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# MORAL EXCESS IN THE CRIMINAL LAW

Sanford H. Kadish

## *ABSTRACT*

This lecture offers some thoughts on the perils of unreflective moral enthusiasm, what I call moral excess. It proceeds by identifying three current instances of it, particularly in the criminal law, and offers reflections on features of morality that are obscured by it. The first instance concerns the moral obligations of lawyers, not only in criminal matters, but in all areas. Some today find moral fault with lawyers who represent morally disagreeable clients or causes on the premise that whatever is wrong for a private person to do is wrong for a lawyer to do. I argue that this is an overstatement which undervalues the moral force of the institutional professional role. The second instance is recent attempts to justify the criminal law principle that deprives the morally suspect of legal defenses they would otherwise enjoy. I view this as itself morally suspect insofar as it invites subjective judicial moralizing antithetical to rule-of-law values. The third instance is the common criticism of the criminal law that it is morally defective to the extent that it fails to accord a legal excuse to defendants who are morally excusable because they are below standard in temperament, intellect or character. This position, I argue, is first, insensitive to the imperatives of an institutionalized system of punishment, and second, offers a concept of moral excuse so broad as to threaten the practice of moral blaming itself. I conclude with observations on the paradox that sometimes it can be “right” to do the wrong thing, and sometimes “wrong” to do the right thing.

## Moral Excess in the Criminal Law

Sanford H. Kadish\*

My subject today is moral excess, a paradoxical but not an unfamiliar phenomenon. Consider, for example, moral zealotry—being so certain of your moral ground that sweeping aside those who disagree becomes the only rational option, if not indeed a duty.<sup>1</sup> No period of human history has been free of it; it seems to be the dark side of our moral natures. Then there are the excesses that flow from a thirst for revenge, inflamed by fear, like the resort to brutally excessive imprisonment of offenders in this country today. Another example is the punishment of conduct harmful to none except those offended that some are privately enjoying themselves in morally disapproved ways.<sup>2</sup> But these are not my direct concern. I mention them only to suggest how common and familiar moral excess in the law really is.

My direct concern today is with three instances of what I claim to be moral excess that have appeared in the Criminal Law literature in recent years. I confess to being a bit perverse in going on about moral excess when the far greater cause for human concern is its opposite. Yet we may learn something about morality by considering its excesses, as I'll suggest at the end. One more confession: I do not say that the particular instances of moral excess I will be talking about are among the most consequential in the law, but they are illustrative. In any event, they have been

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1. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting): "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."

2. This raises the issue that exploded on the American scene following the famous 1957 Wilfenden Report on the criminalization of homosexuality and the debate between Lord Devlin and Professor Hart more generally on the criminalization of private immorality. See generally HOME OFFICE, SCOTTISH HOME DEP'T, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1957); PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

buzzing around on my radar screen in recent days and I have a mighty urge to zap them.

I suppose I should now describe these instances and summarize what I mean to say about them. That would be the law review way. But there was no law review editor reigning me in when I delivered this lecture and now it's after the fact. So I'll tell my three tales one by one and see at the end if I can make my case that taken together they exhibit the paradox that sometimes it can be right to do the wrong thing, and sometimes wrong to do the right thing.

*Lady Mason and Lawyer Morality*

My first story concerns the role of the lawyer. The subject is raised in a fine Victorian novel by Anthony Trollope, *Orley Farm*.<sup>3</sup> We are told at the outset that Lady Mason has committed a crime—as a young wife she forged her elderly husband's will (and the signatures of three witnesses to boot!) in order to assure the bequest of Orley Farm to their infant son, a bequest which her husband had cruelly refused to make. Now we know this because, as I say, the novelist told us so at the start, and the novelist knows it because he made it up—novelists have lots of troubles, but never epistemological ones. Lady Mason confesses the truth only to two of her friends, but her four defense lawyers come to suspect it. The lawyers undertake to represent her anyway, and they proceed to do so with vigor and diligence. They make a fool of a witness, who indeed is very much a fool, although they suspect he is telling the truth. They expose the unreliability of another witness, who indeed is unreliable, although here again, they suspect she is speaking the truth. They impugn the manifestly unworthy motives of the complaining witnesses, though believing their complaints to be warranted nonetheless. They exploit the sentiments of the jurors by portraying Lady Mason, altogether correctly, as a respected member of society who has led a blameless life both before and since her husband died twenty years before. One lawyer participates in this because he is smitten with Lady Mason, as well as for professional reasons. Two others do so simply because they are lawyers and that's what they are retained to do. And one, the novelist's alter ego, has acute compunctions about even his limited role in the case. In the end, of course, the jury acquits. The moral of the tale, as I read it, is that the lawyers behaved as shameful accomplices of Lady Mason in thwarting the search for the truth and the vindication of justice.

