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**THE CONSTITUTION OF CRIMINAL LAW:
JUSTIFICATIONS, POLICING AND THE STATE'S FIDUCIARY DUTIES**

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I. Introduction

In its historic decision of 15 February 2006, the German Constitutional Court (*Bundesverfassungsgericht*) struck down s. 14 of the federal Air Safety Law (*Luftsicherheitsgesetz*), a statute that purported to grant the minister of defense (or, in his absence, another member of the federal government standing in for him) the power (in peacetime) to order the military to shoot down an airplane (even if there were innocent people on board)¹ should this be necessary to prevent the plane from being used as a weapon against human targets. The Court reasoned that because all subjects of the German state² have constitutional rights to life³ and to human dignity,⁴ it would be beyond the powers of any state official to order the destruction of a plane in such circumstances because this would be in breach of the state's duties to the innocents on board the plane in a way that could not be justified.⁵

¹ There was some controversy in the case about whether the law applied to situations where innocent passengers would be onboard when the order was given to shoot down the plane. The court found that this sort of situation was (a) covered by the law; and (b) brought it in violation of the right to dignity and the right to life. If the statute had excluded this possibility, it would still have been struck down on federalism grounds, but it appears that it would not have violated the guarantees of life and dignity. See ¶ 140 of the judgment: "§ 14 Abs. 3 LuftSiG ist dagegen mit Art. 2 Abs. 2 Satz 1 in Verbindung mit Art. 1 Abs. 1 GG insoweit vereinbar, als sich die unmittelbare Einwirkung mit Waffengewalt gegen ein unbemanntes Luftfahrzeug oder ausschließlich gegen Personen richtet, die das Luftfahrzeug als Tatwaffe gegen das Leben von Menschen auf der Erde einsetzen wollen."

² Of course, as a matter of jurisdiction, the German Basic Law is only concerned with the rights of those who are within the jurisdiction of the German state and not all human beings.

³ Guaranteed by § 2(2) of the Basic Law: "Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden."

⁴ Guaranteed by § 1(1) of the Basic Law: "Die Würde des Menschen ist unantastbar. Sie zu achten und schützen ist Verpflichtung aller staatlichen Gewalt."

⁵ Strictly speaking, violations of § 1(1) right to dignity are not even open to justification, for this right is absolute. Although the § 2(2) right to life is subject to justified infringement by statute, the court found that this was not made out in this case. The law was also struck down on federalism grounds. The law purported to give the federal government the power to use military means to assist the states in their police functions. Although it

The implications of this decision are clear in one respect and quite murky in another. It is clear that the minister of defense does not have the *legal power*⁶ during peacetime to decide that it is permissible to kill innocents no matter what the circumstances. That is, he cannot change the status of killing in such a case from legally prohibited to legally permitted simply by deciding that that is so.⁷ But what *criminal* consequences might an individual face for shooting down a plane in such circumstances?⁸ This question is not a matter for idle speculation, for the present minister of defense in Germany has suggested that he would be willing to order the destruction of an aircraft under such circumstances notwithstanding the Constitutional Court's ruling in this case, and we have good reason to believe that the military would carry out that order.⁹ And even if the minister did nothing, one could easily imagine a private citizen seeing an impending disaster, taking matters into his own hands and shooting down the plane. How would – and how *should* – the criminal law respond?

The question on which I shall focus in this paper is whether it might be legally *permissible* under criminal law for an individual to shoot down the plane. Since there is a general prohibition against the killing of innocent human beings in virtually every criminal law system, this really amounts to the question of whether it might be *justified* to do so in

is permissible for the federal government to use the military to assist the states, it is limited in the means it may do when assisting to *police* means, not military ones. The use of military force against a plane in such circumstances is *ultra vires* the federal government and therefore unconstitutional.

⁶ WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter Wheeler Cook ed., 1919).

⁷ On this point, I follow Andrew Halpin, *The Concept of a Legal Power*, 16 OXFORD J. LEGAL STUD. 129 (1996).

⁸ The person Holmes called “bad man who cares only for the material consequences” (Oliver Wendell Holmes. *The Path of the Law* in COLLECTED LEGAL PAPERS (New York: Peter Smith, 1952) at 171) of his conduct will be a good deal more interested in what the criminal law has to say on this matter than on the judgment of a constitutional court about the legal effectiveness of the powers of the minister to render a certain form of conduct permissible.

⁹ Minister of Defense Franz Josef Jung stated that he would order a plane shot down regardless of the Court's ruling. The military response to this comment was not altogether clear: FRANKFURTER ALLGEMEINE <http://www.faz.net/s/Rub594835B672714A1DB1A121534F010EE1/Doc~EB92A92E841834C4080EED56B289783B3~ATpl~Ecommon~Scontent.html> (last accessed 20 April 2008).

virtue of the high stakes in such a case. The positive law¹⁰ on this question differs significantly between the United States, England and Germany. In the United States, under the Model Penal Code, it is clear that someone who kills one person (especially one who was about to die anyway) in order to save thousands of others is obviously entitled to a justification defense. Indeed, the commentaries on the Model Penal Code's general justification defense make it quite clear that this provision was intended to cover just this sort of situation:

It would be particularly unfortunate to exclude homicidal conduct from the scope of the defense. For, recognizing that the sanctity of life has a supreme place in the hierarchy of values, it is nonetheless true that conduct that results in taking life may promote the very value sought to be protected by the law of homicide. Suppose, for example, that the actor makes a breach in a dike, knowing that this will inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. The life of every individual must be taken in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act.¹¹

In Germany, however, this sort of strategy would be bound to fail. Although § 34 the German Penal Code (*Strafgesetzbuch*) sets out a justification defense of necessity, it is clear that this defense does not extend to the killing of innocents. It is the “totally prevailing opinion” among German criminal law scholars that “[t]he legal interest of human life is neither to *be graded by its quality* – each life holds the same rank – nor can it be subject to a *consideration with regard to the number of human lives opposing each other*; nobody shall kill a human

¹⁰ I use this expression loosely in the context of the United States. The Model Penal Code is not, of course, a real statute. Nevertheless, it is the closest that we have to a national position on criminal law matters in the United States.

