

# Justifications and Excuses

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*The distinction between justifications and excuses is a familiar one to most of us who work either in moral philosophy or legal philosophy. But exactly how it should be understood is a matter of considerable disagreement. My aim in this paper is, first, to sort out the differences and try to figure out what underlying disagreements account for them. I give particular attention to the following question: Does a person who acts on a reasonable but mistaken belief have a justification, or only an excuse? One disagreement I highlight concerns the extent to which justification is primarily about agents rather than about actions (viewed in isolation from the agents performing them). Those who think, as I do, of “His action, X, was justified” as “He was justified in doing X” are far more likely to allow that justification requires reasonable belief and does not require truth, than are those who think of “His action, X, was justified” as “Although actions of this type usually are prohibited, X is in these circumstances in fact permissible.” In addition to (and sometimes in the course of) sorting out the differences and tracing them to some underlying disagreements, I defend the reasonable belief view of justification against some objections, and argue that, whether or not we continue to use the term “justified” in a way that does not require truth (and does require reasonable belief), we need the concept. Contrary to the claims of some who reject the reasonable belief view of justification, justification thus understood does not reduce to excuse.*

## I.

In law, philosophy, and everyday life, we recognize a distinction between justifications and excuses. Many (though not all) of us think the distinction an important one. Just how do justifications differ from excuses? I will argue in favor of tethering justification to reasonable belief rather than to truth (thus allowing that mistaken self-defense should count as justified as long as the mistaken belief is reasonable). But I am equally interested in diagnosing where the disagreements arise. To that end, I will spend some time setting out what is uncontroversial, seeing how far one can go before bumping up against

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controversy—not, it turns out, very far—and examining the controversies as they arise. I will suggest that at the root of the disagreements concerning how to understand justification are (a) ambiguities concerning both the word “right” and the question “Was S’s action justified?” and, related to the latter, (b) differences concerning the extent to which justification is primarily about agents rather than mainly about actions.<sup>1</sup>

Although my focus is on justification and excuse in law, my remarks are by and large intended to apply to justification and excuse in ethics more generally. My working assumption is that the distinction between justification and excuse in law is continuous with the distinction between justification and excuse outside of law, in the ethics of everyday life.<sup>2</sup> It is of course possible that criminal law will turn out to require a distinction between justification and excuse that is different from the distinction in ethics, but I would regard it as unfortunate if that were the case. I thus take it as a strong desideratum in an account of the distinction between justification and excuse in law that it mirror the distinction between justification and excuse outside of law.<sup>3</sup>

I begin with what is familiar and (mostly) uncontroversial so as to trace the points where disagreements arise.

## II.

Defenses (setting aside those based not at all on culpability, and entirely on pragmatic concerns) are usually classified in philosophy of law and in criminal law as either excuses or justifications.<sup>4</sup> Insanity is an excuse; self-defense is a

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<sup>1</sup> Of course justification can be about belief, as well. My view is that it is less about the action than about the agent (and less about the belief than it is about the person *qua* believer).

<sup>2</sup> I say “continuous with” rather than “identical to” because some of the concepts deployed to explain the distinction will no doubt need to be cashed out a little differently in law than in ethics. For instance, when we say “S is not blameworthy” in the context of criminal law, our concern is that S not be subjected to punishment (at the hands of the state), and not that S not be looked down upon by his neighbors for what he did. By “the ethics of everyday life” I mean to indicate that I am speaking not of justification as it is understood in some particular ethical theory, but of justification as we use the concept in everyday life.

<sup>3</sup> An alternative approach would not speak of justification *simpliciter* but would instead separate moral justification from legal justification and take care always to specify which sense of ‘justification’ is intended. For such an approach, see SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE (1994); see *infra* Part VII.

<sup>4</sup> A different approach, taken in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 14–15 (1968), distinguishes three types of defenses: excuse, justification, and mitigation. I find this a peculiar grouping, blurring two separate issues. One issue is whether the defense is complete or only partial, complete defenses being those that result in acquittal, whereas partial defenses merely reduce the crime to a lesser one (usually murder to manslaughter). What Hart calls “mitigation” can be either formal or informal. Formal mitigation is the same thing as a partial defense, and informal mitigation is simply the handing out of a lighter sentence than one would otherwise mete out. The second issue is whether the defense is a justification or an excuse. These strike me as distinct issues, and although we should leave open the possibility that a justification has to be complete to be a

justification.<sup>5</sup> Admittedly, some defenses are difficult to classify. Provocation, a partial defense, seems to have elements of both justification and excuse.<sup>6</sup> Duress also poses problems, but less weighty ones. Unlike provocation, it does not seem to be a hybrid. Instead, depending on the particulars of the case, duress can be a justification, but usually is only an excuse.<sup>7</sup> Although one might take these difficulties as evidence that the distinction between justifications and excuses is a hopeless one, I assume for the purposes of this essay that it is not hopeless, and try to figure out how best to draw it.

I said that duress is “only an excuse,” and this (emphasizing “only” rather than “duress”) brings me to a point that I hope is uncontroversial: “justified” and “excused” are not quite on a par, morally. Given a choice between having some action of mine deemed justified and having it deemed excused, I would rather that it be deemed justified. Most people would presumably share this preference. The reason is that *to say that an action is justified is to say (insofar as we focus on the action, rather than the agent) that though the action is of a type that is usually wrong, in these circumstances it was not wrong.*<sup>8</sup> *To say that an action is excused,*

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justification (and likewise for excuses), I see no reason to take that as a starting point and to shape our classification of defenses accordingly.

Still another approach is that of Sarah Buss, who argues in *Justified Wrongdoing*, 31 NOUS 337, 338 (1997), that “excuses and justifications are not two distinct sorts of exculpatory explanations” and that a “justification can be an excuse.” I hope in another paper to examine her arguments, but in this paper I start from the premise that they are distinct and try to figure out how best to draw the distinction.

<sup>5</sup> Although usually classified as a justification, self-defense is sometimes classified as an excuse, the idea then being not that self-defense is permissible, but rather that there is a natural instinct to defend oneself, and that therefore people cannot be expected to refrain from using violence when they believe it necessary for self-preservation. See Claire Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621 (1996). It is hard to see why one would regard self-defense as a mere excuse unless one holds that killing is always wrong, hence that killing in self-defense is never permissible; though if one accepts the positive rightness thesis, see *infra* Part VI, classifying self-defense as a justification becomes problematic (since in some instances killing in self-defense, though permissible, would not appear to be positively right).

