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Justifications, Powers, and Authority

ABSTRACT. Criminal law theory made a significant advance roughly thirty years ago when George Fletcher popularized the important conceptual distinction between justifications and excuses. In the intervening years, however, very little progress has been made in exploring the structure and function of justification defenses. The reason for this failure, I suggest, is a widely shared misconception about their place within the criminal law's institutional structure. Contrary to what is generally believed, it is not up to trial courts to decide ex post facto what conduct is justified and what is not. This determination is made ex ante by other institutional actors such as private fiduciaries, public officials, and sometimes, ordinary citizens caught in extraordinary circumstances. The court's role is simply to review the validity of that prior exercise of decision-making discretion. More broadly, my study is intended to serve as a reminder of the importance of institutional structure in criminal law. It is almost always misleading to address issues in criminal law by way of abstract moral theorizing, as is often done, because this leaves out the crucial question of institutional division of labor. Before addressing the substantive aspect of particular questions—what conduct should be prohibited, justified, or excused—we must first address ourselves to the institutional questions that I have called the problems of authority, discretion, and legality. These institutional questions receive their most thorough treatment in two other areas of law: the private law of fiduciaries and public administrative law. If we wish to make progress in understanding justification defenses—and the institutional structure of criminal law more generally—I argue that it is to these areas of law that we should attend.

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INTRODUCTION

Sometimes, we are legally permitted to do what the criminal law generally prohibits: police officers are entitled to restrain suspects to effect a lawful arrest; parents may use force on their children to discipline them; a ship's crew is allowed to jettison passengers' property to save the ship in a storm; and ordinary citizens are permitted to use deadly force to protect themselves when their lives are threatened. In all these cases and many more, we say that the actor is entitled to do what is generally prohibited because his conduct is legally justified, that is, he has a valid justification defense.

Over the past thirty years, justification defenses have been the subject of a protracted debate in criminal law theory. Much of that debate has been based on an evaluation of the conduct itself according to rival moral theories: utilitarians (such as Paul Robinson) suppose that conduct should be legally justified so long as it prevents more harm than it causes, while those who focus on the structure of practical reasoning (such as George Fletcher and John Gardner) suppose that conduct should be legally justified whenever the reasons in favor of acting outweigh those against and the act was done for the right reason. But the law does not recognize conduct as justified simply on the basis of its merits according to either of these moral theories. There is also another factor—the actor's legal role—that forms a distinct and important consideration: for example, a police officer is entitled to make arrests in contexts where a private citizen is not; a corrections official may punish an offender in situations where others may not; and a parent may use disciplinary force on his child when a stranger may not. In all these cases and more, the law recognizes that, by virtue of their roles, these persons are legally justified in taking action that many others would be criminally prohibited from pursuing.

This revelation about the importance of the actor's role might lead us to conclude that conduct is legally justified simply on the basis of these two variables: the moral merits of the conduct itself and the actor's legal role. But things are still more complicated than that. Even those who play the appropriate legal role (corrections officials, police officers, and so on) are justified in acting only after the appropriate decision maker has approved the conduct—that is, has decided that the conduct was justified. For example, a corrections official cannot take it upon herself to administer punishment until a court has decided (through a proper trial and sentencing hearing) that the offender should be punished in a certain way. If the corrections official decided to impose punishment before the court had imposed sentence, the law would treat her as an unjustified vigilante. This is so even though it is the job of a corrections official to impose punishment and even if the "punishment" she would administer on her own is precisely what a court ultimately deems to be

appropriate. Similarly, under ordinary conditions, police officers may search private homes for evidence only after a justice of the peace has decided (by granting a search warrant) that the search is legally justified. Even though it is part of a police officer's job to undertake searches, and even though a warrant would have been granted had the police applied for one, the law does not generally recognize a warrantless police search as justified. Neither the merits of the conduct as such nor the legal role of the actor is enough on its own; rather, for conduct to be legally justified, the appropriate decision maker must have made an authoritative decision that it is so.

This analysis suggests that there is a division of labor between those who have the legal power[1] to decide what conduct is, and is not, legally justified in the circumstances and those who carry out that conduct. And indeed, this division of labor is at work in a wide variety of contexts. We find that most bureaucratic hierarchies are structured largely in terms of this distinction. For example, high ranking police officials have a good deal of power to decide what conduct is legally justified (for example, when it is appropriate to use force in a hostage-taking situation, or how to conduct a major drug bust), but they engage in very little of that conduct themselves. By contrast, junior police officers have much less power to decide what conduct is legally justified, but they actually carry out most of the conduct that senior officers have approved. In the private sector, we also find this bureaucratic hierarchy at work. For example, the captain of a ship usually decides when jettisoning passengers' property to save the ship would be justified, but crewmembers then actually carry out this task. This division of labor is also often present elsewhere in the private sector, even in the absence of any formal bureaucratic hierarchy. For example, parents have the power to decide whether or not an operation on their child would be justified, but then a team of medical professionals actually carries out the operation.

Sometimes, however, the division of labor between the person who decides what conduct is justified and the person who carries out the justified conduct is only *notional*, for sometimes those two persons are actually one and the same: for example, when a police officer makes a warrantless arrest, she both decides whether the use of force is justified under the circumstances and then carries out the arrest. Similarly, when a parent uses force to discipline her child, that parent both decides what disciplinary force is appropriate under the

1. I use the expression "legal power" in the technical sense set out by Wesley Hohfeld. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter Wheeler Cook ed., 1919). For a thorough treatment of the crucial role of decision in legal powers, see Andrew Halpin, *The Concept of a Legal Power*, 16 OXFORD J. LEGAL STUD. 129 (1996).

circumstances and then carries it out. And perhaps most importantly, when a citizen uses force in self-defense, she both determines whether or not the force is justified and then actually uses that force to defend herself.

The important point to focus on, however, is not whether there is an actual or merely notional division of labor between those who have the power to decide what conduct is justified and those carrying it out; rather, the critical point is that *all* justifications involve the exercise of a legal power—an authoritative decision by the appropriate person that a certain course of action is justified under the circumstances. Further, we find that the law accords some decision makers a good deal more discretion in the exercise of their decision-making power than others. In the case of self-defense, for example, the law gives the decision maker quite detailed criteria to apply to the facts at hand: she must decide not only whether it is necessary, under the circumstances, for her to use force to defend herself, but if so, what force would be proportionate to the nature of the threat she faces. In other cases, the decision maker has considerably wider discretion. For example, when senior police officers authorize a "sting" operation, they must decide what sorts of otherwise criminal activity their officers may engage in, a decision likely to involve balancing broad considerations of public safety against the societal harms inherent in allowing police officers to engage in serious criminal activity. In other words, although the scope of discretion may vary widely from one justification to another, the fact is that all such decisions require at least some case-by-case discretion about when it is justified to do what the criminal law generally prohibits.

There are two important normative conclusions I mean to draw from this analysis of the conceptual structure of justification defenses. First, I will suggest that the way in which courts should evaluate claims of justification ought to reflect their proper institutional role. Since all justifications involve discretionary decision making, I argue, courts should always approach the evaluation of any justification claim, not by evaluating the underlying conduct de novo; rather, they should engage in a more limited review of the *prior* exercise of discretion. For example, where a court is asked to evaluate a warrantless arrest, it should not be considering de novo whether it would have acted similarly. Rather, the question is whether the police officer exercised his decision-making authority—his discretion—reasonably. More generally, so long as the decision maker (be she a justice of the peace, a police officer, a parent, or even an ordinary citizen) was within her jurisdiction in making that decision and so long as she reached her conclusions in the proper way, her decision should stand.

The second normative conclusion I mean to draw from the foregoing analysis is that we should consider the political legitimacy of claims of

justification from a different point of view. Most writers largely ignore the problems of institutional division of labor at work in criminal law and focus their attentions almost exclusively on the merits of that conduct and perhaps on the legal role of the actor. But I suggest that the most important aspect of justifications is the discretion wielded by certain individuals to decide what conduct is justified and what is not. Accordingly, I argue that most of our normative attention should be focused on the legal recognition and control of that discretion: who should wield it, how broad their discretion should be, what guidance the law should give to them, and so on.

In answering these questions, we should keep in mind the political legitimacy challenges that this sort of discretionary power might present. Perhaps the most pressing normative question raised by this analysis is how we might be able to render this sort of discretion over the affairs of others compatible with traditional liberal respect for individual freedom.[2] We might at first miss the significant normative problems raised by justification defenses. After all, there is another place in criminal law in which ordinary citizens can decide what conduct is and is not criminal, namely, the granting or withholding of consent to others' interference with our own affairs. For example, each of us has the power to render lawful otherwise wrongful conduct such as the taking of our property, entrance onto our land, or interference with our bodily integrity simply by consenting to such conduct. But consent does not raise similar problems of political legitimacy because justifications differ from consent in one crucial respect: whereas consent concerns power over *our own* affairs, justifications always involve power over the affairs *of others*. Whether this is in the private sphere (where parents decide whether their children should be disciplined or captains decide whether their passengers' property should be jettisoned), in the public law context (where justices of the peace decide whether private homes may be searched, and courts decide who may be punished and how), or in the somewhat murkier contexts of self-defense and lesser evils (where ordinary citizens decide whether others may be killed or their property destroyed), justifications always involve a decision by one party about justified interferences with the affairs of *another*. And this, of

2. The notion of freedom I have in mind here is what is sometimes called "freedom as independence." It is not concerned with maximizing the number of valuable options available to each person (as most utilitarians or perfectionists would have it). Rather, it is the simple notion that it should be up to each person—and no one else—to decide the purposes to which her body and her property shall be put. For more on this notion and the related notions of Kantian "external freedom" and Republican notions of "freedom as non-domination," see Arthur Ripstein, *Authority and Coercion*, 32 PHIL. & PUB. AFF. 2, 10 (2004).

course, raises deep issues at the core of liberalism concerning individual freedom.

As the beginning of an answer to this question of liberal legitimacy, I suggest that there are already doctrines at work in the law that can help us to render this exercise of legal power by some over the affairs of others compatible with a commitment to individual freedom: notably, the concept of fiduciary relationships and duties. In the private law context, for example, the fiduciary relationship provides a normative framework in this regard. The relationship between fiduciary and beneficiary—for example, parent-child, doctor-patient, captain-passenger, director-corporation, and many more—imposes a set of normative constraints that are designed to render the fiduciary's exercise of power over the beneficiary compatible with the beneficiary's autonomy. In the public law context, the norms of administrative law are similarly designed to render the discretion of public officials over their subjects' affairs compatible with the individual rights of those subjects. Indeed, I argue that there are a number of important similarities between the normative constraints on fiduciaries in private law and those imposed on public officials in administrative law.[3] Finally, I shall argue that the best way to make normative sense of the power wielded by citizens over the affairs of others—power that is manifest in the justifications of citizens' arrest, self-defense, and lesser evils—is to conceive of the former as public officials pro tempore of necessity. It is only insofar as they are performing a public function that ordinary citizens have the authority to make such judgments, and accordingly, they are bound by similar normative constraints when deciding what conduct is justified as public officials would be in the same situation.

I. THE JUSTIFICATIONS DEBATE SO FAR

In this first Part of the Essay, I set out the groundwork for my own account of justification defenses. Because justification defenses are the subject of so much controversy and disagreement, I begin by setting out some of the most basic structural features of these defenses upon which there is widespread agreement. Once I have established this common ground, I consider whether the two best-known accounts of justification defenses from the past thirty years are able to account for these agreed-upon features of justifications. In

3. For what is perhaps the most thorough treatment of the analogy between private fiduciaries and the position of public officials in administrative law, see Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

reviewing the failings of these accounts, I find the beginnings of my own account, focused on the crucial role of legal powers.

A. Introducing Justifications

My analysis of justification defenses is grounded in a close examination of their place within the conceptual structure of contemporary Anglo-American criminal law doctrine. I assume that such an analysis can help us to understand the function of justifications and to answer larger questions of political legitimacy that surround justifications in criminal law theory. Before I begin this analysis, however, a few words about the merits of this approach are in order.

1. Methodological Preliminaries: The Concern with Structure

For many years, most commentators on the criminal law almost entirely ignored any questions about its conceptual structure, particularly as it concerns justification defenses. They assumed, as generations of scholars before them had done, that the criminal law was nothing more than "an instrument of the state,"[4] one that the state could shape in whatever way best served its favored policy objectives. As late as 1975, George Fletcher lamented quite accurately that the "instrumentalist style of thought is so deeply entrenched in the United States that it is hard for our commentators and draftsmen to think of a reason for punishing or not punishing that is not a function of the ends of the criminal law."[5]

Over the past thirty years, a number of criminal law theorists have questioned the wisdom of this wholly instrumentalist account of the criminal law. Paul Robinson, George Fletcher, John Gardner, and others have insisted that the concepts at work in criminal law give rise to a certain structure that we have good reason to respect. They have argued that, insofar as we use terms such as "justification," legislators should examine the concept of justification in moral theory more closely and the sort of conceptual structure to which it gives rise. For example, Robinson has argued that conduct is justified so long as it prevents more harm than it causes.[6] Fletcher and Gardner have insisted that conduct is justified so long as, first, the reasons in favor of the conduct

4. JEROME MICHAEL & MORTIMER J. ADLER, CRIME, LAW AND SOCIAL SCIENCE 342-43 (1933).

5. George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 293-94 (1975).

6. *See infra* text accompanying note 41.

outweigh the reasons against it, and, second, the actor did it for the right reasons.[7] But as Mitchell Berman has pointed out, one important problem with these accounts is that justification defenses in criminal law do not, in fact, reflect these accounts of moral justification at all.[8] Berman notes that the criminal law does *not* deem morally permissible conduct such as civil disobedience to be justified.[9] And he notes that the criminal law *does* deem to be justified such morally impermissible conduct as the use of force against an old, deranged and disabled intruder to one's home where retreat was an available alternative to the use of force.[10] Insofar as the very purpose of the Robinson and Fletcher/Gardner accounts is to explain why the criminal law has the structure it does, therefore, they have failed.

One conclusion we might draw from the failure of these attempts to discover the conceptual structure of justification defenses in criminal law is that we should forget about the conceptual analysis of criminal law altogether and simply focus on trying to achieve the instrumentalists' policy objectives. Berman sets out this conclusion quite succinctly as follows: "I hope to prod scholars to argue for their favored articulations of particular defenses (like particular offenses) in terms of good policy broadly conceived—justice, fairness, efficiency, administrability, and the like—not in terms of conceptual or logical truths."[11] But as I shall endeavor to show, this is not the only conclusion one can draw from the failure of these particular conceptual arguments. Instead, I argue that there is indeed a complex and in some ways attractive[12] conceptual structure to criminal law justification defenses. Further, I shall endeavor to show that a close examination of this conceptual structure may shed considerable light on some of the most basic issues in criminal law theory.

In order to make progress, however, we must (temporarily) put aside abstract theorization about what conduct our favored moral theories would

7. *See infra* text accompanying note 58.

8. *See* Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 17 (2003).

9. *Id.* at 11.

10. *Id.* at 14.

11. *Id.* at 77.

12. I hope to make clear below precisely how this conceptual structure is attractive. I aim to show that it provides a remarkably subtle balancing of a variety of system-wide considerations. By granting decision-making power to actors "on the ground," justifications provide flexibility and creativity when dealing with nonideal conditions. But by maintaining strict standards of judicial review, the law also retains control over the discretion wielded by these decision makers. It is precisely this combination of flexibility and accountability that is also the promise of administrative law.

hold to be justified and consider the role that justification is supposed to play within the institutional framework of a modern criminal justice system. We must keep in mind that the criminal law is not just a set of directives to citizens; rather, it sets out a basic institutional framework that applies to all—state and citizen alike.[13] By taking account of justifications' role in allocating decision-making power within the legal order, it is therefore possible both to explain the general structure of justifications and to make clear the normative issues they raise.

2. *Three Structural Features of Justification Defenses*

Roughly thirty years ago, English-speaking commentators began to notice that one class of criminal law defenses performed quite a different function from all the others.[14] Recognizing the distinction between legal rules that individuals use to guide their conduct and the conceptually secondary set of rules that direct courts to impose sanctions when the primary set have been breached,[15] some commentators noticed that justifications seemed to fit within

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13. Victoria Nourse is one of the very few commentators on criminal law who has made a similar argument. *See* V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1697 (2003) ("[T]he criminal law should be seen as a fundamental agent in maintaining a just relation between citizen and state. Although this premise is widely accepted by rather ancient political philosophers, one is unlikely to read about it in much contemporary scholarship on the criminal law or political theory." (citation omitted)).

