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EXCUSING BEHAVIOR: RECLASSIFYING THE FEDERAL COMMON LAW DEFENSES OF DURESS AND NECESSITY RELYING ON THE VICTIM'S ROLE

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Scholars have long debated the best way to classify the affirmative defenses of necessity and duress. Necessity typically involves a defendant arguing that he committed the crime in order to avoid a greater evil created by natural forces. Duress usually entails a defendant arguing that he committed the crime in order to avoid unlawful physical threats made by a third party. Most scholars categorize duress as an excuse (wrongful conduct where the defendant is still found not culpable based upon mitigating circumstances) and necessity as a justification (warranted or encouraged conduct where the defendant is found not culpable), but their focus has been on state law and related jurisprudence. This Article makes an original contribution to the literature by presenting a theory for classifying these defenses that focuses entirely on the role of the victim in the criminal act and ultimately categorizes both defenses as excused acts.

The Article consists of two parts. First, it surveys how federal courts have treated duress and necessity. They have applied similar standards both during the liability and sentencing phases of trial. Some courts actually have adopted a consolidated definition for these affirmative defenses. This treatment suggests that duress and necessity should be classified in the same way.

The second part of the Article focuses on the conceptual framework behind classifying these defenses. In light of federal jurisprudence, we need to reexamine the methods criminal theorists have used to distinguish necessity and duress. Scholars typically focus their attention on the defendant and what he does. The prominent theories include appealing to

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the type of harm the defendant causes, his particular state of mind, whether he deserves aid from another, whether his behavior conforms to a public norm, or whether his actions are warranted. However, none of these five approaches provides a comprehensive methodology that accurately captures the nature of duress and necessity. Nor do any of them preserve our intuitions when applied to other affirmative defenses such as self-defense and insanity.

The problem is that theorists have focused too heavily on the defendant. In doing so, they have left out the victim—the central figure who suffers the harm. This Article seeks to change this defendant-oriented perspective when it comes to classifying duress and necessity. The final part of the Article outlines an alternative theory that focuses entirely on the victim’s role in the crime. As the person who was harmed by the defendant’s conduct, the victim should be our focus when deciding whether the defendant’s conduct constitutes an excused or justified act. Where the victim played a direct role in what happened, the defendant’s action is better classified as a justification, and where the victim innocently suffered, the defendant’s action is better classified as an excuse. This focus on the victim’s culpability more accurately captures the intuitive difference between excuse and justification and explains why duress and necessity (particularly as used by federal courts) should be classified together as excused acts.

I. INTRODUCTION

Much has been written on the affirmative defenses of duress and necessity.¹ Necessity typically involves a defendant arguing that he committed the crime in order to avoid a greater harm created by natural

¹ See generally 2 PAUL ROBINSON, *CRIMINAL LAW DEFENSES*, §§ 121, 161 (1984); Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597 (2009); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CALIF. L. REV. 1331 (1989); Arnold N. Enker, *In Support of the Distinction Between Justification and Excuse*, 42 TEX. TECH. L. REV. 273 (2009); Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TULSA L. REV. 191 (2007); 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).

forces.² Duress usually entails a defendant arguing that he committed the crime in order to avoid unlawful physical threats made by a third party.³ Neither defense negates a defendant's *mens rea* or criminal state of mind; rather, these defenses serve to "negate[] a conclusion of guilt."⁴ The defendant thus typically bears the burden of proving these affirmative defenses.⁵

² See, e.g., *United States v. Bailey*, 444 U.S. 394, 410 (1980) (noting that necessity involves a "situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils"); MODEL PENAL CODE § 3.02 (1981) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."); 1 WHARTON'S CRIMINAL LAW § 90 (Charles E. Torcia ed., 15th ed. 2009) ("[T]he actor engages in the conduct out of necessity to prevent a greater harm from occurring"); 22 C.J.S. *Criminal* § 57 (2009) ("A necessity defense traditionally covers the situation where physical forces beyond the actor's control rendered the actor's illegal conduct the lesser of two evils."); Dressler, *supra* note 1, at 1347 ("[N]ecessity exculpates when, as the result of a naturally-caused condition, 'a man has his choice of two evils before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two.'") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *31–32); Westen & Mangiafico, *supra* note 1, at 849.

³ See, e.g., *Bailey*, 444 U.S. at 409 (finding that duress involves a situation "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"); MODEL PENAL CODE § 2.09 ("It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist."); 1 WHARTON'S CRIMINAL LAW, *supra* note 2 at § 52 ("[W]hen a defendant engages in conduct which would otherwise constitute a crime, it is a defense that he was coerced to do so by the use or threatened use of physical force upon him or upon a third person."); 22 C.J.S. *Criminal Law*, *supra* note 2 at § 59 ("Three elements must be shown to establish duress: an immediate or imminent threat of death or serious bodily injury; a well-grounded or reasonable fear that the threat will be effected; and no reasonable opportunity to escape the threatened harm, except by committing the criminal act."); Westen & Mangiafico, *supra* note 1, at 849.

⁴ *Bailey*, 444 U.S. at 402.

⁵ See *Dixon v. United States*, 548 U.S. 1, 2 (2007) (noting that at common law the defendant generally bears the burden of proving affirmative defenses and specifically finding that, where Congress is silent on the issue, the burden of showing duress rests with defendant); *Patterson v. New York*, 432 U.S. 197, 202 (1977) (finding that state did not violate due process by making the defendant prove his affirmative defense); *United States v. Jumah*, 493 F.3d 868, 873 n.2 (7th Cir. 2007) (noting that *Dixon*'s discussion of burden of persuasion applied to other affirmative defenses not just duress); Madeline Engel, *Unweaving the Dixon Blanket Rule: Flexible Treatment to Protect the Morally Innocent*, 87 OR. L. REV. 1327, 1329 (2008) ("Traditionally, the burden to prove these affirmative defenses, indeed all 'circumstances of justification, excuse, or alleviation,' rested with the defendant.") (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 693 (1975)).

Scholars have extensively examined whether necessity and duress are properly understood as excused or justified acts.⁶ These quasi-legal labels seek to capture the overall nature of such defenses. A justification defense exculpates otherwise criminal conduct because the conduct is not wrongful and benefits society or is socially useful.⁷ An excuse defense also exculpates otherwise criminal conduct, only this time the conduct is deemed wrongful, but the defendant is not blameworthy because of the specific circumstances surrounding the offense.⁸ Most scholars classify duress as an excuse and necessity as a justification.⁹

Despite this wealth of scholarship, few have focused on how federal courts analyze these affirmative defenses.¹⁰ To the extent scholars have examined the application of these defenses, not surprisingly, they have

⁶ See, e.g., Dressler, *supra* note 1, at 1351–60; Daniel Varona Gómez, *Duress and the Anticolony's Ethic: Reflections on the Foundation of the Defense and Its Limits*, 11 NEW CRIM. L. REV. 615 (2008); Kyron Huigens, *Duress Is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303 (2004); Westen & Mangiafico, *supra* note 1, at 896.

⁷ See, e.g., Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 7 (2003) (“[J]ustified action is not wrongful . . .”); Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1327–28 (2006); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 726 (2004) (“Justification defenses focus on the act and not the actor—they exculpate otherwise criminal conduct because it benefits society, or because the conduct is in some other way judged to be socially useful.”).

⁸ See, e.g., Berman, *supra* note 7, at 7 (“[E]xcused action is wrongful conduct for which the actor is not ‘morally responsible . . .’”); Chiu, *supra* note 7, at 1326–27; Milhizer, *supra* note 7, at 726 (“Excuse defenses focus on the actor and not the act—they exculpate even though an actor’s conduct may have harmed society because the actor, for whatever reason, is not judged to be blameworthy.”).

⁹ See, e.g., GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 130–43 (1998); 2 ROBINSON, *supra* note 1, at §§ 124, 177; Laurie Kratky Doré, *Downward Adjustment and Slippery Slope: The Use of Duress in the Defense of Battered Defenders*, 56 OHIO ST. L.J. 665, 745 (1995) (noting that most scholars classify necessity as a justification and duress as an excuse); Dressler, *supra* note 1, at 135–51 (noting that necessity is a justification but finding that some scholars also define duress as a justification and arguing that this classification is not tenable); Gómez, *supra* note 6 (arguing that necessity is classified as a justification whereas duress should be classified as an excuse); Huigens, *supra* note 6 (arguing that duress is better classified as an excuse not a justification); Kent Greenawalt, *Violence—Legal Justification and Moral Appraisal*, 32 EMORY L.J. 437, 443 n.10 (1983). But see Donald L. Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49 LAW & CONTEMP. PROBS. 109, 125 (1986) (noting that duress and necessity are instances of excused acts); Westen & Mangiafico, *supra* note 1, at 896–900 (arguing that while most scholars classify duress as an excuse this defense is better understood as a justification). See generally Miriam Gur-Arye, *Should the Criminal Law Distinguish Between Necessity as a Justification and Necessity as an Excuse?*, 102 LAW Q. REV. 71 (1986).

¹⁰ See Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259 (2008) (analyzing the use of necessity by federal courts).

limited themselves to state law or related jurisprudence.¹¹ Federal criminal jurisdiction is restrictive and thus precludes many crimes where duress and necessity would naturally be invoked.¹² Still, it is worthwhile to focus on this subset of cases, even if it represents a smaller pool. Surveying federal common law on the subject provides a unique perspective that may better inform our understanding on how to classify duress and necessity.

The first part of this Article examines how federal courts have analyzed duress and necessity during the liability phase, as well as how sentencing judges have departed from the U.S. Sentencing Guidelines based on these affirmative defenses. Federal courts by and large have applied the same standard when examining the permissibility of these defenses. Some federal courts have gone further and explicitly adopted a consolidated definition for these two defenses in the context of certain crimes. This treatment suggests that duress and necessity (at least as interpreted by federal courts) should be categorized together as either excused or justified acts.

The second part of the Article focuses on the conceptual framework behind classifying these defenses. In light of federal jurisprudence, we need to reexamine the methods criminal theorists have used to distinguish necessity and duress. This Article synthesizes and evaluates the five main theories on the subject, which focus on the defendant and what he does. These prominent theories include appealing to the type of harm the defendant causes, his particular state of mind, whether he deserves aid from another, whether his behavior conforms to a public norm, or whether his actions are warranted. Each relies on unique methodology intended to distinguish excused from justified acts. However, none of these approaches provides a comprehensive theory that accurately captures the nature of duress and necessity. Nor does any of them preserve our intuitions when used to analyze other affirmative defenses such as self-defense and insanity.

¹¹ See, e.g., Hoffheimer, *supra* note 1 (focusing on the Model Penal Code and state law in understanding the necessity defense); Westen & Mangiafico, *supra* note 1 (focusing on the Model Penal Code in understanding the duress defense).

¹² See generally 18 U.S.C. § 3231 (2006) (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”); *Gonzales v. Raich*, 545 U.S. 1 (2005) (finding federal criminal jurisdiction limited by the Commerce Clause); *Pettibone v. United States*, 148 U.S. 197, 203 (1893) (“The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States”); *Peters v. United States*, 94 F. 127, 131 (9th Cir. 1899) (“It must be borne in mind that the national courts do not resort to common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon congress to define what are crimes, to fix the proper punishment, and to confer jurisdiction for their trial.”).

The main problem is that theorists have focused too heavily on the defendant. In doing so, they have left out the victim—the central figure who suffers the harm. This Article seeks to change this defendant-oriented perspective when it comes to classifying duress and necessity. It posits an alternative theory that centers completely on the victim’s role in the crime. As the person who was harmed by the defendant’s conduct, the victim should be our focus when morally judging the defendant’s conduct. Where the victim played a direct role in what happened, the defendant’s act of necessity or duress is better classified as a justification, and where the victim innocently suffered, the defendant’s act is better classified as an excuse. This emphasis on the victim’s culpability in the criminal act provides a more consistent and intuitive approach to understanding the distinction between justification and excuse. It also properly places duress and necessity in the same category as excused acts.

The Article consists of eight parts. Parts II through IV explore how federal courts define and analyze duress and necessity during the liability phase of trial. Part V specifically addresses how courts have interpreted these defenses under the U.S. Sentencing Guidelines. Part VI focuses on the basic concepts of excuse and justification and how federal courts analyze the defenses of self-defense and insanity. Part VII critically examines the methods by which scholars classify necessity and duress, including why they usually classify the former as a justification and the latter as an excuse. Part VIII presents a victim-based theory that explains why both defenses are more appropriately classified as excused acts.

II. FEDERAL JURISPRUDENCE ON DEFINING AND ANALYZING THE AFFIRMATIVE DEFENSE OF NECESSITY

A. SUPREME COURT JURISPRUDENCE

The first reference to necessity as a defense to a violation of law appears to come from admiralty cases.¹³ In *Brig Struggle v. United States*, for instance, the Supreme Court heard a case involving an American registered vessel that violated certain commercial laws by making port in

¹³ See, e.g., *The New York*, 16 U.S. (3 Wheat.) 59, 68 (1818) (“The necessity must be urgent, and proceed from such a state of things as may be supposed to produce on the mind of a skilful mariner, a well grounded apprehension of the loss of vessel and cargo, or of the lives of the crew. It is not every injury that . . . will excuse the violation of the laws of trade.”); *Brig Struggle v. United States*, 13 U.S. (9 Cranch) 71, 76 (1815) (finding insufficient evidence for defense of necessity where ship had to sail for the West Indies to preserve cargo and protect lives of crew); *Brig James Wells v. United States*, 11 U.S. (7 Cranch) 22, 25–26 (1812) (finding necessity defense applicable where weather and leaky vessel forced claimant to port ship and violate embargo law must be clear and positive).

the West Indies without making the appropriate bond to the United States.¹⁴ The claimant relied on the defense of necessity, arguing that based on unexpected inclement weather, he was forced to port in the West Indies to protect the cargo and the lives of the crew.¹⁵ While the Court recognized the permissibility of this defense, it noted that the claimant must provide sufficient evidence that his actions were necessary. The Court ultimately rejected a necessity defense on the instant facts because the proffered evidence did not support the purported “magnitude of injuries” or “imminence of the danger to . . . the vessel and crew.”¹⁶

United States v. Kirby seems to be the first Supreme Court case that discussed, albeit as dicta, the necessity defense in the criminal context.¹⁷ The Court reasoned that to prevent injustice or “absurd consequence[s,]” common sense sometimes requires exceptions to the application of laws.¹⁸ Referencing a law that punished a person who “drew blood in the streets,” the Court stated that this law should not apply to a surgeon who “opened the vein of a person that fell down in the street in a fit.”¹⁹ Similarly, the Court noted that a prisoner who breaks out of a jail that is on fire should not be guilty of a felony because he tried to avoid getting burnt.²⁰

It was not until *United States v. Bailey* that the Court explicitly discussed the contours of the necessity defense and applied it to the facts at hand.²¹ The defendants were convicted of escaping from federal prison.²² One of the issues before the Court was whether the defendants were entitled to a jury instruction on necessity based on the threats of death by prison guards and other severe conditions at the prison that purportedly prompted their escape.²³ The Court defined necessity as a “choice of evils . . . where physical forces beyond the actor’s control rendered illegal conduct the lesser of two evils.”²⁴ The Court reasoned that “where A destroyed [a] dike in order to protect more valuable property from flooding, A could claim a defense of necessity.”²⁵ The Court went on to say that this defense is only

¹⁴ *Brig Struggle*, 13 U.S. at 71–72.

¹⁵ *Id.* at 72.

¹⁶ *Id.* at 75–76.

¹⁷ *United States v. Kirby*, 74 U.S. 482 (1868). The Court does not explicitly use the term “necessity” though it is clear that this is the principle being invoked.

¹⁸ *Id.* at 486.

¹⁹ *Id.* at 487.

²⁰ *Id.*

²¹ 444 U.S. 394 (1980).

²² *Id.* at 397.

²³ *Id.* at 395–98.

²⁴ *Id.* at 410.

²⁵ *Id.*

available where there is no “reasonable, legal alternative to violating the law.”²⁶ Without deciding the issue of whether the defense of necessity can be invoked for prison escape, the Court concluded that the defendants were not entitled to the defense on the instant facts.²⁷ The Court found that the defendants made no effort to surrender or return to custody after their escape and therefore could not avail themselves of the necessity defense.²⁸

In *United States v. Oakland Cannabis Buyers’ Cooperative*, some twenty years later, the Supreme Court revisited the necessity defense.²⁹ The case involved a cooperative organization that was distributing marijuana to patients pursuant to a California initiative but in violation of the federal Controlled Substance Act.³⁰ The cooperative contended that providing this marijuana was medically necessary and the only way to alleviate the “severe pain and other debilitating symptoms of [its] patients.”³¹ The Court first noted that it is an “open question whether federal courts ever have authority to recognize a necessity defense not provided by statute.”³² Relying on *United States v. Bailey*, the Court defined such a defense as a situation where physical forces beyond the defendant’s control made him commit the lesser of two evils.³³ The Court went on to say that the defense could not succeed in the instant case where the relevant statute “le[ft] no doubt that the defense is unavailable.”³⁴ The Court found that even though the Controlled Substances Act did not explicitly preclude a necessity defense, the statute reflects “a determination that marijuana has no medical benefits worthy of an exception.”³⁵

B. FEDERAL CIRCUIT JURISPRUDENCE

Federal circuits have further elaborated on the contours of the necessity defense. A typical characterization of the defense includes the following requirements: (1) “[the defendants] were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to

²⁶ *Id.*

²⁷ *Id.* at 412.

