

DISTINCTIVE DURESS

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In both law and morality, duress serves as a defense. The bank teller who provides an armed robber with the bank vault combination, the innocent suspect who fabricates a story after hours of interrogation, the Good Samaritan who breaks into a private cabin in the woods to save a stranded hiker, and the father who drives at high speed to rush his injured child to the hospital -- in deciding whether and to what extent to blame or punish agents like these, we should take into account that they have acted under duress. In some cases, duress functions as an ordinary justification: the circumstances justify or permit behavior that was prima facie impermissible. In other cases, duress functions as an ordinary excuse: the circumstances interfere with the agent's opportunity to respond to the moral or legal reasons at issue. On common understandings of duress, duress always instantiates one or the other of two ordinary defenses.

In this paper, I offer a new duress defense, which I call "distinctive duress." My argument proceeds as follows. In Section One, I make the case that good agency will involve contoured normative sensitivities. In Section Two, I claim that those contoured normative sensitivities will predictably lead to special cases of wrongdoing, cases which mark a particular and central sort of duress case. In Section Three, I consider the defenses of ordinary justification and ordinary excuse, showing how neither ordinary defense comfortably explains the special cases of wrongdoing. In Section Four, I offer my account of distinctive duress, explaining why and how we should nonetheless grant these agents a defense for acting under duress.

1. Contoured Normative Sensitivities

Many arguments about the appropriate conditions of blame and punishment proceed from casuistry, a vignette prompting an intuition that only the new contender theory can handle. My argument proceeds otherwise. I contend instead that a plausible way of thinking about good normative psychology points us to a case of a specific structure, a structure that prompts us to revisit how we think about duress. In this first section, I offer that way of thinking about good normative psychology.

Good agents are sensitive to normative reasons. Good moral agents are able to properly perceive and react to moral reasons, and good legal agents are able to properly perceive and react to legal reasons. Thus, the capacities familiar from the reasons-responsiveness literature--reasons receptivity and reasons reactivity, to borrow terminology from John Martin Fischer and Mark Ravizza (1998)--are capacities we should want to have and capacities we should want others to have.¹ Possessing these capacities is not sufficient for an agent to successfully act well: it is widely accepted within the compatibilist, moral responsibility literature that an agent with these capacities could be responsible for doing wrong. However, the normative capacities are necessary for good agency, at least robustly good agency.

An agent's capacities need not be uniformly sensitive to be good or sufficient. Instead, we should expect good agents to have contoured normative sensitivity. That is, we

¹ For more on the nature and metaphysics of the capacities at issue, see the compatibilist, reasons-responsiveness literature, especially Fischer and Ravizza (1998), Manuel Vargas (2013), and R. Jay Wallace (1994).

should expect good agents to be comparatively more sensitive to some reasons and comparatively less sensitive to others.² An agent is comparatively more sensitive to one reason rather than another when the agent more readily notices, understands, or comports his behavior to the one reason than the other, beyond those differences which can be explained by matters external to the agent's moral psychology (e.g., the weight of the reasons). For example, a good agent might be more sensitive to her friends' concerns than to strangers' similar concerns. This means more than that the good agent places particular value on her friends' concerns, such that for her their concerns outweigh the similar concerns of strangers. The comparative sensitivity claim holds that, even if the friends' interests and the strangers' interests were equally valuable given the agent's values, the good agent is more likely to notice that her friends' interests are at stake, more likely to perceive the significance of those interests, and more likely to comport her will to those interests.

We should want contoured normative sensitivity in good agents because we should want good agents' normative capacities to be specialized. We are finite, limited beings. We have limited attention, limited cognitive power, and limited volitional power.³ Because these limited resources are needed for responding to reasons, we should expect our normative performance to be imperfect. We should expect that even good agents will sometimes overlook relevant matters, will sometimes misapprehend the significance of relevant matters, and will sometimes act akratically.

Given our finite, imperfect natures, it is plausible that we will do better on the whole comporting our behavior to our values if our normative capacities are specialized. Some relevant matters present themselves more often than others. For example, those of us living in largely secular Western cities are confronted many times a day with the demands of complicated social coordination with proximate strangers, whereas we are rarely confronted with issues having to do with religious hierarchies. And we have much more influence on the resolution of some matters than on the resolution of other matters. There is much I can do when a close friend needs comfort and reassurance, and there is far less effect I can have when I learn that a distant stranger is in the same position. Finally, the stakes are much higher for some matters than for others. Although the resolution of local

² For the most part, reasons-responsiveness theorists have not taken up the question of the patterns in reasons-responsiveness we might find in agents' moral psychologies. The notable exception is Fischer and Ravizza, who argue that an agent's reasons-receptivity must display an "understandable" pattern of perception of reasons (1998, p. 75). Thus, Fischer and Ravizza leave it open for the agent to be more perceptive of some reasons than others (within the limits of understandability). However, Fischer and Ravizza's understandability-pattern requirement is better understood as an evidentiary condition on imputing reasons-receptivity than a metaphysical condition on possessing reasons-receptivity, and so, even for them, the question of patterns in reasons-responsiveness is not directly at issue.

³ Here, I mean to apply the armchair claim that finite beings' powers are finite to the moral psychology claim that volitional power is one sort of agential power possessed by finite beings. I do not mean to rely upon any particular contemporary empirical psychological results, e.g., the literature on willpower as a depletable resource.

discussions about street lighting is not trivial, surely the resolution of neighborhood local about poverty and crime is of more importance.

Because of these disparities in the regularity, tractability, and importance of the issues we face, specialization in our normative faculties will help us to live lives which better conform to our values and goals. An agent who is equally good at receiving and reacting to all reasons will plausibly be too sensitive to some reasons, dedicating precious psychological resources to matters that will rarely, if ever, be of importance to that agent. By contrast, an agent who is especially sensitive to regular, tractable, and important matters will get those matters right more often. A specialized agent will do better in the ways that matter than a uniformly sensitive agent will. The nature and the development of such normative specialization is an empirical matter, of course, but even from the armchair we can appreciate that we should desire such specialized agency.

