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The Neuropsychology of Justifications and Excuses: Some Problematic Cases of Self-defense, Duress and Provocation

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In one defence, briefly, we accept responsibility and deny that it was bad; in the other, we admit that it was bad but don't accept full, or even any, responsibility.

By and large, justifications can be kept distinct from excuses, and I shall not be so anxious to talk about them because they have enjoyed more than their fair share of philosophical attention. But the two certainly can be confused, and can seem to go very near to each other, even if they do not perhaps actually do so. – J. L. Austin

I. Introduction

In his famous address to Britain's Aristotelian Society more than a half century ago, Professor John Austin provided dictum that has become a part of the conventional wisdom in the jurisprudence of our criminal law. His thesis simultaneously acknowledges the evident moral distinction between justifications and excuses, on the one hand, and the tendency, on the other, for the two doctrines to overlap and confound. From the perspectives of moral philosophy and jurisprudence, the distinction is clear. Justifications are socially approved (or, at least, not disapproved); excuses are not approved, but they obtain because the actor's conduct reflects a substantial (and therefore judicially acknowledged) cognitive or volitional deficit, whether internal or external to the agent. In this work, I examine the adverb Austin uses to condition his understanding that the ideas can come very near each other, “perhaps,” and argue that in some cases, they actually do bump into one another. The conceptual confusion may rest on our neurobiological processing in the face of morally challenging situations.

Why might that be so? Building in part on work done by Professors Antonio Damasio, Joshua Greene, Robert Frank, and Claire Finkelstein, I will suggest that the confusion in the marginal cases is the natural outcome of the justification/excuse distinction in these circumstances because the distinction is not always supported by how our brains process threatening information in these borderline cases – that is, there is an appreciable disconnect between our intuitions and the way our brains actually operate, and we should simply cognizance of it. In these cases, two different areas of the brain – one largely concerned with cognition, the other largely with emotion – are operating almost simultaneously to resolve certain moral/legal dilemmas. In just those cases, the distinction breaks down.

Part I sets out the conventional distinction between justifications and excuses, where the former leads to a legal verdict of no offense committed because the defendant was at least permitted to do what he did. In contrast, the latter leads to a not guilty “but” verdict: what the defendant did was wrong but for reasons roughly related to involuntariness, broadly understood, the defendant's conduct lacks blameworthiness. These distinction are both necessary and useful
in everyday criminal law and moral theory, and they are far too useful in general to be discarded. But they cannot alone or together account for boundary problems. Part II sets out the three most prominent borderline cases: self-defense, duress, and the defense of spousal infidelity provocation (a species of diminished capacity), and then briefly rehearses the pervasive, unending jurisprudential controversies surrounding them. Part III examines and illustrates the brain areas – the dorsolateral surface of the prefrontal cortex “DLPFC” and the amygdala and associated areas – in which decision-making that precedes the harmful conduct to which the different types of moral dilemmas give rise: those roughly labeled “personal” and those roughly labeled “impersonal.”

Part IV revisits these dilemmas, the conduct they engender, and the neuroanatomy they trigger in areas of the brain that tend to reflect emotional or cognitive processing. It examines these boundary cases of justification or excuse and points out that the neuroanatomy implicated in our responses seems to track both anatomical areas. I also note that all three defenses enhance fitness. In the end, I suggest that we opt for a hybrid defense that dispenses with the jurisprudential confusion that now exists. My aims are modest.

I. Justifications and Excuses: The Conventional Approaches

In general, the situation is one where someone is accused of having done something, or . . . where someone is said to have done something which is bad, wrong, inept, unwelcome, or in some other of the numerous possible ways untoward. Thereupon he . . . will try to defend his conduct or to get him out of it.

One way of going about this is to admit flatly that he, X, did do that very thing, A, but to argue that it was a good thing, or the right or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion. To take this line is to justify the action, to give reason for doing it: not to say, to brazen it out, to glory in it, or the like.

A different way of going about it [an excuse plea] is to admit that it wasn't a good thing to have done, but to argue that it is not quite fair or correct to say baldly "X did A."

We may say it isn't fair just to say X did it; perhaps he was under somebody's influence, or was nudged. Or, it isn't fair to say baldly he did A; it may have been partly accidental, or an unintentional slip. Or, it isn't fair to say he did simply A – he was really doing something quite different and A was only incidental, or he was looking at the whole thing quite differently. Naturally these arguments can be combined or overlap or run into each other.1

Austin's basic approach to the distinction between justifications and excuses remains a part of our jurisprudence today. As one who teaches criminal law, I have borrowed from many others in my attempt to bring the point home to my students. I have asserted, for example, that justified conduct is not wrong in the particular circumstances. This conduct “may be exemplary and socially encouraged, but typically is permissible and socially tolerated,” whereas excused
conduct is legally wrongful but some characteristic of the defendant makes punishment (or full punishment) inappropriate. With Professor Kadish I have told my students that a justification – “I did nothing wrong even though I violated a prohibition” – implies that the circumstances make my action tolerable. Moreover, I have noted that justifications require an advertent balance: Model Penal Code §3.02 (1) (a) states the following: “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.” In contrast, excuses are necessary when my conduct was somehow involuntary – for example, the result of external physical compulsion or involuntary reflex actions or some disability that prevents me from being (fully) blameworthy. As Gary Watson points out, “the concept of responsibility results from the principle that one is not responsible for one's conduct if that conduct is necessitated by causes for which one is not responsible.” Thus we have excuses.

And I have taught the distinction as one that implicates perspective in two ways, first, where justifications hold that particular generalizable circumstances external to the actor that he perceives may warrant actions that would otherwise be wrongful, and excuses look to the internal mental functioning of the individual actor. Thus the justification asks whether, given the circumstances the actor (or any similarly situated actor) faces, the world is or is not better off because of the actor’s conduct (self-defense, for example), whereas the latter traditionally asks whether this particular actor, given this disability, is culpable (duress, for example). Finally, I have borrowed from Professor Hart, describing utilitarian justifications as “forward-looking” and excuses as mostly denunciatory theories and “backward-looking.” None of these approaches is wrong, and none misstates the cases, but none holds up very well in borderline cases.

II. Borderline Cases: Self-Defense, Duress, and Provocation

A. Self-defense – The facts of the Goetz case are well known. Approached by four young, tough black men in a subway car and asked by one for $5, Goetz, believing they were going to “play” with him but convinced that they did not have a gun, pulled out an unregistered handgun and, firing in a pattern, squeezed off four shots, hitting three of them. Confident that one of the young men had not been hit, Goetz walked up to the man, Darryl Cabey, and fired at him. Of Cabey's shooting, Goetz told the police,

~I said ~[y]ou seem to be all right, here's another~ ~, and he then fired the shot which severed Cabey's spinal cord. Goetz added that ~if I was a little more under self-control * * * I would have put the barrel against his forehead and fired.~ He also admitted that ~if I had had more [bullets], I would have shot them again, and again, and again.~

Goetz acknowledged that on two previous occasions he had warded off attack merely by brandishing the weapon. Goetz self-defense plea which, under New York law required the jury to find that his actions were “reasonable,” was successful.
Inasmuch as no one threatened Goetz with physical harm, and in light of his stated belief that the young men were not seriously armed – they had screw drivers to break into coin boxes on video machines, the jury's verdict is nearly incomprehensible. As one criminal law scholar noted, "[t]he jurors had so little faith in the criminal justice system, both to protect us and to bring the guilty to justice, that they were willing to tolerate a degree of vigilante behavior that I think rationally cannot be justified." New York courts, like courts everywhere, have repeatedly held, moreover, that the force permitted to be used under its justification defense must be related to the degree of force reasonably believed necessary to repel the threat. With Cabey, in particular, not only was there no force used, he was sitting on a bench at the end of the car trying to be invisible. So what was going on in the Goetz case?

