Lesser Evils, Mere Permissions and Justifying Reasons in Law

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During the 2010–11 Queensland floods, the Brisbane River’s waters rose so high that they lifted many jetties off their pilings. A friend of mine who owned a jetty told me that a concerned neighbour had, without asking his permission, tethered his jetty to a large tree. When the flood waters receded, my friend recovered his jetty with minimal cost. In order to tether the jetty to the tree, the neighbour had to trespass across my friend’s property, as well as the property of several others, as he waded through rising flood waters. I think we can say, as a matter of both criminal law and apparent common sense, that the neighbour’s trespass was justified, and therefore permissible.[[2]](#footnote-3) The neighbour’s reasons to render aid outweighed any reasons he had not to trespass on others’ land.[[3]](#footnote-4) On the other hand, I am reluctant to say that the neighbour was required to help my friend as he did. His intervention was time-consuming and potentially dangerous, and he could just as easily have helped one of the many flood victims in some other way.[[4]](#footnote-5) In spite of the apparent strength of his reason to intervene and save my friend’s jetty, it would have been equally permissible for him not to do so.

This chapter is concerned with cases such as these, where we are justified in performing an otherwise prohibited action but do not perform it. The case is one example of what criminal lawyers often call ‘lesser-evils’ defences. Trespassing across several neighbours’ land in order to secure the jetty was a lesser evil than the trespass itself. In criminal law, ‘lesser-evil’ defences are often regarded as justification defences *par excellence*, and even as a conceptual paradigm for justification defences generally.[[5]](#footnote-6) But I will not base my arguments in this chapter on the assumption that all justification defences involve a choice of lesser evils.[[6]](#footnote-7) What interests me is the curious nexus that these cases illustrate between justifying reasons and the conclusion that conduct is either permitted or required. So-called reason-based or ‘reasons-first’ accounts hold that our normative conclusions – our conclusions about what we are required to do and what is permissible – are explained by our practical reasons.[[7]](#footnote-8) As I note in section II, it is difficult to offer a reason-based account of lesser-evils justifications that does not collapse the distinction between the required and the permissible with respect to justified conduct.[[8]](#footnote-9) Some justifying reasons generate mere permissions, rather than requirements. I will consider several prominent attempts to account for the distinction. I conclude by suggesting that none of these attempts is adequate without the further concession that some reasons lack deontic or requiring force.

Justifications are an important point of interaction between law and practical reason. When law creates justification defences, it makes a concession about the limitations of general legal rules for the guidance of conduct. It creates a discretionary space in which it permits its subjects to be guided by reasons for non-conformity with a legal prohibition.[[9]](#footnote-10) Justificatory reasoning may not, strictly speaking, be legal reasoning.[[10]](#footnote-11) It is certainly not unique to law. Nonetheless, it is a form of practical reasoning that is often incorporated in law and given clear legal effects. One source of disagreement amongst theorists of the criminal law is whether justified conduct is merely permissible, creating a ‘licence’ or ‘privilege’, or whether the presence of a complete justification renders conduct ‘warranted’, ‘objectively right’ or ‘correct’.[[11]](#footnote-12) (This tension is particularly clear in commentary and criticism of George Fletcher’s work.[[12]](#footnote-13)) The accounts of justifying reasons that I will explore all seek to resolve the apparent conflict between these two positions. I will argue that it is coherent to insist that justified conduct is both warranted and merely permissible. I begin with a survey of the general problem that I wish to address.

# Lesser Evils and Justificatory Reasons

All action calls for rational justification. One of the fundamental roles played by practical reasons is to justify conduct – to render it intelligible from the standpoint of practical rationality. It does not seem to be controversial that reasons can play this role.[[13]](#footnote-14) If I decide to go swimming in my lunch hour, I can cite, as my justification for doing so, my reason to enjoy the warm weather or my reason to get some much-needed exercise. In legal settings, however, it is typically only prohibited conduct that calls for justification. Justifications are invoked defensively, in order to explain why normally prohibited conduct is in fact legally permissible.

 The notion of justification plays an important role in theoretical accounts of defences in criminal law, where it underlies the basic distinction between justification defences and excuses.[[14]](#footnote-15) (More recently, the role of justifications in other areas of law – torts especially – has begun to attract attention.[[15]](#footnote-16)) On one view, the existence of a legal justification creates an exception to the general prohibition. The late John Gardner identified this approach with the ‘closure view’, according to which justified conduct is not in breach of a legal duty and therefore not a legal wrong.[[16]](#footnote-17) According to the closure view, justified conduct falls within an exception to the general legal rule, and therefore does not comprise a wrong (at least in the eyes of the law). I am sympathetic to the closure view, at least as an account of legal rules, which are capable of being specified either in advance or over time through the acknowledgement of exceptional cases. Nonetheless, it is worth noting that there is a difficulty with this approach that is, broadly speaking, interpretive. While some legal rules do specify the absence of justification as a requirement for wrongdoing, in other cases there is a separate norm providing for a defence where conduct is justified. This distinction seems to carry procedural implications. In the former case, the absence of justification must be established by the plaintiff or prosecution. For instance, the negligence standard in tort law explicitly prohibits only unreasonable or unjustified conduct. A defendant is not in breach of the primary norm unless their conduct is unjustified. As a result, the absence of justification must be proved by the plaintiff. On the other hand, many criminal rules do not require the prosecution to establish the absence of relevant legal justification, at least not as a matter of course. The presence of a justification must be raised by the defendant. According to critics of the closure view, these procedural distinctions reflect underlying notions of moral responsibility. The wrongness of the defendant’s conduct is sufficient reason to call them to account for their actions. Justification does not negate the wrongdoing; it merely renders it permissible, all things considered.[[17]](#footnote-18)

In any case, the merits of the closure view are orthogonal to the main problem I will be discussing here. From the perspective of reason-based accounts, the content of the legal rule – whether it contains an explicit exception for the justified conduct – is a secondary issue.=. As Joseph Raz notes, rules are ‘expressions of compromises, of judgements about the outcome of conflicts’.[[18]](#footnote-19) Even where a legal rule creates an explicit exception for justified conduct, that exception reflects a judgement about the outcome of an underlying conflict of reasons. In the case of lesser-evils justifications, it reflects a legal judgement that the reason not to engage in certain conduct is defeated by my reason to pursue the lesser evil.[[19]](#footnote-20) Even where a reason is defeated by another reason of greater weight or stringency, it still functions as a reason.[[20]](#footnote-21) The residue generated by non-conformity with the defeated reason becomes a basis for regret, and, at least in some cases, a reason to repair the harm caused by the justified action.[[21]](#footnote-22)

I will focus on the apparent asymmetry of reasons that underlies a choice of lesser evils. The asymmetry in question appears to track the distinction between ‘reasons for’ and ‘reasons against’ an action, or ‘pros’ and ‘cons’.[[22]](#footnote-23) It is not so much a matter of the content of the reasons in question as their differing normative force. Choices of lesser evil arise in the context of a conflict between reasons that have requiring or ‘mandatory’ force and justificatory reasons.[[23]](#footnote-24) Criminal prohibitions purport to give us reason not to do something, but, more fundamentally, they give us reason to rule out otherwise worthwhile options. My reason not to trespass is not simply a reason not to trespass, it is a reason that, ordinarily, rules out pursuit of otherwise good options that involve trespass. Ordinarily, it is not permissible for me to trespass across a neighbour’s land to repair his jetty.

Unlike the reasons associated with the prohibition, however, justifying reasons are often associated with a kind of optionality. There are some cases where the lesser evil justification involves a conflict of duties: conformity with the duty of higher priority is judged to be a lesser evil than conformity with the other duty.[[24]](#footnote-25) But cases of lesser evil need not involve a conflict of duties. My friend’s neighbour did not have to expose himself to potential danger to rescue the jetty – I think he could have done something else with his time without behaving impermissibly. This sort of optionality arises in cases like my friend’s neighbour, in which the justified conduct appears to be supererogatory – in the sense that it is commendable or highly morally desirable but not required – as well as in cases where the greater evil we seek to avoid is adverse to our own interests.[[25]](#footnote-26) The defendant in *Cross v State*, who protected his property by slaughtering wild game, was presumably not *required* to do so, even supposing the slaughter of game was the lesser evil than allowing damage to his property.[[26]](#footnote-27) The sailors in *United States v Ashton* were not duty bound to mutiny – they would have been permitted to sacrifice their own interests for the good of the mission, and to try their luck with an unseaworthy ship.[[27]](#footnote-28) I can be justified in speeding a seriously unwell friend to the hospital without being required to do so – my reason to speed only needs to be sufficient to render my speeding permissible in the circumstances.[[28]](#footnote-29) In this regard, the law reflects an aspect of commonsense morality, which allows that a choice of lesser evils is at least sometimes morally permissible, rather than required. These cases of mere permission create a problem for reason-based accounts of justification.