We find powerful evidence that specialization is an important element of good normative psychology in familiar roles like those of friend, parent, and sibling.⁴ We have but a thin sense of these rich roles if we explain them wholly in terms of norms of external treatment or in terms of agent-relative reasons. To fully understand these roles, we need to appreciate that they involve heightened sensitivities. Consider friendship. It is true that there are behaviors that mark friendships: social behaviors, helping behaviors, and the like. But someone who merely does these things is at best a superficial friend. And it is also plausible that friendship involves agent-relative reasons privileging one's friends over strangers: as between one's friend and a stranger, the friend should favor the friend. That gets closer to what it is to be a friend, but it is still too thin a description. What marks true friendship is the immediacy of the importance of the friend.⁵ A good friend will notice and appreciate that you are hurting before others do, and a good friend will find your pain motivating more than others will. This is a kind of specialization: the moral psychology of a friend involves a heightened sensitivity to the interests of friends. Friendship is not unique in this regard: attention, appreciation, and motivation are important for understanding most (and maybe virtually all) of the roles most important to our lives.

We can also find powerful evidence that specialization is an important element of good normative psychology in the working of the emotions. Emotions guide our attentions, mark value and disvalue in the world, and motivate us.⁶ For instance, when we are angry with someone, we are disposed to notice their flaws, the harms they have caused, their ill will, and the like, we are disposed to see them as having done wrong and caused harm, and we are disposed to exclude and punish them. The emotions are also focused, directing attention, understanding, and motivation. Therefore, a person experiencing an emotion has contoured normative sensitivity. Such contours are real even if episodic. Of course, being in the grips of an emotion can lead one awry; too much anger is a bad thing. But insofar as the

⁴ For two recent arguments that a good friend's view of things is colored by her friendship, see Simon Keller (2004) and Sarah Stroud (2006).

⁵ That these roles are marked by dispositions that in part come before moral deliberation is one way to make good Bernard Williams's famous "one thought too many" objection in his (1981).

⁶ For a thorough discussion of these agential roles for the emotions, see Christine Tappolet (2016).

ordinary emotions are a good part of our ordinary lives, it is in significant part because they ground productive normative contours.

Finally, that our moral sensitivities are specialized is consistent with what we see in our other sensitivities. For instance, epistemic and reasoning heuristics are specialized responses to our finite evidence and reasoning capacities.⁷ Consider the anchoring effect, a heuristic by which we are particularly sensitive to initial reference points. The anchoring effect can explain why sales are so effective: we find it very difficult to ignore the higher ordinary price in our estimate of the value of the good. It is true that the anchoring effect can lead us to make apparent mistakes. However, heuristics are an economical response to finite evidence and finite cognitive power, and in ordinary cases we can hope that they get us better judgments at lower costs than alternative strategies. The anchoring effect provides a cheap way to develop useful estimates: anchoring can be “a reasonable compromise between error in judgment and the cost of computation” (Lieder, Griffiths, Huys, & Goodman, 2018). As with contoured normative sensitivity, epistemic and reasoning heuristics are an example of the specialized deployment of agential resources addressing our finite situations.

Let me be clear about what I’m claiming here. Contoured normative sensitivity will help us achieve our normative goals, contoured normative sensitivity marks many important human roles as well as many valuable emotions, and contoured normative sensitivity echoes other familiar contoured sensitivities. However, this is not to say that any one contour is the best contour. That might be the case, but more likely there are many productive, good contours, as there are many ways of being a good, productive agent. Relatedly, any particular good agent will likely have a normative psychology that is both fluid and mixed, reflecting not just any one role or one emotion, but rather, a complex set of dispositions marking a complex life. Next, that we should recognize that contoured normative sensitivity is often good is also not to say that a non-specialized agent is a bad agent. Just as there are likely many good manners of specialization, it might be that being an evenly sensitive agent has significant advantages. Finally, I am here claiming that contoured normative sensitivity marks good agency. This is a claim about virtue and the good, not a claim about the right. There are further substantive arguments needed to connect the former to the latter.

2. Cases in the Shadows

We should expect contoured sensitivities to lead us well in many cases. Being a good friend entails being especially sensitive to the reasons having to do with one’s friends, and this will ordinarily lead to a good friend being more likely to notice when those reasons are at stake. In a characteristic case, this heightened sensitivity is part of the explanation of why a good friend notices a subtle need and responds to it. The contoured sensitivity leads the good friend to notice, appreciate, and react to a reason that he was otherwise comparably more likely to miss, underappreciate, or fail to act upon. But we should also expect contoured sensitivities to lead us awry in some cases. Of course, being imperfect agents, even uniform sensitivities will sometimes fail us, as might be the case when morality’s demands are especially high or especially unclear. But we should expect contoured sensitivities to lead to particular failures because contoured sensitivities will leave some reasons in the shadows, as I now explain.

⁷ A classic text here is Amos Tversky and Daniel Kahneman (1974).

Contoured sensitivities will yield important comparative insensitivities. There are two senses of comparative insensitivity I am concerned with. First, insofar as the contours are grounded by the deployment of finite resources, that greater resources are dedicated to the reasons in the contours of heightened sensitivity entails that comparably fewer resources will be dedicated to the complements of those contours, in two senses. Fewer resources will be dedicated to the complements of the contours than to the heightened regions of the contours, and fewer resources will be dedicated to the complements of the contours than would be dedicated to those complements were resources distributed evenly. Accordingly, we should not be surprised to discover that well-ordered moral agents are comparably insensitive to rare, distant, or low-stakes matters, even considering their comparatively low importance. Second, as virtually all interesting cases involve a number of relevant factors, if a particular case involves both relevant factors in the regions of heightened sensitivity and other relevant factors, we should expect that the agent's heightened sensitivity to some factors will render the agent comparatively insensitive to the remaining factors. If the agent is attending to the one factor, that attention will occlude the agent's capacity to attend to the others; likewise for the agent's capacity to be motivated. Accordingly, in both sorts of cases, the agent is disposed to overlook, misperceive, or fail to be motivated by some relevant factor. That is, given the agent's contoured normative psychologies, the agent is more likely to fail to respond to some relevant factor.

