A Liberal Theory of Excuses

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JEREMY HORDER, EXCUSING CRIME (OXFORD: OXFORD UNIVERSITY PRESS) (2004)

Jeremy Horder, presently a Tutor in Law at Oxford University and one of the most eminent theorists of the criminal law in the English-speaking world, has written the first sophisticated book-length treatment of the philosophical foundations of excusing conditions. In most respects, his effort is outstanding, and I highly recommend it for all serious criminal law scholars. *Excusing Crime* contains a mountain of insight and detail, and my short review can only scratch the surface of the issues he canvasses in impressive depth. After a few casual observations about some of the differences (as I see them) between the landscape of criminal theory in the United States and Great Britain, I will critically examine three topics: Horder's concept of what excuses are; his substantive theory of the conditions under which excuses should be granted; and, finally, his thesis that it is instructive to arrange types of defenses (including excuses) as rungs on a ladder.

I. CRIMINAL THEORY IN THE UNITED STATES AND GREAT BRITAIN

Horder begins by acknowledging that several existing treatises do an excellent job summarizing the current state of the law of excuses. What is lacking, he continues, is a deep examination of the philosophical issues surrounding excusing conditions. Each of these claims is correct, although I believe that both the quantity and the quality of treatises in the United Kingdom are significantly higher than those in the United States. Consider, for example, the outstanding textbooks produced in the last decade by Andrew Ashworth, J.C. Smith and Brian Hogan, William Wilson, and Andrew Simester and G.R. Sullivan. In the United States, only Joshua Dressler's treatise is comparable. No American theorist who decides to focus on excusing conditions can afford to presuppose that existing law has been explicated as thoroughly as in Britain.

Notwithstanding his concentration on "why things are as they are, and on how they should be" (Horder, at 1), *Excusing Crime* is not simply a book in which a philosopher presents his grand theory despite knowing or caring little about the substantive criminal law itself. Horder is extremely knowledgeable about both statutes and cases. Unfortunately for readers in the United States, almost all of these statutes and cases are English, a fact that is bound to make his monograph less interesting to legal commentators on this side of the Atlantic. The larger

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philosophical points, of course, are important for theorists everywhere. Even philosophically, however, Horder is much more engaged (both positively and negatively) with British commentators; he is less conversant with the parallel treatment of several of these issues in the United States. The two theorists who most often serve as foils for the presentation of his views, John Gardner and Joseph Raz, are Horder's distinguished colleagues at Oxford. Certainly no one can fault him for the quality of the philosophical company he keeps, although some American readers will be unhappy about his emphasis on British law. Nonetheless, those who share his intellectual passion for the philosophical foundations of excuses can use his research as an opportunity to gain familiarity with a world of high-level scholarship that they may know less well.

Even though Horder's theoretical ambitions are not narrowly tied to British law, I have several grounds for predicting that his book will be condemned to a fairly small American audience. First, relatively few potential readers in the United States will be fluent in the latest Oxfordian distinctions between the various types of *reasons* that are central to Horder's approach: explanatory reasons, guiding reasons, operating reasons, auxiliary reasons, exclusionary reasons, adopted reasons, and the like. Many British commentators (including Horder) are more persuaded than Americans that the key to solving many of the persistent problems in criminal law theory is to develop and apply a taxonomy of reasons. Moreover, the intrinsic difficulty of the topics pursued in *Excusing Crime* is exacerbated by the density of Horder's prose. Because he is not an especially elegant writer, his views are easily misunderstood. When H.L.A. Hart renewed interest in legal philosophy in the English-speaking world, British theorists had a well-deserved reputation for writing clearly. At the present time, I believe this trend has been reversed. The power of their analyses aside, I now regard American theorists as better writers. Horder's book might have a greater impact if it were more accessible. In addition, and perhaps most importantly, criminal theory is generally healthier and more philosophically advanced in Britain. For whatever reason, disappointingly few of the most talented American legal philosophers are drawn to the substantive criminal law.