# The Problem of Mere Permission

Justifications and permissions are intimately related.[[29]](#footnote-30) The existence of a valid and complete justification permits me to engage in conduct that in other circumstances would be prohibited.[[30]](#footnote-31) The relationship entailment between justificatory reasons and permissions can be easily stated. I act with justification if I act on a ‘good’, ‘sufficient’ or undefeated reason.[[31]](#footnote-32) It is always permissible to act on an undefeated reason, at least on the assumption that whenever we face inconsistent undefeated reasons, we are permitted to follow any one of the inconsistent reasons for action.[[32]](#footnote-33) Thus I am justified in doing something just in case I am permitted to do that same thing. But, on the other hand, there appears to be an equally tight relationship between justifications and requirements. It is plausible to think that we are required to conform with our strongest reasons.[[33]](#footnote-34) According to John Gardner, ‘it is a basic principle of practical rationality’ that ‘one should always act for *some* undefeated reason’.[[34]](#footnote-35) If I choose a lesser evil, then I am acting on reasons that are stronger than my inconsistent reasons not to engage in the prohibited conduct. (For instance, the neighbour’s reasons to secure my friend’s jetty were stronger than his reasons not to trespass.) But in the absence of other, inconsistent reasons, it follows that I am required, and not merely permitted, to act on my justifying reasons. This is the problem that I wish to address in the remainder of this chapter. I will call it the problem of mere permission.

 It is useful to set out the problem in a slightly more formal way, albeit with considerable oversimplification.[[35]](#footnote-36) (I think the oversimplification is harmless for our purposes.) I will treat reasons as propositional. A reasoning context will be characterised in terms of a set of reasons applicable to an agent in a given context. The notation $R\left(ϕ\right)$ will indicate that in a given context there is some subset of these applicable reasonssupporting the proposition $ϕ$. In a given reasoning context, there may be subsets of reasons that are inconsistent with each other. Two sets of reasons $R(ϕ)$ and $R’(ψ)$ are inconsistent just in case the set of propositions supported by the two sets is inconsistent. We will also suppose that, in a given reasoning context, there is an ordering of ‘weight’ or strength over subsets of reasons that holds when one subset of reasons is stronger than the other.[[36]](#footnote-37) To allow for the possibility of sets of reasons of equal or incomparable strength, the order is partial: in a given reasoning context there may be sets of reasons such that neither set is stronger than the other.[[37]](#footnote-38) We begin with a definition of a set of ‘good’ or undefeated reasons in a given reasoning context:

**Undefeated Reasons:** In a reasoning context, a subset of reasons $R(ϕ)$ is defeated just in case there is some other subset of reasons $R'(ψ)$ such that (i) $R(ϕ$) and $R'(ψ)$ are inconsistent, and (ii) $R'\left(ψ\right)$ is stronger than $R(ϕ)$. A subset of reasons that is not defeated is undefeated.

The idea underlying this account is that if a subset of reasons is inconsistent with some other, stronger, subset of reasons, it is no longer eligible for rational choice. It is no longer permissible to act on the defeated subset of reasons. As a corollary, it is always permissible to act on an undefeated subset of reason:

**Undefeated Reasons Entail Permissions:**  In a reasoning context, if there is some subset of undefeated reasons supporting the proposition $ϕ$, $R(ϕ)$, then it is permissible that $ϕ$.

We then complement this thesis about the relation between undefeated reasons and permissions with a seemingly attractive thesis about the relations between our strongest reasons and requirements:

**Strongest Reasons Entail Requirements:** In a reasoning context, it is required that $ϕ$ if there is some subset of reasons supporting the proposition that $ϕ$, $R(ϕ)$, such that for any subset of reasons $R'(ψ)$ that is inconsistent with $R(ϕ)$, $R\left(ϕ\right)$ is stronger than $R^{'}\left(ψ\right).$

This account partly formalises the idea that we are required to act on our strongest reasons. It is easy to see that our strongest reasons will be undefeated reasons. If a subset of reasons is stronger than all other inconsistent subsets of reasons, there will be no subset that defeats it. It will also follow that the other incompatible subsets are defeated by the strongest set. It will be impermissible to conform with the weaker subsets of reasons, and we will therefore be required to conform with the remaining subset of undefeated reasons. Thus the theses that **Undefeated Reasons Entail Permissions** and that **Strongest Reasons Entail Requirements** are compatible with the intuitively appealing idea requirement entails permission. If your strongest reasons support the proposition that $ϕ$, then you will have a set of undefeated reasons supporting $ϕ$, and it will be permissible that $ϕ.$

The problem of mere permission arises in cases where it appears as though our strongest reasons do not require conformity. Suppose that an agent is faced with two inconsistent subsets of reasons: a subset of reasons supporting the proposition that they not engage in prohibited conduct, denoted$ R\_{1}(¬P)$, and a subset of reasons supporting the proposition that they pursue the lesser evil, which we denote $R\_{2}(LE)$, where the two subsets of reasons are inconsistent. If the proposition supported by the latter reasons, $R\_{2}(LE)$ is indeed a ‘lesser evil’ than the prohibited conduct, then $R\_{2}(LE)$ is stronger than $R\_{1}(¬P)$. This means that the set $R\_{1}\left(¬P\right)$ is defeated, and the set $R\_{2}\left(LE\right)$ is undefeated. I am therefore permitted to pursue the lesser evil. But it also follows, since I am required to act on reasons stronger than any other inconsistent reason, that I am required to act on $R\_{2}(LE)$. Thus lesser-evils justifications entail requirements, rather than mere permissions. It is true that pursuit of the lesser evil is permitted, but seemingly only in virtue of the fact that it is required, and requirement entails permission. The distinction between justified conduct that is required and justified conduct that is merely permissible has been lost.

# III. Non-Revisionary Responses

I will ultimately suggest that we should abandon the thesis that our strongest reasons entail requirements. The thesis that Gardner identifies as a ‘basic principle of rationality’ is in need of revision. Some undefeated reasons for action justify conduct without requiring it. Before considering this possibility, however, I want to critique several non-revisionary solutions to the problem. These responses are non-revisionary in the sense that they do not entail the abandonment of either the thesis that undefeated reasons entail permissions or the thesis that strongest reasons entail requirements. I think these solutions are inadequate. If we want to solve the problem of mere permissions, we need to abandon the thesis that our strongest reasons entail requirements. Some of these alternatives are worthy of greater discussion than I will be able to give them. (I feel that the role of incomparability in some cases of mere permission is particularly important.) Nonetheless, I will set out some reasons for regarding these responses as insufficient.

## Rejecting Mere Permissions

The most straightforward answer to the problem is to assert that in order to qualify as a legal justification, conduct must be morally required. The function of the lesser-evils defence is to permit the law’s subject to deliberate free from the rational interference of a legal prohibition. Thus, though we are not legally to pursue the lesser evil, we are morally or rationally required to do so. A proponent of this approach might argue that, when we avail ourselves of a lesser-evils justification, we are like the disinterested bystander who attempts an easy rescue in the absence of a legal duty: we act as we are morally or rationally required to act, although the law will not enforce our moral requirement. At various points in his work, George Fletcher appears to take something like this view. Though he concedes that justifications create a legal permission, Fletcher argues that legal ‘justification renders conduct right’.[[38]](#footnote-39) He further rejects the view that legally ‘justified conduct is not necessarily right, but merely tolerable or permissible’.[[39]](#footnote-40) Fletcher’s approach is most easy to reconcile with philosophical frameworks – such as those in the Kantian and utilitarian traditions – that deny that justified conduct could ever be merely permissible. Some Kantians, for example, will insist that the neighbour was fulfilling an imperfect duty of beneficence. My friend’s neighbour conformed with a non-enforceable or ‘non-juridical’ duty – his actions are meritorious in the sense that he did ‘more in the way of duty than he can be constrained by law to do’, but that does not make his action *merely* permissible.[[40]](#footnote-41) The existence of mere permissions in law reflects conceptual limits on the law’s ability to enforce imperfect duties of virtue (like the duty of beneficence, for example), not the absence of these duties. Consequentialists may likewise argue that we have a general moral requirement to promote the overall good, and that this requirement is baldly inconsistent with the thesis that it can be merely permissible to act on our strongest reasons.[[41]](#footnote-42) If either of these approaches is correct then there is no need for us to address the problem of mere permission.