<sup>6</sup> I address the issue of how to classify provocation in Marcia Baron, *Killing in the Heat of Passion*, in *SETTING THE MORAL COMPASS: ESSAYS BY WOMEN PHILOSOPHERS* (Cheshire Calhoun ed., 2004); see also UNIACKE, *supra* note 3, at 13–14. Uniacke classifies provocation as an excuse, as does Joshua Dressler in his *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002).

<sup>7</sup> For discussions of duress, see JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW*, ch. 23 (3d ed. 2001); ROBERT SCHOPP, *JUSTIFICATION DEFENSES AND JUST CONVICTIONS* (1998); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 SO. CAL. L. REV. 1331 (1989); Claire Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251 (1995).

<sup>8</sup> I have spoken just now in terms of actions being justified or excused, but as emerges in Parts III and IV, I think it more apt to speak of persons being justified in doing X, and of persons being excused for having done X; see also *infra* note 25. I should also mention that some would object to “not wrong” in the italicized statement, claiming that it results in too “weak” a statement of what it is for an action to be justified. See *infra* Part VI.

by contrast, is to say that it was indeed wrong (and the agent did commit the act we are saying was wrong), but the agent is not blameworthy. The reason why the agent is not blameworthy can be something about the agent, something about the circumstances (conjoined with facts about humans in general), or both.<sup>9</sup>

Care is needed in spelling out exactly what, if we say the agent is excused, we are denying. We are saying the agent isn't . . . isn't what? Isn't deserving of punishment and isn't deserving of blame; but also isn't accountable? Not necessarily; at least, not if "not accountable" means there is nothing he or she should be expected to do to make amends. If, due to a medication (which I have taken exactly as the doctor directed), my hands shake, with the result that I break a piece of your porcelain, I owe you an apology and should offer to buy you a replacement even though (let us assume) I am not blameworthy. In general, an obligation to make amends may be in order even if I am not blameworthy—indeed, even if I acted justifiably.<sup>10</sup>

That justifications and excuses are not on a par, morally, is uncontroversial. One does not want to be excused unless an excuse is called for (or unless the only alternative is to be punished); and it is called for only if one has done something wrong. For example, if a colleague says to me, "Of course, we could hardly have expected you to do X, when you had just given birth a few weeks earlier, so no one blames you," and I believe that in fact it was not my job to do X, period, I will not be entirely happy to be told that I am excused. I will be tempted to set the record straight: X was someone else's responsibility, not mine. I did nothing wrong at all.

As noted above, the reason why a person is not deserving of blame can be something about the person, or something about the situation together with facts about humans in general. Excuses thus divide into two rather different groups, the first of which is much more akin to justifications than is the second:

- (1) those (such as duress) that come into play because the situation was such that it was extremely difficult for that actor *and would be extremely difficult for most actors* to avoid acting wrongly or unlawfully; and

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<sup>9</sup> The reason need not be that the agent did not act voluntarily. Excuses can be in order even if the agent acted voluntarily; indeed, it seems a mistake to think that excuses ever come into play if the action was *not* voluntary. See ARISTOTLE, NICOMACHEAN ETHICS, bk. III, ch. 1 (Terence Irwin trans., Hackett Pub., 2d ed. 2000); Aristotle clearly sees excuses as coming into play only if the action was voluntary. He introduces the idea of excuses when he explains that the fact that S did X voluntarily, where X is something objectionable, does not entail that S is blameworthy for having done X. Some legal scholars, however, speak of excuses as if they apply primarily and paradigmatically to involuntary responses. George Fletcher, for example, writes that "[e]xcuses apply on behalf of morally involuntary responses to danger; they acknowledge that when individuals merely react rather than choose to do wrong, they cannot fairly be held accountable." GEORGE FLETCHER, RETHINKING CRIMINAL LAW 811 (1978); see also Finkelstein, *supra* note 7.

<sup>10</sup> This is an established principle in tort law, clearly enunciated in *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910), and affirmed in the RESTATEMENT (SECOND) OF TORTS § 197 (1974).

- (2) those (insanity being the paradigmatic instance) that come into play because of some peculiarity about the actor that makes it very difficult for him or her to act as the law requires.

Being excused on grounds of the second sort is clearly less desirable (barring ulterior motives, such as qualifying for a disability pension) than being excused on grounds of the first sort. Still, even an excuse of the first sort is less desirable, from the perspective of most agents, than a justification.

### III.

Although in the previous section I tried to present the distinction in a way that all can agree on, saving for a little later the disagreements, I found that one cannot say very much about it without saying something that will raise hackles (to my mind, philosophically interesting hackles). My classification of excuses will draw opposition from those (e.g., Douglas Husak) who hold that it is important to distinguish sharply between appraisals of acts and appraisals of agents, and who regard the following as imposing a constraint on how justifications and excuses should be characterized: "By definition, if the facts that comprise the defense describe the defendant's act, they constitute a justification; if these facts describe the defendant himself, they constitute an excuse."<sup>11</sup> Husak emphasizes that "justifications focus entirely on actions, not agents" and admonishes Kent Greenawalt for blurring "the distinction between judgments about acts and judgments about actors."<sup>12</sup> I do *not* think it generally important to draw a sharp distinction between appraisals of actions and appraisals of agents. It is an undercurrent of both this paper and some of my other work that it is often better to blur them, speaking in terms of the agent's conduct and thus about both action and character (as reflected in the agent's choice of this course of conduct and in her motivation and attitudes).<sup>13</sup>

That I reject Husak's definitional claim is evident from my characterization of excuses. The facts comprising excuses of type (2) describe the agent herself, but those constituting excuses of type (1) describe the circumstances of the act, human nature in general (more precisely, what is deemed to be too much, at least in that particular society, to expect of people-in-general), as well as the agent.

One might, without endorsing the general principle that act-appraisals should be sharply distinguished from agent-appraisals, nonetheless affirm Husak's claim

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<sup>11</sup> Douglas Husak, *Justifications and the Criminal Liability of Accessories*, 80 J. CRIM. L. & CRIMINOLOGY 494, 496-97 (1989).

<sup>12</sup> *Id.* at 497. Husak is referring to Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89 (1986).

<sup>13</sup> See Marcia Baron, *Kantian Ethics*, in THREE METHODS OF ETHICS: A DEBATE 32-64 (1997); MARCIA BARON, *KANTIAN ETHICS ALMOST WITHOUT APOLOGY* (1995); Marcia Baron, *The Ethics of Duty/Ethics of Virtue Debate and Its Relevance to Educational Theory*, 2 EDUC. THEORY 135, 138-43 (1985); see also Michael Stocker, *Act and Agent Evaluations*, 27 REV. METAPHYSICS 42 (1973).

that justification applies only to acts, not to agents. Although the claim does not bear directly on what I said above about excuses, it is very much at odds with my position on justifications, and therefore needs to be addressed. What reasons are there (apart from an underlying principle of the sort I have just questioned) for this position?

