remote or accidental to have a just bearing on the alleged justification. Indeed, the stabbing bears *crucially* on whether Joe's subsequent behavior deserves to be called justified.²²⁵ The fact that Joe was drunk might also be deemed a but-for cause of the necessity: but for the fact that Joe was drunk, no necessity would have arisen. But the act of becoming intoxicated is, in the first place, not criminally culpable and, in the second, it has a far more remote and accidental relationship than the stabbing to the judgment about whether Joe's conduct deserves to be called justified.²²⁶ Without the stabbing, there would be no question that Joe's choice to drive Jane to the hospital while intoxicated would deserve to be called "justified conduct" in a way that it would not deserve if he had stabbed her. On the other hand, if one accepts Joe's account, the necessity was caused by his negligent bumping of Jane in combination with all of the same attendant factors. Under the imputed created culpability approach, Joe would not be barred from the necessity defense because (1) he performed no consciously chosen, culpable act that was the but-for cause of the necessity, and (2) his negligent bumping was too remote and accidental (it was, in fact, an accident) in its relationship to the allegedly justified act to have a just bearing on the question of whether the act deserves to be called justified.

None of this is to deny that complex questions of causation, as well as difficulties in ascertaining an actor's mental state at the time of the created conduct, will inevitably arise.²²⁷ Yet establishing causation and *mens rea* always present difficulties of proof,²²⁸ and this Article's rebuttable presumption procedure, outlined in the following subpart, will make the government's evidentiary burden more feasible while avoiding potential con-

225. There is an extensive literature on but-for causation in tort and criminal law. See, e.g., Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761 (1951); Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113 (2008); Moore, *supra* note 167; David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765 (1997); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985). For purposes of deciding whether culpable conduct directly causes a necessity, this Article advocates what Professor Johnson has called the "wrongful aspect" approach to but-for causation because of its inverse relationship with justification. That is, upon a challenge by the defendant on the question of direct causation, the government must prove beyond a reasonable doubt that the wrongful aspect of the defendant's conduct—the culpable conduct—was the but-for cause of the necessity. Johnson, *supra*, at 126.

226. See Robinson, *supra* note 5, at 16.

227. See generally Johnson, *supra* note 225, at 124–32 (noting a variety of problems in establishing but-for causation).

228. Causal requirements for satisfying the necessity defense are in fact quite common. See, e.g., *State v. Drummy*, 557 A.2d 574, 578 (Conn. App. Ct. 1989) (requiring that a "direct causal relationship [may] be reasonably anticipated to exist between defendant's action and the avoidance of the harm" (quoting *United States v. Seward*, 687 F.2d 1270, 1275 (10th Cir. 1982))) (alteration in original). For problems of proof as to mental states, see Robinson, *supra* note 5, at 57–59.

stitutional pitfalls by allocating the burden of persuasion on the question of created culpability to the government.²²⁹

Imputed created culpability also fares well when measured against Professor Robinson's other criticisms of the Code's approach. First, imputed created culpability dissolves Robinson's offense/element criticism of the Code's approach: that is, that the Code improperly assumes that there is a single culpable mental state for each offense that can be measured against the applicable type of created culpability.²³⁰ Imputed created culpability is concerned only with culpability as to the conduct that directly causes the necessity, not with comparing that type of created culpability against the type of culpability for the underlying offense or that of any element of the underlying offense.

Second, Robinson's "third party" or "correspondence thesis"²³¹ objection—that it is "anomalous" to deny the defense to an actor who has culpably created a necessity but not to a third party engaging in the same conduct side-by-side the actor²³²—loses its sting if one acknowledges that the circumstances of created culpability can and sometimes should make a difference in determining whether conduct is justified. Even where an actor and a third party share the same objective beliefs about a necessitous situation, it will not necessarily be the case that where the third party is justified in acting, the actor must as a matter of logical coherence be justified as well.²³³ Whether it is the case will depend at least in part on those salient circumstances that lead to the necessity, including the question of created culpability. If, after Joe and his friend Fred return from an evening of heavy drinking with Jane, both of them chase Jane with knives and

229. See *infra* Part III.D. On the unconstitutionality of shifting the burden of proof to the defendant, see *Patterson v. New York*, 432 U.S. 197 (1977), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *Mullaney* and its progeny deal with burdens of persuasion that are for the jury, so they are not directly applicable in this context because the "presumptions" in created culpability situations involve burdens of production that require judicial, not jury, determinations. For this reason, too, they are less constitutionally concerning than the situation addressed by *Mullaney*. Thanks to Cliff Fishman for this point.