14. The Robinson-Fletcher exchange in the *UCLA Law Review* in 1975 is where the debate began in earnest. *See* Fletcher, *supra* note 5; Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975). Of course, some writers, such as H.L.A. Hart and J.L. Austin, set out the distinction between justification and excuse earlier. *See* J.L. AUSTIN, *A Plea for Excuses*, *in* PHILOSOPHICAL PAPERS 123 (1961); H.L.A. HART, *Legal Responsibility and Excuses*, *in* PUNISHMENT AND RESPONSIBILITY 28 (1968). The Model Penal Code makes a distinction between these two types of defenses as well. Justifications are dealt with in article 3 and excuses are dealt with in article 2. *See* MODEL PENAL CODE §§ 2.08-2.13, 3.01-3.11 (1985).

15. *See* H.L.A. HART, THE CONCEPT OF LAW (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994). H.L.A. Hart points out the crucial importance of this distinction as follows:

> Plainly we shall conceal the characteristic way in which such rules function if we concentrate on, or make primary, the rules requiring the courts to impose the sanctions in the event of disobedience; for these latter rules make provision for the breakdown or failure of the primary purpose of the system. They may indeed be indispensable but they are ancillary.

Id. at 39. I refer here to H.L.A. Hart's distinction between rules regulating conduct and rules regulating the imposition of punishment rather than Meir Dan-Cohen's later treatment of this question in order to avoid taking on some of the conclusions Dan-Cohen draws from

the first set of rules, whereas most other defenses fall within the second. And while all defenses have the effect of saving the accused from some or all of the punishment he would otherwise receive, only justification defenses do this on the grounds that his conduct was in fact legally permissible.[16]

The characteristic of justification defenses that has most puzzled criminal law theorists over the past thirty years is that although these defenses, like offense definitions, ultimately concern what conduct is and is not criminally prohibited, they have a very distinctive conceptual structure that makes it impossible to think of them merely as exceptions to criminal prohibitions. In fact, justifications seem to have quite a distinct and consistent structure, defined by three features in particular.[17] The first two features have attracted the most attention over the years, but I argue that it is the third of these features that provides the most insight into the place of justifications within the criminal law more generally.

The first distinctive feature of justification defenses (which marks them out as more than just ordinary exceptions to criminal prohibitions) is that while prohibitions are defined in terms of prohibited *means*, justifications are set out in terms of preferred *ends*. That is, the criminal law identifies conduct for prohibition in terms of the means employed—killing a human being, for example, or taking someone's property without her consent—without any concern for how noble or how base the actor's ends might be in doing so. This point is captured in the oft-quoted (though slightly inaccurate) dictum that the criminal law is concerned with conduct but never with motive.[18] Justifications,

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this distinction. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 667-73 (1984).

16. This is a point on which even instrumentalists about the criminal law such as Mitchell Berman can agree. *See* Berman, *supra* note 8, at 32-37. Berman makes this point using Meir Dan-Cohen's language of "conduct rules" and "decision rules." *See* Dan-Cohen, *supra* note 15.

17. There are many other features, too, that are not as significant for our purposes, such as evidentiary burdens, the rule of law, and vagueness constraints, among others. George Fletcher discusses some of these other features of justification. *See* George P. Fletcher, *The Nature of Justification*, *in* ACTION AND VALUE IN CRIMINAL LAW 175-86 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993).

18. *See* Commonwealth v. DePetro, 39 A.2d 838, 840 (Pa. 1944) ("Proof of motive is never necessary . . . ."); Bush v. State, 628 S.W.2d 441, 444 (Tex. Crim. App. 1982) ("[M]otive is not an essential element of a crime but . . . evidence of motive is always admissible because it is relevant as a circumstance tending to prove the commission of an offense."). The same is true in Canada. *See* R. v. Imrich, [1974] 6 O.R.2d 496, 503 (Can. Ont. Ct. App.) ("Motive relates to a consequence ulterior to the *mens rea* and the *actus reus* and, adopting this criterion, motive is irrelevant to criminal responsibility . . . ."), *aff'd*, [1978] 1 S.C.R. 622; *see also* United States v. Dynar, [1997] 2 S.C.R. 462, 497-98, ¶ 81 (Can.) ("It does not matter to

however, are always defined in terms of the actor's ends but do not necessarily specify the particular means by which to accomplish those ends: for example, one is justified in doing whatever is necessary (within proportionality limits)[19] *for the end* of defending oneself, or using force on one's own child *for the end* of disciplining the child. To reflect this emphasis on ends rather than means, justifications bear what is sometimes called a "reasons requirement."[20] According to this requirement, one has a valid claim of self-defense only if one's reason for action (one's end) was to defend oneself; one has a valid claim of lawful arrest only if one's reason for using force was to make a lawful arrest; and so on. The mere fact that one's conduct had a desirable effect is not enough.[21]

A second characteristic feature of justification defenses also distinguishes them from mere exceptions to offense definitions: their fault standard. Whereas particular prohibitions (including any exceptions built into them) are subject to a variety of different fault standards, justifications are almost always

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society, in its efforts to secure social peace and order, what an accused's motive was, but only what the accused intended to do.").

19. The place of proportionality in justifications has been highly controversial. In some early German case law, following the dictum that "right ought never yield to wrong," there was no proportionality limit at all. *See* Landgericht Bamberg [LG] [Bamberg trial court] Sept. 20, 1920, 55 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 82 (F.R.G). In the common law world, however, it has long been recognized that the mere fact that one is resisting a wrongdoer does not provide an absolute right of resistance. Resistance to a wrongdoer provides a good—but not necessarily determinative—reason to act.

20. This is sometimes called the "*Dadson* doctrine" after the nineteenth-century case in which it was most clearly stated. *See* R. v. Dadson, (1850) 169 Eng. Rep. 407. Importantly, this characteristic is shared with excuses such as duress and provocation. Also, it should be noted that the reasons requirement only demands that the justifying reason be *among* one's reasons for action. In some American jurisdictions, the justifying reason (in cases of necessity) must also be the actor's primary (though still not exclusive) reason for action. *See, e.g.*, Dozier v. State, 709 N.E.2d 27, 29 (Ind. Ct. App. 1999); Commonwealth v. Weaver, 511 N.E.2d 545 (Mass. 1987). In Canada, the justifying reason need not have been one's only—or even primary—reason for action. In order to meet the elements of the self-defense justification, an accused who causes death or grievous bodily harm must have had a reasonable belief that he could not otherwise preserve himself from serious harm. *See* Canada Criminal Code, R.S.C., ch. C-46, § 34(2)(b) (1985); R. v. Cinous, [2002] 2 S.C.R. 3 (Can.).

21. This raises, however, the defense of ex post facto vindication, which is a defense in some cases in England (such as a police officer who is justified on the basis of a "hunch" that turns out to be correct, even though he had no reasonable and probable grounds for it at the time). Tony Honoré has argued that these justifications cannot fit within any of the accounts canvassed so far. But this sort of justification seems to be an outlier—an unusual and unprincipled exception to the general rule. *See* John Gardner, *Justifications and Reasons*, *in* HARM AND CULPABILITY 103, 125 n.39 (A.P. Simester & A.T.H. Smith eds., 1996).

subject to the same independent fault standard of reasonable belief.[22] This would make it extremely difficult to assimilate justifications and prohibitions into a single, unified set of conduct rules. For example, if the justification of self-defense were to be incorporated into the definition of the offense of murder, this would significantly change the scope of criminal liability. As it stands, someone with an honest but unreasonable belief that deadly force was necessary to protect his own life would be convicted of murder.[23] But if "non-self-defense" were made an element of the offense, then any honest belief that deadly force was necessary and proportionate to the threat, however unreasonable, would suffice to negate mens rea and thereby ensure an acquittal of the accused.

Finally, there is a third feature of justification defenses that has attracted very little attention in the literature so far but which also marks them out as

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22. The concept of "reasonable belief" is fixed within the wording of many statutory justifications in the United States and Canada. *See, e.g.*, City of Chicago v. Mayer, 308 N.E2d 601, 604 (Ill. 1974); People v. Williams, 205 N.E.2d 749, 752 (Ill. Ct. App. 1965); Shorter v. People, 2 N.Y. 193, 197 (1849) (reasonable belief in need for self-defense). The Model Penal Code precludes justification where "the actor was reckless or negligent . . . in appraising the necessity for his conduct . . . in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability." MODEL PENAL CODE § 3.02 (1985). Provisions in the Canadian Criminal Code, justifying the use of force or the commission of an offense, all mandate that the belief as to the necessity of using force or committing an offense be reasonable and proportional in the circumstances. *See* Canada Criminal Code, R.S.C., ch. C-46, §§ 25-33 (1985). Similarly, a Canadian defendant pleading self-defense must believe, "on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm." *Id.* § 34(2). For cases dealing with reasonable belief in self-defense, see, for example, R. v. Malott, [1998] 1 S.C.R. 123 (Can.); R. v. Petel, [1994] 1 S.C.R. 3 (Can.); and R. v. Lavallée, [1990] 1 S.C.R. 852 (Can.).

In the United Kingdom, reasonableness is at the heart both of self-defense and the prevention of crime. *See, e.g.*, The Queen v. McInnes, (1971) 55 Crim. App. 551 (C.A.) (Eng.) (finding that the failure to retreat before resorting to violence was merely a factor that ought to be considered when assessing the reasonableness of the defendant's conduct); Devlin v. Armstrong, [1971] N. Ir. L.R. 13 (same). Courts more generally have suggested that reasonableness should be judged on broad and liberal grounds. *See, e.g.*, Reed v. Wastie, [1972] Crim. L.R. 221 (Wales); R. v. Julien, (1969) 2 All E.R. 856 (A.C.) (Eng.). A police constable is entitled to take any steps in preventing a breach of the peace that he "reasonably" thinks are necessary. *See* Piddington v. Bates, (1961) 1 W.L.R. 162 (Q.B.) (Eng.). Further, the Criminal Law Act provides that "[a] person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large." *See* Criminal Law Act, 1967, c. 58, § 3(1) (Eng.).

23. Of course, the interpretation of what constitutes a reasonable belief in the circumstances is notoriously generous in the case of self-defense. In Justice Holmes's famous words, "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343 (1921).

something more than just legislated exceptions to criminal prohibitions. The law does not simply lay out justification defenses as permissions to do what is generally prohibited. Rather, it recognizes that when certain individuals, with the requisite legal power, validly *decide* that their conduct is justified under the circumstances, that decision is legally effective. That is, when those individuals decide that it is justified to do something that is generally prohibited, that very decision brings about a change in what we are legally permitted to do. Perhaps the clearest example of this phenomenon is where a justice of the peace exercises his legal power and *decides* that a police officer is justified in carrying out an otherwise prohibited assault as part of an arrest, or when he is justified in doing what would otherwise constitute a trespass as part of a lawful search.[24] But this is equally true of police officers who may *decide* when citizens are justified in doing things that are generally prohibited in order to assist them in pursuing important law enforcement purposes,[25] or parents who may *decide*

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24. U.S. courts have held that the effect of a search warrant is to authorize and make lawful that which legally could not have been done without its issuance. *See* Creech v. United States, 97 F.2d. 390 (5th Cir. 1938). In the United States, the issuance of search warrants by federal courts is governed by the Federal Rules of Criminal Procedure: "After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device." FED. R. CRIM. P. 41(d).

In Canada, the Criminal Code sets out the procedure a justice of the peace must follow in granting a search or arrest warrant. Under section 487,

> A justice who is satisfied . . . that there are reasonable grounds to believe that there is in a building, receptacle or place (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed, (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament, (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or (c.1) any offence-related property, may at any time issue a warrant authorizing a peace officer . . . to search the building, receptacle or place for any such thing and to seize it.

Canada Criminal Code, R.S.C., ch. C-46, § 487 (1985).

25. *See* MODEL PENAL CODE § 3.07 (1985); *see also* Criminal Law Act, 1967, c. 58, § 3(1) (Eng.). The Canadian Criminal Code justifies the use of force for any peace officer or individual lawfully assisting a peace officer in the act of making an arrest or executing process. Canada Criminal Code, R.S.C., ch. C-46, § 25(5) (West 2008). Another provision justifies the commission of an act or an omission that would otherwise constitute an offense if the person committing the conduct was acting under the direction of a public officer, and that the actor reasonably believed the public officer had the authority to give such direction. Canada Criminal Code, R.S.C., ch. C-46, § 25.1 (West 2008).

that it is justified under the circumstances to use force to discipline their children.[26] More controversially, I shall argue that this is even true of ordinary citizens who may *decide* when it is justified to use lethal force in their own defense.[27]

Indeed, it is the importance of a valid decision by the appropriate individual that gives meaning to the crucial distinction between vigilantism and lawful police activity. When vigilantes such as the self-styled "Minutemen" in the United States decide to take it upon themselves to carry out the duties of

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26. *See* MODEL PENAL CODE § 3.08 (1985) (codifying a justification for the "Use of Force by Persons with Special Responsibility for Care, Discipline or Safety of Others"). In *State v. England*, 349 P.2d 668 (Or. 1960), a parent was held not liable for a child's death, which resulted from the negligent administration of lawful punishment. American courts have further held that the relationship between parent and child is constitutionally protected. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ."); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923). A parent has "fundamental liberty interests" in maintaining the parent-child relationship. Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). This includes the right of parents to use "reasonable or moderate physical force to control behavior." State v. Wilder, 748 A.2d 444, 449 (Me. 2000).

The same justification is recognized in Canada. *See* Canada Criminal Code, R.S.C., ch. C-46, § 43 (1985) (affirming the justification for the use of force by parents and schoolteachers against children under their care, provided that "the force does not exceed what is reasonable under the circumstances"); *see also* Canadian Found. for Children v. Canada, [2004] 1 S.C.R. 76 (Can.) (affirming that this justification is consistent with the principles of fundamental justice); Ogg-Moss v. The Queen, [1984] 2 S.C.R. 173 (Can.) (affirming that because the justification found in section 43 effectively removes from children the right to be free from unconsented invasions of physical security or dignity normally protected by the criminal law, it should only be extended to those who undertake the responsibilities and obligations associated with being a parent). In England, it has long been recognized at common law that the reasonable use of force by a parent for the purpose of disciplining a child is justified. Moreover, this defense has been extended to anyone standing in loco parentis. *See, e.g.*, R. v. Hopley, (1860) 175 Eng. Rep. 1024 (K.B.); R. v. Smith, (1985) 82 Law Soc. Gaz. 198 (C.A.) (Eng.). The reasonableness of any such force will depend on such matters as physical and mental consequences for the child, the age and personal characteristics of the child, whether an external instrument was used, or whether marks were left on the child's body. *See* R. v. H., (2002) 1 Crim. App. 59 (A.C.) (Eng.). The defense has recently been limited by legislation. In England, the Children Act denies the justification for: wounding and causing grievous bodily harm; assault occasioning actual bodily harm; and cruelty to persons under sixteen. *See* Children Act, 2004, c. 31, § 58 (Eng.). The effect of the provision is that reasonable and proportionate punishment that amounts to simple assault or battery, and does not involve cruelty, is still protected by the defense of lawful chastisement.

27. *See infra* Subsection II.B.1.

border police, they are not automatically permitted to do so. Even though they might be engaging in *precisely the same* conduct that would be justified if undertaken by border police, there are still situations where they are rightly branded as criminals for doing it.[28] This is because the justification provisions in criminal codes do not set out general permissions to engage in socially worthwhile conduct, however that conduct might be defined; rather, justification defenses recognize that *some* people (but not others) have the legal power to make such a decision.[29]

Although this element of decision-making power is a crucial feature of justification defenses, it is far less well recognized than the first two.[30] Indeed, at one point, George Fletcher seemed to deny the importance of decision making altogether. As he wrote: "Claims of justification lend themselves to universalization. That the doing is objectively right (or at least not wrongful) means that *anyone* is licensed to do it."[31] This widely shared view about the universality of justification is wrong in at least two distinct ways. First, it ignores the fact that only those who play the right legal role may be able to rely on justification defenses for engaging in the same behavior (for example, it is police officers, not Minutemen, who can detain illegal immigrants at the border). But second, it ignores the fact that only certain people have the legal power to decide when that conduct is justified (for example, it is usually the justice of the peace, not the police officer, who can decide when a search is justified). I shall return to this point—and provide further argument for the general importance of legal powers to all justifications—in Part II.

