Excuses, Moral and Legal: A Comment on Marcia Baron's 'Excuses, Excuses'

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Marcia Baron has offered an illuminating and fruitful discussion of extra-legal excuses. What is particularly useful, and particularly important, is her focus on our excusatory practices—on the ways and contexts in which we make, offer, accept, bestow and reject excuses: if we are to reach an adequate understanding of excuses, their implications and their grounds, we must attend to the roles that they can play in our human activities and relationships—and to the complexities and particularities of those roles.

However, I want to focus my comments less on the details of Baron's discussions of excuses in extra-legal contexts than on the implications of her discussion for our understanding of excuses in the criminal law. What light (if any, a sceptic might add) can such analyses of our extra-legal concepts and practices throw on legal concepts and doctrines?

1. Moral and Legal Exculpation

Baron believes, as do many other theorists, that 'the concepts of justification and excuse should function in law at least roughly in the way they do in everyday life'.[1] Some such belief is certainly right: if the criminal law is to be justified in condemning and punishing as

[1] Baron 2006: n. 1 (future bare references in the text will be to this article).

wrongdoers those who commit what it defines as crimes, its crimes must be genuine, unjustified wrongs, and it must allow those who commit them to avoid conviction and punishment by offering an appropriate justification or excuse for their conduct. However, we need to distinguish three claims that could be involved in such a belief.

The first claim is that the factors which exculpate in our extra-legal moral practices should, at least in principle, also exculpate in the criminal law: that the kinds of factor that make it morally inappropriate or unjust to blame or condemn someone for what he has done should make it legally inappropriate to convict him of a criminal offence. Subject to various qualifications that recognise the practical obstacles in the way of any attempt to translate moral principles directly into legal doctrine, this claim is surely right. If I unintentionally cause damage to another's property through non-culpable ignorance, mistake or accident; or if I damage it intentionally but only because this was the only way to avert some much greater harm, or because I acted under a threat that I could not reasonably have been expected to resist: I deserve neither moral condemnation for an act of moral wrongdoing nor legal condemnation for an offence of criminal damage.

The second claim is that the exculpatory concepts of justification and excuse used in criminal law should, at least in principle, be intelligible as formalised, perhaps modestly adapted versions of the exculpatory concepts of justification and excuse as used in extra-legal moral contexts. This claim is surely also right, although care is obviously needed in negotiating some of the conceptual minefields that surround these concepts—in particular the question of whether the justification of an action, in either moral or legal contexts, depends on the reasons for which the agent acted, or only on the reasons that were available for acting thus.[2] To put matters very roughly, an action is justified if, though it is of a kind that we

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[2] A question on which Baron herself has thrown useful light: see Baron 2005.

normally have good or even conclusive reason not to do, in the particular context that reason is cancelled or outweighed; an action is excused if, though it is one that in the particular context there was conclusive reason for the agent not to do, there are factors about the context or the agent given which it would be unfair to condemn her for acting thus (I say a little more about this in s. 2 below). Put even more roughly, an agent whose action is justified does not act against the balance of reasons that bear on her situation; one whose action is excused does act against the balance of relevant reasons, but does so non-culpably.

The third claim is that those exculpatory concepts of justification and excuse should, at least in principle, have the same application or extension in criminal law as they do in extra-legal moral contexts: that what counts as a justification, or as an excuse, in those moral contexts should also count as a justification, or as an excuse, in the criminal law. This claim might seem to follow from the first two, but it does not; indeed, I will argue in s. 3 that it is false, and that its falsity throws some useful light on the contrasting structures of criminal and moral responsibility.

Before developing that argument, however, I should comment very briefly on some aspects of Baron's discussion of excuses in moral contexts.

2. Moral Excuses

Baron offers us some salutary reminders of the rich complexity of our excusatory practices and discourse. One of her own examples suggests that matters might be even more complex than she recognises.