²⁸ *Id.* at 415. The Court also addressed the permissibility of a duress instruction and came to the same conclusion. *Id.*

²⁹ 532 U.S. 483 (2001).

³⁰ *Id.* at 486–87.

³¹ *Id.* at 487.

³² *Id.* at 490.

³³ *Id.*

³⁴ *Id.* at 491.

³⁵ *Id.*

violating the law.”³⁶ The lesser-evil requirement functions as a straightforward utilitarian determination.³⁷ “What all the traditional necessity cases have in common is that the commission of the ‘crime’ averted the occurrence of an even greater ‘harm.’”³⁸ For instance, the Ninth Circuit explicitly found that violating the Controlled Substances Act to prevent the severe physical suffering of the defendant satisfied the lesser-evil prong of the necessity defense.³⁹ To find otherwise and “forgive a crime taken to avert a lesser harm would fail to maximize social utility.”⁴⁰

The imminence requirement simply means that the harm must be immediate.⁴¹ For example, one circuit court found that the necessity defense was not available in a civil disobedience case because, among other things, the supposed harm was simply the existence of the law or policy in question.⁴² Any harm resulting from this policy was generalized and therefore “too insubstantial an injury to be legally cognizable.”⁴³

Defendants are also required to show that their actions would in fact avert the lesser harm.⁴⁴ The First Circuit examined this causal requirement in the context of protests at a naval base surrounding certain live-fire exercises.⁴⁵ The protestors argued that their illegal reentry was necessary to avert a greater evil, namely the continual bombing of lands presumably

³⁶ *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991); *see also* Abigail Alliance for Better Access to Developmental Drugs and Wash. Legal Found. v. Von Eschenbach, 495 F.3d 695, 707 (D.C. Cir. 2007) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980), for the proposition that the necessity defense involves physical forces that require the defendant to choose the lesser of two evils); *United States v. Patton*, 451 F.3d 615, 638 (10th Cir. 2006) (finding similar elements for the necessity defense); *United States v. Ayala*, 289 F.3d 16, 26 (1st Cir. 2002) (same); *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984) (finding that necessity defense not applicable because defendant’s actions were result of human coercion and not physical forces of nature); *United States v. Gant*, 691 F.2d 1159, 1162–63 (5th Cir. 1982) (same)).

³⁷ *See, e.g., Schoon*, 971 F.2d at 197 (“[T]he necessity doctrine is utilitarian.”).

³⁸ *Id.* at 196.

³⁹ *Raich v. Gonzalez*, 500 F.3d 850, 859–60 (9th Cir. 2007). The *Raich* Court found that *Oakland Cannabis Buyers’ Cooperative*, 532 U.S. at 483, did not necessarily “foreclose[] a necessity defense to a prosecution of a seriously ill defendant under the Controlled Substances Act.” *Id.* at 860, 869.

⁴⁰ *Schoon*, 97 F.2d at 197; *see also Gant*, 691 F.2d at 1164 (“If the criminal act cannot abate the threatened harm, society receives no benefit from the criminal conduct . . .”).

⁴¹ *See, e.g., Raich*, 500 F.3d at 860 (finding that the imminence requirement was satisfied because “[a]ll medical evidence in the record suggests that, if [defendant] were to stop using marijuana, the acute chronic pain and wasting disorders would immediately resume”).

⁴² *Schoon*, 971 F.2d at 197.

⁴³ *Id.*

⁴⁴ *United States v. Ayala*, 289 F.3d 16, 26 (1st Cir. 2002).

⁴⁵ *Id.*

occupied by endangered or threatened animals.⁴⁶ The First Circuit found that the defendants could not show that their protests would cause “a change of U.S. Naval policy so that the bombing and ammunition testing [would] cease.”⁴⁷

Defendants must also show that they had no reasonable legal alternative to committing the crime. For example, the Tenth Circuit found that the necessity defense was not available to a defendant who illegally possessed a loaded pistol for a short a period of time purportedly for the sole purpose of taking it away from his twelve-year-old brother.⁴⁸ The Tenth Circuit found that, among other things, the defendant had other legal alternatives such as taking his brother back to the owner of the pistol to return it or ordering his brother to put the pistol on the ground while he reported it to the police.⁴⁹

Courts apply an objective standard when assessing the elements of the necessity defense.⁵⁰ It is not sufficient that a defendant subjectively believed that the harm was imminent or that there was no legal alternative.⁵¹ What matters is whether a reasonable person would have come to the same conclusion. The Ninth Circuit, for example, approved a jury instruction on necessity that required a finding that the defendant’s belief in the imminency and severity of the harm was objectively reasonable.⁵²

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *United States v. Al-Rekabi*, 454 F.3d 1113, 1123 (10th Cir. 2006). The court also found that the supposed danger of the defendant’s younger brother possessing a firearm for a short while did not rise to an imminent threat. *Id.* at 1125.

⁴⁹ *Id.*

⁵⁰ *See, e.g.*, *United States v. Schoon*, 971 F.2d 193, 197 (9th Cir. 1991) (“The law could not function where people are allowed to rely on their *subjective* beliefs and value judgments in determining which harms justified the taking of criminal action.”); *United States v. Lopez*, 885 F.2d 1428, 1433 (9th Cir. 1989), *overruled on other grounds by* *Schmuck v. United States*, 489 U.S. 705 (1989) (“The language used by the *Bailey* Court need not . . . imply a subjective standard We conclude that *Bailey* and the decisions of this circuit establish an objective test.”).

⁵¹ *Schoon*, 971 F.2d at 197; *Lopez*, 885 F.2d at 1433.

⁵² *Lopez*, 885 F.2d at 1434.

III. FEDERAL JURISPRUDENCE DEFINING AND ANALYZING THE
AFFIRMATIVE DEFENSE OF DURESS

A. SUPREME COURT JURISPRUDENCE

Some of the early Supreme Court cases addressing the defense of duress involve contract law.⁵³ The Court in these cases examined whether a contract may be invalid because it was executed under duress.⁵⁴ In defining this term, the Court noted that “[a]ctual violence is not necessary.”⁵⁵ In one case, for instance, the Court defined duress as “that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness.”⁵⁶ In another, it defined the term as “moral compulsion, such as that produced by threats to take life or inflict great bodily harm”⁵⁷

United States v. Bailey provides the first detailed discussion of duress in the criminal context.⁵⁸ The Court explained that under common law, duress can excuse 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.”⁵⁹ The Court noted that duress covered situations where the coercion came from human beings rather than physical forces.⁶⁰ In this way, “where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress.”⁶¹ The *Bailey* Court ultimately rejected

⁵³ See, e.g., *Hartsville Oil Mill v. United States*, 271 U.S. 43 (1926); *Baker v. Morton*, 79 U.S. 150 (1870); *Brown v. Pierce*, 74 U.S. 205, 214 (1868) (noting that “a deed or other written obligation or contract, procured by means of duress, is inoperative and void”).

⁵⁴ *Baker*, 79 U.S. at 157; *Brown*, 74 U.S. at 214.

⁵⁵ *Brown*, 74 U.S. at 214.

⁵⁶ *Id.*

⁵⁷ *Baker*, 79 U.S. at 158.

⁵⁸ *United States v. Bailey*, 444 U.S. 394 (1980). *United States v. Vigol*, 2 U.S. 346 (1795), seems to be the first federal case that addressed duress in the criminal context (in relatively less detail than in *Bailey*). The case involved a defendant who was charged with treason for his role as an insurgent. The defendant argued that he was under duress or fear from the leader of the rebellion. *Id.* at 347. The district court rejected this excuse as legally insufficient. *Id.* The court explained that the duress “must proceed from an immediate and actual danger, threatening the very life of the party.” *Id.* The court found that “loss of property” or “apprehension of slight or remote injury to a person” are not sufficient to excuse the criminal conduct. *Id.*

⁵⁹ *Bailey*, 444 U.S. at 409.

⁶⁰ *Id.* at 410.

⁶¹ *Id.*

the application of duress on the same grounds as the necessity defenses—namely the defendants made no efforts to surrender after their escape.⁶²

In *Dixon v. United States*, the Supreme Court had occasion to comment, albeit as dicta, on the specific elements of duress.⁶³ The Court noted that no federal statute had defined the term nor had the Court previously specified the elements of the defense.⁶⁴ Without officially adopting a definition, the Court accepted the district court's description of the elements of duress. Under this formulation, a defendant has to show that

- (1) [he] was under an unlawful and imminent threat . . . of death or serious bodily injury;
- (2) [he] had not recklessly or negligently placed [himself] in [this] situation;
- (3) [he] had no reasonable, legal alternative . . . and
- (4) that a direct causal relationship [existed] between the criminal act and the avoidance of the threatened harm.⁶⁵

The Court did not discuss the elements any further as the only issue before the Court was who bears the burden of persuasion with regard to this defense.⁶⁶

B. FEDERAL CIRCUIT JURISPRUDENCE

Federal circuits have by and large adopted a definition of duress similar to the one discussed in *Dixon*. A typical definition includes the following elements: “(1) [the defendant] acted under an immediate threat of serious bodily injury; (2) he had a well-grounded belief that the threat would be carried out; and (3) he had no reasonable opportunity to escape or otherwise frustrate the threat.”⁶⁷

⁶² *Id.* at 410, 415.

⁶³ 548 U.S. 1 (2006).

⁶⁴ *Id.* at 5 n.2.

⁶⁵ *Id.*

⁶⁶ *Id.* at 17 (finding that the defendant bears the burden of persuasion for the defense of duress).

⁶⁷ *United States v. Sawyer*, 558 F.3d 705, 711 (7th Cir. 2009) (describing the same three elements); *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008); *United States v. Bravo*, 489 F.3d 1, 10 (1st Cir. 2007); *United States v. Lizalde*, 38 F. App'x 657, 659 (2d Cir. 2002) (same); *United States v. Miller*, 59 F.3d 417, 422 (3d Cir. 1995) (same); *United States v. King*, 879 F.2d 137, 139 (4th Cir. 1989); 1A FED. JURY PRAC. & INSTR. § 19:02 (6th ed. 2009) (federal jury instructions on duress or coercion describing the same three elements of serious bodily injury, reasonableness of belief, and no reasonable opportunity to escape threat).

The elements of immediacy and reasonable alternative are similar to those required under a necessity defense.⁶⁸ For instance, the Ninth Circuit found that a defendant who illegally reentered the United States did not make a sufficient proffer that he was under an imminent threat of serious bodily harm.⁶⁹ The defendant only proffered vague threats against him and his family by unnamed individuals in his native country.⁷⁰ The Ninth Circuit distinguished this case from one involving a defendant who proffered evidence that he was under repeated, specific threats by named individuals who were constantly watching him.⁷¹ The court found that the latter defendant had made a sufficient proffer of the immediacy of the threats in connection with his drug smuggling.⁷²

The application of a duress defense also requires that a defendant have no legal alternative to committing the crime. The Second Circuit, for example, found that a defendant who distributed cocaine could not avail himself of the duress defense because there was “no legally sufficient evidence to show that he lacked a reasonable opportunity to escape the threatened danger other than by engaging in the . . . unlawful activity.”⁷³ Similarly, the Seventh Circuit found that a defendant convicted of drug-related offenses could not use the duress defense because she “did not present evidence that she could have avoided [threats by the Mexican mafia] only by agreeing to help sell drugs, with no reasonable opportunity to seek protection from law enforcement.”⁷⁴ Finally, as with the necessity defense, the elements of duress must also survive certain objective scrutiny. “A defendant’s fear of death or serious bodily injury is generally insufficient. Rather, [t]here must be evidence that the threatened harm was present, immediate, or impending.”⁷⁵

⁶⁸ See, e.g., *Sawyer*, 558 F.3d at 712 (finding that “fear of future violence . . . does not entitle [defendant] to a duress defense”); *Vasquez-Landaver*, 527 F.3d at 798; *Miller*, 59 F.3d at 422 (finding that threats by defendant’s husband who was in jail were not immediate to satisfy duress instruction for crime of bank fraud and transportation of stolen vehicle); *King*, 879 F.2d at 139 (finding that threats by third party were not sufficiently immediate to satisfy duress for crime of making false statements to grand jury).

⁶⁹ *Vasquez-Landaver*, 572 F.3d at 803.

⁷⁰ *Id.* at 803.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *United States v. Lizalde*, 38 F. App’x 657, 660 (2d Cir. 2002).

⁷⁴ *United States v. Sawyer*, 558 F.3d 705, 712 (7th Cir. 2009).

⁷⁵ *Id.* at 711 (citing *United States v. Tanner*, 941 F.2d 574 (7th Cir. 1991)); *United States v. Flores-Vasquez*, 279 F. App’x 312, 313 (5th Cir. 2008) (finding that “objective review” of evidence is required for duress instruction).

IV. FEDERAL COURTS USE A SIMILAR STANDARD WHEN APPLYING THE DEFENSES OF DURESS AND NECESSITY

A. APPLICATION OF FORMAL ELEMENTS OF DURESS AND NECESSITY

The formal definitions of duress and necessity share some elements. Both require an imminent threat of harm where the defendant has no reasonable legal alternative. However, the definitions appear to diverge in certain respects. As an initial matter, necessity seems to focus on natural threats⁷⁶ whereas duress seems to involve only human threats.⁷⁷ But this turns out to be a distinction without a difference. First, as I will argue later,⁷⁸ this apparent difference should not influence the classification of these defenses as excused or justified acts. Second, federal courts have not applied necessity only in cases involving natural forces.⁷⁹ The *Bailey* Court itself applied the defense to a case involving threats by prison guards.⁸⁰ The First and Tenth Circuits also entertained the use of the necessity defense in situations involving human threats caused by the Navy to endangered animals or created by a twelve-year-old boy's possession of a loaded pistol.⁸¹

The more significant difference comes from the defenses' respective requirements of lesser evil and serious bodily harm. Necessity involves a choice between two evils but makes no mention of the kind of threat required. Conversely, duress requires the threat of serious bodily injury but makes no mention of choosing a lesser harm. This leaves open the potential for these defenses applying in very different circumstances.

The *Bailey* Court characterizes the typical necessity defense as a situation where A destroys a dike in order to protect more valuable property from flooding.⁸² Federal circuits courts track this definition by focusing on choosing the lesser harm without mentioning the nature of the harm

⁷⁶ See, e.g., *United States v. Bailey*, 444 U.S. 394, 410 (1980); *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984) (finding that necessity defense not applicable because defendant's actions were result of human coercion not physical forces).

⁷⁷ See, e.g., *Bailey*, 444 U.S. at 409–10; *supra* subpart III.B (the formal definition of duress used by federal circuits uses the term “threat,” suggesting a human source).

⁷⁸ See *supra* subpart VII.A.

⁷⁹ In fact, the definition used by federal circuits does not include reference to physical or natural forces. See *infra* subpart II.B.

⁸⁰ *Bailey*, 444 U.S. at 396–99.

⁸¹ *United States v. Al-Rekabi*, 454 F.3d 1113, 1123 (10th Cir. 2006); *United States v. Ayala*, 289 F.3d 16, 26 (1st Cir. 2002).

⁸² *Bailey*, 444 U.S. at 410.

averted.⁸³ This characterization leaves the impression that necessity, unlike duress, does not require the threat of serious bodily harm. As long as the harm being averted (destruction of the more valuable property) is greater than the harm caused (destroying the dike), the necessity defense could apply. Yet, as a matter of practice, federal courts have generally considered the defense of necessity only in situations where an individual seeks to avoid threats of serious bodily injury. *Bailey* itself involved defendants who wanted to avoid life-threatening prison conditions.⁸⁴ Federal circuits similarly have entertained this defense in cases where the defendant sought to avoid serious injury to his ship's crew⁸⁵ or serious pain and suffering of certain patients.⁸⁶ So courts have implicitly applied a serious bodily injury requirement to necessity cases, even though this element is not part of the formal definition.

The *Bailey* Court characterizes the typical duress defense as a situation where a defendant is under an unlawful threat of imminent death or serious bodily injury.⁸⁷ There is no explicit mention of balancing of harms. Federal circuits similarly only focus on the nature of the threat imposed.⁸⁸ This characterization of duress leaves the impression that duress, unlike necessity, does not require a balancing of harms. As long as the defendant was threatened by serious bodily injury, he may be excused from committing a more serious crime. In this way, the duress defense could be available to a defendant who causes bodily harm to an innocent bystander because of a similar threat against the defendant from a third party. However, as a matter of practice, federal courts have only considered the use of this defense in situations where the harm caused was less than the threatened injury. In *Bailey*, the defendants violated federal custody laws to avoid threats to their life.⁸⁹ Circuit courts have followed suit and have entertained this defense in situations where defendants violated immigration laws because of serious threats to the defendant and his family⁹⁰ or violated drug distribution laws because of threats by the mafia.⁹¹ In each of these

⁸³ See *supra* subpart II.B; see also MODEL PENAL CODE § 3.02 explanatory note 4 (1981) (“[T]he defenses of duress and choice of evils will be independently considered, and that the fact that a defense is unavailable under one section will not be relevant to its availability under the other.”)