If one supposed that the word “justified” is—or should be—used only prospectively, to announce that actions of this type, though generally illegal [wrong], are legal [permissible or right] in circumstances *C*, it would make sense to say that justification applies only to acts.<sup>14</sup> We are announcing that acts of this type, in these circumstances, are permitted. Something ordinarily wrong is, in that sense, justified here.

If the claim is that the word “justified” in fact is used only prospectively, it is patently false. It hardly needs to be pointed out that it is quite common to use the word “justified” retrospectively to say that So-and-So was justified in doing *X*. Perhaps someone will claim that this use of “justified” is just sloppy speech, and that we either should not use the word retrospectively or should do so only to ask “Was his action justified?” and never “Was he justified in acting as he did?” I cannot imagine any reason for this stand (other than the general principle mentioned above). I see no basis for thinking that to assert that (or wonder if) an agent was justified in acting as he did invariably involves some mistake or confusion.

#### IV.

Although the main point of the previous section was to contest the claim that justification applies only to acts, not to agents, that discussion also brings to light an ambiguity that underlies the disagreement over whether to tie justification to reasonable belief or instead to truth. “Was his action justified?” is ambiguous between “*Was he justified in acting as he did?*” and “*Was the action—viewed without any attention to the actor’s beliefs and motives—justified?*” To see the non-equivalence of these questions, consider the following example: *D* killed *V* out of revenge, but, unbeknownst to *D*, *V* was about to kill him, and would have, had *D* not killed *V*. Should we say that *D*’s action was justified? Not if by that we mean that *D* was justified in acting as he did. He had no inkling (let’s suppose) that *V* was about to kill him. Without the belief that he needed to kill *V* to save his own life—and without having acted for that reason<sup>15</sup>—he was not justified in

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<sup>14</sup> I insert the bracketed words in an effort to keep in mind the question of whether what I say also applies outside of a legal context.

<sup>15</sup> In law—at least in the United States—there is generally no requirement that *D* have acted for that reason in order to have a justification; but outside of a legal context, this is something we would, I think, insist on. Suppose that *D* set out to kill *V* to get revenge, and then learned that *V* was aiming to kill him. Imagine that although *D* knew *V* was aiming to kill him, *D* killed *V* not to save his life—for some reason *D* does not particularly care whether he lives or dies, as long as he gets the revenge he is seeking—but for the reason he had at the outset, namely to get back at *V* for some slight

killing *V*.<sup>16</sup> Suppose that we instead understand by “his action was justified” that the action abstracted from the actor’s beliefs, motives and ends was justified. Thus understood, should the claim be affirmed? An affirmative answer is at least plausible. Killing *V*, given *V*’s intention of killing *D* and given that there was no other way to thwart *V*, would have been permissible under the circumstances. For this reason we may want to say that the action was justified.

This ambiguity in “justified”—specifically, in “Was *D*’s action justified?”—explains some of the disagreement over how justification differs from excuse, and whether justification should be tied to reasonable belief or to truth. Those who tie it to truth—holding both that a mistaken reasonable belief cannot render an action justified and that the action is justified in the scenario just described (where *D* had no inkling that *V* was about to kill him)—conceive of justification as applying paradigmatically to actions divorced from their particular actors (and from the actor’s beliefs and motives). Those who tie it to reasonable belief—holding (i) that an action is not rendered unjustified by a mistaken belief about a material element, provided that the belief is held on reasonable grounds and (ii) that an action is not justified in the scenario described above (where *D* had no inkling that *V* was about to kill him)—think of “*D*’s action was justified” as meaning “*D*’s acting as he did was justified.” For them (myself among them), justification applies mainly to actors, the question being “Was he justified in acting as he did?” I will return to this disagreement in Part VI.

## V.

For some of the same reasons why my remarks on excuses might spark disagreement, Part II might be objected to for what I do not include in my list of (mostly) uncontroversial points about justifications and excuses and how they differ. Justifications and excuses are often differentiated in the following way: (a) “Justifications are defenses that arise from properties or characteristics of acts; excuses are defenses that arise from properties or characteristics of actors.”<sup>17</sup> I do not take that characterization to be uncontroversial at all; indeed, I reject the claim, for reasons indicated above.

Other characterizations of the difference between justifications and excuses that I reject include that (b) it is actions and beliefs that are (or fail to be) justified, and people who are (or fail to be) excused; and (c) justifications are objective, and excuses subjective. Regarding (b): as indicated above, people can be justified (or fail to be justified) in doing *X*; it is no less correct to speak of a person being

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to *D*. Morally this would seem not to be a case of self-defense. (One wonders too how ready jurors would be, if they had all this information before them, to acquit *D* on self-defense grounds).

<sup>16</sup> But see UNIAKKE, *supra* note 3, at 20–21. See also *infra* Part VII.

<sup>17</sup> Husak, *supra* note 11, at 496.

justified in doing *X* than to speak of an action being justified.<sup>18</sup> I reject (c) both because justifications have a subjective component,<sup>19</sup> and because excuses of type (1) above have an objective component. Duress (for instance) requires, in the language of the Model Penal Code, that the actor was coerced to commit the offense in question “by the use of, or a threat to use, unlawful force against his person or the person of another, *which a person of reasonable firmness in his situation would have been unable to resist.*”<sup>20</sup> It is not enough that the actor was “unable to resist”; there is the objective component, as well: a person of reasonable firmness would in that situation have been unable to resist.<sup>21</sup>

In addition, justifications are sometimes characterized as follows (quoting what Paul Robinson presents as the “general principle of justification”): (d) “conduct is justified if it avoids a greater harm or evil than it causes.”<sup>22</sup> This too I regard not only as controversial, but as mistaken, though for a different reason than those I put forward in opposition to (a)–(c). As Husak has emphasized, definitional questions need to be distinguished from substantive questions. What this entails for purposes of this discussion is that the question of *what justification is* needs to be distinguished from the question of *when conduct is justified*. I therefore take issue with Robinson for presupposing a particular normative theory when he puts forward an account of what justification is. To say what justification is, is not—and should not be—to say what general justificatory principle we should accept.<sup>23</sup>

Finally, justifications are sometimes said to differ from excuses in the following way: (e) If *S* is justified in doing *X*, no one has the right to interfere to stop *S* from doing *X*, and anyone has the right to aid *S* in doing *X*.<sup>24</sup> I will explain in Part VIII why I think this is doubtful (while granting that it is much more plausible to assert that justifications have this entailment than to assert that excuses do).

