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Heidi M. Hurd

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JUSTIFICATION AND EXCUSE, WRONGDOING AND CULPABILITY

*Heidi M. Hurd**

INTRODUCTION

In his celebrated article, *The Perplexing Borders of Justification and Excuse*,¹ Professor Kent Greenawalt articulates an epistemic theory of justification that, by his own account, implies that American law should abandon efforts to systematically separate justifications from excuses. Like a red flag before a bull, such a theory irresistibly challenges criminal and tort law scholars to advance a conception of the justification/excuse distinction that both explains the historic codification of this distinction and assists in the systematization of case-by-case decisions in precisely the manner that Professor Greenawalt denies is possible.

In this Article, I shall honor Professor Greenawalt's impressive academic legacy by taking up his challenge. As a student of an imposing and influential teacher is wont to do, I take as my target my teacher's theory. My project in this Article is to demonstrate that Professor Greenawalt is wrong in maintaining that an action is justified if and only if an actor reasonably believes that it is justified. I shall argue, on the contrary, that an action is justified if and only if it is permitted by our best moral theory, regardless of the beliefs of the actor. The epistemic state within which the actor acts determines the actor's culpability, but it does not affect the question of his wrongdoing. By cleanly divorcing culpability from wrongdoing, the law *can* accomplish the systematic differentiation of justifications and excuses denied to it by Professor Greenawalt, and it can thereby more clearly reflect the conditions of moral responsibility in the criteria for legal liability.

* Professor of Law and Philosophy and Co-Director of the Institute for Law and Philosophy, University of Pennsylvania.

1 Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

I. PROFESSOR GREENAWALT'S EPISTEMIC THEORY OF THE JUSTIFICATION/EXCUSE DISTINCTION

Professor Greenawalt argues that the distinction between justified and excused actions is best thought of—indeed, can only be thought of—as a distinction between “warranted actions” and “unwarranted actions for which the actor is not to blame.”² Professor Greenawalt maintains that the law cannot and should not seek greater specificity than this because “[t]he price of much greater rigor in the law would be to press concepts beyond their natural capacity, to generate avoidable disagreements or submerge controversies with misleading labels, and, likely, to complicate the tasks of jurors.”³ According to Professor Greenawalt, our ordinary discourse reveals that we consider justification in action to be a function of “having good reasons for what one does or believes.” If a woman reasonably believes that the man who is circling her house is intent upon killing her and that the only means of effective defense available to her is to shoot him, then she is “warranted” in shooting him. That he turns out to be the meter-reader doing his routine rounds is of no consequence to the question of her justification in shooting him. If a fire fighter reasonably believes that the only way to prevent a forest fire from destroying a town is by burning down a row of houses to create a fire break, then his action of setting fire to the houses is “warranted” regardless of the fact that the forest fire later burned out before reaching the charred remains of the houses.⁴

According to Professor Greenawalt, the results of this explicitly epistemic conception of justification at best imperfectly correlate with the results of other tests that many scholars believe mark the difference between justifications and excuses. Such traditional tests sometimes declare that actions that we would ordinarily, and in his view, rightly, describe as justified are in fact unjustified, and they sometimes declare that actions that we would ordinarily, and in his view, rightly, describe as unjustified are in fact justified. According to Professor Greenawalt, this is so much the worse for the traditional tests of justification. In his view, we should abandon the traditional tests in favor of

2 Greenawalt, *supra* note 1, at 1919.

3 *Id.* at 1904.

4 For a theory of justification that reaches similar conclusions for similar reasons, see Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984). While Professor Greenawalt describes as justified all actions we would think of as “warranted,” Dressler describes justified actions as those actions that are “tolerable.” Both terms intend to capture the ordinary notion that people who act on good reasons cannot be blamed.

the general, albeit "conceptually fuzzy" formula that makes an action justified if it is warranted and unjustified if it is not, where an action is warranted if it was based on good reasons at the time that it was committed.⁵

Consider three traditional tests of the difference between justifications and excuses which must be abandoned if Professor Greenawalt is right. First, it is commonly believed that a person's actions are justified if and only if others may not justifiably thwart them.⁶ According to Professor Greenawalt, however, there are a number of instances in which a person's actions are justified (in the sense that the person has good reasons for doing them), and yet, it is fully appropriate for others to prevent them. Professor Greenawalt gives three sorts of examples.

The first sort of case is illustrated by the above example of the woman who reasonably believes that she is in imminent peril from a man who is circling her house. In that case, the woman is justified in shooting at him, and, since he is merely an innocent meter-reader and not a would-be killer, he is justified in shooting back at her to defend himself. A second example of this sort is provided by Professor Greenawalt's story of a person who, upon discovering two men beating and struggling with a teenage boy, reasonably believes that by disabling the boy's assailants, he will justifiably assist the boy to escape.⁷ As it happens, the two men are undercover police officers executing a lawful arrest. As Professor Greenawalt argues, they are surely justified in resisting the rescuer's (justified) efforts to defend the boy. According to Professor Greenawalt, these cases demonstrate that it can be justified to thwart a justified action.⁸

5 See Greenawalt, *supra* note 1, at 1898.

6 George Fletcher, for example, defends this test of justification. In his view, it follows from the truth of the "incompatibility thesis"—"that it is logically impossible for both sides in a conflict to be justified." GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 767 (1978); George Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 975 (1985) [hereinafter Fletcher, *The Right and the Reasonable*]; George Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1360 (1979) [hereinafter Fletcher, *Prison Conditions*]. According to the incompatibility thesis, if a person is justified in doing act A, then another cannot be justified in preventing A. For an extensive examination of whether our best moral theory might issue incompatible obligations to different actors, see HEDI M. HURD, *MORAL COMBAT* (1999).

7 For Professor Greenawalt's discussion of this example, see Greenawalt, *supra* note 1, at 1919. This hypothetical takes its inspiration from the textbook case of *People v. Young*, 183 N.E.2d 319 (N.Y. 1962).

