# Excusing Unjustified Punishment: On Doing Criminal Justice in Unjust Societies

Rocío Lorca*

Struck dead by an angel of God!
Yet the angel must hang!
Herman Melville, *Billy Budd*

Criminal law theory has largely offered two sets of answers to the question of whether criminal justice can be done in unjust societies. First, punishing victims of injustice could be problematic because material conditions such as extreme poverty could undermine the requirements of individual criminal responsibility.[1] Second, punishing in these cases could be problematic because injustice undermines a state's authority, or standing, to punish, i.e., the normativity of the criminal law.[2] Most who have defended this second kind of claim,

* Associate Professor at the University of Chile, School of Law. I would like to thank Antony Duff for raising many questions and objections that led me to think about the ideas in this paper, and Nicola Lacey for encouraging me to write it and for inviting me to contribute to this Inaugural Issue. I would also like to thank all the participants in the "Reconstructing Criminal Law Revisited" workshop for their valuable comments on an earlier draft of this article, and the editors of the *Modern Criminal Law Review* for their dedicated revisions. Last but not least to David Barker for his always insightful comments and edits. This article was written as part of my research project Fondecyt #1241747: "El feminismo en la encrucijada entre lo nuevo y lo antiguo."

[1] Affirmative answers to this question have been occasionally defended in legal theory and practice. A classic example is the dissenting opinion of Chief Judge David L. Bazelon in United States v. Alexander, 471 F.2d 923, 957 (D.C. Cir. 1973) (Bazelon, C.J., dissenting); see also Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 Law & Ineq. 9 (1985). But the search for an excuse in cases such as these has a much longer history. Under the doctrine of necessity, it has long been argued that extreme poverty can be grounds for justifying certain crimes, especially crimes against property. This was formulated as a legal doctrine in Thomas Aquinas, Summa Theologiae 2.2ae. 66.7, as well as in the work of medieval canonists who, during the 13th century, argued that the poor were not guilty of theft when they seized the excess property of the rich in order to sustain their lives. See Brian Tierney, The Idea of Natural Rights 70-73 (1997); Rocío Lorca et al., Famished Theft in the Decisions of Chilean Criminal Courts, 50 Revista Chilena de Derecho 59 (2023). Some have shown skepticism regarding the use of an excuse of necessity. See Stuart P. Green, Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders, 2010 U. Chi. Legal F. 43 (2010); Jeremy Waldron, Why Indigence Is Not a Justification, in From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law 98 (William C. Heffernan & John Kleinig eds., 2000).

[2] See R.A. Duff, Punishment, Communication, and Community 181-84 (2001); see also Stephen P. Garvey, Injustice, Authority, and the Criminal Law, in The Punitive Imagination: Law, Justice, and Responsibility 42, 60-63 (Austin Sarat ed., 2014); Rocío Lorca, Punishing the Poor and the Limits of Legality, 18 Law, Culture & Human. 424 (2022); Tommie Shelby, Justice, Deviance, and the Dark Ghetto, 35 Phil. & Pub. Affs. 126 (2007); Nicola Lacey, Criminal Justice and Social (In)Justice, in Structural Injustice and the Law 168 (Virginia Mantouvalou & Jonathan Wolff eds., 2024).

however, have avoided the conclusion that punishment is, therefore, impermissible. Their ambivalence is the result of countervailing reasons according to which—despite all its flaws—a justification to punish remains.[3] Nicola Lacey has recently called this a "muddy" conclusion.[4] The conclusion is "muddy" because it is unclear why and when these countervailing reasons should override the *prima facie* conclusion that punishing victims of social or political unfairness is unjustified. Moreover, it seems that an important part of what gives weight to these countervailing considerations is a certain unwillingness—perhaps even fear—to accept the consequences of the principled conclusion.[5]

To unravel, and perhaps to avoid, the muddy conclusion, I propose that we add a third possibility to our normative findings: an excuse to punish akin to an excuse of necessity. If this possibility is sound, punishments (like crimes) could be justified, unjustified, or unjustified but excusable.

I proceed as follows. First, I briefly stipulate the problem of punishing in unjust societies by assuming a political view of criminal law where justifying punishment depends not only on it being an appropriate or deserved response to behavior but also on the justification of the political relationship in which it occurs. Second, I describe the muddy conclusion as it appears in the work of some scholars who have shown concern over the legitimacy of punishment in contexts of social and political injustice. I focus particularly on the scholarship of Antony Duff. Third, I present the distinction between justifications and excuses to articulate the idea of an excuse of necessity as a normative claim that a political community can raise to punish. Although this comes with conceptual and practical challenges that I cannot fully address here, I argue that there are good normative and practical reasons to make space for this normative possibility.

## I. Political Legitimacy as a Condition for the Justification of Punishment

According to G.E.M. Anscombe, punishments can wrong individuals in at least two ways, namely, by being undeserved *and* by being imposed by someone "who had no right to inflict them."[6] In a political understanding, this "right to inflict" punishment depends, among

[3] See infra § II.

