

Article

OBJECTIFYING AND IDENTIFYING IN THE THEORY OF EXCUSE

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Abstract

As fundamentally social creatures, healthy and normal human persons have a deep and well-developed capacity for identification with other persons. We are susceptible to such identification when we see others as similar to ourselves, and especially when we have extensive, particularized knowledge about such other persons. In this Article, I argue that identification plays an important role in our excusing practices.

To date, the leading naturalist and psychological accounts of excuse have made no room for identification. Instead, they follow an influential naturalist account (“the objectification account”) in which all our excuses are explained by reference to either our “reactive attitudes” or the “objective attitude.” In this Article, I offer an alternative naturalist account of excuse that makes room for identification; I describe identification and parse it into component judgments and attitudes; I show how these component parts are conducive to excusing and how they drive some of our most important excuses; and I explain how identification can help us understand a long-standing mystery in excuse law (*tout comprendre, c’est tout pardonner*). Finally, I suggest that identification helps us understand why certain long-standing controversies in excuse theory persist, including debates about rotten background excuses and about the significance of causation and determinism for excuse.

Having laid out the identification account, this Article also shows that identification has important ramifications for excuse theory. First, where the conventional objectification account makes excusing a disreputable practice, the identification account shows that excusing is connected to our social and imaginative capacities, and thus to some of the best parts of our psychology. Taking identification into account, then, should make us more

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receptive to innovation in and expansion of the criminal law excuses. Second, where the objectification account resists excuses rooted in formative character influences, the identification account is open to such excuses. And, third, where the objectification account denies the possibility of causal excuses, the identification account offers reasons to think such excuses are plausible. These are deep and important differences between the two accounts, differences that do not emerge clearly until we have a systematic account of identification in mind.

In the end, the identification account gives us a naturalist account of the excuses with which we can identify. Where the objectification account yokes excuse to a weird and detached psychological outlier (the objective attitude), the identification account connects excuse to a central and valued feature of our social psychology. In this way, it gives us a picture of the excuses that feels natural, intuitive, and connected to what we value most in ourselves, and it helps us understand why we persist in the practice of excusing.

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I. Introduction

If I intentionally kill my rival or take money from your wallet without permission, you are likely to think I should be blamed and punished. However, if it turns out that I was very young, mentally ill, or in a desperate situation, you might decide that I should be excused, even if you think I did something wrong. Why is this? Why do we sometimes think a wrongdoer should be excused?

Some answers to this question start with claims about human psychology. They say that we excuse wrongdoers when we have certain attitudes toward them, and that our criteria for excuse track or conform to the cases in which we naturally experience these excusing attitudes.¹ Speaking loosely, we can call these naturalist accounts of excuse.² Such naturalism is

1. I discuss some such theories later in this Article. *See infra* Part II.
 2. *See* PAUL RUSSELL, FREEDOM AND THE MORAL SENTIMENTS: HUME’S WAY OF NATURALIZING

by no means the only way to understand excuse, but it has played an important role in excuse theory.³

In this Article, I contrast two naturalist accounts of excuse. One has been well-developed and influential in excuse theory; the other has some popular or “common sense” appeal, but has received little attention in the theory of excuse. The former traces an important part of our excusing practices to the psychological phenomenon I will call *objectification*.⁴ The latter links excuse to a different sort of psychological phenomenon, which I will call *identification*.⁵

The objectification account maintains that a primary reason we excuse wrongdoers is that something moves us to see them objectively rather than interpersonally.⁶ This might happen, for example, if we learn that the wrongdoer has a characteristic that makes him unfit to participate in normal human relationships: perhaps he suffers from a profound mental illness or a congenital intellectual impairment. Once we see that the wrongdoer is disqualified from normal relationships, we do not blame him for failing to fulfill the usual interpersonal expectations that arise in such relationships any more than we would a wolf or a tornado.⁷ We excuse him, then, because we see him objectively—as a phenomenon to be controlled or avoided—rather than as a person to be praised or blamed.⁸

The identification account paints a different picture. Identification is

RESPONSIBILITY 60 (1995) (providing a detailed discussion of naturalist accounts of responsibility attribution, blame, and excuse).

3. See *infra* Part II.

4. See *infra* Part II (providing a full definition and discussion of objectification as I use the term here); see also generally P.F. Strawson, *Freedom and Resentment*, in FREE WILL 72 (Gary Watson ed., 2d ed. 2003) [hereinafter *Freedom*] (presenting the seminal and highly influential modern discussion of the concept of objectification).

5. See *infra* Part III (providing a full definition and discussion of identification as I use the term here); see Part III, *supra*. Some criminal theorists have gestured at seemingly-related ideas. For example, some have suggested that there is a connection between feelings of “compassion” and excuse. See, e.g., GEORGE FLETCHER, RETHINKING CRIMINAL LAW 808 (1978) (“excuses are motivated by compassion”; upon learning about an excusing condition or circumstance, “we cannot but feel compassion and excuse his all-too-human transgression”); Joshua Dressler, *Reflections on Excusing Wrongdoers*, 19 RUTGERS L.J. 671, 672, 674, 682–84 (1988) [hereinafter *Excusing*] (suggesting a connection between compassion and excusing); *id.* at 682 (“an intimate connection exists between showing compassion and excusing. . . . I submit that it is the feeling of compassion that usually moves us from fear and anger toward excusing”); *c.f.*, Joshua Dressler, *Some Very Modest Reflections On Excusing Criminal Wrongdoers*, 42 TEX. TECH L. REV. 247, 252 (2009) [hereinafter *Wrongdoers*] (explaining why author subsequently rejected the compassion-based explanation). These compassion-based explanations, however, have generally confused attitudes like compassion with the very different phenomenon of identification. In fact, while identification can include compassion, identification is quite different from compassion and supports a much more robust account of excuse. FLETCHER, *supra*, at 808. Fletcher comes closer to the idea that excuse and identification are connected when he says that excusing is connected with “recogniz[ing] our essential equality with the accused” and “identify[ing] with his situation.” *Excusing, supra*, at 682. Dressler comes closest when he writes that compassion involves “affinity, or community of interest.” *Id.* However, both authors mistakenly subsume such identificatory impulses under compassion, rather than seeing that compassion is but one facet of the much more complex phenomenon of identification.

6. See *infra* Part II.

7. See *infra* Part II.

8. See *infra* Part II.

the psychological phenomenon in which we identify with others—discovering shared traits and experiences, standing in their shoes, empathizing and sympathizing with them, and so on.⁹ As deeply social and imaginative creatures, we are strongly susceptible to identification with others, even wrongdoers, and this tendency is magnified when we come to know detailed facts about others' lives, personalities, and personal histories.¹⁰ According to the identification account, this psychological phenomenon can play an important role in excuse, for when we identify with others, we naturally slip into attitudes and ethical perspectives conducive to excusing.¹¹ Thus, identification can be an important driver of excuse.

Though neither of these accounts formally excludes the other, there are deep tensions between these two ways of understanding excuse in contemporary theory. One kind of tension has to do with the psychological models they assume.¹² As it has developed in the theoretical literature, the objectification account depends on a bifurcated psychological model, according to which we can have two sorts of attitudes toward wrongdoers: reactive attitudes and the objective attitude.¹³ (When we have reactive attitudes toward wrongdoers, we blame them for any acts showing disregard or malevolence toward others.¹⁴ When we take the objective attitude toward wrongdoers, we exempt them from interpersonal expectations, and therefore excuse them.¹⁵ Identification does not fit into this bifurcated taxonomy, for identification involves neither reactive blame nor disengaged objectivity.¹⁶ Instead, it involves an understanding of the other that amplifies, rather than suppresses, interpersonal connection, yet nevertheless inclines us to excuse.¹⁷

Another kind of tension has to do with the two accounts' implications for hard problems in excuse. It turns out these two psychological models suggest very different approaches to some of the most fundamental issues in excuse theory, including questions about the legitimacy of our excusing attitudes and about the significance of personal history, causation, and determinism for excuse.¹⁸ While the objectification account encourages us to see our excusing attitudes as suspect and dangerous, the identification account casts these attitudes in a more appealing light.¹⁹ And while the objectification account marginalizes concerns about the significance of personal history, causation, and determinism for excuse, the identification

9. *See infra* Part III.

10. *See infra* Part III.

11. *See infra* Part III.

12. *See infra* Parts II and III.

13. *See infra* Part II.

14. *See infra* Part II.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part IV.

account is more receptive to these concerns.²⁰

In this Article, I will argue that the objectification account fails because it does not take account of identification's role in excuse, and I will show that taking identification into account has profound ramifications for the theory of excuse. I will begin, in Part II, with the objectification account, laying out its psychological claims and showing how those claims give us an account of excuse. Part III shifts focus to identification, explaining what identification is and showing that identification plays an important role in excuse. In Part IV, I look more closely at what taking identification into account means for excuse theory. I show that the identification account dispels the impression that excusing is inherently a demeaning or patronizing activity, opens the door to potentially powerful excusing considerations that the objectification account resists (especially those pertaining to a wrongdoer's hard personal history), and reinvigorates concerns about the significance of causation and determinism for excuse.

In these ways, I conclude, the identification account of excuse gives us a much richer account of excuse. Where the objectification account yokes an important set of excuses to a weird and detached psychological outlier (the objective attitude), the identification account connects excuse to a deep and valued feature of our social psychology (identification), better explaining the importance we place on excuse in our responsibility-attribution practices. And where the objectification account turns a cold eye on powerful intuitions many people have about the causes and sources of human wrongdoing, the identification account helps us understand why those intuitions feel powerful and what they mean for excusing. The identification account, then, identifies us with our excusing practices in ways the objectification account cannot.

II. The Objectification Account of Excuse

In this Part, I lay out the central elements of the objectification account of the excuses.²¹ The heart of the objectification account is a set of claims about human psychology and the relationship between that psychology and our excusing practices. I begin by describing the account's

20. See *infra* Part IV.

21. In doing so, I will follow the most influential discussions of this account, especially Strawson's *Freedom*, *supra* note 5, and Strawson's SKEPTICISM AND NATURALISM 39 (1985), in which the theory is laid out in detail, and Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in AGENCY AND ANSWERABILITY 219 (2004) (a very influential exploration of some of the account's ramifications and problems). I will also draw on other very helpful discussions, including: Michael McKenna and Paul Russell, *Perspectives on P.F. Strawson's "Freedom and Resentment,"* in FREE WILL AND THE REACTIVE ATTITUDES 1, 1–18 (Michael McKenna and Paul Russell, eds., 2009); Paul Russell, *Strawson's Way Of Naturalizing Responsibility*, in FREE WILL AND THE REACTIVE ATTITUDES 143–56 (Michael McKenna and Paul Russell, eds., 2009); Jonathan Bennett, *Accountability*, in FREE WILL AND THE REACTIVE ATTITUDES 47, 47–68 (Michael McKenna and Paul Russell, eds., 2009); Michael McKenna, *The Limits Of Evil And The Role Of Moral Address* 203, in FREE WILL AND THE REACTIVE ATTITUDES 201, 201–18 (Michael McKenna and Paul Russell, eds., 2009); DERK PEREBOOM, *LIVING WITHOUT FREE WILL* 199–213 (2001); TED HONDERICH, *THE CONSEQUENCES OF DETERMINISM* (1988); Tammler Sommers, *The Objective Attitude*, 57 THE PHIL. Q. 321 (2007).

psychological claims, and then explain how these claims support an account of the excuses.

A. Psychological Claims: The Reactive-Objective Model

The objectification account is grounded in a set of claims about “natural” human psychology. These claims include that humans are necessarily and deeply social creatures and that, as social creatures, we are susceptible to two kinds of attitudes toward wrongdoing—“reactive” and “objective” attitudes. Taken together, these claims give us a reactive-objective model of natural human reactions to wrongdoing.

1. The Reactive Prong of the Reactive-Objective Model

The most fundamental claim in the objectification account is that human beings are *intrinsically social creatures*.²² As P. F. Strawson put it in his seminal articulation of the objectification account, we are endowed with a basic “human commitment to participation in ordinary inter-personal relationships.”²³ This commitment is “thoroughgoing and deeply rooted”²⁴ and a feature of our “humanity” rather than our “intelligence.”²⁵

Our social character determines our natural reactions to wrongdoing. Given our social character, we are naturally *concerned about the attitudes others have toward us*. We care deeply “whether the actions of other people . . . reflect attitudes towards us of goodwill, affection, or esteem on the one hand or contempt, indifference, or malevolence on the other.”²⁶ This concern is so strong and pervasive that it gives rise to a “demand” for “goodwill” and “regard” in all our interpersonal relationships.²⁷

22. See P.F. STRAWSON, SKEPTICISM AND NATURALISM: SOME VARIETIES 39 (1985) [hereinafter *Skepticism*] (“We are naturally social beings; and given with our natural commitment to social existence is a natural commitment to that whole web or structure of human personal and moral attitudes, feelings, and judgments”). RUSSELL, *supra* note 2, at 59–60 (noting that Strawson echoes Hume in these claims).

23. *Freedom*, *supra* note 4, at 81. See also Jonathan Bennett, *Accountability*, in FREE WILL AND THE REACTIVE ATTITUDES 47, 60 (Michael McKenna and Paul Russell, eds., 2009) (noting that human commitment to relationships is central to Strawson’s account).

24. *Freedom*, *supra* note 4, at 81.

25. *Id.* at 80. A number of Strawson’s arguments—here and elsewhere—depend in crucial ways on claims that a human belief, attitude, or orientation is “natural” in such a way that it constitutes an “original . . . inescapable commitment[] which we neither choose nor could give up.” *Skepticism*, *supra* note 22, at 28; see also RUSSELL, *supra* note 2, at 60 (associating such arguments with Strawson’s “naturalistic strategy”). Such arguments seem to adopt an implausibly rigid account of the psychology at issue (one that refuses to countenance the diverse ways in which the relevant attitudes might be inculcated and the entirely plausible possibility that such attitudes might change over time). For the purposes of this Article, however, I will assume that while an objectification account of excuse will typically adopt Strawson’s bifurcated reactive-objective psychology, it need not embrace Strawson’s claims about the origins or rigidity of the attitudes involved.

26. *Freedom*, *supra* note 4, at 76; see also Bennett, *supra* note 23, at 54 (noting Strawson’s emphasis on our concern for other’s attitudes toward us).

27. *Freedom*, *supra* note 4, at 76 (“We should think of the many different kinds of relationships we can have with other people—as sharers of a common interest; as members of the same family; as

As a result, we are susceptible to what Strawson famously called the “reactive attitudes.”²⁸ The most elemental of these are the “personal”²⁹ or *participant reactive attitudes*.³⁰ These are “feelings” or emotional states like resentment, gratitude, and anger.³¹ They are “reactive” in that they are responses to things other people do³² and to “attitudes and actions” that “display” “the good or ill will or indifference of others toward us.”³³ They are “personal” or “participant” in that we experience these attitudes as part of our ordinary interpersonal relations with others.³⁴ These attitudes give rise, in turn, to a more complex set of reactive attitudes—including indignation and admiration—which Strawson called the “*moral reactive attitudes*.”³⁵ Like the participant reactive attitudes, the moral reactive attitudes are responses to the acts of others manifesting good or ill will or disregard, but we feel them vicariously,³⁶ on behalf of others.³⁷ That is, they are reactions to how others treat each other (rather than how others treat us).

colleagues; as friends; as lovers; as chance parties to an enormous range of transactions and encounters In general, we demand some degree of goodwill or regard on the part of those who stand in these relationships to us.”) *Id.*

28. *Id.* at 76; *Skepticism*, *supra* note 22, at 40. Strawson emphasizes the strong connection between our social nature and our reactive attitudes: “Our general proneness to these attitude . . . is inextricably bound up with that involvement in personal and social relationships which begins with our lives, which develops and complicates itself in a great variety of ways . . . and which is . . . a condition of our humanity.” They are “as deeply rooted in our natures as our existence as social beings.”

29. *Skepticism*, *supra* note 22, at 39.

30. *Freedom*, *supra* note 4, at 80.