¹¹ MODEL PENAL CODE AND COMMENTARIES, Part I, Vol. 3 (Philadelphia: American Law Institute, 1985) §3.02 at p. 15. Indeed, some American commentators go even further. WAYNE LAFAVE, CRIMINAL LAW, 4th ed. (St. Paul, MN: West, 2003) at 526 argues as follows: “If A is confronted with a choice between (1) intentionally killing B and thus saving the population of a city and (2) letting nature run its course, thus saving B but destroying the city, he ought to be criminally liable for murder if the city population if he does nothing.”

being in order to save several others...”¹² In short, the killing of innocents can never be justified in German criminal law, no matter what the stakes.¹³

In England, the justification of necessity seems to lie somewhere between the American and the German approaches. Historically, the English approach was characterized by the rule in *R. v. Dudley and Stephens* that the killing of innocents cannot be justified under any circumstances.¹⁴ In recent years, however, courts have moved away from this strict line and toward a more flexible standard. In the recent case concerning conjoined twins,¹⁵ Brooke LJ at the English Court of Appeal held that it was justified on grounds of necessity to separate the twins even though this would inevitably lead to the death of one of them (Mary). He held that the operation was justified because it was necessary to allow the other twin (Jodie) to survive and because the first twin (Mary) would have died soon thereafter regardless of whether or not the operation was undertaken. Although Brooke LJ went on to set a considerably broader defense of necessity in that case, we need only read the strict *ratio* of the case to extend to the killing of someone who innocently threatens the life of another and who will die soon from related causes in any case.¹⁶ Thus, although necessity is

¹² VOLKER KREY, GERMAN CRIMINAL LAW: GENERAL PART, VOL. I (Stuttgart: Kohlhammer, 2003) at 83 (emphasis in the original). He cites Claus Roxin’s treatise on German criminal law as his source for this claim: CLAUS ROXIN, STRAFRECHT: ALLEGEMEINER TEIL, vol. 1-3 (Munich: C.H. Beck 2005).

¹³ It is worth noting the nuanced way that an earlier generation of German courts dealt with a similar sort of necessity defense to a charge of murder. George Fletcher points out that in 1949, when a number of doctors were charged with the murder of some of their patients, they raised a sort of defense of lesser evils. They believed (presumably on reasonable grounds) that if they did not kill some of their patients, loyal members of the Nazi party would kill far more of them. When faced with this lesser evils argument the German criminal courts “remained unpersuaded that this argument had undercut the physicians’ culpability for intentional homicide.” Nevertheless, Fletcher notes (in *RETHINKING CRIMINAL LAW* at 853) that “[t]he court was willing... to recognize a special exemption from punishment that was extrinsic to the actor’s moral guilt.” The case he cites is the Judgment of 5 March 1949, I Entscheidungen des Obersten Gerichtshofes für die Britische Zone 321.

¹⁴ 1884 14 QBD 273 (CCR). The precise holding in this case is not altogether apparent from the court’s reasons but this seems to have been how subsequent courts interpreted the case.

¹⁵ *Re: A (Children)* [2001] Fam 147.

¹⁶ A.P. SIMESTER & G. R. SULLIVAN, *CRIMINAL LAW: THEORY AND DOCTRINE* 3rd ed. (Oxford: Hart Publishing, 2007) at 720 suggest that this narrower reading of this case would be appropriate.

unavailable as a justification in almost all cases of murder, it seems to be available in extreme circumstances akin to those considered in the German case at hand.

In this paper, I do not address myself directly to the merits of each of these three substantive accounts of justification in criminal law. Instead, I take this disagreement on a crucial question of justifications doctrine as an opportunity to examine the assumptions that are at work behind them about the institutional structure of the criminal law and ultimately about the proper relationship between state and citizen within which the criminal law should operate. Specifically, I distinguish two models of the relationship between state and citizen at within the criminal law. I argue that most contemporary English-speaking criminal law theorists work within a model of what I call the “disengaged state” in which the state sits at arm’s length from the individuals whose conduct is regulated by the criminal law. As such, they assume that the state is largely free to structure wrongdoing and justification as it sees fit. It is for this reason that they see fit to propose (as the American Model Penal Code does) that all conduct that prevents more harm than it causes should be legally justified or (as the English Conjoined Twins case seems to do) that all conduct that is morally justified ought to be legally justified, as well.

By contrast, I argue that the long-standing common law doctrine concerning justification fits better with a model of the “engaged state” in which the state recognizes that many of the individuals whose conduct is regulated by criminal law act in the state’s name. For this reason, courts are not free to judge the conduct of individuals who come before it as they see fit according to their favored policy or moral theory. Rather, I argue, in most cases a claim of justification simply amounts to the claim that one is acting with the state’s *imprimatur*. So the questions a court should be asking are: did a state decision-maker actually grant permission in this case, was the permission granted in the right way, and is it within the

state's legitimate authority to grant such a permission. That is, claims of justification are primarily concerned with the *political* legitimacy of the state's grant of permission, and not with the evaluation of the individual's conduct at arm's length by the lights of the state's policy objectives or its favored moral theory. When seen in this light, the criminal law appears as a mode of self-government and not simply as a tool for promotion of valuable ends or even for the moral evaluation of individual acts. And as such, it makes good sense that the legal order set down by the criminal law should exclude out of hand the possibility of knowingly killing one of its members. Even though this might be the prudent thing, and even the morally right thing for an individual to do in the circumstances, it is not something that the constitution of criminal law can countenance. The rationale for this view lies not only in the German constitution, but also in the "constitution of criminal law" within common law doctrine, as well.

II. The Institutional Role of Justifications (1): The Trial

Opinion among criminal law theorists in the United States is a good deal more divided on the question of criminal law justifications than the stark utilitarianism of the Model Penal Code's general justification provision might indicate. Of course, there are a number of criminal law theorists who continue to endorse the Model Penal Code's strong utilitarian account of justifications. The most prominent among them is Paul Robinson. In a number of articles and books, Robinson has made clear why it is that he favors this utilitarian account. "If one views deterrence as the proper function of the criminal law," he writes, "a harm requirement is appropriate. To the extent that the criminal law punishes nonharmful conduct, it weakens the stigma and deterrent effect of criminal conviction for

harmful conduct.”¹⁷ That is, because Robinson endorses the Model Penal Code’s strong instrumentalist account of the criminal law,¹⁸ he assumes that prohibitions are designed to identify conduct that usually causes more harm than it prevents and justifications set out exceptions for those cases where it actually prevents more harm than it causes. Specifically, Robinson insists that the criminal law should never be seen to stigmatize anyone as a wrongdoer for conduct that prevented more harm than it caused for this would send the wrong message both to the offender and to others. Accordingly, the law should always grant a justification to anyone whose conduct actually prevents more harm than it causes.

Over the past thirty years, however, the received opinion among American criminal law theorists has shifted quite dramatically on the issue of justification defenses. Primarily at the instigation of George Fletcher,¹⁹ most American criminal law theorists have come to view the Model Penal Code’s single-minded focus on the harms caused and prevented by our conduct as mistaken. Instead, the most common way of describing justified conduct in America today is that it is “the morally correct action”²⁰ or that “[j]ustification defenses operate when defendant’s act is the morally preferred option...”²¹ Now, that does not seem to be too far off of Robinson’s claim that “[j]ustified conduct is correct behavior that is

¹⁷ Paul Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability* 23 UCLA L. REV. 266, 266 (1975).