[4] Lacey, supra note 2, at 198-200.

[5] It is not suprising, indeed, that this "fear" was detected by the early "Scandinavian" abolitionists from the 1970s, who devoted an important space of their work to either show that there was nothing to be feared, Nils Christie, Conflicts as Property, 17 Brit. J. Criminology 1 (1977), or to argue that we needed to embrace the unknown and jump "into the void," to create a space of possibility, Thomas Mathiesen, The Politics of Abolition, 10 Contemp. Crises 81 (1986).

[6] According to Anscombe, the justification of punishment demands that we account for the appropriateness of punishment as a response as well as for the question of who has authority to punish. Here we are discussing this second issue; the first issue is usually discussed under theories of punishment (deterrence, retribution, rehabilitation, etc.). See G.E.M. Anscombe, On the Source of the Authority of the State, in Authority 142, 163 (Joseph Raz ed., 1990).

other things, on the justification of the political arrangement in which it takes place.[7] In order to punish rightfully, the state must have a claim of authority based on the qualities of the social arrangement it serves.[8] Following Lacey, we could thus say that the justification of punishment is relative not only to the standards set by theories of punishment and the requirements of individual criminal responsibility, but also to the justification of both the state's existence and "the type of society in which it functions."[9] In societies plagued by inequality, exclusion, and unfairness, punishments are sometimes hard to see as legitimate acts of political authority. They often appear instead as acts of bare hostility.[10]

Some argue that the requirement of authority "rides on the back" of the distinction between *mala in se* and *mala prohibita*, where political authority would be a condition for fair punishment only in the latter instance.[11] However, to the extent that what is being discussed here is *state* punishment, in a political conception of criminal law, the distinction between *mala in se* and *mala prohibita* should not have such a strong bearing. Even where a categorical moral obligation can be recognized as partially sustaining the normativity of a criminal law statute, this obligation is not implemented by the state *qua* moral obligation. Moral duties are indeterminate and must be articulated into definite rules of behavior through processes of political decision-making. Whether grounded on a categorical moral duty or not, a particular criminal statute is ultimately binding for the members of a polity because it results from this political process of determination and not because it is directly deduced from a shared moral rule.[12]

The difficulty of seeing punishment as a legitimate exercise of political authority in contexts of social or political injustice has been recognized by many.[13] Antony Duff, for

---

[7] Punishment is meant to serve and secure the political project of a political community. Paul Gewirtz, Aeschylus' Law, 101 Harv. L. Rev. 1043, 1047-48 (1988).

[8] Just like paying taxes or enforcing a contract, punishing crimes is a mechanism through which justice "is served" in a political community. All these practices require public authority and their value and meaning will partly reflect the quality of the social project "it serves." See Lorca, supra note 2, at 431.

[9] Nicola Lacey, State Punishment: Political Principles and Community Values 15 (1988).

[10] Lorca, supra note 2, at 441; Rocío Lorca, Extrema Pobreza y Poder Penal, in Derecho y pobreza 221, 236-38 (Carolina Fernández & Esteban Pereira eds., 2021).

[11] See, e.g., Jesús-María Silva Sánchez, Malum Passionis: Mitigar el Dolor en el Derecho Penal 67-112 (2018); Shelby, supra note 2. *Mala prohibita* are wrongful because and insofar as they are declared as such by the law, while *mala in se* are wrongful prior to and independent from their legal proscription. For a longer discussion and defense of the distinction, see R.A. Duff, The Realm of the Criminal Law 277-332 (2018).

[12] See in this sense Jeremy Waldron, Law and Disagreement 164-87 (1999); Rocío Lorca Ferreccio, Castigar Sin Estado: Consideraciones Sobre La Corte Penal Internacional y La Naturaleza Del Derecho Penal, 15 Política criminal 290, 296-97 (2020).

[13] See, e.g., Markus D. Dubber, Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law, in Philosophical Foundations of Criminal Law 83 (R.A. Duff & Stuart P. Green eds., 2011); R.A. Duff, Responsibility, Citizenship, and Criminal Law, in id. at 125; R.A. Duff, Blame, Moral Standing and the Legitimacy of the Criminal Trial, 23 Ratio 123 (2010); R.A. Duff, I Might Be Guilty, but You Can't Try Me: Extoppel and Other Bars to Trial, 1 Ohio St. J. Crim. L. 245 (2003); Lacey, supra note 9; Lacey, supra note 2; Lorca, supra note 12; Lorca, supra note 2; Alice Ristroph, Conditions of Legitimate Punishment, in The New Philosophy of Criminal Law 79 (Chad Flanders & Zachary Hoskins eds., 2016);

example, has argued that contexts of exclusion and injustice can undermine what he calls the preconditions of the justification of punishment by creating a problem of authority that impinges on the normativity of criminal law and by compromising a political community's standing to punish.[14] In a narrower approach, Gustavo Beade has questioned the state's moral standing to blame through punishment, when crimes can be seen as clearly resulting from the state's own failures, e.g., the occupation of public land by those who have been denied a fair right to housing.[15] Similarly, Javier Cigüela has argued that the justification of criminal law must be sensitive to the context of justice or injustice in which it occurs, particularly regarding crimes that can be explained by the injustices and exclusion that the offender has suffered.[16]