31. See RUSSELL, *supra* note 2, at 147 (in Strawson’s account, “the reactive attitude . . . [is] simply a species of emotion”). Strawson repeatedly uses the term “feelings” to describe the reactive attitudes. As feelings, the reactive attitudes are distinct from mere judgments. Thus, for example, to experience a reactive attitude in response to a wrong committed by another is not just to judge the other has done wrong, but also to have an accompanying feeling. Michael McKenna, *The Limits Of Evil and the Role of Moral Address*, in *FREE WILL AND THE REACTIVE ATTITUDES* 201, 203 (Michael McKenna and Paul Russell, eds., 2008); Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in *AGENCY AND ANSWERABILITY* 219, 227 (2004). But this does not mean that they are brute “effusions of feeling, unfettered by facts.” Rather, they are triggered by and depend upon certain “beliefs” and have “internal criteria.” *Id.* at 223.

32. On Bennett’s understanding, they must be triggered, and they cannot be summoned. “One cannot adopt a reactive attitude for a purpose,” and such attitudes are “essentially spontaneous, adopted without the guidance of a *telos*.” Bennett, *supra* note 23, at 68. See also McKenna, *supra* note 31, at 203.

33. *Freedom*, *supra* note 4, at 80; see also *id.* at 96 (presenting a similar formulation); Michael McKenna & Paul Russell, *Perspectives on P.F. Strawson’s “Freedom and Resentment,”* in *FREE WILL AND REACTIVE ATTITUDES* 1 (Michael McKenna and Paul Russell, eds., 2008); Bennett, *supra* note 23, at 54 (“They are essentially expressions of one’s caring about the attitudes of other people”); Watson, *supra* note 31, at 233 (fleshing out Strawson’s account, proposes that in this sense the reactive attitudes “are incipiently forms of moral address,” insofar as they express the demand for goodwill and regard).

34. *Freedom*, *supra* note 4, at 80.

35. *Id.* at 84, 86, 92; *Skepticism*, *supra* note 22, at 32 (calling these attitudes “moral sentiments” or “moral attitudes and judgments”); Bennett, *supra* note 23, at 61. Bennett raises concerns about Strawson’s effort to connect the moral reactive attitudes to the participant reactive attitudes, noting that it is not clear why the moral reactive attitudes, divorced from a personal relationship, should involve feelings, rather than purely objective judgments. *Id.* at 63. A possible solution, says Bennett, is to say that reactive attitudes “prepare” us for *ongoing or future* relationships, such that we can see the moral reactive attitudes as “readying oneself for . . . a special kind of relation” (which may or may not come to exist).

36. *Freedom*, *supra* note 4, at 83.

37. *Id.* at 84.

All these reactive attitudes are expressions of our inherently social psychology. They are “natural” “human” “fact[s],”³⁸ “part of the general framework of human life,”³⁹ “given with the fact of human society.”⁴⁰

Among these reactive attitudes, two are especially pertinent to blame and excuse. One is the participant reactive attitude commonly called “*resentment*.” Resentment is our typical reaction to being “offended or injured”⁴¹ where we believe that the injury was inflicted from disregard or malevolence.⁴² (If we believe that the injury was not the result of disregard or malevolence—because, for example, it was a non-culpable accident or because acceptable reasons overrode his legitimate goodwill—this tends to “remove” resentment.⁴³) Resentment involves “an at least partial and temporary withdrawal of goodwill” and a “preparedness to acquiesce in that infliction of suffering on the offender”⁴⁴ The other is a moral reactive attitude—*moral indignation*.⁴⁵ Moral indignation is a “sympathetic or vicarious . . . analogue[.]” to resentment, a “reaction[.] to the qualities of others’ wills . . . towards others” rather than “towards ourselves”⁴⁶—a kind of “resentment on behalf of another.”⁴⁷ It “rest[s] on” an analogous “demand” to the one resentment rests on: “[T]he demand for the manifestation of a reasonable degree of goodwill or regard . . . towards all

38. *Id.* at 83 (discussing “the fact of our natural human commitment to ordinary inter-personal attitudes”).

39. *Id.* at 83 (“This commitment is part of the general framework of human life, not something that can come up for review as particular cases can come up for review within this general framework.”).

40. *Id.* at 91. Like Strawson, Dressler suggests that these attitudes are an immutable feature of human psychology. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Limits*, 62 S. CAL. L. REV. 1331, 1384 (1988) [hereinafter *Exegesis*].

41. *Freedom*, *supra* note 4, at 77.

42. *See id.* at 76. (“If someone treads on my hand accidentally . . . the pain may be no less acute than if he treads on it in contemptuous disregard . . . or with a malevolent wish to injure me. But I shall generally feel in the second case a kind and degree of resentment that I shall not feel in the first.”); *id.* at 77–78 (no resentment for non-culpable accidents); *id.* at 85 (resentment “involve[s] or “express[es]” “a demand for interpersonal regard. The fact of injury constitutes a prima facie appearance of this demand’s being flouted or unfulfilled,” but a “class of considerations may show this appearance to be mere appearance, and hence inhibit resentment”). This sort of consideration removes resentment because it shows that infliction of injury was “consistent with the agent’s attitude and intentions being just what we demand they should be”—namely, goodwill rather than contempt. *Id.* at 78. Ceasing to resent for these reasons, Strawson says, is “essential and integral” to “ordinary inter-personal relationships” and is “in no way opposed to or outside . . . ordinary reactive attitudes.” *Id.*; *see also* Bennett, *supra* note 23, at 54 (describing accountability “as a matter of degree”). Strawson’s account resonates with Hume’s, which held that we do not experience moral sentiments like blame or approbation regarding actions unless they reveal an underlying motive or character. RUSSELL, *supra* note 2, at 63 (highlighting a “contempt or hatred”); *see also id.* at 112 (quoting DAVID HUME, A TREATISE OF HUMAN NATURE 349).

43. *Freedom*, *supra* note 4, at 77.

44. *Id.* at 90; RUSSELL, *supra* note 2, at 138 (quoting DAVID HUME, A TREATISE OF HUMAN NATURE 591). As Russell points out, Hume had a similar view, for similar reasons: Hume “argue[d] that our moral sentiments naturally give rise to ‘benevolence or anger; that is, with a desire of making happy the person we love, and miserable the person we hate.’”

45. *Freedom*, *supra* note 4, at 83.

46. *Id.*

47. *Id.* at 84.

men.”⁴⁸ Like resentment, it has an essentially social aspect: it is a reaction we can only have to someone who is “a member of our moral community,” for we only make this demand of the moral community’s members.⁴⁹ And like resentment, it involves at least some inhibition or withdrawal of goodwill toward the offender, some acquiescence in the offender’s being made to suffer, and some reduction in the demand that the offender be spared suffering.⁵⁰

On this account, then, we are intrinsically social creatures who care deeply about the attitudes others have toward us, and, as a result, we naturally have strong and distinctive reactions—resentment and indignation—when others act in ways that show contempt or disregard toward us or toward other members of our community. This is the reactive prong of the reactive-objective model.

2. The Objective Prong of the Reactive-Objective Model

While our normal response to wrongdoing involves reactive attitudes, the reactive-objective model holds that there is a second sort of response we can have to wrongdoing, one that emerges in a special sort of case. In these special cases, we “suspend” or “abandon” “our ordinary reactive attitudes”⁵¹ and view the wrongdoer in a more detached way. Strawson famously called this alternative response the “*objective attitude*.”⁵²

The objective attitude is an impersonal and naturalistic⁵³ attitude, one in which we regard the wrongdoer as a natural phenomenon to be observed, understood, or controlled. In the objective attitude:

[We] achieve a kind of detachment from the . . . natural attitudes
and reactions . . . and . . . view another person . . . in a purely

48. *Id.*; see also *id.* at 90. Indeed, “[t]he making of the demand” is nothing but “the proneness to” moral indignation.

49. *Id.* at 90. It is, that is, a reaction we have to someone who is subject to the community’s demands (a member of the community) and has offended against them.

50. *Id.* (moral indignation entails a “modification . . . of the general demand that another should, if possible, be spared suffering,” the effect is “proportion[al] to what is felt to be the magnitude of the injury and to the degree to which the agent’s will is identified with, or indifferent to, it”); Bennett, *supra* note 23, at 67–68. Bennett elaborates on this point, contending that moral indignation (“vicarious resentment”) “involves . . . hostility or ill-will towards its object; and this makes us less unwilling for its object . . . to be hurt in the interests of the greater good.” It “has the same human roots as the desire for vengeance.”

51. *Freedom*, *supra* note 4, at 78, 79; see also *Exegesis*, *supra* note 40, at 1331, 1359 (“[J]ust as we do not blame the pit bull who kills . . . the insane person or similarly excused actor is immune from moral blame . . . [because we] ‘suspend our ordinary reactive attitudes’ . . . We . . . do not feel the type of anger that results in blame.”).

Although the objective attitude involves abandoning the reactive attitudes, it does not entail abandoning all feeling. Rather, as Strawson later explained, we may still “rejoic[e] or regret,” even if we do not feel “gratitude or resentment.” *Skepticism*, *supra* note 22, at 32.

52. *Freedom*, *supra* note 4, at 79 (emphasis added).

53. See *Skepticism*, *supra* note 22, at 35 (suggesting that the objective attitude “might better be called ‘the purely naturalistic’” view).

objective light . . . [We] see . . . others simply as natural creatures whose behavior . . . we may seek to understand, predict, and perhaps control in just such a sense as that in which we may seek to understand, predict, and control the behavior of nonpersonal objects in nature.⁵⁴

In this stance, we see the other “as an object of social policy . . . as something . . . to be managed or handled or cured or trained [or] . . . avoided,”⁵⁵ as “posing problems simply of intellectual understanding, management, treatment, and control.”⁵⁶

According to the reactive-objective model, this objective attitude arises naturally⁵⁷ in two sorts of cases. In the first, the wrongdoer’s normal psyche was temporarily disrupted at the time of the act—he was “not himself”—as in cases of post-hypnotic suggestion.⁵⁸ In these cases, we continue to have reactive attitudes toward the actor in general, but we take the objective attitude regarding the action committed during the period of disruption.⁵⁹ In the second sort of case—which Strawson deems of much greater importance—the wrongdoer is psychologically unfit for social relations.⁶⁰ We shift to this attitude when the wrongdoer is “psychologically abnormal”⁶¹—“warped or deranged, neurotic or just a child,” “compulsive in behaviour or peculiarly unfortunate in his formative circumstances,”⁶² a person “whose picture of the world is an insane delusion,” or “whose behaviour[] is unintelligible to us . . . in terms of conscious purpose[],” or “wholly lacking . . . in moral sense.”⁶³ In these cases the wrongdoer’s

54. *Skepticism*, *supra* note 22, at 34; see also *Freedom*, *supra* note 4, at 81 (explaining that in the objective attitude we deal with others “without any degree of personal involvement, treating them simply as creatures to be handled in our own interests, or our side’s, or society’s—or even theirs”); *id.* (“For reasons of policy or self-protection, we . . . concentrate . . . on understanding ‘how he works.’”); Bennett, *supra* note 23, at 53–55 (emphasizing that the objective attitude involves an inquiry into explanations for human acts).

55. *Freedom*, *supra* note 4, at 79.

56. *Id.* at 86; see also *Skepticism*, *supra* note 22, at 40 (we can see people “simply as objects and events in nature, natural objects and natural events, to be described, analyzed, and causally explained in terms in which moral evaluation has no place; in terms, roughly speaking, of an observational and theoretical vocabulary recognized in the natural and social sciences, including psychology”).

57. *Freedom*, *supra* note 4, at 77; see also *Skepticism*, *supra* note 22, at 34 (in some cases, the objective attitude is “more or less forced upon us, or is at least felt to be itself humanly natural.”). Russell interprets Strawson to hold that the objective attitude is not just natural, but mandatory in these cases. Paul Russell, *Strawson’s Way Of Naturalizing Responsibility*, in *FREE WILL AND THE REACTIVE ATTITUDES* 143, 145 (Michael McKenna and Paul Russell, eds., 2009) (characterizing Strawson as holding that in such cases “we must—we are rationally and morally required to—adopt the objective attitude”).

58. *Freedom*, *supra* note 4, at 78.

59. *Id.* (“We shall not feel resentment against the man he is for the action done by the man he is not.”).

60. *Freedom*, *supra* note 4, at 79.

61. *Id.*; see also *Skepticism*, *supra* note 22, at 34 (the objective attitude is “humanly natural” in cases where the other suffers from “extreme abnormality,” e.g., “someone who is quite out of his mind”); McKenna and Russell, *supra* note 33, at 145 (describing the phenomena that trigger the objective attitude).

62. *Freedom*, *supra* note 4, at 79.

63. *Freedom*, *supra* note 4, at 86. As critics have pointed out, there is an important ambiguity or

abnormality or deficiency leads us to suspend the usual demand for goodwill,⁶⁴ and thus inhibits our participant and moral reactive attitudes.⁶⁵ He is not suitable for ordinary social relations, so we do not subject him to the usual social expectations and demands and do not have participant or vicarious reactive attitudes toward him. And without our normal social reactions, we are left seeing him the same way we see the rest of the natural universe: objectively.⁶⁶

Because the objective attitude involves the suspension of the reactive attitudes, and because those attitudes are essential to ordinary human relationships, the objective attitude is incompatible with ordinary human relationships: “[I]t cannot include the range of reactive feelings and attitudes which belong to involvement or participation with others in inter-personal human relationship; it cannot include resentment, gratitude, forgiveness, anger, or the sort of love which two adults can sometimes be said to feel reciprocally, for each other.”⁶⁷

As a result, it is impossible or intolerable for social creatures like us to take the objective attitude in any general or sustained way. While we can

unappreciated shift in how Strawson describes these cases. At some points, he suggests that “abnormality” triggers the objective attitude; at other points, he suggests that it is “incapacity” that triggers the objective attitude. See RUSSELL, *supra* note 2, at 153–54; McKenna and Russell, *supra* note 35, at 30.

64. *Freedom*, *supra* note 4, at 86.

65. *Id.* at 79; see also *id.* at 86 (“It tends to inhibit resentment because it tends to inhibit ordinary interpersonal attitudes in general, and the kind of demand and expectation which those attitudes involve”); *id.* at 79 (suggesting that in these cases, objectivity is a “natural” response: it is the attitude we “naturally tend to fall into . . . where participant attitudes are . . . inhibited by abnormalities.”).

66. *Freedom*, *supra* note 4, at 82 (“[O]ur adoption of the objective attitude is a consequence of our viewing the agent as incapacitated in some or all respects for ordinary inter-personal [sic] relationships”); see also *id.* at 81–82 (“In the extreme case of the mentally deranged, it is easy to see the connection between the possibility of [taking] a wholly objective attitude and the impossibility of . . . ordinary inter-personal [sic] relationships”); McKenna and Russell, *supra* note 33, at 77; Bennett, *supra* note 23, at 54 (summarizing Strawson’s argument as follows: because the reactive attitudes “get their value from their role in normal, adult, interpersonal relations . . . it is inappropriate to have such feelings towards someone whose youth, mental ill-health, etc., incapacitates him . . . for such relations”); McKenna, *supra* note 33, at 204 (Strawson equates “incapacity for adult interpersonal relationships” with “incapacity for responsible moral agency”).

As several friendly critics have pointed out, Strawson does not say much about what the capacities necessary for adult interpersonal relationships are. See, e.g., McKenna, *supra* note 33, at 204. Some of these critics have endeavored to fill the gap. See, e.g., Watson, *supra* note 31; McKenna, *supra* note 33. McKenna, for example, suggests that the capacity required is the “capacity for membership within the moral community.” *Id.* at 207. This, in turn, might require the “capacity for moral address,” “the capacity to be seen as a potential interlocutor in our interpersonal exchanges.” *Id.* at 204, 207. And this might require “sharing” in, or at least “understanding,” the community’s “moral framework.” *Id.* at 204–05, 207–09.