I would be delighted to be mistaken about the size of the American audience that Horder is likely to attract, since there is no doubt that theorists everywhere would profit by paying close attention to *Excusing Crime*. Many commentators come to mind who know a lot about the criminal law and have sufficient philosophical skills to theorize about it constructively. And many excellent philosophers know enough about the criminal law to write about it productively. Horder is among a handful of scholars who is both an able philosopher and extraordinarily knowledgeable about the criminal law itself. This rare combination is prominently displayed throughout *Excusing Crime*. It would be difficult to imagine an American who could have written it; no one quite qualifies as Horder's counterpart in the United States.

In his preface, Horder worries that "very long monographs are nowadays destined to remain unread," but hopes his book will prove an exception to this

trend largely because he has "tried to stay reasonably brief in what I have to say." (Horder, at ix.) Horder *is* reasonably brief. He is seldom repetitive, and could easily have been more long-winded. Still, I fear his book is likely to attract a small audience for yet another reason he specifically addresses but optimistically dismisses. He quotes Lindsay Farmer as holding that analytical legal philosophers tend to produce arguments that are "'[t]oo abstract for the policy maker and too difficult for the average undergraduate law student,' leaving them to be read only by other criminal law theorists." (Horder, at 5.) In fact, Horder will ensure that his views receive a fair hearing in the political arena, since he soon will be leaving his academic post to join the Law Commission. Without this career move, Farmer probably would be correct. In rebuttal, Horder praises the intelligence and qualifications of undergraduates, but I suspect he may be generalizing from his experience at one of the world's elite institutions. This book is far too difficult for the undergraduates I have encountered. Of course, law students in the United States have undergraduate degrees, so they might be competent to understand Horder's views. Unfortunately, I believe that only a very small percentage of American law students could reasonably be assigned to read *Excusing Crime.* Horder also expresses confidence that judges will consult his work, and provides examples of English opinions in which Hobbes, Locke, and (even) Descartes have been cited. To my mind, the paucity of these references tends to support a position contrary to Horder's. And whatever the case may be in Great Britain, I am certain that his hope is misplaced in the United States, where criminal justice is thoroughly politicized and judges almost never engage the best works in legal philosophy. Unless Horder's new position allows him to become more influential, I would share Farmer's gloomy prediction that none but a small number of academic criminal theorists would be likely to make the substantial effort needed to comprehend *Excusing Crime.*

Those theorists who invest this effort will be rewarded enormously, for Horder has produced an outstanding book on excusing conditions. The volume succeeds both as a general overview, as well as in its remarkable detail. Although *Excusing Crime* is rich in countless respects for which I have no space to address here, I now propose to briefly focus on three of his main themes.

II. THE NATURE OF EXCUSE

Horder's most important structural theme is that one must distinguish "the considerations that make a claim a candidate for excuse" from "the conditions that must be satisfied if the candidature is to be successful." (Horder, at 8.) He calls the former the "necessary conditions," and the latter the "sufficient conditions" for recognition of an excuse. Horder adopts a broad account of the necessary conditions. Any claim to excuse:

> is an explanation for engagement in wrongdoing (an explanation not best understood as a justification, as a simple claim of involuntariness, or as

> an out-and-out denial of responsibility) that sheds such a favorable moral light on D's conduct that it seems entirely wrong to convict, at least for the full offence. . . . Excuses excuse the act or omission amounting to wrongdoing, by shedding favorable moral light on what D did through a focus on the reasons that D committed that wrongdoing. (Horder, at 8–9.)