That an agent is disposed to fail to respond to an important moral factor does not mean that the agent will thus act wrongly. First, despite the disposition, the agent might nonetheless respond to the factor at issue. That the agent is disposed to respond to some reason is no guarantee that the agent in fact responds, and that the agent is disposed not to respond to some reason is likewise no guarantee that the agent will in fact fail to respond. Second, even if the agent fails to respond to some morally relevant factor, that factor may not be dispositive. That factor might be countervailed or outweighed in the particular case. For instance, suppose that supporting a friend requires you to fall short on some workplace obligation. Perhaps your friend is in dire need of comforting on the same evening that a minor work project is due. If you are a good friend, you might attend to your friend without thinking of or appreciating the potential importance of the work project. As it turns out, your friend's interests in fact outweigh the importance of the minor work project. You failed to consider the work project; however, this did not lead you to act other than as you should have acted, all reasons considered.

However, we should expect there to be some cases where, because the agent is disposed to overlook, misperceive, or fail to be motivated by some relevant factor, the agent ends up acting contrary to the balance of reasons. Call these cases "cases in the shadows." Cases in the shadows have three central properties: 1) the agent's contoured normative sensitivity disposes the agent to fail to respond to a relevant moral factor (that is, there is a relevant factor in the shadows cast by the agent's heightened sensitivity to other factors), 2) that moral factor is dispositive with regard to what should be done in the case, 3) the agent in fact fails to respond to the relevant moral factor, leading them to act wrongly.⁸

⁸ What is central to my broader argument about duress is the proposition that good agency will, in some predictable pattern of cases, lead agents to make normative mistakes.

Whether any particular case is a case in the shadows will always be controversial. We never have a complete grasp of the facts of any case, and we are always forced to fill in some gaps by supposition. The weight of the relevant normative factors will often be a matter of judgment. Which facts are normatively relevant, which direction those facts tell, how weighty those facts are, and how those facts interact are all matters for a first-order normative theory. Because first-order normative theories are themselves controversial, whether any particular agent acts in accord with the correct first-order normative theory will itself be controversial. However, so long as we accept that good agents will have contoured normative dispositions, we should accept that there are cases in the shadows, even if we might also expect identifying them to be controversial.

I now offer two cases in the shadows. In each case, the agent acts on their family's interests, and so we should expect contoured normative sensitivities in both cases. Because both the relevant facts and the correct first-order theories are controversial, whether these will be cases in the shadows will also be controversial. Nonetheless, they are hopefully illustrative. Consider Abra first:

Abra, a good mother, lives with her children in a country which, though it is relatively stable and peaceful, is bereft of significant economic opportunities. She must prepare paperwork to join a long queue to emigrate to a country with much richer prospects for her children. She realizes that she can move to the front of the queue by submitting fraudulent paperwork. She carefully considers this possibility, making a list of pros and cons and deliberating over the course of several weeks. She decides to submit fraudulent paperwork and does so, with the expected result. She and her children are granted visas long before other families languishing on the queue, and her children are given and take advantage of substantial opportunities for educational, cultural, and financial enrichment.

Abra plausibly has a heightened sensitivity to her children's interests, that being largely constitutive of being a good parent. Abra's heightened sensitivity to her children's interests leads her to attend more closely to those interests, and that in turn leads her to overlook, fail to fully appreciate, or fail to act in accordance with the interests of the others on the queue, interests which compete with her children's interests. However, because the stakes are no different for Abra and her children than for many other families and children on the queue, the balance of relevant reasons tells against Abra's commission of fraud.⁹

Contoured normative sensitivity is but one of several plausible ways to make good that proposition. For example, Gideon Rosen (2014) offers a similar account of duress stemming from the connection between morally acceptable agency and making normative mistakes. Rosen claims that the level of moral commitment we require of each other (basic moral decency) is less-than-perfect moral commitment (full moral decency). Because we do not expect each other to be perfectly committed to morality, an agent might have an acceptable moral commitment and yet do wrong. I claim that it is a good-making feature of good agency that leads to distinctive-duress cases; Rosen claims only that it is a to-be-tolerated feature of good-enough agency that leads to duress cases.

⁹ From conversation, some think that agent-relative reasons license Abra's behavior. I have two responses to this concern. First, notice that there are many other families on the queue. Even if Abra has agent-relative reasons heightening the import of her children's interests,

Consider another example, that of Absalom:

Absalom, a good father and a former amateur boxer, lives with his young son in a city. Absalom works from home, and so he watches for his son to return from school each day. One day, as Absalom is waiting, he sees his son walk up to the door. Before his son can enter the home, however, Absalom sees an older teenager approach, and Absalom hears the older teenager threaten his son, seeking his son's bag. Moving quickly to defend his son, Absalom runs to the door, opens it, steps outside, and punches the older teenager several times in succession. Bloodied, the teenager sprawls to the ground before running away.

As with Abra, Absalom plausibly has a heightened sensitivity to his child's interests, that being largely constitutive of being a good parent. Absalom's heightened sensitivity to his son's interests leads him to attending closely to those interests, it leads him to be particularly sensitive to threats to those interests, and it leads him to overlook, fail to fully appreciate, or fail to act in accordance with the interests of others. While the teenager's threat to Absalom's son gave Absalom reason to intervene, Absalom failed to avail himself of less drastic means of intervention. As a former amateur boxer, Absalom is quite imposing, and his merely opening the door would have scared the teenager off. Even if some physical intercession was necessary, several punches were not--a shove or single punch from a boxer surely would have done the trick (and, had he considered the situation more objectively, Absalom would have realized this). Finally, while the teenager was threatening Absalom's child, the teenager was a teenager, and thus was less culpable for his own wrongdoing. Absalom's behavior was against the balance of reasons.¹⁰

It is not clear which cases are cases in the shadows, nor is it clear how many cases are cases in the shadows. However, if the argument in the first section is correct, there are cases in the shadows, cases like Abra's and Absalom's. What should we say about such cases?