Tommie Shelby, referring specifically to the American criminal justice system, argues that the conditions of structural injustice that characterize what he calls "ghetto poverty" can undermine the normativity of the criminal law, but only of those rules that express "civic" rather than "natural" duties that individuals have towards each other.[17] Stephen Garvey has argued that the normative authority of the state to impose duties and to punish their violation weakens in relation to members of a community that have been treated as "second-class citizens" by being deprived of their fair share of the benefits of social cooperation.[18] In these cases, the state has no authority to condemn or censure, which entails that it has no authority to punish.[19] As a final example, Matt Matravers has claimed that social injustice should have important normative consequences in our criminal law practices.[20] In cases of extreme unfairness, he argues, the political relationship can completely break down to the point that no legal obligation can be recognized. Unlike the view I developed elsewhere, however, he seems to believe this is not the current state of most of our political communities.[21] However, even in cases where the political relationship still

---

Alice Ristroph, Responsibility for the Criminal Law, in Philosophical Foundations of Criminal Law 107 (R.A. Duff & Stuart P. Green eds., 2011); Silva Sánchez, supra note 11, § II.

[14] Duff, supra note 2, at 181-84.

[15] Gustavo A. Beade, Who Can Blame Whom? Moral Standing to Blame and Punish Deprived Citizens, 13 Crim. L. & Phil. 271 (2019). Beade's argument echoes the arguments formulated by Victor Tadros, Poverty and Criminal Responsibility, 43 J. Value Inquiry 391 (2009).

[16] Javier Cigüela Sola, Crimen y Castigo del Excluido Social: Sobre la Ilegitimidad Política de la Pena 264-68 (2019).

[17] Shelby, supra note 2, at 144-46, 151.

[18] Garvey, supra note 2, at 60-63.

[19] Id. at 61.

[20] Matt Matravers, "Who's Still Standing?" A Comment on Antony Duff's Preconditions of Criminal Liability, 3 J. Moral Phil. 320, 330 (2006). While he does not say much about what these consequences may be, Matravers does express skepticism about Duff's propositions and suggests we explore more nuanced accounts.

[21] In "Punishing the Poor and the Limits of Legality," I argue that states, by enforcing legal and political order, produce and secure extreme poverty. Since extreme poverty puts people's lives at risk both absolutely and relatively, it should completely break down even a minimal bond of authority such as the one proposed by Hobbes. Drawing on Hobbes's own framework, I argue that this upsets the conditions of legality vis-à-vis the

stands, Matravers holds that social injustice should have *some* normative consequence for the legitimacy of criminal responsibility.[22]

All these authors recognize that a context of injustice poses important challenges to justify state punishment, yet most stop short of the conclusion that punishment would be unjustified in such cases. Instead, they reach what Lacey has called a "muddy conclusion," in which they appeal to practical or principled countervailing reasons that would justify punishment despite a lack of authority or standing through a balancing test that lacks sufficient clarity.[23]

## II. And Yet, Punish We Must: The Muddy Conclusion

Duff's account of criminal law arguably offers the most compelling and richest account of both the muddy conclusion and the normative troubles that we confront in doing criminal justice in unjust societies. In his view, punishment is meant to communicate the existence of a shared normative code of behavior and censure offenders for violating it. This communication, among other things, allows offenders to reflect upon their actions and to restore their relationship with their community.[24] For this communicative function of punishment to be possible, the offender and those who call the offender to account must have a relationship in which they share certain background values.[25] Accordingly, the justification of punishment has some requirements strictly related to the integrity of the relationship between the offender and the community that calls him or her to answer.[26] Even when an

extreme poor, and would thus be a case where punishment could no longer be considered an act of law and authority but what he calls an "act of hostility." See Lorca, supra note 2, at 439-42.

[22] Quoting Duff, Matravers concludes that "[w]e cannot hope to do adequate penal justice, penal justice to both victims and offenders, until we come closer to achieving political and social justice." Matravers, supra note 20, at 330.

[23] Lacey, supra note 2, at 198.

[24] According to Duff, punishment expresses moral disapproval of offenders in a way that intends to "persuade them to repent those crimes, to try to reform themselves, and thus to reconcile themselves with those whom they wronged." Duff, supra note 2, at xvii.

[25] This background relationship is central to Duff's theory of criminal justice because, for punishment´s message to be appropriately communicated, offenders have to be "expected to understand their punishment as a justified response to their crimes." Id. at 198.