67. *Freedom*, *supra* note 4, at 79. As a number of commentators have noted, Strawson’s argument here does not seem complete. Strawson fails to provide a clear explanation for why the objective and reactive stances are at odds. Bennett, *supra* note 23, at 63. The “fundamental opposition between the ‘objective’ and the ‘participant’ stances” does not adequately account for the fact that we may experience “personal, emotional response or engagement” toward another even if we do not have reactive attitudes toward him. McKenna and Russell, *supra* note 33, at 25. Indeed, Strawson himself recognizes that the “simple opposition of objective attitudes on the one hand and the various contrasted attitudes which I have opposed to them must seem as grossly crude as it is central.” *Freedom*, *supra* note 4, at 88.

summon such an attitude for a brief period of time⁶⁸—perhaps as a “refuge” if we wish to escape “the strains of involvement” with another⁶⁹—“we cannot, in the normal case, do this for long, or altogether,”⁷⁰ for “[a] sustained objectivity of inter-personal attitude” would entail an isolation that we, as social creatures, would not be able to bear.⁷¹

The objective attitude, then, is an alternative to our normal reactive attitudes, arising in those special cases where we suspend the expectations we have for participants in human social life. It is the natural response of social creatures to beings (temporarily or persistently) unfit for social life. This is the second prong of the reactive-objective model.

3. A Bifurcated Psychology

The reactive-objective psychological model, then, paints us as susceptible to two very different sorts of reactions to wrongdoers: reactive attitudes and the objective attitude. The reactive attitudes spring naturally from our fundamentally social nature, by virtue of which we feel resentment and indignation regarding social actors who violate normal interpersonal and communal expectations. The objective attitude is the natural response of fundamentally social creatures to persons who are not fit for social life. Together, they map the full range of responses that creatures like us have to wrongdoers.

B. From the Reactive-Objective Model to an Account of Excuse

This reactive-objective psychological model is the foundation⁷² for the objectification account of the excuses.⁷³ On this account, our

68. *Freedom*, *supra* note 4, at 79–80; *Skepticism*, *supra* note 22, at 34. See also *Freedom*, *supra* note 4, at 90 (“[I]t is possible to cultivate an exclusive objectivity”); RUSSELL, *supra* note 2, at 146 (characterizing Strawson as holding that the objective attitude is sometimes “an available option, which we may choose to adopt if we wish, though we are not required to do so”).

69. *Freedom*, *supra* note 4, at 79–80, 86.

70. *Id.* at 80. See also *Skepticism*, *supra* note 22, at 34 (we can only do this “temporarily”).

71. *Freedom*, *supra* note 4, at 80–81. See also *Skepticism*, *supra* note 22, at 34 (“the price” of maintaining this attitude “for very long” “would be higher than we are willing, or able, to pay”; “the loss of all human involvement in personal relationships, of all fully participant social engagement.”). As Bennett puts it, Strawson suggests that sustained objectivity “is barely conceivable and wholly repellent.” Bennett, *supra* note 23, at 53.

72. In traveling from its psychological model to claims about the criteria for excuse, the objectification account makes what appears to be a naturalist move, traveling from observations about actual human psychology to claims about the moral criteria for excuse. On such moves, see generally RUSSELL, *supra* note 2. Such moves are open to a number of important objections. For the purposes of this paper, however, I will put those objections to one side and, accepting *arguendo* that the naturalist move could in theory identify the criteria of excuse, I will argue that this move has not been correctly performed.

73. Although this account is most strongly associated with moral philosophy, it has also had a strong influence on leading criminal theorists. See, e.g., *Exegesis*, *supra* note 40, at 1384 (“[t]he immutable reality is . . . that we possess these feelings [the reactive attitudes]. . . . It would be wrong, and ultimately self-defeating, to develop and enforce rules of criminal responsibility alien to these reactions”;

responsibility attribution practices “are expressions of our moral attitudes,”⁷⁴ and “the practice of holding responsible” is “*constitut[ed]*” by the reactive attitudes.⁷⁵ Thus, on this view, we blame those who act with disregard or malevolence when we experience the reactive attitudes toward them, and we excuse when we take the objective view.

If this is right, then we can identify the conditions for blame and excuse by observing the factors and circumstances present where we have or suspend the reactive attitudes. We blame when we feel moral indignation or resentment regarding another person’s wrongful act.⁷⁶ We experience these reactive attitudes regarding a wrongful act when the act manifests disregard or malevolence on the part of the actor and the actor is a fit target for the normal social demand for goodwill.⁷⁷ These, then, are the conditions for blame.

We can derive the conditions for excuse in a similar way.⁷⁸ According to the objectification account, there are some cases in which we relate to the actor reactively, but do not experience resentment or indignation toward the actor because we see that despite inflicting injury, she did not do so out of disregard or malevolence.⁷⁹ (This can happen in cases of non-culpable accident, for example.)⁸⁰ Our reactive machinery remains engaged, but the offensive attitude that normally triggers resentment and indignation is not present in the actor.⁸¹ As a result, we do not blame the actor.⁸²

In other cases, we excuse because we take an objective view of the actor, suspending our reactive attitudes and viewing her like a natural phenomenon.⁸³ We do this in a selective or limited way in cases where the actor suffered a temporary psychological disruption at the time of the act, such that she was “not herself.”⁸⁴ (This can happen in cases of post-hypnotic

to override these reactions would be to “run afoul of our natural reactions to wrongdoing”).

74. *Freedom*, *supra* note 4, at 93; *see also id.* at 92 (blaming and punishing are “in part, the expression” of these “human attitudes”).

75. Watson, *supra* note 31, at 227 (in Strawson’s account, reactive attitudes are “constitutive of the practice of holding responsible”). On this view, what we call holding responsible is, in fact, a “natural human reaction[.]” to the attitudes others have toward us, an “expression[.] of certain rudimentary needs and aversions [arising from] . . . ‘the demand for the manifestation of a reasonable degree of good will [sic] or regard.’” Watson, *supra* note 31, at 222 (quoting *Freedom*, *supra* note 4, at 84); *see also Skepticism*, *supra* note 22, at 79 (blaming and punishing are “in part, the expression” of these “human attitudes”).

76. *Skepticism*, *supra* note 22, at 79 (blaming and punishing are “in part, the expression” of these “human attitudes”).

77. *See supra* Part II.A.

78. *See McKenna*, *supra* note 31, at 202 (extracting “local” and “global” excuses from Strawson’s account).

79. *See supra* Part II.A.2.

80. Strawson also suggests that this is why we do not blame in cases of justified action. In such cases, the actor’s good reasons for acting dispel the impression that the actor acted from disregard or malevolence. Watson, *supra* note 31, at 222–23.

81. *Freedom*, *supra* note 4, at 79.

82. *Id.*

83. *Id.*

84. *Id.* at 78.

suggestion, for example.)⁸⁵ In such cases, we take the objective attitude toward acts committed during the psychic disruption, and thus excuse those acts.⁸⁶

In another sort of case, we take the objective attitude in a general or comprehensive way.⁸⁷ We do this in cases where the actor is so psychologically abnormal that she cannot participate in normal human relationships at all.⁸⁸ In these cases, we cannot hold her to normal social expectations, and thus we do not have reactive attitudes regarding any of her acts.⁸⁹ This is why infants are generally exempt from blame: they lack the basic capacities necessary for participation in normal adult relationships, so we see them objectively rather than reactively, and therefore excuse them.⁹⁰ It is the reason why people of subnormal intelligence are excused: they too lack the basic capacities necessary for participation in normal adult relationships, such that their wrongs do not trigger resentment or moral indignation in us.⁹¹ And it is why those who are seriously mentally ill are excused: pervasive misperception, delusion, confusion, or irrationality leaves them unable to participate in normal adult relationships, such that we do not hold them to the usual requirements for goodwill and regard.⁹²

In this sense, then, the objectification account's psychological model gives us the basis for an account of the excuses. One especially important implication of this account is that an agent will be excused if she is the sort of person toward whom we naturally take the objective attitude—meaning that, due to psychological abnormality or deficiency, she lacks (temporarily

85. *Id.*

86. *Id.*

87. *Id.* at 79.

88. *Id.*

89. See *Exegesis*, *supra* note 40, at 1357–58.

90. *Id.* at 1357 (stating that “in cases of insanity [or] infancy . . . the wrongdoer is blameless because he substantially lacked the capacity for free choice”).

91. *Id.*

92. For examples of this sort of reasoning in criminal theory, see, e.g., Michael Moore, *Causation and the Excuses: Justifying the Excuse and Search for Its Proper Limits*, 73 CAL. L. REV. 1091, 1137 (1985) (because the insane lack rationality, they are “no more proper subjects of moral evaluation than are young infants, animals, or even stones”); Sanford Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 280 (1987) (the insanity defense is “fundamental” because “blaming” “insane people” “commits an anomaly . . . similar to that entailed in blaming a rock for falling or a dog for barking”); *id.* at 284 (rejecting the rotten social background excuse because evidence of such background does not show the defendant to be a person “whose powers of judgment and rational action have been so destroyed that he must be dealt with like an infant, a machine, or an animal”); *Exegesis*, *supra* note 40, at 1331, 1357–58 (we excuse in cases of insanity and infancy because such “disability” prevents a person from being “a responsible moral agent” or a “member of the moral community”).

Dressler once also echoed this sort of reasoning (albeit, blending this reasoning with ideas about compassion and excuse that he subsequently rejected). As Dressler wrote, we excuse an insane person because he “is not a ‘whole’ human being. We sense this inadequacy in the mentally ill person. We feel sorry for him. We try to reduce his suffering his suffering by freeing him from blame.” *Excusing*, *supra* note 5, at 682. (In passages like this, Dressler appears to blend elements of an objectification account of the excuses with elements of a nascent identification account. This was an awkward fit, and the awkwardness may help explain why he so quickly abandoned his compassion-based account of the excuses.).

or persistently) the capacities necessary for participation in normal human relationships. In the absence of this capacity, we cannot expect her to understand or comply with the demand for goodwill and regard, and we therefore will not have participant or moral reactive attitudes toward her when she fails.⁹³ Instead, we will view her objectively, as a phenomenon rather than a person, and excuse her.⁹⁴

III. The Identification Account of Excuse

The objectification account supplies a robust naturalist explanation of our excusing practices, anchoring those practices in our deeply social nature and in two sorts of attitudes that arise from that nature. Nevertheless, I will argue that this account has a serious flaw: its bifurcated psychological model fails to account for an important psychological phenomenon, one that is pertinent to our excusing practices.

What the model overlooks is our susceptibility to “identification,”⁹⁵

93. *Freedom*, *supra* note 4, at 79–80.

94. *Id.*

95. The term “identification” has acquired a multitude of meanings in popular and academic use, with its usage depending on context and audience. One thesaurus, for example, associates the term with the set of concepts including “understanding, relationship, involvement, unity, sympathy, empathy, rapport, fellow feeling.” COLLINS THESAURUS OF THE ENGLISH LANGUAGE (2002). A widely used dictionary defines identification as “[a] person’s association with or assumption of the qualities, characteristics, or views of another person or group.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). Another defines it as “psychological orientation of the self in regard to something (as a person or group) with a resulting feeling of close emotional association” or “a largely unconscious process whereby an individual models thoughts, feelings, and actions after those attributed to an object that has been incorporated as a mental image.” MERRIAM-WEBSTER ONLINE DICTIONARY (2012) <http://www.merriam-webster.com/dictionary/identification> (last visited Feb. 5, 2012).

As discussed more fully below, I use identification in this Article in a way that tracks one common use. On this use, identification describes a particular psychological phenomenon, having both cognitive and emotional aspects, in which one person judges and experiences another person to be similar to himself in a way or ways important to his sense of self or identity. For various illustrations of this use, see, e.g., Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995); Lisa A. Crooms, *Stepping Into the Projects: Lawmaking, Storytelling, and Practicing the Politics of Identification*, 1 MICH. J. RACE & L. 1 (1996); Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLINICAL L. REV. 135 (2002); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983 (2000).

Finally, it may be useful to distinguish two alternative uses of the term “identification.” First, the term is sometimes used to describe a facet of the parent-child relationship—namely, the child’s identification with the parent. In this context, identification appears to take on an aspirational aspect. An essential feature of the identification is that the child aspires to be like the parent (and thus, for example, models her behavior after the parent’s). (The term is sometimes used analogously in relation to other sorts of stratified relationships.) See, e.g., 22 SIGMUND FREUD, *The Dissection of the Psychical Personality*, in THE STANDARD AND COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 63–65 (James Strachey ed. and trans.) (discussing identification with the parent and its relation to development of the super-ego). I do not use identification in this sense in this Article. The sort of identification I describe does not necessarily entail the aspiration to be like another person. Second, the term is sometimes used to describe an attitude a person can have toward a social group or institution—namely, an allegiance or loyalty to that group or institution. See, e.g., Christina Bicchieri, *Social Norms*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, March 30, 2012, <http://plato.stanford.edu/entries/social-norms> (discussing identification with social groups). We might use the term this way if we say that a person identifies with the Republican

a natural corollary to our social nature and a vital feature of human psychology. In this Part, I flesh out the concept of identification and explain the connection between identification and excuse.

A. What is Identification?

It is sometimes said that the *Catcher in the Rye* was so influential because adolescents “identified” with the protagonist Holden Caulfield.⁹⁶ Sarah Palin made such a splash during the 2008 national elections because many Americans found her easy to “identify” with.⁹⁷ Most teachers can identify with a colleague who dreams her lecture notes turn to gibberish while she is teaching.⁹⁸

As these examples suggest, we often use the term identification to describe a particular attitude we can have toward another person. Here, I give an account of this attitude. On this account, identification is a complex psychological phenomenon having both cognitive and emotional components: it is triggered by certain judgments, and these judgments activate certain feelings. It is also a natural fit for our social nature.

1. The Triggering Judgment: Similarity

Identification is triggered by a judgment that another person is similar to oneself. I identify with Holden Caulfield because I believe that he has an attitude toward authority figures—that they are phonies—that I believe I have too. I identify with Sarah Palin because photographs of Palin holding a beer and smiling suggest she enjoys letting her hair down, just as I think I do. In each case, I identify with another because I judge that the other is similar to me in that the other has features that I have too.

Some similarities seem stronger to us than others, and this influences the strength of identification. I see myself as more like the teacher with gibberish notes than I am like Holden Caulfield, and more like Caulfield than

Party, or identifies with a clique in his school. I do not use identification in this sense here, at least insofar as this sort of identification does not depend upon a judgment of interpersonal similarity.

96. Jennifer Schuessler, *Get A Life, Holden Caulfield*, N.Y. TIMES, June 20, 2009, at WK5 (observing that while adolescents once identified with Salinger’s protagonist, they are less likely to do so today).

97. See, e.g., Yuval Levin, *The Meaning Of Sarah Palin*, COMMENTARY MAGAZINE (February 2009), <https://www.commentarymagazine.com/viewarticle.cfm/the-meaning-of-sarah-palin-14674?page=all> (last visited Feb. 5, 2012) (“Republicans tend to identify with the traditional values, unabashedly patriotic, anti-cosmopolitan, non-nuanced Joe Sixpack. . . . It was this sense, this feeling, that Sarah Palin channeled so effectively”). Christina Hager, *Hockey Moms Identify With Sarah Palin*, WBZ 38 (August 30, 2008), <http://wbztv.com/local/vice.president.running.2.806738.html> (last visited April 5, 2010) (quoting approving prospective voters: “She’s really a regular person, you know, just like most of us. She feels the same way that we feel”; “I’m a mother of four, I can kind of relate to what her day is like”).

98. See, e.g., ELAINE SHOWALTER, TEACHING LITERATURE 1–2 (2003) (recounting several teachers’ teaching anxiety dreams, including several dreams where notes are unfamiliar or otherwise useless).

Sarah Palin. As a result, I identify more strongly with the teacher than with Caulfield, and more strongly with Caulfield than with Palin. Thus, similarity judgments vary in strength, and the intensity of identification varies with the strength of the similarity.