230. See MODEL PENAL CODE § 3.02(2) (1985). The Code's presumption that every offense has a single culpability requirement "is most unusual coming as it does from draftsmen who were pioneers in providing the theoretical insight that offenses do not have one required level of culpability, but rather may have a different culpability requirement as to each objective element of an offense." Robinson, *supra* note 5, at 19.

231. Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2205 (1992) ("The correspondence thesis . . . holds that the justifiability of an action determines the justifiability of permitting or preventing that action."). The correspondence thesis rests on the intuition that an action cannot be simultaneously right and wrong. *Id.*

232. Robinson, *supra* note 5, at 28–29.

233. See Berman, *supra* note 112, at 62–64 (arguing that there is no necessary logic of justification that compels the conclusion that if a third party acts justifiably it must also be the case that the primary actor is justified, and that "we should be thinking in terms of reasons for treating the primary and third party differently, and not for conceptual truths"); see also Greenawalt, *supra* note 159, at 1903 ("Although the conclusion that someone is justified often bears importantly on judgments about the permissible actions of others, those judgments are analytically separate from the initial conclusion.").

purposely, knowingly, or recklessly stab her, then their situations may be parallel with respect to the created culpability that may fairly be imputed to them.²³⁴ But if an intoxicated Fred only appears after the stabbing, is faced with the same necessitous situation—i.e., Jane bleeding profusely from a head wound—and while drunk, drives her to the hospital, then Fred has a different, and more powerful, claim on the necessity defense than Joe.

Finally, a word on voluntary, or “self-induced”²³⁵ intoxication and its relationship to imputed created culpability is necessary. Under the imputed created culpability analysis, voluntary intoxication that leads to the creation of a necessity only bars the defense if the actor became voluntarily intoxicated (1) for the purpose of engaging in culpable conduct that was the direct cause of the allegedly justified act; (2) aware that it was practically certain, or highly probable, that he would engage in the culpable conduct that was the direct cause of the allegedly justified act; or (3) in conscious disregard of a substantial and unjustifiable risk that he would engage in the culpable conduct that was the direct cause of the justified act. Imputed created culpability does not bar the defense where an actor should have been, but was not, aware that by becoming voluntarily intoxicated there was a substantial and unjustifiable risk that he would engage in the conduct that was the direct cause of the allegedly justified act.²³⁶ Imputed created culpability thus follows the Code’s provision that “[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”²³⁷ But imputed created culpability goes further, and appropriately so. Suppose that Joe goes to the bar intending (1) to get drunk, so that (2) he will beat Jane, and (3) he does beat Jane, and (4) that beating is the direct cause of the choice of evils and Joe’s allegedly justified decision to drive Jane to the hospital while drunk. If the evidence suggests that at the time he beat Jane,

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

235. MODEL PENAL CODE § 2.08(5)(b) (1985) (“[S]elf-induced intoxication’ means intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime . . .”).

236. And of course it does not bar the defense when the actor was not culpable at all by becoming voluntarily intoxicated. *See, e.g.*, *People v. Kucavik*, 854 N.E.2d 255, 258–59 (Ill. App. Ct. 2006) (holding that a defendant charged with driving under the influence was entitled to a necessity defense instruction where she presented evidence that she was not at fault for creating the situation in which she drove while intoxicated).