[26] Duff calls these requirements the "preconditions of punishment." Unlike conditions for the justification of particular punishments—like culpability or the proportionality between punishment and crime—the preconditions of punishment pertain to more general considerations about the context where deserved punishments are being determined and imposed. In *Punishment, Communication, and Community*, Duff distinguishes three different preconditions of punishment: first, that the offender is bound to obey the laws of the community (political obligation/authority); second, that the offender is answerable to the community (standing); and third, that the offender shares the language of the community (language). In addition to these preconditions, in his later work, Duff has discussed specific objections to standing to punish such as "tu quoque" and co-responsibility, Duff, Blame, Moral Standing and the Legitimacy of the Criminal Trial, supra note 13, at 128-30, but his theory allows for other circumstances or objections that can impair the community's standing to judge and punish, through a lack of integrity in the community's behavior towards the offender. See Duff, supra note 2, at 184-88.

offender is *prima facie* fully accountable for her action, certain circumstances—like social injustice—can sever the "suitable relationship" required for fair punishment.[27]

Within this framework, Duff concludes that by placing the offender in a situation of deprivation and exclusion, the political community breaches norms grounded on the same values for which the offender is supposedly accountable.[28] This undermines political authority and the normativity of the criminal law vis-à-vis the offender, as well as the moral standing of the community to call that agent to account. One would assume that when this happens, namely, when an agent has no duty to obey the laws of a political community and that community has no standing to call him or her to account, punishing would not be justified. However, this is not the conclusion reached by Duff.

Regarding cases in which a context of injustice undermines political authority and, as a consequence, the normativity of the criminal law, Duff argues that there might still be a duty to respect particular criminal law statutes.[29] This would be the case of *mala in se* crimes that express uncontroversial moral wrongs. In his view, these criminal law statutes are binding for those who otherwise cannot be expected to abide by the laws of a given community. Shelby follows a similar line of thought, based on the distinction between "civic" and "natural" duties.[30] As I mentioned above, I am unconvinced that a distinction between *mala in se* and *mala prohibita* (or "natural" versus "civic" duties) should have such relevance in overcoming a problem of political authority, given the importance of the political process in articulating moral duties as determinate rules of behavior.[31] However, the muddy conclusion has an additional element.

In one of the most important insights in recent punishment theory, Duff argues that solving the authority problem is not enough to justify punishment in contexts of injustice. Even if a criminal law statute is binding because the offender's action constitutes a serious and uncontroversial moral wrong, the community may not be authorized to call her to answer in its criminal courts.[32] This objection to punishment is not about the normativity

---

[27] Duff, Responsibility, Citizenship, and Criminal Law, supra note 13, at 126.

[28] Duff, supra note 2, at 186.

[29] Here, the idea of the authority of the law is understood in the sense of having a duty to obey the law "because it is the law." It is a content-independent reason to obey, which means that the duty does not depend on whether the content of the law expresses an independent moral duty, but on the fact that it is the law of a legitimate authority which we have general reasons to obey.

[30] According to Shelby, civic obligations are those obligations which we owe each other as fellow members of a political community and are sustained by the value of reciprocity, while natural duties are those duties we owe each other as fellow human beings. Shelby, supra note 2, at 144. While structural injustice, in his view, could undermine the normativity of civic duties, it does not undermine the normativity of natural duties. Id. at 151-52.

[31] See supra note 11.

[32] Duff, supra note 2, at 183-84; R.A. Duff, Moral and Criminal Responsibility: Answering and Refusing to Answer, in 5 Oxford Studies in Agency and Responsibility: Themes from the Philosophy of Gary Watson 165, 184-86 (D. Justin Coates & Neal A. Tognazzini eds., 2019).

of the criminal law but about the community's standing to call someone to answer. However, again, this is not a fatal objection to justifying punishment since, in Duff's view, it can be overcome when crimes both constitute uncontroversial moral wrongs *and* the community has a responsibility to punish. This responsibility may come from a duty to prevent crime but also, and I think most importantly in Duff's view, from a duty towards both the victim and the offender. If we fail to call an agent to publicly account for their wrongful behavior, "we fail to treat them [as well as the victims] as fellow members of the normative political community."[33]

The situation here is presented as a dilemma, where we have a duty to impose a punishment (the one owed to the victim, the offender, or the community) yet we have no authority nor standing to impose it.[34] In other words, the preconditions for the justification of punishment are not met, yet we still have a duty to punish. Duff resolves this dilemma in favor of punishment's justification. He argues that a trial cannot be barred when there is a victim, even if the community's standing is compromised because it has failed to treat the accused respectfully.[35] But then it is not clear whether the preconditions for fair punishment are truly that, and this is, in my view, what makes the argument muddy. It also becomes unclear whether we really mean what we say when we argue that a fair political context should have a bearing on punishment's justification.[36] In Duff's account, the "bearing" ends up being a duty to answer to the offenders for the wrongs we have committed against them. This could be articulated as a public recognition in the trial of the community's failures and the implementation of some actions that could help remedy this unfairness.[37] But these duties have no impact on the justification of punishment, and so are not really a condition for it.