What determines the strength of the similarity? Sometimes similarity strength seems to have a quantitative dimension—as though it depends on the *number* of shared features we have. This might be what happens when a tween boy notices that he shares a laundry list of traits with the hero of *Diary of a Wimpy Kid*⁹⁹ and thinks “he is *just like me*.” More often, strength of similarity lies in something qualitative. I might say that I am “very similar” to another person if we share characteristics that I consider important in my account of myself. Even if you and I are very different in most ways, I may consider you a kindred spirit if you survived the same harrowing battle in the war or if we share a strong conviction regarding an important moral issue. Along comparable lines, similarity seems stronger when we share a *vivid* trait (a flamboyant temper) rather than a pallid one; when we share an especially unusual or *distinctive* feature (a severe physical disability) rather than a common or universal one; and when we share an *easy to conceptualize* characteristic (an intense fear of heights) rather than one for which there is no easily accessed schema. In short, the strength of similarity normally depends on whether the similar features are important, vivid, distinctive, or easy to conceptualize.

Finally, given the foregoing, the sense of similarity and (thus) the experience of identification are especially likely to be strong when we encounter richly detailed narratives regarding other persons. Such narratives offer multiple points of comparison, making it more likely that significant similarities will be identified. Such narratives also (typically) foreground the other person’s most vivid and distinctive traits and organize those traits into accessible schemas, further facilitating and intensifying the identification-generating similarity judgment.

2. Triggered Feelings—Other-Affirming and Self-Affirming

Identification is not just a similarity judgment, for the similarity judgment triggers an array of important feelings that are part and parcel of the experience of identification. Some of these feelings are other-affirming, and some are self-affirming.

One of the primary *other-affirming* feelings associated with identification is *empathy*.¹⁰⁰ Upon determining that the other is similar to the

99. JEFF KINNEY, *DIARY OF A WIMPY KID* (2007).

100. Empathy is defined in several competing ways. See, e.g., Robert M. Gordon, *Empathy*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 261 (Robert Audi ed., 2d ed. 1999); Ellen Berscheid and Harry T. Reis, *Attraction and Close Relationships*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 193, 229–30 (Daniel Gilbert, Susan Fiske, & Gardner Lindzey eds., 4th ed. 1998) (discussing multiple definitions of empathy and how empathy affects relationships); C. Daniel Batson, *Altruism and Prosocial Behavior* 304, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 304–05 (4th ed., Daniel Gilbert, Susan Fiske, & Gardner

self, we come to empathize with the other.¹⁰¹ The perception of similarity draws us, imaginatively, into his shoes,¹⁰² and we come to experience his feelings as our own.¹⁰³ If he appears to be sad, we feel sad too.¹⁰⁴

Identification also involves the related response of *sympathy*.¹⁰⁵ Seeing the other as similar to myself, I feel a greater concern for her well-being and a stronger desire that she be happy.¹⁰⁶ I become more likely to have compassionate or merciful impulses toward her and to pity her suffering,¹⁰⁷ and less likely to have punitive, retaliatory, or destructive

Lindzey, 1998) (exploring various ideas of what empathy is and disagreements over the nature of empathic feelings). Some definitions focus on a primarily emotional phenomenon—"empathic concern." Bersheid & Reiss, *Attraction and Close Relationships*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra*, at 193, 229–30. This entails "feeling the same way that an observed other is feeling—or something very like it." Batson, *supra*, at 304. Other definitions focus primarily on a cognitive phenomenon—"perspective taking," which entails "the tendency to seek to understand the circumstances from another person's viewpoint" or "the attempt by one . . . self to comprehend unjudgmentally the positive and negative experiences of another self." Bersheid & Reiss, *supra*, at 229–30; *see also* Batson, *supra*, at 304 ("the cognitive process of seeing a situation from another person's perspective"). In addition, the term empathy is sometimes defined more broadly to encompass sympathy, a "heightened awareness of the suffering of another person as something to be alleviated," Bersheid & Reiss, *supra*, at 229 (internal citation omitted), or "feeling not *as* the other feels but *for* the other," Batson, *supra*, at 304. In this Article, I use the term empathy broadly, understanding it to entail both the cognitive and emotional features described above, but I do not use it to encompass sympathy, which I discuss separately, below.

Some accounts of empathy, then, emphasize its cognitive features; these accounts emphasize that the empathizer comes to perceive circumstances in a way similar to the way the empathizee perceives those circumstances. Other accounts emphasize empathy's emotional features: these accounts emphasize that the empathizer comes to feel the emotions of the empathizee. And still others fold another emotional experience – sympathy – into the definition of empathy. Batson, *supra*, at 282–316. In this Article, I use the term empathy broadly, understanding it to entail both the cognitive and emotional features described above, but I do not use it to encompass sympathy, which I discuss separately, below.

101. Perceptions of similarity catalyze empathy. *See, e.g.*, SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 335 (1991) (internal citations omitted) ("People empathize with another person's perspective when both are in the same mood, have similar personalities, share cooperative goals, or take the role of the other.").

102. Robert M. Gordon, *Empathy*, in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 261 (2d ed., Robert Audi ed., 1999) (defining empathy in part as "imaginative projection into another person's situation"); THOMAS GILOVICH, DACHER KELTNER, & RICHARD E. NISBETT, SOCIAL PSYCHOLOGY 545 (2006) (when empathizing with another, "we imagine what their experience is like").

103. *See, e.g.*, FISKE & TAYLOR, *supra* note 101, at 334–35 ("Empathy is defined as the ability to share in another's feelings."); GILOVICH ET AL., *supra* note 102, at 545 (empathy entails "feeling and understanding what that person is experiencing"); Gordon, *supra* note 102, at 261 (defining empathy in part as "vicarious capture of [another's situation's] emotional and motivational qualities").

104. GILOVICH ET AL., *supra* note 102, at 545 ("[W]e respond to others' distress with our own distress.").

105. Sympathy is a "heightened awareness of the suffering of another person as something to be alleviated," Bersheid & Reiss, *supra* note 100, at 229 (internal citation omitted), or "feeling not *as* the other feels but *for* the other." Batson, *supra* note 100, at 304. Sympathy is associated with compassion, tenderness, and "motivation with an ultimate goal of benefiting the [other] person." Batson, *supra* note 100, at 300. Fletcher and Dressler both associate compassion with something like identification. FLETCHER, *supra* note 5, at 808 (associating compassion with "recogniz[ing] our essential equality with the accused and identify[ing] with his situation.").

106. Batson, *supra* note 100, at 304 (noting the theory that "sympathy emerges out of empathy"); GILOVICH, ET AL., *supra* note 102, at 545 (when empathizing, "we are motivated to have that person's needs addressed, to enhance that person's welfare.").

107. *See, e.g.*, Bersheid & Reiss, *supra* note 100, at 229–30 (sympathy involves awareness of the

thoughts and feelings about her.¹⁰⁸ I will want to protect and help her.¹⁰⁹

Intertwined with empathy and sympathy is a kind of *appreciation*.¹¹⁰ Seeing the other as similar amplifies the other's value to me, not only because I am likely to have a positive view of myself (such that attributing my features to him makes him seem "better") but also because we often find our own traits attractive and appealing in others.¹¹¹

Alongside these other-affirming feelings, the similarity judgment triggers a set of *self-affirming* ones. Some are feelings of *affiliation* or connection. To see another as like myself can make me feel that I am a member of a set or group (insofar as there are others "out there" like me). More particularly, I am part of a dyad—there is an important actual or potential link between me and another person. As deeply social creatures, we welcome (even cherish) the discovery of such connections between ourselves and other people. They buttress us against isolation, validate and normalize our thoughts and experiences,¹¹² and help confirm our fitness for interpersonal relations and social life generally.

Finally, the similarity judgment gives us a sense of *competence*. In identifying the similarity, we begin to organize the chaotic jumble of data we have about the other person. Moreover, the similarity encourages us to look for other features of the self in the other. (Seeing some of the features of my self-schema in the other, I have reason to check for other features of that schema.)¹¹³ We feel a "spark of recognition," marking the move from uncertainty to knowledge and the reestablishment of a social facility that is especially important to social creatures like us.

other's suffering and the sense that his suffering should be alleviated, and therefore "enhances helping and other prosocial behaviors" and "supportiveness"); Batson, *supra* note 100, at 300–01 (empathic and sympathetic attitudes increase helping behavior and involve the "ultimate goal of reducing the other's suffering"); *Excusing*, *supra* note 5, at 682 (the compassion triggered by a sense of affinity makes us "aware of the other's pain or distress" such that we "desire to alleviate it"). This passage appears in Dressler's argument that excuse is associated with compassion. Dressler subsequently repudiated this argument.

108. See, e.g., Bennett, *supra* note 23, at 66–67 (discussing sympathy and punishment).

109. See, e.g., GILOVICH, ET AL., *supra* note 102, at 538, 549 (noting the relationship between similarity judgments and helping behavior: "people are more likely to help others who are similar to themselves").

110. See GILOVICH, ET AL., *supra* note 102, at 538.

111. See, e.g., *id.* (noting that "interpersonal attraction . . . is enhanced by similarity," and that such attraction "is also likely to increase helping behavior").

112. We sometimes say, triumphantly, "See, it is not just me!" or "I knew I was not the only one who thought that," as though the fact that another shares our thoughts, feelings, traits, or experiences adds to their validity or confirms that we are not abnormal or deviant.

113. Of course, we can recognize and categorize others' traits even if we do not identify with them. But recognition and categorization are especially powerful when they are intertwined with identification, for we are more likely to feel that we have deep knowledge about another if we think we have discovered that they are similar to ourselves—on the premise that we know ourselves more deeply than we know others.

3. Identification as a “Connective Attitude”

Identification, then, begins with a comparison between oneself and another person, and a judgment that the other person is similar to the self in some significant way. This judgment, in turn, triggers an array of distinctive feelings, including empathy, sympathy, appreciation, affiliation, and competence. Taken together, these judgments and feelings constitute identification.

On this account, identification is a natural fit for our deeply social psychology. It makes sense that creatures with fundamentally social characters, a deep concern for the attitudes of others, and a psychic and moral life filled out with participant reactive attitudes would also have a robust susceptibility to identifying with others. It is natural that we scrutinize others and look for points of contact with them. And the feelings associated with identification facilitate and motivate the interpersonal relationships that are so central to the social psyche and the social life. In identification, we come to know the other better, to understand her feelings and attitudes, to care about her well-being, to value her, and to feel affirmed by her. These are motivations to connect with the other, and they equip us to do so more easily and more deeply. Identification, then, can catalyze and drive social connection. It fits seamlessly into our deeply social psychology.

Thus, where the objective attitude takes the other as an alien object, identification moves the other closer to the self. Where the objective attitude atomizes and isolates, identification networks and integrates. Where objectification is fundamentally opposed to social connection, identification is a fundamentally social phenomenon. In this sense, we might call identification a “connective attitude.”¹¹⁴

B. How Identification Can Drive Excuse

With this model of identification in mind, we can now see how identification can drive excuse. First, identification involves feelings and attitudes that tend to diffuse resentful and indignant attitudes. Second, these feelings and attitudes encourage ethical insights that work against resentment and indignation. As a result, the more we identify with a wrongdoer, the more inclined we are to excuse the wrongdoer.

1. Identification Activates Feelings and Attitudes that Diffuse Resentment and Indignation

One way that identification drives excuse is by activating feelings

114. I use this label gesturally, and do not mean to suggest by it systematic categorical distinctions between identification and the reactive or objective attitudes (beyond those already suggested in the text). Thus, for example, I do not mean to suggest that the reactive attitudes lack a connective character—for they indeed play an important role in creating and maintaining interpersonal connections.

and attitudes that tend to diffuse resentment and indignation (the reactive attitudes that drive blame).

For example, the *empathy* integral to identification supplies a strong and visceral counter to resentment and indignation. When we empathize with a person, we are more likely to empathically anticipate and experience the pain they will experience in being the target of resentment and indignation (and the blame and punishment these attitudes drive). The more we stand in the wrongdoer's shoes, the more we feel his anxiety and pain and the more averse we will be to feeling resentment and indignation toward him. We withdraw from these feelings the same way we pull our hand away from a hot stove.

Likewise, the *sympathy* in identification works against resentment and indignation. In sympathizing with him, we see him compassionately, care for his well-being, and want to reduce his suffering. Full-bodied resentment and indignation threaten and frustrate these objectives. Resentment and indignation are, then, in tension with something we want, and this conflict can diminish them and sap their power.¹¹⁵

The *appreciative* aspect of identification has a similar effect. When we identify with another person, we see him more positively. He becomes more attractive, appealing, and valuable. Such positive attitudes do not coexist easily with negative attitudes like resentment and indignation. It is hard to see another person as valuable, appealing, and attractive while at the same time feeling a "withdrawal of goodwill" and a "preparedness to acquiesce in that infliction of suffering"¹¹⁶ on that person. Once again, resentment and indignation are in tension with other significant feelings, and this can sap their energy.

The *affiliative* aspects of identification also work against resentment and indignation. As social creatures we cherish our affiliations with others, which stave off isolation and confirm our normalcy and our fitness for social life. Resentment and indignation threaten these affiliative benefits. Though resentment and indignation may be intrinsic to social relationships, they are also volatile and hurtful feelings, and can drive off or destroy the other. Moreover, marking the other as a transgressor not worthy of goodwill, they strip affiliation of its validating and normalizing value (our affiliation with him, it turns out, does not validate or normalize us after all). Our investment in affiliation, then, may drain the passion from resentment and indignation.

Identification, then, involves an array of feelings and attitudes that do not coexist easily with resentment and indignation. When these feelings

115. Watson notes that sympathy can oppose resentment and indignation. Watson, *supra* note 31, at 244. Fletcher and Dressler note that compassion (one of the products of sympathy) can fuel excuse (though Dressler subsequently withdrew from this view); see FLETCHER, *supra* note 5 at 808; *Excusing*, *supra* note 5, at 682.

116. *Freedom*, *supra* note 4, at 77. As Russell points out, Hume had a similar view, for similar reasons: Hume "argue[d] that our moral sentiments naturally give rise to 'benevolence or anger; that is, with a desire of making happy the person we love, and miserable the person we hate.'" RUSSELL, *supra* note 2, at 138 (quoting DAVID HUME, A TREATISE OF HUMAN NATURE 591).

and attitudes are strong (i.e., when identification is strong), their conflict with resentment and indignation may suck the energy out of those reactive attitudes, diminishing or entirely defusing them. In such cases, blame will evaporate, and we will excuse the wrongdoer.

2. Identification Catalyzes Ethical Insights that Oppose Resentment and Indignation

Identification works against blame in another way too, for in generating the feelings described above, it also catalyzes ethical insights that tend to oppose resentment and moral indignation.

The experience of identification with a wrongdoer is often associated with thoughts like “that could have been me” and “there but for the grace of God go I.”¹¹⁷ These ideas express poetically some of the judgments and feelings we have when we identify, including the thought that we are similar to the wrongdoer in important ways and the empathetic experience of standing in the wrongdoer’s shoes. But these thoughts do something else too, for the realization that “that could have been me” sensitizes us to an array of ethically relevant considerations that are not always accessible to us, and these considerations can undercut resentment and moral indignation.¹¹⁸

For example, realizing that “it could have been me” amplifies our sensitivity to the hostile, threatening, and destructive aspects of resentment and indignation. In realizing that “it could have been me,” we stand in the other’s shoes, and part of standing in the other’s shoes is seeing our attitudes and their consequences from his perspective. In this stance, we see that for the wrongdoer, the suspension of our goodwill and our willingness to see him suffer are hostile¹¹⁹ and hurtful. Resentment and indignation appear as violent and destructive passions, bound up with exclusion and punishment, palpably threatening his psychological and physical well-being.¹²⁰ Seeing

117. Though Watson does not discuss identification, he does describe the related experience of realizing “if I had been subjected to such circumstances, I might well have become as vile.” *Freedom*, *supra* note 4, at 245. Fletcher describes something similar. FLETCHER, *supra* note 5, at 808 (describing the realization we sometimes have that “if any one of us were forced to act at gunpoint or to steal in order to survive, we would do the same,” a realization that leads us to see our “essential equality with the excused”).