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<sup>18</sup> One might argue that this conflates justifications with excuses, and that if we say “*S* was justified in doing *X*” we really mean that *S* is (or should be) excused, and are simply speaking sloppily. I will address this objection in Part VII, *infra*.

<sup>19</sup> Clearly this is a contentious matter. Although it is standard in law to require, for self-defense (and other justification defenses) the relevant belief, those who support what I call the material rightness thesis in its pure form reject this requirement. See *infra* Part VI.

<sup>20</sup> MODEL PENAL CODE § 2.09 (Proposed Official Draft 1962).

<sup>21</sup> See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1898 (1984) (emphasis added), for a critical discussion of this and other ways of distinguishing justifications from excuses. For challenges to Greenawalt’s arguments and to his thesis that “Anglo-American criminal law should not attempt to distinguish between justification and excuse in a fully systematic way,” see B. Sharon Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, 33 WAYNE L. REV. 1289 (1987).

<sup>22</sup> PAUL H. ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 665 (1988); see also 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 21 (1984).

<sup>23</sup> Husak, *supra* note 11, at 498–99.

<sup>24</sup> See, e.g., George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 971–80 (1985).

## VI.

I now want to bring into focus an assertion from Part II, and leave to one side the ambiguity discussed in Part IV and the related issue of whether to think of justification as applying primarily to actors or to actions. If we set that aside,<sup>25</sup> I think almost everyone can assent to the following way of differentiating justifications from excuses (depending on how “right” is understood): *To say that an action is justified is to say that although it is of a type that is usually wrong, under these circumstances it was right. To say that an action is excused is to say that it was wrong (and the agent did indeed commit the act we are saying was wrong), but the agent is not blameworthy.* Supposing agreement on this, let’s see where disagreements arise once details are filled in, and ambiguities attended to.

One disagreement can be traced to an ambiguity concerning the word “right”; the other is due in part to another such ambiguity, and in part to the issue that I am setting aside for now (concerning whether justification is primarily about persons or primarily about actions).

One’s action is justified, it is widely held, only if, under the circumstances, it is right; but some (myself included) intend by “right” in this context simply “not wrong,” while others mean something more. “Right” can mean simply permissible or it can mean obligatory (or something in between permissible and obligatory). Understood in the more restrictive way, “right” can mean, among other things, “obligatory” or “morally best” or (say some) “morally recommended”—and it is a further source of confusion that those who hold that it cannot, for purposes of justification, include the merely permissible may differ on exactly how it should be cashed out.

Second, although when we speak of an action being right we often mean (a) that it was right materially (for example, if we are consequentialists, that it did in fact bring about the best consequences compared to other actions available to the agent at the time), we sometimes mean (b) that it was right formally, meaning that it was the right choice (or at least, a permissible choice) for an agent in that situation to make at that time, given the information that was available to him (given what he knew and/or should have known).<sup>26</sup> The idea in (b) is that a reasonable person in that situation might well have opted as the agent in question

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<sup>25</sup> The only problem is that it is not possible to set them entirely aside, for it is impossible to come up with a statement that brings out the issue I want to bring out yet is neutral between putting the focus on actions, and putting it on agents. I of course want it to be on agents, but it would unfairly help my case to so frame it. So I have opted (here and in Part II) to frame the contrast in a way that, by speaking in terms of actions, favors a view opposed to mine.

<sup>26</sup> I chose the terms “materially” and “formally” rather than “objectively” and “subjectively” because “subjectively wrong” suggests “wrong according to the agent”—and that is not the idea at all. Relatedly, “materially” and “formally” have the advantage that neither one sounds as if it is an inferior, or watered down, version of the other; whereas “subjectively wrong” sounds less fully wrong than “objectively wrong.”

did.<sup>27</sup> In consequentialist terms, “formally right” would mean that it was the right choice because a reasonable person in the agent’s situation might well have judged that action to be the one most likely to bring about the best consequences.

That “right” can mean either permissible or something more is obvious, and requires little comment. That legal scholars differ accordingly as to how to understand “justified” is also well known. The disagreement is prominent enough that careful statements of what it is for an action to be justified are often put disjunctively so as to reflect both views. H.L.A. Hart writes that a justified act is one that “the law does not condemn, or even welcomes,”<sup>28</sup> and Joshua Dressler, quoting Hart, draws attention to the fact that “[j]ustification’ . . . may imply a positive judgment about conduct . . . or . . . may constitute a weaker value judgment. . . . Some scholars believe that the concept of ‘justification’ necessarily implies the stronger meaning; others favor an interpretation broad enough to include both characterizations.”<sup>29</sup> I will refer to the view that justification necessarily implies the stronger meaning as the *positive rightness thesis*.

By contrast, the other ambiguity has received little attention in the context of justification, and since space does not permit me to discuss both at length, I will devote more discussion to it and to the disagreements that can be traced to it (more precisely, traced to it and to the issue I said I would set to one side, concerning whether justification is primarily about persons or primarily about actions).<sup>30</sup>

Whatever degree of goodness or rightness one thinks necessary for justification, there is room for debate as to whether conduct can be justified if the conditions for the action’s permissibility do not obtain, but the agent believes on reasonable grounds that they do. Which stand one takes will be shaped by whether one thinks of “right” in this context as “formally right” or as “materially right.”

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<sup>27</sup> Exactly how to understand “reasonable person” is a topic that I cannot take up here, apart from offering two comments. First, I purposely said “might well have opted” rather than “would have opted” because I think it a mistake to suppose that all reasonable people would arrive at precisely the same decision, in any given situation, given the same information. There may be more than one reasonable option. Second, I understand “reasonable” objectively rather than subjectively and understand “objectively reasonable” in a fairly broad sense, roughly as spelled out in *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986), though substituting “person” for “man” in the instruction endorsed there. I discuss the question of how “reasonably believes” should be understood for purposes of self-defense in *Self-Defense: The Reasonable Belief Requirement* (unpublished manuscript, on file with author).

<sup>28</sup> HART, *supra* note 4, at 13.

<sup>29</sup> DRESSLER, *supra* note 7, at 206 n.8; see also Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155 (1987). Some, however, speak as if there is no controversy. See Finkelstein, *supra* note 5, at 624: “In the criminal law, to call a violation of a prohibitory norm *justified* is to say not only that it is *permissible*, but that it is *encouraged*.”