She talks about cases in which 'civility calls for offering an excuse for one's conduct even though one believes that one was justified' (at n. 11) as when I apologise to my

departmental chair for being late for a meeting because I 'couldn't get away' from the teacher who wanted to talk to me about my son. It is not clear, however, that this is a case of offering an excuse *as distinct from a justification* (as her 'though' implies). That I say 'I'm sorry' does not constitute it as an excuse as distinct from a justification: that could be a polite expression of regret that I 'had to' justifiably inconvenience him. That I say 'I couldn't get away' does not constitute it as an excuse as distinct from a justification: that 'could' is the 'could' of what I had or did not have good enough reason to do, not of what it was or was not within my power to do—I couldn't *reasonably* get away. I do not deny that we would naturally talk of my offering an excuse, or making my excuses, in such a case; but I do not think that we are then talking of excuse as something in tension with the belief that I was justified in acting as I did. We should, instead, recognise that alongside the specific use of 'excuse' as something distinct from justification, we also use 'excuse' as a quite general term of exculpation, to cover what in other contexts or other tones we might count as justifications as distinct from excuses. This is true both inside and outside the criminal law. The Criminal Damage Act 1971, s. 1, defines the basic offence of criminal damage as destroying or damaging another's property 'without lawful excuse', and it is clear from s. 5 of the Act that 'lawful excuse' includes justifications. Similarly, a student's 'excuse' for missing a class might be that he was ill in bed; but unless the illness was such as to incapacitate him completely, what he offers is a justification —that one is permitted to miss classes when ill.

It is also true, as Baron rightly emphasises, that we are interested in the demeanour or style of exculpatory pleas as much as in their substantive content: as a matter of 'civility', I *offer* excuses, but *claim* justifications; my demeanour might thus be excusatory, when I ask for a recognition of the relevant exculpatory factors rather than asserting them or claiming them, whilst the content of my plea might still be unambiguously justificatory. My point here is only that given the dual use of 'excuse'—in a broad sense that includes justificatory

exculpations and a narrower sense that excludes them—we must take care not to classify as non-justificatory excuses what are actually offered and understood as justificatory pleas.

What then identifies excuses, as distinct from justifications? Baron initially identifies three factors, all of which figure in familiar accounts of excuses: each merits brief comment here.

First, an excuse admits 'that what the agent did was wrong, or at least untoward'.[3] The 'or at least untoward' qualification is important, since even when we are dealing with excuses that avert moral blame as opposed to other kinds of criticism, and that thus respond to or seek to ward off an accusation of moral wrongdoing, excuses sometimes negates wrongdoing. If my excuse for doing you some serious and intentional harm is that I acted under a kind of pressure (from human threat or from natural circumstances) that I cannot fairly be blamed for not resisting, we could say that I have an excuse for the commission of what is still a serious moral wrong—even if the excuse also changes the character of that wrong. But if my excuse for knocking over and breaking your vase is that I did not realise (and could not have been expected to realise) that it was there, or that I was non-culpably pushed against it, the excuse negates any wrongdoing: an intentional or careless act of destroying your vase would have been wrong, but we should not say that of a non-culpably inadvertent or accidental breakage.[4] Any adequate account of excuses will have to attend to such differences in their operations and implications—which makes it hard to offer a general account of excuses that will be both substantive and sufficiently inclusive. We can say, however, as a way of unifying the diverse

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[3] Or 'bad, wrong, inept, unwelcome, or in some other of the numerous possible ways untoward'; Austin 1961: xxx-x, quoted by Baron in s. 6.

[4] As we will see in s. 3, matters are different in the criminal law: criminal excuses presuppose a criminal wrong.

kinds of untowardness that Austin mentions, that an excuse presupposes that the agent acted as she had conclusive reason not to act: for even when I accidentally break the vase, it is still true that I performed an action (I broke the vase) that I had conclusive reason not to perform.

Second, Baron agrees that 'to excuse past conduct is to say that it would be unfair to hold the wrongdoer responsible for the action' (at n. 18). This is, I think, true only of some excuses. It is true of such excuses as insanity or infancy, which in effect deny that the person was, at the time of the relevant action and in relation at least to that action, a responsible agent at all. However, it is not true of many of the excuses that Baron discusses: as we will see more clearly in s. 3, to offer an excuse of duress or other kinds of pressure, or even of non-culpable inadvertence or accident, is to admit responsibility for the action that is excused. This difference between excuses such as insanity and excuses such as duress—that the former negate whilst the latter admit responsibility —explains why some legal theorists distinguish 'excuses' from 'exemptions' (e.g. Gardner 1998; Tadros 2005: 124-9): an agent who can plead (or on whose behalf others can plead) insanity is exempted from responsibility for his actions; an agent who pleads non-justificatory duress as a defence is offering an excuse for an action for which she admits responsibility.