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28. For more on these latter-day "Minutemen," see Jim Gilchrist's Minuteman Project, http://www.minutemanproject.com (last visited Jan. 31, 2008). *See also* Sarah Vowell, Op-Ed., *Lock and Load*, N.Y. TIMES, July 23, 2005, at A13 (describing modern Minutemen projects as "random guys with guns stalking Niagara Falls or the Rio Grande" and noting that President George W. Bush has condemned them as "vigilantes").

29. As I shall argue below, this authorized person may in some cases be the very one who carries out the permitted conduct as well. *See infra* Section II.B.

30. Kent Greenawalt was one of the first to notice the crucial role of standing in justification defenses. *See* Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1915 (1984) ("Some justifications depend upon the social role of the actor or his relation to a person affected by the act. Police and parents, for example, have special authorizations to use physical force when others may not."). Crucially, however, Greenawalt talks of the social role of the *actor* rather than the *decision maker*, whom I take to be central to the structure of justifications in criminal law.

31. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 761-62 (1978) (emphasis added).

B. The Two Accounts

Over the past thirty years, a debate has raged in criminal law theory between two accounts of justifications. Both accounts have rejected the thoroughgoing instrumentalism of generations past and have accepted that there is an important difference between justifications (which concern what conduct the law permits) and many other defenses such as excuses (which concern when we shall not be punished for doing what is prohibited). On one side, Paul Robinson has argued consistently for a utilitarian account of justifications: as a general rule, the law ought to permit anyone to do whatever prevents greater harm than it causes. But Robinson's utilitarian account of justifications is unable to explain any of the three basic features just identified: he rejects the reasons requirement as incompatible with his utilitarian reading of the harm principle, he insists that justifications should be subject to a fault standard of correctness, and he fails to consider the importance of decision-making powers. On the other side, Fletcher and Gardner have consistently rejected Robinson's utilitarianism in favor of a view focused on the structure of practical reasoning. But even they are unable to account for two of the three basic features of justifications just identified: first, they too reject the reasonable belief standard for justifications, and second, they simply do not consider the importance of decision making.

1. Robinson's Challenge

Paul Robinson has consistently argued for the reform of justification defenses in Anglo-American law because they do not fit his favored moral theory of justification.[32] Although he has written extensively on matters of structure and function in criminal law,[33] he does not pay close attention to the institutional division of labor in this area of criminal law doctrine. When it comes to justification defenses, he assumes that they, like prohibitions, are part of the general rules of conduct for citizens set down by the legislature.[34]

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32. In a paper coauthored with John M. Darley, Robinson suggests that most people's intuitions favor his "deeds" account of justifications rather than the traditional common law "reasons" account. *See* Paul H. Robinson & John M. Darley, *Objectivist vs. Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUD. 409 (1998).

33. *See, e.g.*, PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW (1997).

34. Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, *in* HARM AND CULPABILITY, *supra* note 21, at 45, 48 ("[A] 'deeds' theory of justification . . . allows the law to better communicate to the public the conduct rules that it commands they follow."). Antony

Nevertheless, he insists that the question of whether or not a particular act is justified can only be answered ex post by the courts. As a result, he argues that Anglo-American criminal law should abandon its traditional fault standard of reasonable belief for justifications.[35] Further, he argues that justification defenses should be subject to his (very controversial) utilitarian interpretation of the harm principle, according to which the state may only prohibit individuals from doing things that cause more harm than they prevent.[36] When we cause harm to prevent a greater evil, Robinson argues, "due to the special circumstances of the situation, *no harm has in fact occurred*."[37] Any extension of the criminal sanction to such harmless conduct, he argues, is illegitimate.[38] Since justifications, along with criminal prohibitions, set the boundary between permissible and criminally prohibited conduct,[39] Robinson's argument would require that we deem all conduct that prevents more harm than it causes "justified."

Building on these normative foundations, Robinson then suggests that much of present-day criminal law doctrine is best understood as a not entirely successful attempt to live up to the demands of the harm principle as he understands it. Following Herbert Wechsler and Jerome Michael,[40] Robinson claims that criminal law prohibitions and justification defenses are mechanisms by which the law attempts to identify conduct that causes more harm than it prevents.[41] Prohibitions do this in a more rough-and-ready fashion by simply

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Duff rightly points out that Robinson's account effectively does away with justifications as a distinct category altogether. It is, he suggests, "not a theory of justification, as a criminal defence: it is a theory about where the distinction between offences and defences should be drawn, and holds that what 'reasons' theorists count as justificatory defences should rather be counted as factors that negate an element of the offence." R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 280 (2007).

35. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 239-40 (1982) ("A mistake as to justification is by its nature necessarily an excuse, not a justification.").

36. Robinson, *supra* note 14, at 268. For a strong critique of Robinson's reading of the harm principle, see Gardner, *supra* note 21, at 126-29. Gardner's account is based on an argument by Joseph Raz. *See* Joseph Raz, *Autonomy, Toleration, and the Harm Principle*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 313 (Ruth Gavison ed., 1987).

37. Robinson, *supra* note 14, at 272 (emphasis added).

38. *Id.* at 267-68.

39. *Id.*; *see also* Robinson, *supra* note 34.

40. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701 (1937).

41. Paul H. Robinson, *In Defense of the Model Penal Code: A Reply to Professor Fletcher*, 2 BUFF. CRIM. L. REV. 25, 39-40 (1998).

banning whole classes of conduct because they tend to cause more harm than they prevent; justifications do this in a more nuanced way, allowing for the balancing of evils in the particular case.[42] This utilitarian balancing structure is most evident in the "lesser evils" defense, which dominates the Model Penal Code's account of justification.[43] But, he argues, this utilitarian balancing structure is also in evidence in many other justification defenses: police officers are entitled to effect lawful arrests where the harm caused by the officer's assault is less than the harm of allowing criminal suspects to evade justice;[44] citizens are entitled to kill in self-defense where the harm of killing the attacker is less than the harm of allowing the object of the attack to be killed; and so on.[45]

Finally, Robinson applies these principles to contemporary criminal law doctrine—specifically, to the "reasons requirement" that is a central part of the law of justifications throughout the English-speaking world. The traditional reasons requirement, he points out, ensures that some people whose conduct clearly prevents more harm than it causes will still be subject to criminal sanction. For example, someone who steals a bag purely for selfish gain but who later finds a bomb in it (which would almost certainly have killed many people had he not stolen it) and turns it in to the police is not entitled to a justification of lesser evils for his theft because he did not take the bag for the

42. According to this account, criminal prohibitions simply function as what Fred Schauer calls "rules of thumb." *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 4 (1991).

43. Indeed, the Model Penal Code simply calls their choice of evils defense "justification generally." MODEL PENAL CODE § 3.02 (1985).

44. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (holding that the use of deadly force to prevent the escape of an apparently unarmed suspected felon is permissible only when necessary to prevent the escape and when the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others). Similarly, the Canadian Criminal Code authorizes the use of force in preventing a breach of the peace so long as the actor "uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace." Canada Criminal Code, R.S.C., ch. C-46, § 30 (1985).

45. The Model Penal Code makes the same suggestion in its discussion of justification defenses generally. *See* MODEL PENAL CODE § 3.04 (1985) (providing that, in evaluating whether the "Use of Force in Self-Protection" is justifiable, the use of force must be balanced against the unlawful act being committed, and the actor must believe that the force used is necessary to protect himself from death or serious bodily harm. The defense will be denied if the actor knows he can avoid the use of force with complete safety by retreating or surrendering possession of property).

right reasons.[46] This, Robinson claims, violates the harm-minimization principle because it subjects an individual to criminal sanction even though he prevented much greater harm than he caused. Accordingly, he advocates for the elimination of the reasons requirement altogether.[47] He calls his favored model, which has no reasons requirement, a "deeds" account of justifications (though it might more accurately be called an "outcomes" account), as opposed to the orthodox "reasons" account.[48]

In sum, then, Paul Robinson is quite frank about his inability to explain why justification defenses have the structure that they do in present Anglo-American criminal law doctrine. Indeed, he suggests that the law applies a reasons requirement to justification defenses simply because it has confused the appropriate requirements for excuses (which also bear a reasons requirement) and justifications.[49] The proper basis upon which the law should exempt conduct from criminal prohibition, he argues, is that it prevents more harm than it causes. Anything that runs counter to this rationale (such as the reasons requirement) should be eliminated.[50]

2. *Fletcher and Gardner's Response*

Over the years, George Fletcher and John Gardner[51] have attacked the specifics of Robinson's revisionist account of justifications on numerous occasions, particularly its insistence on doing away with the reasons requirement.[52] Whereas Robinson assumes that courts should consider conduct to be justified whenever it prevents more harm than it causes, Fletcher and Gardner insist that the concept of justification is too complex to be fully

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46. This example is taken from the actual case of Motti Ashkenazi. *See* Paul H. Robinson, *The Bomb Thief and the Theory of Justification Defenses*, 8 CRIM. L.F. 387, 387-90 (1997).

47. *Id.* at 407-09.

48. Robinson, *supra* note 34, at 48.

49. Robinson, *supra* note 14, at 274-79.

50. *Id.* at 292.

51. It is hard to say that George Fletcher and John Gardner defend precisely the same account. Gardner's position is—quite explicitly—a retelling of Fletcher's with considerable emendations and new foundations in Joseph Raz's theories of authority and practical reasoning. In my retelling, I elide some of the differences between the two accounts for the sake of brevity. For more on the relationship between Fletcher's and Gardner's positions, see John Gardner, *Fletcher on Offences and Defences*, 39 TULSA L. REV. 817 (2004).

52. Gardner cites Kenneth Campbell as a major inspiration for the underpinnings of this view. *See* Gardner, *supra* note 21, at 107 n.8 (citing Kenneth Campbell, *Offence and Defence*, *in* CRIMINAL LAW AND JUSTICE 73 (I.H. Dennis ed., 1987)).

explained by Robinson's harm-minimization principle. Although they provide a subtle and, in many ways, convincing account of the concept of justification in practical reasoning, Fletcher and Gardner are not much closer than Robinson to being able to explain the structure of contemporary Anglo-American criminal law doctrine. And this is because they, too, have mistaken the proper institutional place of justification defenses.

Fletcher and Gardner begin their account of justifications in the same place as Robinson, with the observation that justifications are part of the criminal law's rules of conduct—rules that tell us what is, and what is not, permitted. And, like Robinson, Fletcher and Gardner insist that the question of whether or not a particular act is justified can only be answered ex post by the courts.[53] But unlike Robinson, they insist that courts should not deem conduct to be justified simply by balancing the harms it causes and averts. Whereas Robinson would assert that justified wrongdoing is on a moral par with ordinary, permitted conduct (for neither type of act causes more harm than it prevents), Fletcher and Gardner insist that there is a radical moral difference between the two: ordinary, permitted conduct is usually unobjectionable, they argue, but justified wrongdoing, while permissible, is nonetheless morally conflicted. Indeed, as Fletcher has argued, when we violate a prohibition and invade another's rights, "even if the right is trumped or overridden [by a justification], we should retain a certain sense of loss in witnessing the overriding of the right."[54] It is this element of moral conflict, both he and Gardner argue, that gives justification defenses their distinctive flavor. They thus argue that if we wish to understand why the criminal law is structured in terms of (ex ante, legislated) prohibitions and (ex post, court-controlled) justifications, we should put aside utilitarian assumptions that there is a formula that can simultaneously determine what is *wrongful*, what is *justified*, and what is *prohibited*. Once we do so, they suggest, we will be able to make sense of the particular function played by justification defenses.[55]

The fact is, Fletcher and Gardner insist, the structure of criminal law is complex because the structure of the underlying moral norms is itself complex. In criminal law, and everywhere else, the concept of *wrongdoing* is more basic than concepts of justification or prohibition. Fletcher and Gardner argue that if there are strong moral reasons not to do something, then it is appropriate to

53. It is this sense of "decision rule" that Fletcher is referring to when he states that justifications "function, it seems, as decision rules rather than conduct rules." *See* Fletcher, *supra* note 17, at 180.

54. George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 978 (1985).

55. JOHN GARDNER, *In Defence of Defences*, *in* OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 77, 77-82 (2007).

say that it is *wrong* to do it. The legislature reflects this fact by telling us to disregard any reasons—by providing what Gardner, following Joseph Raz, calls "exclusionary reasons"[56]—we might have to engage in such wrongful conduct. Criminal offense definitions, they say, provide exclusionary reasons not to consider any reasons for engaging in certain sorts of conduct. Once we establish the scope of wrongdoing through offense definitions, however, we still have not determined what conduct should be *prohibited*, all things considered, since there are many situations where an individual might still be justified in doing a *real wrong*.[57] For example, even though there are always good reasons not to kill another person (and therefore, they suggest, it is *always* wrong to do so), there are strong countervailing reasons why we should nevertheless be permitted to do so in situations of legitimate self-defense. The class of permitted conduct, then, includes not only nonwrongful conduct but also justified wrongdoing. The reason why we say that killing in self-defense is justified wrongdoing—rather than saying that it is not wrong at all—is that the reasons against killing, though outweighed, still exist and still have force.

The law's focus on the justified actor's reasons for action, Fletcher and Gardner argue, comes from this complex interplay of wrongdoing, justification, and prohibition. Although we are permitted to engage in wrongdoing under certain circumstances, they argue, we are allowed to do so only if we can show the court ex post facto that our conduct was in fact justified, all things considered. And this means not only that our conduct was *justifiable*—that is, that there were good reasons for *someone* to have done it in the circumstances—but that *we* were in fact *justified* in doing it under the circumstances. Therefore, there must not only have been good reason for us to have violated the prohibition as we did, but also this good reason must have been *our* reason for action at the time. Only if both of these sorts of reasons are present—what Gardner calls "guiding reasons" and "explanatory reasons"[58]—is our conduct in fact justified.

Fletcher's and Gardner's account is thus able to offer an explanation for why the reasons for action matter by means of their sophisticated account of justification in practical reasoning. But their account forces them to reject another core feature of justifications: their distinctive fault standard. Fletcher and Gardner's insistence that we are entitled to a justification only where there

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56. Gardner, *supra* note 51, at 822 (citing JOSEPH RAZ, PRACTICAL REASON AND NORMS 191 (2d ed. 1999)).

57. Gardner, in particular, puts great emphasis on the claim that justified wrongdoing is *really* wrong, even though justified—not just *prima facie* wrong. *See* Gardner, *supra* note 51, at 78.

58. Gardner, *supra* note 21, at 103 (citing JOSEPH RAZ, PRACTICAL REASON AND NORMS (2d ed. 1999)).

were both good reasons to act as we did (guiding reasons) and where we acted for those reasons (explanatory reasons) leads them to conclude with Robinson that justification defenses should always be subject to a fault standard of correctness, rather than of reasonable belief. As Fletcher puts it, "[j]ustification—harmony with the Right—is an objective phenomenon. Mere belief cannot generate a justification, however reasonable the belief might be."[59] But this conclusion is starkly at odds with settled doctrine: it would represent a seismic shift in the structure of criminal law if police officers were only held to be justified in making an arrest if they were *correct* in their belief that there was good reason to do so (rather than merely having reasonable and probable grounds for believing this), or if parents were only justified in disciplining their children if they were *correct* in their belief that disciplinary force was in their child's best interest in the particular case (rather that just having good reason to believe that this was so), and so on.[60] As Kent Greenawalt has pointed out, "[I]n the common law, it is universally said that police are justified in making arrests based on probable cause. . . . No one of whom I am aware has asserted that police are really only 'excused' in these situations."[61]

It is because they focus directly on the court's evaluation of the conduct ex post facto that Fletcher and Gardner, like Robinson, assume that the fault standard for justifications should be one of correctness. Courts should find that the conduct was genuinely justified, they assume, only if they determine that there was in fact good reason to do it. But if they were to focus instead, as I shall, on the intervening *decision*—the ex ante exercise of a legal power judging the conduct to be justified—they would see why a fault standard of reasonable belief is appropriate. It is only possible for the decision maker to determine whether conduct is justified in the circumstances based on the evidence available to him at the time. So long as there are reasonable and probable grounds to find that the conduct is justified, he should so find—and once this decision has been validly made, this renders the conduct justified for the purposes of criminal law.