Self-defense is almost uniformly described as a justification. Although there are some splits of authority among courts on the elements of the defense, the basic contours of the defense are fairly clear and begin with "necessity."

"[t]he law of self-defense is a law of necessity;" the right of self-defense arises only when the necessity begins, and equally ends with the necessity; and never must the necessity be greater than when the force employed defensively is deadly. The "necessity must bear all semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable as excusable."

Traditionally, the plea of self-defense applied when the victim of an attack or potential attack reasonably believes that he is in immediate or imminent danger of an unlawful bodily attack and uses such forces as is necessary to avert the harm. When the use of force is deadly, it is necessary that the force to be averted is deadly as well. Typically, an aggressor forfeits his right to self-defense. Again, given these principles, the Goetz jury seems to have been erroneous.

Perhaps the mistake, however, is not so much in the jury's application of the law, which was clear error, as it is our conception of the defense itself. Although I carry no brief for Mr. Goetz, as Fletcher points out, in a case like Goetz, where the defense of self is preemptive, "the defender calculates that the enemy is planning an attack or surely is likely to attack in the future." This notion of calculation is characteristic of justificatory defenses generally. As Westin and Mangiafico note, "[a]n actor has a defense of justification if, though he engages in conduct that the state ordinarily wishes to deter . . . he does so in the context of a choice of evils . . . such that the state ceases to wish to deter the conduct under the circumstances." Thus Goetz was required to undertake a counterfactual analysis, asking himself what will happen if, in light of a perceived threat, he does nothing. But there is, in fact, a prior issue to resolve, namely, whether any preemptive reaction based on fear of future harm is warranted. The resolution of this counterfactual is unavoidable in this circumstance. What part of the brain is activated that gives rise to the counterfactual itself?

Although there is near unanimity today in describing self-defense as a justification, as noted, it was not always so viewed. In his Metaphysics of Morals, Kant famously characterized
necessity — two shipwrecked sailors fighting for space where only one could be accommodated — as an excuse. Fletcher points out that under these circumstances the excuse expresses "compassion. The assumption is that there are situations in life in which people have no choice but to engage in harmful and unjust actions." Throughout much of early English common law self-defense was viewed the same way — as a personal excuse that saved the victim/defendant from the gallows. It is important to note that in this situation, the actor is fully in control and could be held accountable; thus, an excuse seems inapplicable; the actor cannot claim that his conduct is justified because the cost-benefit calculation does not work; it is not at all clear that social welfare is, on the whole, better off for his conduct; and, finally, the actor's motives are personal to him. What one is faced with is a situation in which the general distinction between justifications and excuses fails because our intuitions are, in part, at odds with how we in fact process information and react under circumstances of threat, a point we return to shortly.

B. Duress — Like self-defense, the defense of duress is "adaptive," in that both defenses "enhance[] the welfare of the agent who cultivates it and makes possible collective welfare improvements." The actor is pursuing his own welfare and we approve of that move. Also like the self-defense context, the actor faces both a calculated decision and an emotionally harrowing threat. The central jurisprudential question is the warrant for the defense: Is the duress defense a justification based on choosing the lesser of evils, its traditional anchor in the common law, or, more modernly, is it an excuse premised on the disabling effect of the threat on the actor's capacity to control his conduct?

Dr. Joe Toscano, a chiropractor who was also a gambler, was first approached by William Leonardo, the brother of a patient, Richard Leonardo. Over a period of two days Leonardo called Toscano three times, each time threatening him and his wife if he refused to participate in an insurance fraud scheme premised on faking automobile accidents and submitting fraudulent medical care claims. (Toscano owed Leonardo's brother Richard some money from gambling debts.) The Court described the third and final call.

~You're going to make this bill out for me.~ Then he [William Leonardo] said:
~Remember, you just moved into a place that has a very dark entrance and you leave there with your wife. . . . You and your wife are going to jump at shadows when you leave that dark entrance.~ Leonardo sounded ~vicious~ and ~desperate~ and defendant felt that he ~just had to do it~ to protect himself and his wife. He thought about calling the police, but failed to do so in the hope that ~it would go away and wouldn't bother me any more.~

Toscano did not call the police, hoping, he said, that if he signed the fraudulent medical claim form, Leonardo would disappear and his and his wife's safety would be insured. With that, he signed the phoney document and delivered it to a Leonardo colleague. Toscano received no compensation from either William or his brother Richard, who might have reduced the size of Toscano's gambling obligation. He soon left his home for another, changed his phone number, and suffered poor quality in his work. He never heard from Leonardo again.
At his trial for insurance fraud, Toscano pleaded duress but the trial court told the jury that the evidence presented was insufficient as a matter of law because, consistent with the traditional common law formulation of duress, the threat had to be “imminent, present and pending,” and Toscano’s evidence failed that standard; he failed to satisfy the “imminence” requirement because he could have called the police. The intermediate court of appeals affirmed. The New Jersey Supreme Court reversed, adopting the Model Penal Code formulation and holding that the jury was entitled to determine “whether a ‘person of reasonable firmness in his situation’ would have failed to seek police assistance or refused to cooperate, or whether such a person would have been, unlike defendant, able to resist.”

Although there are troubling aspects of the Toscano decision even under the Model Penal Code approach, not least that suggestion that Toscano arguably put himself in the position to be threatened, it reflects the modern view that both dispenses with the “imminence” requirement and also replaces the traditional requirement that the threatened force be one of death or great bodily harm with the more forgiving phrase “unlawful force.” But is the defense a statement about the overcoming of the actor’s will, that is, an excuse, or is it a lesser of evils situation, a justification?

The removal of the “imminence” requirement in modern iterations of the defense – reducing it to an evidentiary consideration – tends to undermine the claim of excuse: no longer must the will be “overcome” by the immediate and pending harm. At the same time, the limitation of the availability of duress – the actor is almost never permitted to plead the defense if he has been required to murder someone to avoid the threat – suggests that (a) the common law has itself balanced evils and (b) the actor better do so himself. As many have pointed out, if duress is viewed as an excuse – external forces caused the actor to lose control of decision-making – it is a strange kind of excuse. The actor, in every case, is making a clear choice: Do this or else! The individual who literally lacks decision-making ability cannot take advantage of the defense; he cannot make the appropriate decision. Thus it cannot be a cognitive deficit that permits the defense. Nor can it properly be viewed as a volitional defense; the defendant’s actions are intentional and desirable, considering the alternatives. Moreover, because the choice made is always counterfactual, the defendant always “could have done otherwise.”

C. Provocation – Perhaps the clearest cases in which the traditional approaches fail to provide a complete explanation arise in the context of spousal/infidelity provocation, which often starts with a history of marital discord. A successful provocation defense reduces a charge of first degree murder to voluntary manslaughter. In State v. Thornton, for example, the defendant, a second year law student (who presumably had studied criminal law) and his wife had been married just under four years. They had a three-year-old son in the home in an upstairs bedroom at the time of the events at issue. He and his wife had been separated for about six weeks, but no divorce action had been filed and James Thornton had been making a serious effort toward reconciliation with his wife. Reconciliation, however, appeared unlikely.