⁸⁴ *Bailey*, 444 U.S. at 396–99.

⁸⁵ *Brig Struggle v. United States*, 13 U.S. (9 Cranch) 71 (1815).

⁸⁶ *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001).

⁸⁷ *Bailey*, 444 U.S. at 409.

⁸⁸ See *supra* subpart III.B; see also MODEL PENAL CODE § 3.02, explanatory note 4.

⁸⁹ *Bailey*, 444 U.S. at 396–99.

⁹⁰ *United States v. Vasquez-Landaver*, 527 F.3d 798, 803 (9th Cir. 2008).

⁹¹ *United States v. Sawyer*, 558 F.3d 705, 721 (7th Cir. 2009).

instances, the harm to be averted (threats of bodily harm) was greater than the harm caused (violations of federal custody, immigration, and drug laws).⁹² So federal courts have implicitly applied a lesser-harm principle to duress cases, even though this element is not part of the formal definition.

B. A CONSOLIDATED DEFINITION FOR DURESS AND NECESSITY

So far, I have restricted the analysis to federal jurisprudence that at least formally distinguishes between the defenses of duress and necessity. But in the context of at least one kind of crime, some federal circuits have adopted a consolidated definition for both defenses. With felon-in-possession cases, these courts have used a unified “justification” defense that incorporates both duress and necessity.⁹³ As one circuit has noted, “[i]n modern times, the traditionally separate defenses of necessity and duress have become increasingly blurred in modern decisions, to the point of merger.”⁹⁴

The First Circuit, in *United States v. Leahy*, provides a typical analysis of the consolidated defense.⁹⁵ In this case, the defendant was convicted of being a felon in possession of a firearm.⁹⁶ He claimed that he possessed the gun to “scare away attackers who were attempting to inflict serious bodily injury on him.”⁹⁷ The main issue on appeal was whether the district court erred in telling the jury that the defendant had the burden of proving the justification defense.⁹⁸ The court ultimately found that the district judge correctly placed the burden of persuasion on the defendant.⁹⁹ In reaching its conclusion, the First Circuit discussed the contours of this affirmative

⁹² See also, e.g., *United States v. Miller*, 59 F.3d 417, 422 (3d Cir. 1995) (defendant committed bank fraud because of alleged physical threats by defendant’s husband); *United States v. King*, 879 F.2d 137, 139 (4th Cir. 1989) (defendant made false statements to grand jury based on alleged physical threats).

⁹³ See, e.g., *United States v. Butler*, 485 F.3d 569, 572 n.1 (10th Cir. 2007) (using a consolidated affirmative defense that incorporates duress and necessity); *United States v. Leahy*, 473 F.3d 401 (1st Cir. 2007) (same); *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000) (same); *United States v. Paolello*, 951 F.2d 537, 540 (3d Cir. 1991) (same); *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982); 2 FED. JURY PRAC & INSTR. § 35:06 (6th ed.) (2009) (same); accord *United States v. Bryan*, 591 F.2d 1161, 1162 (5th Cir. 1979) (finding the requirements of duress or necessity to include a prisoner facing a specific threat of bodily harm at the prison, where he has no ability to prevent threat or time to report threat to the court, and where there is no evidence that an innocent person is hurt and he immediately turns himself in upon reaching a safe position).

⁹⁴ *Butler*, 485 F.3d at 572 n.1 (internal quotation marks and alterations omitted).

⁹⁵ *Leahy*, 473 F.3d at 401.

⁹⁶ *Id.* at 404.

⁹⁷ *Id.*

⁹⁸ *Id.* at 405.

⁹⁹ *Id.* at 409.

defense and its relationship to duress and necessity.¹⁰⁰ The court noted the confusion over the nomenclature surrounding these defenses and that many courts have avoided this problem by “lumping them” into one defense.¹⁰¹ The First Circuit similarly concluded that the “ease in administration favors treating these . . . defenses in a federal felon-in-possession case, under a single, unity rubric: justification.”¹⁰²

This justification defense typically requires the following elements: (1) the defendant was under an unlawful and present threat of death or serious bodily injury, (2) he did not recklessly place himself in a situation which forced him to engage in the criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal conduct and the need to avoid the threatened harm.¹⁰³ These elements are very similar to the duress requirements cited above.¹⁰⁴ They also closely track the way federal circuits have applied the necessity defense (in non-felon-in-possession cases), even if these courts have used a different formal definition.¹⁰⁵

V. DEPARTURES UNDER THE GUIDELINES BASED ON DURESS AND NECESSITY

Because the U.S. Sentencing Guidelines (Guidelines) are now advisory, courts are not restricted to their policy statements or their explicit departure grounds.¹⁰⁶ However, courts must still look to the Guidelines and their policy statements for general guidance in crafting a sentence.¹⁰⁷ In fact, the majority of federal circuit courts have found that a trial judge must

¹⁰⁰ *Id.* at 405–06.

¹⁰¹ *Id.* at 406.

¹⁰² *Id.* The First Circuit also included self-defense as part of this unified “justification” defense. *Id.*; see *United States v. Beasley*, 346 F.3d 930, 933–34 (9th Cir. 2003) (finding that in felon-in-possession cases, the justification defense encompasses necessity, duress, and self-defense); *United States v. Salgado-Ocampo*, 159 F.3d 322, 327 n.6 (7th Cir. 1998) (“[N]ecessity, justification, duress, and self-defense are interchangeably lumped together under the rubric of the justification defense.”).

¹⁰³ See, e.g., *United States v. Butler*, 485 F.3d 569, 572 (10th Cir. 2007); *United States v. Leahy*, 473 F.3d 401, 404 (1st Cir. 2007); *Beasley*, 346 F.3d at 933; *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000); *United States v. Gant*, 691 F.2d 1159, 1162–63 (5th Cir. 1982).

¹⁰⁴ See *supra* Part III.

¹⁰⁵ See *supra* Part II and subpart IV.A.

¹⁰⁶ See *United States v. Booker*, 543 U.S. 220 (2005); Lee D. Heckman, *The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-Booker World*, 69 OHIO ST. L.J. 149, 169–71 (2008).

¹⁰⁷ *Booker*, 543 U.S. at 259–60 (noting that under § 3553(a), courts must still consider the Guidelines and its policy statements); see also 18 U.S.C. § 3553(a) (2000) (referencing the Guidelines and policy statements as factors to be considered in sentencing).

calculate any applicable departures under the Guidelines as part of their sentencing process.¹⁰⁸ Accordingly, an analysis of the Guidelines and related case law is appropriate in understanding how federal courts approach duress and necessity during the sentencing phase.

A. TEXTUAL ANALYSIS OF DEPARTURES

The Guidelines formally distinguish between duress and necessity as two separate grounds upon which courts can depart. Under § 5K2.11, a court may depart downward on necessity grounds where “a defendant . . . commit[s] a crime in order to avoid a perceived greater harm.”¹⁰⁹ However, “[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted.”¹¹⁰ For instance, a departure is not warranted where a defendant provides secrets to a hostile country because he believes that America’s policies are misdirected.¹¹¹ Similar to the typical definition articulated by federal courts during the liability phase, the Guidelines make no reference to the kind of harm required to be averted. Rather, the focus is on the balancing of harms and the choosing of the lesser evil.

Duress serves as a separate ground for departure. Under § 5K2.12, a court may depart downward where a “defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense.”¹¹² The coercion ordinarily must involve “a threat of physical injury, substantial damage to property or similar injury”¹¹³ “[P]ersonal financial difficulties and economic pressures” are not sufficient.¹¹⁴ Much like the formal definition of duress articulated

¹⁰⁸ See, e.g., *United States v. Wallace*, 461 F.3d 15, 32 (1st Cir. 2006); see also Heckman, *supra* note 106, at 152 n.16 (“The First, Second, Third, Fourth, Fifth, Six, Eighth, Tenth, and Eleventh Circuits all require calculating applicable departures as part of consulting the Guidelines.”). The majority of trial courts now use a three-part process when fashioning a sentence: first, a court calculates the applicable Guidelines range; next, the court calculates any applicable departures under the Guidelines; finally it considers all the § 3553(a) factors to determine whether a variance is appropriate. See e.g., *Wallace*, 461 F.3d at 32.

¹⁰⁹ U.S. SENTENCING GUIDELINES MANUAL § 5K2.11 (2006).

¹¹⁰ *Id.*

¹¹¹ *Id.* Section 5K2.11 also allows for a departure where the “conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue.” *Id.*; see also *United States v. Bayne*, 103 F. App’x 710 (4th Cir. 2004) (affirming downward departure under § 5K2.11 for possession of sawed-off shotgun where defendant did not use it for any unlawful purpose). This departure ground is not relevant to this Article.

¹¹² § 5K2.12. The Guidelines provide that the extent of the mitigation depends on the reasonableness of the defendant’s actions and the proportionality of the defendant’s actions to the seriousness of the coercion or duress. *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

by federal courts during the liability phase, the Guidelines emphasize physical injury as the coercive factor. There is no reference to balancing harms or choosing the lesser evil.

B. APPLICATION OF DEPARTURES BY FEDERAL CIRCUITS

The formal definitions of necessity and duress departures track their counterparts at the liability phase. The Guidelines likewise make no mention of the kind of harm to be averted for necessity departures nor do they require a balancing of harms for duress departures. This leaves open the potential that these departures could also apply in very different circumstances.¹¹⁵ However, much like during the liability phase, federal circuits have incorporated (as a matter of practice) both the lesser harms and serious injury requirements when considering the permissibility of these departures.

Federal circuits have generally approved of departures from the Guidelines based on necessity only in cases where serious injury was averted.¹¹⁶ For instance, the Tenth Circuit approved of a district court's decision to depart on necessity grounds where a defendant illegally reentered the United States so that he could pay for his wife's life-saving operation.¹¹⁷ Similarly, the First and Eleventh Circuits found departures on necessity grounds potentially applicable where the harm to be averted was a person's physical well-being.¹¹⁸ Indeed, courts have disapproved of departures on necessity where the harm averted did not involve serious injury.¹¹⁹ For example, the Eleventh Circuit rejected a departure on this ground where the defendant pleaded guilty to possession of unregistered firearms for political reasons.¹²⁰ Specifically, the defendant contended that he committed the "criminal act . . . to liberate the people of Cuba."¹²¹ The

¹¹⁵ See *infra* subpart IV.A.

¹¹⁶ See, e.g., *United States v. Macias-Madrid*, 209 F. App'x 752 (10th Cir. 2006); *United States v. Hernandez*, 103 F. App'x 882 (6th Cir. 2004); *United States v. Torres*, 71 F. App'x 103 (3d Cir. 2003); *United States v. Carvell*, 74 F.3d 8 (1st Cir. 1996); *United States v. Rojas*, 47 F.3d 1078 (11th Cir. 1995); *United States v. Salemi*, 26 F.3d 1084 (11th Cir. 1994).

¹¹⁷ *Macias-Madrid*, 209 F. App'x at 753–54.

¹¹⁸ *Carvell*, 74 F.3d at 12 (finding that departure on lesser harms ground was appropriate where defendant manufactured and used drugs to prevent the taking of his own life); *Salemi*, 26 F.3d at 1087 (finding that departure on necessity ground only appropriate for kidnapping conviction where there was evidence that defendant's child was in abusive environment).

¹¹⁹ The Third Circuit, for example, rejected a necessity departure in a drug possession case where the harm to be averted was merely the failure of the defendant's business. *Torres*, 71 F. App'x at 105.

¹²⁰ *Rojas*, 47 F.3d at 1082.

¹²¹ *Id.*

court found that merely furthering a greater political good was not sufficient to warrant a departure under lesser harms.¹²² The Sixth Circuit also rejected a departure on necessity where the defendant illegally reentered the United States because of his concern for the safety of his sons.¹²³ The defendant learned that his “teenage sons were getting into trouble, living on the streets and not attending school” and “one son . . . was sent to a foster home.”¹²⁴ The court affirmed the sentencing judge’s decision that these “harms” were not extreme enough to warrant a departure.¹²⁵

Federal courts have entertained the use of departures based on duress only where the defendant’s actions were intended to avert a greater harm.¹²⁶ For instance, the Seventh Circuit discussed the permissibility of a departure based on duress where a defendant argued that he unlawfully possessed a weapon because he was allegedly shot and received threats to himself and his family.¹²⁷ Similarly, the First Circuit considered a duress departure where a defendant illegally withdrew money from his bank account because a third party threatened him and his family with physical harm if he did not repay his debt.¹²⁸

The foregoing analysis shows that federal courts have applied duress and necessity in similar circumstances both during the liability and sentencing phases of trial. While these defenses have different formal definitions, their uniform application suggests that they have more in common than one might think. This lends support to the conclusion that these defenses should be classified together as either excused or justified acts.

¹²² *Id.*

¹²³ *United States v. Hernandez*, 103 F. App’x 882, 883–84 (6th Cir. 2004).

¹²⁴ *Id.* at 883.

¹²⁵ *Id.* at 833–34.

¹²⁶ *See e.g.*, *United States v. Harvey*, 516 F.3d 553 (7th Cir. 2008); *United States v. Allen*, 450 F.3d 565 (4th Cir. 2006) (considering duress departure where defendant illegally possessed firearm because of physical threats to him and his girlfriend during a break-in); *United States v. Cotto*, 347 F.3d 441 (2d Cir. 2003) (considering duress departure where defendant was convicted of obstruction of justice because of alleged threats to her and her family); *United States v. Sachdev*, 279 F.3d 25 (1st Cir. 2002); *United States v. Hamilton*, 949 F.2d 190 (6th Cir. 1991) (considering duress departure where defendant sold drugs to pay off debt because of threats of harm to himself and family).

¹²⁷ *Harvey*, 516 F.3d at 555.

¹²⁸ *Sachdev*, 279 F.3d at 27.

VI. THE BASICS OF EXCUSE AND JUSTIFICATION

A. A PRIMER ON DEFINING THE TERMS

The basic concepts of excuse and justification are readily understandable and not particularly controversial. *Merriam-Webster* defines “justification” as the act or process of being “just, right or reasonable.”¹²⁹ It defines “excuse” as the act of making an apology or trying to remove blame from.¹³⁰ These definitions elicit very different intuitive actions and alone suggest that a justified action is morally superior to or in some way preferable to an excused act. Legal scholarship tracks this general sentiment. As one notable scholar writes, a justified act is “to be encouraged (or at least tolerated)” whereas an excused act is “wrong and undesirable” though “[c]riminal liability is nonetheless inappropriate.”¹³¹ The hallmark of a justified act is something that is desirable or something that benefits society.¹³² It is no surprise that such an action can be used to avoid criminal liability. An excused act works differently. It is harmful or undesirable, but at the same time can still be invoked to avoid criminal liability because of the specific circumstances in the case.¹³³ A robust understanding of these two terms would probably need to go beyond the aforementioned definitions. As one scholar points out, “the concept of being justified is quite complex and multifarious” and “the social message

¹²⁹ MERRIAM-WEBSTER ONLINE DICTIONARY (2010). The term “justification” is defined as “the act, process, or state of being justified” and the term “justified” means “to prove or show to be just, right, or reasonable.” *Id.*

¹³⁰ *Id.* The noun is defined as “the act of excusing” and the verb means “to make apology for” or “to try to remove blame from.” *Id.*

¹³¹ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 759 (1978) (“A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act.”); 2 ROBINSON, *supra* note 1, at § 25(d); Berman, *supra* note 7, at 7–11; see Gabriel J. Chin, *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*, 43 U. MICH. J.L. REFORM 79 (2009).

¹³² Chiu, *supra* note 7, at 1330; Milhizer, *supra* note 7, at 726 (“Justification defenses focus on the act and not the actor—they exculpate otherwise criminal conduct because it benefits society, or because the conduct is in some other way judged to be socially useful.”). *But see* 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, 64 (1984) (arguing against notion that justification implies morally right, good, or proper conduct and finding that such conduct may simply constitute permissible or tolerated action).

¹³³ 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 a justification, it means that society does not condemn the act committed; on balance, the justice system decides that society is better off that the act occurred. 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.”).

of excuse may be more varying than a universal pronouncement of being wrong.”¹³⁴ Luckily, such a detailed understanding is not necessary here. I only need to appeal to the basic intuitive¹³⁵ difference between these two actions. As this same scholar concludes, “despite the multiple meanings that may be attributed to justification and excuse, there is still undeniably a significant divide between the two; the substantive message of justification is a positive one, while the substantive message of excuse produces negative overtones.”¹³⁶

The labels of justification and excuse should not be confused with legal determinations.¹³⁷ The classification of an act as an excuse or justification does not bear on how courts will analyze these defenses. One scholar, for instance, may classify the defense of duress as an excuse while another may classify this defense as a justification. It is a separate question whether the defendant has satisfied the legal elements of duress. One may rightly ask then “What is the purpose of discussing excuse and justification if this classification does not bear on a court’s determination of criminal liability?”¹³⁸ There are a couple of responses. First, there is a basic desire in all of us to morally judge actions regardless of their legal status. So there is some value in distinguishing between justification and excuse. But this exercise may serve more than just intellectual curiosity. One scholar explains that this exercise may serve to provide a philosophical justification of our criminal system—“A clear and broadly recognized distinction between justification and excuse, founded upon objectively true and immutable norms for exculpation, is necessary if a criminal law system is to be moral, just, and tethered to principles greater than itself.”¹³⁹ Another scholar puts forth a more practical application, suggesting that appreciating this distinction would help legislators better understand the legal contours of affirmative defenses such as duress.¹⁴⁰

¹³⁴ Chiu, *supra* note 7, at 1332.