I tell the story of Lady Mason to introduce the familiar question: Do lawyers act immorally when they act in their professional role in ways that would be immoral if they so acted in their personal role? Trollope apparently thought so, contrary to the

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3. ANTHONY TROLLOPE, *ORLEY FARM* (David Skilton ed., 1991) (1862).

reigning view, which was and still is that a lawyer is not obliged to judge the morality of a client's cause, but rather, within the limits of the law and established professional traditions, is to serve as a loyal and zealous partisan of that cause.<sup>4</sup> Yet, Trollope would feel more at home today, for within the last several decades the accepted tradition has come under attack from academic lawyers and ethicists.<sup>5</sup> So one distinguished critic, Professor Applbaum, has claimed: "Institutions and the roles they create ordinarily cannot mint moral permissions to do what otherwise would be morally prohibited."<sup>6</sup> Another leading scholar in this area, Professor Luban, has observed: "The lawyer's role subjects him or her to moral risk because if the client's aims are unjust the lawyer becomes an accomplice in injustice—not just a bystander, but an active agent of injustice, using skills of thought and speech . . . to effectuate injustice."<sup>7</sup> These claims raise the much mooted issue of role moralities; whether persons sometimes may do in their institutional role what they might not do in their personal capacity. I take the view that they may, but I will only argue the case of the lawyer.<sup>8</sup>

I agree that there is moral risk for a lawyer in representing a client the lawyer thinks is doing something immoral. I'm with Professor Luban on that. But risking moral error is not the same as committing moral error. Some do make that jump and it strikes me as an instance of moral excess. Of course, if I, acting in my personal capacity, intentionally help another do something immoral, I become a moral accomplice of the wrongdoer. Is that also true if I am acting as a lawyer giving legal advice and representation? Well, sometimes it may be so, depending on the seriousness of the immorality and how far the lawyer has personally identified with the client's cause. That's why there is a moral risk. One can think of examples, but is that necessarily, or even generally so? I think not. Defending criminal defendants,

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4. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (4th ed. 1999) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."); see also Rule 1.2(b) cmt. ("Of course, a lawyer may not allow personal interests and loyalties . . . to dilute the diligence or vigor with which a client is represented.").

5. The emergence of the criticism is sketched in David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 877 (1999).

6. ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* 3 (1999).

7. David Luban, *Smith Against the Ethicists*, 9 LAW & PHIL. 417, 428 (1990). Professor Luban makes an exception for criminal cases, however. See DAVID LUBAN, *LAWYERS AND JUSTICE, AN ETHICAL STUDY* 63 (1988).

8. See M.B.E. Smith, *Can a Lawyer be Happy, Essay Review of William Simon, The Practice of Justice (1998)*, 19 CRIM. JUST. ETHICS XXX (2000) (who takes a similar position and who piqued my interest in the issue).

like Lady Mason, presents the strongest case for my position. It is a well known case and it is part of the received wisdom, but I must take a moment to state the reasons anyway.

Criminal defense lawyers are not, as Trollope believed, moral accomplices of the wrong of their guilty clients in seeking to escape justice. What makes Trollope's case seem so strong is that we know for a certainty that Lady Mason is guilty. In fact, however, though lawyers may suspect, even strongly suspect, rarely do they know in real life. But what of that, you may think? May it not be a moral fault to act in awareness of a great risk that you will be helping another do a moral wrong?<sup>9</sup> I think yes, but not here, because of a consideration that holds apart from epistemological uncertainties. The role of the defense lawyer in the adversary system is to assure that the state strictly complies with the conditions the law imposes on the right of the state to punish an individual. This is designed to protect all of us, not just the guilty, against mistake, abuse and oppression by the State in its punishing mode.<sup>10</sup> That protection would come to a lot less if it were morally dubious for lawyers to represent defendants they thought were probably guilty. And If lawyers are free to represent defendants in this circumstance, must they not put aside their personal suspicions and do what the lawyers for Lady Mason did to show the shortcomings of the prosecution's witnesses and the weakness in the prosecution's case? How else could they serve their function as defense lawyers ? Justice is more complicated than simply bad guys getting their just deserts. Consider the recently reported action of Chinese prosecutors.<sup>11</sup> Convinced of the guilt of an official charged with taking bribes, they charged his lawyer with illegally obtaining evidence (and kept him in custody for five months) for too aggressively seeking out witnesses and documents to contradict the official police story. I'm not sure Trollope would have thought something like that a bad idea for Lady Mason's lawyers.