On May 3, 1983, Thornton returned to the marital home and found an unfamiliar car in
the driveway. He then got out of his car and watched his wife and her new boyfriend, McConkey, eating dinner before moving on to sexual relations. According to the court, Thornton decided to return to his apartment to get his camera, but before doing so he let the air out of one of the tires on McConkey's car. Thereafter, he went to his apartment and got his camera and a pistol before returning to the residence. He arrived at about 9:30 p.m. and planned to take pictures for the purpose of showing them to the marriage counselor on the next day and possibly also for use as evidence if divorce proceedings followed. Thornton then spent more than an hour in the backyard of his home, doubtless revving himself up for something, and observing his wife and McConkey in the den and kitchen and then into the guest bedroom downstairs. Thornton listened near the window and, hearing unmistakable sounds of sexual intercourse, burst through the front door and into the bedroom where he found the nude couple and attempted to take some pictures. At that point he testified that he thought McConkey was attempting to attack him, so he drew his pistol and fired a single shot, striking McConkey in the left hip. The victim died sixteen days later as a result of a massive infection resulting from the bullet wound. Before the night in question Thornton had never met McConkey or had any previous contact with him. Thornton was convicted of first degree murder; the judgment was affirmed by the court of appeals.

The Tennessee Supreme Court reached the decision that these facts could not support more than a voluntary manslaughter conviction even before it presented the details of the case. The court held that

it has long been a well-settled legal principle that the commission of unlawful sexual intercourse with a female relative is an act *obviously calculated to arouse ungovernable passion*, and that the killing of the seducer or adulterer under the influence or in the heat of that passion constitutes voluntary manslaughter, and not murder, in the absence of evidence of actual malice.

Why might this husband, now separated and advised that the couple was not likely to reconcile, find his passions ungovernable? There are two obvious choices (putting to one side the moral sensibility of the first). One claim the defendant can make is to declare that McConkey deserved to be shot because he was messing around with his woman. Full stop. In the other, he will again concede that he shot the SOB, consistent with the Tennessee Supreme Court's language, for messing around with his woman and *because of that* he simply went berserk. Note the difference between the two pleas; they track the distinction between a justification and an excuse. In the first instance – "messing with his woman" – the defendant is claiming that the behavior was *justified* based on the aggressor's conduct; he had intruded into his relationship with his wife (and threatened his fitness). In the second – "I just went berserk" – the defendant is confessing a loss of self-control and asking for some measure of excuse. Thornton claimed that "he simply lost control and 'exploded' when he found his wife in bed." In either case, we have entered into the marshy terrain that distinguishes justifications from excuses.

Although there are a number of ways to articulate the test for provocation, at common law there were four elements, each of which requires a certain kind of psychological reaction:
There must have been adequate provocation (from someone's perspective);

(2) The killing must have been in the heat of passion;

(3) It must have been a sudden heat of passion – that is, the killing must have followed the provocation before there was a reasonable opportunity for the passions to cool; and

(4) There must have been a causal connection between the provocation, the passion, and the fatal act.48

Traditionally, “mere words” are not sufficient to trigger the defense; the actor must have actually witnessed his spouse in the act.49 Other jurisdictions follow the Model Penal Code and apply the test of Extreme Mental or Emotional Disturbance (“EMED”),50 a stubbornly muddled broadening of the common law provocation defense that seems seldom to be successful.51 What constitutes adequate provocation (1) is also subject to several articulations, but each states something to the effect that the provocation must be such as “might naturally cause a reasonable person in the passion of the moment to lose self control and act on impulse and without reflection.”52 On this telling, the defense should be deemed a partial excuse – a diminution in cognitive and volitional capacity. Others argue, however, that these conditions evoke a partial justification: the individual is “to some extent morally justified in a punitive response.”53

There seem to be conflicting intuitions involved in these statements. The court in Girouard v. State, a “mere words” case in which a severely taunted man stabbed and killed his wife after a brief and stormy marriage, refused to extend its tightly controlled provocation defense, stating that it could not “in good conscience countenance holding that a verbal domestic argument” could extend the traditional categories.54 In contrast, the court in People v. Berry, reviewing a murder conviction involving a 20 year old woman married to a 46 year old man who tormented him sexually for nearly two weeks, and told him that she was in love with and had slept with another man, stated that any “(v)iolent, intense, high-wrought or enthusiastic emotion” may serve as the source of provocation.55

Those courts which, like Girouard, predict that expanding the defense to cover more contexts than the common law recognized risk uncovering a deeper, more fundamental conflict, 56 recognizing that our capacity for impulse control does not in fact operate in a dualist, binary fashion, where defendants either do or do not possess minimum adequate capacity to choose and control.57 In fact, our capacities distribute themselves normally.58 The court in Maher v. People, a mostly words case,59 seemed to recognize this fact implicitly when it defended an expansion of the defense, “out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted.” It leaves to the jury's determination the “extent the passions must be aroused and reason obscured to render the homicide manslaughter.”60

There is, in fact, a second conflict of intuitions here, one that pervades this subject. The
Girouard court was unconvinced that a reasonable man, faced with his wife's taunts, would not strike out in “hot-blooded blind passion to kill her.”61 This language suggests that the court was taking a excuse-based, character approach to provocation: because a defendant is blinded by his emotions, he might be unable fully to control his behavior. One, then, is entitled to an excuse
only if the conduct does not reflect badly on the person's character, otherwise the defendant would be responsible for and in control of his own behavior.\textsuperscript{62} On the other hand, the courts in \textit{Maher} and \textit{People v. Berry},\textsuperscript{63} and the drafters of the Model Penal Code have expanded the defense on the theory that some diminished capacity, short of insanity, occurs in any number of
contexts, and perhaps recognizing that specific deterrence may not be useful in these situations. We thus have a conflicting intuitions that trace the distinction between justifications and excuses, and between utilitarian and retributive explanations for the defense. This conflict of intuitions raises questions about the appropriate punishment.
If [provocation is] based on a theory of justification, provocation merits a reduced sentence both for retributivists (because less punishment is deserved) and for utilitarians (because less punishment is needed). If based on a theory of excuse, however, retributivists would claim provocation merits a reduced sentence (again, because less punishment is deserved), while utilitarians would claim it merits an
increased sentence (because more punishment is needed to effect deterrence and rehabilitation, or to ensure incapacitation).  

And so we are left with unanswered questions, including why a “reasonable person” would kill
under these circumstances.

III. What Happens Inside – Processing Moral Dilemmas

In each of the three contexts – self-defense, duress, and provocation – the actor has a
choice to make and the choice is a hard one. In each case his choice is intentional and follows some sort of cost-benefit analysis, if only a primitive one. And in two of the three cases – self-defense and duress – the actor believes he is facing a threat of physical harm. In the case of provocation, the harm suffered is one of humiliation and lost fitness. In all three cases, two centers in the brain are almost simultaneously triggered: one that processes strong emotional
dilemmas, first, and one that processes consequences shortly thereafter. Finally, in all three cases the actor who responds is attempting to enhance his fitness.