¹⁸ This instrumentalist account of criminal law is perhaps most strongly in evidence in the Model Penal Code’s statement of the “aims of criminal law” in § 1.02.

¹⁹ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* is the most-cited book on criminal law (indeed, it is the *only* book on criminal law to make the Fred Shapiro’s list of “fifty most-cited legal books”) primarily for this reason. Although his discussion of other issues has also generated debate (particularly his discussion of the two patterns of liability), it is cited primarily for his discussion of justification and excuse (which makes up only a small part of the text itself). Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 J. LEGAL STUD. 397 (2000).

²⁰ Laurence A. Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV. 1177, 1177 (1987).

²¹ Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C.L. REV. 211, 242-243 (2002).

encouraged or at least tolerated...”²² except in that it identifies the features that make conduct worthy of encouragement or at least toleration as something other than just the harms it causes and prevents. Following Fletcher (and a recent re-formulation of his view by John Gardner),²³ it is commonly assumed today that justifications in criminal law follow the structure of justification in practical reasoning more generally. Criminal law prohibitions identify conduct that there is *always* good reason not to do. Justifications do not erase the force of those reasons against; they simply recognize *countervailing* reasons in favor of permitting that conduct notwithstanding the continuing force of those reasons against.²⁴ Thus, according to this way of thinking, killing in self-defense is legally prohibited because it is *always* wrong to kill another human being and the reason why courts will recognize a justification in the case of self-defense is that there are strong countervailing moral reasons in favor of permitting people to use even deadly force to protect themselves from wrongful attack.²⁵ In recognition of the importance of practical reasoning to this account, it is now widely agreed (*pave* Robinson) that one is entitled to a justification defense only if one acted for the right reasons.

It is worth noting that in the last few years, a third and quite distinct camp of theorists about justification defenses has arisen in the United States. The most prominent

²² PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 100 (1984). But see John Gardner, *Justifications and Reasons* in *OFFENCES AND DEFENCES* (Oxford: Oxford University Press, 2008) at 97: “It may indeed be a matter of bitter regret or disappointment that, thanks to the reasons which justified ones action, one nevertheless acted against the prima facie reasons for avoiding that action. It may even be a matter of regret or disappointment to the criminal law. The law certainly need not welcome it. But by granting a defence the law concedes that any regret or disappointment must be tolerated, and that no liability can attach to the person who by her prima facie wrongful actions occasioned it.”

²³ John Gardner, *Fletcher on Offences and Defences* in *OFFENCES AND DEFENCES* (New York: Oxford University Press, 2008).

²⁴ I borrow this talk of reasons for and against from John Gardner, “Justifications and Reasons.”

²⁵ There is a tension in this view, of course, between the claim that justified conduct is “morally correct” or “the preferred option” and the claim that the reasons against justified conduct remain and have force but are balanced out by countervailing reasons in favor of permitting the conduct. Many American commentators endorse the first; John Gardner most clearly endorses the second. Fletcher has endorsed each position at different times.

member of this camp is Mitchell Berman. Unlike Robinson and Fletcher, Berman insists that justification defenses are not *conceptually* different from ordinary exceptions to criminal prohibitions. It just so happens that it often serves a number of good policy objectives to structure the criminal law in this way. Berman suggests that because criminal law justifications are, like prohibitions, creatures of “good policy broadly conceived,”²⁶ they ought to be structured in whatever way best suits the state’s policy objectives.

Now, these three accounts of justifications that dominate the American theoretical literature differ in many respects, but they are at one on the institutional role of justification defenses. That is, whether they favor harm minimization, the recognition of morally justified conduct or the pursuit of the state’s policy objectives “broadly conceived,” all of them assume that the appropriate place at which to determine whether or not conduct is justified is the criminal trial. Not surprisingly, all those who insist on a clear and consistent conceptual structure to justification defenses (such as Paul Robinson, George Fletcher and John Gardner) agree that the appropriate fault standard for justification defenses is one of correctness.²⁷ This is (at least in part) because they assume, first, that justifications are a sort of answer that an accused person can provide the court to the question why he violated one of the criminal law’s prohibitions and, second, that it is up to trial courts to evaluate the merits of the accused’s argument and to decide whether or not to condemn his conduct as wrongful on the basis of that argument. The locus of their disagreement, then, is on the question of what normative framework courts should use when evaluating the accused’s answer for his wrongdoing: some might favor a utilitarian cost-benefit analysis and others

²⁶ Mitchell N. Berman, *Justifications and Excuses: Law and Morality*, 53 DUKE L.J. 1, 17 (2003).

²⁷ Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis* 82 COLUM. L. REV. 199, 239-40 (1982); George P. Fletcher, *The Right and the Reasonable* 98 HARV. L. REV. 949, 972.

would suggest a broader policy analysis others suggest that we should use our best moral theory to evaluate the merits of the conduct in question.

This view about the institutional role of justification defenses has taken root so firmly in the theoretical literature not only in the United States but throughout the English-speaking world that it is almost impossible for most English-speaking criminal law theorists even to imagine that there might be an alternative. This enterprise has been further spurred on by the recent work of Antony Duff in which he has set out a very detailed account of the criminal trial as a locus for calling wrongdoers to answer for their criminal wrongs.

According to Duff, “[w]e are criminally responsible for that for which we can be called to answer to our fellow citizens in a criminal court. I answer for something, in this context, either by admitting liability or by offering a defence, a justification or excuse, that will show conviction and punishment to be unwarranted.”²⁸

III. The “Incompatibility Thesis”

There is one prominent feature of justification defenses in German criminal law that fits particularly awkwardly with the common assumption among English-speaking criminal law theorists that the appropriate place for the consideration of justifications is at trial. It is the doctrine popularized by George Fletcher and often referred to as the “incompatibility

²⁸ R.A. DUFF, ANSWERING FOR CRIME (Oxford: Hart Publishing, 2007) at 176. See also ANTONY DUFF, LINDSAY FARMER, SANDRA MARSHALL AND VICTOR TADROS, THE TRIAL ON TRIAL, VOLUME THREE: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL (Oxford: Hart Publishing, 2007), at 142: “[T]he core of the trial is to be found not in that role as a prelude to and legitimation of the punishment that the convicted defendant then receives, but in its role as calling citizens who are accused of such public wrongdoing to answer that accusation, as determining the justice of that accusation, and as calling the defendant who has committed the crime to answer for it.” See also, John Gardner, *In Defence of Defenses* at 82: “so far as criminal lawyers are concerned, the acquisition of a moral duty to offer some justification for what one did is *itself* a normative consequence of doing it. [...] It makes it the wrongdoer’s job to offer up what justification she can, as a responsible agent who answer for her own wrongs.”