Nonetheless, approaches that deny the possibility of mere permissions face their own explanatory burdens. They run counter to a commitment to the existence of agent-centred options that appears to be deeply embedded in commonsense morality.[[42]](#footnote-43) Within commonsense morality, justified conduct includes conduct that is morally merely permissible rather than required. We are permitted – but not required – to pursue our projects and interests at the expense of what would be optimific. We are also permitted – but not required – to sacrifice our own interests for the interests of others, even where doing so does not promote the overall good or ensure conformity with impartial duty.[[43]](#footnote-44) In various guises, these forms of commonsense permission have puzzled philosophers working across different traditions in moral theory. Sidgwick noted that ‘Common Sense praises (though it does not prescribe as obligatory), a suppression of egoism beyond what Utilitarianism approves’.[[44]](#footnote-45) Bernard Williams famously deployed similar agent-centred considerations in his critique of Kantian and utilitarian traditions in moral philosophy.[[45]](#footnote-46) The problem of accommodating these agent-centred permissions is one that continues to occupy philosophers across a variety of traditions in moral theory.[[46]](#footnote-47)

A full defence of mere permissions is beyond the scope of this chapter. Instead I will take their existence as an aspect of commonsense morality at face value. If we do concede that there are moral justifications that create mere permissions then Fletcher is wrong to seek to rule them out with the simple conceptual stipulation the justified conduct is ‘right’ conduct. Theoretical accounts of the function of justifications in law ought to cohere with our understanding of ordinary practical reasoning. Justificatory reasoning in law may not exactly replicate moral justificatory reasoning, but it is surely safe to observe that there is some sort of structural equivalence between the two.[[47]](#footnote-48) Our understanding of justifications in law can only be enriched through study of justificatory reasoning as a form of practical reasoning. Different systems of law will choose to institutionalise justificatory reasons in different ways.[[48]](#footnote-49) Before we consider the way in which particular legal systems do or should incorporate justificatory reasoning in law, it is useful to pay attention to the salient rational distinction between requirements and mere permissions.

While Fletcher suggests justified conduct is morally or rationally required, other criminal law theorists are happy to accept the possibility of ‘weaker’ standards of justification, whereby a defendant is able to argue that their behaviour, though otherwise prohibited, was permissible in the circumstances.[[49]](#footnote-50) On these accounts, defences that permit but do not require a defendant to act out of self-interest, such as self-defence against a culpable attacker, are properly considered to be justification defences.[[50]](#footnote-51) Anthony Duff further suggests that the distinction between requirements and mere permissions is important to resolving a problem that has divided theorists of the criminal law: whether justification defences should apply in cases where the motive for justified conduct was malicious or improper.[[51]](#footnote-52) So it may well be that the proper understanding of mere permissions has important ramifications for our doctrinal understanding of defences in criminal law.

## Reasons of Incomparable Strength

We could appeal to incomparability, or imprecise comparability, in the strength of reasons to resolve the problem. According to the account of the relation between reasons and requirements I offered in section II, we are required to $ϕ$ if we have a set of undefeated reasons to $ϕ$ and that set of reasons is stronger than any incompatible set of reasons. The account allows for the possibility that where we have inconsistent sets of reasons of equal or incomparable strength, we are required to choose between them but permitted to choose either one.[[52]](#footnote-53) Suppose that the defendant in *Cross v State* had reasons to protect his property against damage by protected game animals and reasons not to kill the protected game that were either incomparable or imprecisely comparable, so that neither was stronger than the other. Since both sets of reasons are undefeated, it is permissible for the defendant to choose to conform with either set. In circumstances where they face a choice between preserving their property and killing the game, the defendant is permitted to choose between either course of action.[[53]](#footnote-54) But, since his reason not to kill the protected game is not stronger than his reason to protect his property, he is not required to protect his property. The optionality of the conduct in question can thus be said to be a result of the law’s tolerance of these sorts of choices between evils that resist complete comparison. (We could also argue, seemingly implausibly, that our reasons to avoid either evil have equal strength.[[54]](#footnote-55)) Where neither evil is the lesser evil, the subject is required to make a choice between evils, and the law permits them to make their choice.

 This explanation is at odds with law’s presentation of these cases as involving *lesser* and *greater* evils, but this should not stop us from regarding it as plausible.[[55]](#footnote-56) Law could well be wrong about the moral basis of its own doctrines. It seems to me to be particularly plausible to think that in some cases it is permissible to choose between two evils because neither evil is lesser than the other.[[56]](#footnote-57) The problem with an appeal to ties or incomparability is that it accommodates only a narrow range of cases. There are cases where it is merely permissible to choose an evil, even when our reason to choose it is clearly stronger than its alternatives. I think that cases of heroic self-sacrifice offer the most compelling example. I am permitted, but not required, to imperil my own life by breaking into my neighbour’s property to defuse a bomb. A proponent of incomparability as a source of optionality must argue that my reasons not to trespass, including my reasons of self-interest, are not fully comparable with my reasons to defuse the bomb.[[57]](#footnote-58) This does not seem to me to be the correct explanation of the source of the optionality. In fact I think that in these cases my reason to defuse the bomb is clearly stronger than either my reasons not to trespass – it has superior moral weight or priority – but that nonetheless I am merely permitted, and not required, to imperil myself. The commonsense understanding of cases of supererogation (including heroic self-sacrifice) is that they create a state of affairs that is better than the alternative, but which we are nonetheless not required to bring about. The argument that such cases actually involve a choice between incomparable evils is at odds with this conventional understanding. This does not make the argument wrong, of course, but it does suggest there is value in exploring other plausible explanations.

## Rationally Required, Morally Permitted

Many cases in which justifications generate mere permissions involve a choice by an agent as to whether to favour or sacrifice their own interests. The defendant in *Cross v State*, for instance, had an apparent choice between sacrificing their own interest in property and acting to defend it. Some philosophers argue that mere permissions of this sort arise where we have most moral reason to act in a way that we do not have most reason to act, all things considered. Our strongest moral reasons for action are not our strongest ‘non-moral’ reasons for action, so a choice between them is morally permissible. Naive attempts to formulate an account along these lines will imply that acting on our strongest moral reasons in these cases is irrational.[[58]](#footnote-59) In recent work, Douglas Portmore develops a sophisticated version of this approach, which allows him to avoid this and other implausible commitments.[[59]](#footnote-60) But any argument along these lines, including Portmore’s, needs to offer a convincing account of the distinction between moral and non-moral reasons. It is notoriously hard to make a rigid distinction between morality and self-interest. This makes appeal to non-moral reasons in order to explain mere permissions unattractive.[[60]](#footnote-61) It is also plausible to think that, at least in some cases, we have moral reasons to promote our own interests, even where we are not morally required to promote them. Suppose, for example, that the neighbour who rescued the jetty had self-interested reasons to do so, because if the jetty had lifted from its pilings it would have travelled downstream and damaged his property. He had at least two reasons to rescue the jetty: a reason to protect my friend’s property and a reason to protect his own. It seems implausible in this context to say that his reason to preserve his own property is not a moral reason.[[61]](#footnote-62) Surely the destruction of property is something we have moral reason to avoid, even when the property in question is our own.