Neuroscientists have known for some time that cognitive processing tends to be associated with the dorsolateral surface of the DLPFC, while the emotions tend to be associated
with the aygdala and medial surfaces of the frontal and parietal lobes. The images below should help orient
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the reader to these areas. First, the dorsolateral surface of the PFC, and second the amygdala.
This is not to say that these areas *alone* facilitate the operation of cognitive and emotional capacities. Such an understanding of brain functioning is inappropriately simplistic and just wrong. In fact, there are neural circuitries that connect brain structures along several neural
pathways. \textsuperscript{68}

Still the importance of these two processing domains cannot be overstated. The DLPFC, for example, permits individuals to form intentions, the basis of “higher consciousness, for
judgment, for imagination, for empathy, for identity, for 'soul.' As Laurence Tancredi points out: “Virtually every functional part of the brain is directly interconnected to this cortex, which plays a fundamental role in internally guided behavior;” that is to say, the cerebral cortex initiates “actions influenced by intentions, decisions, and plans that originate in the individual's
The DLPFC is also connected to centers of motor control and, along with the brain stem, is activated in the “fight or flight” response to fear. 71

Those connections lead to the amygdala, among other areas of the primitive brain. As
Joseph LeDoux points out in his seminal study, “emotional responses can occur without the involvement of the higher [DLPFC] processing systems of the brain.” LeDoux’s notes that conditioning fear involves a two processes – one through the cortex, which is a relatively lengthy process that ultimately produces a “conscious experience of fear;” and the second, which,
bypassing the cortex, produces a quick avoidance reaction focusing on the amygdala.\textsuperscript{73} This second pathway runs from the thalamus directly to the amygdala,\textsuperscript{74} which is located in the oldest, most primitive part of the brain and has changed little over the vast expanse of evolution. \textsuperscript{75} “The amygdala . . . is a neuronal crossroads, perfectly positioned for the meeting of
previously unassociated inputs converging from different brain regions."\textsuperscript{76} We shall return to this point when we examine Damasio’s “somatic marker hypothesis.”

There are, to be sure, other areas of the brain involved in reacting to threatening signals.
The anterior cingulate cortex (ACC) is “implicated in emotional self-control, conflict resolution, and error recognition;” the ACC also deals with uncertainty in conflict and cognitive control. The hypothalamus, like the amygdala a part of the oldest of limbic structures, is involved in aggression control among other things. Still, the larger point is that two areas of the brain –
the DLPFC and the amygdala and associated substrates tend to be more activated than normal. 79

Support for this conclusion also comes from several places, and not least in the form of some ingenious functional imaging experiments by Joshua Greene and his collaborators, 80 who
have examined the neuroanatomical reactions of individuals to the “Trolley Problem” – first introduced as a thought experiment by Phillipa Foote and elaborated by Judith Jarvis Thomson – and variations thereon. The problem is quite simple: You are conducting a high speed train
The Trolley Problem
when you realize suddenly that the train is on a collision course with five workers on the track; they are working with jack-hammers and other noisy tools and are unmindful of any potential warnings. You realize at the last moment that you can switch the train to another track, but one worker is working on the second track, also oblivious to warnings. If you do nothing, five
workers will be killed; if you switch to track 2, one worker will be killed. What should you do, faced with this dilemma? The vast majority of subjects who respond to the scenario make a quick and relatively easy utility calculation and throw the switch.82
Change the facts slightly, however, and the same calculation is not so simple, although the math is identical. Now suppose the same fast moving train, the same noisy jack-hammers and other noisy distractions inducing the same unmindfulness, but this time there is no side track. Rather,
The Footbridge Problem

there is a rather heavy man standing next to you on a footbridge under which the train will pass before it strikes the five workers. You can throw the man off the bridge into the path of the train, which will stop it and save the five workers. What should you do? Now most people say "
No, I won't do it,“83 and they take a longer time to reach this conclusion than they did in the Trolley version.84 Most importantly, decision-making in these two dilemmas under fMRI visualization shows that different areas of the brain are primarily involved in reaching these solutions, and that the areas evolved at different points in evolutionary time, the affective
emerging before the cognitive. 85

Greene and his colleagues initially labeled the traditional trolley problem an example of an *impersonal moral dilemma* – impersonal because no contact is made with the individual
whose life is sacrificed. Although an immediate reaction is required in both cases, in the footbridge problem, a "personal" dilemma, the reaction is driven more by cognitive brain processes than quick, prepotent affective (emotional) processes, and in the footbridge problem the decision-maker actually makes contact with the victim. These labels are less important in the
present context and the extent to which these labels matter, is unclear, as we shall see momentarily. Suffice it to say that the sub-cortical locations of the mechanisms that the reactions to the footbridge scenario trigger are ones that tend, in general, to respond more cognitively *in the aggregate*. As Greene and his colleagues point out, it would be surprising
if, over time, we had not evolved different processes for different types of moral dilemmas that trigger all our fears at once. Domain-specific processing is the rule rather than the exception in our neuroanatomy, although it is not fixed. The thesis of Greene and his collaborators goes further still. “It has become clear that natural selection can favor altruistic instincts under the
right conditions, and many believe that this is how human altruism came to be. If this is right, then our altruistic instincts will reflect the environment in which they evolved rather than our present environment."90
Greene has recently summarized his general theory.\textsuperscript{91}

(1) Intuitive responses play an important role in moral judgment.
(2) More specifically, intuitive responses drive people to give nonutilitarian responses to moral dilemmas that have been previously been categorized as “personal.”

(3) This includes the *footbridge* case.
(4) These intuitive responses are *emotional* (i.e., constituted or driven by emotion).

(5) Cases like the *footbridge case* elicit negative emotional responses because they involve a kind of harm that is *in some sense* more personal than other kinds of harm.
(6) We respond emotionally to these “personal” harms because such harms, unlike others, were prominent during the course of human evolution.

The most important feature for present purposes is that brain processing occurs more
frequently depending upon the nature of the dilemma; that is to say, processing occurs in two areas of the brain generally associated with emotion (trolley) and cognition (footbridge). Further support for this idea comes from studies of patients with brain injuries. For example, patients with bilateral damage to their amygdalas (that is, damage to both the left and right amygdala)
express one form of emotional lopsidedness: negative emotions such as anger and fear are less frequent and less intense than positive emotions. 93 Similarly, patients with certain severe frontal lobe insults have sufficient instrumental reasoning capacity to work through a problem and generate appropriate options, but they cannot make a choice: balancing and prioritizing are
skills they lack. That they cannot appropriately choose strongly suggests that the DLPFC is a fundamental locus for certain kinds of decision-making.94

Damasio's "somatic marker hypothesis" provides still more support for this processing
distinction based on everyday experiences. Reasoning and deciding, according to standard accounts of instrumental reasoning, presuppose choice; and choice seems to require mentation: we need some strategy for making valid inferences within the transitional procedures that lead to action: choosing the best option. According to the standard legal canon, there is
little room in this process for emotion and feeling.\textsuperscript{96} Substantial research data suggest that this view is vestigial. Damasio's work provides several examples of seemingly reasoned behavior.\textsuperscript{97} Example 1: Joe feels hungry (desire); he walks into the kitchen and opens the refrigerator to find some food (belief); he takes out some left-over lasagna, heats
Example 2: Joe is playing golf, standing in a fairway waiting to hit his next shot when he hears a shout from the tee, “FORE.” His eyes open wide as his body reacts instantly, his arms cover his head, and he immediately turns to look at the
Example 3(a): Joe falls in love with Amy. They date for a year. Joe wants to marry Amy (desire). Joe considers marriage in the context of his age, his family, his career, and decides he can pursue his career, satisfy his family, and marry.
Example 3(b): Joe wants to build his own computer (desire). Joe reads several magazines and articles about computer design and construction and available kits to construct same and decides to purchase a kit (belief). Joe purchases the kit.
through the Internet (action).