thesis:²⁹ the claim that “[i]t is in the nature of justification... that if two people are locked in a conflict, only one person can be justified.”³⁰ Or, as stated in a recent German criminal law treatise, “conduct covered by a ground of legal justification is *permitted and thus has to be endured by the individual concerned*.”³¹ This German justifications law doctrine has been attacked in the English-language literature so often that it is difficult to enumerate all the various arguments that have been marshaled against it.³² I do not mean to engage here in the substance of that debate. Rather, I believe that it is instructive to examine this debate as evidence of a deeper disagreement – an inability even to *imagine* another way of seeing things – between English-speaking criminal law theorists and their German colleagues. It is often the case that when an argument seems *obviously* right to one intelligent group of people and *obviously* wrong to another, there is something more at work than at first meets the eye.³³

Many American critiques of the “incompatibility doctrine” point to the moral intuition that two people may indeed be locked in conflict and yet we would still be inclined to say of both parties that they are justified. This, for example, is Joshua Dressler’s strategy when he considers his version of the famous “plank of Carneades” problem: two sailors stranded at sea reach for the same plank that is capable of sustaining one of them, but not both. It would appear, he suggests, that each has precisely the same claim to the plank as the

²⁹ I follow Russell Christopher in using this moniker, *Mistake of Fact in the Objective Theory of Justifications: Do Two Rights Make Two Wrong Make Two Rights...?* 85 J. CRIM. L. & CRIMINOLOGY 295, 299 n. 20.

³⁰ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* at 767.

³¹ Krey, vol. II, § 225 at p. 17. (emphasis in original)

³² R.A. DUFF, (ANSWERING FOR CRIME at 267) suggests that “the errors [the incompatibility thesis] involves have been thoroughly exposed by others...” In support of this claim he cites the following critiques: Kent Greenawalt, *The Perplexing Borders of Justification and Excuse* 84 COLUM. L. REV. 1897, 1918-27 (1984); Joshua Dressler, *New Thoughts About the Concept of Justification in Criminal Law: A Critique of Fletcher’s Thinking and Rethinking* 32 UCLA L. REV. 61, 87-98 (1984); Douglas N. Husak, *Justifications and the Criminal Liability of Accessories* 80 J. OF CRIM. & CRIMINOLOGY 491 (1989); Douglas N. Husak, *Conflicts of Justifications* 18 L. & PHIL. 41 (1999); Mitchell N. Berman, *Justifications and Excuses: Law and Morality*, 53 DUKE L.J. 1, 62-64 (2003).

³³ Numerous examples spring to mind: the disagreement between American and European approaches to freedom of expression is one example; their disagreement on the demands of what the French call “laïcité” and the Americans call the “separation between church and state” is another.

other and therefore both are justified in the same way in claiming the plank for themselves.³⁴ Other, more recent critiques have focused on Fletcher's claim that "in any situation of physical conflict, where only one part can prevail, *logic* prohibits us from recognizing that more than one of the parties could be justified in using force."³⁵ As Doug Husak has pointed out, it is surely not logic alone that gets us to the conclusion that claims of justification can never conflict. He writes: "the supposition that justifications can conflict is not incoherent. In a situation of conflict, the best substantive theory of justifications may award a justification to only one person. Or the best theory may not do so. The issue cannot be resolved without defending a substantive account of justifications."³⁶

As I mentioned above, I do not wish to add yet another argument to the ongoing debate about the merits of the German "incompatibility thesis." Instead, I mean to re-direct attention away from the object-level debate and toward the underlying assumptions that animate each side of the argument about the institutional role that they expect justifications to play within the criminal law. If we assume (with most English-speaking criminal law theorists) that justification is a matter to be settled by courts at trial, then it seems quite natural to agree with those same English-speaking criminal law theorists that the incompatibility thesis is false: there is no reason in principle why claims of justification could not conflict. For why should we expect it to be the case that the conduct of individuals that is judged *ex post facto* to have been justified on any substantive theory should never come into

³⁴ Joshua Dressler, *New Thoughts About the Concept of Justification in Criminal Law: A Critique of Fletcher's Thinking and Rethinking* 32 UCLA L. REV. 61 (1984) at 88. This example has little purchase with German criminal law scholars who would treat this case as a classic case of excuse, not justification. See Krey §232 at p. 23. This is also Immanuel Kant's example of conduct that cannot be justified but ought still not to be punished. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* tr. Mary Gregor (Cambridge: Cambridge University Press, 1996) at 28 [Ak. 6: 235-6].

³⁵ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* at 975 (emphasis added).

³⁶ Douglas N. Husak, *Conflicts of Justifications* 18 LAW AND PHILOSOPHY 41, 46 (1999).

conflict? Husak is quite right to point out that there is nothing in the “logic” of justification that requires this result.

But what if we do not take justifications to play this institutional role in criminal law at all? What if, instead of assuming that the question of justification is to be determined *ex post facto* by the courts, we assumed that justifications all operated in the manner of judicial search or arrest warrants: *ex ante* permissions granted by a single institutional decision-maker entitling the bearer of the warrant to engage in generally prohibited conduct in the name of the state?³⁷ Given that (a) conduct is judged to be justified *ex ante* and (b) it is judged to be justified on the basis of whether it can be authorized in the name of the state, we now have significant reason to expect that justifications ought³⁸ never to conflict with one another. For why would the state authorize two different agents to come into conflict with one another? This would make about as much sense as a single person using his right hand to struggle

³⁷ GEORGE FLETCHER acknowledges (RETHINKING CRIMINAL LAW at 773) that there has historically been a division on this point. He suggests that “there is an intriguing diversity of sentiment about which category of justificatory claims, the governmental or the private, should be taken as paradigmatic of the theory of justification as a whole. In the history of the common law, the notion of justified homicide was always closely associated with governmental conduct. [...] In contrast to Blackstone’s finding the core cases of justification in governmental action, the modern European view takes the claims of private justification to be paradigmatic...” In what follows, I shall suggest that the German interest in the justification of self-defense and lesser evils does not mean that “private” claims to justification are taken as paradigmatic by German criminal law. Rather, this simply reflects the fact that such defenses will necessarily be set out in a less fine-grained way than those that apply to government action (and they will be set out in the criminal code, rather than in a separate statute regulating state action).

But the German academic commentary makes clear that the disproportionate attention given to necessity and self-defense among justification defenses in the German treatises need not represent a commitment to the view that “private justificatory claims” are taken as paradigmatic. Volker Krey points out (§ 217 at p. 11) as follows: “[T]he clarification whether grounds of legal justification intervene is typically carried out pursuant to the valuations of the whole legal system (of all fields of law). Grounds of justification as legal permission are no specific subject of criminal law. Rather, only a few such legal permissions are laid down in the German Criminal Code (StGB), e.g. self-defence (§ 32 StGB) necessity/emergency as legal justification (§ 34 StGB) In contrast, most grounds of legal justification are laid down in private law and particularly in public law, *inter alia*: Defensivnotstand, § 228 BGB; Aggressivnotstand, § 904 BGB; Selbsthilfe, §§ 229, 230 BGB; Right to arrest criminal offenders (§ 127 StPO)...”