Even though the foregoing condition is met, a court should deny an alleged excuse unless the law's "strategic" conditions are satisfied. Roughly, these sufficient conditions involve the need to maintain the integrity and flourishing of a common good. (Horder, at 14.) A few examples of these common goods are as follows. The state must take care that the availability of a defense does not undermine a culture of compliance and law-abidingness, discourage the emergence of a "defense industry" that will result in the success of too many unmeritorious claims, ensure that the circumstances in which a defense is pleaded do not entail intractable problems of proof, and maintain a relationship between the judiciary and the legislature in which it is mutually understood that the former must take responsibility for the resolution of morally complex issues raised by an excusatory claim that is beyond the competence of the adversarial process to resolve in a satisfactory way.

I do not regard the terms "necessary" and "sufficient" conditions to be perspicuous in drawing the contrast Horder intends to make; this distinction might as well have been described as reasons *in favor of* and reasons *against* recognizing an excuse. The former are mostly "desert-based"; the latter are largely consequentialist. Alternatively, the supposed necessary conditions might be thought to identify the *concept* of excuse; a substantive theory, to qualify as a theory of excuses, must show why given kinds of conduct should be viewed in a favorable moral light. In any event, many of the difficult questions about whether to allow an excuse in a particular case involve the interplay of Horder's two conditions. First, does the explanation for the defendant's wrongdoing indeed cast his conduct in a favorable moral light? If so, must the state nonetheless deny the excuse because of its concern for the foregoing "strategic" or "common goods"? Decisions about whether the necessary conditions are satisfied are largely intuitive, and I will return to this matter in Part III. But if a given plea passes this first test, how are we to assess whether it also passes the second? Obviously, no formula exists to ascertain whether the strategic considerations loom sufficiently large to justify withholding a given excuse. Horder acknowledges that judges typically exaggerate the likelihood that granting a defense will have adverse social consequences. (Horder, at 18.) In reply, he ably argues that denying the excuse can frequently bring the law into more disrepute than accepting it.

Although much of *Excusing Crime* discusses factors that contribute to locating the optimum balance between these two conditions, the task as Horder performs it is frequently too speculative for my taste. My hunch is that the probability of undermining the law's common goods is more a function of the

publicity surrounding a case than of abstract features of the case itself. Excusing a delusional defendant who attempts to assassinate the President will have more deleterious consequences for strategic goods than would excusing a defendant with a comparable mental defect whose crime is less notorious. The public is bound to misunderstand the contrast between justification and excuse, and would be likely to proclaim an excuse as authorizing an open season on assassinations. But empirical evidence would be preferable to conjecture. A useful strategy in weighing Horder's necessary and sufficient conditions would draw from historical experience. Can we provide real examples of excuses that courts have extended so charitably that common goods have been undermined? Sometimes this allegation has been raised about the insanity defense, but tangible evidence for this fear is hard to produce. Stories about clever defendants who dupe gullible juries are more the subject of fiction than reality. Although Horder is rightly critical of theorists who neglect strategic concerns altogether, I am inclined to side with those who believe that denying excuses on this ground is always a matter of extreme regret for which substantial evidence rather than speculation or anecdote should be required. The criminal law is the institution *par excellence* in which justice to the individual is paramount.

I want to mention just a few of the significant features of Horder's general characterization of the necessary conditions. Notice that excuses, according to this account, presuppose *wrongdoing*. No wrongdoing, no excuse. This claim is not simply about when an excuse is needed; it is about when an excuse can exist at all. Moreover, excuses preclude justifications. If conduct is justified, it cannot be excused. Presumably, Horder does not believe that agents can simultaneously possess two defense types: one a justification, the other an excuse. In addition, excuses necessarily focus on the reasons for which the defendant acted. Hence, putative excuses that cannot be understood in terms of reasons simply are not excuses at all. Partly because of his focus on reasons, Horder departs from virtually all American theorists in denying that insanity and infancy function as genuine excuses (instead, he regards them as conferring an exemption from liability). Also, Horder's characterization asks whether the defendant's conduct is to be cast in a favorable moral light. Many theorists, by contrast, conceptualize excuses as more about agents than about their acts. Each of these features of Horder's account might be challenged.