A criticism of muddiness can also be directed against those who, instead of presenting normative reasons to counterbalance their *prima facie* conclusion that the state has no authority to punish, resort to prudential considerations. Stephen Garvey has argued that, in contexts of systematic injustice, the state retains a "pale and pallid" right to coerce based only on prudential considerations, but has lost its moral power to impose actual duties and punish their infringement. Regarding people being treated as what he calls "second-class citizens," the state retains a weak kind of authority to "issue demands and enforce those

---

[33] Duff, Moral and Criminal Responsibility, supra note 32, at 186 (words in brackets added).

[34] Duff, I Might Be Guilty, but You Can't Try Me, supra note 13, at 259.

[35] Michael Philips had pointed before in a similar direction, albeit without offering much of an argument. He contends that an illegitimate government has no authority to pass and enforce laws that people must obey. But then he argues that this conclusion does not apply to the issue of punishment because "as long as a government holds power, there are certain tasks it ought to perform, whether it is legitimate or not." Michael Philips, The Justification of Punishment and the Justification of Political Authority, 5 Law & Phil. 393, 414 (1986). In Philips's view, the main duty of an illegitimate government is to transfer power to a legitimate one, but in the meantime, or while it does so, it has a right to punish certain crimes and enforce certain laws. Id. at 415-16. What these crimes are and how we identify them, however, remains unclear.

[36] The same thing can be said regarding Beade and Cigüela.

[37] Duff, Moral and Criminal Responsibility, supra note 32, at 187.

demands," but loses a thicker sense of authority where it can impose duties and *rightfully* punish their violation.[38] The problem here is not that practical considerations are *always* muddy. Justifications can be grounded on moral or practical reasons.[39] But, as John Simmons has argued, the kind of justification we need depends on the objection we are confronting.[40] Prudential considerations cannot overcome a problem of authority, unless we have an account of authority fully based on prudential considerations—which does not seem to be the case in Garvey's account. Also, it is not clear in Garvey's account what the normative consequence would be of calling something "coercion" instead of "punishment." I suspect his view is similar to the one I will defend later: that there is no justification for punishment, but perhaps there is an excuse. But, most importantly, the appeal to practical considerations is muddy here because it is unclear what consequence we are worried about—as well as the degree to which punishment (or coercion) is appropriate and needed to avoid or to promote such consequences. While we may agree that sometimes in political life we must sacrifice rights and liberties in order to obtain social goods, the more uncertain the goods and ways of achieving them are, the more unclear (and unwarranted) the argument becomes.

Nicola Lacey has suggested that part of the reason we end up with these muddy conclusions is that we face the question of doing criminal justice in unjust societies as if there were only two possible outcomes: punishment is either legitimate or illegitimate, justified or unjustified. She suggests we explore exiting this all-or-nothing scenario by relying on more nuanced approaches, such as Chamberlen and Carvalho's idea of justification as an "ongoing practice."[41] In this view, justice should be understood not as an existing state of affairs "vulnerable to be harmed" but rather as something to strive for. Presumably, then, what seems to be at stake in an inquiry about the justification of a certain practice is whether it is moving *towards* justice rather than having satisfied (or not) a certain normative threshold.

I find this view of justice very compelling. It seems constructive to see justification as evaluating a process in motion rather than a snapshot of a society.[42] I am unconvinced, however, that replacing our conception of *justification* with a more nuanced one, such as the view proposed by Chamberlen and Carvalho, will save us from reaching a muddy conclusion.

---

[38] Garvey, supra note 2.

[39] According to Simmons, when justification consists of offering a prudential reason, the idea is not necessarily that the institution or practice is "good" or "ideal" but rather that, all things considered, it is worth having it; when it consists in offering moral reasons the claim is that the practice is morally permissible. A. John Simmons, Justification and Legitimacy, 109 Ethics 739, 741 (1999).

[40] Id. at 740.

[41] Anastasia Chamberlen & Henrique Carvalho, Feeling the Absence of Justice: Notes on Our Pathological Reliance on Punitive Justice, 61 How. J. Crime & Just. 87, 97 (2022).

[42] Lacey, supra note 2, at 199-200.

That justice is an ongoing practice cannot entail that practices can never be unjustified or illegitimate; at some point, we must be able to distinguish between practices that can be seen as "moving towards" justification and those in which no plausible commitment to justice can be found. This seems to me to be the unfortunate state of many criminal law systems today, in which no plausible commitment to move toward justice can be ascertained—at least with regard to an important number of offenders.[43] But even if we disagree with this last diagnosis, I am convinced that we can find at least a few cases in our societies in which we would agree that justification does not seem to appear on the horizon. In these, we may still need to confront the predicament raised by Duff (and others) of believing that punishment is *prima facie* unjustified regarding certain offenders while being unwilling to conclude that the state should not punish them when we are facing a serious violent crime. To address these cases, we can look, as Duff does, for additional reasons to justify punishment—or we can explain ourselves differently. I now explore one such possibility.