³⁸ Even according to this account, there is the conceptual possibility of a conflict of justification claims. This is because the notion of “no conflict” is a *regulative ideal* to which the state’s decision-makers should aspire. But it is still possible that they might come into conflict through differences in their reasonable interpretations of what would be the appropriate state-sanctioned response to the situation. As we shall see, the state’s bureaucratic hierarchy is another mechanism that the criminal law uses to minimize the possibility even of reasonable disagreement on these matters.

with his left.³⁹ Now, this all might be true, but do we have any reason to suppose that justifications in fact operate in this way? In the following section, I shall argue that this is, in fact, the most plausible account of how justifications actually operate – not only in Germany but even in the common law tradition.⁴⁰

IV. The Institutional Role of Justifications (2): *Ex Ante* State Permission

There are far more justification defenses in criminal law than most English-speaking theorists seem to notice.⁴¹ In addition to the much-discussed justifications of self-defense and necessity, there are also a great many others: justified use of force in arrest, justified invasion of privacy in police search, justified confinement as criminal punishment, justified use of corrective force by parents toward their children, and so on. I believe that we can make a good deal more sense of the category of justification defenses as a whole if we keep in mind not only a few examples that seem to interest legal theorists, but the full panoply of legal justifications in all their variety.

Now, if we are to make any headway in understanding the category of justification defenses, the first thing we must do is to determine what features all the members of this category have in common. It seems that there are three crucial⁴² features shared by all justification defenses as they exist in Anglo-American criminal law. First, they are concerned

³⁹ There are a number of assumptions (about the nature of state action, the relationship between state decision-makers and those who carry out authorized conduct, *etc.*) built into this analogy that I do not have the space here to unpack. I welcome the opportunity to work out some of these assumptions with conference participants.

⁴⁰ I set out the basic argument of the following section – that justification defenses in the common law world arise through *ex ante* permissions rather than *ex post* moral judgments – in greater detail in another paper: Malcolm Thorburn, *Justifications, Powers, and Authority* 117 *YALE L. J.* 1070 (2008).

⁴¹ As Volker Krey points out (§ 217, p. 11), most justification defenses do not arise within criminal codes, but come from “the whole legal system.” Unfortunately, the absence of such justification defenses from the text of criminal codes has led some criminal law theorists to ignore them and to focus exclusively on those that arise in the statutory language of criminal codes.

⁴² Of course, one can disagree about what counts as a “crucial” feature. I hope that it will become clear in what follows why I have identified these three features.

with the actor's reasons for action in a way that prohibitions are not. So, for example, one who brings about a good consequence through his criminal wrongdoing purely serendipitously (*e.g.*, the bag he stole happened to have a bomb in it and therefore dozens of lives were saved by his wrongdoing) is not entitled to a justification defense.⁴³ Second, they are subject to a fault standard of reasonableness. That is, when a court comes to decide whether or not an actor's plea of justification should be accepted, it does *not* ask whether the good reasons upon which the actor based his actions in fact obtained.⁴⁴ Rather, the court asks only whether the actor had good reason in the circumstances to *believe* that such good reasons for action obtained. Thus, a search is justified so long as there was "reasonable and probable cause" for the search (even if it turns out that no good evidence turned up), and a killing in self-defense is justified so long as the actor reasonably believed that his use of deadly force was necessary and proportionate to the threat he faced. And so on.

The first two characteristics of justification defenses are quite familiar. Although some criminal law theorists insist that we should do away with the law's interest in the actor's reasons for action when it comes to justification defenses, even they recognize that their views are sharply at odds with the structure of the settled doctrine. And although many theorists insist that justifications ought to be subject to a fault standard of correctness rather than reasonable belief, they recognize that this claim, too, does not fit with the settled doctrine. The third characteristic of justification defenses is not merely controversial in some straightforward way as the first two – for it is a feature that most criminal law theorists have

⁴³ Paul Robinson has spent the past thirty years arguing for the reform of justification defenses in order to do away with precisely this feature. (Indeed, the example of the stolen bag with a bomb in it arises from the actual Israeli criminal case of Motti Ashkenazi. *See* Paul H. Robinson, *The Bomb Thief and the Theory of Justification Defenses*, 8 CRIM. L.F. 387 (1997).) Even Robinson acknowledges that this is a well-settled feature of justification defenses as they exist in Anglo-American doctrine.

⁴⁴ This is a point that not only Robinson but also Fletcher and Gardner and the other proponents of the "justifications and reasons" camp argue is mistaken. Nevertheless, they all recognize that this, too, is a settled feature of justification defenses in Anglo-American doctrine.

simply not noticed at all. It is this: justification defenses are necessarily linked to *ex ante* exercises of discretion or decision-making authority. That is, whenever an actor makes a successful justification claim, the thrust of his argument is not that the court ought to grant him a justification *ex post facto* because his conduct is morally worthy or because there are good policy reasons for the court to allow him to act as he did. Rather, his claim is that the court is *bound by law* to recognize his claim of justification because he has already been granted legal permission to act as he did by the requisite legal authority.

This element of *ex ante* permission is most obvious in the case of judicial warrants granted to police officers for searches and arrests. In these cases, it is not open to the court to second-guess the prior judgment of the justice of the peace who granted the warrant. So long as the justice of the peace who granted the warrant had the jurisdiction to grant it and so long as the procedure through which she granted it was appropriate (no improper bias or other irregularities), it should stand. The other place where this exercise of *ex ante* discretion is quite obvious is in the case of powers wielded by private law fiduciaries over their charges. A medical team that undertakes surgery upon a child is justified in doing so just in case the child's parents have granted their permission and so long as their grant of permission was reasonable and not based on irrelevant considerations.⁴⁵ The same is true of a vast array of private law fiduciaries: a third party may deal with the assets of a beneficiary so long as the person with power of attorney over that beneficiary grants permission (and, once again, so long as that permission was reasonably granted and not subject to bias or other irregularities). And so on.

⁴⁵ For example, the parent cannot consent to surgery on her child for the sake of profit (say, by selling a child's kidney) if she does not deem it to be in the best interests of the child.