 Moreover, it is plausible to think that mere permissions arise in contexts other than those that involve a trade-off between self-interested reasons and moral reasons. Consider a standard trolley problem, in which an operator chooses between diverting a trolley towards a single person or allowing it to continue and kill five people. In the absence of any significant relationship between the operator and the track-workers, it seems plausible to say that the operator is permitted to divert the trolley, but that they are not required to do so.[[62]](#footnote-63) Neither the reason to divert the trolley nor the reason not to divert the trolley is properly characterised as a reason of self-interest. The problem of mere permission seems to arise in a broader category of cases, and requires a broader form of explanation.

 Rather than appealing to any of the three above-mentioned strategies to accommodate mere permissions, I think we need some way of accommodating the idea that some undefeated reasons do not support requirements. We ought to concede that in some cases it is permissible not to act on our strongest reasons.

# IV. Protected Reasons, Exclusionary Permissions and Cancelling Permissions

In Joseph Raz’s work, the asymmetric conflict between requirements and justifications is embodied in the well-known idea of a protected reason.[[63]](#footnote-64) Prohibitions are mandatory norms, which are understood as protected reason – a ‘first-order’ reason not to engage in the prohibited activity, and a ‘higher-order’ exclusionary reason not to act on otherwise good reasons that are inconsistent with the prohibition.[[64]](#footnote-65) The requirement not to trespass, for instance, comprises both a reason not to trespass and a reason to exclude otherwise good reasons to trespass. The apparatus of protected reasons offers an elegant explanation of how the reasons associated with requirements come to rule out otherwise attractive options that are available to me. On a sunny day I might be tempted to sit by the river on a neighbour’s jetty. The requirement not to trespass gives me good reason to exclude this option, at least not without my neighbour’s permission.

 Protected reasons offer a very attractive account of the distinction between those reasons that appear to have requiring normative force and those reasons that do not. But in order to accommodate mere permissions, the idea that justifications involve conflict between an ordinary reason to perform the prohibited act and a protected reason to conform with the prohibition needs to be supplemented, at the very least, with an account of how the ordinary reason can come to defeat the protected reason without, itself, generating a requirement. How is it that a reason to trespass in order to rescue property can both (i) fail to be excluded by my protected reason not to trespass and (ii) defeat the reason not to trespass, without itself generating a requirement? I am aware of two attempts to accommodate mere permissions within a framework of practical reasoning that involves protected reasons. The first is Joseph Raz’s appeal to exclusionary permissions, which he uses to explain supererogation and other phenomena.[[65]](#footnote-66) The second is John Gardner’s idea of a ‘cancelling’ permission, which he invokes specifically to explain the rational character of justification defences.

## Exclusionary Permissions

Mere permissions might be explained by appealing to Raz’s notion of an ‘exclusionary permission’, which is a permission to exclude an otherwise good or undefeated reason.[[66]](#footnote-67) Exclusionary permissions can permit us not to act on our strongest reasons for action.[[67]](#footnote-68) Cases of supererogation, for instance, arise where on a complete ‘balance of reasons’ we would be required to perform the supererogatory act, but where we are given permission not to act on those reasons.[[68]](#footnote-69) In the context of lesser-evils justifications, mere permissions could be said to arise where law confers permission to exclude reasons for conformity with the prohibition. We are permitted, but not required, to exclude our reasons to conform.

 There are technical difficulties with the idea of exclusionary permissions that need not concern us here.[[69]](#footnote-70) In the context of lesser-evils justifications, an appeal to exclusionary permission is problematic. It fits poorly with our understanding of the rationale and function of justifications in law. The very idea of justification involves a weighing of conflicting reasons, rather than a reason not to act on conflicting reasons.[[70]](#footnote-71) The prohibition continues to exert some form of rational weight or force, but the law affords some recognition that we have a stronger reason for acting that justifies our conduct. The defendant who invokes a lesser-evils justification argues that he acts on a good or undefeated reason that is stronger than his competing reasons, not merely that he was permitted to exclude competing reasons for action. Although the reason associated with the prohibition is defeated, it continues to play a role in practical deliberation. As Joshua Gert notes, the model of exclusionary permission cannot accommodate this – permission to exclude another reason means that the reason is assigned either a ‘full role’ or ‘no role’ in rational deliberation, depending on whether the permission is exercised or not.[[71]](#footnote-72) Exclusionary permissions cannot accommodate the sense in which justifications are the result of a conflict of practical reasons, in which a requiring reason is matched or defeated by a competing justifying reason.

## Cancelling Permissions

John Gardner developed a nuanced reason-based account of justification in criminal law in terms of what he called ‘cancelling permissions’.[[72]](#footnote-73) Gardner follows Raz in appealing to second-order ‘exclusionary’ reasons to accommodate the asymmetric conflict between requirements and justifications. According to Gardner, cancelling permissions ‘do not cancel the reasons not to perform the criminalised action, but merely cancel the second-order protective reasons not to act for certain countervailing reasons’.[[73]](#footnote-74) The justifying reason is not excluded, but rather is regarded as an ‘acceptable’ or ‘permitted’ reason for engaging in the otherwise prohibited conduct.[[74]](#footnote-75) The norm associated with the prohibition is not cancelled, since it still exerts its ‘ordinary rational pull as a reason not to commit the offence’.[[75]](#footnote-76) Gardner’s account is intended to explain justifications as exceptions to the authority of legal norms, but it can be adapted to any case in which a justifying reason is able to defeat a requirement. In the context of legal prohibitions, cancellation of the second-order exclusionary reasons is a matter of positive law’s recognising limits to the scope of the prohibition. Outside of law, these limits to the scope of the protective reason could well emerge as the result of reasons holism: a valid justification could cancel or disable the exclusionary reason associated with the prohibition.[[76]](#footnote-77)

 Gardner’s account cancelling permissions allows for the possibility that it will remain permissible to conform with the reason not to engage in the prohibited conduct. I think he is right to think that, in the case of justified failure to conform with a prohibition, the reason to conform with the prohibition continues to make the option rationally intelligible. It accommodates mere permissions as cases of conflict between two ordinary, non-protected reasons. Where a valid justification is present, the reason not to engage in prohibited conduct loses its requiring force but not its justificatory force. Gardner’s approach is also able to overcome the problem that faced Raz’s account, since he is able to explain how the reason to conform with the prohibition continues to play a role in rational deliberation.

 Unfortunately Gardner’s exposition of cancelling permissions is brief, and he offers no clarity on the interaction between the strength of the justifying reason and the strength of the otherwise protected reason. Supposing, as we have, that the justifying reason is stronger than the reason not to engage in the prohibited conduct, how is it that the stronger justifying reason can fail to generate requirement? Gardner suggests that in at least some cases, these ordinary reasons are incomparable, so that ‘one acts on undefeated reasons whichever way one acts’.[[77]](#footnote-78) But, as I have noted, incomparability between reasons does not seem to be a necessary condition for a mere permission.

 Though the distinction between ordinary reasons and protected reasons offers a plausible starting point for addressing the asymmetric practical conflict between justifications and requirements, the distinction cannot accommodate mere permissions without the further stipulation that some of our strongest reasons do not entail requirements.

# V. Purely Justificatory Reasons

I think that the most plausible solution to the problem of mere permissions invokes what Gert calls ‘purely justificatory’ reasons for action, and contrasts these with the class of reasons that support requirements.[[78]](#footnote-79) There are reasons that, in spite of their strength, do not support requirements. In the context of a choice between evils, strong justifying reasons can support the conclusion that we are justified, and therefore permitted, to act without supporting the conclusion that we are required to do so. Acceptance of the possibility of purely justificatory reasons allows for a straightforward resolution of the problem of mere permissions. Mere permissions arise when a subset of purely justifying reasons defeats (or matches in strength) other incompatible subsets of reasons that arise in a given reasoning context.

 It seems uncontroversial, at least amongst those theorists who assign a fundamental role to reasons in generating normative conclusions, that reasons can perform both a justifying and a requiring function.[[79]](#footnote-80) The motivation for the distinction between purely justificatory reasons and reasons that also support requirements lies partly in the rational asymmetry between reasons for and reasons against that we noted at the beginning of this chapter. The asymmetry in question arises because there are reasons for pursuing certain options that do not seem to play a requiring role – they support the conclusion that certain choices are rationally intelligible and permissible, but they do not support the conclusion that the support of other inconsistent options is forbidden or impermissible. We can explain this asymmetry by invoking the existence of purely justificatory reasons.