¹³⁵ I use this term to generally describe society’s moral opinion of the action in question. Specifically, the term encompasses whether society would consider an action right or wrong or someone blameworthy or not blameworthy. This term is not intended to be utilitarian in nature but focuses more on principles of fairness. See, e.g., Kenneth W. Simons, *On Equality, Bias Crimes, and Just Deserts*, 91 J. CRIM. L. & CRIMINOLOGY 237, 245 n.18 (2000).

¹³⁶ Chiu, *supra* note 7 at 1332.

¹³⁷ See generally Berman, *supra* note 7, at 7–14 (discussing how moral determinations are distinct from legal determinations).

¹³⁸ See Chin, *supra* note 131 (suggesting that there is no practical value to distinguishing between excuse and justification).

¹³⁹ Milhizer, *supra* note 7, at 728–29.

¹⁴⁰ Westen & Mangiafico, *supra* note 1, at 950.

One could write an entire article on how this distinction can inform our opinions about the criminal justice system or specific affirmative defenses.¹⁴¹ Fortunately, this kind of analysis is beyond the scope of this Article. If these classifications are to serve such lofty purposes, scholars must first get the distinction right.¹⁴² They must accurately determine on what basis a particular act should be classified as an excuse or justification. This Article shows that scholars have failed in this regard when it comes to the defenses of duress and necessity. Before examining these theories, it makes sense to look at two affirmative defenses for which there is little controversy on their classification. Most scholars consider the affirmative defense of self-defense as the paradigmatic justified act¹⁴³ and insanity as the quintessential excused act.¹⁴⁴ Understanding the legal contours of these defenses will help shed light on how best to classify duress and necessity.

¹⁴¹ See generally Joshua Dressler, *Some Very Modest Reflections on Excusing Criminal Wrongoers*, 42 TEX. TECH L. REV. 247 (2009).

¹⁴² See Berman, *supra* note 7, at 6 (“To be sure, so long as scholars are going to employ [the distinction between excuse and justification], it’s important that they get the distinction right.”).

¹⁴³ Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 388–89 (2004) (noting that self-defense unlike duress is easily classified as a justification); Enker, *supra* note 1, at 277 (“Self-defense, also called private defense, and necessity, which is essentially choosing the lesser evil, are justifications.”); Huigens, *supra* note 6, at 304 (making the same argument); David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 153 (2007) (“[T]he great weight of international legal authority treats self-defense as a justification, and not as an excuse”); Schwartz, *supra* note 10, at 1266 (“Self-defense, to be sure, is generally grouped with necessity as a justification, rather than duress as an excuse.”); Westen & Mangiafico, *supra* note 1, at 842 (noting that self-defense sits above both necessity and duress in the hierarchy of defenses). *But see* Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 623 (1996) (“This view of self-defense [as a justification] is so widely shared that it is espoused by lawyers and philosophers, rights-based theories and utilitarians alike. In this article, however, I sketch a view which challenges this received wisdom, [and find that] self-defense should be thought of as a species of *excuse*.”).

¹⁴⁴ Baron, *supra* note 143, at 388–89 (noting that insanity is an excuse and excluding it from the list of defenses that is hard to classify); Kevin Bennardo, *Of Ordinarity and Excuse: Heat-of-Passion and the Seven Deadly Sins*, 36 CAP. U. L. REV. 675 (2008) (noting at the beginning of article that insanity defense is the typical excused act and self-defense is the typical justified act); Chin, *supra* note 131, at 104 (finding that making legislators label insanity as an excuse adds nothing to the moral quality of the defense because this characterization is obvious); Enker, *supra* note 1, at 277 (noting that insanity is clearly an excuse whereas duress may be a justification or excuse depending upon the scope of the defense); Arnold H. Loewy, *The Two Faces Insanity*, 42 TEX. TECH. L. REV. 513 (2009) (arguing that insanity is an excuse when functioning as a means to exculpate); Paul H. Robinson, *A System of Excuses: How Criminal Law’s Excuse Defenses Do, and Don’t, Work Together to Exculpate Blameless (and only Blameless) Offenders*, 42 TEX. TECH. L. REV. 259, 260 (2009) (recognizing that insanity is commonly understood as an excused act).

B. SELF-DEFENSE AND INSANITY AS PROTOTYPICAL JUSTIFIED AND EXCUSED ACTS

The federal common law doctrine of self-defense traces its roots to early Supreme Court jurisprudence. In *Anderson v. United States*, for example, the Court found this defense applicable in the context of lethal force where a defendant “was acting under a reasonable belief that he was in imminent danger of death or great bodily harm by the deceased, and that his act in causing death was necessary in order to avoid [this harm] which was apparently imminent.”¹⁴⁵ This case involved a sailor who killed the first mate but claimed it was in self-defense.¹⁴⁶

The Supreme Court did not find any error with the jury’s decision that the defendant was guilty of murder.¹⁴⁷ The Court explained that the defendant did not act in response to an imminent threat of bodily harm from the victim; rather, the threatened harm consisted merely of arrest and immediate incarceration.¹⁴⁸

The basic elements of self-defense have not changed over the years.¹⁴⁹ Federal courts apply the defense where a defendant’s use of force was reasonable and necessary to defend himself or another against imminent bodily harm.¹⁵⁰ The Ninth Circuit provides a typical definition:

In order to make a prima-facie case of self-defense, a defendant must make an offer of proof as to two elements: (1) a reasonable belief that the use of force was necessary to defend himself or another against the immediate use of unlawful force and (2) the use

¹⁴⁵ *Anderson v. United States*, 170 U.S. 481, 508 (1898); see *Beard v. United States*, 158 U.S. 550, 559 (1895); *Gourko v. United States*, 153 U.S. 183, 191 (1894).

¹⁴⁶ *Anderson*, 170 U.S. at 508–09.

¹⁴⁷ *Id.* at 511; see also 2 WHARTON’S CRIMINAL LAW § 127 (Charles E. Torcia, ed., 15th ed. 2010) (“A defendant may kill in self-defense when he reasonably believes that he is in imminent danger of losing his life or suffering great bodily harm.”).

¹⁴⁸ *Anderson*, 170 U.S. at 508–09.

¹⁴⁹ Defendants most likely bear the burden of proving self-defense in federal court. See, e.g., *Dixon v. United States*, 548 U.S. 1, 13–14 (2006); *United States v. Jumah*, 493 F.3d 868, 873 n.2 (7th Cir. 2007) (noting that *Dixon*’s discussion of burden of persuasion applied to other affirmative defenses like self-defense). But see *Dixon*, 548 U.S. at 24 (Breyer, J., dissenting) (collecting cases from various circuits showing that Government bears the burden of persuasion as to this defense).

¹⁵⁰ See *United States v. Biggs*, 441 F.3d 1069, 1071 (9th Cir. 2006) (“In defining one’s self against an unlawful attack, a person is only justified in using such an amount of force as may appear to him at the time necessary to accomplish that purpose.”); *United States v. Loman*, 551 F.2d 164, 167 (7th Cir. 1977); *United States v. Peterson*, 483 F.2d 1222, 1231 (D.C. Cir. 1973) (collecting federal cases on the doctrine of self-defense); see also MODEL PENAL CODE § 3.04 (1985) (“[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”); *id.* at § 3.05 (applying self-defense elements to defense of another).

of no more force than was reasonably necessary in the circumstances.¹⁵¹

The Federal Jury Practice and Instructions on self-defense track these elements. The instructions provide that “[u]se of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force.”¹⁵²

Historically, the Supreme Court left the development of the insanity defense to federal circuit courts, which employed a variety of tests.¹⁵³ The federal landscape changed in 1984 when Congress enacted the Insanity Defense Reform Act (IDRA).¹⁵⁴ The details surrounding its enactment and subsequent promulgation are not important for my purposes. What matters is that the statute for the first time codified the insanity defense for federal prosecutions.¹⁵⁵ Under the IDRA, defendants invoke the insanity defense where, at the time of the commission of the offense, they failed to appreciate the nature and quality of the wrongfulness of the action.¹⁵⁶ It also explicitly provides that the defendant bears the burden of proving this defense.¹⁵⁷ Federal courts continue to use the IDRA when applying the insanity defense.¹⁵⁸

VII. THE MAJOR THEORIES USED TO CLASSIFY DURESS AND NECESSITY

A. PRELIMINARY CONSIDERATIONS

Numerous elements make up a case of duress or necessity. A common list might include the defendant’s state of mind and actions, the nature of the harm caused, the type of threat averted, and the role of other participants. Any of these could be logical starting points to constructing a theory that classifies these situations as excused or justified acts. The specific circumstances surrounding each of these components will obviously vary from case to case. The federal cases cited highlight this

¹⁵¹ *Biggs*, 441 F.3d at 1071.

¹⁵² 2A FED. JURY PRAC. & INSTR. § 45:19 (5th ed. 2009).

¹⁵³ See Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL’Y 7, 14–40 (2007) (summarizing evolution of insanity defense in state and federal courts); Henry Miller, *Recent Changes in Criminal Law: The Federal Insanity Defense*, 46 LA. L. REV. 337, 349 (1985) (tracing the history of the insanity defense in federal courts and collecting cases on the variety of tests used, including the *McNaughten* test and the American Law Institute formulation).

¹⁵⁴ Fradella, *supra* note 153, at 25.

¹⁵⁵ *Id.*

¹⁵⁶ See 18 U.S.C. § 17 (2006).

¹⁵⁷ See *id.* at § 17(b).

¹⁵⁸ See, e.g., *United States v. Long*, 562 F.3d 325 (5th Cir. 2009); 1A FED. JURY PRAC. & INSTR. § 19.03 (6th ed. 2009) (discussing elements of insanity defense in light of IDRA).

point. The type of harm to be averted, for example, could encompass the suffering of another,¹⁵⁹ harm to endangered animals,¹⁶⁰ danger of a child possessing a firearm,¹⁶¹ coercive threats in prison,¹⁶² or threats to family and person.¹⁶³ Any classification theory would have to account for all these scenarios. Naturally, the theory would have to focus on the essential components that make up each of these fact patterns.

It is important to say something about self-defense and insanity. As stated earlier, these defenses are generally classified as justification and excuse respectively. Thus, any criteria we use to categorize duress and necessity must also appropriately classify these two defenses. If some theory classifies necessity as a justification but, under its own terms, also classifies self-defense as an excuse, we would have to reject it. So we want a theory that seeks to classify all purported cases of excuse or justification.¹⁶⁴ It would be somewhat arbitrary if one theory were used to classify self-defense, while a different theory were used to classify duress and necessity. A unified theory would naturally be more robust, and ultimately more persuasive, than this kind of piecemeal approach.

As stated earlier, classifying cases of duress and necessity as excuses or justifications is separate from determining whether they are legally applicable.¹⁶⁵ Still, it makes little sense to discuss their classification if a court would not find the defenses legally viable. Imagine a defendant who argues self-defense when the facts clearly show an intent to physically harm an innocent victim. There is no point in asking whether the defendant's purported act of self-defense was justified. His actions do not merit any relief from criminal liability. So there is no justifying (or excusing) action and thus nothing to classify.

This does not mean that a proposed classification theory should entirely follow the way courts treat these defenses. For instance, courts sometimes associate natural threats with necessity and manmade threats with duress.¹⁶⁶ But we would not want to rely on this factor alone when

¹⁵⁹ See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 487 (2001).

¹⁶⁰ See *United States v. Ayala*, 289 F.3d 16, 26 (1st Cir. 2002).

¹⁶¹ See *United States v. Al-Rekabi*, 454 F.3d 1113, 1123 (10th Cir. 2006).

¹⁶² See *United States v. Bailey*, 444 U.S. 394, 410 (1980).

¹⁶³ See *United States v. Vasquez-Landaver*, 527 F.3d 798, 803 (9th Cir. 2008).

¹⁶⁴ Cf. FLETCHER, *supra* note 131, at § 10.1.3.

¹⁶⁵ See *supra* subpart VI.A.

¹⁶⁶ See *Bailey*, 444 U.S. at 409–10. *But see Al-Rekabi*, 454 F.3d at 1123; *United States v. Ayala*, 289 F.3d 16, 26 (1st Cir. 2002).

trying to classify these defenses.¹⁶⁷ For one thing, the nature/manmade distinction does not seem to bear on how we would judge a defendant who invokes either of these defenses. Just because the threat comes from nature, for instance, would not mean that the defendant's behavior should be considered less blameworthy than if the threat comes from another person. In both cases, the defendant has not caused the threats, and so it is hard to see why this distinction would bear on his culpability. Furthermore, this very crude distinction could inaccurately classify self-defense and the insanity defense. Assuming defenses involving natural threats should be classified as justified actions, self-defense would be classified as an excuse because by definition it entails manmade threats. Similarly, this theory would classify insanity as a justification if the relevant threats arise naturally. Any classification scheme would have to do more than just appeal to the type of harm involved.

That said, how federal courts have analyzed these defenses can be instructive to our task. Federal circuit courts generally apply the same elements (whether explicitly or implicitly) when examining these defenses during both the liability and sentencing phases of trial.¹⁶⁸ For one specific crime, they have codified their analysis of duress and necessity into a single test.¹⁶⁹ While this treatment should not be dispositive, it does suggest that these two defenses are better classified together (as either excuses or justifications).

Before proceeding further, it is important to address the case where the defendant acted on a mistaken belief. Under this scenario, the defendant has satisfied the legal elements of an affirmative defense but as it turns out, he was mistaken about the threatened harm. Take the classic case of self-defense. A court may find that the defendant reasonably believed that he was under imminent bodily harm and find him not guilty of the related

¹⁶⁷ I am not suggesting that the distinction between "manmade" and "natural" does not have any bearing on the legal scope of these defenses. For instance, the Model Penal Code implies that duress only applies in instances involving manmade threats. *See* MODEL PENAL CODE § 2.09 (1984) (requiring that the defendant was "coerced to [commit the crime] by the use of, or a threat to use, unlawful force against his person or the person of another . . ."). But the Model Penal Code does not seem to limit necessity only to natural threats. *See* MODEL PENAL CODE § 3.02 (focusing only on the balancing of harms).

¹⁶⁸ *See supra* Parts IV and V.

¹⁶⁹ Federal courts have also included self-defense as part of this consolidated defense in felon-in-possession cases. *See supra* note 102. I am not suggesting that this means that self-defense should be classified in the same category as necessity and duress. For one thing, this consolidated defense only applies in one federal crime. In fact, courts generally apply separate elements when evaluating self-defense. *See supra* subpart VI.B. Moreover, treatment by federal courts provides only guidance on how these defenses should be classified.

assault. However, let us assume that as a matter of fact, the defendant was mistaken as to his belief of threatened harm. The would-be perpetrator, for example, had a fake weapon and never intended to harm the defendant. In this situation, one might argue that this act of self-defense is better classified as an excuse than justification.¹⁷⁰ We do not want to privilege or otherwise tolerate actions that involve mistaken beliefs of threatened harm (even if they are reasonable).¹⁷¹ While the defendant should not be held criminally liable, his actions are wrong and, thus, should not warrant the label of justification.

But this type of analysis does not end the inquiry. For one thing, some may still argue that even under these circumstances, this instance of self-defense remains a justified act.¹⁷² We now need a theory that explains such a classification. But assuming this act is better classified as an excuse, we are no closer to an answer to the original question. The purpose of this Article is to find criteria that accurately classify duress and necessity. The problem with invoking mistaken belief as the distinguishing factor is that this permutation can be applied to all such affirmative defenses.¹⁷³ For instance, the defendant may mistakenly but reasonably believe that natural forces made him destroy another person's property. As an instance of mistake, this would be classified as an excuse.¹⁷⁴ The same can be said of a fact pattern involving a mistaken duress defense.¹⁷⁵ We are left then with the somewhat uninteresting conclusion that all of these affirmative defenses involving mistake should be classified as excuses. More importantly, we are still without an answer on how to classify duress and necessity where there is no mistake of fact. For the purpose of this Article therefore, I will assume (unless stated otherwise) that none of the scenarios involve

¹⁷⁰ See George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 576 (1996).

¹⁷¹ See Berman, *supra* note 7, at 38–57 (discussing the classification of defenses where the defendant's action is objectively reasonable but subjectively mistaken).

¹⁷² See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1900–07 (1984). See generally CRIMINAL LAW CONVERSATIONS 343–63 (Paul H. Robinson et al. eds., 2009) (collecting scholarly articles on whether an action should be classified as a justification if premised on mistaken belief). *But see* Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289, 314–24 (2006) (arguing against Greenawalt).

¹⁷³ The defense of insanity by definition includes a mistaken belief because the defendant suffers from some mental defect that prevents him from appreciating the nature of the crime.