There are two other categories of justification defenses that fit this pattern somewhat less obviously. First, there are those justification defenses that do not require the actor to seek *ex ante* permission from anyone else before acting. For example, police officers may use force to arrest a suspect without securing a warrant where there is not sufficient time to do so and there is pressing need to make the arrest (because of the seriousness of the offense or because of the suspect's likelihood of flight if not apprehended immediately). In this case, however, I believe that it makes most sense to view the police officer as the relevant legal decision-maker. Although the legal system generally requires justices of the peace to make such determinations, in emergency situations the law will permit police officers to do so in their place. The legal system maintains the importance of the hierarchy of decision-making, however, by prohibiting those lower down in the hierarchy from making such decisions unless those who are higher up are unavailable to do so.

This hierarchical decision-making structure, I believe, extends all the way down to the power of private citizens to make arrests and to use force in their own defense and in defense of others. If the law of self-defense were really concerned with the moral right of each individual to protect himself, one would expect that this right would obtain in all circumstances and that the rights of others (such as police officers) would be derivative from the original right of the individual who is under attack. But that is not the way the common law of self-defense works. Instead, it is police officers who are generally permitted to use force to protect us from attack. We ordinary citizens are legally entitled to do so only when the police officer is unavailable. That is, just as the police officer must defer to the decision-making power of the justice of the peace unless the situation requires him to make a decision on the spot, so the citizen must defer to the decision-making power of the police officer unless the situation requires her to make a decision on the spot. As George Fletcher pointed

out many years ago, “[i]n the history of the common law, the notion of justified homicide was always closely associated with governmental conduct.”⁴⁶ It seems that this close association between state conduct and the justified use of force continues in the common law to this day.⁴⁷

All justifications, then – from the putatively “private” justifications of necessity and self-defense, through the justification of police powers to arrest, to search, to punish and so on, through even those justifications that arise from the consent of private fiduciaries – appear to share the same basic structure. In each case, the law recognizes that there is someone in a position of legal authority to determine whether or not a particular course of conduct is legally justified under the circumstances. And in each case, that person’s authority to make that determination is constrained by something like a fiduciary duty: either of the private fiduciary toward her charge or of the state toward the citizenry. But so long as the decision was made in accordance with the terms of that fiduciary duty, the business of trial courts is simply to recognize that it had legal effect. Thus, it seems, it is *never* the case that courts should evaluate the merits of our conduct *de novo* to determine whether or not it was justified under the circumstances. Their job is simply to review the prior exercise of discretion as they would the decision of a private fiduciary or an administrative agency.⁴⁸

V. Justifications and The State

⁴⁶ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* at 773.

⁴⁷ Of course, it is not only the common law that assumes this close connection between state action and the legitimate use of force. The most famous statement of this connection is MAX WEBER, *The Profession and Vocation of Politics* in *POLITICAL WRITINGS* ed. Peter Lassman & Ronald Speirs (Cambridge: Cambridge University Press, 1994) at 310-11: “The state is that human community that lays claim to the *monopoly of legitimate physical violence* within a certain territory...” (emphasis in original)

⁴⁸ The parallel between public administrative agencies and private fiduciaries is drawn most fully in Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 *UCLA L. REV.* 117 (2006).

Now, if I am right that justification defenses in fact operate as *ex ante* permissions to act rather than *ex post facto* evaluations of our conduct by trial courts, I believe that this has significant consequences for a good deal more than just our understanding of the debate over the “incompatibility thesis.” The answer to the problem about the incompatibility thesis turns on the fact that the law deals with (most)⁴⁹ justified actors as agents of the state. Claims of justification ought never to conflict on this account because it would not make sense for the state to enter into conflict with itself. But *why* does the common law view criminal law justifications in this way? What reason might there be to treat all claims of justification as though they were judicial warrants, granted *ex ante* by an official decision-maker? And why should the criminal law treat private citizens as the lowest-ranking members of state officialdom whenever they claim a justification of self-defense or necessity? The most plausible explanation for this phenomenon, I believe, requires us to take a step back from the workings of the criminal trial and to consider the nature of state-larger institutional context within which it takes place.

(a) The “Disengaged State”

First, let us imagine the institutional context as most American criminal law theorists seem to do. That is, let us assume that there is a sharp divide between the private citizens who are administered by the criminal law and state officials who administer it.⁵⁰ According to this approach, it is always the state that sits in judgment⁵¹ and it is always individuals *qua*

⁴⁹ Recall that some justifications arise from the exercise of irreducibly *private* authority (such as the authority of parents over their children or private fiduciaries generally over their charges).

⁵⁰ Meir Dan-Cohen’s famous image of acoustic separation between state officials and private citizens is perhaps the most memorable sketch of this perspective. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

⁵¹ Although some writers such as R. A. DUFF, (ANSWERING FOR CRIME at 176) talk of individuals being “called to answer to our fellow citizens in a criminal court...” rather than to the state. Nevertheless, I believe that Duff’s account is committed to the same claim of “disengagement” as the standard state-centered view. Our fellow citizens would tend to judge our conduct at arm’s length in the same way as the “disengaged” state. But this is

individuals who are judged by the criminal law. When we are concerned with private citizens claiming a justification of self-defense or necessity, the law is always ultimately concerned with evaluating the conduct of those particular individuals *qua* individuals. This view is only plausible, of course, insofar as we ignore the myriad justifications that apply to the conduct of individuals who are clearly acting as state agents and not in their own private capacity. When a police officer undertakes a search or an arrest armed with a warrant, it seems more than a little implausible to suggest that she is just another justified individual and that the fact of her position as a police officer and the valid search warrant she holds are just a few more facts about her situation that help to establish that her conduct was justified, all things considered.

Much of contemporary criminal law theory takes as its starting-point this clear separation between the way that the criminal law regulates the conduct of individuals (through prohibitions, justifications and the like) and the way that the law regulates what the state does to individuals.⁵² Their responses are mostly of two sorts. When considering the criminal law's rules governing the conduct of individuals, some theorists (whom we may loosely call "conservatives") will provide policy briefs to the state about how best to regulate the conduct of individuals through the criminal law and others (whom we may loosely call "liberals") will try, using every tool of liberal political theory or constitutional doctrine, to expand the scope of individual liberty as wide as possible.⁵³ By contrast, when it comes time

not the way that the common law seems to operate. Instead, it seems to recognize that insofar as an actor is justified in using force in self-defense, to make an arrest, *etc.*, in does it in the name of all of us.

⁵² To some extent, this distinction is mirrored in the terms "law and police": the law is the set of rules that govern the conduct of individuals; "police" is the area of lawless discretion that is state conduct. See: MARKUS D. DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (New York: Columbia University Press, 2005).

⁵³ One of the most prominent examples of the assumption that the criminal law is a means to the achievement of the state's purposes, constrained by the constitution and perhaps some political theory commitments is HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (Stanford, CA: Stanford University Press, 1968),

to consider “state conduct” such as arrest, search and punishment, some “conservative” theorists will be inclined to provide policy briefs to the government about what are the best ways to operate in order to achieve the state’s policy objectives and “liberals” will use every tool of liberal political theory or constitutional doctrine to restrict the power of the state as much as possible.⁵⁴ In short: whatever side of these debates they come down on, criminal law theorists tend to assume that a clear distinction between individual conduct and state conduct can be drawn and that a different set of rules must govern each one.