While many would agree with Trollope, most lawyers would accept the minimal claims I've made for a privileged role for the criminal defense lawyer; the criticism of defense lawyers centers mainly on certain practices, such as concealment and deception, which I am by no means defending. But civil matters are different; the lawyer who provides loyal legal service to the client's wrongful end seems to some to serve no immediate good, and the indirect overall common good seems less

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9. See generally Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997).

10. John Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223 (1986).

11. Elisabeth Rosenthal, *In China's Legal Evolution, the Lawyers Are Handcuffed*, N.Y. TIMES, January 6, 2000, at A1.

apparent here than in criminal cases. This has led critics increasingly to reject the prevailing model of the lawyer's role.

Now, I do not deny the virtue of lawyers who devote their legal talents to furthering their moral ideals. Nor do I doubt the freedom of lawyers—their moral as well as their professional freedom—to decline to represent a client for any non-invidious reason, including of course a judgment that the client is in the moral wrong. The issue I raise here is only whether lawyers are morally suspect if they do not decline a case for this reason. One can't be dogmatic about this, but there are two considerations that lead me to worry about an excess of moral zeal here. The first is that there is an immediate value at stake that is imperiled by imposing a moral duty on the lawyer to judge the client's actions—the value of autonomy, the freedom of persons to pursue their lives within the law as they choose.<sup>12</sup> Lawyers serve the autonomy of others by using their legal expertise and privileges to help their clients achieve the rights the law accords them. In view of their gatekeeper function, this has moral value even where the client's goals are less than admirable. Of course, furthering your client's choices may work against those of another, but legal representation by both parties furthers the choices of each that the law supports. Granted that autonomy is not at stake in the full sense where the client is an institution or an organization, still the freedom of action of the persons who constitute these institutions is at stake to the extent it would be imperiled by having to pass the moral scrutiny of their lawyers.

This brings me to my second consideration, the indeterminacy and contestability of moral judgments. Of course, there is agreement in our culture of certain fundamental moral principles. But the agreement is on a very general level, and we often disagree on what they mean, what they imply, and how they apply. Need I mention abortion and euthanasia? Moreover, the line between these basic principles and matters of lesser moral moment is no clear divide but a gradual shading from more to less serious. This does nothing to hinder the human tendency to ratchet up strong personal preferences into matters of the highest personal principle. All of these considerations make it perilous to confer upon lawyers the office of moral censor of their client's cause.

I need examples to exhibit these two considerations. Consider a developer who buys a building in a small town and hires lawyers to obtain a rental increase. It turns out that one of the tenants is an art cooperative which many feel is good for the community, but which will be forced to close if the increase is granted. Does it strike you as immoral for the lawyers to proceed? This is an actual case for which the

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12. See Alan Donagan, *Justifying Legal Practice in an Adversarial System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 123, 134-35 (David Luban ed., 1983).

lawyers received considerable criticism.<sup>13</sup> Now, one might admire lawyers (I would) who tried to work with their client to find ways of saving the cooperative, but it's another thing to charge them with moral fault if they do not, or if they try but fail. However socially desirable it would be for the cooperative to continue, it seems to me to trivialize morality to conclude that the lawyers are morally suspect in representing the developer. Or consider the lawyers who represent, say, Borders in opening huge retail outlets with which small local bookstores cannot compete. Now, I am one of those who regrets the passing of local bookstores, but I cannot believe the lawyers for Borders are acting immorally in helping the company succeed in its business. The lawyers in both cases are in the moral clear for the same reason: they are performing their institutional role of making a reality of the rights and remedies the law promises to individuals. If these were one of those rare and anomalous cases where the law in a particular case wreaks moral havoc, it would be another story.<sup>14</sup> But they're not. We live, after all, in a competitive capitalist society. Many people deplore its excesses and prefer law and policies with a kinder face, but many do not, and it seems to me excessive to fault the lawyers morally for not lining up with those who do. One need not approve of Scrooge to grant that a lawyer may, without moral compunction, help him secure the rights the law accords him.

I must make some disclaimers before I leave this subject. First, I do not mean to defend dubious practices that lie in the borderland of legal and professional acceptability. Nor do I assert that even all the actions squarely sanctioned by the prevailing standards should be so sanctioned. There are hosts of difficulties in these areas that my comments don't pretend to deal with. Second, it is no accident that my examples come from the world of business, where competition and efficiency are the prevailing goods. When it comes to personal relationships, like marriage, family and custody matters, for example, we might do better with conciliatory processes less damaging to human relationships than antagonistic representation. Nor would I want to doubt that even under our present system, lawyers who practice in these areas are less insulated from the concerns and interests of third parties than are lawyers in other kinds of practice.