## III. Excusing Punishment

The normative predicament addressed by the muddy conclusion is better explained by the logic of "excuse" rather than "justification," specifically an excuse of necessity. This way makes possible a more accurate and fair description of the predicament of punishment in unjust societies. It also provides a better normative stance for policy definitions.

In justifications, agents might claim that they did nothing wrong in breaking a rule of behavior or harming someone because a different rule under the same normative order authorizes the behavior or the harm.[44] In the case of a given criminal law system, a justified action is simply not a crime.[45] Instead, by offering excuses, agents are not pretending that their actions were not wrong, but showing that, given the circumstances in which they acted, it would be unfair to require them to do the right thing.[46] While excuses cannot make our actions right, they provide understandable explanations for having acted in a certain way that deny or diminish individual responsibility.[47] In an excuse, as opposed to a justification, the issue is not assessing the value of the agent's action, but rather understanding or giving consideration to the agent for the position in which he or she acted.[48]

---

[43] Lorca, supra note 2, at 439-42; Rocío Lorca, Sick and Blamed: Criminal Law in the Chilean Response to COVID-19, 50 Netherlands J. Legal Phil. 142 (2021).

[44] Sanford H. Kadish, Excusing Crime, 75 Cal. L. Rev. 257, 258 (1987); Joshua Dressler, Understanding Criminal Law 218 (4th ed. 2006).

[45] This is why Mitchel Berman, following Dan-Cohen's framework, regards justifications as rules of conduct, and not as decision rules. See Mitchell N. Berman, Justification and Excuse, Law and Morality, 53 Duke L.J. 1, 4 (2003); Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 629-37 (1984). I'm grateful to Juan Pablo Mañalich for reminding me of Dan-Cohen's important piece for the development of my argument.

[46] Kadish, supra note 44, at 258; Dressler, supra note 44, at 219.

[47] Kimberly Ferzan, Justification and Excuse, in The Oxford Handbook of Philosophy of Criminal Law 239, 239 (John Deigh & David Dolinko eds., 2011).

[48] Alan Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law 201-02 (3d ed. 2014).

The distinction between excuses and justifications is not easy to draw in practice. This difficulty is particularly relevant in the case of the defense of necessity, which has always been vague and imprecise, and may constitute a justification or an excuse, depending on the circumstances.[49] Despite the difficulties, it is important to make the distinction in order to create an alternative to the muddy conclusion because an important consequence of the distinction is that, unlike in the case of justifications, we cannot ask those who are harmed by our actions to accept our excuses as applicable to them. They have a right to resist the harm and to demand reparation.[50] Before I elaborate on this point, let me clarify how I understand the rationale of a necessity excuse.

In a necessity *justification*, agents claim that their behavior was justified because, in breaking the rule of conduct, they chose the least harmful course of action available to them in a given situation.[51] As an instance of a "lesser evil principle," necessity justifications create problems for the stability and certainty of a legal order because they seem to make rules of conduct intolerably dependent on contingent balancing judgments. This explains why, in most criminal law systems, the possibility of relying on necessity is very limited, either by statute or by case law.[52] In the case of punishment in unjust societies, a justification of necessity based on the principle of the lesser of two evils would lead us back to the muddy conclusion that, in an effort to uphold the permissibility of a *prima facie* unjustified punishment, we would have to resort to a balancing test that lacks desirable degrees of precision or clarity.[53]

The *excuse* of necessity, also called duress of circumstance or situational duress, also refers to a context that requires the agent to choose between evils, but the focus is not on the outcome of the agent's decision, but, instead, on how that context undermines the degree of freedom necessary to sustain the agent's responsibility. A necessity excuse does not claim that the agent's action is justified because he or she chose the less harmful action, but rather that the agent did not have a fair chance to do the right thing.[54] Agents acting under duress of circumstances decide voluntarily to act against the law, yet do so in a context where this decision shows no lack of loyalty to the legal system and, therefore, they should

---

[49] See id. at 199-200, 203; Dan-Cohen, supra note 45.

[50] A list of the practical consequences of the distinction can be found in Dressler, supra note 44, at 233-35.

[51] Norrie, supra note 48, at 201; Dressler, supra note 44, at 233-35.

[52] This problematic character also suggests that perhaps the lesser evil principle is not what should sustain and explain this justification but rather a principle of solidarity. See Javier Wilenmann, La Justificación de un Delito en Situaciones de Necesidad 103-26 (2017).

[53] Lacey, supra note 2, at 198-99.