In short, although Fletcher and Gardner are able to offer an explanation for the importance of the law's reasons requirement for justifications, their failure

59. Fletcher, *supra* note 54, at 972.

60. *Id.* at 973 ("American legislatures routinely equate reasonable belief in the existence of a justification with the actual existence of the justification.").

61. Kent Greenawalt, *Justifications, Excuses and a Model Penal Code for Democratic Societies*, 17 CRIM. JUST. ETHICS 14, 23 (1998). For a thoughtful and careful critique of Gardner's failure to explain the fault standard of reasonable belief for justifications, see Hamish Stewart, *The Role of Reasonableness in Self-Defence*, 14 CAN. J.L. & JURISPRUDENCE 317 (2003).

to recognize the place of decision-making powers still leaves them unable to explain the fault standard of reasonable belief. And in the end, they are almost as sharply at odds with Anglo-American criminal law doctrine as Robinson. Nevertheless, this examination of precisely how and why both the Fletcher/Gardner and the Robinson approaches failed points the way toward another, more promising account.

C. The Beginnings of a New Account: The Power To Decide

The two accounts of justifications that have dominated the theoretical debate over the past thirty years make similar mistakes about the institutional place of justification defenses in criminal law. Whereas Robinson rejects both the fault standard of reasonable belief and the reasons requirement for justifications, Fletcher and Gardner are able to explain the reasons requirement, but they are still unable to explain the fault standard of reasonable belief. In addition to these problems, however, both accounts are guilty of an even more serious failing, for neither of them can explain perhaps the most important feature of justification defenses: their deep connection to the power of certain individuals to make authoritative decisions about when they are justified to do what the criminal law generally prohibits.

Robinson's account, focused as it is on the minimization of harm, is unable to make any sense of the criminal law's focus on this power of certain legal actors to decide when otherwise prohibited conduct is justified. His account focuses exclusively on the consequences of particular acts, leaving no conceptual room for considerations of whose job it is to decide what conduct is legally justified. He cannot explain in anything but an ad hoc fashion why the law insists that police officers who have reasonable and probable grounds for a search should ever have to seek the say-so of a justice of the peace before proceeding[62] or why citizens should be entitled to do more when authorized by

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62. In the United States, a warrantless search is constitutionally suspect under the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 20 (1968) ("[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."). Despite this general principle, however, U.S. courts have recently deemed constitutional a wide variety of warrantless searches. Under the Federal Rules of Criminal Procedure, a federal magistrate may issue a warrant based on information communicated by telephone or other appropriate means, including by fax. There is no general policy of avoiding the use of such warrants. FED. R. CRIM. P. 41(d)(3)(A); *see also* United States v. Jones, 696 F.2d 479 (7th Cir. 1982) (affirming issuance of such a warrant).

In Canadian law, there is a presumption that a warrantless search is unreasonable and therefore a violation of section 8 of the Canadian Charter of Rights and Freedoms. *See* Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (Can.) (holding that section 8 of the Canadian

a peace officer than they may when acting on their own.[63] In all these cases and many more, the criminal law recognizes actors as justified only when the appropriate decision maker has exercised a legal power determining that their conduct is permissible. Any account of justifications that leaves this crucial element out of the mix is surely doomed to fail.

Fletcher and Gardner's position is no less vulnerable than Robinson's to a similar critique. Although they do not share his consequentialist assumption that justification defenses are designed to save all harm-minimizing conduct from criminal sanction, they too are unable to account for the crucial role of decision-making power in the structure of justifications. But as I shall argue, conduct is legally justified only if the appropriate person validly *decides* that it is justified. The mere fact that there are good reasons to engage in certain conduct is not enough to justify it, even if they are the actor's reasons for action. The appropriate decision maker must consider those reasons and make an authoritative decision on the matter before we can say that the conduct is in fact legally justified.

II. JUSTIFICATIONS AND THE POWER TO DECIDE

In this Part, I present an alternative account of justifications that emphasizes an aspect of the criminal law that has hitherto been largely ignored. I suggest that while legislative provisions and common law rules concerning justifications are ultimately concerned with regulating individual conduct, they do not do so by prohibiting and permitting conduct directly. Instead, they do so *indirectly*, by recognizing that certain individuals have the legal power to decide when it is justified to engage in conduct that is generally prohibited. Put another way, I argue that we cannot make sense of justification defenses simply as part of what H.L.A. Hart called the law's "duty-imposing rules"—rules that relieve us of certain duties imposed by criminal prohibitions. Instead, to

Charter of Rights and Freedoms requires prior authorization in the form of a warrant, except where obtaining a warrant is not feasible). There are very few exceptions to the presumption of unreasonableness; a warrantless search may be upheld if it is exercised in exigent circumstances, *see* Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (Can.); Eccles v. Bourque, [1975] 2 S.C.R. 739 (Can.), or as incident to arrest, *see* R. v. Caslake, [1998] 1 S.C.R. 51 (Can.); Cloutier v. Langlois, [1990] 1 S.C.R. 158 (Can.). But these powers have been limited by section 8 of the Canadian Charter of Rights and Freedoms. Situations in which police officers may arrest without a warrant are similarly limited. The Canadian Criminal Code also codifies a procedure through which police officers may request warrants by phone where it is impractical to appear in person before a justice of the peace. *See* Canada Criminal Code, R.S.C., ch. C-46, § 487.01 (West 2008).

63. *See supra* note 25 and accompanying text.

understand justifications, we must look—as Hart does—beyond those rules to an additional set of guidelines, what Hart terms "authority-conferring rules," which recognize that certain individuals have legal powers to change legal relations simply as a result of their valid decision to do so.[64]

A. Legal Powers, Decision Rules, and Conduct Rules

At the root of both the Robinson and the Fletcher/Gardner models of justifications is the same basic assumption about the sorts of legal rules that are at work in the criminal law. Meir Dan-Cohen sets out this basic assumption most clearly in one of the best-known articles in recent criminal law theory.[65] The legal rules at work in the criminal law, Dan-Cohen suggests, can be divided neatly into two groups, which he calls "decision rules" and "conduct rules," based on their subject matter and the audience to whom they are directed.[66] Whereas conduct rules are addressed to ordinary citizens and concern what conduct those citizens are and are not permitted to do, decision rules are addressed to state officials and concern how those officials should exercise their decision-making powers over citizens.

Some rules can fairly intuitively be placed into one category or another. Criminal offense definitions,[67] for example, clearly seem to be addressed to citizens and concern what conduct they are and are not permitted to do. Accordingly, basic rule-of-law concerns about fair notice to citizens are crucial here—for it is only fair to hold someone responsible for violating a rule of conduct if the rule has been made available to him. Excuse defenses such as duress, however, seem to be the result of decision rules.[68] It is implausible, Dan-Cohen points out, to think of these defenses as rules addressed to citizens, permitting them to commit criminal offenses so long as they do so under

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64. HART, *supra* note 15, at 39.

65. Of course, because Dan-Cohen's article only appeared in 1984 (many years after both Robinson and Fletcher set out their initial positions), I do not mean to suggest that the article itself informed the original formulations of their positions from the 1970s. Rather, I suggest only that he made explicit assumptions that underlie both of their positions. This seems plain from the fact that Robinson and Fletcher both use Dan-Cohen's language of "conduct rules" and "decision rules" in their post-1984 discussions. *See* Fletcher, *supra* note 17; Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990).

66. Dan-Cohen, *supra* note 15, at 627. This distinction follows the structure of Hart's distinction. *See supra* note 15 and accompanying text.

67. Dan-Cohen, *supra* note 15, at 648-50 (distinguishing between prohibitions—which serve as conduct rules—and some fault standards, which he believes function as decision rules).

68. *Id.* at 632-34.

duress. Rather, it makes better sense to say that the law instructs officials to excuse individuals who have committed offenses under duress. And since decision rules apply directly to officials, we should be less concerned to give notice of these rules to citizens and more concerned to give clear guidance to the relevant officials on precisely what these rules require them to do.

A court should proceed quite differently when faced with each of these two sorts of rules. When a court faces a decision rule such as whether to excuse the accused on grounds of duress, its task is very straightforward: simply *follow* the decision rule that tells it when to grant an excuse and when not to. There is a more complex interplay of rules at work when courts confront a conduct rule such as a criminal offense definition. Here, the court must (1) *follow* decision rules that instruct it in how it should (2) *use* a conduct rule as a yardstick by which to determine whether the actor violated that conduct rule.

Dan-Cohen's neat distinction between these two sorts of rules seems to animate both the Robinson and the Fletcher/Gardner models of justifications, but in a rather surprising fashion. On the one hand, all three agree that the subject matter of justifications is typical of conduct rules (for they all insist that justifications concern what citizens may and may not do). On the other hand, they all insist that justifications are addressed to courts, rather than to citizens (for they say that it is up to courts to determine what conduct is justified, ex post facto, based on a standard of correctness). So do they conclude that justifications are conduct rules or decision rules? George Fletcher's answer to this question has changed depending on the context.[69] When the focus of discussion was on the subject matter of justifications, he asserted that "the criteria of justification are supposed to function not only ex post as decision rules, but ex ante as conduct rules."[70] But when the focus was on the appropriate fault standard for justifications, he asserted that justifications "function, it seems, as decision rules rather than conduct rules."[71] Although Robinson and Gardner have not been as explicit in stating their equivocation on this issue, it seems that they are committed to following Fletcher on this point.

On my account, justification defenses can be fit into Dan-Cohen's conceptual apparatus of conduct rules and decision rules, but we must be very careful to find their proper place. While ordinary conduct rules, such as criminal prohibitions, are created by legislation ex ante, and ordinary decision

69. Mitch Berman points out this apparent contradiction in Fletcher's views. *See* Berman, *supra* note 8, at 37.

70. Fletcher, *supra* note 54, at 976.

71. Fletcher, *supra* note 17, at 180.

rules, such as those concerning excuses or denials of responsibility, govern the exercise of judicial decision making ex post, justification defenses seem to crystallize at some point in the middle. That is, a justification consists of both (a) a decision rule guiding the relevant decision maker's determination that a particular course of conduct is or is not justified under the circumstances; and (b) a resulting conduct rule telling the relevant actors that they are entitled to do what that decision maker validly held to be justified.

When a court is faced with a claim of justification, then, it is not easy to explain the nature of its task in terms of Dan-Cohen's decision rule/conduct rule dichotomy. The court's task is not a simple one-step process of following a decision rule, nor is it even a two-step process of following a decision rule instructing it to use a conduct rule to evaluate an actor's conduct. Rather, the court must follow a three-step process of reviewing the underlying decision making. According to this procedure, the court (1) follows a decision rule instructing it to (2) evaluate the decision of another decision maker concerning (3) what conduct was justified in the circumstances. That is, the court should not just use a conduct rule to evaluate the actor's conduct directly. Instead, it should evaluate the intervening decision (by asking whether the decision maker was within her jurisdiction in making the decision, or whether she drew a reasonable conclusion based on appropriate consideration of the relevant factors), and if it finds that the decision was valid, it should simply defer to that decision, whether or not it would have decided in the same way itself.

So, should we call justification defenses "conduct rules," then, or "decision rules"? It might be best to avoid this language altogether and to keep in mind that things are rather more complicated.[72]

B. Three Types of Decision Makers, Three Types of Justifications

So far, we have noted that at least some important justification defenses arise from the exercise of a legal power by authoritative decision makers. But do *all* justification defenses in Anglo-American criminal law fit this general pattern? In this Section, I will consider somewhat more systematically the broad sweep of justification defenses in Anglo-American criminal law to confirm that this model presents the most plausible account of generally recognized justification defenses.

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72. Several administrative law scholars have commented on the inability of the conduct rule/decision rule dichotomy to describe the place of administrative agencies exercising delegated decision-making authority. *See, e.g.*, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

I organize my review of justification defenses by separating them into three distinct groups according to the sort of relationship that exists between the decision maker and the party whose interests are subject to the decision. The first group consists of justifications where the decision maker owes a fiduciary duty toward the party whose interests are subject to her decision. Justifications in this group arise from such exercises of legal power as a parent's decision to use disciplinary force on his child, a doctor's decision to operate on an unconscious patient, and a ship captain's decision to jettison passenger property in a storm.

The second group comprises those justifications where the decision maker is a state official and the party whose interests are subject to the decision is one or more ordinary citizens. Justifications in this group arise from exercises of legal power such as the decision of a justice of the peace to authorize a police search, the decision of a court to authorize a corrections official to impose punishment, and the decision of a firefighter that the destruction of property is justified to help quell a blaze.

Finally, the third group of justifications includes those where both the decision maker and the person whose interests are subject to the decision are ordinary citizens. Examples of this third category include the decision of a citizen that she is justified in killing in self-defense, the decision that she is justified in causing a "lesser evil" to avoid a greater one, or the decision that she is justified in performing a citizen's arrest.

1. Private Fiduciaries

The most neglected category of justification defenses in recent debates is made up of those that arise from the exercise of a legal power by a private fiduciary.[73] George Fletcher simply leaves them out of his taxonomy of justifications altogether,[74] and Paul Robinson assimilates them into the quite different class of "public authority" justifications.[75] When we look closely,

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73. Ernest Weinrib explains the basic structure of the fiduciary relation as follows: "Two elements thus form the core of the fiduciary concept and these elements can also serve to delineate its frontiers. First, the fiduciary must have scope for the exercise of discretion, and, second, this discretion must be capable of affecting the legal position of the principal." Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 4 (1975). For a very thoughtful and subtle investigation of the fiduciary relation and its role in private law, see Paul Baron Miller, Essays Toward a Theory of Fiduciary Law (2008) (unpublished Ph.D. dissertation, University of Toronto) (on file with The Yale Law Journal).

74. FLETCHER, *supra* note 31, at 770-98.

75. Robinson, *supra* note 35, at 218-19.

however, we find that they make up an important and distinct class of justification defenses. There are a great many occasions where the criminal law treats individuals as justified in interfering with a certain individual's rights because the person standing in the position of fiduciary to that rights-holder has decided that it is justified to interfere in that way. The trouble is that most commentators either explain these justifications in a way that conceals the crucial role of decision by the fiduciary, or they ignore them altogether.[76]

The justification of disciplinary force that is open to parents and those acting *in loco parentis* is well known, but it is usually explained in a way that ignores the crucial role of decision-making power. Paul Robinson's treatment is typical in this respect. He explains the general structure of justification defenses in the following way, leaving out any role for decision making: "All justifications have the same internal structure: triggering conditions permit a necessary and proportional response. The triggering conditions are the circumstances which must exist before the actor will be eligible to act under a justification."[77] According to this way of thinking, parental use of disciplinary force can be explained without recourse to the exercise of decision-making power. Rather, under this view, when a child behaves in a manner that merits the use of disciplinary force, that conduct serves as a "triggering condition" that permits a necessary and proportional response. When we think of the use of disciplinary force in this way, justifications seem to operate as simple exceptions to the general prohibition against the use of force.[78] But such a view seems to suggest that the law somehow affords *less* protection to children from their parents than it does to ordinary citizens, for under this theory, parents appear to be subject to fewer prohibitions concerning the use of force toward their children than they are toward total strangers. This view seems jarring,

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76. Andrew Ashworth is one important exception to this tendency. Although he suggests that the rationale for this justification of disciplinary force may reside in some form of delegation by the state of its power to punish, he also points out that it might also have an independent basis in the parent's power to determine, within limits, what is in the "best interests" of the child. *See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 150 (5th ed. 2006).

77. Robinson, *supra* note 35, at 216.

78. Indeed, it is not surprising that Robinson, who sees justifications as simple permissions arising from "triggering conditions," also seeks to do away with the reasons requirement. For so long as the proper conditions existed and our response was a necessary and proportionate response, why should it matter what our *reasons* for action were? As I shall explore in greater detail in Subsection II.B.3 below, the element of decision is most consistent with the reasons requirement through justification defenses.

however, in light of the fact that parents generally owe *greater* duties to their children than they do to strangers.[79]

A better way to understand the justification of disciplinary force that is available to parents is to think of it as arising from the exercise of decision-making power by parents over their children. That is, just as we recognize that parents have the legal power to decide their child's name and may make decisions about the disposition of their child's property,[80] they may also decide when it is appropriate to use otherwise prohibited force to discipline the child. The parent is not just someone who is sometimes relieved of the law's prohibitions against violence. Rather, the parent is someone whom the law entrusts with important decisions about the child's welfare—and sometimes the exercise of that decision-making power results in a determination that the use of disciplinary force toward the child is justified in the circumstances. It is the parent's valid exercise of her legal power over her child's person and interests—deciding that her use of force on her child is appropriate in the circumstances—that renders that conduct lawful.