My point is a modest one: the role of the lawyer affords some significant insulation against moral association with the client's ventures, and to deny this is to engage in a bit of moral excess. For example, I often hear the charge, especially from young people, that lawyers who work for large law firms or for large corporate interests or for other causes that are thought to be not in the public interest are

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13. See Austin Sarat, *Ideologies of Professionalism: Conflict and Change Among Small Town Lawyers*, discussed in Luban, *supra* note 7, at 427.

14. I have elsewhere defended the justification for role agents to interpose their moral judgment in extreme cases. See MORTIMER R. KADISH AND SANFORD H. KADISH, *DISCRETION TO DISOBEY* (1973).

somehow selling out. I think that's a bad rap. Let me make it personal. When I was a young man practicing law, I once wrestled with my conscience when called upon to represent a company in its disputes with a union. It was, I recall, as if I were picking my way along a precipice falling away to mortal sin at either side. But it seems to me now that I was being just a bit priggish.

*Henry Prince and the Lesser-Wrong Doctrine*

To introduce my second instance of moral excess, I have two stories to tell. The first is a Romeo and Juliet story from Victorian days, known in the law books as *Regina v. Prince*.<sup>15</sup> Romeo was Henry Prince, and Juliet was Annie Phillips, a physically matured girl of almost fourteen. Without seeking permission of her parents, Henry persuaded Annie to leave her home in Reading and spend ten days with him in Oxford. The record does not tell us, but we're entitled to suspect that they found other sources of amusement than attending university lectures. At any event, Annie's father discovered them there and had him arrested on a charge of taking "any unmarried girl . . . under the age of sixteen . . . out of the possession and against the will" of her parents.<sup>16</sup> At the trial it emerged that Annie was one of those girls who looked very much older than sixteen, and the jury found, upon reasonable evidence, that before the defendant took her away she had told him that she was eighteen, and that Henry had a bona fide and reasonable belief she was telling the truth. The court had to decide whether these circumstances constituted a defense. Of the sixteen judges participating, fifteen held no, remitting Henry to three months in prison with hard labor.<sup>17</sup>

All the judges agreed that fault (*mens rea*) was a necessary element of crime; they disagreed only on what that meant. What, then, was Henry's fault according to the majority? If Annie had been as old as she looked, Henry would have committed no crime at all. True, she wasn't, but he had good reason to think so. So was his criminal fault inducing a girl who might have been under sixteen out of the possession of her parents? Exactly. Even if Annie had been eighteen, the judges concluded, he still would have been doing something that was immoral, not a crime, concededly, but still wrong in itself, namely, in the words of Lord Bramwell, "the taking of a female

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15. 2 L.R.-Cr. Cas. Res. 154 (1875).

16. Rupert Cross, *Centenary Reflections on Prince's Case*, 91 LAW Q. REV. 540, 540-41 (1975).

17. *Id.* at 541.

of such tender years that she is properly called a girl [from the possession of her parents].”<sup>18</sup>

My other story is also a Romeo and Juliet tale, or at least it started as one. It comes from an American case, *White v. State*.<sup>19</sup> The record is sparse but we know that the romance between Ora H. White and his beloved, Marie, culminated in a lawful marriage. Thereafter, Ora and Marie lived together in a small town in southern Ohio until one day, for reasons undisclosed, Ora deserted Marie, and Marie sought the help of the local prosecutor. Now, let me imagine some facts that would be fully consistent with the decision in the case. Imagine that the interview between Marie and the prosecutor went like this:

Marie: I want you to put Ora behind bars for deserting me.

Prosecutor: Sorry, Marie, can't do that. Ora's a son-of-a-bitch all right, but it ain't no crime for a guy to leave his wife.

Marie: Oh, but don't it matter if I'm pregnant?

Prosecutor: Sure it does. If a guy leaves his pregnant wife with intent to abandon her, like the statute says, that's a crime. So how long you been pregnant?

Marie: I found out about it a month after he left me. It was a big surprise to me and it will be to him too when he finds out, 'cause we tried real hard not to get me pregnant. Does that matter?

Prosecutor: Well, let's find out.