3. Applying the Ordinary Understandings of Duress

For many philosophers, duress is a defense when it instantiates either of ordinary justification or ordinary excuse.¹¹ If duress always instantiates one of those ordinary

those heightened interests can still be outweighed, and this is plausibly such a case. (I urge this point later in considering whether Abra is entitled to a justification defense.) Second, because I proceeded from a model of good normative psychology, rather than by casuistry, those who see Abra's case as one of justified, agent-relative behavior can construct their own examples. As I explained, exactly which cases will be cases in the shadows will be controversial; that there will be cases in the shadows should not be.

¹⁰ I urge those readers who do not share my intuition about this case to recall what I have about Abra's case—that the existence of cases in the shadows should not be controversial even if the classification of particular cases is.

¹¹ For examples of philosophers and lawyers discussing duress as instantiating one, the other, or both of these ordinary defenses, see Brenda Baker (1974, 1985), David Brink and Dana Nelkin (2013), Joshua Dressler (1999, 2009), Carl Elliott (1991), Sylvia Rich (2018), and Suzanne Uniacke (1989).

defenses, we need no new philosophical machinery to account for duress defenses.¹² It certainly is the case that circumstantial matters can make for ordinary justification or ordinary excuse; the many philosophers who urge that are not wrong. As I argue in this section, however, neither ordinary justification nor ordinary excuse applies comfortably to the cases in the shadows. Should the agents in those cases, agents like Abra and Absalom, be entitled to a defense, it will have to be a defense of another type.

Duress sometimes serves as an ordinary justification defense. An agent has an ordinary justification defense against blame or punishment when, though the behavior at issue is *prima facie* wrongdoing, the particular circumstances of the case are such that the behavior is permitted or even required. On a familiar if colloquial way of thinking of wrongdoing, at least for the purposes of the ordinary justification defense, an action is wrongdoing when the balance of evils tells against the action. It is *prima facie* wrong to batter another because the harm imposed by battery is a very weighty evil, and thus ordinarily the balance of evils tells against battery. This makes battery wrongdoing, at least in ordinary cases. Given this familiar notion of wrongdoing, an agent has a justification defense when the particular circumstances shift the balance of evils. As David Brink and Dana Nelkin write, “If the balance of evils is such that the evil threatened to the agent is worse than the evil involved in her wrongdoing, then compliance with the threat is justified” (2013, p. 302), and as Sylvia Rich writes, justification is an appropriate defense in “cases in which conduct that is usually wrongful is rendered correct by unusual circumstances” (2018, p. 2). For example, an agent might have a justification defense to driving over the speed limit if the agent is driving an injured child who needs immediate medical attention. Ordinarily, the risk of harm posed by speeding is the weightiest evil in speeding cases, and so speeding is *prima facie* wrongdoing. However, the risk of harm posed by an unattended injury can outweigh the risk of harm from speeding. If so, the balance of evils has shifted, and the agent is entitled to a justification defense for acting under duress.

There is no shift in the balance of evils in the cases in the shadows. By construction of the cases, these agents get things wrong. They overlook, fail to appreciate, or fail to react to some moral reason that dispositively tells against acting as they do. For example, it might be the case that Abra took her visa fraud to be a justified way to protect her children’s interests, and it seems plausible both that the visa fraud advanced her children’s interests and that her children’s interests gave her significant reason to act. However, in this case, her children’s advancement came at the expense of others on the visa queue, including many other similarly situated children. Because Abra’s case is a case in the shadows, it might be that she simply failed to consider that her visa fraud would adversely impact those others, it might be that she noted those adverse impacts but failed to appreciate their significance, or it might be that she appreciated the reasons against the fraud but could not prevent herself from acting akratically. Whatever the case, because this

¹² Even supposing it to be true that no new theoretical machinery is needed to account for duress, there is still good reason to recognize a duress defense. Our ordinarily deployed legal and moral rules are general, and duress can help us pick out an important class of exceptions to those rules. For instance, if our legal rules take simple forms like “it is a crime to intentionally kill another,” then duress can help us pick out important exceptions to those rules without unduly complicating the primary statement of the rules.

is a case in the shadows, Abra's response did not track the underlying moral facts: those others' interests in fact outweighed her children's interests. That her children had an interest in better opportunities did not shift the balance of evils. Thus, that her children had an interest in better opportunities did not ground a duress defense of justification.

Likewise, Absalom correctly understood his son to be under threat, and that threat rendered permissible some action to protect his son. However, Absalom's response was disproportionate to that threat.¹³ Because Absalom's case is a case in the shadows, it might be that he over-appreciated the danger his son was in, it might be that he failed to consider alternative, tempered interventions, it might be that he failed to appreciate how much pain and harm he would cause to the teenager by his repeated blows, it might be that he failed to appreciate that the teenager was, like his son, still a child, only partially responsible for his actions, or it might be that he accurately assessed the circumstances but acted akratically. Whatever the case, because this is a case in the shadows, Absalom's response did not track the underlying moral facts: a lesser response was permissible, but Absalom's actual, violent response was not. That his intervention protected his son's safety did not shift the balance of evils. Thus, that his intervention protected his son's safety did not ground a duress defense of justification.

It might seem that Abra and Absalom are entitled to justifications precisely because they act as parents.¹⁴ It might seem that, because Abra is a mother, she had some agent-relative reason or permission making her children's interests more morally significant for her than the interests of the others on the queue, giving her a justification.¹⁵ But remember that this is a case in the shadows. It isn't just that Abra's children's interests are at stake; it is also that Abra has made a normative error. Even if her children's interests are weightier for Abra because of her role, she has overlooked, failed to appreciate, or failed to comport her will to reasons that outweigh her children's interests. And even if her children's interests are weightier for her, unless her children's interests are infinitely weightier, they can be outweighed by sufficient competing matters.