 Recognition of the possibility of purely justificatory reasons raises a number of technical complications concerning their interaction with reasons that support requirements. (Gert’s presentation of the view, which attributes different ‘degrees’ of requiring and justifying strength to reasons, is particularly complicated, since it seems to allow for cross-scalar comparison.[[80]](#footnote-81)) I will avoid sketching a complete framework here.[[81]](#footnote-82) The rudiments of the approach involve an abandonment of the idea that the strongest reasons in a given reasoning context support requirements. According to the **Strongest Reasons Entail Requirements** thesis I considered in section II, I am required to act on a set of reasons that is stronger than any other set of inconsistent reasons. As we saw, this account generates implausible conclusions in cases where our strongest reasons appear to entail mere permissions rather than requirements. Postulating the existence of purely justificatory reasons resolves the problem by allowing for the possibility that some of our strongest reasons do not support requirements. I will refer to reasons that generate requirements as ‘deontic’ reasons, in order to distinguish them from purely justificatory reasons.[[82]](#footnote-83) These reasons are ‘deontic’ in the strict sense, since they support obligations or requirements, but they can also perform a justificatory role. Both deontic reasons and purely justificatory reasons can be invoked in the justification of conduct, but where purely justificatory reasons never support requirements, our strongest deontic reasons do.[[83]](#footnote-84) More formally, we will now define a reasoning context in terms of both a set of purely justificatory reasons and a set of deontic reasons applicable to an agent. We will stipulate that the ‘stronger than’ relation can obtain between subsets of deontic reasons and subsets of purely justificatory reasons. We then retain our earlier definition of **Undefeated Reasons**, noting that the reference to a subset of reasons in the definition can now be taken to refer to either a subset of deontic reasons, or a subset of purely justificatory reasons. The approach therefore accommodates the fact that purely justificatory reasons and deontic reasons can be comparable in strength: a subset of purely justificatory reasons may be stronger than an inconsistent subset of deontic reasons, and thus defeat them. Likewise, a stronger subset of deontic reasons will defeat an inconsistent subset of justificatory reasons. We then replace our early account of the relationship between reasons and requirements with the following:

**Strongest Deontic Reasons Entail Requirements:** In a reasoning context, it is required that $ϕ$ if there is some subset of deontic reasons supporting the proposition that $ϕ$, $R(ϕ)$, such that for any subset of reasons $R'(ψ)$ that is inconsistent with $R(ϕ)$, $R\left(ϕ\right)$ is stronger than $R^{'}\left(ψ\right).$

In a practical conflict between a set of reasons not to engage in prohibited conduct $R\_{1}(¬P)$, and a stronger and inconsistent set of reasons to pursue the lesser evil, $R\_{2}(LE)$, the conflict will generate a mere permission where the reasons to pursue the lesser evil are purely justificatory reasons. $R\_{1}(¬P)$ is defeated by $R\_{2}\left(LE\right)$, since the two subsets are inconsistent, but, if the strongest subset of reasons $R\_{2}\left(LE\right)$ is purely justificatory, it does not support the conclusion that pursuit of the lesser evil is required and that compliance with the prohibition is impermissible. In spite of their strength, purely justificatory reasons do not make it impermissible to pursue an inconsistent option. If our reasons to pursue the lesser evil, $R\_{2}(LE)$ are purely justificatory, then acting on the weaker subset of reasons to conform with the prohibition, $R\_{1}(¬P)$ will not be impermissible or wrong. It is still permissible to conform with the defeated set of reasons, $R\_{1}\left(¬P\right). $This approach also allows us to retain the thesis that **Undefeated Reasons Entail Permissions**, as the conflict between $R\_{1}(¬P)$ and $R\_{2}\left(LE\right)$ demonstrates.If any subset of reasons (either purely justificatory or deontic) is strong enough to be undefeated, then it will always be permissible to conform with those reasons

 As I noted previously, deontic reasons still occupy a justificatory role within this framework. If one set of deontic reasons is not weaker than any other inconsistent subset of reasons, it will be permissible to act on them. What sets them apart from purely justificatory reasons is that they also act to preclude the pursuit of other rational options. Consider, for example, a reasoning context based on the situation in *Cross v State* involving a choice between two inconsistent subsets of reasons, $R\_{1}(PP)$ and $R\_{2}(¬KG)$, representing the defendant’s reasons to protect his property by killing the protected game and his reason not to kill the protected game, where the evils in question are incomparable and thus neither subset of reasons is stronger than the other. Neither set of reasons will defeat the other. Even supposing that $R\_{1}\left(PP\right)$ and $R\_{2}\left(¬KG\right)$ are both subsets of deontic reasons, choice of either evil will still be justified and permissible. The defendant acts with justification if he acts on either set of reasons.

By stipulating the existence of purely justificatory reasons, this approach abandons the ordinary view of the relationship between reasons and requirements. The entailment between justifications and permissions is retained: it is always permissible to act on a subset of undefeated reasons, whatever the character of the reasons in question. And yet in the absence of a subset of undefeated deontic reasons, it is permissible to act on any set of reasons, even a defeated one. In acting on a defeated subset of reasons I may expose myself to some sort of criticism or negative appraisal, but I do not necessarily act impermissibly. Purely justificatory reasons do not operate negatively – they do not rule out other options by rendering them rationally unintelligible or impermissible. The special function of deontic reasons is to exclude or pre-empt otherwise intelligible options. Deontic reasons are needed to capture the sense in which a certain subset of rational considerations function as *sui generis* constraints on our practical deliberation – constraints that seem to rule out otherwise rational options and mandate the pursuit of others.[[84]](#footnote-85)

I think that this proposal can be interpreted in a manner that is compatible with the Razian distinction between reasons and protected reasons.[[85]](#footnote-86) Raz’s proposal that mandatory norms be interpreted as protected reasons is an attempt to offer a reductive explanation of the negative character of deontic reasons: deontic reasons are ordinary reasons that rule out otherwise good options by excluding them from their role as reasons for action.[[86]](#footnote-87) In order to reconcile Raz’s account with the framework offered here, we only need to add the further stipulation that ordinary non-protected reasons do not support requirements. In other words, non-protected reasons are purely justificatory reasons. Whatever other practical functions they might serve, non-protected reasons do not support the conclusion that inconsistent conduct is impermissible.[[87]](#footnote-88) Raz himself notes that the ‘primary function of reasons’ is to ‘make certain responses eligible, appropriate’ and that only sometimes do the facts make ‘one response non-optional’ or the ‘required response’.[[88]](#footnote-89) The thesis that non-protected reasons are purely justificatory reasons provides us with an explanation of reasons’ primary function in supporting the rational intelligibility of options. If we augment Raz’s framework with the stipulation that non-protected reasons do not support requirements, we have the resources to explain mere permissions. The explanation follows Gardner’s suggestion that justifications arise in the context of cancelling permissions, in which the force of the protective reason that would ordinarily exclude reasons for non-conformity is cancelled. The resulting conflict between non-protected, first-order reasons does not generate any requirement. We are permitted to act on any of our first-order reasons, even when one subset of reasons is stronger than another set of inconsistent subset of reasons.