[54] According to Kadish, the principle underlying duress applies both to the classical (coercion) and the necessity case, i.e., the idea that blame is not appropriate because "there is no basis for attributing fault to the person who" did not have the capacity to choose otherwise. Kadish, supra note 44, at 272.

not be held responsible for breaking the law.[55] As John Gardner has argued, an agent who acts excusably has done the wrong thing but has lived up to our expectations regarding his or her behavior.[56] Legal systems also tend to be very restrictive in accepting this excuse, both because it is difficult to find the equilibrium in which breaking a rule of conduct does not reflect a lack of loyalty to it, and because of the fear that being open to this kind of excuse could destabilize the legal order.[57]

In my view, the explanation offered in the necessity excuse provides a good structure for explaining the predicament of a political community that does not meet the conditions of justification for punishing an offender, yet feels compelled to impose that punishment. I am persuaded to see things this way for a number of reasons. First, the idea of excuse presents the complexity of the problem in a more straightforward way. What happens in this predicament is that we have reasons to believe that punishment is unjustified for a particular offender, and yet not punishing him or her seems too onerous to us because we are concerned about something else, such as public order, vigilantism, the integrity of rights, or a duty to recognize the harm done to a victim. These concerns may be ambiguous in the sense that we have no certainty about their specific countervailing moral weight to configure a justification. Nevertheless, they compel us to act in ways that seem understandable. When the state punishes in a context of extreme injustice, it wrongs the punished, but it may be acting in the way we expect it to act. It is the result of a real dilemma, and the excuse of necessity conveys just that.

Second, the idea of excuse better communicates the offender's position toward the community that has previously wronged him or her and yet seeks to hold him or her accountable. As I mentioned above, excuses are not reasons that apply to those affected by our wrongful actions in the sense that they can still claim to have been wronged and have a right to resist and demand reparation.[58] Duff's proposal to resolve the dilemma through a duty to answer to the offender for the injustice suffered goes in this direction, but falls short of blocking the availability of justification. [59] I think it is important to insist that the

[55] As John Gardner has claimed, with excuses, the explanation offered entails that by doing the wrong thing the person did not actually betray our normative expectations regarding him or her as a fellow member of a normative order. John Gardner, The Gist of Excuses, 1 Buff. Crim. L. Rev. 575, 578 (1998). To put it in Shelby's terms, though not referring particularly to excuses, in breaking the law they show no unwillingness to reciprocate the terms of social cooperation by which the community abides. See Shelby, supra note 2, at 143-44.

[56] Gardner, supra note 55, at 578.

[57] In Kadish's view, "the narrow recognition of the necessity-coercion excuse creates a gap between what the law allows and what just blaming requires." See Kadish, supra note 44, at 273. But he argues that this departure may be justified all things considered, because of the risk of exposing every prosecution to this consideration, thus weakening the deterrent effect of the law and the stability of the legal system. He is not sure this justifies blaming, but he doesn't think the issue is easy to solve. Id. at 274.

[58] Duff, Moral and Criminal Responsibility, supra note 32, at 186-87.

[59] Duff formulates this idea in terms of being a polity's responsibility to respond to crime "not only to take what steps it properly can to prevent future crime, but also to respond appropriately to past crimes. We owe this to the victims of crimes . . . but also to those who commit them . . . as part of what it is to recognize one

state cannot claim justification for punishment in these cases, because this entails that, even if we could excuse these punishments, those harmed by injustice have a more effective or clearer claim to reparation: as long as the state does not properly answer for the injustice to which it has subjected them, it cannot claim that punishments against them are justified. This not only gives the offender a stronger claim to reparation, but also gives political communities a much-needed reason to pause before taking a strong, righteous stance in criminal trials, and should create pressure to put in place social conditions for criminal responsibility, provided we consider the practice of punishment valuable and important, which is of course open to debate.

That an excuse of necessity better communicates the position of the agent being unfairly punished can be illustrated by Robert Cover's account of 19th-century anti-slavery American judges who used the idea of necessity to explain why they saw themselves bound to apply the Fugitive Slave Act, even though they personally believed it contradicted natural law or the "natural rights of men."[60] According to these judges, even if the Fugitive Slave Act went against human nature or the natural rights of men, returning runaway enslaved people to those who claimed to be their owners was warranted under the dictates of necessity as opposed to the demands of justice.[61] In the words of one of the judges, "[t]he claims of nature, it will be said, are stronger than those from social institutions only. I admit it, but nature also dictates us to provide for our safety and authorizes all *necessary* measures for that purpose."[62] This argument, however, is not a kind of reasoning that is addressed to enslaved people who are being sent back to where they escaped from. For enslaved people, this argument could only confirm their condition of domination and exploitation, and gives *them* no reason to excuse the judges.[63] And, in my view, this constitutes evidence that while we *could* excuse these judges for having acted in this way given how they perceive their context, the application of these laws cannot be justified.

Another notorious, but more contemporary, example is that of the Latin American judges who, during the many dictatorships in the region in the 1970s and 1980s, refused to do their jobs by systematically rejecting thousands of *habeas corpus* petitions filed on behalf of people imprisoned for political reasons. Some of these judges did this out of ideological commitment to the authoritarian regimes, but many did it out of fear that they would be harmed if they did their job. For the victims of state violence, for the survivors of the thousands of detainees who remain disappeared fifty years later, none of these reasons are

---

another and to take one another seriously as fellow members of the normative political community." Id. at 185-86.

[60] The Fugitive Slave Act required judges to return runaway enslaved people to those who claimed to own them, even if they were in a free state.