Third, what grounds an excuse is that it was 'extremely difficult' for the agent not to commit the action in question: difficult either because of some peculiarity of the agent or because of some feature of her situation that would make it extremely difficult for most people not to act thus (s 1). This can, I suspect, be made true of all excuses only by stretching the idea of 'extremely difficult' so far that it loses substantive content. We could indeed properly talk of how difficult it would be for someone acting under serious threat or serious pressure to avoid committing a crime—of how difficult it is both to deliberate clearly about what to do and to act in accordance with the outcome of any deliberation; but it is less illuminating to say that we should excuse the person who acts in non-culpable ignorance of

relevant facts, or the person who is suffering an all-embracing mental disorder, because it was difficult for them to avoid acting as they did—though we might say in all these cases that the agent is excused because for one of a variety of possible reasons we could not reasonably have expected them to avoid acting as they did. Nor indeed do excuses that seek 'to thwart an inference from one's conduct to one's character or to one's sentiments' (s. 6.2) happily fit Baron's initial picture: what can thwart such inferences need not be the difficulty of acting as one should. This reinforces Baron's own concluding remark (s. 12) that '[o]ne thing is clear: the classification of excuses that I sketched in my opening section is too narrow to cover all excuses'.

I want to turn now to a contrast between moral and criminal excuses that Baron notes (s. 12), but whose significant implications she does not explore.

3. Excuses and Responsibility

Moral excuses include such factors as non-culpable ignorance or mistake of fact, and accident: if I knock your vase over and break it, I can avert moral blame for that destructive action by pointing out that I did not realise, and could not reasonably have been expected to realise, that it was there, or that I (non-culpably) slipped or was pushed; in so doing, I offer an excuse for that action. Now I am also innocent of an offence of criminal damage if one of those factors obtained; but they do not function in law as excuses. Once we distinguish, as many theorists recognise that we should, offences from defences, we also see that mistake of fact and accident normally serve to negate the *mens rea*, as an essential element of the offence (since the damage is not then caused intentionally or recklessly). By contrast, excuses come into play only when all the elements of the offence have been proved: an excuse is a

type of defence, which wards off criminal liability for the commission of an offence; under English criminal law I need a excuse for damaging your vase only if it can be proved that I damaged it intentionally or recklessly, i.e. neither through non-culpable ignorance or mistake, nor by non-culpable accident.[5]

It might be tempting to pass off this difference either as simply a lawyers' quirk (or misuse) of language, or as reflecting the formal procedural features of the criminal trial, but that would be a mistake: this difference in what counts as an 'excuse' as between extra-legal moral contexts and the context of the criminal law displays a deeper and more significant difference in the ways in which moral and criminal responsibility are constructed; in recognising that difference, we will also realise that excuses do not typically deny responsibility, understood as answerability.

To excuse my action is to admit I had conclusive reason not to act as I did—that I acted either against a categorical, indefeasible reason, or against the balance of reasons; but to plead that I could not reasonably have been expected to act in accordance with either that categorical reason or the balance of reasons—which is to say, since the expectation that is involved here is clearly a normative one, that I cannot reasonably be condemned for failing to act thus. To offer an excuse is thus to admit responsibility, but deny liability: I admit to committing an action for which I must now answer, but seek to block the otherwise legitimate transition from responsibility to liability (liability, in this context, to moral criticism or blame) by offering an exculpatory answer. To offer an excuse is thus to present myself not

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[5] This is not the place for a detailed explanation or defence of the distinction between offences and defences; but see generally Fletcher 1978: 552-79, 683-758; Campbell 1987; Gardner 2004; Tadros 2005: 103-15. For some classic scepticism about the distinction, see Williams 1982.

just as a responsible agent, operating within the realm of reasons, but as an agent who is responsible for that which he seeks to excuse.[6]