¹⁷⁴ Again, some may argue that even under these circumstances, such a defense of necessity is still better classified as a justified act.

¹⁷⁵ Peter Westen, *Offences and Defences Again*, 28 OXFORD J. LEGAL STUD. 563, 581 (2008).

mistaken belief. This way we do not muddle the issue and can simply focus on how best to classify the prototypical cases of duress and necessity.

Scholars have put forth a number of theories to classify these defenses as excused or justified acts. The theories typically center around the defendant and what he did. They can be grouped into roughly five main types: the lesser-harm theory, act-versus-actor distinction, able-to-aid versus able-to-prevent, conduct versus decision rule, and warranted versus unwarranted action.¹⁷⁶ Each relies on unique criteria intended to provide a comprehensive methodology to distinguish excused from justified acts. Ultimately, all of them fail on their own terms to provide a consistent theory that accurately captures the nature of duress and necessity.

B. LESSER-HARM THEORY

The most widely accepted theory to distinguish an excuse from a justification is the lesser-harm model.¹⁷⁷ Scholars use a number of labels to describe this theory, including “choice of evils,” “balance of utilities theory,” or “public good.”¹⁷⁸ This theory focuses on balancing the threatened harm with the harm caused by the defendant. For a defense to be considered a justification, “the harm caused by the defendant’s illegal act must be less than the harm which would have resulted had the defendant obeyed the law . . .” and done nothing.¹⁷⁹ Put another way, “[e]very justification defense is a statement that the defendant’s act in question was actually the least harmful act the defendant could have done, given the options in front of him or her as defined by the particular circumstances.”¹⁸⁰

Any robust application of this theory would have to accurately gauge the type of harms involved. This requires appealing to both qualitative and quantitative criteria.¹⁸¹ For instance, property (regardless of how much is involved) can always be destroyed to save even one innocent life. We value

¹⁷⁶ This is not an exhaustive list. For instance, one scholar proposes distinguishing justification and excuse by reference to their historical origins. See Horowitz, *supra* note 9. However, as one critic points out, laws have changed over time (the scholar initially proposed his theory in 1986) and the notion of justification has expanded in criminal law thereby lessening the value of this methodology. See Linda A. Malone, *Is There Really a Difference Between Justification and Excuse, or Did We Academics Make It Up?*, 42 *TEX. TECH L. REV.* 321, 323 (2009).

¹⁷⁷ See generally FLETCHER, *supra* note 131, at § 10.2; Chiu, *supra* note 7, at 1328; Dressler, *supra* note 1, at 1350–52; Milhizer, *supra* note 7, at 844; Mulroy, *supra* note 133, at 166–67.

¹⁷⁸ Chiu, *supra* note 7, at 1328.

¹⁷⁹ Mulroy, *supra* note 133, at 166.

¹⁸⁰ Chiu, *supra* note 7, at 1328.

¹⁸¹ Milhizer, *supra* note 7, at 844.

the sanctity of life, which is “qualitatively superior to property rights.”¹⁸² To be effective, this theory must also not be construed as purely utilitarian. There are some interests that are “always morally superior to others.”¹⁸³ For example, an action where a few lives are sacrificed to save many would probably not be classified as a justification because such a calculation fails to recognize the unquantifiable nature of human life.¹⁸⁴

It should come as no surprise that this theory would classify necessity as a justification.¹⁸⁵ The lesser-evil requirement is a formal element of the defense.¹⁸⁶ Take the simple case of destroying a dike to save more valuable property from flooding. By opting to commit the illegal act (destruction of the dike), the defendant causes less harm than if he did nothing (destruction of more valuable property by flooding). So this case of necessity would be classified as a justified act. The same analysis applies in a case where the defendant provides marijuana to severely ill patients in violation of the federal drug laws.¹⁸⁷ Under the lesser-evil theory, this action would also be considered a justification. The threatened harm (illness of patients) was greater than the harm caused (violation of drug laws).

The case of duress is more complicated. The formal definition does not include a lesser-evil element.¹⁸⁸ So we can imagine a scenario where the harm caused is greater than the threatened harm. For instance, someone may threaten the defendant with physical harm unless the defendant assaults an innocent person. Should the defendant harm the innocent person and the court finds a proper application of duress, the defendant’s action would fail the lesser-harm test and be considered an excuse.¹⁸⁹ But as we have seen, federal courts have (tacitly) applied the lesser-harm principle when entertaining the application of duress.¹⁹⁰ It is likely then that most (if not all) instances of duress in federal court would satisfy the lesser-evil theory and be classified as justifications. Take, for example, the

¹⁸² *Id.*

¹⁸³ *Id.* at 845.

¹⁸⁴ *Id.*

¹⁸⁵ See 2 ROBINSON, *supra* note 1, at § 124 (finding that the “choice of evils” is synonymous with “necessity” defense).

¹⁸⁶ See *United States v. Bailey*, 444 U.S. 394, 410 (1980).

¹⁸⁷ See *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001).

¹⁸⁸ See *supra* Part III.

¹⁸⁹ I assume that the threatened harm (e.g., seriously maiming defendant) is greater than the harm caused by the defendant (e.g., breaking an innocent person’s legs). But the degree of the physical harm caused in comparison to the threatened physical harm may not matter for a proper application of the lesser harm theory. As I have said, this theory is not purely utilitarian. Hurting an innocent person would automatically constitute the greater harm because of the unquantifiable nature of human life.

¹⁹⁰ See *supra* subpart IV.A.

case of a defendant who deals drugs to avoid threats of physical harm by the mafia.¹⁹¹ Under a specific set of conditions, most of us would say that the defendant causes the lesser harm. Let us assume that the defendant only participates in one drug transaction with a government informant so there is no harm to others resulting from the drug deal. Because the defendant avoids greater harm to his person and family by committing the drug violation, under the lesser-harm principle, he commits a justified action.¹⁹²

There is nothing particularly problematic about certain cases of duress being classified as justifications and others as excuses.¹⁹³ Nevertheless, intuitively it is hard to see why we would judge the defendants differently in each of these two cases. Assume in one case, someone physically threatens the defendant unless the defendant hurts an innocent person, and in another case, the same person threatens the defendant with the same harm unless he destroys this innocent person's property. Under the lesser-harm theory, the first would be classified as an excuse (not choosing the lesser evil) and the second a justification (choosing the lesser evil). It is easy to see why assaulting an innocent person would be the wrong thing to do. So classifying this situation as an excuse makes sense. But it is not clear that the case of a defendant destroying an innocent person's property to avoid physical harm warrants the label justification. Are we suggesting that this behavior constitutes the right action—something to be tolerated or even encouraged? On the one hand, the defendant avoids grievous bodily harm, which might be worth destroying property (at least to him). But what about the harm to the innocent victim? Maybe destroying his property will have adverse financial consequences for his family. This financial harm may not constitute the "greater harm," but this would hardly give the owner and his family much comfort. The fact remains that the defendant is destroying the property of an innocent person who did nothing wrong.¹⁹⁴ On the justification/excuse hierarchy, the defendant's action seems to be closer to an excuse—wrongful conduct that we excuse because of the unlawful threats facing the defendant.

¹⁹¹ See *United States v. Sawyer*, 558 F.3d 705, 712 (7th Cir. 2009).

¹⁹² See generally Dressler, *supra* note 1, at 1350–51 (discussing circumstances under which duress can be considered a justification); Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 220 (2010) (same).

¹⁹³ Dressler, *supra* note 1, at 1350–51 (noting that situations of duress can be classified as justifications and excuses).

¹⁹⁴ The same analysis applies in a case of necessity, where the defendant destroys a dike that floods an innocent person's property (the lesser harm) to save more valuable property from flooding (the greater harm).

Another problem with the lesser-harm theory is that it fails to properly account for situations where the harms are equal.¹⁹⁵ At first glance, this may not seem to pose a problem. Take the case where the destruction of the dike (and the resulting damage to other property) causes the same amount of damage as the flooding of the property in question. This situation simply would be classified as an excuse because the defendant did not choose the lesser harm.¹⁹⁶ The case of self-defense presents a more troubling counterexample. Imagine an instance of self-defense where a defendant physically assaults an aggressor in the same way that the aggressor threatened him (e.g., the aggressor threatens the defendant with a punch in a face and the defendant responds in kind to defend himself). Here, the harm caused to the aggressor (or victim)¹⁹⁷ is equal to the threatened harm. What would the lesser-harm theory make of this situation? It seems that such a situation would be classified as an excuse. The defendant does not choose the lesser harm. Even more troubling is the case where the harm caused is greater than the harm threatened. Suppose two perpetrators threaten to physically harm the defendant who is then forced to assault both of them in self-defense. Because the defendant's actions cause greater harm (two individuals getting hurt versus one person getting hurt), the lesser-harm theory would classify this as an excuse. But most of us would agree that in both these instances of self-defense, the defendant's actions are justified.

To avoid this counterintuitive conclusion, one might appeal to another theory that somehow accounts for these difficult scenarios. One prominent scholar of the lesser-harm model makes the following addendum: “[W]hen the harm is inevitable and will be of equal severity regardless of who suffers it, then distribute it to the party who culpably caused the harm to be inevitable.”¹⁹⁸ But this self-serving solution is hardly satisfying. For one thing, it does not explain how to deal with an instance of self-defense where the harm caused is greater than the threatened harm. This addendum does not apply and so such a scenario would still be classified as an excuse under the lesser-harm model. One way to avoid this problem would be to appeal to a theory that focuses on the value of the aggressor's life. Such a theory would discount the aggressor's life because of his provoking actions, thus

¹⁹⁵ See generally Dressler, *supra* note 1, at 1352–53 (discussing how the lesser-harm theory fails to account for situations where the harm is equal).

¹⁹⁶ This kind of case is unlikely because federal courts employ (formally or as a practical matter) a lesser-evil requirement when examining duress and necessity.

¹⁹⁷ It might seem odd to call the attacker the victim given the connotation of the term. However, I use the term “victim” simply to mean the person who suffers the harm.

¹⁹⁸ Chiu, *supra* note 7, at 1329.

reducing the amount of harm the defendant causes.¹⁹⁹ This theory would explain self-defense situations where the threatened harm is seemingly equal or less than the harm caused. Here, the defendant actually chooses the lesser harm because the victim's life counts less on account of his provoking actions.

But the more fundamental problem with both these theories is that they have moved away from a true balancing of harms. Instead, they focus on the victim's role in the crime as a proxy for classifying the action. In the one, the blame has shifted to the victim because of his actions and in the other, the value of the victim's life has been reduced because of his conduct. This begs the question why we would not focus on the victim's culpability in the first place. This may avoid the need for constructing supplemental ad hoc criteria to explain difficult scenarios. As I will show, focusing on the victim from the beginning provides the better and more comprehensive theory of distinguishing a justification from an excuse.

C. THE ACT-VERSUS-ACTOR DISTINCTION AND DISABLING CONDITIONS

Another way to distinguish excused from justified acts relies on the actor/act distinction and the presence of a disabling condition.²⁰⁰ "In determining whether conduct is justified, the focus is on the *act*, not the actor[;]" but excuses "focus . . . on the *actor*."²⁰¹ In this way, "[e]xcuses do not destroy blame . . . rather they shift it from the actor to the excusing conditions."²⁰² This excusing condition (i.e. that which makes this action an excuse) hinges on some disability suffered by the defendant at the time of the offense.²⁰³ Put otherwise, "[t]he disability can arise from a number of sources, both internal and external to the actor, and may be temporary or permanent in nature."²⁰⁴

It is easy to see how insanity serves as the prototypical example of a disabling condition. Here, the actor suffers from an internal mental

¹⁹⁹ Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 19 (1999).

²⁰⁰ See, e.g., Chiu, *supra* note 7, at 1330–31; Eugene R. Milhizer, *Group Status and Criminal Defenses: Logical Relationship or Marriage of Convenience?*, 71 MO. L. REV. 547, 568–70 (2006); Christopher D. Moore, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151, 1179–82 (1995); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 221–29 (1982).

²⁰¹ Chiu, *supra* note 7, at 1330–31. (citing 1 ROBINSON, *supra* note 1, at § 25(d) at 100–01).

²⁰² *Id.*

²⁰³ Robinson, *supra* note 200, at 221.

²⁰⁴ Milhizer, *supra* note 7, at 817.

condition that impacts his understanding of the offense.²⁰⁵ Because of this condition, we excuse the actor's conduct. The case of duress is slightly different. Here, the defendant "perceives the conduct accurately and fully, understands its physical consequences, and knows its wrongfulness or criminality."²⁰⁶ The defendant still suffers from a disabling condition. But this time, the disability stems from outside threats, which prevent him from having a fair opportunity to obey the law.²⁰⁷

The problem with this theory is its underlying premise. What constitutes a "fair opportunity" under this principle? We are always making choices on whether to obey the laws and frequently dealing with pressure (in one form or another) from outside sources. It is not clear how such pressure constitutes a disability. A successful case of duress means that the court has found the defendant's actions reasonable given the circumstances. His actions are the result of weighing options and intentionally choosing one alternative.²⁰⁸ Perhaps more striking is why anyone would place this actor in the same category as a defendant who committed the same drug violation because of a mental defect like insanity. As one critic of this theory points out, unlike insanity, duress constitutes "actions that actors deliberately undertake to achieve conscious ends."²⁰⁹ This is not to suggest that both insanity and duress cannot be classified as excused acts (in fact, this is what I will argue). But such a theory cannot rely on a purportedly shared disabling condition.

More troubling is the fact that this theory classifies both necessity and self-defense as justifications presumably because these defendants do not suffer from any disabling condition. But it is hard to see what makes these two defenses different from duress. Like duress, the cases of necessity and self-defense also involve external threats of extreme pressure that force defendants to violate the law. These defendants are also deprived of a "fair opportunity" to obey the law. They do not have the luxury of following the law free of external pressure or coercion. More to the point, what exactly is the nature of this so-called lack of fair opportunity that applies in cases of duress but not in cases of necessity or self-defense? Indeed, there is no reason to think that only the defendant under duress has been unduly

²⁰⁵ See Robinson, *supra* note 200, at 222–25.

²⁰⁶ *Id.* at 222.

²⁰⁷ See 2 ROBINSON, *supra* note 1, at § 177(c); Dressler, *supra* note 1, at 1365–66; Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677, 1698–1700 (2005); Milhizer, *supra* note 200, at 569 (noting that with duress the disabling condition constitutes external threats); Robinson, *supra* note 200, at 225 ("[In the case of duress], [h]e is exculpated because he lacks the capacity to control his conduct").

²⁰⁸ Westen & Mangiafico, *supra* note 1, at 903.

²⁰⁹ *Id.* at 902.

pressured or coerced into acting.²¹⁰ Any so-called disabling condition or unfair coercion would seem to apply (or not apply) equally to cases of necessity and self-defense.

D. ABLE-TO-AID VERSUS ABLE-TO-PREVENT

Another theory used to distinguish justified from excused acts focuses on the distinction between a third party being able to aid or prevent the defendant from committing the crime.²¹¹ Here, the idea is that a justified act may be encouraged and not stopped while its excused counterpart may be stopped but not encouraged.²¹² Take the classic self-defense scenario. A proponent of this theory would argue that a third party should not stop the defendant from taking action but such a party can help the defendant in fending off the attack. For example, the third party could provide the defendant with a weapon, assuming that the defendant's actions still make out a viable claim of self-defense. So the instant case of self-defense would be a justified act. The defense of insanity elicits the opposite reaction. Here, a third party should be prohibited from aiding or helping this defendant commit the crime. Because of his mental defect, the defendant is not thinking clearly and his actions are not reasonable. A third party could prevent this defendant from committing the crime. So this case of insanity would constitute an excused act.

The problem with this theory is that it assumes that the third party possesses certain knowledge. However, this individual may know more or less than the defendant, thus altering the able-to-aid versus able-to-prevent calculus above.²¹³ For example, in the self-defense scenario, the third party may know that he could simply grab the wrists of both individuals thereby diffusing the entire situation.²¹⁴ Would we still want to say that this person should aid the defendant in attacking his perpetrator, possibly providing him a weapon? In fact, it seems that the third party—given his unique knowledge—should prevent the defendant from committing the crime

²¹⁰ Robinson, a proponent of this theory, acknowledges that “some necessity statutes provide[] the necessity defense in cases where the defendant acted under the ‘[p]ressure of natural physical forces,’ suggesting an excuse rationale for an otherwise justification-based defense.” Robinson, *supra* note 200, at 235 (citing WIS. STAT. ANN. § 939.47 (West 1958)).

²¹¹ See, e.g., Berman, *supra* note 7, at 62–64; Sharon Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, 33 WAYNE L. REV. 1289 (1986); 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, 95–97 (1984); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1900, 1924 (1984).

²¹² See Berman, *supra* note 7, at 62.

²¹³ See *id.* at 63; Greenawalt, *supra* note 211, at 1924.

²¹⁴ Greenawalt, *supra* note 211, at 1924.

rather than help him. This reasoning leads to the counterintuitive conclusion that this instance of self-defense is better understood as an excuse.