237. MODEL PENAL CODE § 2.08(2) (1985).

Joe was unaware of his conduct and that conduct directly caused the necessity, under the Code's approach to self-induced intoxication Joe would have acted only with reckless created culpability; under imputed created culpability, he would have acted with purpose.²³⁸ Likewise, if Joe knows that he always beats Jane after getting drunk, or that it is practically certain that he will do so, and he does so, and that beating is the direct cause of the necessity, under the Code's approach to self-induced intoxication he would only be reckless as to creating the necessity, while under imputed created culpability he would be knowingly culpable. In either case, however, he would be barred from the defense. The rationale for the position taken by imputed created culpability is essentially retributive. A person who becomes intoxicated in order to, knowing that it is highly probable that, or consciously disregarding a substantial and unjustifiable risk that he will engage in culpable conduct is not justified by acting in the face of a choice of evils that was directly caused by his culpable conduct.

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

D. Easing the Bar: The Rebuttable Presumption

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

238. Compare the analysis of the same problem in Robinson, *supra* note 5, at 35-36.

tions of the criminal law and is insufficiently sensitive to the social value of the necessitous act.

The evidentiary difficulties as to causation and culpability faced by the government might be eased by the mechanism of a rebuttable presumption.²³⁹ If the government could meet a threshold showing on the question of culpability as to the underlying offense, a defendant who wished to assert the affirmative defense of justification would be presumed to have culpably created the necessity. The defendant could rebut the presumption by presenting some evidence (that is, meeting the minimal burden of production)²⁴⁰ that (1) he did not purposely, knowingly, or recklessly engage in conduct that directly caused the necessity, or (2) his purposeful, knowing, or reckless conduct did not directly cause the necessity. If the defendant met that burden of production, the presumption would be rebutted and it would become the government's burden of persuasion to prove beyond a reasonable doubt that the defendant was not justified. This procedure appropriately allocates the burden of persuasion as to the existence of created culpability, and therefore the absence of justification, to the government. As Professor Huigens has explained:

[E]ven though we impose the burdens of pleading and production on the defense, the burden of persuasion on justification defenses rests with the prosecution. The prosecution bears the burden of proving that a crime has occurred, and a crime consists of the violation of a prohibitory norm. The absence of justification is part of the prohibitory norm, even though we enact it into law separately from the offense for the sake of clarity and convenience.²⁴¹

The rebuttable presumption also has the salutary effect of narrowing the scope of the challenge to the direct causation and culpability components of created culpability. In response to the defendant's showing, the government's burden of proof becomes more feasible because it can focus specifically on those aspects of causation and culpability that the defendant disputes.²⁴² Yet once the defendant meets the relatively minimal burden of production, the burden of persuasion always remains on the government to

239. See Robinson, *supra* note 5, at 58–62 (listing a variety of rebuttable presumptions as possible solutions to the problems of proof suggested by Robinson's approach to created culpability).

240. By contrast, some jurisdictions require that the defendant produce "substantial evidence" of a necessity in order to meet the burden of production. See, e.g., *State v. Williams*, 968 P.2d 26, 30 (Wash. Ct. App. 1998).

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

242. Massachusetts uses a similar procedure in requiring that a defendant who asserts the necessity defense must present "some evidence" as to each element of the defense which, in Massachusetts, includes that the defendant had been faced with a clear and imminent danger and that there had been no legal alternative that would have been effective in abating the danger. *Commonwealth v. Pike*, 701 N.E.2d 951, 957–58 (Mass. 1998).

prove the absence of justification, thus avoiding any constitutional challenges.²⁴³

The second difficulty is that the imputed created culpability framework does not account for the situation where the necessitous act is sufficiently socially valuable that it *should* be deemed justified even in the face of created culpability. It is worth emphasizing here that the aim of acknowledging created culpability is not to banish or “discard” all consequentialist concerns relevant to the assessment of justification and replace them with others.²⁴⁴ It is merely to ensure that there is an appropriate place for integrating retributivist (and some deterrence-related) concerns into the evaluation of whether conduct is justified.²⁴⁵ Even if one acknowledges that created culpability is relevant in that assessment, that need not mean that created culpability always ought to trump the social value of the justified act.