118. Though Strawson’s characterization of the reactive attitudes as brute, inevitable feelings might suggest that they would not be influenced by insights and reasons, Strawson and subsequent theorists have generally treated resentment and moral indignation as susceptible to being dispelled by various sorts of realizations and discoveries. *Freedom*, *supra* note 4, at 245. Bennett, for example, suggests that thinking about the causes of a person’s acts “dispels reactive feelings”; “when we contemplate someone’s action as the upshot of deterministic causes . . . our frame of mind encourages questions like ‘what do we have here?’ ‘How did this come about?’ Which naturally goes with the question ‘How can we lessen . . . the chance that this will happen again?’ That objectivity of attitude dispels reactive feelings.” Bennett, *supra* note 23, at 57. Thus, an “intellectual operation can dispel” a reactive attitude. *Id.* at 58.

119. Bennett uses “hostility” to characterize blaming reactions. See Bennett, *supra* note 23, at 52.

120. This characterization of the blaming attitudes is not meant to exclude the view that they also carry potentially positive or reintegrative meaning for the wrongdoer as well. It is only to highlight that whether or not blaming attitudes have such positive implications for the wrongdoer, they also have hostile, threatening, and destructive implications for him.

these features of our blaming attitudes can be like catching a glimpse of our own face in a mirror during a rage—a startling and momentum-checking discovery that we are in the throes of something corrosive to human well-being. A new hesitation about our blaming attitudes might now set in.

In realizing that “it could have been me,” we also see more clearly how deep a role luck plays in who we are and how we act. The thought “it could have been me” expresses the recognition that, had circumstances been different, I could have ended up doing the same thing the wrongdoer did.¹²¹ Though we are quite different, the similarities between us highlight that we are molded from similar clay, and that, had I been placed in the wrongdoer’s circumstances, I might have come out similarly shaped. This, we see, is a matter of luck, in the sense that it is determined by phenomena over which we have no control or influence.¹²² Neither of us had any say in which parents we were born to, which genes met at our conception, whether we grew up in a poor neighborhood or a rich one, whether we were raised in a peaceful village or a war zone, whether a parent died of cancer, whether someone entrusted us to an abusive babysitter, or whether a drunk driver caused us a brain injury. All these things—and an infinity of like things—were given to us by lottery; and everything we do, it appears, can be traced back to our lottery ticket.

Seeing that who we are and how we act is pervasively influenced by luck, in turn, primes serious questions about the propriety of resentment and indignation, and about the fairness of blaming and punishing the wrongdoer.¹²³ If the things that make me an apt target for these reactions are allocated to me arbitrarily, is it not unfair to subject me to them? If a roll of the dice or a deal of the cards determines how blame and punishment will be allocated among us, is that not unfair? Identification puts us in a position to see that the inextricable element of luck bound up with our blaming attitudes

121. Watson describes part of this thought process as an “ontological shudder”: “I might well have become as vile. . . . This thought induces . . . an ontological shudder.” *Freedom*, *supra* note 4, at 245. Though Watson does not discuss the phenomenon of identification, he associates this shudder with identifying thoughts and feelings—“a sense of equality with the other. I too am a potential sinner”; “[t]he awareness that . . . the others are or may be like oneself,” a reaction that opposes “distancing” (and thus presumably involves drawing nearer or assimilation). *Id.* at 245. And, indeed, in a postscript added in 2004 (twenty years after the article was published), Watson comes even closer to invoking identification, reporting that at the time of his villain’s death, it was apparent that “he was one of us.” *Id.* at 259. Fletcher also connects the realization that “we would do the same” with a sense of our “essential equality” with the wrongdoer. FLETCHER, *supra* note 5, at 808.

122. It is, as Bennett suggests, a matter of “ultimately hands that were dealt to him by God or nature.” And this realization, says Bennett, tends to undermine the impulse to blame. Bennett, *supra* note 23, at 55.

123. *Id.* at 56 (“many people . . . hold that if a person is as God or nature made him, and if how he is determines what he does, then it is ‘in some ultimate sense hideously unfair’ that he should be blamed for bad things that he does,” quoting Bernard Williams, *Morality and the Emotions*, in *PROBLEMS OF THE SELF* 207, 207–09 (1973)); *Freedom*, *supra* note 4, at 245–46 (noting that concerns about moral luck undercut blaming reactions).

Watson does not identify fairness problems, but points to problems of standing. If I would have been “as vile” as the wrongdoer had I been exposed to the same formative influences, perhaps I do not have standing to blame him? *Id.* at 245–46.

and practices raises serious fairness concerns about those attitudes and practices. Again, we come upon reasons for hesitation. Seeing how deeply luck invades these attitudes and practices may dampen our taste for them.¹²⁴

Finally, realizing “it could have been me” sensitizes us to the possibility that resentment and indignation direct our passionate reactions to wrongdoing at the wrong target. Standing in the other’s shoes, we become more sensitive to the way the particular circumstances of the other’s life have channeled the other to his wrongdoing.¹²⁵ We appreciate more deeply the role that grinding poverty played in his conduct, the impact of the babysitter’s abuse, and the power of the peer group’s incessant threats and commands. And as we come to imagine and appreciate these influences, it is natural for our attitude toward the wrongdoer to change.¹²⁶ Before we stood in his shoes, we were satisfied to identify him as the source of the offense or injury and to direct our negative reactions against him alone. But now, seeing from his vantage all the forces and circumstances that channeled him to his wrongdoing and seeing how he is but the last link in a web of chains pervading his personal history and converging at the moment of his wrongful act, it seems stranger to focus all our attention on him. In an important way, he is not the source of the wrongdoing—at most, he is a component in a complex web. And, it seems to follow, he should not be the sole target of our reactions to the wrongdoing.¹²⁷ We wanted to hurt, change, or reform him; now, perhaps, we want to hurt, change, or reform the whole complex web. Circumstances channeled this actor to his wrong; those circumstances become the target of our strongest reactions. Resentment and indignation drift to the margins.

In these ways, then, identification positions us to appreciate ethically significant aspects of blame and wrongdoing that are not always immediately accessible to us. Putting us in the wrongdoer’s shoes, identification helps us imagine and experience the consequences of blame and punishment, and thus helps us appreciate what is at stake when we blame and punish. Moreover,

124. Dressler urges us to resist these sorts of reactions to moral luck. *Exegesis*, *supra* note 40, at 1370. His argument, however, assumes that the primary reason moral luck seems to undercut blame is that it makes us worry that we have no standing to blame others, given our own good luck. Here, I have argued that moral luck undercuts blaming attitudes for a different reason, having to do with arbitrariness and fairness. I contend that when blame entails serious problems of fairness, this undercuts the reactive attitudes that constitute blame.

125. Dressler associates a similar shift in perspective with being an “exceptionally compassionate person[.]” Such people, he says, are “broad contextualizers” who “are unwilling to fix their gaze . . . narrowly” on the offender alone. *Excusing*, *supra* note 5, at 685. However, Dressler warns that such perspective shifting should not drive excuse doctrine. *Id.* at 686.

126. Though Bennett does not make the argument that I am making here, he makes the related observation that thinking about the causes of a wrongdoer’s actions tends to “dispel[] reactive feelings.” Bennett, *supra* note 23, at 57–58 (emphasis omitted). Bennett suggests that this is because this sort of “naturalist” inquiry is “psychologically immiscible with the frame of mind in which the question is asked.” (emphasis omitted). In the text below, I offer a different explanation.

127. *See, e.g., id.* at 56 (noting the discomfort we might feel about blaming wrongdoers if we know their acts can be traced to God, an observation that highlights the way we can come to see the original source of the wrongdoing as the proper target for our negative reaction to wrongdoing).

identification helps us see what a profound role luck plays in who does wrong, and thus in who is eligible for blame and punishment. This raises fairness questions, at least if we have the intuition that significant pain and unhappiness should not be allocated in accord with a lottery. And identification helps us see that the wrongdoer is but a piece of a complex web of circumstances and phenomena, such that directing our negative reactions to the wrongdoer but not the rest of the web raises serious fairness concerns.

All of this contributes to the push against blame and punishment. All these realizations tend to undercut resentment and moral indignation, and thus to diminish the inclination to blame. In this way, these ethical considerations make us more likely to excuse a wrongdoer.

C. Identification, Particularistic Detail, and *Tout Comprendre, C'est Tout Pardonner*

Seeing how identification inclines us to excuse can help us understand a nettlesome problem for objectification accounts of excuse. The problem is *tout comprendre, c'est tout pardonner*¹²⁸—that is, the inclination to excuse wrongdoers seems to grow as we learn more about them. Objectification accounts have not adequately accounted for this phenomenon. Identification, on the other hand, can, for our capacity for identification makes excuse highly susceptible to detailed, particularistic information about the wrongdoer.

As theorists have often noted, it appears that the more we learn about a wrongdoer's personal history and circumstances, the more inclined we are to excuse the wrongdoer. Michael Moore, for example, has written, "Common sense often adopts . . . the French proverb, 'tout comprendre c'est tout pardonner.' This common sense urges that we should excuse whenever we come to know the causes of behavior."¹²⁹ Philosopher Gary Watson's seminal commentary on Strawson's piece demonstrates this especially vividly: Watson presents extensive detail from the personal history of a person who has done a terrible wrong and shows convincingly that as we learn more of his personal history, our moral indignation begins to dissipate.¹³⁰ The reactive attitudes, he says, seem to be inhibited by "explanations of why . . . individuals display qualities" that normally offend.¹³¹

128. "To understand all is to forgive all." Theorists frequently invoke this phrase. See, e.g., MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (2010); FLETCHER, *supra* note 121, at 513; Bennett, *supra* note 23, at 60.

129. MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 488 (2010); see also FLETCHER, *supra* note 5, at 513 (discussing a belief "many people" have that "if we know everything about the defendant, we will invariably excuse him.").

130. *Freedom*, *supra* note 4, at 233–59.

131. *Id.* at 228. Putting the point more abstractly, Jonathan Bennett has written,

many careful and intelligent people are influenced by lines of thought in which a

Some theorists treat this phenomenon as a nettlesome mystery.¹³² But even those who grapple with this phenomenon most seriously are often perplexed by it. Watson, for example, carefully catalogs several of the ways in which detailed personal history seems to undermine blame: it diminishes our antipathy, generates sympathy,¹³³ shows how the wrongdoer is a victim too,¹³⁴ ignites anxieties about moral luck, sensitizes us to the connection between un-chosen formative experiences and subsequent conduct, and reminds us that we might have done the same had we been in the wrongdoer's shoes.¹³⁵ However, Watson observes, on Strawson's account, none of these reactions should detract from blame, for none suggest that any Strawsonian excuse applies.¹³⁶ None show that the wrongdoer offended by accident or that the offender is so psychologically abnormal as to be incapable of participation in normal human relationships or community.¹³⁷ None should trigger the objective attitude.¹³⁸ So why, then, do such details seem to undermine the attribution of responsibility?¹³⁹

Linking excuse to identification demystifies and normalizes this phenomenon. If identification can drive excuse, then it makes perfect sense that the more we learn about a wrongdoer, the more likely we are to excuse him, for the more we learn about him, the more likely we are to identify with him (and to do so deeply). It is hard to identify with someone we know only

person is presented as a natural object whose structure and behavior ultimately results from nothing but the behavior of parts of the universe other than himself; and in which his behavior is presented as wholly predictable. Such lines of thought lead many people to say that the person is not really accountable for what he does.
...

Bennett, *supra* note 23, at 55; *see also id.* at 58 ("I cannot imagine anyone thinking hard about the causation of behavior while continuing to boil with rage against the malefactor."). Bennett explains this phenomenon in a different way than I will. He argues that the reason that learning the causes of a person's acts leads us to excuse him is that this sort of knowledge leads us to take the objective attitude toward him: "When we contemplate someone's action as the upshot of deterministic cause, we adopt the objective attitude towards him. . . . That objectivity of attitude dispels reactive feelings, and their disappearance presents itself to us as the judgment that the person is not morally accountable." *Id.* at 57.

As my discussion in the text below suggests, I do not think Bennett's explanation correctly explains this phenomenon. Thus, while I agree with Bennett's observation that the phenomenon occurs, I do not agree that it is best explained by reference to the objective attitude.

132. *See e.g., id.* at 55 (referring to this phenomenon as "the old issue about determinism" which we can now "settle[] (at last!)").

133. Watson, *supra* note 31, at 244–45.

134. *Id.*

135. *Id.* *See also* McKenna, *supra* note 33, at 210–11 (summarizing and approving Watson's observations).

136. Watson, *supra* note 31; *see also* McKenna, *supra* note 31, at 210–11 (following Watson on this point).

137. Watson, *supra* note 31; *see also* McKenna, *supra* note 31, at 210–11.

138. *See supra* notes 57–66 and accompanying text.

139. Perhaps because he cannot resolve this mystery, Watson concludes that these phenomena cannot entirely dissipate the inclination to blame. Watson, *supra* note 31, at 243–44. This observation, and the conclusion Watson derives, are at least contestable. We might disagree with the observation itself—learning the offender's personal history may, in fact, completely dissipate resentment and moral indignation. Or we may suspect that it would do so if a more complete history was provided.

as a “wrongdoer”; most of us will not have done what he has done, so he will not appear similar to us. In contrast, particularistic details about the other’s characteristics and experiences invite identification, and the more such detail we learn, the stronger the inducement and opportunity to identify.¹⁴⁰ This is so because such details provide the raw material necessary for the identification-triggering cognition that the other is similar to the self.¹⁴¹ Each detail can be a point of comparison between the self and the other, a trigger for the spark of recognition.

At the very least, learning that he has a recognizably human personal history will make it more salient that he is a human and a person, like us, rather than the abstractly conceived author of a wrongdoing. But we are also likely to discover more than that. If the story is told in any meaningful detail, we will learn that he was once a child, malleable, powerless to shape his environment, hungry for love, and vulnerable to physical and psychological force—and therefore shares something vitally important with us.¹⁴² We will learn that as an adult, he craves acceptance, affection, love, and respect; that he yearns for the power to protect himself, feed himself, support himself, and acquire material comforts—things nearly all of us hunger and yearn for. If a mother or father was brutal or cold, if one of his parents was missing or died, or if a parent was mentally ill or alcoholic, these details will trigger that spark of recognition in many of us because we have experienced these things ourselves or because other experiences we have had enable us to vividly imagine ourselves in his shoes. If he has been very poor or addicted to drugs; if he has been discriminated against because of his religion, race, or national origin; if he has struggled with dyslexia, attention deficit hyperactivity disorder, depression, or bipolar disorder; or if he has been ostracized by his social group or persecuted by bullies, then these details will each open new opportunities for intense identification.

Taking account of identification, then, helps us work through the puzzle that perplexed Watson. Indeed, we might say that Watson had all (or most of) the pieces but did not put them all together. Watson recognized that personal history undercuts indignation.¹⁴³ More than that, Watson identified several of the ways in which it does so—by triggering sympathy, sensitizing us to moral luck problems, helping us stand in the other’s shoes, and so on.¹⁴⁴ For Watson, these phenomena were a disorganized hodgepodge, a messy collection of organic human reactions, none of which should have excusing

140. Bennett gestures at the same idea—while using the term “identify” differently—when he writes that we have stronger reactions to harm to “an identified person” than to harm to “an unidentified group.” Bennett, *supra* note 23, at 67. It is harder to connect with abstractions and easier to connect with a person we know concretely.

141. *Supra* note 118 and accompanying text.

142. This phenomenon emerges especially vividly from Watson’s piece, in which we discover that learning about the murderer’s childhood—one involving great vulnerability—undercuts our indignation at the wrong he committed. Watson, *supra* note 31, at 235–44.

143. *See id.*

144. *Id.* at 244–46.

significance in Strawson's objective schema for excuse (or in Watson's extension of it).¹⁴⁵ As a result, Watson could not resolve their relation to blame and excuse. Taking account of identification, however, helps us cast new light on Watson's puzzle. We can see that each of the discrete phenomena Watson noted were components of a coherent and important psychological phenomenon: identification. Having identified identification as an alternative avenue to excuse, we need not be perplexed by the disconnect between these discrete phenomena and the objective attitude. It may be true that the phenomena have little connection to the objective attitude, but they are closely tied to identification, and that is why they undercut blame.