8 See Greenawalt, *supra* note 1, at 1920.

A second sort of case that Professor Greenawalt advances to demonstrate that warranted actions may be justifiably thwarted is that of the prison inmate who is justified in escaping confinement if he has a well-grounded fear of serious injury and intends to surrender as soon as he is clear of the danger. While a prison escape may be justified, says Professor Greenawalt, prison guards are justified in preventing such an escape because they may justifiably fear that the inmate will escape permanently.⁹ Once again, then, it is wrong to think that an action is justified if and only if others would be wrong to interfere with it.

A final sort of case in which an actor might be justifiably prevented from doing a justified action is provided by the following example: "John attacks Mike with a knife; Mike justifiably draws his own knife, and each raises his arm to strike. Both are very weak. Arnold, who is extremely strong, is capable of grabbing John and Mike by their wrists and forcing each to drop his knife."¹⁰ In Professor Greenawalt's view, Arnold is justified in thwarting Mike's justified acts of self-defense. According to Professor Greenawalt, this case, like the cases above, falsifies the claim that acts are justified if and only if they cannot be justifiably prevented.

According to Professor Greenawalt, a second test of justification with which his theory is in conflict equates having a justification to do an action with others having no right that one not do the action.¹¹ In Professor Greenawalt's view, however, there are numerous instances

9 See *id.* at 1920. George Fletcher somewhat surprisingly argues that prison escapes are not justified, only excused. See Fletcher, *Prison Conditions*, *supra* note 6, at 1359. As he argues, it follows from his incompatibility thesis that since prison guards are justified in preventing escapes, prison inmates must only be excused in escaping.

It seems to me that while Fletcher's incompatibility thesis is right, Fletcher cannot sustain this particular conclusion if it is premised simply on Professor Greenawalt's view that, in most cases, prison guards have insufficient evidence of an inmate's intentions to be confident that he will return to custody upon achieving safety. If this were the basis of Fletcher's argument, Fletcher would have to admit that if a guard in fact knew that an inmate was escaping only long enough to save his own life, that guard would be unjustified in stopping him. To sustain his view, Fletcher must think that it is a feature of the role of being a prison guard that a guard is *always* justified in stopping prison escapes—even escapes by inmates who are in fact seeking only temporary escape to save their lives. But if morality is "role-relative," then Fletcher's incompatibility thesis is in trouble. As the prison case suggests, actors within different roles might well be bound by their unique obligations to confront one another in what I call "moral combat"—to thwart one another's role-justified actions. See HURD, *MORAL COMBAT*, *supra* note 6. I discuss the view that morality is role-relative *infra* at text accompanying note 36.

10 Greenawalt, *supra* note 1, at 1924.

11 See *id.* at 1922–23.

in which persons have a right to use force to do what others have a right that they not do. For example, suppose that powerful evidence exists that Megan committed a murder. Upon a finding of probable cause, a judge issues a warrant for her arrest. Were all the true facts known, however, Megan's innocence would also be known; but such exculpatory facts are unavailable at the time that the warrant is executed. In this case, Professor Greenawalt argues, Megan has a right not to be forcibly arrested, but the arresting officer is justified in using necessary force to arrest her and she is not justified in using force to resist arrest.¹² Similarly, if a person has a claim of right to property in his possession, he is justified in using force to prevent that property from being taken by the rightful owner who has a right to its return.¹³ Such cases, argues Professor Greenawalt, illustrate that it is wrong both to equate justified actions with actions that others have no right that one not do, and to equate excused actions with actions that others have a right that one not do.

A third well-known test of when actions are justified holds that an action is justified if and only if we are willing to recommend that others emulate it in similar circumstances. In contrast, an action is eligible only for an excuse when we wish that the actor had acted differently and hope that others do not emulate the actor's unfortunate conduct in the future. Professor Greenawalt does not address this test on its face.¹⁴ Rather, he first attributes to it the assumption that justifications are general or universalizable, while excuses are based on personal characteristics or subjective attributes, and he then takes issue with this assumption.¹⁵ As he maintains, inasmuch as justifications have subjective components and excuses have objective components, such a test fails to capture accurately the difference between justifications and excuses. As Professor Greenawalt maintains:

One subjective characteristic of the actor is crucial . . . for justification in both ordinary usage and in the law: his belief in the presence of justifying circumstances. If, unknown to Sue, David has begun to draw a gun to shoot her a split second before she shoots him, Sue's claim of self-defense is unavailing. Although the objective situation

12 See *id.* at 1922.

13 See *id.* at 1923–24.

14 Indeed, he puts this test to use at numerous points in his article. For example, in discussing the response of the man (Young) who reasonably believed that two plain clothes police officers were wrongfully beating a boy, Professor Greenawalt writes: "Young is to be praised, not blamed, for what he did, and members of society would wish that others faced with similar situations requiring instant judgment would act as Young did." *Id.* at 1919.

15 See *id.* at 1915.

warranted her shooting in self-defense, Sue lacks that justification because she was unaware of the relevant facts when she shot.¹⁶

In Professor Greenawalt's view, while we should be unwilling to recognize a justification in Sue's case, we should be willing to recommend that another actor in Sue's situation do precisely what Sue did *if* that actor believes himself to be in peril. Whether actors are justified in their actions is therefore a function of their subjective attributes.

In contrast, many excuses have objective components. For example, in most jurisdictions an actor may claim the excuse of duress only if she gave way to a threat to which "a person of reasonable firmness" would have yielded.¹⁷ Professor Greenawalt argues that there are sound reasons for including objective elements in legal excuses:

[I]nstructing the jury to apply a completely subjective standard would make the jury's task too difficult, introduce too much uncertainty in application, provide some incentive for fraudulent efforts to establish that actors have inordinate susceptibility to threat or insult, and reduce the constraints on people who are strongly tempted to yield to powerful emotions.¹⁸

It follows, he says, that we cannot characterize the criteria for excuses as purely subjective and we cannot, therefore, describe the difference between justifications and excuses as a difference between objective and subjective conditions.