# VI. Conclusion

The problem of mere permissions as I have defined it is a problem about the relationship between the strength of reasons and their normative consequences. It is a problem about practical reasoning, and not a problem that arises solely in the context of institutionalised, legal reasoning. Studying the problem in the context of the lesser-evils justification in law is nonetheless instructive. Most fundamentally, mere permissions demonstrate the limits of naive utilitarian or consequentialist analysis of legal justifications. The language of ‘lesser evils’ is sometimes taken to suggest a utilitarian calculus of social harm and benefit, whereby justifications arise just in case we are morally and rationally required to pursue the lesser social evil at the expense of breaching a prohibition.[[89]](#footnote-90) As others have recognised, focus on the rational structure of justifications makes this interpretation of lesser-evils defences difficult to maintain.[[90]](#footnote-91)

 There is another respect in which resolving the problem of mere permissions, along with my proposed solution, is informative in the context of legal justification. As I noted at the beginning of this chapter, some theorists of the criminal law contrast the view that justified behaviour is correct or commendable with the view that justified behaviour is merely permissible. As a result, they argue that we should allow that the category of justification defences include conduct that is merely ‘tolerated’ (for example, killing an innocent aggressor in self-defence).[[91]](#footnote-92) If we wish to insist that justified conduct involves acting on our strongest reasons, then we can admit that justified conduct is merely permissible without conceding that justified conduct is simply tolerated. Conduct can be correct or warranted, in the sense that it conforms with our strongest available reasons, without being required. We need not abandon the view that justified conduct involves acting on the strongest reasons in order to accommodate mere permissions. On the other hand, if we wish to argue that justified conduct need only be permissible, we can also take mere permissions to illustrate the rational intelligibility of acting on a set of weaker reasons. There are cases where failure to conform with our strongest reasons is permissible, even if not commendable or desirable. I take no view here as to which of these approaches is the correct one. Criminal theorists have long suspected that focus on labels like ‘justification’ and ‘excuse’ have the potential to occlude other salient rational distinctions in the discussion of defences.[[92]](#footnote-93) Perhaps it is helpful to distinguish two senses in which an act can be justified. In the first sense, we are justified when we act on our strongest reasons. In the second sense, we are justified when we act on a set of reasons that, while not necessarily our strongest, remain eligible for rational choice.