Alternatively, perhaps Abra's behavior is justified by direct reference to her role as a mother. Perhaps her behavior is justified because she did what a good mother would do. This concern anticipates what I say about quasi-justification in the next section. However, we should be skeptical that this reference to her role provides a comfortable ordinary justification. First, notice that Abra does not reason from her role as a mother. Perhaps on reflection she might say that she should commit visa fraud because she is a mother. However, as described, she commits visa fraud because it advances her children's interests. That is, from her perspective, her children's interests are the relevant justificatory factor.¹⁶ Accordingly, even if we suppose that Abra's role justifies her action, the action still involves an important mistake because Abra is wrong about what justifies her action. Second, Abra's role as mother is not at stake in her commission of visa fraud. Plausibly, one could be a

¹³ For a rich discussion about the limits and proper understanding of self-defense, see Judith Jarvis Thomson (1991) and Larry Alexander (1993).

¹⁴ The analyses of Abra's case that follow apply *mutatis mutandis* to Absalom's case.

¹⁵ For an argument that duress should be thought of as akin to agent-relative justification, see Alexander and Kim Ferzan (2009).

¹⁶ As a referee notes, this is surely how Abra should reason. For her to reference her role as a mother in her own reasoning would be one thought too many.

good mother and yet, perhaps by luck, correctly appreciate the normative choice. A good mother might still wait on the queue or seek alternative opportunities. Even if Abra's wrongdoing was the upshot of her role, that does not mean that her fulfilling that role was on the line. Finally, even if Abra's behavior was what a good mother would do, this sort of virtue-ethical reasoning is at odds with the balance-of-evils reasoning at issue in ordinary justification. While we might prefer the virtual-ethical reasoning, the discord should give us pause.

If duress does not serve as an ordinary justification in the cases in the shadows, might it serve as an ordinary excuse? Many see excuse as the complement of responsibility, and an agent is responsible when they have both robust normative capacities and a robust opportunity to exercise them.¹⁷ Accordingly, an agent is entitled to an excuse when either they lack robust normative capacities or they lack the robust opportunity to exercise those capacities. This leads many philosophers to see duress as instantiating an excuse when it either compromises the agent's normative capacities or mars the operation of the agent's normative capacities. This understanding of duress-as-excuse makes sense of thinking of duress as destabilizing the agent's practical reasoning and overbearing the agent's will. Brenda Baker (1974) and Joshua Dressler (2009), for instance, talk of threats which overwhelm the actor's will, and Rich talks of "a fear so great that it supersedes the agent's usual moral reasoning" (2018, p. 3). Antony Duff writes that an agent is entitled to a duress excuse when the agent is marked by "such reasonably strong fear ... that is apt to destabilise--to disturb the rational deliberations even of a 'sober person of reasonable firmness'" (2009, p. 288). On this understanding, duress grounds an excuse because the agent did not act while in the possession of ordinary, sufficient, non-occluded normative capacities. Consider the secret spiller who divulges something held in confidence only because of intensive, abusive questioning. The secret spiller would be entitled to a duress excuse were the questioning so intense that the secret spiller found himself unable to reason clearly about what he should do.

The agents in the cases in the shadows are not entitled to an excuse on these grounds. Though their capacities are contoured, these agents are responsible agents in possession of sufficient normative capacities. Responsibility does not require perfectly sensitive, perfectly performing capacities. Such a high bar would leave none of us responsible. Rather, responsibility requires capacities of some significant, sufficient level. For instance, Fischer and Ravizza (1998) and Brink and Nelkin (2013) require only "moderate" reasons-responsiveness. Picking the right moderate level is sure to be controversial, but many of the agents in the cases in the shadows are ordinary agents, filling ordinary roles. Barring significant revision about our responsibility practices, ordinary agents filling ordinary roles are responsible agents (or, at least, that they are ordinary agents filling ordinary roles is no ground for denying their responsibility). Accordingly, we can defeasibly assume that the agent in a case in the shadows has sufficient capacities. Likewise, we can defeasibly assume that nothing is interfering or occluding with the operation of those capacities. The capacities of the agents in the cases in the shadows

¹⁷ Brink and Nelkin (2013) offer a clear statement of this two-component view of moral responsibility in their account of the fair opportunity to avoid wrongdoing. Although much remains to be said about what counts as sufficient normative capacities and sufficient opportunities, the fair-opportunity view is an attractive view of moral responsibility.

operate exactly as we should expect them to operate. Of course, an agent in a case in the shadows could lack the relevant capacities or could be in circumstances preventing their capacities from operating, but the mere fact of being in a case in the shadows does not entail either of these excusing conditions. The agent in a case in the shadows errs normatively not because their capacities fail to operate correctly nor because some outside factor blocks the capacities from working as expected. Rather, the agent in a case in the shadows errs normatively because their sufficient capacities operate as we expect them to operate. The agent in a case in the shadows has sufficient, non-occluded capacities, and thus no ordinary excuse is warranted.

This analysis puts the ordinary normative capacities and the opportunity to exercise them at the heart of responsibility. Accordingly, if excuse is grounded in something other than the absence of one of those conditions of responsibility, then Abra and Absalom might be entitled to excuses despite possessing ordinary normative capacities which operate ordinarily.¹⁸ Here is one attractive alternative formulation of excuse: an agent should be excused if, given the circumstances, she could not be reasonably expected to avoid doing wrong.¹⁹ Because Abra and Absalom act on good, contoured normative capacities and because those capacities make it unlikely that they will act in accord with the balance of reasons, it is plausible that we cannot reasonably expect them to avoid wrongdoing. Accordingly, if reasonable expectations mark the boundary between responsibility and excuse, it is plausible that Abra and Absalom are entitled to an excuse.

I am sympathetic to this response. There is an intimate connection between reasonable expectations and blameworthiness. However, notice that this is no longer an ordinary excuse. In the ordinary case, we can reasonably expect an agent to act in accord with the balance of reasons precisely because the agent possesses ordinary normative capacities and has a sufficient opportunity to exercise them. Insofar as this response is persuasive, those same conditions make it unreasonable to expect the agent to act in accord with the balance of reasons. Thus, even if this is to count as an excuse, it would be an extraordinary excuse. (I make this point in fuller detail in the next section.)