When we look more closely, we find that there are a great many justification defenses that arise from the exercise of legal powers by fiduciaries over beneficiaries. Unlike the parental justification of disciplinary force, however, most of these justification defenses are simply ignored altogether by criminal law scholars. Fiduciary relationships arise between parent and child by operation of law,[81] but there are a great many other fiduciary relationships that arise either through unilateral undertaking[82] or by agreement.[83] For example, it is by unilateral undertaking that doctors who provide emergency medical treatment enter into a fiduciary relationship with their patients. By contrast, it is by means of bilateral agreement that doctors and patients (in nonemergency

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79. The law imposes a great many positive obligations on private fiduciaries that it does not impose on others. For example, parents owe a positive obligation to their children and to their spouse to provide them with the necessities of life. *See* Criminal Code, R.S.C., ch. C-46, § 215 (1985) (Can.); Eversley v. State, 748 So. 2d 963 (Fla. 1999).

80. 1 ENGLISH PRIVATE LAW 114-15 (Peter Birks ed., 2000).

81. *See, e.g.*, M. (K.) v. M. (H.), 3 S.C.R. 6, 10 (1992) (Can.) ("The relationship between parent and child is fiduciary in nature . . . .").

82. Lord Browne-Wilkinson suggested that the paradigmatic fiduciary relationship is established "where one party, A, has assumed to act in relation to the property or affairs of another, B." White v. Jones, (1995) 2 A.C. 207, 271 (H.L.) (Eng.).

83. Although this agreement might exist within a contract, it need not do so. *See* Stone v. Davis, 419 N.E.2d 1094, 1098 (Ohio 1981) ("A fiduciary relationship need not be created by contract; it may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed." (citation omitted)).

circumstances), lawyers and clients, captains and passengers of a ship,[84] settlers of a trust and trustee, and directors and shareholders of a corporation enter into fiduciary relationships.[85]

In all these cases, the criminal law treats conduct that would otherwise be criminal as justified because of the exercise of legal power by the relevant decision maker: doctors who are unable to obtain consent from their patients (whether because they are unconscious or for other reasons) are still justified in interfering with a patient's bodily integrity without consent insofar as this follows from their decision that a particular medical procedure would be justified;[86] similarly, a lawyer is entitled to interfere with the financial affairs of his client so long as he has the appropriate power of attorney over those assets and he is acting pursuant to his decision that his conduct is in his client's best interests; and so on.

The independent significance of legal powers in the structure of these justifications is most clearly evident in situations where the person exercising

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84. *See* United States v. Holmes, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383) ("The sailors and passengers, in fact, cannot be regarded as in equal positions. The sailor (to use the language of a distinguished writer) owes more benevolence to another than to himself. He is bound to set a greater value on the life of others than on his own. And while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even "the law of necessity" justifies not the sailor who takes it from him.").

85. Katz Corp. v. T.H. Canty & Co., 362 A.2d 975, 978-79 (Conn. 1975) ("An officer and director occupies a fiduciary relationship to the corporation and its stockholders." (citation omitted)).

86. In the United States, the Model Penal Code provides that use of force by a doctor is justified in "an emergency when the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent." MODEL PENAL CODE § 3.08(4) (1985).

In Canada, the Ontario Health Care Consent Act states, "In deciding what the incapable person's best interests are, the person who gives or refuses consent on his or her behalf shall take into consideration" the patient's best interests. Ontario Health Care Consent Act of 1996, S.O., ch. 2, sched. A, § 21(2) (1996) (Can.). The statute then provides several factors that ought to be weighed in determining "best interests," *id.*, and authorizes doctors to administer treatment without consent in an emergency and where "steps that are reasonable in the circumstances" have been taken to obtain consent, *id.* § 25(3)(c). In such an emergency, a health practitioner may administer treatment if the substitute decision maker fails to comply with section 21. *See* Marshall v. Curry, [1933] 3 D.L.R. 260 (Can. Nova Scotia Sup. Ct.) (holding that a surgeon may, in the course of an operation, take action he believes reasonably necessary to preserve the patient's life or health).

In the United Kingdom, a "best interests" defense of medical necessity has been developed through judge-made jurisprudence. *See, e.g.*, R. v. Bournewood Cmty. & Mental Health NHS Trust, (1999) 1 A.C. 458 (H.L.) (Eng.); *In re* F., (1990) 2 A.C. 1 (H.L.) (Eng.).

the legal power is different from the person engaged in the justified conduct.[87] For example, although it is generally the ship's captain who has the legal power to make *decisions* about what it is justified to do with her passengers' property and persons in a storm, this does not mean she will herself carry out the justified conduct. Indeed, it will usually be her crew (once she has made her decision, of course) who jettison cargo or force passengers onto lifeboats. Similarly, an incompetent patient's family members are usually the ones to exercise the legal power authorizing medical treatment[88]—but it is doctors, nurses, and other medical professionals who then administer the course of treatment. Once again, the crucial element in the justification of all such conduct is the valid decision by an authorized individual.

This analysis, which puts the decision-making power over what conduct is justified at the center of our account of justifications, makes much better sense of the three basic structural features of justifications doctrine in all these cases than either the Robinson or the Fletcher/Gardner alternative. Unlike Robinson's account, the argument put forth here explains the importance of the law's reasons requirement for justifications by suggesting that it is the strict limits on the authorized person's legal decision-making power that accounts for the importance of the actor's reasons for action. Captains do not have unbridled discretion to authorize the jettisoning of cargo for any reason they wish. Rather, because of the fiduciary duty they owe their passengers, they only have the authority to exercise their powers in the best interests of their passengers. Accordingly, they are only authorized to permit specific acts that further the best interests of their passengers, such as saving the ship from

87. But Alon Harel argues that these two tasks may not always be separable. He suggests that there is an intrinsic relationship between the parental role and the imposition of sanctions just as there is an intrinsic relationship between the state's role and the imposition of criminal punishment. In both cases, he argues, the decision maker should also be the one to impose the punishment. *See* Alon Harel, *Why Only the State May Punish: On the Vices of Privately-Inflicted Sanctions for Wrongdoing*, 14 LEGAL THEORY (forthcoming 2008).

88. In some cases, however, parents' exercise of decision-making power has been ruled invalid. This was the case in the famous English case of *In re A (Children) (Conjoined Twins: Surgical Separation)*, [2001] Fam. 147 (A.C.) (Eng.). In that case, the hospital applied to the court to seek authorization, against the wishes of the parents, for a surgical procedure that would separate a pair of conjoined twins and would almost certainly lead to the death of one of them. *Id.* In a small number of cases, the court exercises the decision-making power over medical issues itself. See, for example, *R. v. Bournewood Cmty. & Mental Health NHS Trust,* (1999) 1 A.C. 458 (H.L.) (Eng.), where doctors sought leave of the court to sterilize a mentally incompetent but sexually active patient.

sinking.[89] Similarly, parents do not have absolute discretion to decide to assault their children for any reason they like. The scope of their fiduciary duty toward their children means that they are authorized only to decide to do so for the purpose of disciplining their children.

Second, unlike both Robinson's view and the Fletcher/Gardner view, this account is also able to explain why justification defenses are subject to a fault standard of reasonable belief. Because justification defenses are always concerned with the exercise of a legal power, the fault standard that is of concern to us is the one that governs the exercise of that power. The parent's decision to assault his child for the purpose of discipline must be reasonable based on all the facts available to him at the time of his decision. But we cannot ask that he be able to anticipate facts that only become available later, at the time of trial (as would be required by a correctness standard). The same is true of the captain's decision to permit the jettisoning of cargo, the doctor's decision to order emergency medical treatment, and so on. The net effect of all this is that so long as the authorizing party's decision is based on reasonable beliefs about the relevant facts, then that person's decision to permit the conduct is a valid one.

2. *Public Officials*

It is possible to make sense of justifications arising from the exercise of decision-making power by public officials in much the same way as those that arise from the decisions of private fiduciaries. In order to do so, however, we need to make a few minor adjustments to our analysis. Whereas private fiduciaries are only entitled to make decisions about justified interferences with the interests of their specific charges (parents over their children, family members over their incompetent relatives, or captains over their passengers), public officials are entitled to make decisions about when it is justified to interfere with the interests of many more people. Generally speaking, a justice of the peace may grant a search warrant over the property of *anyone* within his jurisdiction so long as there are appropriate grounds for doing so. And a police

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89. Indeed, the duty of fiduciaries to treat all beneficiaries of the same class equally would also explain the court's insistence on fair procedures for the determination of whom to throw overboard in *Holmes*, 26 F. Cas. at 367. As the court put it:

> When . . . a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode . . . for selection of the victim . . . . In no other than this or some like way are those having equal rights put upon an equal footing, and in no other way is it possible to guard against partiality . . . .

officer may determine that it is appropriate for him to arrest *any* person within his jurisdiction without a warrant under the appropriate circumstances. This second class of justification defenses, therefore, is still narrowly limited in the class of persons who may exercise the relevant legal power—specific state officials—but the class of persons whose interests are subject to that decision-making power is considerably broader—usually including anyone within the decision maker's jurisdiction.[90]

Just as justification defenses claimed by private fiduciaries make it possible for them to carry out their fiduciary duties toward their charges, so justification defenses make it possible for public officials to carry out their official duties toward the citizenry. Indeed, without justification defenses, state officials would be quite unable to perform their most basic functions. Markus Dubber points out that from a different point of view, a list of police functions looks like a list of serious criminal offenses:

> The statutory threat of punishment looks suspiciously like "menacing," wiretapping like "eavesdropping," entrapment like "solicitation" (or even "conspiracy"), searching a suspect's house like "trespass," searching (or frisking) the suspect herself like "assault," arresting her like "battery," seizing her property like "larceny," a drug bust like "possession of narcotics" (with or without intent to distribute), indicting—and convicting—a defendant like "defamation," imprisoning the convict like "false imprisonment," and executing her like "homicide" ("murder," to be precise).[91]

The way the law recognizes that police officers are entitled to effect arrests is to say they are *justified* in doing what would otherwise constitute an assault; they are entitled to search private places because they are *justified* in doing what would otherwise constitute a criminal trespass; they are entitled to engage in otherwise criminal conduct as part of a "sting" operation because they are *justified* in doing so; and so on.

This parallel between justifications claimed by state officials and those claimed by private fiduciaries is somewhat surprising. Private fiduciaries are

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90. These questions of jurisdiction quickly become complicated: although the person usually (but not always) must be present in the jurisdiction in order to be subject to the state official's decision-making power, he often need not be a citizen of that country. For example, border guards may be permitted to apprehend illegal aliens, and police officers may be permitted to arrest noncitizen criminal suspects.

91. Markus Dirk Dubber, A Political Theory of Criminal Law: Autonomy and the Legitimacy of State Punishment 1-2 (Mar. 15, 2004) (unpublished manuscript), *available at* http://ssrn.com/abstract=529522.

entitled to exercise legal powers over the interests of those in their charge, but they are bound by law to exercise those powers only for the benefit of those in their charge. State officials are similarly entitled to exercise legal powers only over those within their jurisdiction, but for the benefit of whom, exactly? Criminal law doctrine does not usually make explicit the interests that public officials must take into consideration when exercising these legal powers. Instead, most commonly, officials are simply granted the power to make particular decisions based on specific criteria: for example, they may permit an arrest where there are reasonable and probable grounds to believe that the individual is guilty of an offense of sufficient seriousness.[92] For now, I shall simply assert without arguing that the criminal law sets out these decision-making powers in a way that may plausibly be interpreted as the expression of a quasi-fiduciary duty owed by public officials to the public at large (or to a particular sub-class of the public). I shall return to the question of the quasi-fiduciary nature of the relationship that obtains between public officials and the citizenry in Part III.

Once again, the crucial role of legal decision-making powers in these justifications is most obvious in those cases where there is a clear division of labor between those officials who exercise legal powers (such as a judge or a justice of the peace who grants search or arrest warrants) and those who carry out the justified conduct (such as the police officers who are armed with such warrants).[93] In all these cases, the scope of the justification available to the actor is defined quite precisely by the terms of her warrant.[94] In other cases, however, the division of labor is still present but not quite as obvious, such as when a junior police officer must defer to a senior officer's judgment in making an arrest or conducting an investigation. Sometimes police officers have the power to decide what conduct ordinary citizens are justified in carrying out in order to deal with emergency situations.[95] In all these cases, there is still a

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92. *See supra* note 24.

93. *Id.*

94. *See* Walter v. United States, 447 U.S. 649, 656 (1980) (Stevens, J., plurality opinion) ("When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization.").

95. *See* MODEL PENAL CODE § 3.07(1) (1985) (authorizing the use of force to effect an arrest by the actor making or assisting in making that arrest); *id.* § 3.07(4) (authorizing the use of force by a private person assisting in an unlawful arrest); *see also* Canada Criminal Code, R.S.C., ch. C-46, § 25(1) (1985) (stating that everyone who is required or authorized by law to do anything in the administration or enforcement of the law, including a private person, is justified in doing whatever is required, so long as he acts reasonably); *id.* § 25.1(10) (similarly stating that "[a] person who commits an act or omission that would otherwise constitute an offence is justified in committing it if: (a) a public officer directs him or her to

division of labor between the exercise of decision-making powers and the carrying out of the justified conduct.

In many other cases, however, the individual making the decision and the individual carrying out the justified conduct are one and the same. When police officers execute warrantless arrests[96] or when they use force to prevent the commission of an offense,[97] they both decide that the conduct is justified and carry out that justified conduct. Although the division of labor between decision making and carrying out the conduct is not quite so obvious, it is still present in the hierarchical structure of state decision making that lurks in the background of such situations. In the state, as in any bureaucratic organization,[98] the general impetus is to ensure that legal decision making powers are exercised at the highest ranks—even though it is often much lower-ranked individuals who carry out the justified conduct. Because the justice of the peace sits higher in the state decision-making hierarchy than a police officer, the officer must ask the justice of the peace for a warrant to proceed with a search or an arrest unless it would be impracticable under the circumstances to wait for permission.[99] The same logic explains why the power of lower-ranking officials is usually narrower than that accorded to their superiors in the hierarchy.[100] Only in cases where it is impracticable to divide labor in this way do the two roles—deciding what is justified and carrying out the justified conduct—actually overlap. Even though police officers have the power to decide when it is justified to arrest or to search in some cases, this is only, *faute de mieux*, because no more senior state official is available to do so in their place.

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commit that act or omission and the person believes, on reasonable grounds, that the public officer has the authority to give that direction"); *id.* § 27 (authorizing the use of force to prevent the commission of an offense); Criminal Law Act, 1967, c. 58, § 3(1) (Eng.) (justifying "such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large" by any person).

96. *See* Canada Criminal Code, R.S.C., ch. C-46, §§ 31, 495 (1985).

97. *Id.* §§ 25(1), 25(4), 30.

98. The classic text on the theory of bureaucracy is MAX WEBER, ECONOMY AND SOCIETY (1968).

99. *See supra* note 62 and accompanying text.

100. There are also a number of provisions that require police officers to defer to the decisions of their superiors in order to engage in justified conduct. In Canada, many of these provisions are to be found in an omnibus justification provision set out in section 25.1 of the Criminal Code of Canada. Subsection (3) of that provision empowers senior officials such as the minister of public safety and emergency preparedness to designate individuals to carry out otherwise prohibited conduct. Subsection (6) empowers "senior official[s]" to determine what conduct is justified for public officers to undertake.

As with justifications claimed by private fiduciaries, this legal power-based account of justifications is best able to explain why justifications have both a reasons requirement and a fault standard of reasonable belief. Once again, the reasons requirement is a result of the limitations on the power of state officials to permit violations of general criminal prohibitions. Unlike private persons consenting to the use of their own bodies and interests, officials cannot exercise their legal powers arbitrarily.[101] For this reason, when public officials deem a particular course of conduct to be justified, they must always be in a position to explain this judgment in terms of specific, legally recognized justifying purposes: police officers are entitled to invade another's privacy *as part of a search*, they are entitled to assault citizens *while arresting them*, and so on. Accordingly, such permissions do not permit just any invasion of privacy or any assault, but only those that (wholly or partially) *constitute* a search or an arrest. Second, this powers-based approach is also best able to explain the fault standard of reasonable belief for justifications. The police officer who makes an arrest without a warrant is justified in doing so if and only if his decision that the arrest was justified was made on the basis of reasonable and probable grounds.