Professor Greenawalt concludes that the tests that are commonly used to differentiate justified from excused actions frequently cause us to misclassify actions. In his view, certain sorts of actions that are clearly warranted are classified by these tests as unjustified, while other sorts of actions that are clearly unwarranted are classified by these tests as justified. Professor Greenawalt thus proposes that we abandon the traditional benchmarks of justified and excused actions in favor of the general notion that justified actions are actions that we would commonly think of as "warranted," while excused actions are actions that we would commonly think of as "unwarranted," but for which the actor is not to blame. Such a test, he admits, is regrettably imprecise and engenders certain paradoxical results. For example, it entails that morally identical actions in morally identical circumstances may be categorized differently (because the intentions and beliefs of the different actors may vary significantly). And it suggests that two people who are locked in conflict may each be justified in their

16 *Id.* at 1916 (footnote omitted).

17 *Id.* at 1917 (quoting MODEL PENAL CODE § 2.09 (1) (Proposed Official Draft 1962)).

18 *Id.* at 1918.

actions. Yet according to Professor Greenawalt, this test better captures “the troubling borders of the two concepts” than do other tests, and it admirably “compromise[s] disagreements about substantive morality” and permits judges to group “similar factual situations under the same rubric in order to focus the jury’s efforts on the questions crucial to liability and nonliability.”¹⁹

In the next Part, I shall advance an alternative account of the difference between justifications and excuses that both avoids the “conceptual fuzziness” from which Professor Greenawalt’s account admittedly suffers and honors Professor Greenawalt’s widely shared moral intuitions about when persons act in praiseworthy and blameworthy ways. As I shall demonstrate, this alternative account both vindicates all of the traditional tests of the distinction between justified and excused actions and allows the law to systematically reflect that distinction with all the analytic rigor that Professor Greenawalt’s theory denies it.

II. A NONEPISTEMIC THEORY OF THE JUSTIFICATION/ EXCUSE DISTINCTION

Professor Greenawalt’s epistemic conception of justification is fundamentally premised on the claim that we ordinarily describe persons as having acted justifiably when, at the time that they acted, they had good reasons for doing what they did. In his view, any conception of justification that denies this “distort[s] ordinary concepts” in ways that are “not appropriate” for Anglo-American law.²⁰ It is my view, however, that while the values that underlie the rule of law require laws to be clear and readily understandable by those to whom they apply, clarity (and therefore, comprehensibility) can often be achieved only by giving legal meanings to terms that part ways with the ordinary meanings given to those terms. We should thus avoid hamstringing our analysis of the distinction between justified and excused actions by an *ex ante* requirement that we use moral language the way that it is used in daily gossip, because the terms of daily gossip may obscure or equivocate between distinctions to which the law should be attentive.

Let me propose, then, an alternative account of the justification/excuse distinction that better allows us to individuate the discrete moral judgments that go into judging actions justified or excused. This alternative account takes its leave from the claim that it is both

19 *Id.* at 1927.

20 *Id.* For similar claims about nonepistemic conceptions of justifications, see Dressler, *supra* note 4, at 84–85.

conceptually and normatively important to distinguish between wrongdoing and culpability (and between right-doing and nonculpability). Justified actions should be conceived of as right actions, while excused actions should be conceived of as wrong actions done nonculpably.²¹

A. *The Wrongdoing/Culpability Distinction*

Moral wrongdoing consists of doing an action that violates the maxims of our best moral theory—whatever that theory may be, be it consequentialist or deontological.²² I have elsewhere extensively argued that the objects of our best moral theories are causally complex actions, not mental states.²³ We are prohibited from killing, raping, maiming, defaming, and stealing; we are not prohibited from harboring mental states about killing, raping, maiming, defaming, and stealing. On pain of doing wrong, we would be wise to refrain from harboring mental states that incline us toward wrongdoing. And it may be appropriate to blame us for possessing mental states that have as their objects or likely consequences wrongful actions. But to blame us for possessing such mental states is to blame us for culpability, not wrongdoing. For wrongdoing does not occur until we have completed the causally complex actions prohibited by our best moral theory.

Moral culpability consists in intending to do an action that is wrongful, knowing that one will do an action that is wrongful, or failing to infer from available evidence that one will do an action that is wrongful. As I said, moral culpability may be a sufficient condition of

21 The theory that I shall defend in this section bears significant resemblance to the theories of the justification/excuse distinction defended by George Fletcher and Paul Robinson. As George Fletcher has maintained, "A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act." FLETCHER, *supra* note 6, at 759; see also 2 PAUL ROBINSON, *CRIMINAL LAW DEFENSES* § 122 (1984); George Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974); Fletcher, *Prison Conditions*, *supra* note 6; Fletcher, *The Right and the Reasonable*, *supra* note 6; Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982).

22 If our best moral theory is consequentialist, then wrongdoing will consist in failing to maximize the good, however it is defined (e.g., as utility, preference-satisfaction, the cultivation of personal virtue, the protection of rights, etc.). If our best moral theory is deontological, then wrongdoing will consist in violating agent-relative maxims that are intrinsically good and that cannot justifiably be violated in the name of maximizing good consequences.

23 See Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249-72 (1996); Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 157-216 (1994).

blame and punishment. While we may independently wish to blame and punish persons for culpable conduct and for wrongdoing, there are weighty conceptual and normative reasons why we cannot smear the distinction between these two bases of liability.

First, it should be clear that it is *conceptually necessary* to distinguish wrongdoing from culpability. This is true even if one believes—as Professor Greenawalt plainly does—that it is a person's culpability that primarily determines his moral and/or legal responsibility for a harm. It literally makes no sense to maintain that an action is justified if and only if the actor reasonably believes that the action is justified. First, for an actor to believe that an action is justified, he has to have a theory about when an action is justified, and on pain of circularity, that theory cannot consist solely of the formula that an action is justified if the actor believes that it is justified. Second, for an actor to *reasonably* believe that an action is justified, his beliefs must approach truth about the matter. There thus must be a truth about the matter separate from his beliefs about it. We cannot assess whether a person reasonably inferred from the evidence available to him that he would do no wrong without a nonepistemic theory of wrongdoing. For evidence is only evidence if it is evidence *of something*. We can only inquire into whether a person reasonably believed that a killing was justified if we have a theory of the conditions under which it is wrong to kill and can assess the evidence available to him concerning the existence of those conditions in light of that theory.