Moreover, it would be condescending to excuse agents in the cases in the shadows.²⁰ Although granting an agent an excuse often benefits the agent (who thereby avoids blame or punishment), the benefit comes with a cost--the denial of agency. When the agents in the shadows act, their wrongdoing is the upshot of their fulfilling their roles. To grant them an

¹⁸ The capacities-and-opportunities account of excuse is common in the moral responsibility literature and in the criminal law literature, as is explained by Brink and Nelkin (2013). However, there are rich alternatives, especially Antony Duff (2009) and John Gardner (2007).

¹⁹ Wallace's account of moral responsibility has this reasonable expectation at its core. For Wallace, an agent can reasonably be expected to respond to the normative reasons so long as the agent has the requisite capacities and the requisite opportunity to act on those capacities. In the cases in the shadows, those capacities and opportunities are not sufficient for the reasonable expectation; we might then choose reasonable expectation as the guiding notion of excuse. I thank a referee for pushing the force of this reasonable-expectation account of excuse.

²⁰ For forceful presentations of this worry about condescension and insult, see Duff (2015) and Gardner (2007, especially "The Gist of Excuses").

excuse in these cases is to deny that their success in fulfilling those roles should be attributed to them. Consider Abra again. Abra has the healthy, functioning normative capacities typical of a good parent. She has sufficient time to deliberate, and there are no special environmental pressures interfering with her assessment of her options. When she commits immigration fraud, she does so with sufficient, unoccluded capacities. She is not entitled to an excuse. Moreover, giving her an excuse would be to in effect judge that her action on behalf of her children is not attributable to her, i.e., that her acting as a mother in this case is not the manifestation of her agency, even though presumably this is precisely the sort of action she is most concerned with.²¹ In Abra's case, we can see why it would be both inaccurate and insulting to grant an excuse. Likewise, imagine telling Absalom that he was excused for defending his son. Surely, he sees shepherding and defending his son as significantly constitutive of who he is. When he defends his son and rebuffs his son's attacker, that behavior goes to the core of his identity. Excusing him for that behavior would be to say to him that we do not take him to be responsive to reasons in the way that marks responsible agency. In familiar Strawsonian (1962) terms, we would treat him like a patient in that case, not like an agent. Such treatment is condescending, especially given how important parents take their responsibilities with regard to their children.

Taking stock: Finite agency is such that an agent's contoured normative sensitivity will sometimes dispose the agent to act incorrectly on the basis of ordinarily operating ordinary normative faculties. In some such cases, the agent will act against the balance of reasons because of the distortions created by the agent's contoured normative sensitivity. Such cases are cases in the shadows, cases like Abra's and Absalom's. In those cases, the ordinary understandings of duress do not give us reason to withhold or mitigate our blame. The circumstances do not shift the balance of reasons, and the agents' healthy capacities are operating as normal, without disruption or occlusion. It might seem that these agents should be exposed to the full force of blame, because it seems that these agents are responsible for their wrongdoing. In the next section, however, I explain why these agents should be granted a distinctive-duress defense.

4. The Distinctive-Duress Defense

We can find theoretical grounding for a defense for the cases in the shadows by looking at both justification and excuse more closely. Each of these defenses is associated with co-occurring properties, properties that come apart in the cases in the shadows. Teasing apart those properties, we see that the cases in the shadows are cases of quasi-justification and of quasi-excuse (quasi in each case because they instantiate one but not all of the ordinarily co-occurring properties), two defenses which together comprise the defense of distinctive duress.

Begin with quasi-justification. In paradigmatic cases of justified action, the agent does what is either called for or permitted by the balance of reasons because of the proper functioning of the agent's good normative psychology. That is, in the paradigmatic cases, the functioning of the agent's good normative psychology makes it so that the agent perceives and correctly judges the applicable reasons and acts in accordance with her accurate perception. Accordingly, there are two co-occurring properties in paradigmatic

²¹ I am thinking here of the attributability sense of responsibility picked out by Gary Watson (1996).

cases of justified action: the action is called for or permitted by the balance of reasons, and the action is the upshot of the proper functioning of good normative psychology.

But in the cases in the shadows, those two properties no longer coincide. In such cases, the action is the upshot of the proper functioning of good normative psychology, but the action is not called for or permitted by the balance of reasons. The former property is shared with cases of paradigmatic justification, but the latter is not. This divergence is not accidental. In the cases in the shadows, the proper functioning of a good normative psychology is what leads someone to act against the balance of reasons. Because Abra is a good mother, she is highly sensitive to her own children's interests. This leads her to be comparably insensitive to others' interests, leading her to act contrary to the balance of reasons. Because the cases in the shadows share one important property with cases of paradigmatic justification but not both, they are cases of "quasi-justification." Because agents in these cases act against the balance of reasons, their behavior does not warrant an ordinary justification. However, their behavior is the product of good normative psychology, and so in a significant sense, this behavior is the behavior we should want from agents. We want agents to have and act upon good normative psychology. We want fathers to act like good fathers, and good fathers will often act like Absalom acts. Accordingly, we should extend a quasi-justification defense to agents in the cases in the shadows.

What of quasi-excuse? In paradigmatic cases of excused wrongdoing, because the agent either lacks ordinary and robust normative capacities or those capacities are occluded or disrupted, it is not reasonable to expect the agent to respond appropriately to the reasons at issue.²² Accordingly, we get two co-occurring properties in excused action: first, that either the agent lacks ordinary, robust normative capacities or those capacities are occluded or disrupted and, second, that it is not reasonable to expect the agent to respond to the reasons at issue.