It turned out that it didn't matter. Ora was convicted, and his conviction was affirmed by the Ohio Court of Appeals.<sup>20</sup> The court granted that this was not a public welfare offense where strict liability may be imposed. Rather, guilty knowledge was required, even though the statute didn't say so, because “[g]uilty knowledge is an essential ingredient of crime.”<sup>21</sup> Where was the guilty knowledge here, then? What Ora had knowledge of was that he was deserting his wife, and that was not a crime. To be sure, the court replied, but “a husband abandoning his wife is guilty of wrongdoing. It is a violation of his civil duty”<sup>22</sup> and that's guilty knowledge enough.

These two cases illustrate what has come to be called “the lesser-wrong” approach to mistake-of-fact defenses, which I offer as my second instance of moral

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18. *Regina v. Prince*, 2 L.R.-Cr. Cas. Res. 154 (1875).

19. *White v. State*, 185 N.E. 64 (Ohio Ct. App. 1933).

20. *Id.* at 65.

21. *Id.* (quoting *State v. Cameron*, 109 N.E. 584, 587 (Ohio 1914)).

22. *Id.*

excess. This is the doctrine that says, never mind that on the defendant's reasonable view of the facts he was guilty of no crime. So long as what he knew he was doing was immoral, that is enough to make him guilty of the crime. Now, this view has hardly gone unchallenged. Academic critics over the years have subjected it to a terrible pasting, with the *Prince* case in the role of leading villain.<sup>23</sup> Why? Well, consider what it rests on. In the language of Peter Brett, an early and rare academic defender of *Prince*, "we learn our duties, not by studying the statute book, but by living in a community[;]"<sup>24</sup> a legal defense requires the defendant to be able to say that he has observed the community ethic, "and this Prince could not do."<sup>25</sup> But making criminality turn on the community ethic is a wickedly subjective call to give to juries and judges. In our society, there's more than one community and more than one community norm; even when norms are thought to be broadly accepted there is uncertainty over their relative weight and whether they are mainly preached or also practiced. For example, in what circles and at what point does a female of eighteen become, as Lord Bramwell thought, "a female of such tender years that she is properly called a girl,"<sup>26</sup> rather than a young woman of eighteen? But even putting those considerations aside, the fact remains that Henry's fault was in running off with an eighteen-year old person of the opposite sex (as he reasonably took her to be), and however immoral this was thought to be, even the Victorian Parliament never made it a crime. Even if the court (and Peter Brett) were primarily moved by what they surmised Henry and Annie were doing together in Oxford, there's little more justification in the decision, for having sex with an eighteen-year old woman was not a crime however much it might have been frowned upon in some segments of Victorian society. And of course, much the same is true of Ora White. Abandoning one's wife is a wrongful act for all kinds of reasons, but it was not a crime under the statute unless the wife is pregnant, and this Ora had no reason to expect. So the fault for which he was convicted was the moral wrong of leaving his wife, or in the court's words, "a violation of his civil duty."<sup>27</sup>

I said before that academic judgment has been strongly against this lesser-wrong doctrine. But in recent years, several distinguished academic critics have broken

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23. *E.g.*, GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 69, at 189-90 (2d ed. 1961); GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 9.3, at 727 (1978); Graham Hughes, *Criminal Responsibility*, 16 STAN. L. REV. 470, 480-81 (1964).

24. PETER BRETT, AN INQUIRY INTO CRIMINAL GUILT 149 (1963).

25. *Id.*

26. *Prince*, 2 L.R.-Cr. Cas. Res. at 175.

27. *White*, 185 N.E. at 65.

ranks. The first is my colleague Professor Meir Dan-Cohen.<sup>28</sup> He uses *Prince* as an example of his arresting and influential theory of how sometimes a criminal statute may be taken as speaking to two audiences—the general public and legal officials. The explicit language of the statute is the decision rule directed to the judge: in *Prince*, the girl must be under sixteen and because she was, the judges were right to convict. Can Henry complain that he was convicted without the mens rea the court said was required? No, because the statute embodied as a conduct rule addressed to the public the moral norm against abducting girls. It said, as Lord Bramwell put it: do not take “a female of such tender years that she is properly called a girl”<sup>29</sup> from her parents without permission. Since Henry knew Annie was a “girl” according to the conventions of the day, he had the mens rea the statute required.