In short, all the standard details in the life story of the wrongdoer present opportunities and inducements to bridge the chasm between the wrongdoer and the self; to see how we are similar to each other; and to empathize, sympathize, appreciate, and affiliate. The more extensive the detail, the more likely and the more powerful the opportunity for identification. Identification, then, is the hidden link between "the more we learn" and "the more we excuse." We excuse when we learn about another because learning catalyzes identification.

D. Identification at Work in the Excuses

Identification is a basic and robust psychological phenomenon that and it is conducive to excuse. Indeed, taking identification into account can help us understand and explain many of the excuses. This is especially easy to see with the excuses that seem to involve understandable emotion, but it is also (perhaps unexpectedly) true of excuses involving incapacity.

1. Understandable Emotion Excuses and Identification

It is easy to see identification at work in excuses involving what I will call "understandable emotion"¹⁴⁶: cases of (for example) duress, provocation, and entrapment.¹⁴⁷ These excuses arise where the wrongdoer

145. See *id.* at 244 (noting that seeing the accused as a victim appropriately opposes, but does not dispel, the reactive attitudes elicited by the actions and character of that person, leading to a complicated and conflicted emotional response); *cf. id.* at 224–25 (explaining that under Strawson's "objective view," people incapable of adult relationships because of mental illness or extraordinary circumstances *inhibit* reactive attitudes on the part of the observer).

146. See Reid G. Fontaine, *Adequate (Non)Provocation and the Heat of Passion as Excuse not Justification*, 43 U. MICH. J.L. REFORM 27, 43 (2009). Fontaine characterizes the provocation partial excuse in terms of an "understandable" emotion because ". . . given the circumstances, a similarly placed individual would likely experience emotional disturbance similar to that of the defendant's, and that such an emotionally aroused state can undermine one's rationality and limit one's self-control." *Id.* However, not everyone would characterize these excuses as emotion-based excuses. For example, some might prefer to characterize them as excuses for understandable reactions (with the term reaction encompassing not only emotional but also cognitive reactions and perhaps even behavioral reactions). Adopting such alternative characterizations, however, would not change the argument in the text.

147. We might also include other excuses here. For example, we might think that a good

was in a situation that elicits powerful emotions in most people, and the wrongdoer experienced those emotions. (He was threatened and he felt fear; he was provoked and he felt passion; he was lured to commit a crime and he felt tempted to do so.) In such cases, the wrongdoer did wrong while he was in the throes of a powerful emotion that arose in an understandable way.

In such cases, we are especially likely to identify with the wrongdoer. Insofar as the wrongdoer's emotional experience was understandable, it provides a ready point of identification between him and us. It is understandable in that it is the sort of feeling that people normally have when they encounter the situation he encountered, so it should be easy for us to imagine ourselves having the same feeling. This will highlight an important similarity between us. More than that, many of these understandable emotion cases come with narratives that strongly invite identification. In such cases, wrongdoers often have straightforward, easy-to-understand descriptions of the emotion-triggering situations they faced—descriptions filled out with dramatic and emotionally salient details. (“As I was walking back from the corner store I saw my daughter riding her tricycle in the cul-de-sac, and then I saw the victim run over her in his car”) Such descriptions are strong invitations to stand imaginatively in the wrongdoer's shoes and to see an important scene through his eyes. Moreover, such wrongdoers can usually tell us simple, accessible, and plausible stories about the intense emotions they experienced. (“When I saw him run over my daughter I was so scared and angry I thought I was going to explode. It hurt so much I just went crazy”) Such stories induce us—as social creatures naturally interested in the feelings and attitudes of other persons—to enter into and imaginatively reconstruct important parts of the wrongdoer's private subjective experience.¹⁴⁸ This is a strong inducement to identification.

The ease of identifying with wrongdoers in these cases helps explain why we excuse them. Though we would normally feel resentment or indignation for the wrongs they commit, identifying with them steers us in another direction. Identification makes us more sensitive to their psychic and physical experience and more appreciative of their value—undercutting our impulse to inflict suffering on them. Moreover, in reminding us that “that could have been me,” (“I would have been overwhelmed by passion, too, if I'd seen someone run over my daughter in the cul de sac . . .”), identification foregrounds the wrongdoer's bad luck. This energizes fairness concerns about penalizing bad luck, which may defuse resentment and indignation. Additionally, in putting us in the wrongdoer's shoes, identification induces

explanation for the defense of self-defense is that it is really an excuse for killings committed under the sway of understandable emotions associated with self-preservation. And even if we are not tempted by this excuse account of self-defense, we might still think that “true-man” and “stand your ground” rules about retreat in self-defense cases are really excuses for cases in which understandable emotions are in play.

148. For a fuller discussion of the way particularistic narratives impact attitudes and moral intuitions about wrongdoing, see Anders Kaye, *Powerful Particulars: The Real Reason The Behavioral Sciences Threaten Criminal Responsibility*, 37 FLA. ST. U. L. REV. 539, 562–66 (2010).

us to think more carefully about the criminogenic forces and circumstances that moved the wrongdoer (e.g., the threat, provocation, or inducement¹⁴⁹) so that our negative reactions to the wrong are drawn away from the wrongdoer and toward the criminogenic forces around him (e.g., the threatener, provoker, or inducer). It is not hard to see, then, how identification might fuel excuses in understandable emotion cases.¹⁵⁰

2. Incapacity Excuses and Identification

Identification helps explain another set of excuses that might appear, at first glance, to be beyond the reach of the identification account: the incapacity excuses.¹⁵¹ This group of excuses applies where the wrongdoer has significant disabilities or deficiencies compared to a normal person.¹⁵² It most obviously includes insanity, subnormality, and immaturity.¹⁵³ It also includes temporary impairments like intoxication.¹⁵⁴

At first glance, it might appear that identification is especially unlikely where the incapacity excuses are in play. After all, these wrongdoers are flagrantly different from most of us, and different in ways that are vivid and important.¹⁵⁵ They do not see the world the way we do. They do not understand what we understand. They do not want what we want. It is tempting, then, to say that they are more like wolves or tornadoes than full-fledged persons.¹⁵⁶ Indeed, most theorists hold that we recognize these

149. Identification may also lead us to think more carefully about less immediate criminogenic influences. For example, standing in the wrongdoer's shoes, we might think about the cultural influences that made him sensitive to threats, provocations, or inducements.

150. Criminal theorists have sometimes discussed excuses like duress in language that is compatible with the identification account. Kadish, for example, says that in these excuses "the actor has shown himself no different from the rest of us." Kadish, *supra* note 92, at 262. Dressler made similar points while developing a compassion-based account of excuse (though he subsequently rejected this account). See *Excusing*, *supra* note 5, at 683 (in duress cases we "feel a strong connection to the coerced wrongdoer. . . . His weakness is our weakness. We find it impossible to separate him from ourselves; there, but for the grace of God or good fortune, go the rest of us."); *Exegesis*, *supra* note 40, at 1360 ("[The] tragic circumstances" in duress cases "create unmitigated compassion for the defendant. We can identify with him and imagine ourselves in the same predicament."). Dressler repudiates the compassion-based account. *Id.* at 1361 ("Ultimately, excusing is a matter of justice, not of compassion.").

151. It is conventional to cluster these incapacity excuses separately from the understandable emotion excuses discussed above. Kadish, for example, characterizes duress as an excuse for "deficient but reasonable actions," while characterizing insanity and immaturity as "nonresponsibility" excuses. Kadish, *supra* note 92, at 259–62. John Gardner suggests these incapacity excuses are not really excuses at all, insofar as such incapable actors "are not responsible for their actions and therefore need no excuses for what they do." John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 589 (1998).

152. See *Freedom*, *supra* note 4, at 81.

153. *Id.*

154. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1642 (1994) (finding that intoxication weakens self-protective self-consciousness, which makes people less responsible for their actions).

155. See, e.g., Kadish, *supra* note 92, at 262 ("the basis of the insanity excuse is that he has shown himself very different from the rest of us" (emphasis omitted)).

156. Dressler struggles with this in his discussion of compassion and insanity. According to Dressler, it is a problem for the compassion account of the insanity excuse that "the more severe the mental

excuses for exactly that reason: the actor is not a moral agent and therefore cannot be held responsible.¹⁵⁷

Nevertheless, identification may play an important role in these excuses for the excuses offered in these cases actually reestablish (rather than break) the connections between such wrongdoers and us. This counter-intuitive dynamic emerges if we look closely at what makes such wrongdoers seem alien to us in the first place. Such wrongdoers become alien to us not when their excuses become apparent, but prior to that when they do their wrong. It is at the moment of wrongdoing that the wrongdoer most forcefully severs himself from us and our community. It is at that juncture that the wrongdoer does something that most of us do not and would not do. In killing his rival or stealing a stranger's wallet, he shows himself capable of and drawn to violence and cruelty, or greed and deception in ways that we are not. He displays a disconnection from or disdain for community norms that the rest of us assiduously learn, follow, and cherish. Moreover, in at least some of these cases, this is the moment at which he shows himself flamboyantly bizarre and unintelligible. (In that he acts for bizarre and unintelligible reasons or in bizarre and unintelligible ways—e.g., he shoots the president in front of a crowd in order to impress a movie star he has never met.) It is at the moment of the wrongdoing that he becomes alien to us.

Against this backdrop, the incapacity excuses help *rebuild* the connection severed by the wrongdoing.¹⁵⁸ They do so by helping us see that the wrongdoer may be a recognizable human person despite his utterly alien conduct. His excuse—that he was insane, subnormal, an infant, or intoxicated—is an explanation. It points to a discrete and understandable deficiency that helps us understand how a recognizable human person could produce such (otherwise) inexplicable behavior. Of course, such excuses highlight that there is something strange and different about the wrongdoer, but that strangeness and difference was already evident to us (because of his wrongdoing). What was not evident (in the aftermath of the wrongdoing) was that he might nevertheless also be a recognizable human person. The incapacity excuse restores this possibility. In tying the wrongdoing to a

disease—e.g., the more the defendant is like a wild beast rather than a human being—the more difficult it is to feel oneness with him . . . [and] the more likely it is that the emotions we feel will be revulsion and fear rather than compassion.” *Excusing*, *supra* note 5, at 682–83 n.71. Dressler subsequently repudiated the view that excusing and compassion are associated. Dressler resolves this problem for his compassion account by suggesting, somewhat awkwardly, that in such cases we know we “should” feel compassion. *Id.* Here, I offer a quite different resolution.

157. *See, e.g.*, Stephen J. Morse, *Excusing And The New Excuse Defenses: A Legal And Conceptual Review*, 23 *Crime & Justice* 329, 333 (1998); Peter Arenella, *Convicting The Morally Blameless: Reassessing The Relationship Between Legal And Moral Accountability*, 39 *U.C.L.A. L. REV.* 1511, 1533 (1992); *Exegesis*, *supra* note 40, at 1358; Peggy Sasso, *Criminal Responsibility In The Age Of “Mind-Reading”*, 46 *AM. CRIM. L. REV.* 1191, 1194 (2009).

158. Dressler captures part of this dynamic when he writes about our need to “make sense” of why a person does wrong. *See Excusing*, *supra* note 5, at 695. Dressler thinks we feel this need when we believe the apparent wrongdoer has good character. *Id.* Here, I suggest that our interest in sense-making explanations of wrongdoing is broader than that: we are interested in explanations of wrongdoing that help us reconcile the wrongdoer’s bad act and his essential humanity (whether or not he has a “good character”).

discrete and understandable deficiency, it diminishes the possibility that the wrongdoing stems from a complete and thoroughgoing inhumanity. It enables us to reopen the possibility that, beyond this discrete difference, the rest of him is recognizably human. We can recapture the thought that, though he is delusional or cognitively impaired, the wrongdoer still feels pain and joy, still wants security and love, still has recognizably human fears and projects, is still a fundamentally social creature, and so on. He is not a wolf or a demon after all. He is a human being who has a mental illness or a cognitive impairment or who was impaired by intoxication. At the moment of his wrongful act, he became incomprehensible and thus alien, but his incapacity excuse makes him comprehensible again—thus restoring the potential for identification.

Imagine, for example, that you learn two things about me. First, you learn that I have committed a brutal killing and took sadistic pleasure from the suffering I inflicted on my victim. Learning this shatters any actual or possible connection between us. It makes me utterly mysterious and strange. I have done something you would never do. I have completely disregarded communal norms you care deeply about. It seems entirely plausible that my psychic life is as different from yours as a wolf's or a demon's. Then you learn that, at the time that I committed this atrocious act, I suffered from a profound mental illness such that I believed my victim was a murderous demon who had been hounding me for years. Learning this will not make me normal in your eyes. Indeed, it affirms that I am very strange and different from you. But, nevertheless, it makes me *less* mysterious and strange than I seemed before. Now you have an explanation for how I came to do something you would never do and how I came to disregard the communal norms you care so deeply about. This explanation is compatible with my being recognizably human in many ways. Per this explanation, my actions are not the products of random chance; they are not the incomprehensible cruelty of a wolf or a demon. Rather, they come from distortions of recognizably human motivations which are traceable to an identifiable and understandable source (my insanity). Moreover, while the source of the distortion does mark me as very different from you, it also limits the extent of the difference. It assures that I am not a wolf or a demon after all. It allows you to return to many of the default expectations you had about me before you found out about my wrongdoing: that I feel pain and joy; that I want security and love; that I have recognizably human fears and projects; and that I am a fundamentally social creature.

In short, in the aftermath of my connection-shattering transgression, my incapacity excuse restores some of the possibility for connection between us. That is, it restores the potential for identification. This can help us understand the incapacity excuses. Like the understandable emotion excuses, the incapacity excuses apply where the wrongdoer offers us a way to connect with him, to understand him, and to see his humanity and the ways in which

he may be like us.¹⁵⁹ The understandable emotion excuses do this directly by spotlighting something important that we have in common with the wrongdoer.¹⁶⁰ The incapacity excuses do this in a more complex way by diminishing an obstacle to identification (the alienation generated by the wrongful act).¹⁶¹

E. Identification as an Essential Piece of the Puzzle

Identification can help us explain the excuses. It has a strong tendency to incline us toward excuse; it helps us understand why the more we understand, the more we excuse; and we can see it at work in more than one kind of excuse. This is not to say that we excuse solely when and because we identify. Rather, it is to say that—from the naturalist perspective—identification is a piece of the excuse puzzle.

It may be that identification is only one piece. Nothing said here precludes the possibility that there are other important psychological drivers of excuse. For example, it may be that objectification also drives some excuses.

The important thing, however, is to recognize that identification should be an essential piece of the naturalist account of the excuses. Traditionally, the objectification account of excuse has neglected this possibility—building its account of excuse around the dichotomy between reactive and objective attitudes. This dichotomy has left no room for identification. It has, then, neglected a powerful part of the psychology of excuse.

IV. The Diverging Ramifications of the Objectification and Identification Accounts of Excuse

As we have seen, the objectification and identification accounts offer quite different explanations of excusing practices. In this Part, I show that these differences have far reaching implications for the theory of excuse.

I focus on three important issues in excuse theory and show how the objectification and identification accounts handle these issues in very different ways. First, the identification account casts our excusing attitudes in a more reputable light than the objectification account, and thus favors a less conservative approach to innovation in excuse. Second, the identification account is more accommodating to excuses rooted in the wrongdoer's hard personal history. Third, the identification account is more receptive to concerns about the significance of causation and determinism for excuse—concerns that the objectification account almost entirely suppresses.

159. *See supra* Part III.D.2.

160. *See supra* Part III.D.1.

161. *See supra* Part III.D.2.

A. Are Excusing Attitudes Suspect?

One important issue for the theory of excuse has to do with the attitude we should have toward our excusing attitudes. Should we trust and embrace those attitudes? Should we temper them? Should we resist them? Our answer will have significant implications for the theory of excuse. It will influence whether we take a (theoretically) liberal or conservative view of interpretations and proposals that seem to expand the universe of the excuses.¹⁶²

On this issue, the objectification account and the identification account suggest different answers. Central features of the objectification account suggest that an important cohort of our excusing attitudes is suspect in important ways such that we should take a theoretically conservative view of innovations that extend the reach of the excuses. In contrast, the identification account casts our excusing attitudes in a more appealing light, deflating some of the arguments for theoretical conservatism about the excuses.