It should also be apparent that the distinction between wrongdoing and culpability is of significant normative importance. This is true even if one believes—as Professor Greenawalt clearly does—that, in the end, persons should be held morally and legally responsible whenever they have caused harm culpably (regardless of whether they have done a right action or a wrong action), and persons should not be held morally or legally responsible whenever they have caused harm nonculpably (regardless of whether they have done a right action or a wrong action, and hence, regardless of whether they should be thought to be justified or excused). Even if wrongdoing is neither a necessary nor a sufficient condition of moral and legal responsibility, it is our theory of wrongdoing (not culpability) that necessarily guides our actions. If our culpability turns on whether we intend to do wrong, know that wrong will occur, or have reason to predict that we will do wrong, then to avoid being culpable we must know what it is to do wrong and seek to avoid it. Only if we know what it is to do wrong can we refrain from forming intentions and beliefs about doing wrong and rationally assess available evidence concerning the likelihood that our actions will be wrongful.

B. *The Legal and Moral Pay-Offs of the Wrongdoing/
Culpability Distinction*

Once it is clear that we must distinguish wrongdoing from culpability, it also becomes clear that there are four possible categories of actions:²⁴ (1) culpable wrong actions; (2) nonculpable wrong actions; (3) culpable right actions; and (4) nonculpable right actions.²⁵ Because our use of the term "justified action" in ordinary moral discourse commonly equivocates between the second, third, and fourth categories of action, while our use of the term "excused action" com-

24 This is a conceptual claim. It may turn out that one or more of these categories is empty. For example, while it is conceptually possible for persons to culpably commit right actions, it is also possible that, as an empirical matter, they simply never do. In such a case, the third category of culpable right actions would turn out to be empty.

25 I have elsewhere argued that within the category of right action (defined as action that is either obligatory or permitted according to our best moral theory) there are actions of varying moral stripes. There are supererogatory actions (permitted actions that are praiseworthy to perform but not blameworthy to omit, such as throwing oneself on a grenade to save one's buddies), suberogatory actions (permitted actions that are blameworthy to perform but not praiseworthy to omit, such as smoking, or buying a Renoir only to destroy it), and quasi-supererogatory actions (permitted actions that are praiseworthy to perform and blameworthy to omit, such as giving one's kidney to save the life of one's sister). See Heidi M. Hurd, *Duties Beyond the Call of Duty*, 6 ANN. REV. LAW & ETHICS 1, 1-36 (1988).

These further distinctions do not affect our ability to talk in terms of the four categories of action identified above, although they are helpful in replying to a further complaint that Professor Greenawalt and others have had with the justification/excuse distinction. As Professor Greenawalt rightly argues, there are "permissible acts that are less than ideal." Greenawalt, *supra* note 1, at 1904; see also Dressler, *supra* note 4, at 84 (arguing that there are actions that morally sensitive people could find "not right" without considering them "wrong"). These acts, he says, defy categorization as either justified or excused: they are justified in the sense that one has a right to do them, but they are unjustified (and hence, perhaps at best excused) in the sense that one ought not to do them. In my taxonomy, such acts would be considered suberogatory. Professor Greenawalt is right that in complicating our taxonomy of morally significant actions with super-, sub-, and quasi-supererogatory actions, we are forced to make more sophisticated our understanding of what should be thought a morally and legally justified action. But there is, in principle and in practice, no problem with doing this and no ability to avoid doing this. We have two choices: Either we can characterize all permitted actions (including suberogatory actions) as justified, making prohibited actions the only actions eligible for excuses, or we can characterize all morally praiseworthy and morally neutral actions as justified, leaving prohibited and suberogatory actions to the excuses. We are not spared this choice by the adoption of an epistemic conception of justification, nor does the adoption of such a theory assist us in making this choice. I therefore take Professor Greenawalt's discussion of permissible acts that are less than ideal to be by the way of his arguments for an epistemic theory of justification.

monly equivocates between the first, second, and third categories, it is no surprise that ordinary moral language obfuscates rather than illuminates distinctions that may be material to judgments of legal responsibility. We would thus do better to abandon the legal use of the terms "justification" and "excuse" altogether in favor of talking about actions in the four ways described above. Short of that solution, it is important to sort out the senses of justification and excuse that are commonly merged in daily discussion and to define which senses of those terms should be adopted by the law. Only then can we be clear about when and why legal liability should attach to conduct, and when and why it should not.

The distinction between wrongdoing and culpability is hardly foreign to the law. Indeed, it is the distinction between the *actus reus* and *mens rea* of any crime or tort. To make out a defendant's *prima facie* liability, prosecutors and plaintiffs must demonstrate both that the defendant did (a legal) wrong, i.e., that she did a voluntary act that brought about a legally prohibited state of affairs (a killing, a rape, a destruction of property), and that she did that wrong culpably, i.e., that she acted purposefully, knowledgeably, recklessly, or negligently with regard to bringing about the legally prohibited state of affairs. We thus have doctrinal precedent for separating our evaluation of a defendant's actions from an evaluation of that defendant's beliefs about her actions.

While the *prima facie* elements of torts and crimes explicitly distinguish judgments of legal wrongdoing from judgments of legal culpability, it is nevertheless true that the distinction between wrongdoing and culpability becomes blurred when one moves to the conditions that a defendant must make out in order to avail himself of one of the law's defenses. As Professor Greenawalt rightly points out, in both legal and moral parlance a killing is deemed justified if it was committed by a person who, at the time of the killing, reasonably believed herself in peril, even if subsequently revealed facts prove her beliefs to be wrong.²⁶ Similarly, a prison guard is deemed justified in preventing the escape of an inmate, even if subsequently revealed facts prove that the inmate was fleeing from a murderous cellmate and would have turned himself in at the first safe opportunity.

26 For example, after the New York Court of Appeals held in *People v. Young*, 183 N.E.2d 319, 319-20 (N.Y. 1962), that "one who goes to the aid of a third person does so at his own peril," the New York legislature enacted N.Y. PENAL LAW § 35.15 (1968) (defense of justification), which reads: "A person may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person. . . ." *Id.*

It is my view that the law that governs the defenses can and should employ the wrongdoing/culpability distinction to achieve the sort of clarity that the law has already accomplished within the doctrines of prima facie liability. Were the law to do this, it would clearly reflect the four possible categories of action that the wrongdoing/culpability distinction reveals. Let us map the theoretical sacrifices and doctrinal changes that would be required to bring this four-fold taxonomy to the law.