Professor Dan-Cohen is persuasive that Lord Bramwell’s opinion can be seen as an instantiation of this theory, and I have little doubt that the Parliament which enacted the statute would have accepted it if it had thought about it. But I have two reservations. First, it is not a defense of the lesser-wrong theory across the board; it does not seem to help justify Ora White’s conviction, for example. If “Don’t leave your pregnant wife” was code for “Don’t leave your wife, period,” then it would indeed be a wondrous code, even perhaps an unbreakable one. The concern of the statute is with pregnant women and their needs. Far from being an arbitrary marker, like age in *Prince*, pregnancy here is an essential element in the norm enacted by the statute—don’t abandon your *pregnant* wife. Second, the cloud of uncertainty facing Henry as to his criminal peril would have been dense enough had the statute explicitly prohibited running off with any female who could be called a girl. But the clouds become even denser where that conduct rule must be divined from a statute that explicitly prohibits only going off with girls under the age of sixteen. There is much too much guesswork invited here—for the prosecutor, the judge, the jury, and certainly for Henry—to satisfy rule-of-law values.

The other defense of *Prince* I have still greater trouble with, since it constitutes an overall defense of the lesser-wrong doctrine. It has been made by Professor Yaeger and Professor Kahan, but I will use the latter as an example.<sup>30</sup> Professor Kahan criticizes the position which “insists that the law appraise a person’s culpability exclusively by the standard of conduct reflected in positive law and without recourse

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28. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 652 (1984).

29. *Prince*, 2 L.R.-Ct. Cas. Res. at 175.

30. Daniel Yaeger, *Kahan on Mistakes*, 96 MICH. L. REV. 2113, 2117-18 (1998); Dan M. Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 MICH. L. REV. 2123, 2125-26 (1998).

to extralegal moral understandings.”<sup>31</sup> He calls it “a variant of liberal positivism,”<sup>32</sup> a double-barreled put-down I am inclined to accept with equanimity. Like Peter Brett, he believes that community moral norms should be consulted in deciding when mistakes of fact should excuse,<sup>33</sup> but I find the position no more compelling now than when Peter Brett advanced it. The criminal law serves not only the interests of the state and the prevailing culture; it also serves to protect the individual by carefully circumscribing the power of judges and prosecutors so that beyond those bright-line boundaries the individual may act without fear of the state’s ultimate coercion. To authorize conviction where the defendant can be faulted only for violating a community norm as some judge or jury construes it is an instance of moral excess that is fraught with danger<sup>34</sup>. I call on Lord Devlin, surely no foe of morality in the law, for authority:

It is a doctrine firmly embedded in English law that power which is given for one purpose, whether to a minister or to a judge: must not be used for another purpose. That is abuse of power, and its prevention is essential to the existence of a free society. Under the law as it is now administered it would be an abuse of power to punish for immorality that is outside the law.<sup>35</sup>

#### *Excuses*

My third instance of moral excess is also from the criminal law. I don’t have a single story to introduce this subject; I have many, namely every criminal case involving a claim that the defendant should be fully excused (not simply punished less) because of low intelligence, or because he or she was emotionally distraught, or was badly brought up, or was abused, or was in the grip of some disabling syndrome. All of these claims rest, at bottom, on the proposition that the law would be morally deficient to the extent that it failed to afford a legal excuse where the circumstances

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31. Kahan, *supra* note 29, at 2125.

32. *Id.*

33. *Id.* at 2126.

34. Both Professors Kahan and Yaeger have extended their idea of “legal moralism” to mistakes of law as well, arguing that even otherwise reasonable mistakes of law should excuse only those whom the court decides were seeking to comply with social norms, and not to “Loopholers” or others of dubious motives. Dan Kahan, *Ignorance of Law Is An Excuse -- But Only For The Virtuous*, 96 Mich. L. Rev. 127 (1997); Daniel Yaeger, *Kahan on Mistakes*, 96 Mich. L. Rev. 21132 (1998). My criticism in the text applies to this manifestation of moral excess as well.

35. DEVLIN, *supra* note 3, at 129.

might possibly afford the basis for a moral excuse. But before I proceed to say why I regard these types of claims as cases of moral excess, I need to say a word about blame and the criminal law generally, lest I be misunderstood.

The requirement that defendants be in some sense morally blameworthy for their criminal actions is bedrock. The basic doctrines of criminal liability give expression to that requirement. Indeed, the substantive criminal law as a whole, at least its general part, constitutes a developed and institutionalized system for apportioning blame and responsibility. That is what the actus reus and mens rea requirements are all about, for example, as well as the doctrines of causation and complicity and, of course, excuse. I have myself long celebrated the place of moral blame in the criminal law and argued that efforts to eliminate it in favor of measures of therapy and social defense were gravely mistaken.<sup>36</sup> What I have to say about moral excess hereafter is not a withdrawal from that position, although it may plausibly be seen as a qualification of it.