All three of the approaches to justifications that are now current among American criminal law scholars fit nicely within this account of the institutional structure of criminal law. The first, most literal understanding of the “disengaged state” model takes the criminal law to be “an instrument of the state”⁵⁵ that the state may use to manage the citizenry at arm’s length in whatever way suits its favored policy objectives. According to this approach, criminal law theory is reduced to the business of providing policy briefs to the government for how best to achieve its objectives through the criminal law. Paul Robinson’s harm-minimization account of justifications (in which he suggests that the state’s purposes are best served by granting a justification to everyone whose conduct prevents more harm than it causes) and Mitchell Berman’s explicitly policy-oriented account (in which he argues that the state should grant justifications in whatever circumstances best suits its policy objectives “broadly conceived”) both seem to fit this bill quite neatly.

at 163. There, he distinguishes between two models of the criminal process: the “crime control” model which is nothing but a means to achieving the state’s policy ends and the “due process” model which takes into consideration the many “formidable impediments to carrying the accused any further among in the process.”

⁵⁴ One particularly powerful statement of the felt need to justify the state’s power in criminal law is to be found in John Gardner, *Punishment: In Proportion and in Perspective* in *FUNDAMENTALS OF SENTENCING THEORY* ed. Andrew Ashworth & Martin Wasik (Oxford: Oxford University Press, 1998) at 32: “The criminal law (even when its responses are non-punitive) habitually wreaks such havoc in people’s lives, and its punitive side is such an extraordinary abomination, that it patently needs all the justificatory help it can get.”

⁵⁵ JEROME MICHAEL & MORTIMER J. ADLER, *CRIME LAW AND SOCIAL SCIENCE* 342-43 (1933).

Fletcher's decidedly non-consequentialist account fits just as easily with this account, although in a slightly different way. It is because he assumes that the criminal law is always concerned with the evaluation of the conduct of individuals *qua* individuals that he assumes that the state should grant justifications only to those individuals whose conduct is morally justified according its best moral theory. That is, the view that Fletcher shares with Robinson and Berman is not that the state has a stake in the criminal law as a tool for promoting its policy agenda – for he explicitly renounces that claim. Rather, he shares their deeper assumption that somehow it is only ever the conduct of individuals *qua* individuals – and never the state's own conduct – that stands to be judged by the criminal law.

(b) The “Engaged State”

Because it is almost universally assumed among contemporary English-speaking criminal law theorists that the state stands apart from the individuals whose conduct is regulated by the criminal law, it is difficult for many of them even to imagine an alternative. But the structure of justification defenses in common law criminal law doctrine that we have just examined, however, points us toward a different way of conceiving of the institutional structure within which the criminal law operates. According to this alternative model – which I shall call the “engaged state” – the state does not stand at arm's length from the individuals whose conduct is regulated by the criminal law. Rather, the state recognizes that many of the individuals whose conduct it regulates are not acting in their own private capacity at all but are acting in the state's own name. Indeed, their claim to be acting in the state's name and their claim to a criminal law justification are one and the same.⁵⁶

⁵⁶ This claim is related to Hans Kelsen's “identity thesis:” the claim that the state is totally constituted by law. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY tr. Stanley Paulson & Bonnie Litshewski-Paulson (Oxford: Oxford University Press, 1992) pp. 97-106. David Dyzenhaus points out that “when a political entity acts outside the law, its acts can no longer be attributed to the state and so they have no

For example, it would be a misunderstanding to suggest that the police officer who claims a justification for her search because she has a valid warrant is claiming that she is justified *qua* individual in performing the search and that the search warrant is simply another fact that helps to support her individual claim of justification.⁵⁷ And it would be a gross misunderstanding if we were to suggest that the corrections official who claims that he is justified in imprisoning or even executing a convicted offender because this is the sentence that has been duly passed by a judge was simply claiming to be justified *qua* individual and that the fact of the criminal sentence was merely another fact that helped to establish his individual justification. We would be mischaracterizing the nature of these acts unless we recognized that they were justified *qua* state acts and that the individual is justified in carrying them out only insofar as he is the agent of the state in so doing. According to this model of the criminal law's institutional structure, the state cannot judge those individuals' claims to justification at arm's length because their justification claims simply amount to the claim that they were acting as the state's legitimate agents. It is in virtue of their status as state actors that they were justified in acting as they did.⁵⁸

So according to the "engaged state" model, at least some claims of justification are not made in one's private capacity but are instead raised in the actor's capacity as a state agent. In these cases, the actor's claim is a single coin with two sides: on one side, he claims

authority. Dicey, on my understanding, subscribes to the same thesis, and differs from Kelsen only in that he clearly takes the claim that the state is constituted by law to mean that the law constitutes the state and its authority includes the principles of the rule of law, which has the result that a political entity acts as a state when and only when its acts comply with the rule of law." DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (Cambridge: Cambridge University Press, 2006) at 199.

⁵⁷ I am not the first to point this out. See Markus D. Dubber, *Criminal Police in the Rechtsstaat* in *POLICE AND THE LIBERAL STATE* (Stanford, CA: Stanford University Press, 2008) (92-109) at 95.

⁵⁸ There is an important asymmetry to the claim, however. Although the claim of justification is made in the state's name, it is the individual who commits a wrong should he fail to establish such a justification. To paraphrase an old saying: "Act justifiedly and the state acts with you, act wrongly and you act alone." (Of course, the state might still be vicariously liable for an official's conduct even though her conduct could not be attributed to the state in the strict way required for justification defenses.) Thanks to Victor Tadros for pointing out this distinction.

that his conduct is legally permissible and on the other side, he claims that his conduct is legitimate state conduct. That is, the actor's claim that his conduct is legitimate state conduct is inextricably linked with the claim that it is justified conduct. If the police search was not legitimate state conduct, then the police officer's conduct was unjustified; if the punishment was not legitimate, then the corrections official's conduct was unjustified; and so on. This means that the nature of the individual police officer or corrections official's claim to justification is inextricably linked not to any judgment as to the *moral* merits of his *individual* conduct (where his status as a state official is relevant only as another fact that might support his claim to justification) but to the *political* legitimacy of his act qua *state* conduct. And, as we have seen, the structure of the common law suggests that this basic understanding of the relationship between justifications and state authorization goes all the way down even to the acts of individual private citizens acting in self-defense or reacting to a case of necessity.