1. Culpable Wrong Actions

Culpable wrong actions comprise actions that violate the maxims of our best moral theories and are performed by actors who intend, know, or can predict that they will be of a sort deemed wrongful by our best moral theory.²⁷ This category consists of actions that are, by all accounts, unjustified. By some accounts, however, such actions may be excused. It is because there is a dispute over whether to include excuses in the analysis of culpability that some speak of culpable wrong actions as excusable, while others think that such a description is an oxymoron. For example, some criminal law scholars would describe an insane actor who intends to kill a person (because he believes that the person is an alien trying to steal his brains) as a culpable wrongdoer who ought to be excused, while others would declare him, all things considered, nonculpable. Some would think of a person who kills under duress as a culpable wrongdoer eligible for an excuse, while others would deem him altogether nonculpable.

Those who fold excuses into the analysis of culpability thus place excused actions in the category of actions to which we will next turn—the category of nonculpable wrong actions. They would recommend that the category of culpable wrong actions be viewed as the category of actions that, all things considered, deserve moral blame and often

27 It is my view that knowledge of morality is no more required for culpable wrongdoing than knowledge of the law is generally required for legal liability. A person need only intend to kill to be morally blameworthy for murder; he need not know that an intentional killing is murder, nor need he know that murder is morally blameworthy.

Most moral theorists—save moral emotivists and subjectivists—would presumably agree. For example, moral conventionalists, who believe that morality is constituted by the dominant beliefs within a community, maintain that inasmuch as individuals within the community can be mistaken about those beliefs, they can be wrong about the morality to which they are subject. For a conventionalist's defense of the view that morality is only meaningful if the persons subject to it can be wrong about it, see Philippa Foot, *Moral Relativism*, in *RELATIVISM COGNITIVE AND MORAL* 152, 158–60 (Michael Krausz & Jack W. Meiland eds., 1982).

legal liability. Those who resist the move to collapse excuses into the analysis of culpability simply think of cases involving excused culpable wrongdoing as discrete exceptions to the general rule that cases of culpable wrongdoing merit moral blame, and often legal liability.

As a matter of legal practice, it matters little whether excuses are folded into the analysis of culpability or kept separate: in the end, those who merit an excuse will be relieved of moral and legal liability. But how one conceptualizes the role of excuses *vis-à-vis*, say, intentional killings, may affect how one analyzes the sorts of cases to which we turn in the next sections. If this is the case, we must be cautious not to let our practical indifference concerning the legal description of cases that fall within the category of culpable wrong actions generate confusion about how to legally describe cases that fall within the categories of nonculpable wrong actions and culpable right actions.

2. Nonculpable Wrong Actions

Nonculpable wrong actions are actions that violate the maxims of our best moral theory but are performed by actors who neither intend to do wrong nor have good reasons to predict that they will do wrong. It is worth distinguishing two sorts of cases, even if, in the end, they ought to be treated identically. Those who incorporate excuses into the analysis of an actor's culpability will put examples of harms perpetrated as a result of insanity, duress, diminished capacity, and (involuntary) intoxication in this category of actions, thereby expanding what it means for an actor to be nonculpable in the commission of a wrong. As we said in the previous Section, such theorists will reserve the category of culpable wrong actions for actions that, all things considered, merit blame and punishment, employing the present category of nonculpable wrong actions to capture excused actions as those are traditionally understood. This is a perfectly clear and sensible means of defining these categories of actions.

Those, on the other hand, who view the traditional excuses as considerations extraneous to both wrongdoing and culpability, and who thereby allow for culpable wrong actions that are excused, may think that this category of nonculpable wrong actions is empty. But in fact, there is a second set of wrong actions that are nonculpable, not because they are performed under circumstances to which traditional excuses apply, but because they are performed reasonably. Recall the case of the woman who shoots the meter-reader as a result of a reasonable, but wrong belief that he is a would-be killer. If our best moral theory makes it wrong to kill an innocent person, then the woman does wrong, although her reasonable belief that such an action was

necessary for self-defense makes her killing nonculpable. Similarly, if it is wrong to take another's property, then the person who takes an umbrella while innocently believing that it is his own does wrong, albeit nonculpably. If culpability is a necessary condition of moral blame, then the actors in these cases should be exonerated.

There are a number of theorists—Professor Greenawalt being one of them—who describe this category of actions as justified, rather than excused.²⁸ Inasmuch as we both idiomatically refer to reasonable beliefs as “justified” and idiomatically extend the term “justified” to actions based on reasonable beliefs, such a description is at home in our daily discourse. But to describe such actions as justified is, in fact, *morally* misleading. Actors who commit nonculpable wrongs of the second sort are *epistemically justified* (i.e., “warranted”), and for that reason, they are nonculpable. But their actions are not *morally justified*, and for that reason, they do wrong.

It is open to theorists to argue, as Professor Greenawalt does, that the law ought to adopt the epistemic understanding of justification rather than the moral understanding. But it is my view that this is a recipe for confusion. As I made clear in the previous Section, even if culpability is both necessary and sufficient for responsibility, inasmuch as one is culpable only if one intends to do wrong or can predict that one will do wrong, one can only avoid culpable conduct by working to conform one's actions to our best theory of right action. If law is to be action-guiding, then it must seek to articulate the conditions of right and wrong action—not epistemically justified and unjustified action. It should therefore confine the notion of justification to *morally justified* actions, rather than extending it to include epistemically justified actions.