Rather than disputing any of these claims, however, I want to comment on an additional aspect of Horder's characterization of excusing conditions. An implicit contrast is presupposed in order to decide whether an agent should be excused. Relative to what, in other words, do we decide whether the agent's reasons for wrongdoing cast his behavior in a favorable moral light? This question asks for a *baseline* by reference to which such determinations are made. One might assume the relevant baseline to be the moral judgment the defendant's conduct would have warranted in the absence of the alleged excuse. In many cases, however, this answer is unintelligible. Suppose we debate whether the fact that the offender was seventeen years old at the time of his offense provides a partial excuse for his

crime. We can certainly compare this particular defendant with another who commits the same offense and is not seventeen. But how old do we imagine the latter to be? Similar questions can be raised about other potential excuses. We can contrast a given defendant with someone who commits the same offense but is not under duress, for example. But why, we then must ask, does the latter commit the crime? Everyone commits an offense for *some* reason. Relative to what motivation(s) do we decide whether the defendant's explanation for wrongdoing casts his behavior in a favorable moral light? As far as I can tell, Horder's account of the necessary conditions of excuses is unhelpful in solving this problem.

We should also note that excuses, as so conceived, are relative to the content of the substantive criminal law. Suppose that two defendants steal different amounts of money. Does the fact that the first took less than the second cast his behavior in a favorable moral light? The legislature may already have provided the answer to this question by creating distinct offenses of grand and petty larceny. If the amount taken by the defendant makes him guilty only of the lesser offense, he can hardly make the argument that this same fact makes him eligible for a partial excuse. But if a jurisdiction does not distinguish between two grades of theft, this argument would seem plausible and might be accepted.

The fact that wrongdoing is built into Horder's concept of excuses also shows the dependency of his view on assumptions about the content of the substantive criminal law. What are we to say about statutes that may not proscribe wrongdoing at all? Can a theory of excuses compensate for defective statutes? Suppose a jurisdiction does not allow patients to remove prescription drugs from their original containers. A defendant arrested at a border engaged in this offense prior to his vacation for the convenience of not having to carry his medicines in a dozen different bottles. Does this (presumably common) reason cast his behavior in a favorable moral light? I am unable to answer one way or the other, since the conduct proscribed does not seem wrongful in the first place. If the statute does not proscribe wrongdoing, it makes little sense to ask whether the behavior of a particular defendant should be viewed favorably.

III. THE SUBSTANCE OF EXCUSES

When should wrongdoing be viewed in a favorable moral light? The answer to this question calls for a substantive theory of excuses. If excuses are granted whenever the wrongful conduct of the defendant is assessed positively (relative to some unspecified baseline), one would expect that the criminal law would be receptive to an astonishingly broad array of excusing conditions. Obviously, the reality of criminal justice has not conformed to this expectation. Apart from denials of responsibility, existing law mostly confines the domain of excuses to duress, provocation, and mistake. Nor have theorists (with a handful of prominent exceptions) tended to endorse Horder's calls for a substantial expansion of excusing conditions. What accounts for this reluctance? Is it largely due to moral disagreement about whether the necessary conditions for granting an excuse have

been satisfied? Probably not. Of course, some such disagreement is inevitable, and I am unsure how it might be resolved. Perhaps Horder would have made more progress in this difficult matter by reflecting on *aggravating* factors—reasons that cast wrongdoing in an *unfavorable* moral light. Surprisingly, he barely mentions aggravation, and decisions about whether conduct should be viewed favorably remain largely intuitive.