1. The Stakes

As the vast literature on excuse shows, there are many unresolved issues in excuse law and theory. Much rides on how these issues are resolved. Our view of the excusing attitudes is likely to have an important influence on how we resolve these issues.

Just to illustrate, our view of the excusing attitudes may influence how we come out on some important issues on which there are currently disagreements among American jurisdictions, such as whether volitional impairments can constitute legal insanity; whether the defense of duress should be available in homicide cases; whether “mere words” are sufficient provocation to reduce murder to manslaughter; whether mental or emotional disturbance should be excusing in the absence of provocation; whether we should recognize an excuse for diminished capacity; whether and how psychological syndromes like the battered woman’s syndrome should excuse; and whether retreat should be required in self-defense cases (at least insofar as this aspect of the self-defense doctrine seems excuse-like).¹⁶³ Our

162. This is an issue that looms over the excuses generally, and excuse theorists frequently reference it. See, e.g., Douglas Husak, *A Liberal Theory of Excuse*, 3 OHIO ST. J. CRIM. L. 287, 293 (2005) (reviewing JEREMY HORDER, *EXCUSING CRIME* (2004)) (noting that “courts and commentators have been loathe to broaden the range of excusing conditions”); *Excusing*, *supra* note 5, at 715 (“We should be cautious about recognizing new excuses and expanding old ones.”); *Wrongdoers*, *supra* note 5, at 253 (posing the question “whether we should construe excuses broadly or narrowly”).

163. See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW*, § 25.04[C][1][b] (discussing debate about volitional impairment and insanity); § 23.04 (discussing debate about whether duress should be a defense to homicide); § 31.07[B][2][b][i] (discussing debate about whether “mere words” should be considered adequate provocation); § 31.10[C][3][a] (discussing Model Penal Code shift from provocation to mental disturbance approach to manslaughter); § 26.01 (discussing ongoing uncertainty about status of diminished capacity defense); § 23.07 (discussing debate about Battered Woman Syndrome and duress

view of the excusing attitudes might also influence our positions on some other long-standing debates about the contours of the existing excuses such as whether the insanity defense should be available to sociopaths or drug addicts;¹⁶⁴ whether duress should be available in cases involving nonhuman threats or threats to property;¹⁶⁵ and whether the entrapment defense should be available for inducements offered by a private citizen rather than a police officer.¹⁶⁶ Our view of the excusing attitudes also bears on what we think about more obviously revisionary proposals to add entirely new excuses¹⁶⁷ such as excuses for brainwashing,¹⁶⁸ “rotten social background,”¹⁶⁹ and acting from conscience.¹⁷⁰ These views also have implications for more theoretically framed (but still important) questions, such as whether—and to what extent—we are willing to individualize the reasonable person in excuses like duress and provocation;¹⁷¹ whether cultural differences can be excusing;¹⁷² and whether causation or determinism should be considered excusing.¹⁷³

Of course, our views of the excusing attitudes do not mandate particular positions on these issues. But many of these issues have proven to be stubborn and difficult to resolve, so our general attitudes toward the excusing attitudes may exert an important influence on how we choose among the available positions. If we are generally skeptical about the attitudes that drive excuse, we may generally prefer theoretically conservative answers to these sorts of questions—answers that limit or contract the scope of the excuses. If we see excusing attitudes more favorably, then we may be more comfortable with solutions that appear to extend the reach of the excuses.

excuse); § 18.02[C] (discussing long-standing debate about retreat rule in self-defense).

164. See, e.g., WAYNE LAFAVE, *CRIMINAL LAW*, § 7.2(b)(1) (discussing judicial reluctance to determine contours of definition of “disease of mind” for insanity defense and doctrinal struggles regarding drug addiction and psychopathic personality).

165. See, e.g., Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 *DUKE L.J.* 1, 69–73 (2003) (discussing some of the arguments for and against treating non-human threats as duress).

166. See, e.g., LAFAVE, *supra* note 164, § 9.8(a) (discussing, *inter alia*, whether private inducements should be recognized as entrapments).

167. Many theorists take a generally conservative view toward the creation of new excuses. See, e.g., *Wrongdoers*, *supra* note 5, at 253 (“I see no good reason for creating new excuse defenses, such as brainwashing or severe economic deprivation (i.e., rotten social background).”).

168. See, e.g., DRESSLER, *supra* note 163, § 23.06[B] (discussing proposals to recognize defense for brainwashing).

169. Discussed further in Part III.B, *infra*.

170. See, e.g., Douglas Husak, *A Liberal Theory Of Excuses*, 3 *OH. ST. J. CRIM. L.* 287, 294–95 (2005) (discussing Jeremy Horder’s proposed defense for wrongdoing from conscience).

171. See, e.g., DRESSLER, *supra* note 163, § 23.08[B][4] (discussing individualization of reasonable person standard in Model Penal Code duress context); § 31.07[B][2][b][ii] (discussing individualization of reasonable person standard in provocation context).

172. See, e.g., Elaine Chiu, *Culture as Justification, Not Excuse*, 43 *AM. CRIM. L. REV.* 1317 (2006).

173. Discussed further in Part III.C, *infra*.

2. Objectification Account: Excusing Attitudes are Suspect

The objectification account of excuse casts an important cohort of our excusing attitudes in an unappealing light so that they appear demeaning to the excused and self-serving for the accuser.¹⁷⁴

a. Excusing Attitudes as Demeaning to the Excused

On the objectification account, our excusing attitudes normally entail a view of the excused that most people would find demeaning, hurtful, or threatening. As we have seen, this account holds that we excuse when we take the objective attitude, and that we naturally take the objective attitude toward those who are psychologically abnormal and unfit for participation in normal adult human relationships. If so, to have an excusing attitude toward a person is to mark that person as deviant in an important way—he is psychologically abnormal. Moreover, it is to cast that person as deficient in a particularly humiliating way—he is unfit for normal relationships with others (an especially painful and embarrassing deficiency for a naturally social creature).¹⁷⁵ Thus, to have an excusing attitude toward a person is in many cases to deem him seriously flawed and to exile him from the social

174. Criminal theorists commonly suggest that excusing has negative implications for the excused—at least in cases of incapacity. One commonly given reason is that it is better to have done no wrong (as when justified) than to have done wrong blamelessly (as when excused). See, e.g., Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 389–90 (2005). But other common reasons are resonant with the objectification account. For example, theorists often connect excusing with disability and lack of personhood—reasoning that excuses are therefore denigrating. See, e.g., Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89, 89 (1986) (noting that excuses paint wrongdoers as weak or defective); *id.* at 96 (arguing that, given the negative implications of excuse, “one should refer to acts as ‘justified’” when there is a choice between labels); Kadish, *supra* note 92, at 284–85 (suggesting that we excuse those whom we see as “an infant, a machine, or an animal,” and that this can be “an insult” to the excused person”); Gardner, *supra* note 151, at 590–91 (arguing that it is denigrating to be held non-responsible due to incapacity); *id.* at 592 (incapacity defenses show the defendant to be “an incapable and pathetic specimen”); *Excusing*, *supra* note 5, at 672 (“[E]xcusing says something less complimentary about the wrongdoer . . . since ‘to examine excuses is to examine cases where there has been some abnormality or failure.’”); *id.* at 682 (we excuse an insane person because “he suffers from a disabling condition . . . that renders him unsuitable for condemnation . . . [he] is not a ‘whole’ human being. We sense this inadequacy . . .”); Chiu, *supra* note 243, at 1331–32 (“excuse is built upon a disability. . . [t]he cost is public portrayal as an individual who is flawed . . . he is. . . brand[ed]. . . as an individual who is defective and weak and therefore, lesser in some serious way. . . [T]he substantive message of excuse produces negative overtones.”); *id.* at 1370–71 (excuse can imply wrongdoers are “compelled” by their excusing condition like “automatons” and thus lack “will or choice” which denigrates them). Explanations such as these tap into the intuitions at work in the objectification account—that excused wrongdoers are excused because they are so deficient or so different from us that we cannot see or engage them as persons—and very plausibly take these intuitions to be denigrating to the excused.

Husak raises questions about the conventional wisdom that incapacity excuses are “the worst kinds of defenses to have.” Husak, *supra* note 162, at 297–99.

175. Indeed, even if we take the objective attitude non-naturally, as a “refuge from the strains of such involvement,” we seem to say that involvement with the other is especially or unusually undesirable. See *Freedom*, *supra* note 4, at 86.

activity essential to human happiness.¹⁷⁶ In these ways, the excusing attitudes can be demeaning and hurtful to the excused.

Such attitudes are demeaning in another way: they seem to strip the excused of the privileged and protected status of a person.¹⁷⁷ As Strawson tells us, when we take the objective attitude toward someone, we view and treat him as natural phenomenon—like a wolf or a tornado. He becomes an object: a target for control or treatment, a thing to be avoided, a means rather than an end. He is no longer special in the way that persons are, no longer separate from and above the rest of nature, no longer qualitatively different from and more valuable than other natural things. Thus, even as we excuse him, we also demote him—stripping him of value and status. This demotion is not just demeaning, it is also threatening. Persons generally enjoy privileges and protections (e.g., of their autonomy, well-being, and privacy) that non-persons do not. Casting the excused as an object, excusing attitudes undercut the excused's claim to these privileges and protections.

b. Self-Serving for the Excuser

At the same time, objectification seems self-serving for the excuser. According to the objectification account, the excuser judges the excused abnormal and unfit for human relationships. In most cases, this judgment will be made by a normal person (since most people are normal on the objectification account). Consequently, the person having the excusing attitude will generally see himself as normal where the excused is abnormal socially fit where the excused is socially defective, a person where the excused is just a natural phenomenon or thing. The excusing person seems to reinforce his own privilege and status at the expense of the excused. This seems self-serving.

Moreover, taking the objective attitude casts the excusing person as the one who manages, treats, or avoids the other.¹⁷⁸ In so doing, it seems to encourage or authorize the excuser to interfere with and manipulate the life of the excused. Thus, it shifts power and authority to the excuser at the expense of the excused. Again, this seems self-serving.

In this light, such excusing attitudes take on a greedy hue. They feed the excuser's hunger for status, privilege, power, and authority. They also seem disingenuous in that they gratify the excuser under the cover of consideration for the excused. In this light, they seem conducive to other ugly attitudes like elitism and paternalism.

176. See, e.g., *Exegesis*, *supra* note 40, at 1360 (discussing the insanity excuse in terms resonant with the objectification account, noting that “insane people do not seem like the rest of us . . . ; figuratively, they are pushed away. In a more fundamental sense, they are already apart from the rest of society . . .”).

177. Tapping into this, Chiu presents cultural excuses as depersonalizing when she suggests they fail to “respect[] defendants as moral agents.” Chiu, *supra* note 172, at 1317, 1371.

178. *Freedom*, *supra* note 4, at 79. Strawson tells us that these are the things we think about doing when we take the objective attitude. *Id.*

c. Ramifications for Excuse

The objectification account of excuse puts the excusing attitudes in a very unappealing light. In many cases, it shows them to be insulting, hurtful, and threatening to the excused while being self-serving for the excuser.

This ugly portrait of the excusing attitudes has important ramifications for excuse theory. At first glance, excusing attitudes might seem to come from innocent or admirable sources like compassion; but, once we see their connection to the objective attitude, we wonder if this virtuous sheen obscures more sordid origins. This worldly-seeming concern makes us suspicious of innovations and proposals that would expand the scope of excuse, and channels us toward a theoretically conservative approach. On disputed doctrinal issues and on related debates about the contours of the excuses, we should favor approaches that limit or reduce cases of excuse. Proposed new excuses should be viewed with great skepticism; and theoretical claims that might expand the scope of the excuses (e.g., by individualizing the reasonable person or treating causation as excusing) should be resisted.

3. Identification Account: Restoring Respectability to Our Excusing Attitudes

Things look quite different on the identification account. Once we take identification into account, the excusing attitudes seem more respectable and appealing, and we can be more receptive to innovation and expansion in excuse.¹⁷⁹

For one thing, the identification account does not make excusing demeaning to the excused. As we have seen, objectification labels the excused person as abnormal and different. Identification, in contrast, does something almost the opposite: it discovers and places importance on the similarities between the excused and the excuser. It puts a spotlight on points of contact, not points of divergence. Likewise, while objectification entails a determination that the excused person is unfit for participation in interpersonal relationships, and thus seems to exile the excused person from normal social life identification fosters affiliation and connection between the excuser and the excused. Thus, where objectification severs social connection on the demeaning premise that the excused is deviant and deficient, identification highlights grounds for ongoing social connection

179. Dressler's discussion of the compassion-based account of excuse suggests that associating excuse with compassion may lead us to take a more favorable view of excuse generally. *Excusing*, *supra* note 5, at 682–83 (“Since compassion is a moral virtue, it is good that we excuse. Excusing demonstrates that we are humane. . . . It might seem to follow that . . . it is morally better to excuse everyone for whom we feel compassion.”). (Dressler subsequently repudiated the compassion-based account of excuse). However, Dressler resists these implications, warning that “[c]ompassion is good, but is not a sufficient reason to excuse wrongdoers.” *Id.* at 683.

with the wrongdoer (despite her wrongdoing). In this way, identification affirms rather than demeans the value of the excused person.

Nor does identification entail the self-serving features of objectification. As we have seen, objectification involves the self-serving view that the excuser is superior to the excused. That is, the excuser is normal and fit for social life while the excused is not. Identification does not entail such a self-serving view. In identification, the excuser does not represent himself as superior to the excused. On the contrary, the excuser represents himself as similar or equivalent to the excused. The identifying excuser's view, after all, is that he might have done the same thing had he faced the same circumstances as the excused. The fact that the excuser has not done wrong is a testament to his circumstantial luck—not a reason to judge himself superior to the excused. Likewise, the objectifying excuser accrues to himself authority to control or manipulate the excused. The objectifying excuser sees the excused as something less than a person—something to be managed and controlled. Again, the identifying excuser does not make this self-serving move. The identifying excuser does not demote the excused from the category of person. He does not equate her to a tornado or a wolf; nothing in his identification with the excused suggests a right to manipulate or control the excused. Indeed, seeing the excused as similar to himself, the identifying excuser is likely to resist rather than endorse attempts to treat the excused as an object rather than a person.

Thus, identification does not involve either the demeaning or the self-serving aspects of objectification. Instead, identification is rooted in much more appealing and reputable facets of human psychology: our social impulses to connect with others and our natural desire to understand others.¹⁸⁰ It draws on our interest in and desire for other people, and our capacity for imaginative vicarious experience. In short, identification springs from some of our best features.

It follows that this portrait of the excusing attitudes has very different ramifications for excuse than the objectification account did. Where the objectification account inspired skepticism about excusing attitudes, this account puts those attitudes in an appealing and encouraging light. Where the objectification account inspired resistance to innovations and proposals that might expand the scope of excuse, this account raises no special objection to the expansion of excuses. Indeed, seeing how excuse connects to some of our best features—e.g., our appetite for connection and community, our capacity for empathic imagination—the identification account may even argue in favor of a theoretically open or liberal approach to excuse. This is a very different attitude toward excusing, and it may steer our answers to excuse theory's many hard questions in a very different direction.

180. *Skepticism*, supra note 22, at 39.

B. Character Influence Excuses

The objectification and identification accounts also differ with respect to their implications for an important issue in contemporary excuse theory: whether formative circumstantial influences on character (“character influences”) should be excusing. While the objectification account makes little or no room for treating such influences as excusing, the identification account is considerably more receptive.