It has been the unfortunate blurring of epistemic justification with moral justification that has confounded the law's ability to keep the moral distinction between wrongdoing and culpability clear, and has thereby confounded the law's ability to systematically define its defenses with the same clarity that it defines its *prima facie* cases. Were the law of self-defense, for example, analogous to the law that

28 See, e.g., Dressler, *supra* note 4, at 92–93. In a number of jurisdictions, this position has the law on its side. See WAYNE LAFAVE & AUSTIN SCOTT, HANDBOOK ON CRIMINAL LAW 762–67 (2d ed. 1986) (recounting that at common law, conduct is justified if an actor reasonably mistakes the existence of justifying circumstances); MODEL PENAL CODE § 3.04(1) (Proposed Official Draft 1962) (holding that use of force is justified if an actor merely believes it to be immediately necessary); RESTATEMENT (SECOND) OF TORTS §§ 63–76 (1964) (justifying self-defense and third-party defense when an actor reasonably believes it necessary). *But see* ROBINSON, *supra* note 21, at 224, 239.

governs the prima facie case for murder or tortious battery, it would separate the question of whether the act committed was in fact a necessary response to genuine peril from the question of whether the actor believed it so. Just as a battery has not been committed unless the defendant inflicted upon the plaintiff a contact deemed by law to be harmful or offensive, so the law should grant the self-defense justification only in instances in which a killing was in fact necessary to avert real peril.

In cases in which the self-defense justification founders on an inability to make out this "actus reus" (e.g., because the victim turned out to be a meter-reader and not a would-be killer), the law should adopt a solution analogous to the solution adopted in cases in which the actus reus fails for prima facie liability. For example, when a would-be killer tries to kill, but fails, the law does not satisfy our sense that he should be punished by glossing his failure to kill and declaring him a murderer. Rather, it has specially crafted attempt liability to hold persons liable when they have sought to kill, but have not in fact performed the actus reus of murder. In reverse, when a person kills under the reasonable but mistaken impression that the victim was an aggressor, the law ought not to gloss the fact that she killed an innocent person by declaring her a justified self-defender. It ought, instead, to craft a special excuse doctrine to exonerate such a nonculpable person of the wrong that she has done.

3. Culpable Right Actions

Culpable right actions are actions that one has a right to do, but that one does with bad intentions or for bad reasons. Consider Professor Greenawalt's example of Sue who seeks out David in order to kill him. Unbeknownst to her, David is seeking her out for the same reason. Neither, however, has reason to guess the other's intentions. At just the moment that Sue is about to shoot David, David takes aim at her. When Sue kills David, she does a morally permitted action: she prevents her own murder. But inasmuch as she has no reason to believe that in shooting David she is defending herself from a culpable aggressor, she acts culpably. As a second case, imagine a man who believes that he is raping a woman; he believes, that is, that she is not consenting to their sexual intercourse. Unbeknownst to him, however, she is indeed voluntarily acquiescing to his contact: she has as her purpose sexual intercourse with him and she is physically repelling him only as a means of prompting him to believe wrongly that he is raping her. Inasmuch as the woman is, in fact, consenting to his

actions, the man is doing nothing wrongful.²⁹ But inasmuch as he believes that he is raping her, his (right) actions are culpable.

Many theorists follow Professor Greenawalt in thinking that a defendant's belief in the presence of justifying circumstances is crucial to a defendant's justification.³⁰ And surely this is so if what we are concerned with is a defendant's *epistemic justification* for acting. But if doctrines of justification ought to reflect the circumstances in which actions are *morally justified*, then the law ought not to satisfy our sense that the above actors ought to be punished by glossing the fact that their actions were permitted and declaring them to be murderers and rapists. If these actors should be punished, it should not be because they in fact did unjustified actions.³¹ Rather, it should be because they *tried* to do unjustified actions, even though they did not, in fact, succeed. Sue attempted to murder David; the man attempted to rape the woman. Both ought to be dealt with in the same manner that we deal generally with persons who try to murder and rape—namely, both should be subject to attempt liability.

Culpable right actions should thus be thought to be justified actions (in the moral sense in which the law should construe justified actions). But they are apt candidates for attempt liability and for the

29 For a defense of the thesis that consent constitutes a mental state (specific intent vis-à-vis another's conduct), not a set of actions, see Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121–46 (1996). For one counter-punch to this thesis, see Larry Alexander, *The Moral Magic of Consent II*, 2 LEGAL THEORY 175 (1996).

30 See Greenawalt, *supra* note 1, at 1916. George Fletcher, who is well known for advancing a nonepistemic conception of justification, oddly enough also embraces this view. See FLETCHER, *supra* note 6, at 557, 559–60, 564–65; George Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293 (1975). Paul Robinson, however, disputes both the normative claim that justifications ought to embody such a subjective requirement and the descriptive claim that the legal doctrines of justification now in fact embody such a requirement. See ROBINSON, *supra* note 21, § 122; Paul Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975).

31 As Sanford Kadish and Stephen Schulhofer write:

If the theory of self-defense is excuse, that is, that a reasonable person who believes that his life is about to be taken by another can't be expected simply to permit it to happen, then obviously he should not be permitted to claim self-defense because the condition for the excuse, his belief, is not present. But if the theory of self defense is that it is right to do as the defendant did under the circumstances, why should it be thought less right because he was unaware of his right? Wasn't it still a good thing that the aggressor should be stopped from killing an innocent person? And isn't that just what the defendant did?

SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 842 (6th ed. 1995).

moral blame that rightly attaches to persons who try, but fail, to do wrong.

4. Nonculpable Right Actions

Nonculpable right actions are actions that comport with the maxims of our best moral theory and are performed by persons who intend, know, or have good grounds for believing that they will do so. By all accounts, nonculpable right actions are justified. That the law has distributed the criteria for nonculpable right actions between the prima facie case and the defenses is of no moral concern, unless the burdens of proof that are thereby allocated to prosecutors, plaintiffs, and defendants somehow result in persons being held liable for nonculpable right actions. If, for example, it is systematically more difficult to prove one's lack of consent to a physical contact than it is for another to prove one's consent (because omissions leave fewer traces in the world than do actions), then it would be morally unfortunate for the law to define the actus reus of battery as "an unconsented-to touching," rather than to characterize consent as an affirmative defense that must be proven by the defendant. Whether legal procedures accomplish moral results is largely an empirical question. What is clear from our above discussion is that one only reaches a proper formulation of the relevant empirical questions if one taxonomizes actions so as to accurately reflect in law the fundamental moral differences between wrongdoing and culpability.