Consider a few troublesome examples. Suppose a defendant assaults doctors who perform abortions. Does he deserve a partial excuse? We may be unclear whether his reasons for wrongdoing cast his behavior in a favorable light relative to persons who commit garden-variety assaults. Or does this defendant's plea fail because he does not satisfy Horder's sufficient conditions for leniency? And what about contemporary Robin Hoods? Although persons who steal from the rich to give to the poor surely merit our sympathies relative to typical thieves who pocket the fruits of their crimes, Horder agrees with those commentators who conclude that strategic concerns require the excuse to be withheld. Robin Hood violates individual rights, and has no moral basis to decide for himself whose property entitlements may be breached. But should we think otherwise of a Robin Hood who did not violate individual rights, and gained the money he distributed to the poor by cheating on his taxes? It seems suspiciously ad hoc to insist that strategic concerns always predominate in such cases. We again confront the intractable difficulty of deciding whether the need to preserve strategic goods swamps the claim in favor of allowing the excuse. In any event, unless Horder's basic approach is fundamentally misguided, we should be puzzled about why both courts and commentators have been loathe to broaden the range of excusing conditions.

For some reason, few criminal theorists appear to share Horder's charitable sentiments. Instead, they have tended to construct elaborate theories that severely limit the conditions under which wrongdoing should be viewed favorably. No single theory of excuses has garnered a consensus. According to the most well-known positions, defendants merit a complete or partial excuse when their wrongful conduct manifests some defect of capacity for choice, or deviates from their settled character, or lives up to what should be expected of them in their particular role. Horder offers penetrating criticisms of each such account, persuasively arguing that they are both too broad and (perhaps more importantly) too narrow. Legal philosophers who endorse one of these theories will have much to learn from Horder's thoughtful objections. But what does he offer to replace the alternatives he rejects? No simple answer is given.

Among the most striking features of *Excusing Crime* is the lack of a grand generalization about the conditions under which wrongdoing should be assessed in a favorable moral light. Despite the absence of an overarching principle, what Horder calls his "liberal" theory respects personal autonomy by expanding the variety of excusing conditions far beyond those currently recognized by law. Because he is largely interested in legal reform, Horder has relatively little to say about existing excuses (although he has written about them extensively elsewhere). Instead, the final half of his book is devoted to a fascinating discussion of three

circumstances in which he argues that our criminal justice system is too unreceptive to defendants.

First, he defends the partial excusatory significance of diminished capacity for "shortcomers"—defendants who suffer from a handicap that badly hampers their ability to comply with the law—but is not so serious as to negate *mens rea* or to preclude their responsibility altogether. (Horder, at 106–07.) Something very close to the excuse for which he argues is currently available in prosecutions for murder under the Model Penal Code, as well as in a handful of jurisdictions in the United States. Horder, however, can find no good reason to confine it so narrowly. He urges the creation of "second degree" offenses for nearly all crimes, especially those in which defendants face severe sentences. His case in favor of a partial excuse of diminished capacity for crimes in addition to homicide is made largely by addressing the reservations of John Gardner, who allows no excusatory space between what is expected of us on a given occasion as human beings, and what individuals are personally capable of achieving in light of their particular limitations. The age-old problem is the difficulty of distinguishing between the defendant who possesses normal abilities of self-control but fails to exercise them from the defendant who lacks normal abilities to exercise. Although Horder does not regard this obstacle as insuperable, no device to surmount it would be easy to implement.

Second, Horder contends that our criminal justice system should be less punitive toward defendants whose conscience demands wrongdoing. A liberal state cannot insist that persons sacrifice their beliefs in order to comply with a legal demand without placing a disproportionate emphasis on the importance of law-abidingness, thereby unduly limiting our prospects for achieving personal autonomy. (Horder, at 199.) Existing law is not entirely unreceptive to these claims, although it mostly affords them significance through reductions in sentences (if not by prosecutorial discretion). Like many theorists, Horder finds these solutions inadequate. He rightfully stresses the significance of conviction itself; the judgment courts render should accurately reflect what defendants have actually done. In any event, the law's reluctance to at least partially excuse conscientious wrongdoers is seldom due to a failure to assess them favorably. Instead, courts and commentators have emphasized various strategic reasons to deny the defense. In particular, they have worried that the law will be brought into disrepute by too many specious claims. Horder argues that this assumption is frequently mistaken. What steps can we take to safeguard the law's common goods? Horder's answers are extraordinarily nuanced, and I cannot begin to do them justice here. One of several suggestions is to limit excuses derived from demands of conscience to those offenses that do not violate individual rights. (Horder, at 202.) Thus a defendant who cites religious beliefs as the reason for not seeking medical assistance for his seriously ill child is entitled to less favorable treatment than a defendant who alleges similar reasons for not providing a blood specimen to the police who suspect he was driving while intoxicated.