A similar problem exists with the insanity scenario. Assume that the third party does not realize that the defendant is insane and believes his assault against the victim constitutes an instance of self-defense. Here, the third party—given his lack of knowledge of the situation—may think he is doing the right thing by assisting the defendant. This leads to the odd conclusion that such a case of insanity would be a justified act. The analysis of the cases of duress and necessity fares no better. Take the simple case of a defendant destroying a dike to save more valuable property from flooding. Should a third party aid the defendant in this destruction? Again, an answer would depend on the idiosyncratic perspective of the third party. Maybe the third party does not realize what property is more valuable. Or perhaps he has a vested interest in the property being protected by the dike. Having these perspectives will make him less likely to help the defendant and more likely to thwart the defendant's efforts.

Maybe the theory is intended to work on a more conceptual level. Understood in this way, it is not important what a third party would actually do in the circumstances at hand. We are not analyzing the issue from his personal perspective and so his specific knowledge is not relevant. Rather, we focus on the situation from hindsight and ask whether a hypothetical third party with the same knowledge as the defendant *should* be able to aid or prevent the crime. If such a person should be able to help the defendant then the act is a justification, and if the person should stop the defendant, the act is better understood as an excuse. While this conceptual approach certainly avoids the problems cited above, it now becomes too abstract to serve as an effective way to classify these defenses.²¹⁵ The problem is not apparent when examining self-defense and insanity. These are easy defenses to classify and so the theory works. For example, no one would disagree that in hindsight a third party with the same knowledge as the defendant should help him fend off an attacker. But the cases of duress and necessity are more complicated. Take again the example of destroying a dike to save more valuable land. Merely appealing to a third party (with equivalent knowledge as the defendant) does not help classify this action. One person could say that this third party should help the defendant whereas another might say that this person should prevent the defendant from acting. This will depend on whether one sees this act as an excuse or a justification. Either way, the insertion of a third party and their ability to

²¹⁵ Berman appears to make a similar point. See Berman, *supra* note 7, at 63.

aid/prevent does not constitute this difference; it merely follows from it.²¹⁶ The problem is that once the third party is imputed with the same knowledge as the defendant, this device ceases to serve as an effective distinguishing tool. We are still left without an answer as to why this action of destroying a dike to save more valuable land is better understood as an excuse or justification.²¹⁷

E. CONDUCT VERSUS DECISION RULES

A more theoretical approach to distinguishing justification from excuse focuses on the difference between conduct and decision rules.²¹⁸ Conduct rules are meant to be a publicly announced norm that individuals are encouraged to follow.²¹⁹ These rules are addressed to ordinary citizens and concern what conduct is and is not permitted.²²⁰ When individuals conform their behavior to these public norms or conduct rules, their actions are considered justifications.²²¹ A decision rule on the other hand is a norm that is not publicly announced but is followed by officials after the fact in deciding specific cases.²²² This would include judges exercising their authority to find a defendant not culpable²²³ or state officials exercising their decisionmaking power over citizens.²²⁴ The point here is that these rules are not actively promoted to society at large. Because these rules are not publicly promoted *ex ante* but rather applied individually *ex post*, actions based on decision rules would be considered excuses.²²⁵

Self-defense is a quintessential conduct rule and thus properly understood as a justification.²²⁶ We want to publicly promote a rule that

²¹⁶ The same problem exists with a case of destroying a dike because of physical threats (a case of duress). Again, the addition of a third party does not explain why this should be classified as an excuse or justification.

²¹⁷ For instance, the lesser harm theory does provide such an explanation, but as I show, it fails to accurately reflect our intuitions on these cases. *See supra* subpart VII.B.

²¹⁸ *See, e.g.*, Berman, *supra* note 7, at 32–37; Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); Enker, *supra* note 1, at 289–90; Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1095–97 (2008); *see also* Kyron Huigens, *Duress Is Never a Conduct Rule*, in CRIMINAL LAW CONVERSATIONS, *supra* note 172, at 3–28.

²¹⁹ Berman, *supra* note 7, at 32–33.

²²⁰ Thorburn, *supra* note 218, at 1095.

²²¹ Berman, *supra* note 7, at 32.

²²² *See* Dan-Cohen, *supra* note 218, at 633.

²²³ Berman, *supra* note 7, at 32–33.

²²⁴ Thorburn, *supra* note 218, at 1095.

²²⁵ Berman, *supra* note 7, at 32–33 (finding that duress functions as a decision rule while necessity functions as a conduct rule).

²²⁶ *Id.*

declares someone can physically harm another to protect himself from imminent and unprovoked use of force against him.²²⁷ On the other hand, the defense of insanity is more appropriately considered a decision rule—something applied by judges during trial—and thus classified as an excuse.²²⁸ We do not want to publicly promulgate a rule that says, “Do not punish someone who is insane.”²²⁹ Presumably, this may promote unlawful conduct by individuals who may believe (incorrectly) that they suffer from some mental impairment.

The central problem with this theory is agreeing on whether an action is a conduct rule or decision rule. Insanity and self-defense are seemingly easy cases. But take the conventionally understood case of duress where a defendant destroys property because of physical threats to his person. It is not clear whether this should be a conduct rule or a decision rule.²³⁰ On the one hand, we may want to promote the norm that individuals can damage property to avoid threats of violence, thus classifying this case as a justification. But others may argue that we should not publically promote the destruction of an innocent person’s property. Such action is better understood as a decision rule and thus classified as an excuse. But on what basis are these assessments being made? For example, proponents of calling this act a conduct rule are probably appealing to some principle such as preserving life is more valuable than preserving property. But this seems like a version of the lesser-harm theory.

The problem with the conduct/decision rule calculus becomes more apparent if we imagine a duress scenario where the defendant chooses the greater harm. Suppose the defendant assaults an innocent person because of similar threats from a third party. Do we want to promote the idea of harming others when confronted with similar threats by a third party? Probably not. This would suggest that such conduct follows a decision rule. But on basis do we make this assessment? Again, it seems that a different rule like the lesser-harm principle is doing the work.²³¹ The conduct/decision rule distinction does not itself provide an answer. The same issue persists in situations involving the traditional case of necessity. Take the case of a defendant destroying a dike to save more valuable property from flooding. Again, do we want to publically promote the

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See Huigens, *supra* note 218, at 12–13 (arguing that duress is never a conduct rule but always a decision rule).

²³¹ Proponents of the conduct/decision theory squarely find that such actions fall within a society’s decision rules because the defendant did not choose the lesser harm. See Dan-Cohen, *supra* note 218, at 633–37.

destruction of an innocent person's property even if this particular instance would result in saving more valuable land? Or does this action better fall within the decision rule system? The conduct/decision rule divide does not provide an obvious answer.

This theory ultimately suffers the same fate as the able to aid/prevent concept. It merely follows the excuse/justification binary distinction without answering what constitutes the difference. Whether one classifies the destruction of the dike as a conduct rule or a decision rule will depend on whether one sees this as an excuse or justification. No one would disagree that a justified action is something we want to publically encourage as the right behavior. Similarly, no one would disagree that an excused action should not be publically announced or promoted and should be employed only by judges at trial. But we still need a theory that explains why one action is better understood as a decision rule (and thus as an excuse) instead of a conduct rule (and thus as a justification).²³²

Even on its own terms, the conduct/decision rule distinction does not cleanly map onto the justification and excuse dichotomy. Public policy may dictate that an action, while considered a justification, is better classified as a decision rule.²³³ Take, for example, the case of a prisoner who escapes from jail because of life threatening conditions.²³⁴ We may think that the prisoner did what he should have done (i.e., followed a public norm regarding preserving one's life) and thus deem this action a justification. Still, we may not want to publicize this event. We do not want other prisoners to know about this defendant's exculpation because some might try to escape no matter what they believe the relevant conduct rule provides. In short, we risk encouraging prisoners to escape absent life-threatening situations. So this action—while classified as justification—falls under the rubric of a decision rule.²³⁵ But now the question remains why this case should be classified as a justification. Appealing to the decision/conduct rule dichotomy does not provide an answer.

Perhaps this scenario is not a real counterexample; rather it only suggests we need to reexamine the conduct/decision rule calculus when dealing with prison escapes prompted by life threatening conditions. If we

²³² Berman makes a similar point. See Berman, *supra* note 7, at 38 (“Another way to capture this point is that a justification exists within the conduct rules, while an excuse exists within the decision rules. Unfortunately, this way of putting things provides little guidance in determining whether any given defense is a justification or an excuse.”).

²³³ See *id.* at 35. In fact, Dan-Cohen, the originator of the conduct/decision rule distinction, acknowledges that at least for cases of necessity, such actions can fall into both conduct and decision rules. Dan-Cohen, *supra* note 218, at 637–38.

²³⁴ See *United States v. Bailey*, 444 U.S. 394 (1980).

²³⁵ See Berman, *supra* note 7, at 35.

think that this type of prison escape will indeed increase inappropriate prison escapes, we may simply say that the action should not be labeled a justification in any setting. This escape squarely follows a decision rule—excused conduct that only a judge should administer at trial. Alternatively, if we think this escape will not increase inappropriate prison breaks and in fact encourage better prison conditions, we may label the action as following a conduct rule—justified conduct that should be publically promoted. But now we are back to the original question of how we decide which “rule” better captures this action? If we use utilitarian principles, we necessarily have to rely on some empirical data. It certainly will not be enough to say that I believe such escapes will better prisons conditions or instead increase inappropriate escapes. This cost–benefit analysis project seems practically difficult to conduct, especially considering we would have to apply it to all the various acts of duress and necessity. Practicality aside, there is a deeper problem with this approach. Such an enterprise could find that the public promotion of self-defense will increase inappropriate attacks on others. This cost–benefit analysis would thus lead to the counterintuitive conclusion that the act of self-defense should be classified as a decision rule.

The conduct/decision fails as a persuasive methodology to distinguish excuse from justification. Either the calculus is applied *ex ante* without the benefit of empirical guidance—in which case, it does not sufficiently explain a justification from an excuse—or applied *ex post* using a utilitarian calculus—in which case it may end up classifying a clear case of a justification as part of a decision rule.

F. WARRANTED ACTIONS VERSUS UNWARRANTED BUT NOT BLAMEWORTHY ACTIONS

Another prominent theory used to distinguish justifications from excuses centers on actions that are warranted and those that are unwarranted but not blameworthy.²³⁶ A justified act would naturally be a warranted action whereas an excused act would be an unwarranted action in which the defendant is held not blameworthy.²³⁷ A warranted action is simply the morally appropriate action or the one based on good reasons at the time.²³⁸ An unwarranted action is considered wrong, though we find the defendant

²³⁶ See, e.g., Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89, 90 (1986); Horowitz, *supra* note 9, at 109–10; Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1552–53 (1999) (arguing against Greenawalt’s warranted/unwarranted distinction); Malone, *supra* note 176, at 321–22.

²³⁷ See Greenawalt, *supra* note 236, at 91.

²³⁸ *Id.*

not blameworthy based on the specific circumstances.²³⁹ This dichotomy seems to track the definitions of excuse and justification outlined earlier.²⁴⁰ However, the lack of any further specificity is intentional. As the main proponent of this theory explains, “The price of much greater rigor in the law would be to press concepts beyond their natural capacity, to generate avoidable disagreements or submerge controversies with misleading labels.”²⁴¹

This bare bones approach has a certain appeal. It sheds potentially cumbersome constructs and conditions in favor of a simple, more intuitive theory. Certainly, cases of self-defense and insanity would be easy to classify using this model. A defendant’s physical assault of a provoking victim is surely a warranted action. On the other hand, a defendant hurting someone based upon some mental defect (and not in response to an attack) would be unwarranted, but we would find the defendant non-blameworthy because of his insanity.

But this theory—like its counterparts described above—stumbles when it comes to harder cases involving duress and necessity. Again, it may track our intuitions on excused and justified acts, but it fails to explain the difference. Is destroying a person’s property to save more valuable property a warranted or unwarranted action? This will naturally depend on whether one classifies this as an excuse or justification. But without this determination, it is hard to see how merely appealing to the unwarranted/warranted dichotomy does the job.²⁴² One person may think that this kind of action is done for a good reason and thus justified; another may find that destruction of an innocent person’s property is not warranted though the defendant should not be held responsible. The same problem persists in a case of duress. Take the case of the defendant who deals drugs in response to physical threats to person and family. Avoiding physical harm may seem like the proper course of action, but one can reasonably argue that this action is unwarranted. Dealing drugs is never appropriate and should not be tolerated, though the defendant in this instance should not be held culpable. The point here is that simply appealing to the unwarranted/warranted dichotomy does not answer our inquiry. Something more is necessary (e.g., the lesser-harm principle) to explain why these actions are better understood as excuses (or justifications). Intuitive appeal is certainly important. But it cannot stand alone as a means to classify these

²³⁹ *Id.*

²⁴⁰ See *supra* subpart VI.A.

²⁴¹ See Greenawalt, *supra* note 211, at 1904.

²⁴² See Horowitz, *supra* note 9, at 110 (arguing that the term “warranted” is ambiguous when it comes to classifying something as an excuse or justification).

situations. We need a theory that goes further by positing some affirmative classification principle.

VIII. FOCUSING ON THE ROLE OF THE VICTIM TO CLASSIFY DURESS AND NECESSITY

A. THE VICTIM AND THE CRIMINAL LAW

It is perhaps not surprising that criminal theorists have not focused on the victim when analyzing cases of excuse and justification. Indeed, a commonly held belief in our legal system is that the victim is not to blame for a defendant's action. Who the victim is ought to be irrelevant in determining whether the alleged criminal acted badly.

In adjudicating guilt and doling out punishment, the criminal law explicitly seeks to ascertain the criminal's culpability. Focus is always on the defendant and what he does. As one scholar explains, "the theory of criminal law has developed without paying much attention to the place of victims in the analysis of responsibility or in the rationale for punishment."²⁴³ One criminal casebook, for instance, separates the "elements of just punishment" into discussions of culpability, proportionality, and legality that look only to the alleged criminal but not his victim.²⁴⁴ In this way, the underlying rationale of determining guilt or assigning punishment is to evaluate the individual who stands accused. After all, the conventional reasons for punishment—deterrence, retribution, and rehabilitation—concern only criminals (or potential criminals) and their blameworthiness.²⁴⁵

Only a few scholars have examined the victim in the context of adjudicating criminal responsibility and imposing punishment.²⁴⁶ One scholar, Vera Bergelson, recently published a book in an attempt to provide a comprehensive theory on a victim's role in the criminal act.²⁴⁷ She argues that when determining a defendant's criminal liability, courts should take

²⁴³ George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 51 (1999); see also Robert Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371 (2000) (arguing against increased victim's rights in the criminal process).

²⁴⁴ SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* ch.3 (8th ed. 2007).

²⁴⁵ See, e.g., Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 119–23 (2010) (analyzing the historical reasons for punishment including, among other things, deterrence, retribution, and rehabilitation).

²⁴⁶ See VERA BERGELSON, *VICTIMS' RIGHTS AND VICTIMS' WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW* 3 n.13 (Markus D. Dubber ed., 2009) (collecting citations).

²⁴⁷ See *id.* at 1–5.

into account whether the victim was in any way culpable for the defendant's actions. She frames her argument in terms of the principle of the conditionality of rights.²⁴⁸ Under this principle, a victim may lose (or lessen) his right not to be harmed because of his own conduct. If that happens, the defendant ought not to be held criminally accountable or his punishment should be reduced.²⁴⁹ A victim may lose his rights voluntarily—a case where the victim consents to the defendant's actions—or involuntarily—a case where the victim attacks the defendant.²⁵⁰ She goes on to argue that jurors should be instructed on this comparative culpability defense when imposing criminal liability.²⁵¹

Her argument for why we should focus on the victim in the first place is multifaceted, and I will not do it justice here. Instead, I highlight two reasons she gives for focusing on the victim. First and probably most important, she appeals to the principle of fairness, explaining that a defendant's punishment should reflect the amount of harm he caused relative to other participants.²⁵² In this way, if the victim is responsible for a part of that harm, the defendant's resulting liability should be reduced accordingly. This sounds right. Most of us would agree that a defendant is less culpable for an offense where the victim was partly to blame. Indeed, federal courts can reduce defendants' sentences in situations where the victim provoked the commission of the offense.²⁵³ Bergelson also appeals to the need for internal consistency within various types of law.²⁵⁴ If the victim's role is relevant for one offense, it should be equally relevant for other offenses. She focuses her discussion on tort law, where she finds precedence for her comparative analysis. In this area of law, the actions of the victim are uniformly considered, and it is commonplace for courts to allocate responsibility between the tortfeasor and victim when awarding damages.²⁵⁵

Whether and to what extent courts should take into account a victim's culpability during trial is beyond the scope of this Article. My undertaking

²⁴⁸ *See id.* at 61–62, 161–63.

²⁴⁹ *See id.* at 89–90, 123.

²⁵⁰ *See id.* at 123.

²⁵¹ *See id.* at 155–57. Bergelson ultimately advocates for an affirmative defense of comparative liability that defendants can use to mitigate their culpability. *See id.* at 157–60.

²⁵² *See id.* at 36–44.

²⁵³ U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (2003) (“If the victim’s wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense.”).

²⁵⁴ *See* BERGELSON, *supra* note 246, at 44–45.