So whence the moral excess in these claimed excuses? Is this more of the paradox of too much of a good thing? In a way. While the concept of moral excuse provides the ultimate mainspring of legal excuse, there is such a thing as pushing too far toward identifying the two. I see two main reasons for this. One is practical, having to do with human limitations and the competition among ends; the other more fundamental, having to do with the status of our concepts of moral responsibility.

First, the practical. The problem arises because the criminal law is not simply a system for keeping score of possible moral lapses. It has the job of contributing to civil order and the solidification of society through the administration of punishment to offenders. Are there no limits to the accommodations the law is morally required to make in order to assure that all possible moral excuses are also legal ones, whatever the cost to the administration of justice? I think there are.

For the system to work, we need a procedure to establish the factual basis for the defendant's guilt. Can mistakes be avoided? Surely not. We can minimize the risk of error, but we can never eliminate the possibility that an innocent person will be convicted. Our system requires the prosecution to prove guilt beyond a reasonable doubt. Is that enough? Is the system morally deficient in not requiring proof beyond any *conceivable* doubt, or in not requiring retrial whenever *any* new evidence is found? Surely not. The line has to be drawn somewhere if the system is to function, and proof beyond a reasonable doubt is not morally deficient because there are other lines which would further reduce the chances of error.<sup>37</sup>

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36. Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968).

37. Cf. RONALD DWORKIN, MATTER OF PRINCIPLE 72-103 (1985).

Similar considerations apply to formulating the substantive law. The criminal law, in contrast to social mores, has to be enforced. Therefore, laws need to be amenable to fair and uniform application in order to keep to a minimum the play of personality, preference and bias in the decision of prosecutors, judges and juries. Most would agree that these considerations would make unacceptable a general rule of law that all moral excuses are full defenses to crime. But the same considerations also stand against more particularized defenses that would exonerate solely because of the personal limitations of the defendant.

The law seeks to avoid these problems by requiring that the excusing condition or circumstance be assessed in terms of some objective standard—the mistake that a reasonable person might make, the threats a person of reasonable firmness could not resist, such provocation as would challenge the person of reasonable self-control. Of course, these problems are not always solved in this way. Sometimes the law fails to exhibit a proper concern for criminal fault, as we saw with the lesser-wrong doctrine, where conventional immorality suffices, and in cases of strict liability, where no fault at all is required. But these are exceptional and regrettable lapses and I have had my say on them here and elsewhere. Here, the question is whether the law fails in justice just as much when it employs an objective standard of criminal fault. The argument that it does is that some people are just incapable of meeting the standards that most of us meet. Some people, for whatever reason, are going to be too weak-willed to resist pressure, too lacking in self-control, too feckless, too simple, too excitable, and so on. These people can't do better, that's the way they are, they have no choice. Morally, therefore, they are not to blame. On this ground alone, critics find the law deficient and demand that it be demonstrated in each case whether this particular defendant could have known better, resisted better, or done better than he or she did. But I think that's as morally excessive as requiring guilt to be proven beyond any shadow of doubt. Except for cases of palpable "gross and verifiable" disabilities<sup>38</sup>—physical handicap, for example, or legal insanity—there's no way the law can reliably make these discriminations in individual capacity, and to attempt to do so across the board not only invites arbitrary and biased judgments, but risks exculpating only those from whom society has most to fear—the violent, the dangerous, the incorrigible.<sup>39</sup>

Is it tolerable in a just society for the law so to compromise the demands of personal blameworthiness in deference to these larger social ends? Well, people differ on this. A common approach is through the concept of rights, claims of the

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38. MODEL PENAL CODE §2.09 commentary at 374 (1985).

39. *See id.* §210.3 commentary at 71 (1980).

individual against the state that must prevail over social goals. Jeremy Bentham<sup>40</sup> believed that claims of right in this sense are nonsense. That's severe. I find the concept of rights attractive insofar as it serves as a moral limitation on oppressive incursions into individual liberties. What I can't accept is that rights must always trump, short, at least, of catastrophe. In my terms, that's another example of moral excess. I find appealing the view that a "practice can be right even though to some extent unjust, that we can sometimes be justified, all things considered, in treating some persons to some extent unjustly."<sup>41</sup> This represents a general moral intuition and a common ground for practical judgment. It is always debatable how much concession to personal injustice may be made in the interest of social justice and how greatly social justice is truly at stake. Therefore, I do not mean to say that the law now has it just right in the formulation of its defenses. That will always be in fair contest. I do mean to say only that the position that no compromise is tolerable is excessive, morally, all things considered, excessive, and not only practically excessive.