[61] Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 107 (1975).

[62] Id. (italics in original).

[63] Id.

valid reasons that could make the actions of these judges morally or legally right. They therefore have the right to demand reparation and recognition of the wrongs committed.[64]

A third consideration in favor of an excuse offering a better way of understanding the predicament of punishment in unjust societies is that it offers a normative middle ground (between justified and unjustified punishment) that seems helpful for thinking about policy. Excusing, rather than justifying, punishment would allow for a middle ground between being a conformist and an abolitionist, as it offers a way of explaining punishment that does not obscure its deficiencies. This puts more pressure on political communities to overcome the circumstances that make punishment unjustified, without putting them in an all-or-nothing situation where advocating for abolitionism may be perceived as having important immediate costs.[65]

Despite the reasons I have just given, there are a number of problems with this proposal, two of which I would like to mention briefly before concluding. First of all, some may say that punishment, unlike crime, is an instance of deliberate justice, which therefore does not seem to convey the sense of emergency or compulsion that sustains the excuses of necessity. Although more needs to be said here, I am not sure that this is true. Public opinion today exerts enormous pressure on legislators and judges to punish, so that it appears that political actors are compelled to resort to criminal law in order to address any number of social problems, regardless of whether there are good reasons for punishing certain behaviors or not.[66]

Another problem, perhaps more troubling than the previous one, stems from the idea that excuses lose their meaning when the person making them has previously considered them in deciding how to act, in a kind of cost-benefit analysis.[67] In the case of a necessity excuse, this would mean that the likelihood of benefiting from the excuse should not be considered by the political community when deciding whether to punish an offender who has been deprived of fair treatment. I recognize the problem, and while I probably cannot offer an adequate answer here, as long as the boundary between the excusable and the inexcusable remains vague or hard to ascertain, I do not think that the state or the political community can meaningfully engage in a balancing process that would allow for

[64] See Rocío Lorca, Judges as Criminal Associates of Totalitarian Regimes: The Chilean Case under the Framework of International Law, in Transitional Justice and the Criminal Responsibility of Judges (Claudia Cárdenas et al. eds., forthcoming 2025).

[65] Many see abolitionism as bearing many risks and remain unconvinced by it, even if they are very critical of the criminal law system. See, e.g., Douglas Husak, The Price of Criminal Law Skepticism, 23 New Crim. L. Rev. 27 (2020); Máximo Langer, Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then, 133 Harv. L. Rev. Forum 42 (2020).

[66] David Garland, The Culture of Control 139-65 (2001); José Luis Díez Ripollés, La Política Criminal en la Encrucijada 79-82 (2007).

[67] In Gardner's words, "to attempt to benefit from a legal excuse by being guided by it is to forfeit that excuse." See Gardner, supra note 55, at 597.

an instrumental use of the excuse, thus betraying its spirit.[68] The conversation about excusing state punishment is not about what considerations the state should have in mind when deciding whether or not to punish, but rather about evaluating a state's practice as an outside observer.

## IV. Conclusion

In Herman Melville's *Billy Budd*, Captain Vere sees himself as bound to order the execution of the sailor Billy Budd even though he considers Billy morally innocent of the killing of master-at-arms John Claggart.[69] The reasons that lead Captain Vere to convene the court martial and disregard any possible argument to avoid Billy's execution are never fully clear or convincing to the reader. Sometimes, it seems that he is acting on principled reasons (as a legalist); other times, he appears to act on purely pragmatic considerations (avoiding mutiny). In any event, Vere seems to genuinely regret the outcome of Billy's misfortune but believes he cannot act otherwise. Judging whether Vere acted justifiably would obscure rather than illuminate his predicament. Whether he did the right thing or not, from his perspective all available actions had critical moral costs, and there was no clear balancing threshold. Ascribing justification to him might provide some comfort, but the complexity he faced and the normative significance of his actions would still not be properly recognized. Whether or not Vere is in a genuine moral dilemma, it cannot be denied that he faces an inescapable problem where whatever he chooses (or avoids making a choice) will not be fully justifiable.

While the state or political community is not an individual moral agent like Captain Vere, something similar happens when we try to explain ourselves while administering criminal justice in unjust societies. Just as Vere may have told himself that if Billy is not hanged there will be a mutiny, a political society may tell itself that it must impose an unjust punishment in order to avoid vigilantism and political instability. This perceived need to punish, justified or not, is certainly important in evaluating the permissibility of punishment, though probably not sufficient to make it fully justified—at least in the eyes of those to whom we owe a justification. All that may be left is an excuse, and what remains to be clarified is when such an excuse would be available.

---

[68] On this "positive" function of uncertainty, see Dan-Cohen, supra note 45, at 639-40.

[69] In the novella, possessed by envy towards Billy Budd's beauty and charisma, master-at-arms John Claggart falsely accuses Billy of conspiracy to mutiny. Billy, shocked by the accusation and unable to speak in his defense due to his stutter, strikes Claggart, who dies unexpectedly from that one punch.