Because personal autonomy plays such a central role in Horder's approach overall, he finds no good reason to limit demands of conscience excuses to cases in which these demands are *moral.* The state should not be quick to require defendants to sacrifice non-moral values central to their personal identity. (Horder, at 203.) For example, Horder contends that the law should partially excuse persons who survive mutual suicide pacts. Suppose the defendant and his spouse agree that neither of their lives are worth living without the continued presence of the other, and the health of one or both is threatened by a terminal illness. The defendant accedes to the victim's request to be killed, and then botches his subsequent attempt to end his own life. Horder is right to conclude that this situation represents a "paradigm case for partial excuse." (Horder, at 203.) I am less convinced, however, that he is correct to describe the excuse as only partial, since the defendant's action "involves a serious violation of [the victim's] individual rights." (Horder, at 203.) His general point, however, is profound and correct: If the aim is to protect personal autonomy, defendants whose conscience demands wrongdoing may qualify for an excuse despite lacking a moral reason to commit the offense.

Horder is somewhat less sympathetic to claims of civil disobedience, which differ from demands of conscience primarily in their political motivation. Strategic concerns frequently militate against excusing these acts. To my mind, Horder's general reluctance to allow this defense reflects an ideal and abstract conception of the legislative process that often is unrelated to the political realities of how statutes are enacted. He continually emphasizes that legislatures in a democratic state are "better placed than any individual or (protest) group adequately to account for all the reasons that bear on what is to count as the right guidance to follow." (Horder, at 224.) Horder surely is correct to conclude that legislatures are "better placed" than protest groups to evaluate all of the reasons that bear on claims of civil disobedience. One wonders, however, what should be done in cases in which legislatures have reached decisions for reasons other than the merits. The "war on drugs" in general, and the controversy about medical marijuana in particular, provide useful illustrations. In California today, facilities are prosecuted by federal authorities for providing medical marijuana to patients pursuant to state law. Defendants are eager to present their case, but no government agency seems willing to examine the increasingly embarrassing body of scientific evidence in favor of using marijuana as medicine. I am unsure what Horder himself thinks about this issue. But anyone who would deny a defense on the ground that legislatures are "better placed" than doctors and their patients to decide on effective treatments for medical conditions would fail to understand the political forces that drive contemporary drug policy.

Third, Horder argues that judges should recognize a defense of due diligence for the growing number of crimes of strict liability. He employs unusually strong language to criticize the timidity of the legal minds that retarded the development of this defense in recent history. Even when statutory language cannot be strained to find hidden evidence of a fault requirement, courts should develop the criminal

law in a morally sound way by acquitting defendants who did all that could reasonably be expected of them to avoid wrongdoing. According to Horder, the need for an excuse of due diligence comes from two sources. First, a liberal state should ensure that defendants have ample opportunities to provide an explanation for their wrongs. If no explanation *can* be given—if no precautions to avoid wrongdoing are recognized as a defense—the fairness of a trial is threatened "in that one has no self-sufficient moral reason, *qua* individual defendant, to engage constructively and co-operatively in the trial process." (Horder, at 255.) A second and more weighty consideration, in my opinion, derives from the fact that stigma attaches to a criminal conviction. The liberal state must strenuously avoid the imposition of unjustified stigma, much as it avoids unjustified discrimination or prejudice. As this latter consideration suggests, the real problem is with the content of strict liability statutes. What Horder treats as an excuse is designed to correct for deficiencies in the substantive criminal law itself.