Returning once more to the Joe/Jane scenario, even if Joe culpably created the necessity giving rise to the DUI charge—in that he stabbed Jane (purposely, knowingly, or recklessly)—Joe might assert that his decision to drive drunk to the hospital was sufficiently justified—socially valuable, warranted, desirable, and so on—to overcome the fact of his created culpability, because he saved Jane’s life by doing so. This claim would require the jury to weigh the choice of evils and determine whether the action that Joe took was sufficiently socially desirable to outweigh *both* the fact that Joe culpably created the necessity (if the jury believes Jane) and that he committed the underlying offense. While the jury regularly engages in this type of balancing in evaluating claims of justification,²⁴⁶ that balancing generally involves a simple comparison of the social desirability of the evil that was chosen and the evil that was avoided. But in the case of the defendant who culpably created the necessity, the jury must also account for the created culpability, which in the ordinary course would sometimes bar the defense altogether. It is therefore appropriate to impose a higher burden of production threshold for defendants who culpably create a necessity: that the evil that the defendant chose clearly and substantially outweighed the evil that he avoided.²⁴⁷ Under this rule, it is possible—perhaps even probable—that the jury would find that under the circumstances, Joe’s driving Jane to the hospital was justified because of her

243. Compare the three rebuttable presumption approaches proposed by Professor Robinson in Robinson, *supra* note 5, at 58–62, each of which poses constitutional problems.

244. Cf. Martin, *supra* note 3, at 1555 n.126.

245. Parry, *supra* note 18, at 439.

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

247. Cf. N.Y. PENAL LAW § 35.05(2) (2004) (requiring that the evil chosen “clearly outweigh” the evil avoided); TENN. CODE ANN. § 39-11-609 (2006) (same). I include both “clearly” and “substantially,” rather than one or the other, to reinforce the idea that the evil action that is chosen must outweigh not only the competing evil but also the fact of the actor’s created culpability.

urgent need for medical attention, despite Joe's created culpability and the possibility that he might have injured others by driving while intoxicated. It is also possible that the jury would not find that Joe's conduct was justified. But in either case, the jury appropriately considers the question of created culpability in making its determination.

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

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

IV. CREATED CULPABILITY AND DURESS

This part considers briefly how the approach to culpability in creating a choice of evils advocated in this Article might apply to the defense of duress. The comparison is useful because it points to a confusion in the common distinctions between justification and excuse that illuminates the need to account for created culpability in evaluating whether conduct deserves to be called either justified or excused.

Unlike the necessity defense, duress is traditionally regarded an excuse.²⁴⁸ It usually applies when an actor is coerced by threats to the point where a "person of reasonable firmness in his situation would have been unable to resist."²⁴⁹ The retributivist concerns about whether conduct

248. *E.g.*, Dressler, *supra* note 6, at 1349–67.

249. MODEL PENAL CODE § 2.09(1) (1985); *see also* United States v. Bailey, 444 U.S. 394, 409 (1980) (noting that duress excuses criminal conduct where "the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law"); 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 108 (1984) ("To plead an excuse is in effect to admit that one's action 'wasn't a

should be deemed justified appear somewhat less powerful in the context of duress because excused conduct bears no imprimatur of social desirability, warrantedness, or praiseworthiness. Nevertheless, the important point of contact between the two defenses is that both require an assessment of the circumstances that attend the act in question in order to evaluate whether they ought to apply. Excused conduct is in the ordinary course wrongful and blameworthy, but blame is in the specific circumstances deemed inappropriate. Justified conduct is neither wrongful nor blameworthy, and the only way to evaluate whether the conduct does not meet those two criteria is to examine the specific attendant circumstances.