<sup>30</sup> For discussions of the positive rightness thesis (with particular attention to Fletcher), see Husak, *supra* note 11, at 499–504; 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, 69–87 (1984); see also *supra* text accompanying note 22.

Those who understand “right” as “materially right” hold that *S*’s reasonable but false belief cannot justify her conduct. If *S* reasonably but falsely believes that Joe is about to attack her (and that she can avoid injury only by attacking him), her belief does not change the fact that her attack on him was unnecessary. An action can be justified, it is claimed, only by the way things are. An action taken in mistaken self-defense thus cannot be justified, though it may be excusable. An action is justified only when it is materially right—only when it is not based on a false belief regarding the material elements of the defense. (Here, too, “right” can be understood either as merely permissible or as more than that; for simplicity, I will speak in terms of permissibility). If the conditions for the permissibility of the action do not obtain, the agent’s believing—even reasonably—that they do obtain does not make it so, and so the action is not justified (and the agent is not justified in so acting). Those who endorse this position—which I will call the *material rightness thesis*—do not claim that although the action was not justified, the agent was justified in so acting, so I will construe the material rightness thesis to entail that one cannot be justified in doing *A* if *A* is based on a false belief (about something the truth of which is crucial for *A* to be permissible).<sup>31</sup>

There are two possible versions of the material rightness thesis. In its pure form it holds that belief is not required at all; an act of killing another is justified if the victim was about to kill the attacker (and would have, had the attacker not killed him), even if the attacker was unaware of this. The other form requires both that *V* was in fact about to kill *D* and that *D* believed this. In other words, one version requires only that *V* was about to kill *D*; the other requires this together with a belief on *D*’s part that *V* was about to kill *D*. I will refer to the latter as the *qualified material rightness thesis*.<sup>32</sup> It is qualified in that it does not allow that material rightness alone suffices for justification; justification requires the relevant belief, as well as material rightness.<sup>33</sup> (We might also subdivide the qualified

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<sup>31</sup> The positive rightness and material rightness theses are logically distinct, but they lend each other support. In addition, both are nourished by (though they do not require) a consequentialist outlook, and in particular, a consequentialist outlook that evaluates actions in terms of the states of affairs that they bring about. For an example of an endorsement of both theses—an endorsement that reflects a consequentialist outlook—see ROBINSON, *supra* note 22, § 21; see also *infra* text accompanying notes 45–46.

<sup>32</sup> Those who endorse the material rightness thesis in its pure form include MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 65 (1997); 2 ROBINSON, *supra* note 22, § 121(c); Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1563–65 (1999). John Gardner holds the qualified view; see John Gardner, *Justifications and Reasons*, in *HARM AND CULPABILITY* 105, 117 (A.P. Simester & A.T.H. Smith eds., 1996), as does Claire Finkelstein, *supra* note 5, at 625–31, and FLETCHER, *supra* note 9, at ch. 10.

<sup>33</sup> Although self-defense law in the United States typically follows the reasonable belief view of justification, there are some exceptions. *North Dakota v. Leidholm*, 334 N.W.2d 811 (N.D. 1983), endorses the qualified material rightness position. Justice Walle wrote in *Leidholm*: “[A] person who believes that the force he uses is necessary to prevent imminent unlawful harm is *justified* in using such force if his belief is a *correct* belief; that is to say, if his belief corresponds with what actually is the case. If, on the other hand, a person *reasonably* but *incorrectly* believes that the force he uses is necessary to protect himself against imminent harm, his use of force is *excused*.” *Id.* at 815.

material rightness thesis into two forms: one holds that the belief has to be reasonable, as well as true; the other denies that it has to be reasonable. I shall in what follows ignore that complexity).

In the remainder of this essay I will argue against both versions of the material rightness thesis. I will argue, in other words, both that justification requires a belief that the facts are as they would have to be for the action to be permissible, and that justification does not require that the belief be true (as long as it is held on reasonable grounds).<sup>34</sup> There is much more to say than I have the space to say here, and I will not be able to do more than put a dent in the support enjoyed by the material rightness thesis. I shall focus not on reviewing the literature, but rather on addressing what seem to me to be the strongest arguments for the material rightness thesis.

## VII.

Fortunately, my remarks in Parts III and V have already done some of the work of undercutting arguments for the material rightness thesis. That justification requires truth and does not require (reasonable) belief is supported by the claim that justification does not apply to agents, but only to actions; and I called that claim into question.

The fact, to which I drew attention in Part VI—that “right” is used not only to mean “materially right,” but also “formally right”—also helps to weaken the case for the material rightness thesis. Although the distinction is unlikely to be news to anyone who has written on the subject of justifications and excuses, it seems not to be sufficiently attended to. It is familiar enough; we employ the notion of formal rightness when we say that while, with hindsight, it is clear that action A was the wrong choice, it is also clear that the agent acted as well as anyone in that situation could have acted. Notice that the claim is not that she acted as well as we could expect anyone in that situation to have acted. That might suggest an excuse (the thought being that it would be too much to ask of a person that he or she opt for what in fact she should have seen as the right choice). We are not excusing the actor. Rather, we are recognizing that although it later turned out that contrary to

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*Leidholm* requires for justification both truth and a reasonable belief “that circumstances exist which permit him to use defensive force.” *Id.* at 815–16. To see the contrast between this view and more typical treatment of self-defense and justification in general in the United States, see DRESSLER, *supra* note 7, at 214–15.

<sup>34</sup> Because of space limitations, I will say less on the question of whether belief should be required than on the question of whether truth should be. I think the importance of requiring belief is less in doubt than the claim that reasonable belief suffices for justification. As Arthur Ripstein observes, “The person who uses deadly force without believing his life is in danger was prepared to use that force without being in danger. Since the danger is irrelevant to his use of force, such a person is no different from the person who kills in the absence of danger. As a result, he should not be able to avail himself of self-defense.” ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 192 (1999).

what a reasonable (and duly diligent) person would have anticipated, the action was (materially) wrong, the actor's conduct was beyond reproach.