1. \* Thanks to Mark McBride, James Penner and Adam Rigoni for thoughtful comments on a draft of this chapter. An earlier draft, more narrowly focussed on justifications in private law, was presented to audiences at the Australian Centre for Private Law in 2017 and the Australasian Association for Legal Philosophy in 2018. I am grateful to both audiences for their comments and criticism on both occasions. Particular thanks are due to Kit Barker and Iain Field. This chapter is dedicated to the memory of John Gardner, who first encouraged me to work on the relation between justification and permission. I wish he were still around to show me my errors. [↑](#footnote-ref-2)
2. In private law, the situation is murkier. In some jurisdictions, the neighbour’s conduct would be treated as a case of private necessity, which confers an ‘incomplete privilege’; *Vincent v Lake Erie Transportation* 109 Minn. 456, 124 NW 221 (Minn 1910). The neighbour would still be liable for damage to property caused during their trespass; Restatement (Second) of Torts §197 (1965). James Goudkamp argues that interventions to save the property of third parties should be treated as cases of public necessity in English law, and therefore should attract no liability; James Goudkamp (2013) *Tort Law Defences*, Oxford: Hart Publishing, 116. [↑](#footnote-ref-3)
3. The example of trespass unfortunately raises a complication that I will not revisit in this chapter: what is the source of my reason not to trespass? I can trespass on someone’s property without harming their interests in any way. Harmless trespass appears to be one instance of what David Owens calls a ‘bare wrong’; David Owens (2012) *Shaping the Normative Landscape*, Oxford: Oxford University Press, 164. According to Owens, the bare wrong arises from a violation of a ‘normative interest’ that the owner has in controlling use of their own property, rather than from any damage to a human interest. For our purposes, it is enough to suppose that we do have a reason not to trespass, and that this reason usually functions to require us not to do so. [↑](#footnote-ref-4)
4. I do not mean to suggest that my reluctance to say that the neighbour was required to help my friend as he did will be universally shared. I return this this issue in section III.A. [↑](#footnote-ref-5)
5. The ‘lesser evils’ doctrine is used as the paradigmatic case of general justification in § 3.02 of the Model Penal Code (1985). For useful discussion see Larry Alexander (2005) ‘Lesser Evils: A Closer Look at the Paradigmatic Justification’ *Law and Philosophy* 24: 611-643. [↑](#footnote-ref-6)
6. For an argument against this view, see Mitchell N Berman (2005) ‘Lesser Evils and Justification: A Less Close Look’ *Law and Philosophy* 24: 681-709. [↑](#footnote-ref-7)
7. Versions of the reason-based view are espoused by, eg, TM Scanlon (1998) *What We Owe to Each Other*, Cambridge, MA: Harvard University Press; TM Scanlon (2014) *Being Realistic About Reasons*, Oxford: Oxford University Press; Joseph Raz (1999) *Practical Reason and Norms*, 2nd edn, Oxford: Oxford University Press; Jonathan Dancy (2004) *Ethics Without Principles*, Oxford: Oxford University Press; Mark Schroeder, *Slaves of the Passions* (2007) Oxford: Oxford University Press; Derek Parfit (2011) *On What Matters*, vol 1, Oxford: Oxford University Press. [↑](#footnote-ref-8)
8. For the purposes of discussion I will treat ‘ought’ and ‘must’ statements as synonymous – I will use the generic ‘requirements’ to refer to both, and treat requirements as the dual of permissions: if $ϕ$ is required then it is not permissible that not $ϕ$. I do this to avoid difficulties introduced by the distinction between strong necessity operators, like ‘must’ and ‘have to’, and weak necessity operators like ‘ought’ and ‘should’. Though ‘ought’ is often used by practical philosophers to express the notion of requirement, ‘must’ or ‘have to’ may be more apt for this purpose; Paul Portner (2009) *Modality*, Oxford: Oxford University Press, 79–81; Alex Silk (2015) ‘What Normative Terms Mean and Why It Matters for Ethical Theory’ in *Oxford Studies in Normative Ethics*, vol 5, ed Mark Timmons, Oxford: Oxford University Press, 296-319, 298–303; Justin Snedegar (2016) ‘Reasons, Oughts, and Requirements’ in *Oxford Studies in Metaethics*, vol 11, ed Russ Shafer-Landau, Oxford: Oxford University Press, 155-181, 158–62. [↑](#footnote-ref-9)
9. As John Gardner puts it, justification defences seem to create ‘a gap in the mandatory force of a mandatory norm’; John Gardner (2007) ‘Fletcher on Offences and Defences’ in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law*, Oxford: Oxford University Press, 141-154, 148. [↑](#footnote-ref-10)
10. Fletcher traces the incorporation of lesser evils defences in law to two distinct jurisprudential trends. Within German jurisprudence, it took the form of ‘recognition of transcendental norms in the legal system’, while in Anglo-American law it arose from utilitarian legislative concerns; George Fletcher (1978) *Rethinking Criminal Law*, Boston, MA: Little, Brown & Co, 775ff. [↑](#footnote-ref-11)
11. For the former language see, eg, ibid 562–66 (referring to ‘licenses’ and ‘privileges’); Eric Colvin (1990) ‘Exculpatory Defences in Criminal Law’ *Oxford Journal of Legal Studies* 10: 381-407, 392 (‘contextual permission’). For the latter see, eg, Kent Greenawalt (1984) ‘The Perplexing Borders of Justification and Excuse’ *Columbia Law Review* 84: 1897-1927, 1903 ('warranted'); Fletcher (n 9) 761–62 ('objectively right’); Paul H Robinson (1975) ‘A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability’ *UCLA Law Review* 23: 266-292, 274 (‘correct’); George P Fletcher (1979) ‘Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?’ *UCLA Law Review* 26: 1355-1369 (equating justified conduct with ‘right’ conduct). [↑](#footnote-ref-12)
12. For useful discussion of this tension in Fletcher’s work, see esp Joshua Dressler (1984) ‘New Thoughts Aboutthe Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking’ *UCLA Law Review* 32: 61-99, 69–76, 81–91; see also Douglas N Husak (1989) ‘Justifications and the Criminal Liability of Accessories’ *The Journal of Criminal Law & Criminology* 80: 491-520. [↑](#footnote-ref-13)
13. Cf John Gardner (2007) ‘Justifications and Reasons’ in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law*, Oxford: Oxford University Press, 91-120; Joseph Raz (2011) *From Normativity to Responsibility*, Oxford: Oxford University Press, 18–19; Joshua Gert (2016) ‘The Distinction Between Justifying and Requiring: Nothing to Fear’ in *Weighing Reasons*, Oxford: Oxford University Press, 157-172, 160. [↑](#footnote-ref-14)
14. The literature on the question is now too vast to cite exhaustively, but see, eg, Robinson (n 10); Fletcher (n 9) ss 10.1–10.2; Greenawalt (n 10); George Fletcher (1996) ‘The Nature of Justification’ in *Action and Value in Criminal Law*, eds Stephen Schute, John Gardner and Jeremy Horder, Oxford: Clarendon, 175-186; Gardner (n 12). [↑](#footnote-ref-15)
15. See, eg, Goudkamp (n 1) ch 4. [↑](#footnote-ref-16)
16. John Gardner (2007) ‘In Defence of Defences’ in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law*, Oxford: Oxford University Press, 77–78. Cf Fletcher on the ‘unity thesis’ in Fletcher (1996) (n 13). Gardner offers Hart as an exponent of the closure view; HLA Hart (2008) *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford: Oxford University Press, 13. [↑](#footnote-ref-17)
17. Versions of this argument are made in Gardner (n 15) 77–82; RA Duff (2007) *Answering for Crime*, Oxford: Hart Publishing; but see Luís Duarte D’Almeida (2015) *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law*, Oxford: Oxford University Press, ch 8. [↑](#footnote-ref-18)
18. Raz (n 6) 187. [↑](#footnote-ref-19)
19. Strictly speaking, the reason need not be defeated. As I discuss in section III.B., it is enough that some other inconsistent reason be of equal or incomparable strength. For the time being it is enough to note that the rhetoric of ‘lesser evils’ suggests that our reason to pursue the lesser evil is stronger than the reason to engage in prohibited conduct. [↑](#footnote-ref-20)
20. There is an analogue of the closure view in the realm of reasons, which is the view that reasons, once completely specified, do not conflict; Joseph Raz (1999) *Engaging Reason: On the Theory of Value and Action*, Oxford: Oxford University Press, 136; cf Raz (n 6) 40–46. I do not consider this view further here. I do not think it is widely held. [↑](#footnote-ref-21)
21. In private law, this residue provides the rationale for an ongoing duty to repair the initial wrong. This explains why in some cases even justified conduct can attract liability; John Gardner (2011) ‘What Is Tort Law For? Part 1. The Place of Corrective Justice’ *Law and Philosophy* 30: 1, 41–42; Raz (1999) (n 19) 189–92. So-called ‘moral residue’ arguments feature prominently in the argument that defeated reasons still function as reasons; for recent discussion see Peter BM Vranas (2018) ‘“Ought” Implies “Can” but Does Not Imply “Must”: An Asymmetry Between Becoming Infeasible and Becoming Overridden’ *Philosophical Review* 127: 487-514. [↑](#footnote-ref-22)
22. Gardner (n 12) 95. See also Patricia Greenspan (2007) ‘Practical Reasons and Moral “Ought”’ in *Oxford Studies in Metaethics*, vol 2, ed Russ Shafer-Landau, Oxford: Oxford University Press, 172-194 (on the asymmetry between ‘positive’ and ‘negative’ reasons). [↑](#footnote-ref-23)
23. On reasons and mandatory norms see Raz (n 6) ch 2. Cf Victor Tadros on ‘prohibition reasons’; Victor Tadros (2007) *Criminal Responsibility*, Oxford: Oxford University Press, 272. [↑](#footnote-ref-24)
24. Cf *Perka v the Queen* [1984] 2 SCR 232, 274 (Wilson J); *In Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 202 (Ward LJ), 236 (Brooke LJ), 254 (Walker LJ). [↑](#footnote-ref-25)
25. For useful discussion of the structure of these ‘agent-favouring’ permissions, see Thomas Hurka (2012) ‘Permissions to Do Less Than the Best: A Moving Band’ *Oxford Studies in Normative Ethics,* vol2, ed Mark Timmons, Oxford: Oxford University Press, 1-27. [↑](#footnote-ref-26)
26. *Cross v State*, 370 P2d 371 (1962). [↑](#footnote-ref-27)
27. *United States v Ashton*, 24 F Cas 873 (No 14,470) (CCD Mass 1834). [↑](#footnote-ref-28)
28. Though see the Scottish High Court’s decision in *Moss v Howdle* 1997 JC 123, criticised by Victor Tadros (n 22) 271. [↑](#footnote-ref-29)