Curiously, Horder qualifies his general views about the importance of a due diligence defense. For example, British law has created an offense of failing to ensure that one's child attends school regularly. The relevant statute provides for a number of specific justifications and excuses, but due diligence is not among them. Horder tentatively concludes that "a parent who could not have done more to ensure their child attended regularly at school, but cannot make use of any of the specific defenses, is simply unlucky." (Horder, at 256.) I fail to understand why parents should be stigmatized when they are unsuccessful despite making all reasonable efforts to ensure the attendance of their schoolchildren.

For the most part, however, Horder's reasons for recognizing excuses in these three areas are original and persuasive. I am more surprised by what he did *not* say. Since a liberal theory that values personal autonomy is so receptive to proposals to expand the number and range of excusing conditions, I am mildly disappointed that Horder did not discuss additional claims of possible excusatory merit. For example, he makes only passing reference to a possible excuse of ignorance of law, explicitly endorsing an excuse only when a defendant's legal ignorance is induced by legal officials or (perhaps) by barristers. It seems plausible (to me) to go further; a defendant who did not believe (or even suspect) his conduct was illegal and would not have done what he did had he known the truth compares favorably with a defendant who commits the same offense while understanding perfectly well that his behavior was criminal. Such persons gain a limited degree of my sympathy even when their ignorance is unreasonable. Obviously, opportunities to feign ignorance are plentiful. But if the law is to become more charitable in extending partial or complete excuses, enlarging the narrow principles about ignorance of law seems a sensible place to begin. The excusatory significance of ignorance of law seems as strong as that pertaining to shortcomers, persons who respond to demands of conscience, or defendants who exercise due diligence to avoid wrongdoing. Then again, *Excusing Crime* does not pretend to be the last word on which excuses should be recognized, and I am sure that Horder would welcome applications of his liberal theory in new directions.

IV. A DEFENSE LADDER?

The final theme of *Excusing Crime* I propose to briefly discuss is that various excuses can meaningfully be placed on what Horder calls a "ladder." (Horder, at 102.) Among the central questions about excuses is how they relate to other kinds of defenses, and how many other kinds of defenses must be distinguished. Many theorists—perhaps most—believe that justifications have a logical and/or a normative priority to excuses. Horder shares this basic position, and extends it throughout the entire realm of the defense types he contrasts. Although the details are complicated—Horder frequently admits that one rung can blur into another—his ladder consists of the following six rungs:

> Rung 1: transformative justifications, negating wrongfulness
> Rung 2: justifications for wrongdoing (e.g. self-defense; necessity)
> Rung 3: some full excuses (e.g. duress; excessive defense)
> Rung 4: some full or partial excuses (e.g. provocation)
> Rung 5: the partial excuse of diminished capacity
> Rung 6: denials of responsibility (insanity; diminished responsibility)
> (Horder, at 103.)

I confess that I don't fully understand this whole endeavor. I do not insist that the project of arranging defense types in a hierarchy is fundamentally mistaken; I only seek to clarify it in order to be capable of assessing it. What exactly is this a ladder *of*; to what do these rungs *correspond*? I am unsure whether the ladder purports to describe *logical* relations between types of defenses. Horder emphatically believes that "claims of true justification are inconsistent with seeking excuse" (Horder, at 49), but I do not know whether he thinks that similar logical relations obtain between each successive step. Instead, his thesis is primarily *normative*; it is *better* for a defendant if his defense is placed higher up the ladder and worse if it lies nearer the bottom. Since all complete defenses result in acquittal, we must ask: Better or worse for whom, and in what respect? In answering these questions, Horder does not attempt to improve upon the sketchy remarks of Gardner, who writes: "When I say 'best' and 'worst' here I mean best and worst for us: for the course of our lives and for our integrity as people." (Horder, at 99.) Surely more needs to be said. But is this quotation helpful at all? What business is it of the criminal law—especially a *liberal* theory of the criminal law—to make judgments about what is best for us in the course of our lives? Horder (and Gardner) must mean that these judgments are moral. The law itself does not make these judgments; they are made by legal theorists who hope to bring normative sense to the issue of how various legal defenses are related to one another.