But these two properties diverge in cases in the shadows. In those cases, the agent's ordinarily sufficient normative capacities are operating without occlusion or interruption. However, because the agent's good capacities are comparatively insensitive to the reasons at issue, it is not reasonable to expect the agent to respond to the reasons at issue. The one property is shared with cases of paradigmatic excuse, but not the other. This divergence too is not accidental. It is because the agent's ordinarily sufficient normative capacities are operating without occlusion or interruption that it is not reasonable to expect the agent to respond to the reasons at issue. Because Abra's good normative psychology leaves her comparatively insensitive to the interests of the others on the queue, and because nothing is interfering with the operation of Abra's good normative psychology, it is not reasonable

²² For some philosophers, an agent is entitled to an excuse when his behavior, though wrongdoing, does not manifest ill will. For an example of an account of duress given that understanding of excuse, see Norvin Richards (1987). Accounts of culpability dependent upon the manifestation of ill will struggle to appropriately handle cases of negligence and cases of out-of-character wrongdoing. For skepticism about the ill-will condition especially as it bears on duress, see Marcia Baron (2014) and Gardner (2007, p. 577). Here, I focus on reasonable expectations and fair opportunities. However, those who favor a manifestation account could either expand the number of co-occurring properties in excuse or replace the reasonable-expectation property with the manifestation property, the rest of the argument proceeding accordingly, *mutatis mutandis*.

for us to expect her to respond to those interests. It is unfair of us to blame or punish agents where it is not reasonable for us to expect them to respond to the reasons to act otherwise at issue. We should thus extend a quasi-excuse defense to agents in the cases in the shadows.

The quasi-justification and quasi-excuse defenses are connected in the cases in the shadows. It is not reasonable to expect these agents to respond to the reasons to act otherwise (the property associated with excuse) because the agent's good moral psychology disposes them to act as they do (the property associated with justification). Thus, in this case, there is a new pairing of properties: the action is the upshot of the proper functioning of a good normative psychology, and accordingly it is not reasonable to expect the agent to respond to the reasons at issue. This new pairing marks the distinctive-duress defense, a duress defense which cannot be accounted for either by ordinary justification or ordinary excuse.²³

Here I face a classification objection. Why not think that the concepts of justification, excuse, or both are expansive enough to include the distinctive-duress cases? For instance, why not think that it is because Abra's normative capacities are not sensitive to the particular reason at issue that she is entitled to excuse, such that her case is just an ordinary case of excuse? First, it is important to see that even if distinctive duress can be understood as instantiating one or the other of justification or duress, it will be as a distinctive and proper subset of those defenses. Quasi-justification is in one important way like paradigmatic justification and in one important way unlike paradigmatic justification; the term "quasi-justification" is intended to reflect both of those features. A similar point holds for excuse and quasi-excuse, as I explained previously. Even if we accept that the correct understanding of excuse is grounded in thinking about reasonable expectations, the distinctive-duress cases will be distinctive excuses because the distinctive-duress cases will involve ordinary normative capacities operating ordinarily. Even if the distinctive-duress cases can be fit within one or the other of the ordinary defenses, the cases will form a proper subset of those ordinary defenses in light of the properties which remain unshared.

Second, while I am committed to pointing out the complex relationship between quasi- and ordinary justification and quasi- and ordinary excuse, I am not committed to any particular position with regard to the boundaries of the concepts of justification and excuse. These classificatory and conceptual matters turn on broader questions of conceptual ethics, as helpfully discussed by David Plunkett and Timothy Sundell (2013) and by Plunkett (2016). Whether we want to call justification only those cases that shift the balance of evils (the ordinary way justification is discussed in the duress literature), or

²³ For similar arguments seeing duress as grounded in how good agency and acting in accord with moral reasons can come apart, see Craig Carr (1991), Duff (2015), Gardner (2009), and Michael Gorr (2000). For each of these philosophers, as for me, duress cases involve non-justified action that can be explained by reference to non-culpable features of the actor's agency. For example, for Duff and Gardner, duress is a defense where, while the action is not justified, it is the product of a non-pathological, reasonable emotion. My account is distinct from these other accounts in the role played by contoured normative capacities. The contoured capacities provide a distinctive explanation for why the agent would not be at fault, one that connects to quasi-justification and quasi-excuse in a principled manner.

whether we want to revise our concept of justification so as to include the duress cases depends upon the ways that we use the concept of justification, and thus that is a broader question than my present concern: showing how distinctive duress is distinctive.

Seeing how these two pairs of properties come apart in cases of distinctive duress helps to diagnose why these cases have been so difficult to address for many philosophers. Many philosophers writing about duress accept three seemingly plausible propositions: 1) culpability is the product of responsibility for wrongdoing; 2) responsibility is a matter of having a properly functioning normative psychology and the opportunity to exercise that psychology; and 3) wrongdoing is a matter of the balance of reasons bearing on the action. Because that trio of propositions is sensitive to only one property from each of the co-occurring sets of properties for justification and for excuse, it leaves no way to comfortably account for cases of distinctive duress. Instead, philosophers who accept those three propositions strain to find ways to shoehorn the cases in the shadows into either ordinary justification (leaning heavily on agent-relative reasons for example) or ordinary excuse (characterizing duress cases as cases where the agent's psychology interferes with her reasoning, for example). Only by recognizing the complex of properties involved in both justification and excuse, and thereby weakening at least the latter two of the three seemingly plausible propositions, can we find a comfortable analysis of the distinctive-duress cases.

This account of distinctive duress helps illuminate the Model Penal Code's duress provision.²⁴ Section 2.09(1) reads:

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.

Subsection 4 makes clear that, while duress is consistent with justification (which is described as a "choice of evils" defense), duress is not equivalent to justification. Accordingly, a duress defense is available even when the action is not justified. Likewise, the Model Penal Code's duress defense is available even when the agent is fully competent. The person of reasonable firmness is a competent agent. We can thus understand the Model Penal Code's duress provision as pointing to a defense to culpability available even in cases of competent wrongdoing. This is the spirit of the distinctive-duress defense.²⁵

That said, accepting the distinctive-duress defense pushes us to consider revisions to the Model Penal Code's duress provision. First, I am skeptical that the duress defense

²⁴ The Model Penal Code is a text originally prepared in 1962 by the American Law Institute and revised several times since then. Although the Model Penal Code is not binding law, it is widely regarded both as capturing important elements of American criminal law and as providing a productive guide for modernizing aspects of American criminal law.