Do all of these examples – or are any of them – exhibit standard reasoning processes? Or do they result from biological mechanisms that produce a selected response? Or do both operate as an indefeasible whole?
Example 1 satisfies the conditions of a simple practical syllogism. Like a lioness in the wild, however, Joe's action begins with an unreasoning causal mechanism. Joe's blood sugar is low and the neuronal groupings in his hypothalamus, always on duty, signal Joe to eat. Although the choice of what to eat is apparently his and often he can make it free from immediate needs,
assuming his larder is not empty, eating was not a choice. Example 2, the golf outing, requires instantaneous, unthinking action: Joe can duck or he can move or he can do neither; those are all the options. “The requisite knowledge, . . .once conscious” (when he learns the meaning of the cry “Fore”) underscores that Joe's strategy for responding permits no time for deep reflection. “
The ‘strategy’ for response selection now consists predominately of activating the strong link between stimulus and response . . . *automatically* and without effort or deliberation." In neither example is deliberation – the sober evaluation of costs and benefits – an option. In this scenario, it only seems as if Joe is different than the hungry lioness.
In contrast, examples 3(a) and (b) look like prototypical circumstances requiring “rational” choice; that is, they appear to illustrate fully both the need for and the ability in most of us to hold “a great many facts in [our] mind, tallying results of hypothetical actions, and matching them against intermediate and ultimate goals.” In both cases, the decision-making stimuli
arrive in numerous parts, and a decision on any of those parts has polycentric consequences, thus causing Joe to make a selection among diverse potential outcomes, each effected by a decision made with respect to any one of the parts. “Complexity and certainty loom so large that reliable predictions are not easy to come by.” 101 Although this description is more or less accurate,
what is interesting is that despite the obvious differences between the examples of hunger and ducking to avoid imminent danger, on the one hand, and examples 3(a) and (b), on the other, mentally and neurobiologically the decisions share the same information processing systems. Moreover, deciding whom to marry and which of many computer kits to purchase for home construction are also vastly different decisions: the first, unlike the second, implicates a deeply
personal and emotional sphere not unrelated to achieving some advantage in biological survival and the creation of a genetic legacy; in short, example 3(a) clearly implicates fitness, divorce statistics notwithstanding. (And how often have we lamented our choice of computers, technological changes notwithstanding.)
If decision-making were only a matter of coolly and deliberately calculating costs and benefits to arrive at the "best" adaptative conclusion – its "SAR"103 – Joe might be dead or injured, either from hunger or from a golf ball transformed into an invidious projectile. But it is
obviously not a matter of cool deliberation; we are far too complex. Consider that among the
global variables over which our neurobiological systems exercise control are memory and
attention capacity.¹⁰⁴ And all are composed of diverse emotional markers by which our
neurobiology sometimes short-circuits the need for (or focuses narrowly our ability to make) " 
Imagine that before you apply any kind of cost/benefit analysis, and before you reason to the solution of the problem, something quite important happens: When the bad outcome connected with a given response option comes into mind, however
fleetingly, you experience a gut feeling . . . . I include both visceral and nonvisceral sensation . . . when I refer to somatic [bodily] markers.\textsuperscript{105}

We have \textit{all} experienced that “gut feeling”: the loss of sleep, the shortness of temper, the
inability to concentrate, the inclination to over-eat (or not eat at all) – and we do so even when the danger, in retrospect, did not appear nearly as imminent. So like Joe standing in the fairway, the reactions of those faced with a potentially mortal threat act with only a modicum of self-conscious reflection. Our emotional systems, those associated with the amygdala,
indissociably embodied in our decision-making, affect everything we do.106

Recall once again that we are born with our neural systems mostly complete; all of the neural parts and machinery and processes we need to adapt to our environments – whatever they
may be – are in place. Many of these bodily signals, these somatic markers, “were created in our brains during the process of education and socialization by connecting specific classes of stimuli with specific somatic states.”107 As Damasio notes in a later work, emotion “probably assists rationality, especially when it comes to personal and social matters involving risk and conflict.”
Let me be clear: Plainly, emotions are not an all-purpose substitute for traditional deliberative reflection and reasoning; but they are inescapable partners in the process, and for some decision-making they are more implicated in the process than for others. They give shape to the decisions and reactions of every psychologically healthy individual faced with a serious
threat of bodily harm. Damasio has concluded that these emotional reactions “increas[e] the efficiency of the reasoning process” when danger arises by narrowing the options available and permitting the actor to respond more quickly and efficiently to danger. More on this point shortly.
IV. Neuropsychology of Self-defense, Duress and Provocation.
The previous section discussed the two areas of the brain, among others, that tend to be significantly implicated in resolving moral dilemmas, areas that are sparked depending upon the nature of the dilemma the actor faces: those that call primarily upon emotional processing and those that call primarily upon cognitive processing. The two areas are different: cognitive processing does not necessarily demand an automatic behavioral response and emotional
processing generally does. Support for this distinction comes from a series of neuroscientific experiments involving fMRI visualizations, patients with certain brain lesions, and Damasio's somatic marker hypothesis. The thesis here is that, in each of the borderline defenses, the actors involved are *almost* simultaneously reacting both emotionally and cognitively at virtually the same moment and that distinction describes particularly troublesome excuse/justification cases.
Moreover, there is support in behavioral genetics: these defenses enhance fitness.

A. Self-defense and duress – Reacting to previous threats of great bodily harm and the promise that one of the two of them would die the next time an altercation occurred, Robert Brown brought a loaded pistol with him to work. When the threats were renewed and the victim
came at him with a knife, Brown backed up to where his pistol lay near his coat, aimed at the aggressor and fired four shots. Reversing a conviction for second degree murder after the trial court erroneously instructed the jury on the duty to retreat, Justice Holmes noted famously that “[d]etached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to
consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.\textsuperscript{111} The court went further still, “if the last shot was intentional and may seem to have been unnecessary when considered in cold blood, the defendant would not necessarily lose his immunity if it followed close upon the others while the heat of the conflict
was on, and if the defendant believed that he was fighting for his life.\textsuperscript{112}

There can be little doubt that one who is faced with the perceived necessity of defending oneself lest he or she be seriously harmed undergoes substantial neurophysiological reactions.
Whether the cerebral cortex is actually overwhelmed under these circumstances, is only part of the point. What is clear is that under conditions of stress, our musculature immediately demands energy in the form of glucose and our “[h]eart rate, blood pressure, and breathing all increase . . . to transport nutrients and oxygen at greater rates.” Moreover, other bodily
functions such as digestion, the immune system, and the perception of pain are inhibited; in exchange, our cognition, memory and sensory skills are focused – all such adaptive responses occur in light of the stress inducing situation.\textsuperscript{115}
Is self-defense, therefore, properly characterized as a justification, an act that requires a balancing of harms producing a “preferred states of affairs”? \( ^{116} \) In one sense, yes: both Goetz and Brown had decided that if they were threatened, they would react forcefully; they had made a utility calculation. But that cannot be the whole story. In both cases, there were also
emotional responses, ones that reflected some combination of mechanistic “fight-or-flight” response in anticipation of the need for energy, \(^{117}\) and an emotional calculation focused on the anticipated outcome of immediate events. And what does the *somatic marker* achieve in these cases? It forces attention on the negative outcome to which a given action may lead, and
functions as an automated alarm signal.\textsuperscript{118}

In situations that demand defense of self, the stress adapters, including emotional memory, do the work of concentrating cognitive processing. Thus, certainly in contexts where
responding violently to a deadly threat is not deterrable, or is excused, as Hobbes insisted, the actor has made a calculation and responds emotionally. In those jurisdictions that still require that the force used be “necessary,” self-defense sounds like an excuse. In those jurisdictions that follow the Model Penal Code, however, which also requires that the forces be “
immediately necessary," the defense is deemed a justification.\textsuperscript{121} In fact, it is both.