3. *Ordinary Citizens with Public Powers*

Finally, the justification defenses that have attracted by far the most attention among criminal law theorists are those that arise from the exercise of decision-making powers by ordinary citizens[102] caught in extraordinary situations, such as self-defense (understood broadly to include not only defense of self but also defense of property and defense of others), citizen's arrest, and (where the defense exists) lesser evils. If we wish to show that our account truly applies to *all* justification defenses, then it will be crucial—but also most challenging—to show that it applies even in this context. It is much more difficult to demonstrate the connection of this group of justification defenses to the exercise of decision-making power than it is for the other two groups, for two reasons. First, there is *never* an actual division of labor here between those individuals whose job it is to decide what conduct is justified

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101. We shall return to the rationale for this limitation on the exercise of legal powers by state officials, *see infra* Part III, but it is clearly a general feature of present doctrine that they are answerable for the exercises of legal powers.

102. I call them "ordinary citizens" only to distinguish them from individuals who either act as private fiduciaries or who act as public officials. But they need not be "ordinary" in any other sense. As I shall discuss in greater detail below, many—indeed, perhaps even most—of these "ordinary citizens" are in fact private security personnel.

under the circumstances and those whose job it is to carry out that justified conduct. As a result, it is more difficult to identify the exercise of decision-making power. Second, it is a good deal more difficult to explain why some ordinary citizens, rather than any others, should be the ones to decide when it is justified to interfere with the interests of others.

Although these two problems are particularly acute among justifications in this category, we have encountered them both already elsewhere. In a number of situations, we have already found that one and the same person both decides whether a particular course of conduct is justified and also carries it out. In the case of parents and their children, for example, it is generally the parent who both decides what conduct is justified in the circumstances and then also carries out that conduct. The same is true of doctors deciding when to operate in an emergency and then carrying out the operation, and of police constables making a warrantless arrest and many other situations. There is no reason in principle why the same person cannot perform both functions.

We have also encountered situations where individuals who do not have significant decision-making powers are entitled to decide what conduct is justified in certain circumstances only because other, better qualified decision makers are temporarily unavailable. For example, the police officer making an arrest without a warrant is entitled to make the decision that the arrest is justified only because recourse to a justice of the peace is impracticable under the circumstances. If we think of ordinary citizens as the lowest ranks of officialdom (below even the police constable), then the structure of justifications such as self-defense, lesser evils, and citizen's arrest is most readily apparent. Private citizens do not have a standing power to make these decisions; rather, they are entitled to decide when it is appropriate to use force in self-defense, to prevent a greater evil, or to effect an arrest only where recourse to state officials is impracticable. Indeed, it is a generally accepted matter of criminal law doctrine that private citizens are not entitled to use force in self-defense, to effect a citizen's arrest, or to avoid the greater evil if someone closer to the center of state decision-making authority was available to make that determination.[103] This is just another way of stating the law's imminence limit on justifications that are available to ordinary citizens.[104]

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103. However, as Clifford Rosky points out, in the United States, "[p]rivate police are often 'deputized,' or given general public police authority, by federal, state, and local governments." Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 898 (2004) (citing, as examples, Georgia and South Carolina statutes).

104. Although most U.S. jurisdictions focus on the temporal imminence of an attack in the law of self-defense, the Supreme Court of Canada has emphasized that the more basic concern

That is, just as the police officer must defer to the justice of the peace's decision whether or not to perform a search or an arrest whenever it is practicable to do so, the ordinary citizen must similarly defer to the police officer's decision. Where it is open to a citizen to withdraw from a situation and seek the assistance of a police officer, she is not entitled to make any decisions about whether it is permissible to use force in self-defense or to prevent the greater evil.[105] Finally, the scope of the legal powers available to ordinary citizens is consistently narrower than those available to justices of the peace and narrower even than those available to police officers.[106] In other words, citizens, like police officers, must defer whenever possible to those who are higher up the state's decision-making hierarchy than themselves. Indeed, there are even echoes of this hierarchical structure of decision-making power in the Model Penal Code's insistence that the lesser evils justification is open to citizens only where the legislature has not already specifically decided otherwise.[107]

(reflected in the Canadian statutory language) is not temporal imminence for its own sake, but rather the absence of any lawful alternative course of action. *See* R. v. Lavallée, [1990] 1 S.C.R. 852, 883-91 (Can.) (citing Canada Criminal Code, R.S.C., ch. C-46, § 34(2) (1985)). On this view, it is therefore a matter of some urgency to ask when the police can be counted on to provide such a lawful alternative. This has been an issue in cases involving battered women. *See, e.g.*, R. v. Lavallée, [1990] 1 S.C.R. 852 (Can.). It has also arisen in countries where there is little or no rule of law. *See, e.g.*, R. v. Ruzic, [2001] 1 S.C.R. 687 (Can.).

105. Indeed, in the United States, this feature of the defense of necessity is quite strictly construed. The defense was famously denied to New York prison inmates who captured guards and civilians as hostages and threatened to assault and kill them, in protest against allegedly deplorable prison conditions. In denying the defense, the court held that the injuries feared were not imminent, and therefore, the prisoners had legal alternatives through which to air their grievances. *See* People v. Brown, 333 N.Y.S.2d 342 (Sup. Ct. 1972). An Indiana court denied the defense to a juvenile who claimed he brought a handgun to school in order to protect himself from threatened retaliation by a gang of which he had formerly been a member. The court held that there had been reasonable, legal alternatives that the defendant had bypassed, such as seeking help from his parents, informing the police, or requesting an absence from school. *See* Dozier v. State, 709 N.E.2d 27 (Ind. Ct. App. 1999). Further, the defense of necessity has been universally denied in cases of civil disobedience and political protest because of the availability of legal alternatives. *See, e.g.*, United States v. Schoon, 971 F.2d 193 (9th Cir. 1991); State v. Cozzens, 490 N.W.2d 184 (Neb. 1992); State v. Warshow, 410 A.2d 1000 (Vt. 1980).

106. See *supra* note 25 and accompanying text.

107. MODEL PENAL CODE § 3.02(1) (1981) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.").

As with both of the other two classes of justification defenses, this powers-based account makes the best sense of both the reasons requirement and the fault standard of reasonable belief. The reasons requirement flows from the fact that before undertaking the justified conduct, the actor must first have *decided* that his course of action was justified under the circumstances. In order to have rendered that decision, he must first have considered the reasons that would justify his course of action. We can also make best sense of the fault standard of reasonable belief when we keep in mind the crucial role of decision-making power in the structure of these justification defenses. The law recognizes conduct as justified so long as the relevant person has validly decided that it is justified, based on the facts available to him in the circumstances. It would be absurd to criticize such a decision on the basis of facts that only became evident later, at the time of trial. And since conduct is justified so long as the appropriate decision maker validly held it to be justified at the time, the appropriate standard to apply is one of reasonable belief at the time rather than correctness after the fact.

C. Summary

Justification defenses generally—whether they concern private fiduciaries, public officials, or even private citizens caught in extraordinary situations—all exhibit the same basic juridical structure. In each case, they involve the exercise of a legal power by an authorized individual deciding whether or not otherwise prohibited conduct is justified under the circumstances. The exercise of a legal power by private fiduciaries over the interests of the beneficiary is subject to the strict standards of the fiduciary relation: the fiduciary may only do so in the interests of the beneficiary. The exercise of legal power by public officials over the interests of those within their jurisdiction is also subject to a number of important limits that are set out piecemeal in the criminal law. Finally, the exercise of legal power by ordinary citizens over the interests of others more generally is subject to constraints similar to those of the public official. The only significant difference is that the powers available to private citizens are narrower even than those available to the lowest-ranking public official, for they are available only when the private citizen is unable to seek assistance from the authorities.

III. JUSTIFYING JUSTIFICATIONS

My argument so far has been limited to a claim about the conceptual structure of Anglo-American criminal law doctrine and the institutional division of labor that it sets out. I have argued that, contrary to the received

wisdom on this issue, it is neither the legislature nor the trial court that determines what conduct is justified. Instead, the criminal law recognizes a third class of persons—decision makers—who have the legal power to decide when it is justified to do what the criminal law generally prohibits. Sometimes, those decision makers are judges or justices of the peace issuing warrants; sometimes they are public officials such as police officers or firefighters; sometimes they are private fiduciaries such as parents or doctors; and sometimes they are just ordinary citizens caught in extraordinary situations. But whoever those decision makers may be in any particular case, they play a crucial role in the structure of justification defenses. The legislature does not set out precisely what conduct is justified in advance; instead, it relies on these power-holders to decide that question based on their appreciation of the circumstances. Similarly, trial courts do not decide whether conduct is justified; instead, they simply review the authoritative decisions of these power-holders on that question.

A. Reorienting the Normative Debate

Now, if my claims about conceptual structure and institutional division of labor are correct, what normative consequences follow? Indeed, do any normative consequences follow at all? Surely it is criminal law doctrine that should change in response to normative argument, not the other way around. But the point here is not that we must adjust our normative arguments so that they support the structure of criminal law doctrine exactly as it is. Rather, the point is that our normative concerns with a particular doctrine should vary with our understanding of precisely what role that doctrine plays within the larger enterprise of criminal law. As I shall suggest in this final Part, once we place justification defenses in their appropriate institutional setting, we find that they are the battleground for a quite different set of normative issues than the ones that have occupied criminal law theorists over the past thirty years.

1. Different Structure, Different Norms

The sorts of normative issues we focus on in a particular area usually follow from our assumptions about the conceptual structure and institutional division of labor that is at work in that area.[108] This tight connection between

108. As I have tried to make clear in my discussion of Robinson, Fletcher, and Gardner, *see supra* Section I.B, all three of these commentators in fact base much of their argument on certain *assumptions* about institutional division of labor in criminal law. I do not mean to suggest, however, that *they* see themselves as making an argument based on institutional division of

normative and descriptive aspects of criminal law theory is evident in both of the accounts of justifications we have surveyed. Despite their differences on the substantive test for justifications, Robinson, Fletcher, and Gardner are in agreement that the courts are the appropriate institutional actors to determine whether a particular course of action was justified. Although they insist that justifications concern what conduct ordinary citizens may or may not do, they all agree that we can only know for sure whether a course of action is justified ex post facto—that is, once a trial court has examined all the facts available to it and made its determination. Robinson, Fletcher, and Gardner therefore focus their energies debating the appropriate substantive standard courts should apply in making such ex post evaluations.

My argument about the conceptual structure of justification defenses and the resulting institutional division of labor leads to a somewhat different set of normative concerns. Because I argue that it is individual decision makers, not courts, who determine when conduct is justified, I argue that it is a mistake for criminal law theorists to focus exclusively on the substantive norms that should guide judicial decision making on these matters. Instead, they should pay more careful attention to the subtle and sometimes complex ways in which the criminal law allocates decision-making authority. Indeed, by shifting the focus of attention away from the substantive norms by which we determine whether conduct is justified toward the authority of decision makers to *decide* what nonideal conduct is and is not permissible as a means of preserving or restoring ideal conditions, my argument raises questions of legitimacy and power that extend well beyond the debate about justification defenses. The philosopher John Searle expresses this more general point as follows:

> One of the great illusions of the era is that "Power grows out of the barrel of a gun." In fact power grows out of organizations, i.e., systematic arrangements of status-functions. And in such organizations the unfortunate person with a gun is likely to be among the least powerful and the most exposed to danger. The real power resides with the person who sits at a desk and makes noises through his or her mouth and marks on paper. Such people typically have no weapons other than, at most, a ceremonial pistol and a sword for dress occasions.[109]

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labor. One of the advantages of my account is that it makes explicit the institutional division of labor that is at work in criminal law in a way that other accounts do not.

109. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 117-18 (1995).

That is, criminal law theorists who are interested in the important questions of power and legitimacy should spend far less time worrying about what low-level actors (such as beat cops, border guards, corrections officials, and ordinary citizens) do when they are engaged in justified conduct. Instead, they should spend time focusing on how power holders (such as justices of the peace, police officers, and even private citizens) exercise their discretion when they decide what generally prohibited conduct is and is not justified under the circumstances.

Although the normative questions that arise under my account of justification defenses are quite different from the ones that criminal law theorists have focused on over the years, they are not altogether new. Indeed, they are some of the most enduring normative issues that we face anywhere in the legal system. These issues can be generalized into three overarching questions. First, we are concerned with the question of *authority*: on what grounds can we say that these decision makers have the authority over others to decide when it is justified to interfere with their interests? Second, we are concerned with the problem of *discretion*: how much discretion should power-holders have to decide when it is justified to interfere with the interests of others? And third, we are concerned with the problem of *legality*: how can courts render the exercise of discretion by these decision makers consistent with the rule of law? I do not promise even to scratch the surface of these three deep and ancient problems. In what follows, I mean only to highlight some of the ways in which they arise in the context of justification defenses and to show how these problems are crucially related to issues in a few other areas of the law. But before we turn to these questions (in Section III.B), it is worthwhile to pause for a moment to consider the role that justification defenses play within the larger system of criminal law.

2. *Consent and Individual Autonomy*

Justifications are not the only place in the criminal law where individuals' decisions determine the scope of permissible conduct. The power of individuals to consent to interferences with their own interests[110] is probably

110. This qualification is crucial. Many justification defenses crucially involve what is usually called the granting of consent—but not to interferences with *our own* interests. We often say that a justice of the peace *consents* to a search or an arrest, for example, or a family member *consents* to the withdrawal of treatment from her terminally ill relative. But in all cases of justifications, the legal power is exercised over the interests *of another*. And it is precisely because the legal power is exercised over the rights of others that it requires justification. For

the most familiar example of this sort of phenomenon.[111] But, as Peter Westen makes clear, consent does not operate as a justification defense but as a negative element of many offenses. He explains the situation as follows:

> Most offenses are offenses of non-consent. Thus, larceny is not the taking of another's property as such, but the forcible taking of another's property *without his consent*. Kidnapping is not the forcible removal or confinement of a person as such, but the forcible removal or confinement of a person without his consent. So, too, with offenses of trespass, theft, and assault. Legal consent by *S* vis-à-vis *A* transmutes what would otherwise be "larceny" by *A* into charity; "kidnapping" into companionship; "trespass" into hospitality; "assault" into sport; "maiming" into surgery; and "rape" into intimacy.[112]

Westen is clearly right that, as a doctrinal matter, consent generally operates as a negative element of particular offenses rather than as a distinct justification defense.[113] But there is also a deeper explanation for this doctrinal difference that concerns the very different ways that these two exercises of decision-making power affect claims of individual freedom.[114] When individuals grant consent to the use of their own bodies and property, that consent is best understood as a way for them to extend the scope of their freedom. Although there are some things that we can choose to do with our bodies and our property all by ourselves, there are also a great many things that we can only do together with others.[115] Indeed, Westen's examples of charity, companionship, hospitality, and intimacy are all activities of that sort. Consent

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the rest of this Part, I use "consent" as a shorthand for "consent to interferences with *our own* interests."

111. Joseph Raz draws the distinction neatly as follows:

> [W]e can divide powers into powers over oneself and powers over others. The most important species of power over oneself is the power to undertake voluntary obligations. Power over others is authority over them. . . . It is interesting to note that when speaking of a person's authority over himself, we always refer to his power to grant himself permissions or powers.

JOSEPH RAZ, THE AUTHORITY OF LAW 19 (1979).

112. PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 111 n.12 (2004).

113. To some, this is a controversial claim. *See* A.P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW THEORY AND DOCTRINE 611 (2d ed. 2003); Gardner, *supra* note 51, at 820.

114. *See supra* note 2.