²⁵ The Model Penal Code's duress provision is plausibly consistent with seeing agents under duress as lacking a fair opportunity to exercise their competence. Insofar as Section 2.09(1) is read in this fashion, it should be revised to accommodate the distinctive-duress defense.

should exclude cases of natural or non-agential etiology.²⁶ The duress defense has historically been understood as limited to cases where the pressure causing duress is brought about by another agent. However, none of the co-occurring factors marking justification and excuse are predicated upon the involvement of some other agent, and so I am skeptical that there would be a principled reason for excluding the defense in cases where those factors are present for non-agential reasons. Second, given the possibility that there are many good arrangements of normative psychology, we should be clear that the reference to “a person of reasonable firmness” is not pointing to some unique person of reasonable firmness. A mother’s reasonable firmness and a friend’s reasonable firmness are plausibly distinctive. Third, the talk of inability in the provision is ambiguous. We should distinguish between when no person of reasonable firmness could possibly resist (which presumably is true only in very few cases) and when we cannot reasonably expect a person of reasonable firmness to resist (which is presumably true in a substantially greater range of cases). Finally, the Model Penal Code provision limits the defense to cases of threats of unlawful force. But many of the cases of distinctive-duress (at least as I’ve described the defense) might involve matters other than threats and certainly will involve matters other than unlawful force. Consider, for example, the pressures bearing on Abra. Even if we might have good, pragmatic reason to limit the legal defense of duress to cases of threats of unlawful force, we should consider whether the moral defense should be so sharply constrained.

There might be pragmatic reasons to resist these revisions, at least as regards the criminal law. For example, if the duress defense is predicated upon the normative contours particular to different roles, then juries could be charged with sorting out complicated questions about the relevant roles at issue and the contours implicated by those roles. There might be significant practical concerns about how such issues should be litigated at trial. Moreover, cases of distinctive duress might be quite rare, and as I have acknowledged, whether any particular case is a distinctive-duress case will be controversial. Accordingly, while an ideal duress defense should be modified in the ways I’ve suggested, it might be that a duress defense for our non-ideal criminal justice system should leave distinctive-duress cases out. Nonetheless, because we should be concerned not to deploy the punitive force of the criminal-justice system against agents who are not culpable wrongdoers, the duress defense we extend to defendants should closely track the ideal duress defense. Courts have tended to resolve practical questions about the duress defense against defendants. We should instead accept non-ideal restrictions on the duress defense only insofar as we have great evidence of their necessity.

5. Conclusions

In this paper, I’ve offered an account of distinctive duress, a duress defense not reducible to ordinary justification or ordinary excuse. An agent is entitled to a distinctive-duress defense when their wrongdoing was the product of their properly contoured normative psychologies. More precisely, an agent is entitled to a distinctive-duress defense when, because of their properly contoured normative psychology, they are comparatively insensitive to the reasons to do otherwise and are thereby led to act against the balance of

²⁶ For similar skepticism, see Dressler (1999, 2009) as well as cases like United States v. Contento-Pachon, 723 F.2d 691 (1984). Notice also that both Abra and Absalom are reacting to pressures brought about by human agency.

reasons. Distinctive duress helps explain a central sort of duress case, the case of the good, competent agent who does wrong because of the stakes for something important the good, competent agent cares about. Distinctive duress explains cases where parents protect children, where friends protect friends, where spouses protect spouses, and the like. We do not need to expand our accounts of agent-relative justifications to explain these cases, nor do we need to think that these agents are rendered incompetent by their important involvements. Instead, these central cases are cases of distinctive duress.

Recognizing the mechanisms of distinctive duress also highlights broader questions about culpability. First, it is common to suggest that the elements of culpability--responsibility and wrongdoing--are independent. But the distinctive-duress defense shows that the elements of defense are not independent. In distinctive duress, we find a defense that implicates elements of both the responsibility prong of culpability and the wrongdoing prong of culpability. This invites us to revisit the putative independence of the elements of culpability.²⁷

Second, thinking about distinctive duress might point us to questions about the co-occurrent properties in justification and in excuse. For instance, what do we want to say about an agent marked by an undesirable or vicious normative psychology who, precisely because of his vicious normative psychology, thereby reads the reasons correctly in some situation? Imagine an agent who fails to properly appreciate friendship and who, therefore, is not attentive to his putative friends' needs, and imagine that his friends' needs are outweighed. The agent perceives the reasons at issue and acts accordingly. Thus, the agent acts in accord with the balance of reasons, but only because the agent is marked by a significant flaw. In such cases, that an action is supported by the balance of reasons and that the action manifests a good normative psychology come apart. How should we react to such agents?

Finally, there is much work to be done investigating the moral implications of contoured normative psychologies. Almost certainly there are a number of good contours for our normative psychologies. That means that it is almost certain that there are a number of instantiations of the distinctive-duress defense. As a matter of application, do we need to identify all of these contours? Do we need to be sure that an agent is contoured in a fashion that would ground defense, or is it enough that an agent in that position should be contoured in a way that would ground the distinctive-duress defense? We face questions like these in both our interpersonal interaction and the criminal law. And the implications of contoured normative psychologies go beyond the distinctive-duress defense. The criminal law often refers to the reasonable person standard. For example, the Model Penal Code's negligence provision holds agents to "the standard of care that a reasonable person would observe in the actor's situation" (2.02(d)). We should consider how the reasonable-person standard accommodates the diversity of appropriate normative psychologies picked out by contoured normative psychologies. The distinctive-duress defense is one important way that our blame and punishment practices should be sensitive to the good contours in our moral behavior, but it is surely just one of many.²⁸

²⁷ For even more strident challenges to the divide between justification and excuse, see Duff (2009, ch. 11) and Eduardo Rivera-López (2006).

²⁸ This paper was sparked by a rich discussion with Sam Rickless about the relationship between responsibility for wrongdoing and blameworthiness. Thanks also to audiences at

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