But then so too is duress from a neuropsychological perspective. Recall the \textit{Toscano} case: There was no gun pointed at the defendant's head, but there was sufficient fear of great
bodily harm to conclude that a person of reasonable firmness in the same situation might succumb to the threat. Whether one views duress as a judicial recognition of human frailty (an excuse) or as an example of either diminished deterability or of a partially compromised character$^{122}$ (a justification), in either case the actor is called upon to react to a level of fear that
implicates both amygdalar processing and demands a utility calculation: assist in crime or suffer physical harm. If, as jurisprudential orthodoxy has it, “justifications are about utility and... excuses are about internal processing deficits,¹²³" neither label alone accurately describes what occurs in the actor's mind at the time of decision.
B. Provocation – Recall that James Thornton, after watching his wife and her paramour for hours, burst into the room while they were engaged in sexual intercourse and, he said, he “exploded.” What does it mean to say that he “exploded,” which seemed to have occurred
simultaneously with the loss of control? Surely the suggestion is that he lost control of his emotions and, sickened by the sounds and sight of his wife in her lover's embrace, shot the man. But Thornton had already made a judgment about the costs and benefits when, after first viewing the unfamiliar car in his driveway, he spotted the two, let the air out of one of his victim's tires, and then returned to his apartment for a camera and a gun. He had made a calculation.
The response to provocative, anger-conducive stimuli presents a classic choice dilemma, especially in a potentially homicidal context: Does the cuckold respond immediately and violently, as his impulses command? Or does he seek a calmer, non-violent solution? The problem of making normatively approved choices is especially difficult for those who suffer
some impulse control deficit;\textsuperscript{125} it is nonetheless difficult when one considers the fact that even actors with a “normal” capacity for control often embrace seemingly irrational options when an immediate “specious reward” prevents an actor from obtaining a more acceptable and beneficial future reward.\textsuperscript{126}
The classic experiments on “matching,” one variation on the general “discounting” problem, measured the subjects' willingness to delay receipt of the same reward based on the length of delay in receiving the reward. The research thus compares individual choices of identical rewards under two experimental conditions. In Condition 1, subjects were asked to
choose between receiving (a) $100 in 28 days and (b) $120 in 31 days. Most subjects chose (b): they were willing to wait the additional 3 days for the additional $20, apparently reasoning that a 20% return over a three day period of time represented a substantial gain in yield well worth waiting an additional three days. In contrast, Condition 2 subjects were asked to choose between receiving (a) $100 today or (b) $120 in 3 days. Most subjects chose (a), the immediate $100
reward, despite the fact that the 20% return in three days reflected the same generous gain. The earlier $100 payoff in Condition 2 (compared to Condition 1) is viewed as “specious” insofar as it promises a benefit which, relatively speaking, does not exist. The matching law states that “the attractiveness of a reward is inversely proportional to its delay.” The law thus
predicts heavy discounting of future rewards in favor of the primacy given to immediate rewards. This “time-discounting feature of matching law, or some close variant,” Frank notes, “is one of the most robust regularities in experimental psychology."¹³⁰ Many fear greatly that the bird in the hand may fly away.
Applied to the homicide/provocation setting, the matching problem signals that when an actor is sufficiently excited – whether the excitation occurs in a traditionally recognized category of common law provocation or in one of the more expansive settings permitted under the Code or in any other setting – the desire to strike out at the source of torment (the immediate payoff)
competes with some variably salient cognition (a) that killing is morally (and criminally) wrong; and (b) that following through with the rage to kill is likely to bring terrible, unwanted future consequences, including death to an innocent person, imprisonment, loss of self- and social esteem, potentially severe feelings of guilt and shame, or some combination of all the preceding conditions in varying degrees; with (c) the (sometimes) remote knowledge that other
socially-acceptable methods of addressing the excitation are available if he delays the reward. The immediate affective payoff – the apparent relief brought about by the feeling of revenge and the ventilation of immediate or percolating hostile emotions – overwhelms the prospective costs of doing nothing or, if the victim has inflicted an injury on the provoked or his loved one, of seeking future justice.
There is general theoretical support for this view from neuroscience and evolutionary psychology. Anger is a primary or universal emotion shared by all human beings everywhere. Damasio points out that our emotions are “inseparable from the idea of reward and
punishment:” emotions become occurrent psychological states when we perceive a personal advantage or disadvantage.\textsuperscript{132} As noted previously, emotions thus have a “regulatory role to play, leading one way or another to the creation of circumstances advantageous to the organisms exhibiting the phenomenon. What the matching law describes is “how the attractiveness of a
reward – material or nonmaterial – tends to vary with delay, where the attractiveness of the award itself varies from person to person. Provocation presents a classic matching dilemma; emotion and cognition collide and the emotional reward dominates over the calculation of potential punishment.
C. Fitness – Another explanation for all three adaptive defenses, implicit in all that has come before, posits that many of our most basic aims “led to fitness in past environments, and they do not necessarily do so in the present environment.”134
Human beings, like every species of every genus, have evolved through the processes of heredity, variation and natural selection. This process reflects millions of years of adaptation such that the basic architecture of our anatomy and physiology is itself millions of years in the making. As creatures of natural selection, maintaining “
fitness,” the ability to reproduce our phenotypic design, is a never-ending procedure. 135

Evolutionary psychologists understand that the general structure of our human genotype evolved
over a long period of history, largely in response to and as a part of a world that no longer exists, one in which day-to-day survival was the basic rule, not long term planning. Thus, although our genes continue to interact with the environment in important ways everyday, the shared hard-wiring for "social-emotional responses were inherited from our primate ancestors (due,
presumably to some adaptive advantage).” The main point here is that there is a temporal lag because the origins of our cognitive structures were developed “in a very different physical and social environment than we experience today. . . . [and as] a result, evolutionary processes inevitably and importantly contribute to the common origins and ordering of some preferences
that constitute every individual's utility curve.\textsuperscript{137}

Thus, Professor Finkelstein is clearly correct when she notes that self-defensive reactions are "adaptive;"\textsuperscript{138} they are adaptive in the deepest sense. The sense of "Danger Ahead" is
accompanied by somatic changes – that painful gut feeling; the automated, partially visceral feeling is a response that often demands something further. This kind of reaction is not necessarily sufficient for normal decision-making, but it is often essential; the emotional reaction that results from the experienced combination of events and memory set off an emotional alarm.
We are not talking about steps that unavoidably lead to a reasoned reaction.\textsuperscript{139} “[S]omatic markers are a special instance of feeling generated from secondary [acquired] emotions. Those emotions and feelings have been connected by learning, to predict future outcomes of certain scenarios.”\textsuperscript{140} It is worth emphasizing that the hypothesis does not entail displacing rational
thinking; in fact, emotions help us with our reasoning by prioritizing our attention.¹⁴¹

And these adaptive reactions support the universal drive to maintain fitness. The actor who shoots rather than being shot, or who gives in to enormous external pressures, or who lashes
out at the paramour of his spouse – each enhances the individual’s fitness if only by retaining his life. This is not to suggest that homicide is a way to maintain fitness; it is not. It is a brute fact, however, that as between a parent-child relationship and a spousal relationship, for example, men are more likely to kill their spouse than their children. Why? The “parent and
child are genetic relatives with an indissoluble overlap in the expected fitness or marriage partners;” any fitness overlap between spouses is “predicated on reproduction and sexual fidelity.  