115. Action that is irreducibly social is the subject of a large and growing philosophical literature. *See* MARGARET GILBERT, ON SOCIAL FACTS (1989); RAIMO TUOMELA, THE IMPORTANCE OF US: A PHILOSOPHICAL STUDY OF BASIC SOCIAL NOTIONS (1995).

is the legal mechanism that allows us to use our bodies and property in these irreducibly social activities.[116]

The reason why lack of consent is an important element of so many offenses is that the wrongness of the conduct in question lies precisely in the fact that it constitutes a usurpation of another person's exclusive power to decide what shall be done with her body or property.[117] Although a good deal of effort has been made over the years to explain such offenses purely in consequentialist terms (by suggesting that nonconsensual conduct is always more harmful than similar consensual conduct), this sort of argument has never gained much traction.[118] Instead, it is now widely understood that all of these offenses are usurpations of another's exclusive power to decide what shall happen to his body and property—and that the equivalent conduct, when undertaken with valid consent, is not wrongful (and needs no justification) because it is simply carrying out the other's wishes. As such, consent affirms the other party's power to determine the use to which his body and property may be put, rather than undermining it.[119]

Despite their deep similarities, then, justifications appear to be the mirror image of consent in at least one important respect: rather than expanding individual freedom, justifications seem to represent a fundamental attack upon it. Rather than giving individuals greater power to decide what happens to themselves and to what is theirs, justifications give power to *others* to decide

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116. The legal limits on the power of consent are best understood as flowing from this rationale. For example, under the Model Penal Code, one does not have the power to consent to serious bodily injury that is not inflicted as part of an athletic contest or "other concerted activity." MODEL PENAL CODE § 2.11(2) (1981). And in Canada, one does not have the power to consent to activities that cannot easily be conceived of as cooperative such as the infliction of death or serious injury. *See* Rodriguez v. British Columbia (A.G.), [1993] 3 S.C.R. 519 (Can.); R. v. Jobidon, [1991] 2 S.C.R. 714 (Can.); *see also* Canada Criminal Code, R.S.C., ch. C-46, § 14 (1985).

117. In the context of property, Jeremy Waldron famously stated that "[t]he concept of ownership is the very abstract idea . . . that the decision of the named individual object about what should be done with an object is taken as socially conclusive." JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 52 (1988); *see also* Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. (forthcoming 2008).

118. For two strong critiques of the consequentialist account of consent, see John Gardner & Stephen Shute, *The Wrongness of Rape*, *in* OXFORD ESSAYS IN JURISPRUDENCE 193, 193-217 (Series No. 4, Jeremy Horder ed., 2000); and Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215 (2006).

119. Arthur Ripstein puts this point very powerfully in terms of what he calls "the sovereignty principle." Ripstein, *supra* note 118, at 215.

what happens to us and to our interests.[120] Indeed, I shall argue this important difference between consent and justifications presents the deepest problem of legitimacy for justifications. It is important to note here the radical difference between the law's attitude toward the exercise of legal power in consent and in justifications. The law treats our consent to others' interference with our bodies and our property as just another exercise of our freedom. Accordingly, just as the law leaves it up to us to decide how to use our own bodies or property as we see fit, it also leaves it up to us to decide as we wish whether to grant or withhold consent to others' use of our bodies and property. But when it comes to the exercise of legal powers in justifications, the law does not give the decision maker nearly so much discretion. Whenever someone makes a decision about when it is justified to interfere with another's interests, the law requires (at least) that her decision be based on the right sorts of reasons and that it be the result of the right sort of deliberation.

3. Prohibitions and Justifications, Ideal and Nonideal Theory

Why does Anglo-American criminal law leave it to the discretion of particular decision makers to determine when it is justified to do what the law generally prohibits? Why doesn't the legislature simply set down a *complete* set of conduct rules dealing even with these situations as Robinson suggests? Or, if some of these questions are to be dealt with elsewhere, why don't we leave it up to the courts to settle these questions at trial as Fletcher and Gardner suggest? The answer, it seems, lies in a deep difference between the law's prohibitions and its justification defenses. Borrowing John Rawls's distinction between the "ideal" and the "nonideal," we may think of the criminal law's prohibitions collectively as what he calls "ideal theory"[121]—the terms on which

120. Of course, some justifications (such as the justification available to police officers to run red lights and to exceed the speed limit when in hot pursuit of a suspect) do not involve interference with the body or property of any other individual. Instead, they involve interferences with the *public* interest in road safety. Nevertheless, because the rules of the road are essential preconditions to the exercise of individual liberty, interferences with these public interests should be seen as interferences with individual freedom. For the most detailed argument for this position, see Arthur Ripstein, Public Right in Kant: A Road Map (2007) (unpublished manuscript, on file with The Yale Law Journal).

121. John Rawls famously argues that the appropriate way to make out a theory of justice is to begin by setting out a (conceptually prior) ideal theory. "Thus the principles of justice that result are those defining a perfectly just society, given favorable conditions." JOHN RAWLS, A THEORY OF JUSTICE 309 (2d ed. 1999). These fair and stable terms of interaction under ideal conditions provide a yardstick by which to determine what constitutes a just response to injustice (in which category he includes "punishment and compensatory justice") or to other nonideal conditions (in which category he includes "the natural features of the human

we would ideally like to interact with one another. According to Rawls's account, ideal theory is entirely nonpurposive because it simply sets out a framework of fair and stable terms of interaction within which individuals can pursue their own ends as they see fit. As such, it is the sort of thing that is best set out in clear, general terms by the legislature. Criminal law justifications, by contrast, can be thought of as the law's "nonideal theory"—concerned with the way in which we may respond justly to injustice and to other "nonideal" conditions. As such, it is appropriate that justifications are set out in remedial, purposive terms.[122] It is also appropriate that rather than dictating precisely what is and is not permissible, they simply grant a limited sphere of discretion to decision makers to determine how best to preserve or to restore ideal conditions.

B. Justifications and the Control of Discretion

In this last Section of the Essay, I consider how the law addresses some of the major normative issues that arise in the context of justifications: the questions of *authority*, *discretion*, and *legality*. Once again, I group justifications according to the status of the decision maker. The first class of justifications, which arises from an exercise of decision-making power by private fiduciaries, is in some sense the least problematic. Here, the private law of fiduciary relations explains why the fiduciary has the authority to make decisions for the beneficiary, how much decision-making discretion he should wield, and how courts should review those exercises of discretion in order to render them compatible with the rule of law.

The second class of justifications, which arises from the decision-making power of public officials, is slightly more complicated. Here, it requires a good deal more effort to explain how public officials have the authority to make decisions regarding the interests of citizens and what sort of decision-making

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situation, as with the lesser liberty of children"). *Id.* at 244. He writes: "The reason for beginning with ideal theory is that it provides, I believe, the only basis for the systematic grasp of these more pressing problems." *Id.* at 9.

122. Christine Korsgaard has pointed out the purposive/nonpurposive distinction between ideal and nonideal theory as follows:

> Nonideal conditions exist when, or to the extent that, the special conception of justice cannot be realized effectively. In these circumstances our conduct is to be determined in the following way: the special conception becomes a goal, rather than an ideal to be lived up to; we are to work toward the conditions in which it is feasible.

CHRISTINE M. KORSGAARD, *The Right To Lie: Kant on Dealing with Evil*, *in* CREATING THE KINGDOM OF ENDS 133, 148 (1996).

discretion they should wield over those citizens. It is in this context, however, that the standards of judicial review rendering the exercise of discretionary decision making consistent with the rule of law are most highly developed.

Finally, the third class of justifications, which arises from the exercise of decision-making power by ordinary citizens caught in extraordinary circumstances, is the most complicated of all. It is not at all obvious why ordinary citizens should ever have decision-making authority over their fellow citizens, nor is it clear how much discretion they should wield when doing so. I shall suggest that the best way to understand these justification defenses is to see them as special cases, ones that warrant extension of the principles that apply to public officials. The decision-making authority of ordinary citizens is derived entirely from their role as stand-ins for public officials who are unable to make those decisions themselves. Accordingly, I shall argue, we should look to public law for the grounds of their authority, the appropriate constraints on their discretion, and for the appropriate standards by which courts should review their decisions.

1. Private Fiduciaries

A great many criminal law justifications, as we have seen, arise from the exercise of decision-making power by private fiduciaries over the interests of their beneficiaries. Fiduciary relations are in some sense exceptional arrangements precisely because of the threat they pose to individual freedom. As a result, only in unusual circumstances does the law recognize that one individual has the authority to make decisions about the affairs of another. In some cases, this apparent threat to individual freedom is illusory. When two competent adults agree to establish a fiduciary relationship between themselves—as doctor and patient, or shareholder and director of a corporation—we should not think of the power of the fiduciary to make decisions about the beneficiary's interests as undermining the latter's individual freedom. Rather, institutional arrangements built around the fiduciary relation such as corporations, trusts, and professions all provide individuals with a greater variety of ways to arrange their affairs from which they may choose. So long as the entrusting party does not cede decision-making power absolutely,[123] we can consider the fiduciary relationship to be

123. Of course, an absolute and irrevocable grant of decision-making authority would crucially undermine individual freedom. But this is why residual control rights are essential to the legitimacy of such fiduciary arrangements. Indeed, D. Gordon Smith suggests that the retention of residual control rights by the beneficiary is "the defining attribute of fiduciary

just another instrument by which the beneficiary may exercise his individual freedom. The fiduciary has the authority to make decisions over the beneficiary's affairs conferred on him by the beneficiary himself.

In addition to these fiduciary relationships that arise through bilateral agreement, however, there are also a great many other such relationships where the fiduciary wields decision-making power over the affairs of a beneficiary who never consented to such an arrangement. In all these cases, the law entrusts decision-making power over the beneficiary's affairs to a fiduciary because the beneficiary is incompetent to make decisions for herself. This is true both of fiduciary relations that arise by operation of law (say, as between natural parent and child) and those that arise by unilateral undertaking (say, as between adoptive parent and child, or between doctor and unconscious patient in need of emergency medical care). In all these cases, someone is needed to speak for the beneficiary because she cannot speak for herself (because she is a minor, unconscious, or otherwise legally incompetent). Sometimes the law looks to a natural connection between fiduciary and beneficiary (as in the case of biological parents and their children) and at other times the law looks to the undertaking of a potential fiduciary to determine who should stand in the position of fiduciary. In these cases, however, the fiduciary relationship operates as a remedy to a particular problem: who should speak for those who cannot (legally) speak for themselves? The fiduciary's authority over the beneficiary is slightly more controversial in these cases for, rather than representing an *expression* of the beneficiary's choice, it is the law's effort to provide a *substitute* in the absence of any choice by the beneficiary.

Because the fiduciary wields at least some discretionary decision-making authority in all fiduciary relations, there is always the possibility that the fiduciary will not exercise that discretion in the beneficiary's best interests, as he should. Because the fiduciary has the power to make decisions regarding the affairs of another, he might be tempted to ignore the beneficiary's interests either because he prefers to pursue his own interests or simply because he is too lazy or careless to put forth the effort required to pursue those interests properly. It is in order to control these two sorts of agency problems that fiduciary law imposes the twin fiduciary duties of loyalty and care. The problem of the fiduciary relation has been described as follows: "[It] is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the

relationships." D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1405 (2002).

control of this discretion."[124] The fiduciary's duties require him to exercise his legal power over the beneficiary's interests with reasonable care (avoiding laziness and incompetence) and in the beneficiary's best interests rather than his own (avoiding self-dealing). Thus, parents may decide that it is justified to use force on their children—but only if they reasonably[125] conclude that it is in the best interests of their child to do so;[126] and doctors may decide that they are justified in invading the patient's bodily integrity by performing an operation—but only if they reasonably deem the operation to be in the best interests of the patient.[127]

2. *Public Officials and the Judicial Review of Administrative Action*

It is often said that public officials stand in a fiduciary relationship to the people.[128] In many cases, courts not only make this general claim, but go on to list quite specific tenets of fiduciary law as applicable to public officials in the

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124. Weinrib, *supra* note 73, at 4. In a later article, Weinrib sets out the problem of fiduciary relations in slightly different terms, highlighting the importance of the legal status of both parties as equal, self-determining agents:

> [W]hen one party acts on behalf of the other, the law supposes that the dependence of the beneficiary on the fiduciary would transform the former into a possible means for the latter, and thus be inconsistent with their equality as self-determining agents, unless accompanied by a beneficiary's entitlement to the fiduciary's loyalty.

Ernest J. Weinrib, *The Juridical Classification of Obligations*, *in* THE CLASSIFICATION OF OBLIGATIONS 37, 46 (Peter Birks ed., 1997).

125. *See supra* note 22 and accompanying text.

126. *See supra* note 26 and accompanying text; *see also* ASHWORTH, *supra* note 76, at 150.

127. *See supra* note 86 and accompanying text.

128. It is not nearly so clear why state officials and citizens find themselves in this position. Consent-based accounts of state authority (whether actual or hypothetical) seem to suggest that the relation between state and citizen is either one of contract or a fiduciary one founded in mutual agreement (such as the relationship between shareholder and corporate director). But given the failings of most consent-based arguments for the authority of the state, it might seem more helpful to construe this relationship as a fiduciary relationship founded on necessity, akin to the relationship between parent and child or doctor and unconscious patient. Kantians, for example, might argue that the state is necessary to exercise certain powers that are simply impossible for individuals acting on their own to exercise. But this argument in political theory extends well beyond the scope of this essay. On the failings of explicit consent-based arguments for state authority, see A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS (2001). On the failings of hypothetical consent models, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 151 (1977).

exercise of their powers. For example, some American courts have said of public officials that they

> stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. . . . As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office, they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity.[129]

We should not be surprised to see courts insisting that a fiduciary relationship exists between public officials and citizens. Public officials clearly do exercise tremendous decision-making powers over the interests of citizens, determining not only when their property may be searched, when they may be arrested and so on, but also when they are entitled to government benefits or when they deserve police protection against various sorts of harm. And as we have seen, the exercise of decision-making power by some over the affairs of others—what Raz and others refer to simply as "authority"[130]—presents the most serious potential threat to individual freedom. The way that private law reconciles the existence of such power with individual freedom is by recognizing a fiduciary relationship and imposing significant limits (in the form of fiduciary duties) on the fiduciary's discretion to decide matters as he sees fit. It is natural, then, that courts should look to precisely the same legal instrument—the fiduciary relation and fiduciary duties—to reconcile the freedom of individual citizens with the power of public officials to make decisions about their legal rights.

There are two aspects of the law governing decision making by public officials that suggest a deep connection to the private law of fiduciaries. The first is the duty of fairness that applies to fiduciaries who are responsible for a number of different beneficiaries (as in the case of parents of multiple children, directors of corporations with multiple shareholders, or captains of ships with multiple passengers). Although the fiduciary may draw distinctions between different beneficiaries and different classes of beneficiaries, he may not do so

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129. Discoll v. Burlington-Bristol Bridge Co., 86 A.2d 201, 221 (N.J. 1952); *see also* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991); Stone v. Mississippi, 101 U.S. 814 (1880); Nuesse v. Camp, 385 F.2d 694, 706 (D.C. Cir. 1967); Black River Regulating Dist. v. Adirondack League Club, 121 N.E.2d 428, 433 (N.Y. 1954).

130. *See* RAZ, *supra* note 111.

arbitrarily.[131] Rather, it may be said that the fiduciary owes a duty of *fairness* when deciding how to accommodate the interests of various beneficiaries. This raises deep and troubling questions about when a fiduciary may impose significant burdens on some beneficiaries for the benefit of others. For example, when a ship's captain orders the jettisoning of a passenger's property (or even a passenger) during a storm, the law requires not only that he must reasonably believe this to be in the best interests of his passengers as a whole (because it is necessary to save the ship in a storm), but also requires that the procedure through which he selects the property (or person) to be jettisoned be a fair one.[132] And, of course, these fairness concerns arise even more commonly in the context of public officials who must choose quite regularly how to sacrifice the interests of some for the benefit of others.[133]

The second aspect of the law governing decision making by public officials that connects it to private fiduciary law is the way in which courts treat the decisions of power-holders in both cases. When a fiduciary's decision is challenged in the courts—say, because it is alleged that the fiduciary breached his duty of loyalty—courts will not address the wisdom of the fiduciary's decision as such. Rather, they will show at least some deference to his decision making and at least some respect for his discretionary powers. Instead of dealing with the correctness of his decision head-on, courts will consider the *manner* in which the fiduciary reached his decision: did he pursue a self-interested transaction without informing the beneficiary? Did he fail to exercise good business judgment when deciding to enter into the transaction? And so on. And if the fiduciary violated one of his duties (of loyalty or of care) in reaching his decision, then the court will usually impose a remedy designed to nullify the legal effect of the decision—either by voiding the resulting transaction directly or, where this is not a practical solution, by creating a constructive trust or ordering a disgorgement of profits.[134] Similarly, when a

131. Howe v. Lord Dartmouth, (1802) 32 Eng. Rep. 56 (Ch.).

132. *See* United States v. Holmes, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383).