Now in moral contexts responsibility is typically 'strict': I must answer for the harm that I actually cause by my actions, even if I was in no way at fault in causing it. If my answer is suitably exculpatory, I am not liable to moral blame for causing that harm: moral liability is typically non-strict—it depends on fault. The excuse (or justification) that I offer, however, serves not to negate responsibility, but rather to block the transition from responsibility to liability. That is why non-culpable ignorance, mistake and accident constitute excuses in moral context. In a system of criminal law that is structured both by the Presumption of Innocence and by the slogan that *actus non facit reum nisi mens sit rea*, by contrast, matters are very different. It is for the prosecution to prove that the defendant committed the offence, i.e. to prove both *actus reus* and *mens rea*, before she has anything to answer for in a criminal court. She might in fact, if she is to avoid conviction, have to offer an answer *to* the charge: if the prosecution offers good evidence that I intentionally or recklessly damaged your vase, I might have to offer contrary evidence if the fact finder is to have any reasonable doubt about my guilt. But until the prosecution has proved that I did intentionally or recklessly damage your vase, there is nothing *for* which I am criminally answerable, which is to say that until the prosecution has discharged that probative burden I need neither a justification nor an excuse. What I am criminally answerable, i.e. responsible, for is not merely damaging your vase, but damaging it intentionally or recklessly: that is why non-culpable ignorance, mistake and accident are excuses in moral contexts, but not (usually) in criminal law.

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[6] For more on the conception of responsibility on which I rely here, and on the distinction between responsibility and liability, see Duff 2003 and 2005. Note that this implies that, as I suggested in s. 2, insanity should be seen not as an excuse but as an exemption.

The qualifying 'usually' in the previous sentence is crucial: for sometimes the criminal law does make responsibility strict. This phenomenon is distinct from the much discussed (and widely criticised) phenomenon of strict criminal liability, i.e. the imposition of criminal liability without proof of relevant fault, and raises quite different questions. It is found when offences are defined in such a way that the prosecution does not have to prove *mens rea* as to all aspects of the *actus reus*: instead, once the prosecution has proved the *actus reus* (and, perhaps, *mens rea* as to some aspects of that *actus*), the onus then shifts to the defendant to offer evidence, or even to prove (on the balance of probabilities) the absence of what we would normally count as *mens rea* if he is to avert conviction. Sometimes this is done by defining the offence in 'strict' terms, but allowing a 'defence' of due diligence or lack of criminal purpose or knowledge;[7] sometimes it is done by the creation of a rebuttable presumption which allows or requires the fact finder to presume full *mens rea* on the basis of proof of the actus reus and some aspect of the *mens rea*, unless the defendant can prove or adduce evidence of lack of *mens rea*.[8] In both kinds of case, however, the effect is that the defendant must answer for something less than the commission of an *actus reus* with full *mens rea*; which is to say that even if criminal liability is not strictly strict (since it can be averted by evidence or proof of lack of *mens rea*), criminal responsibility is strict.

These features of our criminal law raise two large questions. First, if moral responsibility is typically strict, why should criminal responsibility so often be non-strict?[9] Second, if

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[7] See e.g. Misuse of Drugs Act 1971, ss. 5(2), 28(2); Food Safety Act 1990, ss. 8(1), 21(1); Terrorism Act 2000, s. 57.

[8] See e.g. Prevention of Corruption Act 1916, s. 2; Sexual Offences Act 2003, s. 75.

[9] Given the sheer number of offences for which criminal responsibility in, for instance, English law is now strict, it could be misleading to say that criminal responsibility is

criminal responsibility is properly so often non-strict, how (if at all) can it sometimes be justifiably strict (a question distinct from, and in some ways more interesting than, the more familiar question about the justifiability of strict criminal liability)? I cannot pursue these questions here, but we can draw two important messages about excuses from what we have seen so far. The first is that if we treat responsibility as answerability, and distinguish it properly from liability, we can see that excuses admit, rather than deny, responsibility. The second is that even if the concept of excuse should have roughly the same meaning in criminal law as it has in extra-legal moral contexts; and even if the kinds of factor that can ward off moral blame for what we have done should also, in principle, preclude criminal liability: that is not to say that factors which constitute or ground moral excuses should also, even in principle, constitute or ground excuses in criminal law; it is rather to say that the structures, and thus the logics, of both inculpation and exculpation are significantly different as between the criminal law and extra-legal moral practices. Any adequate discussion of excuses in criminal law will have to attend to their role and meaning in moral contexts—a task to which Baron's paper makes an important contribution; but it will also have to attend to these structural differences.

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typically non-strict; but it is typically non-strict for those kinds of *malum in se* crimes that are still—for better or worse—salient in public conception and theoretical discussion.

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