If it is objected that the fact that we recognize and regularly employ a distinction between formal and material rightness thesis does not decide anything for or against the material rightness thesis, I grant that point; nonetheless, the distinction brings into relief a problem that confronts us if we hold the view that justification requires truth. The view either ignores the possibility that an action can be formally right but not materially right, or holds that it has no bearing on how the actor should be viewed. If the latter, the view presumably is that it does not matter whether the actor is seen as having erred—erred in a way that deserves to be excused given the weakness of human nature or the particular disabilities of the agent—or is instead seen as having conducted himself admirably, or at least adequately. But to most of us, I think, it does indeed matter whether we are told, “We won’t blame you; we understand that it would be too much to ask you to do better than you did”; or instead, “We won’t blame you; for heaven’s sake, you conducted yourself in a way that was exemplary [or at least: perfectly reasonable].” As Hamish Stewart has put it, a system of criminal law ought not say that “a person who has acted reasonably on a reasonably held belief has done a criminal wrong (even an unpunishable one).”<sup>35</sup>

The distinction between formal and material rightness helps us detect arguments that trade on the ambiguity. “[M]istakes cannot justify homicide,” writes Fletcher; and that sounds like a compelling reason for tying justification to truth if we think of “justify” as meaning that it makes materially right what otherwise is not materially right.<sup>36</sup> “Justify” is a slippery term, and when we are thinking of material rightness, we are thinking of the action in isolation from the actor. If it is asked, “Under what circumstances is intentional killing justified?”, “When the actor was mistaken” is not a good answer, not even part of a good answer. “When the actor mistakenly thought, and on reasonable grounds, that the elements that warrant the use of lethal force in self-defense were present,” although better, is still on the wrong track, for the question calls for an answer that explains the circumstances in which intentional killing is materially right. But the

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<sup>35</sup> Hamish Stewart, *The Role of Reasonableness in Self-Defence*, 16 CANADIAN J.L. & JURISPRUDENCE 317, 336 (2003).

<sup>36</sup> Fletcher, *supra* note 24, at 973. Another argument that loses some of its punch once the distinction between formal and material rightness is attended to comes from Michael S. Moore:

If you mistakenly believe that another is trying to kill you and you use deadly force in self-defense, you might in ordinary idiom be said to be “justified” in what you did. But what you did was in fact wrong—it was a non-necessary killing—no matter how reasonable *you* may have been in believing and acting as you did. Your mistake is wholly irrelevant to the wrongness of your action, relevant as it may be to your culpability for doing that wrongful action.

MOORE, *supra* note 32, at 65. It is indeed irrelevant to the material wrongness of your action but not to its formal wrongness.

latter answer is—or so I claim—part of the correct answer to the question, “Under what circumstances has an agent acted justifiably in intentionally killing another?” Fletcher’s argument is far less compelling once we attend to the ambiguity of “justify.”

I turn now to some arguments, not already mentioned, in support of tethering justification to truth rather than to reasonable belief. The first takes as its target the requirement, for justification, that the agent have the relevant beliefs. Legal justification should be distinguished from moral justification, the argument goes; and for purposes of legal justification, it does not matter whether the agent held the relevant belief(s). If we think it does, that is because we are confusing legal justification with moral justification.<sup>37</sup>

In support of the claim that legal justification should be distinct from moral justification, one might point to the sharp contrast between legality and morality (at least from a Kantian perspective). Legality requires only that my conduct conform to the law, not that I realize it does, nor that my motivation be this rather than that. Morality, on the other hand, requires not just that my actions not be “outwardly” immoral, but that my motivation be what it should be—or at least not be what it should not be. I act lawfully when I do not steal, even if I refrain from stealing only because I am afraid of being either injured or arrested, whereas morality (Aristotelian and Kantian, anyway) requires that I refrain for the right reasons. Likewise, I act immorally if I have sex with someone I believe to be a minor (assuming, at least, that I am more than just a year or two older than the age I take him to be), even if in fact he is not a minor; but (unless I am violating some other law, for example, a law prohibiting attempted statutory rape) if he is not a minor, the fact that I believe he is does not make my action illegal. And, one might go on to say, I do not act illegally in these circumstances.

This lends some support to the claim that if I kill someone out of a desire to get revenge, not knowing that unless I kill him, he will kill me, I cannot be guilty of murder because I have a justification for having killed him: he would otherwise have killed me. For, one might argue, the claim sounds peculiar only to those who conflate legal with moral justification. If we do not, we can grant that morally I was not justified in killing him, while at the same time maintaining that legally, I was.<sup>38</sup>

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<sup>37</sup> This argument is loosely suggested by UNIACKE, *supra* note 3, at ch. 2, but her position is more nuanced. She draws a distinction between agent-perspectival justification and objective justification, and holds that the former is compatible with the agent having a mistaken belief, while the latter is not.

<sup>38</sup> I should note here another point that is sometimes introduced in an effort to lay to rest misgivings about allowing that someone who killed in such circumstances was legally justified in acting as he or she did. “Surely,” the person with the misgivings says, “I should be no less liable for murder if I killed out of revenge, not knowing that the victim in fact was about to kill me, than if I killed out of revenge and the victim was not about to kill me. My culpability is the same in each case.” In reply it is pointed out that things are not as bad as they might seem; in the latter scenario I would not be off the hook, legally. Although it is true that I could not be convicted of murder, I could still be convicted of attempted murder. Those who still are dissatisfied are invited to think

But does that last point really hold up? Does the distinction between legality and morality really support the distinction between legal justification and moral justification? No. It would if the point of justifications were to defeat the *actus reus* requirement (and if we agreed that the *actus reus* of murder is unlawful killing, building into the definition of “unlawful” that the victim had not been about to kill the defendant). Then, because there is no moral analogue to the *actus reus* requirement, we could say that legal justification does differ importantly from moral justification: once the *actus reus* requirement is shown not to be met, there is no possibility of convicting the accused of that particular crime. If self-defense and the other justifications were not affirmative defenses but a way of showing that the elements of the offense had not been proven, then yes, we could plausibly claim that *D*, who killed *V* without realizing that *V* was about to kill *D*—indeed, without realizing that *V* was about to attack *D* at all—was justified in killing *V*.<sup>39</sup>

Let’s imagine that that is the point of self-defense and the other justifications. If it is, and if we decide to understand justification to require truth and not to require belief, we will then need another term for what many of us call “justifications” (and what is understood as justification in Anglo-American self-defense law). Put differently, if justifications are to be understood as ways of defeating the *actus reus* requirement, we will need to enrich our conceptual apparatus so as to have something besides excuses, on the one hand, and on the other, justifications as they are understood in the proposal being considered (i.e., as ways of showing that the *actus reus* requirement is not met). This attempt to buttress the material rightness thesis by claiming that the position seems counterintuitive only to those who conflate legal justification with moral justification has a cost. It gets rid of the notion of justification in law by dissolving it into something different, namely, into negation of the act element.