I simply do not know what kinds of intuitions I should consult to test whether we should agree or disagree with the proposal to arrange defense types on a moral ladder. Should I imagine two cases in which everything is constant other than the

fact that the defendants plead defenses that are placed on different rungs? If I have correctly described the relevant thought experiment, I fail to see why Horder (and Gardner) are so confident about how the steps on the ladder are ordered. In particular, I do not understand the basis of their confidence that denials of responsibility (rung 6) are the worst kinds of defenses to have. Perhaps we readers are invited to imagine how we would react if we engaged in wrongdoing but were told that we were not responsible agents. Is this not a grievous insult? Would we not feel less than fully human?

But is our reaction to this question really decisive? An intuitive challenge to Horder's proposal might begin with an incomplete story in which two criminal acts have been performed: Smith and Jones deliberately inflict a fairly serious but not life-threatening injury on White and Black respectively. Imagine the story is embellished in either of two ways. In the first scenario, Smith's behavior is permissible, although not commendable. Suppose White is an impoverished thief who is escaping with Smith's television set. Smith's defense, I assume, belongs on rung two. In the second scenario, Jones is well below the age of criminal responsibility, and injures Black in a schoolyard brawl. Alternatively, in another version of the second scenario, Jones's agency has been seriously impaired by an evil scientist (who figures so prominently in philosophical thought experiments). Even if Jones has not acted in self-defense, I assume he has (what I would call) an excuse; his defense should be placed on rung six (or perhaps five). From a moral point of view, why should we conclude that Smith's defense is superior to that of Jones? Smith's explanations for wrongdoing, in my opinion, cast him in a worse moral light. Had I seriously injured a person at some point in my life, I would be less ashamed and repentant about having done so under the circumstances described in either version of the second scenario. Do such intuitions (assuming they are widely shared) falsify the sequence of rungs Horder has constructed? I *think* so, but cannot be sure. Arguably this counterexample does not present problems for Horder because we should imagine that one and the same person has two different defense types for the same criminal act. But I do not understand how we can possibly imagine one and the same defendant to be wholly lacking in responsibility while simultaneously acting from a justification. We can imagine a given defendant who is capable of having a justification but is temporarily lacking in responsibility, because, for example, he is sleepwalking. If *this* is the relevant thought experiment, I again believe most readers will concur with my intuitive judgment that the sleepwalker who injures another has little or nothing to be ashamed of; his defense does not reflect negatively on the course of his life or on his integrity as a person.

The case against the ladder Horder constructs is bolstered if we believe (as many do) the following propositions. Suppose that agent-relative reasons can give rise to a justification rather than to an excuse. Perhaps I am justified rather than excused if I push someone from a plank in order to save myself. Suppose further that mistakes about justifications, even when reasonable, give rise to an excuse rather than to a justification. Perhaps I am excused rather than justified when I

reasonably but falsely believe that I must push a single individual from the plank to save two others. Again, why think that the (former) justification casts the agent in a better moral light than the (latter) excuse? A theorist may respond to my proposed counterexamples by reclassifying the defenses I have described. Perhaps reasonable mistakes about justifications can justify, while agent-relative reasons cannot. Admittedly, all such categorizations are highly controversial. How should we decide which categorizations are correct? I hope that no one will appeal to a pre-existing ladder as the basis for supposing that my classifications *must* be wrong. Surely our level of confidence in the claim that defense types are arranged in a particular way is not so great that its truth must be preserved by our decision about how to categorize given defenses. These issues require clarification and further thought. Despite the problems I have tried to raise, among the many virtues of *Excusing Crime* is its sophisticated attempt to specify the relations among the several types of defenses recognized by the criminal law.