²⁵⁵ *See id.* at 52–56.

is not strictly legal in nature. I am not critiquing how courts have analyzed the affirmative defenses of duress and necessity when imposing liability or punishment.²⁵⁶ Rather, the purpose of the Article is to propose a better way to classify these defenses after the trial has concluded and the defendant has been found not guilty. Here, relying on the victim's role in the crime provides a more intuitive and consistent approach.

Bergelson does not attempt to use her victim-based theory to classify duress and necessity as excused or justified acts. In fact, her analysis of duress as an excuse and necessity as a justification tracks that of most scholars.²⁵⁷ Still, her focus on the culpability of the victim and the reasons for it underscores the analysis here.

References to the victim are not completely absent from the excuse/justification jurisprudence. Scholars, including Bergelson, have relied on the role of the victim when analyzing self-defense as a justification.²⁵⁸ A common approach is the moral forfeiture argument,²⁵⁹ which is similar to Bergelson's principle of the conditionality of rights.²⁶⁰ The basic thrust of this theory is that the victim loses or forfeits his right not to be physically harmed because of his actions.²⁶¹ This makes the defendant's resulting assault of the victim a justified action. Focusing on the victim's actions in this way sounds right. The victim forces the defendant's act of self-defense. Interestingly, theorists have not broadened their analysis of the victim's role in an attempt to classify other affirmative defenses such as duress or necessity. My theory hopes to do just that.

B. THE BASIC ARGUMENT

Labeling the defendant's conduct an excuse or justification means that he already has been found not guilty. His intent and actions were no doubt relevant at trial and in the resulting success of his affirmative defense. By

²⁵⁶ Quite the contrary, the way federal courts have analyzed these defenses bolsters my contention that duress and necessity should be classified together.

²⁵⁷ See BERGELSON, *supra* note 246, at 31–32 (classifying necessity as a justification defense because it involves choosing the lesser evil but classifying duress as an excuse because it focuses on the mental adequacy of the defendant).

²⁵⁸ See *id.* at 71–77; see also Green, *supra* note 199, at 19; Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 48–49 (1986).

²⁵⁹ See, e.g., Green, *supra* note 199, at 19; Rosen, *supra* note 258, at 48–49.

²⁶⁰ See BERGELSON, *supra* note 246, at 91–92, 105–09.

²⁶¹ See *id.* at 91. A related theory focuses on a defendant's natural right to protect himself when under attack. See generally Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 455–56 (2008). These approaches are similar to the victim based add on theory described *supra* subpart VII.B.

and large, though, he suffers no lingering consequences from the state and continues his life in the same way.

The victim cannot say the same thing. He suffered harm as a result of the defendant's actions and must deal with its aftermath. The victim, for instance, must contend with being physically hurt or sustaining damage to his property.²⁶² So it only seems fair that we center a classification theory on the victim's role in the criminal act.

Where the victim played a role in the criminal act, the defendant's action is more appropriately classified as a justification, and where he played no such role, the defendant's action is better classified as an excuse. This dichotomy makes intuitive sense. It is wrong for an innocent person to suffer because of something the defendant does. These situations are thus better classified as excuses. Indeed, as a matter of policy, we do not want to publically promote or encourage excused acts where victims innocently suffer.²⁶³ On the other hand, if the victim intentionally puts the defendant in the position of committing the crime, the defendant's action would be warranted and properly classified as a justification. Here, the victim is directly culpable for the harm that befalls him. We also want to publicly promote or encourage such actions so that future victims are deterred from putting other defendants in such positions.²⁶⁴

I need to say something more about what "role" means in this context. In one sense, every victim plays a role in the criminal act. He voluntarily puts himself in the place and time where the act occurred. In this way, every victim is a but-for cause of the defendant's action. I certainly do not want to suggest such a loose construction of the term. The victim must have, in some direct way, caused the defendant's actions. Only then can we say the victim played a role in the crime.

Let us start with the uncontroversial defenses of self-defense and insanity. With self-defense, it is easy to see how the victim caused the defendant's action. The victim intentionally placed the defendant in a situation where he had to assault the victim lest he suffer physical harm himself. It does not matter how many victims were involved or the nature of the threatened harm. All that matters is that the victim forced the

²⁶² I am not suggesting that a victim is completely without any recourse. They may have a tort claim against the defendant but this will require the victim to bring an action. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, Introduction, §§ 1, 4, 28 (2010) (discussing elements for tort recover for physical harm and property damage).

²⁶³ This policy consideration tracks the definition of a decision rule discussed earlier. *See supra* subpart VII.E.

²⁶⁴ This policy consideration tracks the definition of a conduct rule discussed earlier. *See supra* subpart VII.E.

defendant to act. The victim is directly culpable, thus making the case of self-defense a justification.²⁶⁵ Policy considerations track our intuitions on this classification. We want to promote or encourage this action so potential future victims are properly deterred from making such physical threats.

Insanity, on the other hand, would be classified as an excuse under this theory because the victim had no role to play in the defendant's action. By definition, the defendant failed to appreciate the nature of the action. His conduct was not the result of anything the victim did but rather stemmed from some internal mental defect. So the victim cannot be said to have caused the defendant's actions. He innocently suffered at the hands of the defendant. It does not matter if the defendant happens to choose the lesser of two evils. The fact remains that the victim did not in any way force the defendant to act, thus making the case of insanity an excused act. Again, policy considerations track this classification. We do not want to promote or encourage this action so future defendants do not inappropriately believe that they can rely on the insanity defense to avoid punishment.

A similar analysis applies in cases of duress and necessity. Take the classic situation of a defendant destroying a dike because of physical threats (an instance of duress) or because of the potential flooding of more valuable property (an instance of necessity). The first thing to note is that the victim here is the owner of the land protected by the dike and the harm caused constitutes the flooding of this person's property. In both cases, the victim is not in any real way responsible or culpable for the defendant's action. The victim did not force the defendant to act. Thus, unlike the case of self-defense, the defendant's actions would properly be considered excused acts or undesirable acts. It is wrong to destroy an innocent person's property.

The perspective from which we view the defendant's conduct is critical. The defendant himself might argue that he *had* to destroy the property lest he suffer physical harm or more valuable property perish. From his particular perspective, this might be the correct or "justified" act. But our classification scheme cannot be based on the defendant's personal viewpoint; rather it should take into account all the various participants and consequences. To do otherwise would reduce the classification of these affirmative defenses to idiosyncratic beliefs of the defendant.²⁶⁶ For instance, such a narrow scope might improperly classify insanity as a

²⁶⁵ A similar analysis applies in the case of the defense of another. Here too, the defendant has no choice but to harm the victim lest the other person suffer physical harm. The victim again is directly culpable for the defendant's actions.

²⁶⁶ Subjective beliefs are certainly relevant when assessing the legal viability of these two defenses. See *supra* Parts II and III. But even here, such beliefs must satisfy some objective reasonableness standard to survive legal scrutiny.

justification or self-defense as an excuse. Even though he suffered from a mental defect, a defendant may believe that he was doing the right thing when he assaulted the victim. But we would not say that this is a justified act; again, because the victim was not directly culpable, this situation is better classified as an excuse. Conversely, a defendant who assaults a victim in self-defense may view his actions as wrong but unavoidable. This would not change our conclusion that such conduct is better classified as a justification. The point here is that our classification analysis must be objective in nature and cannot merely adopt the defendant's point of view.

Returning to our cases of necessity and duress, it is important to understand that the victim suffers the harm. Whether or not the defendant chooses the lesser harm or thinks his actions are right, the fact remains that he destroys this person's property. The victim has no say in what the defendant does. Rather, the victim is an unfortunate bystander whose property happened to be in the wrong place at the wrong time. Does it make sense then to say that the defendant *objectively* did the *right* thing? Most if not all of us would probably destroy property in the face of physical threats. But acting out of a basic desire for self-preservation does not automatically mean that our conduct becomes *objectively* justified even though we might subjectively believe that it is. Such reasoning would mean that hurting an innocent person because of physical threats from a third party would also be considered a justified act. Here too, we are acting out of self-preservation. But most of us would say that hurting someone—who is completely innocent—in this way is wrong. The same reasoning also makes destroying an innocent person's property wrong. The harm is no doubt less (property versus person), but the fact remains that the victim is not culpable in either case and does not deserve to innocently suffer. In fact, destroying this property may have financial consequences that could hurt the victim and his family.

The point here is that in all these situations, the innocent victim pays the price for the defendant's actions. Thus, these instances of duress and necessity are better classified as excused acts—wrongful conduct where we hold the defendant not criminally liable based on the specific circumstances. Policy considerations also favor this classification. We do not want to publicly promote the destruction of an innocent person's property. This could allow defendants to inappropriately invoke duress or necessity in situations where they happen to damage another person's property.

One could construct a duress scenario in which the victim plays a direct role in the defendant's destruction of the dike.²⁶⁷ For example, assume the victim is the owner of the land protected by the dike and he threatens to physically harm the defendant unless he destroys the dike. Here, the victim puts the defendant in the position where he has to destroy the dike (and thus flood the victim's property) lest the defendant suffer physical harm. This situation follows the case of self-defense and is thus better classified as a justification. This makes sense. We are not dealing anymore with the flooding of an innocent person's property. The victim forced the defendant's hand. Because he is directly culpable for the defendant's conduct, this action is better understood as a justified act. In fact, policy considerations favor encouraging these actions so that similarly situated future victims are properly deterred from physically threatening defendants in this way. There is nothing problematic about duress being classified as a justification in one instance but an excuse in another.²⁶⁸ For one, the typical cases of duress will be classified as excuses.²⁶⁹ It is unlikely, for example, that a victim would intentionally coerce a defendant to destroy his own property. In any case, my classification methodology hinges on the victim and so such scenarios are possible.

C. FURTHER CLARIFICATION ON THE ROLE OF THE VICTIM: THE CASES OF THE INNOCENT AGGRESSOR AND PROVOCATION

So far I have focused on situations where it is clear whether or not the victim played a direct role in the defendant's actions. The cases of the innocent aggressor and provocation require a bit more explanation. In the first, an aggressor threatens the defendant with bodily harm and the defendant responds in self-defense. However, unlike the paradigmatic case of self-defense, the aggressor here involuntarily causes these threats.²⁷⁰ One can imagine a hypothetical situation where the aggressor is sleepwalking and does not consciously realize that he is threatening the defendant with bodily harm.²⁷¹ Alternatively, the aggressor may be under some hypnotic trance by a third party. The point here is that the

²⁶⁷ A victim in a case of necessity where natural forces created the threat (e.g., potential flooding of property) cannot by definition force the defendant to act. This scenario then will always be classified as an excuse. But as I have shown, federal cases interpret necessity broadly and include situations where the threats are manmade. *See supra* subpart IV.A.

²⁶⁸ *See, e.g.*, Dressler, *supra* note 1, at 1350 ("As a purely descriptive matter, the [duress] defense *can* function either as a justification or as an excuse.").

²⁶⁹ The aforementioned federal cases of necessity and duress would be classified as excused acts. *See infra* subpart VIII.D.

²⁷⁰ *See* BERGELSON, *supra* note 246, at 71–73.

²⁷¹ *See id.* at 72.

aggressor—the ultimate victim of the defendant’s action—does not intend to hurt the defendant. The defendant certainly should not be held criminally liable. But is his action better classified as a justification or an excuse? Did the defendant commit the right action or just one that should find him not guilty of the crime? The victim certainly put the defendant in a situation where he was forced to act. No one would say that the defendant should not have defended himself. But this case feels different than the paradigmatic self-defense situation. We sympathize with this victim in a way we do not with the victim in self-defense. That is because the innocent aggressor was not really culpable for the harm that befell him. He did not know that the defendant would be forced to physically hurt him. He is more akin to the property owner whose land is unwittingly destroyed. Since the innocent aggressor—like the property owner—did not intend to hurt the defendant, it is hard to see how the defendant did the right thing. His conduct is better seen as undesirable and thus classified as an excuse.

Policy considerations support this conclusion and favor distinguishing self-defense from the case of innocent aggressor. With the former, we want to publically promote or encourage such conduct so future victims are deterred from assaulting defendants. The same considerations do not apply in the case of the innocent aggressor. There is no point to publicly promote the act of defending against an innocent aggressor. By definition, the victim never intended to harm the defendant and so promoting such action serves no deterrent value. This bolsters the conclusion that such actions are better understood as excused acts.

So both a victim’s intent and actions are important when classifying these defenses.²⁷² Specifically, a case of justification requires that the victim intended to physically harm the defendant and placed him in a situation where the defendant *could not avoid causing* the victim harm lest he suffer physical harm himself.²⁷³ Only then can the victim be said to have

²⁷² It makes sense to focus on intent and actions here as these two components are also necessary before imposing criminal liability. See 21 AM. JUR. 2D *Criminal Law* § 4 (2010); *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) (“In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.”).

²⁷³ Insisting that the case of an innocent aggressor is better understood as a justification does not unravel my classification theory. The victim’s role remains the key distinguishing factor. Only this time, the focus would be exclusively on whether the victim placed the defendant (regardless of his intent or lack of it) in a situation where the defendant had to act.

played a direct role in the crime. In this way, a defendant's response in the case of an innocent aggressor is properly labeled as an excuse.²⁷⁴

The victim also plays a prominent part in the case of provocation. Sometimes labeled heat of passion, this is an affirmative defense that seeks to reduce a defendant's liability in homicide prosecutions.²⁷⁵ The defendant is typically charged with intentional homicide or first-degree murder and seeks to reduce his conviction to manslaughter based on the fact that his actions were in the heat of passion or otherwise triggered by adequate provocation.²⁷⁶ One can imagine the kind of case that could trigger such a defense. For example, assume a husband walks in on his wife after she has been raped. Let us also assume that the husband realizes that the perpetrator poses no further threat to him or his wife. Even still, his sudden anger may provoke him to attack and possibly kill the perpetrator who is still in the room. In a subsequent homicide prosecution, the defendant may raise the defense of provocation to lessen his liability. This defense works differently than duress or necessity. Whereas the latter defenses completely exculpate the defendant (that is, the defendant is found not guilty), a provocation defense simply reduces the defendant's liability. He is found guilty of a lesser-included offense, in this case manslaughter instead of murder or intentional homicide. In this way, provocation can be considered

²⁷⁴ This approach of focusing on intent and actions also preserves our intuitions with the case of mistaken self-defense (*see supra* Part V). Here too, because the victim did not intend to harm the defendant, the defendant's resulting action is more appropriately labeled an excuse. Again, the defendant committed an undesirable act but the mitigating circumstances should find him not criminally liable. Self-defense will rarely be classified as an excuse. But situations involving mistakes of facts or innocent aggressors are possible. My focus on intent and actions would also potentially classify the battered women syndrome defense—where continuous and systematic abuse of a woman causes her to ultimately attack her perpetrator—as a justification, assuming a federal court finds the affirmative defense legally viable as a version of self-defense. *See, e.g.,* United States v. Whitetail, 956 F.2d 857 (8th Cir. 1992) (finding that battered women syndrome can serve as a type of self-defense for a homicide charge but concluding that the instant facts did not support such an affirmative defense); ROBINSON, *supra* note 172, at 407–26 (discussing to what extent battered women syndrome can be classified as a version of self-defense).

²⁷⁵ *See* Lizama v. U.S. Parole Comm'n, 245 F.3d 503, 506 (5th Cir. 2001); United States v. Scafe, 822 F.2d 928, 932 (10th Cir. 1987); MODEL PENAL CODE § 210.3(1)(b) (1985) (describing manslaughter as “a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse”).

²⁷⁶ *See* United States v. Medina, 755 F.2d 1269, 1273 (7th Cir. 1985); 2A FED. JURY PRAC. & INSTR. § 45:09 (5th ed. 2000) (discussing how federal courts instruct juries on provocation or heat of passion where defendant seeks to reduce intentional homicide charge to manslaughter); 40 C.J.S. *Homicide* § 108 (2010) (“Passion in order to reduce murder to manslaughter must be of such a degree as would cause an ordinary person to act on impulse and without reflection.”).

a partial affirmative defense. This fact should not change how we analyze this defense as a justification or excuse.²⁷⁷

Under my classification theory, this partial defense would constitute a (partial) excuse.²⁷⁸ The victim did not, strictly speaking, play a direct role in the harm caused. My definition requires that the victim intended to *physically* harm the defendant and placed him in a position where he could not avoid taking action against the victim. Unlike the case of self-defense, the defendant could have restrained himself and not attacked the victim. The victim posed no physical threat to either the defendant or his wife. In this way, the victim is not directly culpable for the defendant's actions. One might push back on this conclusion. By definition, this defense involves a victim who provoked or angered a defendant. Surely then, it makes sense to say that the victim caused or is somehow culpable for this action.²⁷⁹ There is no doubt that the victim is partially to blame for what has happened. This is what makes us sympathetic to the defendant and what allows us to reduce his criminal liability. But this does not mean that the defendant's resulting act should be considered a justification. Quite the contrary, the defendant did something wrong. Remember, neither he nor his wife were under any threat of physical harm, so the victim did not deserve this kind of retribution (despite his immoral act). The defendant's resulting attack should therefore be classified as an excuse—wrongful behavior that we excuse on account of the victim's sexual assault of the defendant's wife. Policy considerations favor classifying provocation in this way. We do not want to publicly promote or encourage attacking a victim if they pose no physical threat to anyone.