C. Revisiting the Traditional Tests of Justification and Excuse

In this final Section, I propose to return to Professor Greenawalt's claim that the tests of justification and excuse that are traditionally adopted by scholars and courts mislead our classification of many cases and ought to be abandoned. As I shall argue, those traditional tests constitute useful heuristics for determining when persons act rightly, and therefore their use ought to be recommended rather than rejected.

Recall that the first test holds that an action is justified if and only if it would be wrong of others to interfere with it. Professor Greenawalt rejected this test for several reasons. First, in his view, the woman who shoots at the meter-reader and the man who interferes with the lawful arrest of the teenager are clearly justified in doing what they do (because they justifiably believe that they are engaging in acts of self-defense and third-party defense, respectively), even though it must be admitted that the meter-reader and the police officers are justified in preventing their actions. If our theory of the justification/excuse dis-

inction tracks the wrongdoing/culpability distinction in the manner that I described in the previous sections, then it is clear that while the woman who shoots the meter-reader and the man who rescues the teenager are *epistemically justified* in doing what they do, they are not *morally justified* in doing what they do. We might excuse them, but we ought not to think of them as justified.

A second sort of case advanced by Professor Greenawalt to defeat the claim that justifiable actions cannot be justifiably prevented is the case of the strong man, Arnold, who breaks up a fight, thereby thwarting Mike's justified acts of self-defense.³² Professor Greenawalt asks, "Could it be argued that Mike's act was only excusable from the start, because if he had known that Arnold would intervene, no use of his knife would have been justified?"³³ He replies, "This argument is flawed at the outset by the faulty premise that justification must always be congruent with what one could do given all the true facts."³⁴ Yet as I have argued, such a premise is not faulty. If a person is permitted to use deadly force against another only when it is necessary to defend his life, then, if Arnold is going to intervene to prevent the attack, Mike is not, in fact, justified in using deadly force against his opponent. When Mike does use such force, Arnold's intervention does not prevent a *morally justified* action, although (inasmuch as Mike may have had no reason to anticipate Arnold's intervention) Arnold's action may prevent an *epistemically justified*, and thereby wholly nonculpable action.

A final sort of case advanced by Professor Greenawalt against the claim that justifiable actions are actions that others cannot justifiably prevent is captured by the prison guard who Professor Greenawalt argues is justified in preventing an inmate's justified escape. Inasmuch as Professor Greenawalt maintains that the prison guard's actions are justified by the prison guard's inability to appraise the prisoner's likely intent to escape permanently,³⁵ he treats this case just like the case of the woman who shoots the meter-reader and the man who interferes with the lawful arrest of the teenager. As such, it is appropriate to respond to this example in the same way that we responded to those cases above: if a prison inmate is in fact fleeing for his life with every intention of turning himself in when he is free of danger, then the prison guard in fact does wrong to prevent his escape, although, if he

32 See *supra* text accompanying note 10.

33 Greenawalt, *supra* note 1, at 1925.

34 *Id.*

35 See *id.* at 1920.

has no ability to assess the inmate's intentions, he may be *epistemically justified* in presuming the worst of them, rather than the best.

I take this case to be different than the previous cases of nonculpable wrong actions because it raises the possibility that certain roles may make it right for the actors within them to interfere with actions of others that are themselves right. If the role of a prison guard is properly to prevent all escapes, including justified ones, then this suggests that morality gives actors role-relative obligations or permissions that require or allow them to interfere with the permissions or obligations that morality gives to others. In such an event, Professor Greenawalt would be right to reject a test that makes an actor's justification for doing something turn on others' obligations of non-interference. Since I have elsewhere given book-length treatment to the question of whether morality gives actors permissions to interfere with actions that it gives others justifications to perform, I do not propose to further pursue that question here.³⁶ I merely want to flag the fact that Professor Greenawalt's complaints with this first test of justification may survive the adoption of my alternative conception of the justification/excuse distinction.

The second traditional test of justification with which Professor Greenawalt takes issue equates a justified action with an action that others have no right that one not do. As Professor Greenawalt argues, such a test fails to capture the fact that persons may justifiably use force against persons who have a right that they not do so, but who would be wrong to resist. For example, a judge might justifiably issue a warrant for the arrest of an innocent person, a police officer might justifiably use force to arrest that person, and that person might have no right to resist arrest even though the fact that the person is innocent gives her a right not to be forcibly arrested.

This case provides a nice opportunity to make clear just how sophisticated the analysis of wrongdoing needs to be under any moral theory. As this case reminds us, we have good moral reasons to set up legal institutions that license people to do things that, absent those institutions, it would be wrong to do, and that require persons to forgo the enforcement of rights that, absent those institutions, it would be permissible to protect. For all the moral reasons that support deference to the rule of law (liberty, equality, security, reliability, etc.), it appears morally permissible to establish procedures that license authorities to restrain persons' liberty upon a showing of good cause, and that prohibit such persons from resisting restraint even when they know themselves to be innocent. When rule of law values

36 See HURD, *supra* note 6.

are added to the considerations that determine whether given actions are morally right, it may be that a police officer does right to arrest an innocent person, and an innocent person does wrong to resist her own arrest, rather than to seek her vindication through established legal processes.

Hollywood is famous for testing this thesis in the dozens of movies that celebrate falsely accused persons who flee from misguided authorities in order to single-handedly vindicate their own innocence.³⁷ What these movies do is nicely remind us that rule of law values may not weigh heavily enough to require innocent persons to succumb to lengthy legal processes that risk their mistaken conviction. In cases in which this is so, innocent persons are right to resist arrest, and legal authorities are wrong, albeit *epistemically justified*, to seek to arrest them.

Thus, in the end, Professor Greenawalt is wrong to deny that justified actions are actions that others have no right that one not do. Once we are clear that the protection of systemic values (such as those that support the rule of law, with all its necessary institutional structures and procedures) is among the things that must be considered in determining whether an action is right, then it becomes clear that an all-things-considered right action is an action that others can have no right that one not do.