Of course it might be argued that we can easily enough make do with excuses, on the one hand, and, on the other, arguments to show that the *actus reus*

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about how it works in general with attempt crimes (specifically, those that involve a mistake regarding a material element of the crime): If I shoot someone, aiming for the heart, but he turns out to be wearing a bulletproof vest, I am liable only for attempted murder, not for murder; yet I am just as culpable as if I had killed him.

Should that lay to rest all misgivings about liability in the case where I kill out of revenge someone who was about to kill me? I think not. First, we might take issue with the differential treatment of those guilty of such attempts and their “successful” counterparts. Second, we might question the parallel. In the bulletproof vest case, I really was attempting but not succeeding in doing something: I was attempting to kill someone, but failing because he was shielded by his vest. But in the other case, I did exactly what I set out to do. What we have is a completed crime, not an attempted one.

<sup>39</sup> I am relying here on the distinction between offense and defense, and the classification of self-defense as a defense; but I take it that is not problematic, since among most legal theorists neither the distinction nor the classification of self-defense as a defense is controversial. And there are constitutional reasons for sharply distinguishing between negating the elements of the offense and offering an affirmative defense (at least in the United States). See DRESSLER, *supra* note 7, at 201–02.

requirement (or for that matter, the *mens rea* requirement) was not met. It might be argued, in other words, that justifications understood as applying mainly to the agent—where we are saying “*S* was justified in doing *A*” or “*S*’s doing of *A* was justified”—are really just excuses, thinly disguised. My reply is as suggested above: we are all well aware that there is a difference between being judged to have acted on reasonable beliefs (i.e., reasonably), and being judged to have acted in a way that is wrong but not blameworthy. The difference is particularly striking if one has acted “as the most competent practitioner in his field would have acted.”<sup>40</sup> One would be understandably miffed (if not outraged) to be told that what one did was “excusable” if one had done everything as well as anyone possibly could have in the circumstances (given the information accessible to one, and which, let’s imagine, one went to some trouble to obtain).

### VIII.

I turn now to a set of objections often put forward by those who hold that justification requires truth.<sup>41</sup> The first concerns the right to resist an attack. Assuming that the right to resist turns on whether the attack is justified, those of us who hold that justification requires only reasonable belief, and not truth, seem to be stuck with the unfortunate implication that if I am attacked by someone who mistakenly but reasonably believes that I was about to attack her, I do not have the right to resist her assault. After all, she is acting justifiably—if we allow mistakes to be compatible with justification. Hence, I am not justified if I resist her attack.

Something seems wrong here, and the problem is thought to lie with the reasonable belief view of justification. To avoid what everyone agrees would be a bad implication—that I am not justified in resisting the attack of someone who attacks me, if she mistakenly (but reasonably) believed that I was about to attack her—it is suggested that we need to say that she was not justified (so that we can then say that I am justified). But the problem lies elsewhere: the critics are forgetting to drop their own notion of justification when they formulate what is supposed to be a problem for the reasonable belief view. If I am attacked by someone, then whether I am justified in resisting attack depends *not*—on the reasonable belief view of justification—on whether my attacker is in fact justified in attacking me; it hangs, rather, on whether I believe, on reasonable grounds, *p*,

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<sup>40</sup> Greenawalt, *supra* note 21, at 1909.

<sup>41</sup> The main source of these is George Fletcher, though others have endorsed the objections. FLETCHER, *supra* note 9, at 762 n.11 (“A valid justification . . . affects a matrix of legal relationships. The victim has no right to resist, and other persons acquire a right to assist—apart from one exception that need not detain us,” namely, “the case in which the person behind the scenes exploits a justifying set of facts in order to inflict harm on another”); *see also* Dressler, *supra* note 29, at 1173 (“If *A* provides *D* with a gun in order to kill *V*, and *D* is acquitted on the ground of self-defense, it follows that *A* should also be acquitted of the offense since she has aided the primary party to commit a socially acceptable act.”). Elsewhere, however, Joshua Dressler calls this into question. *See* Dressler, *supra* note 30, at 95–97.

where  $p$  stands for all those things which if true, render what would otherwise be unlawful aggression, lawful. So what matters is that I reasonably believe that her attack on me is unlawful—not whether it really is. That means that if she believes incorrectly, but on reasonable grounds, that I am about to attack her, then as long as I reasonably believe that she is not justified in attacking me, I *am* justified in resisting her attack.

Now this approach may seem to save the reasonable belief view of justification from one attack only to open it to another. For what if (improbable though it hopefully is) I realize that she does—or at least did—have reason to think that I was about to attack her? (Right behind me is a “Wanted: Armed and Dangerous” poster and the person pictured in fact looks a lot like me; on top of that, I realize that some gestures I made might have suggested belligerence). Does this mean that, recognizing that perhaps she was justified in her attack, I am not justified in resisting her attack? That surely does not sound right. But how are we to handle the problem?<sup>42</sup> Critics suggest that the solution is to give up on the reasonable belief view of justification, so that what matters is not what she reasonably believes, but what is true. The solution helps here, because I know that in fact I am not the person pictured in the “Wanted” poster. But notice that it does not help in other cases involving mistakes where the issue is third party intervention. If, as in the much-discussed case of *Young*,<sup>43</sup> a third party (goodheartedly and maybe even heroically) comes to the aid of a youth who is struggling against what turn out to be plainclothes police officers, it seems wrong to say that the action of intervening was unjustified. On the reasonable belief view, Young’s action was justified (assuming he had reasonable grounds, as it appears he did, for his belief that the youth had a right to use force to defend himself, and for his belief that he needed to use force to prevent further harm to the youth). On the view that justification requires truth, not reasonable belief, Young’s action was not justified.

What we have here are some paradoxes concerning mistaken self-defense, some of which are better handled by the (qualified) material rightness thesis, while others are better handled by the reasonable belief view of justification. Rather than take the paradoxes to show that the reasonable belief view of justification is wrong-headed, we should explore the paradoxes themselves, with a willingness to call into question such commonly accepted principles as that two people cannot both be justified in resisting each other, and that if and only if  $S$  is justified in using force in self-defense, anyone is justified in helping her (and no one is justified in thwarting her efforts).<sup>44</sup>

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<sup>42</sup> Consider Ripstein’s solution, according to which (a) someone whose actions give rise to a reasonable belief that he is an aggressor should therefore be considered an aggressor and (b) mistakes regarding identity are not justifications but are (assuming, presumably, that the mistakes are not due to negligence or recklessness) excuses. See RIPSTEIN, *supra* note 34, § 6.4.

<sup>43</sup> *People v. Young*, 183 N.E.2d 319 (N.Y. 1962).