²⁷⁷ *But see* SUZANNE UNIACKE, *PERMISSIBLE KILLING: THE SELF-DEFENSE JUSTIFICATION OF HOMICIDE* 13–14 (1994) (arguing that a partial defense can only be classified as an excuse because the defendant was still convicted of a crime).

²⁷⁸ *But see* BERGELSON, *supra* note 246, at 32–34 (arguing that provocation is best understood as a partial justification); Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 *RUTGERS L.J.* 197 (2005) (arguing that provocation is better understood as a justification instead of excuse); ROBINSON, *supra* note 172 at 319–41 (differing views on whether provocation is a justification or excuse).

²⁷⁹ Bergelson relies on the victim's culpability to argue that provocation serves more as a justification than an excuse. *See* BERGELSON, *supra* note 246, at 32–34. No one would suggest that this victim is not in some way culpable for what happened, particularly in contrast to a victim who did not provoke the defendant. But this does not mean the action taken by the defendant automatically becomes a justified act. Bergelson interprets culpability too broadly; a victim can be partly culpable for the defendant's action, even though the action is better classified as an excuse.

D. THE GOVERNMENT AS THE VICTIM

The victim in the above-mentioned cases is obvious. In other cases, however, the victim is not so readily identifiable. For example, the federal cases of duress and necessity cited do not appear to have a victim. They include, for example, situations where a defendant has been charged with escaping from jail,²⁸⁰ violating federal drug laws,²⁸¹ unlawfully possessing a firearm,²⁸² or illegally entering a restricted government area.²⁸³ None of these offenses seem to involve a victim. Unlike the cases of self-defense or provocation, here there is no person that suffers any harm. Indeed, effectuating these crimes does not even require the presence of another person. For example, the elements of illegal possession of drugs or unlawful escape from custody do not contemplate the involvement of another party.²⁸⁴ One response would be that because there is no victim, by definition, no victim played a role in the defendant's action and, thus, these situations are better classified as excuses. This labeling preserves our intuitions about these instances of duress and necessity. The defendants did something wrong but specific circumstances make them not blameworthy. As a policy matter, most of us would also say that violating federal drug laws or escaping from prison—similar to flooding an innocent person's property—are not actions that we should encourage, even though these defendants may not be criminally liable.²⁸⁵

A more comprehensive approach focuses on the government as the victim. Federal law defines a "crime victim" as "a person directly or proximately harmed as a result of the commission of a Federal offense."²⁸⁶ The harm here would be the government's financial burden in investigating and prosecuting the defendant's conduct. Of course, this is a very different type of harm from what a traditional victim suffers. The defendant does not

²⁸⁰ See, e.g., *United States v. Bailey*, 444 U.S. 394 (1980).

²⁸¹ See, e.g., *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001); *United States v. Sawyer*, 558 F.3d 705, 711 (7th Cir. 2009); *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008); *Raich v. Gonzalez*, 500 F.3d 850, 859 (9th Cir. 2007); *United States v. Lizalde*, 38 F. App'x 657 (2d Cir. 2002).

²⁸² See, e.g., *United States v. Leahy*, 473 F.3d 401 (1st Cir. 2007); *United States v. Al-Rekabi*, 454 F.3d 1113 (10th Cir. 2006).

²⁸³ See, e.g., *United States v. Ayala*, 289 F.3d 16 (1st Cir. 2002).

²⁸⁴ See 18 U.S.C. § 751(a) (2006) (describing the elements of escape from custody without reference to other parties); 21 U.S.C. § 841(a) (2006) (describing the elements of illegal possession of narcotics without reference to other parties).

²⁸⁵ This could conclude the discussion on the subject. What follows though is an approach that seeks to expand the notion of a "victim" in cases where there is no apparent victim.

²⁸⁶ 18 U.S.C. § 3771(e) (2006).

destroy or otherwise damage government property. Still, the government must expend resources to enforce the purported violation of federal law.

Federal jurisprudence lends support to the idea of the government serving as a victim in this way. Courts have considered the government a victim where it has suffered direct financial harm and have ordered the defendant to pay appropriate restitution.²⁸⁷ As one circuit stated, “it is by now settled that a government entity (local, state, or federal) may be a ‘victim’ [under applicable federal law] . . . (and may be awarded restitution) when it has passively suffered harm resulting directly from the defendant’s criminal conduct, as from fraud or embezzlement.”²⁸⁸ Courts, for example, have ordered restitution to the government where a defendant falsified federal postal money orders²⁸⁹ or where a defendant unlawfully received federal disability benefits.²⁹⁰ The Third Circuit, in *United States v. Hand*, provides the most compelling fact pattern for a restitution award to the government.²⁹¹ Here, a juror in a federal trial pleaded guilty to contempt of court by engaging in impermissible contact with one of the defendants during jury deliberations.²⁹² This behavior resulted in a mistrial and necessitated the retrial of the defendants.²⁹³ The Third Circuit explained that the government, and in particular “the U.S. Attorney’s Office . . . expended time and resources” in a trial that was “rendered futile” by the actions of the defendant.²⁹⁴ In this way, the government was “harmed by [the defendant’s] action,” and was appropriately considered a victim who warranted restitution.²⁹⁵ The court affirmed a restitution judgment against the defendant for the wages of the federal employees involved in the mistrial.²⁹⁶

²⁸⁷ See 18 U.S.C. § 3663 (2006) (using the same definition of victim as found in 18 U.S.C. § 3771(e) and noting that a court may order the defendant to reimburse the victim for “expenses related to participation in the investigation or prosecution of the offense”); *United States v. Gibbens*, 25 F.3d 28, 32 (1st Cir. 1994) (finding that the government can be considered a victim under 18 U.S.C. § 3663 and receive restitution); *Ratliff v. United States*, 999 F.2d 1023, 1027 (6th Cir. 1993) (collecting cases where courts have found the government to be a victim that requires restitution).

²⁸⁸ *Gibbens*, 25 F.3d at 32; see also *United States v. Dudley*, 739 F.2d 175 (4th Cir. 1984) (finding restitution to government appropriate where defendant unlawfully used federal food stamps).

²⁸⁹ *United States v. Lincoln*, 277 F.3d 1112 (9th Cir. 2002).

²⁹⁰ *United States v. Streebing*, 987 F.2d 368, 374 (6th Cir. 1993).

²⁹¹ *United States v. Hand*, 863 F.2d 1100 (3d Cir. 1998).

²⁹² See *id.* at 1102.

²⁹³ See *id.* The defendants all ultimately pleaded guilty before retrial. *Id.*

²⁹⁴ See *id.* at 1103.

²⁹⁵ See *id.* at 1104.

²⁹⁶ See *id.* at 1102–03.

The aforementioned cases of duress and necessity do not involve instances where a defendant misappropriated government funds or interfered with a federal trial. The government can still be seen as expending financial resources because of the defendant's conduct, only this time the financial harm is forward-looking. Specifically, the government must enforce the law that was allegedly violated. This requires investigating the matter and ultimately bringing charges against the defendant. This does not mean that the government becomes a victim for the purposes of restitution. In fact, courts have explicitly disallowed restitution for such costs.²⁹⁷ The above cited federal restitution law however supports my contention that future financial costs associated with the offense can make the government a victim, at least for the purposes of classifying cases of duress and necessity. My concern here is identifying a victim and understanding his role in the crime, not arguing under what circumstances they deserve restitution. In fact, it makes little sense to say that the defendant should reimburse the government for its troubles where a court finds a defendant not guilty based on a successful defense of duress or necessity.²⁹⁸ Similar reasoning applies in a successful case of self-defense. There too, we can identify the victim but no one would suggest the defendant should pay the victim restitution for medical or other relevant costs.

This means that the federal government is the victim in all federal crimes, including cases where there is also an identifiable person. Even here, (e.g., a case of self-defense) the government spends resources to investigate the circumstances surrounding the alleged offense and prosecute the defendant. There is nothing problematic about the government being the victim in every case. It will rarely play a direct role in the defendant's actions. For all practical purposes then, the government will be merely a nominal victim and the focus will remain on the individuals involved to ascertain whether the defendant's actions constitute an excuse or justification.

Nevertheless, as a victim, the government is subject to the same test as an individual victim when it comes to classifying these cases. If the government intended to harm the defendant and put him in a situation where the defendant could not avoid committing the crime lest he suffer physical harm himself, the defendant's action would appropriately be

²⁹⁷ See *United States v. Salcedo-Lopez*, 907 F.2d 97, 98 (9th Cir. 1990) (finding that "[t]he costs of investigating and prosecuting an offense are not direct losses for which restitution may be ordered").

²⁹⁸ Cf. *United States v. Gibbens*, 25 F.3d 28, 32–33 (1st Cir. 1994) (finding that the government is not entitled to restitution where it provokes the commission of the offense through a sting operation where it lost money).

classified as a justification. However, if the government played no such role, the defendant's action is better classified as an excused act. This sounds right. The defendant's action is warranted only where the government is directly culpable for the offense. Otherwise, the government innocently suffers financial harm, similar to the victim whose property is destroyed. In such a case, the defendant committed a wrong, though the mitigating circumstances make him not criminally liable. Policy considerations track this sentiment. For instance, most of us would say that we generally should not promote or encourage federal drug violations or the unlawful possession of firearms.

The idea of the government as the "suffering victim" may not be readily acceptable. Take the example of the defendant dealing drugs to an undercover agent in the face of physical threats to himself and his family from the mafia. The defendant does not appear to be hurting anyone by committing this crime. In fact, he is trying to save his family from bodily harm. Is it really fair then to say that the defendant's conduct constitutes an excuse? The victim may not have a face and the injury may not be immediate. This should not change our analysis. Suppose this defendant had to steal money from an innocent person in order to save his family from unlawful threats. This situation is more easily identified as an excuse and tracks the analysis of the destruction of an innocent person's property described earlier. Again, the victim from whom the defendant steals innocently suffers.²⁹⁹ The government suffers in the same way. By committing the drug violation, the defendant effectively takes money away from the government that could be used for other services and forces the government to spend the money on investigating and prosecuting the crime.

Only one of the aforementioned federal cases would potentially fall into the justification category.³⁰⁰ *United States v. Bailey* provides the most compelling fact pattern in which the government would be directly

²⁹⁹ It should not matter how much money the defendant takes. I realize that the smaller the amount, the less likely we are to disapprove of the defendant's action. Like with any crime, the less harm the defendant causes, the more quickly we may forgive him or the less harshly we may judge him. This does not change the fact that the defendant committed a crime. Similarly, the fact remains that under these circumstances, the defendant's invocation of duress constitutes an excuse.

³⁰⁰ In none of the other cases of duress or necessity did the government threaten or otherwise cause the defendant to violate federal law. At most, the government may have created the situation that motivated the defendant to commit a crime. *See United States v. Ayala*, 289 F.3d 16 (1st Cir. 2002), where defendant illegally entered restricted area to protect endangered species from bombing. Even here, though, the government did not force the defendants to illegally enter the restricted area by threats of physical harm. *Id.* In fact, defendants were free to pursue other legal methods to stop this bombing. *Id.* at 26–27.

responsible for the defendants' actions.³⁰¹ Here, the defendants alleged that the prison guards intentionally created unbearable living conditions that forced them to escape in order to avoid physical harm.³⁰² Specifically, the guards beat the defendants and made threats on their lives.³⁰³ The defendants also alleged that the guards set fire to various objects, causing smoke to build up in the prison cells.³⁰⁴ The Court ultimately decided that the defendants were not entitled to a duress defense because they did not immediately surrender after their escape.³⁰⁵ So the Court never reached the issue of whether the defendants presented sufficient evidence of coercion warranting their escape.³⁰⁶ However, assuming the defendants presented a legally viable defense, their escape would probably be categorized as a justification. The government—through the actions of the prison guards—intentionally threatened the defendants' lives and left them with no option but to escape.³⁰⁷ By staying in prison, the defendants ran a real risk of being physically injured. Classifying their escape as a justification tracks our intuitions. The government is directly culpable, making the defendants' conduct a warranted act. Furthermore, as a policy matter we certainly would want to encourage such federal violations so that the government is properly deterred from threatening inmates or creating such unlivable prison conditions.

The idea of the government playing a part in a defendant's criminal act is nothing new. The entrapment defense has long been recognized in situations where a court finds the defendant not guilty of the crime due to the actions of the government.³⁰⁸ Under a successful application of this doctrine, a court finds that the government implanted or otherwise created in the defendant's mind the predisposition to commit the criminal act and

³⁰¹ *United States v. Bailey*, 444 U.S. 394 (1980).

³⁰² *Id.* at 410.

³⁰³ *Id.* at 398.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 412.

³⁰⁶ *Id.*

³⁰⁷ I assume here that we can attribute the guard's actions to the government. *Cf. id.* at 423 ("It cannot be doubted that excessive or unprovoked violence and brutality inflicted by prison guards upon inmates violates the Eighth Amendment.") (Blackmun, J., dissenting).

³⁰⁸ See *Jacobson v. United States*, 503 U.S. 540, 542 (1992); *United States v. Russell*, 411 U.S. 423, 436 (1973); *Sorrells v. United States*, 287 U.S. 435, 437 (1932); Jess D. Mekeel, *Misnamed, Misapplied, and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine*, 14 WM. & MARY BILL RTS. J. 1583, 1588 (2006) (describing the long history of the entrapment defense in American jurisprudence).

then induced him to commit the crime.³⁰⁹ For instance, the Supreme Court found entrapment where the government informant repeatedly prodded and ultimately persuaded the defendant to take part in a narcotics sale.³¹⁰

Under my classification theory, the affirmative defense of entrapment—like provocation—constitutes an excused act. As the victim, the government employed coercive techniques to facilitate the commission of the offense. But, strictly speaking, it did not force the defendant's hand. The entrapped defendant—like his provoked counterpart describe above—was free not to commit the crime without suffering any harm. This is very different from the prisoner case where the defendants were going to be physically harmed if they did not violate the law and escape. In the narcotics case, for example, the defendant could have abstained from selling drugs to the informant without suffering any harm to himself. This analysis does not take away from the fact that the government—like its counterpart in the provocation case—is partly culpable for the crime. Indeed, this explains why courts find defendants not guilty in entrapment cases.³¹¹ Still, this action is more appropriately classified as an excuse. The government is not directly culpable, and so the defendant is wrong to have committed the crime. Again, policy considerations favor this classification. We do not want to encourage defendants to commit crimes in the hopes that they can argue that the government somehow coerced their actions.

IX. CONCLUSION

Scholars who have sought to classify necessity and duress have focused too much on the defendant or what he does. They have neglected the central figure who suffers the harm. Ironically perhaps, the victim provides the key to understanding what makes an action a justification or excuse. My theory classifies most affirmative defenses as excuses. Only cases of self-defense would realistically be classified as justified acts. Almost all instances of duress and necessity (and certainly most of the federal cases cited) would be considered excused acts. There could be rare

³⁰⁹ *Jacobson*, 503 U.S. at 548; see also *United States v. Bala*, 236 F.3d 87, 94 (2d Cir. 2000) (“The defense [of entrapment] has two elements: (1) government inducement of the crime, and (2) lack of predisposition on the defendant’s part.” (internal quotations and citation omitted)); Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 831–34 (2004) (describing the elements of entrapment).

³¹⁰ *Sherman v. United States*, 356 U.S. 369 (1958).

³¹¹ See, e.g., *Sherman*, 356 U.S. at 376 (arguing the purpose of entrapment is to prevent government from taking advantage of the “weaknesses of an innocent party” and trick him or her into “committing crimes which he [or she] otherwise would not have attempted”); *Sorrells v. United States*, 287 U.S. 435, 448 (1932) (noting the availability of the entrapment defense to “persons otherwise innocent” who are lured by the government to commit the crime).

instances of duress and necessity where a victim directly played a role in the defendant's action. But this is certainly the exception, and not the rule.

There is nothing problematic about such a restrictive notion of justification. This tracks our intuitions on this kind of classification. A justification is the right action or the one that benefits society. Most criminal offenses do not and should not bear this label. The defendant is wrong to have committed these violations. When asked why, a compelling answer is that an innocent victim suffers at the hands of the defendant. Whether it is the destruction of property, physical harm, or financial cost, the victim is generally not blamed for what happened. How then can we classify any such action by the defendant as a justification? We should not. At best, the defendant should be found not guilty based on mitigating circumstances such as duress or necessity. The label excuse then more accurately captures our feelings about these situations. Our intuitions are different where the victim forced the defendant's hand by physical threats. Here, the victim is directly culpable for the harm he suffers. It makes sense then that these situations are classified as justifications. As a policy matter, we also want to encourage these actions so future victims are sufficiently deterred from putting defendants in such positions.

The defendant no doubt will and should remain the center of attention when courts pass judgment on liability and punishment. But the labels of justification and excuse do not exclusively reside in the legal realm. They represent a more general opinion on what we think of defenses such as necessity and duress. So it makes sense that our focus goes beyond simply what the defendant thought and did. By focusing on the victim, we create a truly comprehensive theory that accurately captures the nature of these affirmative defenses and preserves our intuitions on their classification.