143 And, in fact, the sources of conflict between the two relationships is very different. Consistent with the old common law, although by no means endorsing it, 144 Daly and Wilson
found that most inter-spousal homicide entailed male proprietariness, whereas the motives for most infanticide vary depending upon age, gender and other variables. 145

While it may be the case that, at the level of the gene, there are no hard and fast
distinctions between one's own genes and those of a child or sibling, because in each case some measure of reproductive success is achieved, it is withal the case that "selection thinking' suggests . . . that the evolved motivational mechanisms of all creatures, including ourselves, have been designed to expend the organism's very life in the pursuit of genetic posterity." Being
alive is generally a better way to preserve one's pursuit of genetic prosperity than is death. Excuses and justifications acknowledge this fact. The cases discussed here lie in a nether world that defies rigid jurisprudential categorization.
V. Conclusion – Recommendation

Writing in 1984, Professor Greenawalt described cases on the excuse/justification border as "perplexing."\textsuperscript{148} He concluded that two of the most frequently articulated reasons for
distinguishing between justifications and excuses – warranted versus unwarranted conduct, objective and general versus subjective and individual – are not as descriptively clean as they sometimes purport to be. The “conceptual fuzziness” that Greenawalt documents is inherent in the nature of the acts themselves; they are neurobiologically indistinct. Justifications and excuses in the boundary cases trigger both our emotional and cognitive processing areas almost
simultaneously. The emotions tend to precede the cognitive but only long enough to focus attention on the immediate threat.

The conceptual blur will continue as long as our jurisprudence categorizes rigidly conduct that exists only on a continuum. This is not a new problem. The law tends to break
down into categories – guilty or not guilty, for example. But the world is not binary; it is continuous and categorical thinking tends to distort our view of the world.\textsuperscript{149} The drafters of the Model Penal Code's mens rea provisions, which divide into four categories and which the drafters concede exist only on a continuum and cannot be rationally determinate without
question-begging, constitute implicit recognition of the way in which our control functions actually operate. 150,

It is time to acknowledge that these problematic excuse/justification cases defy
categorization and thereby eliminate the confusion by adopting an advertently hybrid defense. Why does this matter? Even a quick survey of jurisdictional law leads the conclusion that the states are all over the place on burdens of persuasion with respect to these defenses. As George Fletcher noted years ago, the burdens are a “jumble of idiosyncracies and ad hoc judgments” on
issues like duress and self-defense. The jumble reflects “the poverty of contemporary theory on the burden of persuasion.” The Supreme Court has done nothing to eliminate the conceptual fuzziness.

Professor Dressler has argued that the courts should, in general, place the burdens of
proof for justificatory defenses on the state, and place the burden on the defendant for excuses. What this paper has shown is that the very distinction between the two defenses breaks down in contexts of self-defense, duress and spousal infidelity provocation. Putting to one side whether one we should continue to recognize the latter defense at all, the state should bear the burdens of persuasion on these issues once the defendant properly puts them in issue. In each case, the
defendant is face with a strong, prepotent emotional reaction that puts into question his ability to make a normatively appropriate response. Under those circumstances, the state ought to bear the burden of proving the wrongfulness of the defendant.


7H. L. A. Hrat, *Punishment and the Elimination of Responsibility*, in Punishment and


9 Id. at 44.

head).

12 People v. Vecchio (3 Dept. 1997) 240 A.D.2d 854, 658 N.Y.S.2d 720; People v. Conigliaro (2 Dept. 1964) 20 A.D.2d 930, 249 N.Y.S.2d 792 (stating that claims of self-defense must be rejected if the asserted self-defense is found to have been more than necessary to prevent injury which decedent was inflicting, or was about to inflict).
13 See, e.g., Goetz, 497 N.E.2d at 43; Joshua Dressler, Understanding Criminal Law 237 (LexisNexis 4th ed. 2006) (Hereafter, Dressler, Understanding”); Fletcher, Basic Concepts, supra note # –, at 132-38; Robinson, supra note # –, at §8.4.

14 See, e.g., Dressler, Understanding, supra note # –, at 253-56; George Fletcher, Rethinking Criminal Law §10.5.4 (Little Brown 1978).
16 See, e.g., LaFave, supra note # –, at 539; Fletcher, Basic Concepts, supra note # –, at 133-35.
17 Dressler, Understanding, supra note # –, at 237.
18 See, e.g., id. at 240.
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19 Fletcher, Basic Concepts, *supra* note # –, at 134.


21 Note that this question is not limited to circumstances giving rise to preemptive self-defense. Even when the assault on the victim/putative defendant has begun, questions related to proportionality
and retreat still require some kind of balancing of harm versus risk to self.

22Immanueal Kant, The Doctrine of Right, in The Metaphysics of Morals 235 (trans by Mary Gregor; Cambridge 1991). See Fletcher, Basic Concepts, supra note # –, at 84-5.

23Fletcher, Basic Concepts, supra note # –, at 130. Accord Leo Katz, Bad Acts and Guilty Minds: Conundrums of the Criminal Law 65 (Chicago 1987) (noting that to excuse is to sympathize and
understand the actor's plight, although we do not approve the decision).

24 Id. at 131; Dressler, Understanding, at 250 (quoting 3 William Blackstone, Commentaries on the Laws of England *3 (1769) (stating that the common law "respects the passions of the human mind").

25 Claire Finkelstein, Excuses and Dispositions in Criminal Law, 6 Buff. Crim. L. Rev. 317, 328 (2002) (hereafter "Finkelstein, Dispositions"). Her earlier work focused of a number of issues, including

26Finkelstein, Dispositions supra note # –, at 321-22, 346.

29 Id. at 758.
30 Id.
31 Id. at 759.

Toscano, 378 A.2d at 765.

Model Penal Code §2.09 (1) states the following: 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.

35 Model Penal Code §2.09 (2) states that the defense is unavailable “if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress.” See Stephen J. Morse, *Culpability and Control*, 142 U. Pa. L. Rev. 1587, 1616 n.88 (1994).
36 The drafter of the Model Penal Code were sufficiently uncertain of the answer to declare that M.P.C. §2.09 is not exhaustive of these coercive situations stating: "When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense. Model Penal Code §2.09(4).

37 Note that all three of the common law requirements – imminent, present and pending – speak
to a temporal dimension: Not only must the gun be pointed to the head (death or great bodily harm), but, from the perspective of the person threatened, the belief must be that “I'm about to die unless I do what this guy says!”

38See, e.g., Sanford H. Kadish and Stephen J. Schulhofer, Criminal Law and Its processes: Cases and Materials 858-59 (7th ed. 2001); Dressler, Understanding, supra note # –, at 330-32.
39Morse, supra note # –, at 1617 (“Choice is wrongfully and extremely constrained by the threat, but the defendant has and makes a choice that the will executes quite effectively to avoid the threat.

40For a particularly Catch-22ish approach under the traditional approach, see United States v. Fleming, 23 C.M.R. 7, 25, 1957 WL 4422 (1957) (denying the defense of duress to a Korean War Veterna charged with collaboration because the constant threats of a deadly experience had not “brought
him to the last ditch’; the danger of death or great bodily harm was not immediate”), quoting Iva Ikuko Toguri D'Aquino v. United States, 192 F2d 338, 359 (9th Cir. 1950).