<sup>44</sup> For a paper that takes a hard look at such principles, in particular, at the principle that justifications cannot conflict, see Douglas N. Husak, *Conflicts of Justification*, 18 LAW & PHIL. 41

There is reason to doubt the principle that if and only if you are justified in doing *A*, anyone is justified in assisting you in doing *A*. Certainly outside of a legal context it does not always hold. I may be justified in saying something cutting in reply to *S*'s cutting remarks towards me; but it does not follow that others are justified in joining me in directing cutting remarks towards *S*. If it is supposed to follow from the fact that I am justified in defending myself that you are justified in defending me, we need to hear what the suppressed premises are. It will not do to invoke a general principle to the effect that if one is justified in doing *A*, others are justified in aiding one in doing *A*.<sup>45</sup> The ethics of intervention—be it in another country's affairs, another person's affairs, and for the defense of others or for other reasons—are not a simple matter. It is implausible to suppose that we can read off the justifiability of a third party intervention from the justifiability of the principal's conduct.

What about Fletcher's claim that it is "contradictory to say that both sides to the conflict were justified in their use of force"?<sup>46</sup> Or, as Fletcher puts it elsewhere, labeling it "the 'incompatibility thesis'," "[in] any situation of physical conflict, where only one party can prevail, logic prohibits us from recognizing that more than one of the parties could be justified in using force."<sup>47</sup> Where is the contradiction? How can logic prohibit us from recognizing that more than one of the parties could be justified in using force? As far as I can tell, Fletcher's principle seems valid only if we either presuppose the positive rightness thesis or for some other reason already accept the view in support of which the principle is put forward, namely that justification is incompatible with mistakes, and thus is tied to truth, rather than to reasonable belief. If one rejects that view and accepts

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(1999). I regret that I learned of this paper only as I was making final revisions on my paper, too late to draw upon it in my discussion.

<sup>45</sup> Judith Jarvis Thomson discusses these issues in *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 306 (1991), pointing out that sometimes defending another would "constitute 'barging in,' meddling, interfering," and that there are also times where "people should be left to fight their own battles, even at the cost of losing some." A consideration she does not mention but that I think should weigh in is the evidentiary one: there is, arguably, reason to permit acting on slightly scantier evidence in defense of oneself or one's child (or perhaps another loved one) than should be required before one acts if one comes upon two strangers, one of whom is attacking another. In addition, there will (depending on the mode of the attack) often be ways a third party can intervene that are not open to the person being attacked—to call the police, or to spray the attacker with a hose or otherwise thwart the attack without attacking the attacker. In any case, the situation of a third party is very different from that of the person who is under attack, and so one cannot lead off from the fact that the person under attack is justified in using force that a third party also is. The third party must also believe on reasonable grounds that using force is necessary, and different considerations will factor in, in support of (or against) that belief.

<sup>46</sup> FLETCHER, *supra* note 9, at 767. Fletcher writes, "It would strike most Continental theorists as contradictory to say that both sides to the conflict were justified in their use of force" and makes it clear that he is siding with the Continental theorists. *Id.* Arthur Ripstein observes that Fletcher's principle poses a challenge not only to the reasonable belief view of justification, but to Fletcher's view of justification, as well. RIPSTEIN, *supra* note 34, at 197–201.

<sup>47</sup> Fletcher, *supra* note 24, at 975.

the reasonable belief view of justifications, there will be nothing obviously wrong in allowing that in such a sad situation, both parties may be justified in using force—though of course that need not mean, unless we accept the positive rightness thesis, that we think using force was commendable.<sup>48</sup>

A third principle that is often invoked in arguments against the reasonable belief view of justification is that resistance of a justified act is never justified. This is sometimes thought to be established by *Ploof v. Putnam*.<sup>49</sup> But is it? Recall the facts of the case: the plaintiff and his family were sailing their sloop when a sudden storm left them no choice (short of risking death) but to moor the sloop to the defendant's dock.<sup>50</sup> The defendant's servant "willfully and designedly" unmoored the sloop, thereby destroying the sloop and causing injury to the plaintiff and his family.<sup>51</sup> The wharf owner was liable for damages, for the employee's resistance was unjustified (and the master was held legally responsible for his servant's actions); and it was unjustified because the plaintiff was doing no wrong, given the violence of the storm, in mooring it to another's dock.<sup>52</sup> The employee had no right to unmoor the sloop.

If we try to express this by saying that *one is never justified in resisting an action that itself is justified*, we invite confusion, given the ambiguity of "justified." Do we mean that one is never justified in resisting something that itself is permissible, even if the agent has every reason to think that what the other is doing is impermissible? That conclusion—and the implication that mistaken self-defense is never justified—is certainly not suggested by *Ploof*. It is an important, but not very striking, feature of *Ploof v. Putnam* that the employee knew there was a storm and thus should have been able to tell that the yachtsman acted permissibly in mooring the sloop to his master's dock. There is no room for a reasonable mistake here. (It also is a relevant, and very obvious, feature that there was no risk—except possibly slight damage to the dock—in allowing the family to moor their sloop to the dock, while the risk to the family if they did not help themselves to the dock was great). The lesson from *Ploof* (apart from any lessons about the responsibility of masters for their employees' actions) is thus best summarized as "[o]ne is never justified in resisting an action which one knows, or should know, is permitted" (and one might add "especially when the permissible action is necessary for avoidance of serious bodily injury"). That is

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<sup>48</sup> It should be borne in mind that what was a reasonable belief may cease to be a reasonable belief if new information comes to light. On a reasonable belief view of justification, then, one would not continue to be justified in intervening if it became clear (or if a reasonable person in the agent's position would have noticed) that the "attackers" were police officers attempting to make a lawful arrest.

<sup>49</sup> 71 A.2d 188 (Vt. 1908).

<sup>50</sup> *Id.* at 188.

<sup>51</sup> *Id.* at 189.

<sup>52</sup> *Id.* at 189–90.

less ringing than “It is never justified to resist a justified action,” but it avoids ambiguity and better captures the point.

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I hope to have shown in this paper some of the disagreements (including different ways of cashing out “right”) that underlie the disagreements about what justifications are and how they differ from excuses. I also hope to have shown that some of the reasons given against the reasonable belief view of justification are not compelling. A lot turns on whether one sees justification to apply primarily to actions (in isolation from the beliefs, attitudes, etc. of the actor) or primarily to agents (or to the agent’s action, viewed as that agent’s action). I have indicated some reasons for thinking that the latter notion of justification is one that we should not abandon.