I have so far tried to defend legal punishment in some cases even when morality would excuse, relying on practical considerations and social goals. But in the kinds of cases I have been imagining—deficiencies of intellect, temperament, education, character—it would be conceding too much to say that the defendants are not morally, as well as legally, responsible. The reason has to do with the very grounds on which we make moral judgments of others, their status as persons and their freedom. First, as to personhood. In too zealously searching for causes of misconduct in order to displace responsibility, we risk undermining the very identity of those whose conduct is at issue.<sup>42</sup> It is not that I dispute the usefulness of searching for causes; I mean to press only the question of what they are useful for. They are of undeniable use for personal therapy or social policy. As the basis of judging responsibility, they are misused. Suppose something goes wrong with a machine, with this computer, for example, on which I am writing these words. You would want to find out what's causing the malfunction in order to repair it. You would never think of holding the computer responsible for its misbehavior; there's no "it" to hold responsible. But of course, that's just the question we do ask of persons, and only of persons, because only they are responsible. But what constitutes the person? A daunting question, but I may say this much, that one's particular

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40. See generally JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (F.C. Montague ed., Greenwood Press 1980) (1891); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Hafner Publishing 1948).

41. Joel Feinberg, *Justice, Fairness and Rationality*, 81 YALE L.J. 1004, 1005 (1972).

42. The argument is developed in Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV.L.REV. 959 (1992) and Tony Honore, *RESPONSIBILITY AND FAULT* (1999).

temperamental and moral equipment, one's character and one's conduct, go to make one's identity. To the extent that we deny a person responsibility for his misconduct because he is deficient in intelligence, or feeling for others, or because he grew up socially and morally deprived, to that extent we are failing to deal with him as the person he is<sup>43</sup>. Earlier, I stressed the practical unfeasibility of making these personal characteristics determinative of responsibility. Here I stress the undesirability of doing so, even if we could.

Second, as to the matter of freedom. The specter of determinism is always beside us, creating a limit to how far we dare delve into the personal incapacities of individuals before putting in jeopardy the very warrant for the practice of blaming. Does understanding everything serve to excuse everything, as the old maxim has it? Well, if it does then everything is in principle excusable and no one can ever be blamed. We should have become so scrupulous in determining when people are morally accountable that the very practice of moral accountability is put in doubt, like the mythical animal that consumes itself in its passion. That is bad news indeed, for if no one is morally guilty then no one is morally innocent either, and the individual has no defense of innocence at all against the uses the state chooses to make of the person for its purposes.

### *Moral*

That's the end of my stories. If you conclude they are just a few unrelated grumbles of an old man, I would dispute only that they are unrelated. That they are all instances of what I have called moral excess, I have already tried to show. But by contemplating each of them we can better see what accounts for the paradoxical notion of moral excess. What accounts for it is the equally paradoxical feature of our moral experience that sometimes it can be right to do the wrong thing, and sometimes it can be wrong to do the right thing. So, in my first instance of the role of the lawyer, at least if I am correct, it can be right, at least in the sense of morally defensible, for the lawyer to assist a client in doing what is morally undesirable for the client to do. And in my third instance of criminal excuses, it can be right for the law to do the wrong of drawing a line that leaves some who may be blameless subject to punishment. Finally, in my second instance of punishment based on the fault of transgressing conventional morality (the lesser-wrong doctrine) we see the complementary paradox; namely, that it can be wrong to do right, for although it is

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43. See Honore, *supra* note 41, at 142:

[People's] self-respect and sense of identity, limited though it may be, depends on their being held responsible for their conduct. To preserve their integrity we and they must refuse to treat what they do as merely the outcome of pressure exerted by others or the narrow range of options open to them.

right that conventional morality should be followed, it is wrong to punish for the fault of not doing so where the legislature has not made it criminal.

What's the explanation? As I see it, in each instance some larger, more inclusive, institutional morality is trumping a narrower, more immediate moral perspective. In the first, it is the value of the role of lawyer trumping what personal morality would require. In the second it is the rule-of-law values of a liberal state trumping the pursuit of conventional morality. In the third, it is both the demands of a functioning institution of punishing and the imperative of maintaining respect for the identity of persons.

That tends to be deflating. One wants to think of doing the right thing as a matter of direct and immediate apprehension. If something is right, act to foster it. If something is wrong, act against it. That's the direction of the emotional charge that motivates moral conduct. But it turns out that our morality is far more complex. In contexts involving public roles and institutions the tendency to act in the direction of that charge will sometimes defeat our moral aspirations. That I take to be the moral of the stories I have tried to tell.