The third traditional test of justification that Professor Greenawalt rejects holds that an action is justified if we would be willing to recommend it to others in similar circumstances. Recall that Professor Greenawalt attacks this test obliquely. As he argues, this test presupposes that justifications are objective while excuses are subjective. Since legal justifications and excuses both reflect a combination of objective and subjective features, this test fails to capture their difference.

Professor Greenawalt is wise not to deny that justified actions are actions that we would want others to do in similar settings. After all, rationality alone requires that we judge like cases alike, and thus that we universalize our moral judgments. If it is right to do act *A* in situation *S1*, then it must be right to do act *A* in situation *S2*, if *S2* is morally similar to *S1*.³⁸

37 See, e.g., Harrison Ford in *THE FUGITIVE* (Warner Bros. 1993).

38 Joshua Dressler disputes this truism. He argues:

It may be morally right to kill in order to further the interests of one to whom we owe . . . loyalty, but not otherwise. Thus, A could be justified to act violently to repel a threat to one's family since the loyalty imperative would apply. Yet stranger B would not be so justified to kill for A . . . [I]t is a

And Professor Greenawalt may be on solid ground in maintaining (without demonstrating) that the universalizability test logically yields the claim that justifications are general and objective, while excuses are individual and subjective. Whether it follows from the universalizability test or not, it is true that the theory that I advanced above in some sense characterizes justifications as general and objective and excuses as individual and subjective. As I argued, justifications concern themselves with the rightness of actions, which is an "objective" determination in the sense that it proceeds without reference to the subjective mental states of actors; and excuses concern themselves with the culpability of actors, which is a "subjective" inquiry in the sense that it is interested in actors' mental states and unique epistemic limitations. If Professor Greenawalt is right that, properly conceived, justifications must have subjective elements and excuses must have objective elements, then a test such as mine that denies this is misconceived.

Yet as I have argued, the law runs amok of the wrongdoing/culpability distinction when it builds subjective conditions into justifications (as it does when it requires an actor to know of justifying circumstances in order to get the benefit of a justification). If I am right, the law ought never to incorporate subjective epistemic elements into justification doctrines. Whether it can justifiably build objective conditions into excuses (such as the requirement in the duress excuse that the threat to which the defendant succumbs be one that might tempt a person of reasonable firmness) turns on whether our doubts about the mental states with which persons do wrong actions should be resolved by exonerating persons from wrongdoing only when they meet certain objective standards. Such a question recalls the fact that the values that support the creation of legal institutions may call upon us to follow procedures that, absent those institutions, we would be wrong to follow. The value of having legal guilt and innocence turn on a preponderance of evidence may justifiably compel us to build objective elements into legal excuses that would not be present in moral judgments of guilt and innocence. Thus, some subjectively nonculpable persons who are eligible for moral exoneration

generalization, and no more, to assert that justifications must be universalized.

Dressler, *supra* note 4, at 98. Of course, what Dressler is missing here is that what it means to generalize a justification is to apply it to all persons who are alike in morally relevant ways. If it is right to defend one's family from culpable aggressors, then *everyone* who finds his family members in peril from a culpable aggressor has the right to defend them, even if others do not. There is no failure of universalizability in making fine-grained moral distinctions between persons.

may be *morally* ineligible for legal exoneration because of the moral requirement that the law hold persons to certain objective evidential standards when proving their legal nonculpability.

In conclusion, Professor Greenawalt is right in thinking that an epistemic theory of justification requires judges and legal scholars to abandon the traditional tests of justifications and excuses, but he is wrong in thinking that the law should adopt an epistemic theory of justification. If the law is to guide action in accordance with our best moral theory, it should grant justifications to those who do right actions (whatever their reasons), excuses to those who do wrong actions nonculpably (including for epistemically justified reasons), and punish culpable actors who do no wrong under the doctrines of attempt liability.³⁹

CONCLUSION

I have long been indebted to Professor Greenawalt for the many profound and interesting lessons that he has taught me about both criminal law and general jurisprudence. The theory of justifications and excuses that I have advanced here, while fundamentally at odds

39 This formulation of the justification/excuse distinction leaves open the question of what actions our best moral theory permits and prohibits. I have said little here about that question. For example, there are those who doubt whether killing is ever permitted, even under circumstances in which one's life is threatened by a culpable aggressor. See, e.g., Cheyney C. Ryan, *Self-Defense, Pacifism, and the Possibility of Killing*, 93 ETHICS 508 (1983); Judith Thompson, *Self Defense and Rights*, in FINDLEY LECTURE 1976 (1977). If such doubts are vindicated by our best moral theory, then self-defense is never justified.

Many who believe that morality grants persons a permission to kill when their lives are endangered by culpable aggressors question whether morality embodies a "selfish tipping principle" that permits persons to injure or kill innocent aggressors or to prevent harm to themselves by using innocent others as shields. If morality does contain such a selfish tipping principle, then one does no wrong in trading another's innocent life for one's own, although, as I mentioned earlier, see *supra* note 25, it may be suberogatory to do so. If morality does not contain such a tipping principle, then one can at most be excused for preferring one's own life to another's innocent life. For discussions that mistakenly construe this issue as an obstacle to delineating justifications from excuses (rather than as simply one of the many difficult issues to be worked out within our best moral theory), see *Laidlaw v. Sage*, 52 N.E. 679 (N.Y. 1899) (famously construing a wealthy financier's use of a clerk to shield himself from an extortionist's bomb as involuntary); Dressler, *supra* note 4, at 84-85; Greenawalt, *supra* note 1, at 1925-26. For thoughtful discussions of whether morality would adopt such a tipping principle, see Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252 (1994); Phillip Montague, *Self-Defense and Choosing Between Lives*, 40 PHIL. STUDIES 207 (1981); Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFFAIRS 74 (1994).

with the theory defended by Professor Greenawalt, is a testament to his enormous influence and inspiration. While Professor Greenawalt would no doubt consider my compliment to his work a higher one if I here agreed with, rather than disputed, his conclusions about the justification/excuse distinction, the fact that the alternative theory I have advanced here is defined and defended in opposition to his speaks volumes about the central importance of his scholarly legacy. I know of no better way to honor Professor Greenawalt than to challenge his ideas in just the way that he has so powerfully challenged the claims of others.