All jurisdictions that bar the necessity defense where an actor culpably created its conditions also do so for duress.²⁵⁰ In marked contrast with the necessity defense context, however, a number of criminal law scholars agree that culpably created conduct should almost always bar the defense of duress.²⁵¹ The Model Penal Code likewise takes the view that an actor who purposely, knowingly, or recklessly creates the circumstances leading to his claim of duress is denied the defense, while the similarly culpable negligent actor is only denied the defense when negligence suffices for the underlying offense.²⁵² Professor Dressler explains:

[D]uress probably may not be pleaded by one who is at fault for placing himself in the coercive situation. For example, a person who joins a terrorist organization and later is coerced to commit a crime is denied the defense. Like the usually implicit rule that a threat be unlawful, the requirement that the coerced actor come to the situation free from fault is consistent with the nature of the defense as an excuse. A person should not be permitted to plead blamelessness, as an excuse implies, if he was culpably responsible for the predicament in which he found himself.²⁵³

good thing to have done, but to argue that it is not quite fair or correct to say baldly,' or without qualification, that one did the thing at all, that it was one's action.") (footnote omitted) (emphasis omitted); FLETCHER, *supra* note 7, at 831.

250. See *supra* notes 68–70 and accompanying text. In part this is because many jurisdictions treat any distinction between duress and necessity as practically unimportant. Dressler, *supra* note 6, at 1348.

251. E.g., Dressler, *supra* note 6, at 1341–42; cf. FLETCHER, *supra* note 7, at 798 ("So far as justification of lesser evils is considered an excuse, then it makes sense to require that the actor be free from blame in the entire transaction."). But see Robinson, *supra* note 5, at 29 ("As with justifications, there is a fundamental flaw in an approach that denies an excuse because the actor culpably causes the conditions of his excuse. Just as causing one's defense does not alter the justified nature of otherwise justified conduct, it does not erase the excusing conditions that exculpates the actor for the offense conduct.").

252. MODEL PENAL CODE § 2.09(2) (1985); see also State v. B.H., 870 A.2d 273, 287 (N.J. 2005) ("[T]he [duress] defense . . . will fail if the defendant acted recklessly.").

253. Dressler, *supra* note 6, at 1341–42 (footnotes omitted).

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

The created culpability bar in cases of duress has a different explanation—one that mirrors the reasons for its exclusion in cases of justification. The actor who joins a terrorist organization is unexcused for a coerced criminal act *not* because there is nothing unique or particular about his personal circumstances that left him vulnerable to being coerced in such a way that a person of reasonable firmness could not have resisted (e.g., he was threatened with torture, his family was threatened, he is especially fragile, etc.).²⁵⁴ The reluctant terrorist's will may well have been overpowered in precisely the same fashion as if he had never joined the terrorist organization.²⁵⁵ Rather, he is unexcused because he does not *deserve* to be excused given his created culpability. Whether an otherwise wrongful act is excused depends in part upon those salient circumstances—circumstances that are relevant universally and irrespective of the special qualities of an individual actor—that attend the act. Likewise, whether an otherwise wrongful act is justified also depends upon an evaluation of the pertinent circumstances.

Deciding whether and which specific circumstances are relevant, and whether they are sufficiently material to affect the availability of one or another defense, is not a question of identifying anything inherently or logically necessary in the concepts of excuse or justification. Rather, for both duress and necessity, it is a matter of determining whether a particular circumstance bears on the issue of justification or excuse sufficiently powerfully, given the aims of the criminal law, that it should not be ignored.²⁵⁶ Retributivist concerns are relevant in evaluating whether a claim

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

255. Cf. FLETCHER, *supra* note 7, at 831. Professor Huigens has suggested that a paradigm case of duress exists where a father is compelled to shoot five children by a man who is aiming a gun at the father's daughter and threatens to shoot her if the father refuses. Kyron Huigens, *Duress is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303, 312–13 (2004) ("The only conceivable ground on which Dad could be acquitted is an excuse premised on the notion that no one who would presume to punish Dad would have the fortitude to watch his own child die were he in a position to prevent it, and that therefore no one who would presume to punish Dad has a moral right to do so.").

256. See *supra* Part III.C.

of duress should in fact be excusable, or whether instead we have a “moral right”²⁵⁷ to punish an actor in a situation that might, had the actor been blameless for its creation, have constituted duress. The importance of created culpability transcends the distinctions between justification and excuse and partially destabilizes the usual, tidy conceptual divisions between these defenses.

CONCLUSION

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

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

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

257. *Id.*