41 State v. Thornton, 730 S.W.2d 309, 309 (Tenn. 1987).
42 Id. at 311.
43 Id. at 311-12.
There are other contexts in which the defense arises, but this one and the barroom brawl are the most likely to arise, and the spousal killing context is, to my mind, the most morally obscure. See Girouard v. State, 583 A.2d 718, 721 (Ct. App. Md. 1991) (identifying the traditional categories in which
the defense of provocation might be available).
47 Thornton, 730 S.W.2d at 312.
49 Dressler, Understanding," supra note # --, at 573.
Model Penal Code §210.3 (1)(a-b) states that a person who would be guilty of murder because he purposely or knowingly took a human life, or because he killed a person recklessly under circumstances manifesting an extreme indifference to the value of human life, is guilty of the lesser offense of manslaughter if he killed the victim while suffering from an “extreme mental or emotional disturbance” (EMED) for which there is “reasonable explanation or excuse.” The reasonableness of the explanation or
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Excuse regarding the EMED is “determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be.”

sight of a woman dancing with another man at her engagement party might satisfy the MPC's provision).

52 United States v. Roston, 986 F.2d 1287, 1294 (9th Cir. 1993).

Adultery and the Provocation Defense, 37 Rutgers L.J. 197 (2005) (arguing that provocation is best understood as a justification but joining the chorus of commentators who believe that at least the spousal infidelity context should be abolished).

54 Girouard, 583 A.2d at 723.

55 People v. Berry, 556 P.2d 777, 780 (Cal. 1976) (citation omitted). Accord, Maher v. People, 10
Mich. 212, 1862 WL 1095 *5 (1862) (“anything the natural tendency of which would be to produce such a [rash] state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them” can serve as the basis of a provocation plea).

The drafter of the Model Penal Code's provisions made exactly this point in their comments. In the comments to the voluntary act requirement, §2.01, point out, as a general matter, the drafters refused to "inject[] into the criminal law questions about determinism and free will." The comments to the section on the affirmative defense of duress explain why the law of duress doesn't use a subjective standard:
The crucial reason is the same as that which elsewhere leads to an unwillingness to vary legal norms with the individual's capacity to meet standards they prescribe, absent a disability that is both gross and verifiable, such as the mental disease or defect that may establish irresponsibility.

Model Penal Code Comment to 2.01 at 215 (1985).

59 Maher v. People, 10 Mich. 212, 1862 WL 1095 (1862). I say “mostly words” because the defendant had been told of his wife's infidelity and witnessed her and her paramour as they went into and left the
woods together.

60 Maher, 1862 WL 1095 at *5, *6 (respectively).
61 Girouard, 583 A.2d at 722.
63 People v. Berry, 556 P.2d 777 (Cal. 1976) (reversing a conviction for first degree murder and holding that the trial court erred in refusing to charge on voluntary manslaughter in a “mere words” case).

64 Rozelle, supra note #, at 214.

65 See, e.g., Greene, Secret Joke supra note #, at 40-1.
66http://images.google.com/imgres?imgurl=http://dericbownds.net/uploaded_images/RSModes.jpg&imgrefurl=http://mindblog.dericbownds.net/2008_05_01_archive.html&usg=__zIiWULT5cicW7gOt2dqAIL80fLM=&h=394&w=812&sz=88&hl=en&start=3&tbclid=SzZze5OpWIzyaM:&tbnh=70&tbnw=144&prev=/images%3Fq%3Ddorsolateral%2Bsurface%2BDLPFC%26gbv%3D2%26hl%3Den%26sa%3DG. Permission to reprint sought.

that the frontal lobes and in particular, the DLPFC are believed to be seat of self - “seat of intellect, of cognitive functioning, of personality and identity, and of emotions and thought”).

70 Tancredi, supra note #_, at 38.
71 Id.; Greenfield, supra note #_, at 92-3.
72 Joseph LeDoux, The Emotional Brain: The Mysterious Underpinnings of Emotional Life 161
(Simon & Schuster 1996). *Accord* Damasio, *Feeling*, *supra* note # –, at 166-8 (discussing the “somatic marker hypothesis,” and noting that some stimuli require a response that bypasses or at least begins by bypassing cognition – e.g., drops in blood sugar, avoiding a falling object occur almost automatically).

73 Greenfield, *supra* note # –, at 18.


77 Tancredi, supra note # –, at 36-7.

78 Id. at 37; Greenfield, supra note # –, at 19 (noting as well the involvement of the hippocampus in memory consolidation).

79 To be sure, what is “normal” during brain activities imaged by fMRI is problematic. Laurence R. Tancredi and Jonathan D. Brodie, The Brain and Behavior: Limitations in the Legal Use of Functional


81 Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, in Jay Garfield and


84 Greene et al., *Neural Bases*, supra note # –, at 389-90.

85 The type of dilemma characterized by the footbridge problem – a serious physical harm, befalling a particular person or set of people, and requiring the a hands-on resolution, *id.* at 389, generated substantial
activity in areas of the brain associated with more affective control of reasoning and, in the standard trolley scenario, more activity in areas of the abstract cognitive reasoning. Id. at 398. Greene and his associates have experimented with a number of different moral dilemmas, but each tended to validate the distinctions between the two main scenarios discussed in the text. See, e.g., Joshua D. Greene, Social Neuroscience and the Soul’s Last Stand, to appear in Social Neuroscience: Toward Understanding the Underpinnings of the

person or member or members of a particular group of people, (3) where this is not the result of deflecting the existing threat onto a different party.” Joshua D. Greene, Reply to Mikhail and Timmons, in Sinnott-Armstrong, The Neuroscience of Morality, supra note # –, at 105, 107.

87 The term "impersonal" does not appear in his summary infra note # –. (91 below).

88 “In the aggregate” is an important qualifier because questions about fitness, in general, express
Evolutionary Perspective on Homicide, in M. Dwayne Smith and Margaret A. Zahn, eds. Homicide Studies: A Sourcebook of Social Research 59 (Sage Publications 1999) (hereafter “Daly and Wilson, Homicide Studies”) (noting that what people, as organisms, seek to achieve is “fitness: the expected value – in a statistical sense – of a phenotypic design's success in promoting replicative success of the bearer's genes relative to their alleles – alternative variants of the same locus – in the environment(s) in which that
phenotypic design evolved”); Jones and Timothy, supra # –, at 423 (suggesting that evolutionary theory, among other resources within biology as a discipline, “can be useful in predicting, at least statistically, both the environmental causes of [psychological brain] states and the nature of the responses that are likely to follow”) (emphasis added).

I have examined this phenomenon in an earlier work, On the Nature of the Action-Omission Network


91 Greene, Reply, supra note # –, at 108.
92 See the first figure above.


94 Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* Ch. 3 (HarperCollins

Cf. Jon Elster, Alchemies of the Mind: Rationality and the Emotions 285-87 (Cambridge 1999), who describes “three optimizing operations” that perform subjectively in the context of the “traditional view” of rational choice: the chosen action itself, in light of the agent's desires and beliefs; the beliefs themselves, given available information; and the resources allocated to obtaining information in light of the agent's desires and beliefs. Emotions can have a negative impact on any one of these operations, according to
Elster; he also suggests that in certain limited situations, emotions may serve as useful tie-breakers in situations of indeterminacy. *Id.* at 3331. *See generally,* Michael Moore, *The Moral and Metaphysical Sources of Criminal Law,* in Nomos XXVII: Criminal Justice 16-23 (ed. by J. Roland Pennock and John W. Chapman; N.Y.U. Press, 1985).

97 All three examples are based on the illustrations and discussion found in Damasio, Descartes' Error,
supra, note #–, at 166-67.

98 See also Robert H. Frank, Passions Within Reason: The Strategic Role of Emotions 53 (New York: Norton 1988). On the difficulties with the idea of choice in selection of the food, see Nagel, What Does It All Mean?, supra note #–, at Ch. 6.