29. Cf Husak (n 11) 500–01 (acts are ’justified if and only if they are permissible’). I will only defend the left-right direction of the biconditional. [↑](#footnote-ref-30)
30. On partial justifications, see esp Douglas N Husak (1998)‘Partial Defenses’ *Canadian Journal of Law & Jurisprudence* 11: 167-192. The idea of partial justification deserves more philosophical attention than it has received. Gardner suggests that partial justifications arise where one has at least some reason for engaging in the prohibited conduct; Gardner (n 12) 95. [↑](#footnote-ref-31)
31. The conception of justifications as undefeated reasons is particularly clear in John Gardner’s work. See John Gardner and Timothy Macklem (2002) ‘Reasons’ in *The Oxford Handbook of Jurisprudence and the Philosophy of Law*, eds J Coleman and S Shapiro, Oxford: Oxford University Press, 440-475; Gardner (n 12); John Gardner (2010) ‘Justification Under Authority’ Canadian Journal of Law and Jurisprudence 23: 71-98, 81. See also Tadros (n 22) 121–24, 267–73. [↑](#footnote-ref-32)
32. I ignore the possibility of so-called ‘tragic’ moral dilemmas, in which an agent is forced to make a choice between two impermissible options; cf Bernard Williams (1973) ‘Ethical Consistency’ in *Problems of the Self: Philosophical Papers 1956–1972*, Cambridge: Cambridge University Press, 166-186; Ruth Barcan Marcus (1980) ‘Moral Dilemmas and Consistency’ *Journal of Philosophy* 77: 121-136; John Gardner (2005) ‘Wrongs and Faults’ in *Appraising Strict Liability*, ed Andrew Simester, Oxford: Oxford University Press, 51–80; John Horty (2012) *Reasons as Defaults*, Oxford: Oxford University Press, ch 4. [↑](#footnote-ref-33)
33. I find it difficult to identify proponents of this account of requirement with any certainty. Some philosophers explicitly defend the view that we ought to act on our strongest reasons, but it is unclear whether they take the word ‘ought’ to express requirement, or whether they use it in a weaker sense; see, eg, Schroeder (n 6) 130–31; but compare Douglas W Portmore (2019) *Opting for the Best: Oughts and Options*, New York: Oxford University Press, 185–86; and Snedegar (n 7) 158–62. Gert compiles a list of philosophers who, he argues, have endorsed the thesis: Joshua Gert (2004) *Brute Rationality: Normativity and Human Action*, Cambridge: Cambridge University Press, 19, fn. 3. [↑](#footnote-ref-34)
34. Gardner (n 12) 100 (original emphasis). [↑](#footnote-ref-35)
35. In Robert Mullins (2021) ‘Formalizing Reasons, Oughts, and Requirements’ *Ergo* 7: 568-599, I set out the problem of distinguishing between permissions and requirements within the framework of a simple version of Horty’s default theory; see Horty (n 31). [↑](#footnote-ref-36)
36. Largely for simplicity, I am following Mark Schroeder in treating the relation of weight or strength as holding between sets of reasons, and not between individual reasons; Mark Schroeder (2007) *Slaves of the Passions*, Oxford: Oxford University Press, 123–45. [↑](#footnote-ref-37)
37. More formally, the strength relation over subsets of reasons is transitive, non-reflexive and asymmetric. [↑](#footnote-ref-38)
38. Fletcher (1979) (n 10) 1358. See also George P Fletcher (1985) ‘The Right and the Reasonable’ *Harvard Law Review* 98: 949-982, 977–80. [↑](#footnote-ref-39)
39. Fletcher (1979) (n 10) 1359. [↑](#footnote-ref-40)
40. Immanuel Kant (1996) *The Metaphysics of Morals*, ed Mary J Gregor, Cambridge: Cambridge University Press, s 6:226 (citation refers to volume and page number in the Akademie edition). [↑](#footnote-ref-41)
41. See, eg, Shelly Kagan (1994) ‘Defending Options’ *Ethics* 104: 333-351. [↑](#footnote-ref-42)
42. Henry Sidgwick (1877) *The Methods of Ethics*, London: Macmillan, 431–39. [↑](#footnote-ref-43)
43. Michael Slote refers to these as agent-centred permissions; Michael Slote (1985) *Common-Sense Morality and Consequentialism*, London: Routledge & Kegan Paul, ch. 1. [↑](#footnote-ref-44)
44. Sidgwick (n 41) 431. See also WD Ross (1939) *Foundations of Ethics*, Oxford: Oxford University Press, 73–75, 273–74. [↑](#footnote-ref-45)
45. See esp Bernard Williams (1981) ‘Persons, Character and Morality’ in *Moral Luck: Philosophical Papers 1973–1980*, Cambridge: Cambridge University Press, 1-19. [↑](#footnote-ref-46)
46. See, eg, Slote (n 42); Shelly Kagan (1989) *The Limits of Morality*, Oxford: Oxford University Press; Shelly Kagan (1994) ‘Defending Options’ *Ethics* 104: 333; Samuel Scheffler (1994) *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions*, Oxford: Oxford University Press; Douglas W Portmore (2011) *Commonsense Consequentialism: Wherein Morality Meets Rationality*, New York: Oxford University Press; Hurka (n 24) . [↑](#footnote-ref-47)
47. These structural equivalencies are explored in Mitchell Berman (2003) ‘Justification and Excuse, Law and Morality’ *Duke Law Journal* 53: 1. [↑](#footnote-ref-48)
48. Cf John Gardner (2007) 'Reply to Critics' in *Offences and Defences*, Oxford: Oxford University Press, 239-284, 256; Antony Duff (2003) ‘Rethinking Justifications’ *Tulsa Law Review* 39: 829-850, 831–32. [↑](#footnote-ref-49)
49. See, eg, Suzanne Uniacke (1994) *Permissible Killing: The Self-Defence Justification of Homicide*, Cambridge: Cambridge University Press, 14. [↑](#footnote-ref-50)
50. Duff (n 16) 276. Cf Claire Finkelstein (1995) ‘Self-Defense as a Rational Excuse’ *University of Pittsburgh Law Review* 57: 621-649; Larry Alexander (1998) ‘A Unified Excuse of Preemptive Self-Protection’ *Notre Dame Law Review* 74: 1475-1505, 1495–96. [↑](#footnote-ref-51)
51. Duff (n 47) 849–50. There is a voluminous literature on this problem, which is often described as involving cases where a defendant performs ‘the right deed for the wrong reason’; George P Fletcher (1975) ‘The Right Deed for the Wrong Reason: A Reply to Mr Robinson’ UCLA Law Review 23: 293-321. [↑](#footnote-ref-52)
52. This corresponds to what is known as the ‘disjunctive’ account of deontic conflict; see Horty (n 31). [↑](#footnote-ref-53)
53. As in *Cross v State* (n 25); Larry Alexander offers the case as an example of a choice between incommensurable options in Alexander (n 4) 614. [↑](#footnote-ref-54)
54. For a recent proposal allowing for reasons that have equal strength, see Douglas W Portmore (2013) ‘Perform Your Best Option’ *Journal of Philosophy* 110: 436-459. [↑](#footnote-ref-55)
55. In this regard, for example, § 3.02(1)(b) of the Model Penal Code requires that the harm or evil avoided be strictly ‘greater’ than the alternative harm or evil. [↑](#footnote-ref-56)
56. ‘Symmetric’ moral dilemmas offer particularly plausible examples; see Walter Sinnott-Armstrong (1985) ‘Moral Dilemmas and Incomparability’ *American Philosophical Quarterly* 22: 321-329, 324–25. The importance of these symmetric cases was first noted by Ruth Barcan Marcus (n 31). [↑](#footnote-ref-57)
57. For arguments to this effect, asserting that reasons of self-interest are not fully comparable with moral or altruistic reasons, see, eg, Parfit (n 6) 137–41; Raz (n 19) 243. [↑](#footnote-ref-58)
58. This was Shelly Kagan’s objection to a version of the same response offered by Michael Slote; Shelly Kagan (1991) ‘Replies to My Critics’ *Philosophy and Phenomenological Research* 51: 919-928, 927–28. [↑](#footnote-ref-59)
59. Portmore (n 45) ch 7; Portmore (n 53). [↑](#footnote-ref-60)
60. For further criticism of Portmore’s account along these lines, see Joshua Gert (2014) ‘Perform a Justified Option’ *Utilitas* 26: 206-217; Seth Lazar (2019) ‘Accommodating Options’ *Pacific Philosophical Quarterly* 100: 233-255. [↑](#footnote-ref-61)
61. See further Lazar (n 59) 237–43. [↑](#footnote-ref-62)
62. Cf Judith Jarvis Thomson (1985) ‘The Trolley Problem’ *Yale Law Journal* 94: 5, 1395-1415, 1395–96; Alexander (n 4) 615. [↑](#footnote-ref-63)
63. Raz (n 6). [↑](#footnote-ref-64)
64. ibid, 49–84. [↑](#footnote-ref-65)
65. Joseph Raz (1975) ‘Permissions and Supererogation’ *American Philosophical Quarterly* 12: 161-168; Raz, *Practical Reason and Norms* (n 6) 89–96. [↑](#footnote-ref-66)
66. Raz (n 64); Raz (n 6) 89–96. [↑](#footnote-ref-67)
67. Raz (n 6) 89. [↑](#footnote-ref-68)
68. ibid, 94. [↑](#footnote-ref-69)
69. I discuss some technical difficulties in Mullins (n 34); see also Gert (n 32) 107–09. [↑](#footnote-ref-70)
70. Cf Tadros (n 22) 270–73. [↑](#footnote-ref-71)
71. Gert (n 32) 108. [↑](#footnote-ref-72)
72. See especially Gardner, ‘Justifications and Reasons’ (n 12) 106–07; Gardner (n 8) 148–49. [↑](#footnote-ref-73)
73. Gardner (n 12) 107. [↑](#footnote-ref-74)
74. ibid. [↑](#footnote-ref-75)
75. Gardner (n 8) 148. [↑](#footnote-ref-76)
76. Cf Dancy (n 6) ch 3. [↑](#footnote-ref-77)
77. Gardner (n 12) 101, fn 21. [↑](#footnote-ref-78)
78. Gert (n 32); Greenspan (n 21). [↑](#footnote-ref-79)
79. See, eg, Gert (n 12) 158; Raz (n 12) 18–19; Scanlon (2014) (n 6) 107–08. [↑](#footnote-ref-80)
80. Cf Joshua Gert (2007) ‘Normative Strength and the Balance of Reasons’ *Philosophical Review* 116: 533-562. [↑](#footnote-ref-81)
81. In ‘Formalizing Reasons, Oughts, and Requirements’ (n 34), I attempt to sketch a workable version of such a model. [↑](#footnote-ref-82)
82. The language of deontic and non-deontic reasons is taken from Margaret Olivia Little (2013) ‘In Defence of Non-Deontic Reasons’ in *Thinking About Reasons: Themes from the Philosophy of Jonathan Dancy*, eds David Bakhurst, Margaret Olivia Little and Brad Hooker, Oxford: Oxford University Press, 112-136; R Jay Wallace (2013) ‘The Deontic Structure of Morality’ ibid, 137-165. [↑](#footnote-ref-83)
83. In other words, all reasons are justificatory reasons, but purely justificatory reasons are not deontic reasons. [↑](#footnote-ref-84)
84. Cf R Jay Wallace (2019) *The Moral Nexus*, Princeton, NJ: Princeton University Press, 26. [↑](#footnote-ref-85)
85. See especially Raz (n 6) 94. [↑](#footnote-ref-86)
86. Wallace ((n 83) 133–34) expresses doubts about Raz’s reductive project in this regard. [↑](#footnote-ref-87)
87. Cf Gert (n 12) 169–71. [↑](#footnote-ref-88)
88. Raz (n 12) 5; cf Raz(1999) (n 19) 99–105. [↑](#footnote-ref-89)
89. For an interpretation along these lines, see Robinson (n 10). [↑](#footnote-ref-90)
90. Alexander (n 4) 615–16; Husak (n 11) 498–99. [↑](#footnote-ref-91)
91. See, eg, Robinson (n 10) 284; Dressler (n 11) 84–85. [↑](#footnote-ref-92)
92. See especially Greenawalt (n 10); Duff (n 16) 264–67; Colvin (n 10). [↑](#footnote-ref-93)