133. Perhaps the best-known area of public decision making where these fairness considerations are at play is in the law of "regulatory takings." If a regulation unfairly targets a specific individual or class of individuals, then it will be treated as a taking, requiring compensation under the Fifth Amendment. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Eric Kades, *Drawing the Line Between Takings and Taxation: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189 (2002).

134. *See* 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 2.5, at 43 (William Franklin Fratcher ed., 4th ed. 1987).

public official's decision is challenged by way of judicial review, the courts do not address the wisdom of the decision directly. Rather, they concern themselves with the *manner* in which the official exercised his discretion.[135] Further, just as courts will defer more or less to a fiduciary's decision making depending on the degree of trust reposed in him,[136] so courts will defer generally to the decision making of administrative agencies.[137] Bolstering this parallel between private fiduciaries and public officials, a number of recent scholars have pointed out that courts treat public agencies and private fiduciaries in strikingly similar fashion.[138] Although courts do not generally make explicit that they are imposing duties of loyalty and care in the public law context nor do they cite private fiduciary law as their authority for doing so,[139] the context of these duties is nonetheless present in the judicial review of administrative decision making. Evan Criddle summarizes the situation in American administrative law as follows:

> The parallels between private fiduciary duties and agency duties are striking. Agencies are bound to exercise reasonable prudence when exercising delegated powers, and they are forbidden from entering self-interested transactions or arbitrarily discriminating between similarly situated beneficiaries. Courts enforce these fiduciary duties as minimal standards of rationality, consistency, transparency, public deliberation, and thoroughness in investigating alternatives.[140]

While the focus of Criddle's concern is the judicial review of administrative decision making more generally, our concern here is somewhat narrower. For

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135. In the leading U.S. administrative law case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court held that so long as the administrative agency's decision did not contravene the unambiguously expressed intent of Congress, courts should construe any gaps in the statutory scheme as an "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" and defer to any reasonable constructions of the statute by the agency. *Id.* at 843-44.

136. *See* Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 291 (1989).

137. *See* Criddle, *supra* note 3, at 164 (suggesting that the different levels of deference to administrative agencies "may best be understood not as a linear continuum but rather as a heterogeneous family of distinct but interrelated species").

138. *Id.* at 151; Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEENS L.J. 259 (2005).

139. In the United States, most judicial review of administrative decision making is guided by 5 U.S.C. § 706 (2000), and, to a lesser degree, the American Constitution. In other common law countries without such a comprehensive statutory regime (such as Canada and the United Kingdom), principles of natural justice play this role.

140. Criddle, *supra* note 3, at 151.

now, we are interested only in how courts treat the decisions of public officials when the decision is central to a claim of justification (such as the claim that a search or arrest was justified because an official granted the requisite warrant). Because the law subjects both private fiduciaries and public officials to strict fiduciary (or fiduciary-like) duties, such persons may only make decisions about what conduct is and is not justified according to certain, well-defined patterns of reasoning. The justice of the peace who must decide whether or not to grant a search warrant, for example, is not free to consider just *any* reason that might justify the invasion of a citizen's privacy. Instead, he is instructed by the law to consider only a particular set of justifying considerations and to make his decision accordingly.[141] (And, because the justice of the peace is bound by the decision rules that guide him, he might sometimes be legally required to grant a warrant in some cases where he thinks it to be morally unjustifiable, too.) Similarly, the parent who is faced with the decision whether or not to use physical force to punish his child is not free to consider just *any* justifying consideration. Instead, he may only consider those factors that have to do with the best interests of the child. Any other reasons—for example, that it might teach other children a lesson or that it might gain the approval of grandparents who advocate harsh discipline—is strictly outside the scope of reasons that the parent may consider when deciding whether or not to use disciplinary force.[142] When courts are asked to determine whether a police officer was justified in carrying out a search or an arrest, they go through the same sort of reasoning as they do when asked to determine whether a private actor was justified in carrying out conduct that a private fiduciary had deemed to be justified.[143] In both cases, the trial court's main task is to undertake a review of the power holder's earlier decision to permit the conduct in question; the court's task is *not* to decide for itself whether the conduct was justified in light of all the evidence now available to it. Indeed, this is a point of doctrine

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141. Williams v. State, 528 N.E.2d 496, 497 (Ind. Ct. App. 1988) ("A search warrant must strictly comply with the constitutional and statutory law permitting a search and seizure.").

142. One should not confuse this point with one that is similar but different. Although parents may not decide to use force on their children for reasons that have nothing to do with the child's well-being, they must rely on certain cultural and religious norms to make their decisions about what constitutes the best interests of the child. For example, a Jewish parent might reasonably decide that it is in the best interests of his son to have a bris, but a non-Jewish parent might not. (Thanks to Ted Diskant for drawing my attention to this distinction.)

143. Although the trial of police officers in this sort of case is unlikely, we have certainly seen police officers tried for excessive use of force. In the British context, there have been a number of high-profile trials of soldiers in Northern Ireland charged with murder in connection to the use of force. *See* Kelly v. Ministry of Defence, [1989] N. Ir. L.R. 431.

that is so uncontroversial that even George Fletcher (who, as we have seen, is committed to a correctness standard for all justifications) acknowledges it. He writes: "If the form of the allegations is correct and the police do not exceed the scope of a properly drawn warrant, there is little that the affected party can do to challenge the legitimacy of the intrusion."[144] That is, so long as the decision to allow the arrest or search was made by someone with the requisite decision-making authority and the decision was made in the right way, courts will allow that decision to stand even if when they would have decided the matter differently based on all the facts available to them.

3. Ordinary Citizens with Public Powers

The greatest challenge to my powers-based account of justifications is to explain how ordinary citizens could legitimately exercise decision-making power over others, as they seem to do in situations of self-defense, lesser evils, citizen's arrest, and so on. In the other two classes of justification defenses, we were able to provide at least the beginnings of such an explanation by referring to the special position of the decision makers. In private law, the fiduciary's authority derives either from the consent of the beneficiary or the need for someone to speak in the name of the beneficiary because she is unable to speak in her own name. In public law, the authority of public officials to wield decision-making power over citizens and their interests is a highly controversial issue, but a good deal of Anglo-American law seems to suggest that it, too, can be explained in terms of the fiduciary model.

But when we come to the justifications that turn on the decisions of ordinary citizens to interfere with the interests of their fellow citizens—self-defense, lesser evils, citizen's arrest justifications, and the like—the authority of these private citizen decision makers is much less clear. In each of these justifications, the law recognizes in ordinary people the power to make extremely important decisions about the interests of others: whether they may be killed in self-defense, whether their property may be destroyed to avoid the greater evil, whether they may be assaulted as part of a citizen's arrest, and so on. What is particularly troubling about the exercise of such decision-making powers is that they seem to be wielded by individuals with no special status that could explain their authority to make such decisions. And this leaves us with the greatest problem of authority of all: if literally *anyone* can make decisions about others' most basic interests in life, liberty, security, and

144. FLETCHER, *supra* note 31, at 772-73.

property, then the law's claim that each person is sovereign over herself and her basic interests is hollow indeed.

The beginnings of an answer to the problem of authority start to appear when we recall that private citizens are entitled to make these decisions about the interests of others only under extremely unusual circumstances. That is, we are entitled to decide that it is justified to kill in self-defense, that it is justified to violate a prohibition to avoid a greater harm, or that it is justified to use force to perform a citizen's arrest only when it is essential to make that decision promptly and there are no properly qualified public officials available to consult. This tells us that there is an important division of labor taking place between public officials and private citizens. Whatever the moral standing of private citizens to use force in these situations, the criminal law in most Anglo-American jurisdictions quite clearly treats private citizens as exercising these powers only as stand-ins for public officials who have the power to make these decisions. Private citizens do not have the authority to make such decisions in their own right.[145] Rather, they have such authority, it seems, only insofar as they stand in the shoes of public officials to whom this authority belongs.

This conclusion about the authority of private citizens to make decisions about when they may act in self-defense, to promote lesser evils, or to perform a citizen's arrest is highly unorthodox. Particularly in recent years, a voluminous literature has developed discussing the precise contours of each citizen's right to engage in such justified conduct. Following the lead of Robinson, Fletcher, and Gardner, most of that discussion simply takes for granted that courts should recognize conduct as justified whenever their best moral theory tells them that there were strong moral reasons to permit individuals to engage in such conduct notwithstanding the strong reasons against permitting it that motivated the original prohibition. But, as we have seen, these accounts of justifications are deeply flawed in their understanding of the institutional division of labor at work in justification defenses and in criminal law more generally. Anglo-American criminal law does not leave it up to trial courts to determine what conduct is and is not justified based on their best moral theory. Instead, the law leaves it up to another set of decision makers to determine in medias res whether the conduct is justified. The job of trial courts is to review that decision maker's exercise of discretion for procedural and jurisdictional flaws and not to decide the issue de novo.

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145. This is in contrast to what John Locke might suggest. For more on Locke's account of self-defense and the law of nature, see Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CAL. L. REV. 711, 736 (2000).

Moreover, there is also substantial support over several centuries in case law and leading commentaries for my argument that private citizens in these situations act as state agents pro tempore of necessity. For example, William Blackstone, in his *Commentaries on the Laws of England*, argues that otherwise prohibited conduct such as killing is legally justified only insofar as it is undertaken to pursue one of the state's own purposes: for example, the court-ordered killing of someone sentenced to death, killing that is necessary to apprehend someone resisting arrest, and killing to prevent a serious crime such as murder or rape.[146] The Supreme Court of the United States recognized this point as follows: "At early common law only those homicides *committed in the enforcement of justice* were considered justifiable; all others were deemed unlawful . . . ."[147] That is, the right of ordinary citizens to kill in self-defense derives from their power to decide to enforce the law when no officials are in a position to do so. The fact that citizens in such situations are exercising a delegated state function is most readily apparent in the case of citizen's arrest. In Canada, for example, the power of arrest, even when exercised by private citizens, has been explicitly characterized as a delegated state power. In *R. v. Lerke*, the Alberta Court of Appeals made this point quite clearly as follows:

> Each citizen had a part to play in this system of criminal procedure with not only the *right* to make arrests, but the *duty* to do so in appropriate cases. The right and duty, however, was directly derived from the Sovereign himself and the citizen acting in obedience to this royal command functioned as an arm of the state. . . .
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> . . . .
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> . . . The power exercised by a citizen who arrests another is in direct descent over nearly a thousand years of the powers and duties of citizens in the age of Henry II in relation to the "King's Peace." Derived from the Sovereign *it is the exercise of a state function*.[148]

Seen in this light, the source of ordinary citizens' legal power to decide when it is permissible to violate criminal prohibitions in order to defend themselves, to effect an arrest, to prevent a breach of the peace, or to prevent the greater evil

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146. 4 WILLIAM BLACKSTONE, COMMENTARIES *178-82. Edward Coke also makes clear that private conduct such as self-defense is justified only insofar as it furthers the state purpose of law enforcement. *See* 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 55 (Garland Publishing, Inc. 1979) (1644).

147. Mullaney v. Wilbur, 421 U.S. 684, 692 (1975) (emphasis added).

148. R. v. Lerke, [1986] 67 A.R. 390, 394-95 (Alberta Ct. App.) (Can.) (emphasis added).

seems quite clearly to derive from the power of front-line state officials such as police constables to make such decisions, as well.

Indeed, the Canadian discussion of the powers and duties of citizens from the time of Henry II and Blackstone's discussion of justifications and state function both remind us that the distinction between public officials and private citizens was not always as neat as contemporary criminal law theorists often assume. In the early modern period, state formation often took place not through the hiring of formal government employees, but rather by the licensing of private citizens to undertake state functions in its name.[149] This lesson from English constitutional history about the murkiness of the public-private divide is particularly relevant today in the age of privatization. That is, although criminal law theorists usually assume a neat distinction between public officials and private citizens, this distinction simply does not hold up in practice. At an amazing rate, governments across the western world are privatizing services that were once considered to be at the very core of the government's role, from prison management to the waging of war.[150] And where governments are not explicitly privatizing such services, they are often retreating from the provision of services, leaving the private sector to provide them in their place. This is perhaps most dramatically visible in the recent steady growth of the private security industry across the developed world. In all these cases, putatively "private" citizens—whether they are private security guards, private prison employees, or mercenaries—engage in conduct that is generally prohibited, claiming criminal justifications in their defense.

The modern phenomenon of privatization (or given the historical precedent, what might more accurately be called "reprivatization") raises perhaps the deepest and most difficult problems for defenders of a neat public-

149. The use of ordinary citizens to carry out state functions is an ancient and familiar strategy, sometimes called "government by license." *See* MICHAEL J. BRADDICK, STATE FORMATION IN EARLY MODERN ENGLAND C. 1550-1700 (2000). The same practice is in vogue once again, although today it is usually referred to as "reinventing government" or simply "privatization." *See* Michael J. Trebilcock, Ron Daniels & Malcolm Thorburn, *Government by Voucher*, 80 B.U. L. REV. 205 (2000).

150. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999); *see also* WILLIAM C. CUNNINGHAM, JOHN J. STRAUCHS & CLIFFORD W. VAN METER, NAT'L INST. OF JUSTICE, PRIVATE SECURITY: PATTERNS AND TRENDS (1991); TREVOR JONES & TIM NEWBURN, PRIVATE SECURITY AND PUBLIC POLICING (1998); GEORGE O'TOOLE, THE PRIVATE SECTOR: PRIVATE SPIES, RENT-A-COPS, AND THE POLICE-INDUSTRIAL COMPLEX (1978); PRIVATE POLICING (Clifford D. Shearing & Phillip C. Stenning eds., 1987); NIGEL SOUTH, POLICING FOR PROFIT: THE PRIVATE SECURITY SECTOR (1988); David H. Bayley & Clifford D. Shearing, *The Future of Policing*, 30 LAW & SOC'Y REV. 585 (1996); *Policing for Profit: Welcome to the New World of Private Security*, ECONOMIST, Apr. 19, 1997, at 21; Rosky, *supra* note 103.

private divide.[151] For decades, American and Canadian constitutional scholars have tried to set out a workable distinction between state action that is subject to constitutional review and private action that is not, but to no avail.[152] The present discussion of justifications and the manner in which the authority of private citizens to decide when conduct is justified seems to be derivable from their position as public officials pro tempore might provide a sort of new beginning to this deeply unsatisfying debate.[153]

CONCLUSION

Criminal law theory made a significant advance roughly thirty years ago when George Fletcher popularized the important conceptual distinction between justifications and excuses. In the intervening years, however, very little progress has been made in exploring the structure and function of justification defenses. The reason for this failure, I have suggested, is a widely shared misconception about their place within the criminal law's institutional structure. Contrary to what is generally believed, it is not up to trial courts to decide, ex post facto, what conduct is justified and what is not. This determination is made ex ante by other institutional actors such as private fiduciaries, public officials, and, sometimes, ordinary citizens caught in extraordinary circumstances. The court's role is simply to review the validity of that prior exercise of decision-making discretion.

More broadly, this study serves as a reminder of the importance of institutional structure in criminal law. Before addressing the substantive moral issues that arise in criminal law, I have argued, it is crucial first to address the institutional problems of authority, discretion, and legality. These problems

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151. The public/private argument I raise goes well beyond the legal realist claim that the public/private divide is meaningless simply because all private action takes place within a context of public law. *See* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

152. This has been true for many years. *See* Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (describing state-action doctrine as a "conceptual disaster area"); *see also* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503-04 (1985) ("There still are no clear principles for determining whether state action exists."); Henry Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (stating that Black's characterization of the state-action doctrine is "even more apt today").

153. Gillian Metzger provides one helpful model for making sense of the public/private divide in the contemporary world of privatization. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); *see also* Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization,* 45 SYRACUSE L. REV. 1169 (1995).

receive their most thorough treatment in two other areas of law: the private law of fiduciaries and public administrative law. If we wish to make progress in understanding justification defenses—and the institutional structure of criminal law more generally—it is to these areas of law that we should attend.