According to this way of thinking about the institutional structure of criminal law, we cannot easily separate out the conduct of private citizens from that of the state. As a result, the strategies that are so common among criminal law theorists – of trying to limit the scope of justified police conduct on the one hand and expand the scope of justified individual conduct on the other – are not possible within this account. According to the “engaged state” model of the criminal law, one and the same principle animates both areas of conduct. Insofar as *anyone* claims that he is justified in using generally prohibited force against others – whether that is in self-defense by a private citizen, in the maintaining the peace by a police officer or for any other reason – we must appeal to the same grounds of justification: that such conduct was legitimately authorized by the state. Now this means not only that we ought to judge the conduct of individuals by the standards of what *the state* may legitimately authorize (and so we cannot simply ask whether that particular individual was

justified in acting as he did). It also means that the question of what *state* conduct is justified becomes a question of ordinary criminal law. That is, just as we may ask as a question of ordinary criminal law whether an individual is justified in acting in self-defense, so we may also ask whether the state is justified in effecting a search, making an arrest or punishing a wrongdoer. Although the principles by which such judgments will be complex, they are in principle legal questions that can be decided *internal to law*.

VI. The Constitution of Criminal Law

The model of the “engaged state” that arises from our reading of the structure of justification defenses in the common law tradition stands in stark contrast to the model that most English-speaking contemporary criminal law theorists take for granted. Contrary to their view of the state and citizens operating in separate legal universes according to separate sets of laws, the “engaged state” model insists that there is but a single set of laws that govern the conduct of all, state official and ordinary citizen alike. This is a model that must seem quite alien to most American criminal law theorists for, as Victoria Nourse has pointed out, “the standard [American] criminal law scholar... when not busy trying to ‘solve’ the crime problem or deciphering sentencing grids, tends to imagine criminal law *in opposition to*, rather than *constructive of*, a political order.”⁵⁹ But, it seems, the criminal law does give rise to a mode of political ordering in which everyone, state and citizen alike, is subject to a single set of laws. This is a theme that should prove somewhat more familiar to legal scholars in England, however, for that is a jurisdiction whose constitutional norms are often said to be reflected in the very fabric of the common law. As A.V. Dicey puts the point, “the general

⁵⁹ Victoria Nourse, *Reconceptualizing Criminal Law Defenses* 151 U. PA. L. REV. 1691, 1698. (emphasis in the original)

principles of the constitution... are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts...”⁶⁰

Under this model of the criminal law as a sort of proto-constitutional ordering, the separation between criminal prohibitions and justification defenses seems to play a role that is as important as the distinction between state and citizen. For it seems that the criminal law’s prohibitions seem to set out a normative baseline of rights and duties that structure the legal relations among citizens. The prohibitions against killing, rape, theft and the like reflect the basic rights that all citizens have against their fellow citizens – whether they are acting in their private capacity or as state officials. Justification defenses are the law’s mechanism for allowing individuals to carry out certain tasks that are necessary to the proper functioning of society: the protection of basic rights (using force to prevent deadly attacks, rapes, thefts and the like), the enforcement of the law (arresting suspects to bring them to justice, searching to obtain important evidence, and punishing wrongdoers) and the protection of certain basic conditions for the survival of the society (fighting fires and other emergencies). In short, justification defenses give legal legitimacy to what are often called the state’s “police powers” (whether or not they are exercised by individuals who happen to be on the state payroll).

The central normative question that we face under such a system, then, is the ground for the state’s authority to empower individuals to engage in justified conduct. It is not enough (normatively speaking) to say that a search is necessary for obtaining valuable evidence. Because a search constitutes a significant infringement of an individual’s right to privacy, we must demonstrate in some way how the state may come to have the power to decide that the right to privacy can be infringed in certain circumstances. Although a full analysis of this question is well beyond the scope of the present paper, I suggest that such an

⁶⁰ A.V. DICEY, *THE LAW OF THE CONSTITUTION* 8th ed. (Indianapolis: Liberty Fund, 1982) at 115.

answer can be found by keeping in mind that other class of justification defenses that we have so far mostly left to one side: the justifications that arise from exercises of legal powers by private fiduciaries (such as parents, the directors of corporations, individuals with power of attorney and the like). In the private law context, the ground of those persons' authority is twofold: first, it is the need for someone to make decisions for another (for a child cannot make such decisions for herself and a corporate entity such as a corporation cannot make decisions for itself, either); and second, it is the guarantee provided by the fiduciary duty owed by the decision-maker toward those over whose interests he exercises his power that he shall make decisions only in the best interests of his charges and not just as his fancy might lead him. The state's authority to make decisions about what sorts of invasions of the individual rights guaranteed by the law's prohibitions, it seems, is constrained by much the same sort of relationship. First, there is a need for someone to make such a decision,⁶¹ and second, the state is constrained by a fiduciary duty to the people to make such decisions in their best interests.

VII. Conclusion: Return to the German Plane Case

In this paper, my primary focus has been on the basic structure of the relationship between state and citizen that is presumed by different accounts of justification defenses. I have argued that the three accounts of justification defenses that have dominated the English-language criminal law literature for the past thirty years are all animated by the same model of the "disengaged state." This model views the criminal law as an alien imposition, a

⁶¹ The pressing need to create a state is expressed most powerfully by Immanuel Kant, *METAPHYSICS OF MORALS* 33, § 44, at 124 [Ak. 312] (Mary Gregor trans., Cambridge University Press 1991) (1797): "the first thing that [a people] has to resolve upon is the principle that it must leave the state of nature, in which each follows his own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law*..."

form of state power over citizens that it is the cause of liberty to resist (or at least to restrain) as much as possible. Although this model is consistent with a wide variety of doctrines about justification defenses in criminal law, I believe that we have good reasons to reject it as a model of political ordering more generally. Its alternative, which I have called the “engaged state” model, views the criminal law as an enterprise in self-government in which the criminal law stands over everyone – private citizens and state officials alike – as a form of impartial standards of fair treatment by which anyone’s conduct may be evaluated.

The “engaged state” model, I believe, has a great deal to recommend it. One thing that it does *not* offer, however, is flexibility in times of crisis. Although, as the German Constitutional Court points out, this model provides for special powers when the entire legal order is under threat (from war or a natural catastrophe so great that it threatens the stability of the legal order), it does not provide *any* special provisions for 9/11-type situations which are neither the “small emergencies”⁶² that ordinary justification defenses allow individuals to deal with nor the great emergencies constituted by war and civilization-threatening natural catastrophes. In the face of these “mid-sized emergencies” (if this phrase does not unduly trivialize the immense suffering that would be caused by a repeat of the events of 9/11), the engaged state – or what I have called here the “constitution of criminal law” – provides no special tools.

⁶² I take the expression “small emergencies” from the title of Kim Lane Scheppele, *Small Emergencies* 40 GEORGIA L. REV. 835 (2006).