1. The Problem of Character Influences and Excuse (In a Nutshell)

Broadly speaking, the influences at issue here are circumstantial influences that shape the wrongdoer’s desires, preferences, attitudes, values, perceptual biases, interpretive biases, behavioral scripts, and other features of (what we might loosely call) his character.¹⁸¹

Excuse theory has long struggled with whether these sorts of character influences can have excusing significance.¹⁸² Suppose that a mentally and emotionally competent person is moved to wrongdoing by feelings or values cultivated in her by brutal parental abuse or by intensive cult indoctrination. Relentlessly battered by her parents as a child, she reacts to her own child’s misbehavior with the violence her parents taught and fueled in her. Saved from suicidal depression by the support of a highly insular, rigid cult and barraged with cult values while isolated from alternative views, she willingly obeys a cult leader’s instruction to commit an act of anti-government terrorism in “defense” of the cult’s values. Or suppose such a person is moved to wrongdoing by an attitude, belief, or interpretive schema he acquired while immersed in a community favoring that attitude, belief, or interpretive schema. Raised from earliest childhood in a community saturated with a rigid code of honor or a violent gang ideology (or both), a young man physically attacks a stranger who bumps him on the street. Maybe he does so because he has absorbed from his community a hyper-aggressive attitude or a belief that violence is a proper response to another’s disregard; maybe he does so because he has internalized an interpretive schema that treats ambiguous physical contact as

181. I have discussed such character influences at some length elsewhere. See Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 U. KAN. L. REV. 365, 396–99 (2007) (noting the challenge such influences pose for some theories of responsibility); Anders Kaye, *Schematic Psychology and Criminal Responsibility*, 83 ST. JOHN’S L. REV. 565 (2010) (discussing significance of circumstantial influences on interpretive and perceptual biases for responsibility.); Anders Kaye, *Does Situationist Psychology Have Radical Implications For Criminal Responsibility?*, 59 ALA. L. REV. 611 (2007) (discussing significance of situational influences on perceptions, interpretations, beliefs, and desires).

182. See, e.g., Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); Kadish, *supra* note 92, at 283–85; Patricia Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996); Chiu, *supra* note 172, at 1317.

threatening imminent violence.

Scenarios like this give rise to some of the most debated questions in modern excuse theory. Should we excuse wrongdoers who can show that their “rotten social background” influenced or brought them to their offense?¹⁸³ Can the wrongdoer’s prior exposure to crushing poverty, frequent acts of violence, or oppressive discrimination and degrading social stereotyping supply a basis for excuse?¹⁸⁴ If we can trace the offense back to the wrongdoer’s indoctrination into an insular subculture’s antisocial beliefs, values, and practices, should we excuse him? What about formative years spent in a foreign culture with values different from our own?¹⁸⁵ Or a childhood dominated by emotionally, physically, or sexually abusive parents? Or unusual exposure to violence-themed pornography? What about systematic exclusion from educational and economic opportunities? Drug addiction?

In these sorts of cases, we can see that the wrongful act was influenced by features of the wrongdoer’s character (e.g., his feelings, values, interpretive schema, etc.), and we can see that these features of his character were shaped by formative experiences outside his control (e.g., parental abuse, cult indoctrination, immersion in a community’s values, etc.). Should we treat such circumstantial character influences as excuses? While legal criteria for excuse appear unsympathetic to such claims, some theorists have argued that these influences should have excusing force generally,¹⁸⁶ and many theorists have said or implied that such influences should be excusing in at least some extreme cases.¹⁸⁷

2. The Objectification Account Leaves Little Room for Character Influence Excuses

The objectification account leaves little room for such excuses. As we have seen, the objectification account posits that we excuse acts of disregard or malevolence only in those cases where it is natural for us to take the objective attitude; that it is natural for us to take the objective attitude only where wrongdoers are abnormal in a way that renders them unfit for social relations; and that we cannot sustain the objective attitude in other sorts of cases.¹⁸⁸

183. See, e.g., Delgado, *supra* note 182 (arguing in favor of a form of “rotten social background” defenses); Bazelon, *supra* note 182; (same); Morse, *supra* note 182 (arguing against such defenses); Kadish, *supra* note 92, at 283–85 (same).

184. Patricia Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996) (arguing in favor of such defenses).

185. See, e.g., Chiu, *supra* note 172, at 1317 (surveying arguments for cultural excuses, but favoring a cultural justification instead).

186. See e.g., Delgado, *supra* note 182; Falk, *supra* note 184.

187. R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 232–34 (1994).

188. See *supra* Part II.

On this schema, we generally should not recognize character influence excuses for character influences generally do not render wrongdoers psychologically unfit¹⁸⁹ for social relations.¹⁹⁰ Although such character influences can have profound influence on how people act, they generally do not exert this influence by incapacitating people for normal human relationships.¹⁹¹ Such phenomena may have an enormous influence on attitudinal and emotional predispositions, perceptual and interpretive tendencies,¹⁹² values and beliefs, preferences and desires. They may instill anger, resentment, grudges and hatred. But such influences generally do not leave individuals so mentally or emotionally disturbed or so intellectually impaired that they cannot participate in interpersonal relationships or human communities.¹⁹³ To use Strawson's words, they do not leave the wrongdoer "warped or deranged, neurotic or just a child,"¹⁹⁴ or "compulsive in behaviour."¹⁹⁵ They do not make him a person "whose picture of the world is an insane delusion," or "whose behavior . . . is unintelligible to us . . . in terms of conscious purpose" or "wholly lacking . . . in moral sense."¹⁹⁶

After all, most wrongdoers—even wrongdoers from the worst and

189. *Skepticism*, *supra* note 22, at 66; *see also* McKenna & Russell, *supra* note 23, at 27 (describing the phenomena that trigger the objective attitude). Strawson suggests that, in these cases, objectivity is a "natural" response: it is the attitude we "naturally tend to fall into . . . where participant attitudes are . . . inhibited by abnormalities." *Freedom*, *supra* note 4, at 79; *see also* *Skepticism*, *supra* note 23, at 27 (the objective attitude is "humanly natural" in cases where the other suffers from "extreme abnormality," e.g., "someone who is quite out of his mind").

190. McKenna and Russell flag this as an especially important problem for Strawson:

Perhaps the most fundamental problem with Strawson's theory in the eyes of his critics is that he has too little to say about the extent to which our reflections concerning the (historical) origins or sources of character and conduct can inhibit—if not altogether undermine—the (normal) operation of our reactive attitudes. . . . Strawson's theory, the critic continues, simply presupposes that (historical) considerations of this kind are irrelevant to . . . our reactive attitudes. Most philosophers maintain that this view of things is neither psychologically credible nor philosophically defensible.

McKenna & Russell, *supra* note 23, at 13–14.

191. *See Freedom*, *supra* note 4, at 79.

192. *See Kaye*, *supra* note 181.

193. *See Freedom*, *supra* note 4, at 79.

194. *Id.* Strawson subsequently explains that parents must have both objective and reactive attitudes to their children: "[A] kind of compromise, constantly shifting in one direction." *Id.* at 75.

195. *Id.* at 79.

196. *Id.* at 73. As critics have pointed out, there is an important ambiguity (or unappreciated shift) in how Strawson describes these cases. At some points, he suggests that "abnormality" triggers the objective attitude; at other points, he suggests that it is "incapacity" that triggers the objective attitude. *See* RUSSELL, *supra* note 2, at 153–54; McKenna & Russell, *supra* note 23, at 12–13. This is an important problem for a number of reasons. For example, Strawson's later argument that we cannot take the objective attitude toward everyone makes more sense if abnormality is required for the objective attitude. After all, by definition, everyone cannot be abnormal. It makes less sense if lack of capacity is the trigger because it is perfectly possible that all humans lack some capacity necessary to the reactive attitudes. *See* RUSSELL, *supra* note 2, at 153–54; McKenna and Russell, *supra* note 23, at 12–13.

most traumatic backgrounds—function successfully as social persons.¹⁹⁷ They form genuine friendships, participate fully in social groups, fall in love, marry, parent children, debate values and beliefs, and so on. Their harsh or distinctive formative experiences may have a profound influence on their character and conduct, but not by stripping them of the basic capacities associated with human social life.¹⁹⁸ The abusing parent may follow the behavioral scripts laid down by his parents or vent the rage that abuse instilled in him, but this does not mean he is likely to be a sociopath or delusional or unable to reason. The young man raised in a community saturated with violence may very well have strong and nuanced social instincts despite his non-mainstream attitudes about violence. As a result, learning that the wrongdoer's act can be traced in some way to such character influences will generally not trigger in us the objective attitude. And since it will not trigger the objective attitude, it will not support excuse on the objectification account.

Strawson did think that we might sometimes have the objective attitude toward a person due to his being “peculiarly unfortunate in his formative circumstances.”¹⁹⁹ In so saying, he may have been thinking of cases like the ones described here, but he did not explain how or when the objective attitude would arise in such cases. Given his reactive-objective psychological model, the most natural explanation is that Strawson thought that unfortunate formative circumstances sometimes leave a person unfit for social life in a way consistent with the other kinds of unfitness in his list. That is, it seems most likely that he thought that such unfortunate circumstances could render a person deficient for social life in the sense of lacking a feature, capacity, or skill necessary for social life. He may have believed that such circumstances could render a person so cognitively or emotionally disabled that we might say his motives were unintelligible or that he was delusional or he could not be communicated with.²⁰⁰ Indeed, it seems entirely plausible that this may sometimes happen. Extraordinary trauma may leave a person so psychologically shattered that that person becomes delusional, unintelligible, or otherwise beyond the reach of communication.²⁰¹

Even if this is true, however, it does not offer much support for character influence excuses. These sorts of cases are likely to be extremely rare compared to the class of cases in which socially competent wrongdoers

197. For further discussion of this point, see Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 U. KAN. L. REV. 365 394–98 (2007).

198. See *Exegesis*, *supra* note 40, at 1380-83.

199. *Freedom*, *supra* note 4, at 79. There are hints in Strawson (and in works building on Strawson) that we sometimes will take the objective view toward such people. See R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 232–33 (1994); SUSAN WOLF, *FREEDOM WITHIN REASON* 75–88 (1990). As I have argued elsewhere, I think these hints are unconvincing. See Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 U. KAN. L. REV. 365 (2007).

200. See *Freedom*, *supra* note 4, at 79.

201. See, e.g., Wallace, *supra* note 199, at 233 (noting that intense deprivation may produce profound psychological pathology).

do wrong due to formative character influences. For example, it may be that some abused children whose behavioral scripts and emotional states are influenced by abuse grow into adult sociopaths or slip into multiple personality disorder as a result of their trauma, but most do not. Perhaps some heavily indoctrinated cult members whose values are profoundly shaped by indoctrination have psychotic breaks, but most surely do not. Thus, within the class of wrongdoers whose characters were shaped by these sorts of formative experiences, there may be a handful whom are left unfit for social life, but most probably are not. In short, while the objectification account may anticipate that we will excuse some wrongdoers who were exposed to hard formative influences, it also limits such excuse to a very small subset of the class of people whose conduct can be traced to such influences on character.

Thus, if the excuses are tethered to the objective attitude, the excuses will be limited to a narrow universe of cases: those involving incapacity for social relations. Such excuses will not be able to reach the large majority of cases involving significant character influences.

3. The Identification Account is More Receptive to Character Influence Excuses

The identification account is much more receptive to character influence excuses. The identification account does not tie excuse to the objective attitude; thus, it does not limit excuse to cases involving abnormal incapacity for social relations. Instead, we excuse when the feelings and insights catalyzed by identification are sufficiently strong to dissolve or overwhelm resentment and moral indignation. This opens the door to excuses based on character influences.²⁰²

Learning that a person's act can be traced to circumstantial character influences is conducive to identification. One reason for this is that claims about such formative character influences generally depend on personal, particularistic narratives about a wrongdoer and his experiences. To be plausible, such claims must present the wrongdoer during a formative period and bring out his vulnerability to formative influences. At the same time, such claims must also describe the distinctive and powerful influences to which he was exposed and by which he was shaped. By necessity, then, such claims depend on detailed and personal descriptions of the wrongdoer and detailed descriptions of some of his most important experiences. As we have seen, these are the sorts of descriptions that make us especially likely to identify. Supplying and organizing a wealth of personal detail, they give us

202. Dressler observes that compassionate feelings about people from hard social backgrounds may make it "emotionally tempting" to excuse such people when they do wrong, and he warns that we should not give in to this temptation. *Exegesis*, *supra* note 40, at 1383 n.265. Dressler does not, however, grapple with the various attitudes and insights associated with identification, or with their impact on the reactive attitudes that constitute blame.

ample opportunity to see points of similarity between ourselves and the wrongdoer; and, focusing on formative times and formative circumstances, they are likely to spotlight points of similarity we consider especially important.

Indeed, the narratives involved in these cases are likely to be especially inviting, for they naturally put a spotlight on a poignant and common human experience: the experience of being vulnerable to powerful formative influences. If we learn that a wrongdoer was raised in grinding poverty or by cruel parents and that these experiences influenced him deeply, we may recall similar experiences of our own and find a ready point of significant identification. But, even if we do not share these particular experiences, we are vividly reminded of something else deeply important that we do share. Such stories remind us that we share the experience of a childhood subject to influences beyond our control, including all the helplessness, dependence, vulnerability, and malleability such a childhood entails. Like soldiers who survived a grueling battle, we have in common a profound experience—one that has left its mark on both of us. This is a point on which we can identify in a deep way.

The narratives offered in these cases are also especially suited to stimulate some of the excuse-favoring insights associated with identification. For example, in reminding us of the wrongdoer's vulnerability, they make us more sensitive to the hostile and destructive aspects of our blaming attitudes. Having been reminded of the malleable and vulnerable child the wrongdoer was, we are more likely to acknowledge his present vulnerability and to contemplate the ways blame and punishment may damage him now. Such narratives also put a powerful spotlight on the role that luck plays in determining who does wrong. As we come to understand how circumstantial character influences made the wrongdoer who he is, we realize that those experiences might have formed us in similar ways had we been as unlucky as he. Seeing luck's power in our two life stories brings out the fairness problem in blaming him while we skate by untouched. Finally, the more we learn of such formative circumstances, the more we wonder whether our reactions to wrongdoing should be directed not at the wrongdoer but at the formative phenomena that channeled him to the wrongdoing. Formative influence narratives, then, are especially suited to catalyze ethical insights that tend to drain the reactive attitudes of their power and steer us toward excuse instead.

Thus, taking identification into account opens the door to character influence excuses. It is true that seeing a wrongdoer's character influences rarely leads us to take the objective attitude toward him, but character influence stories will often provide the fuel for identification. Such identification can drive excuse. Seeing that identification can play a role in excuse helps us understand why the possibility of character influence excuses has been such a persistent concern in modern moral and legal theory. Such excuses seem so plausible and imminent because personal histories provide ample basis for identification, and identification can drive excuse.

C. Determinism, Causation, and Excuse

Finally, the objectification and identification accounts have different implications for one of the most fundamental and timeless issues in the theory of excuse: Is causation excusing?²⁰³ That is, should we excuse wrongdoers whose acts were caused by forces and circumstances beyond their control? The issue is often raised as an anxiety about determinism. If “everything is caused” (as determinism holds), does that mean people do not have “free will”—requiring us to excuse every human wrongdoing? But the issue is not just (or even primarily) about determinism and free will. Even putting those notions aside, if we believe that some individual act is caused by forces beyond the actor’s control, should we excuse that act?

The objectification and identification accounts have different implications here. The objectification account is associated with one of the most influential arguments against treating determinism as an excuse, and has been used to argue that causation is not excusing in individual cases. The identification account undercuts these arguments and gives more credence to anxieties about determinism, causation, and excuse.

1. Objectification Account: Against Excuses for Determinism and Individual Cases of Causation

The objectification account has been an important source of arguments that neither determinism nor individual instances of causation call for excuses.

a. Objectification and Determinism

One of P.F. Strawson’s primary projects in his seminal discussion of the reactive and objective attitudes, *Freedom and Resentment*, is to dispel anxiety about the significance of determinism for responsibility and excuse.²⁰⁴ In the wake of increasingly powerful scientific and naturalist explanations of our world, some observers have worried that determinism is true, that we therefore do not have “free will,” and that everyone who does wrong must therefore be excused.²⁰⁵ Strawson responds that, given our reactive-objective psychology, even determinism cannot drive us to such universal excuse.²⁰⁶

Strawson’s argument is grounded in two basic claims from the

203. For arguments on either side of the issue, see Moore, *Causation*, *supra* note 92 (arguing that causation and determinism cannot be bases for excuse); Kaye, *supra* note 199 (critiquing the view that causation cannot be a basis for excuse); Anders Kaye, *Resurrecting the Causal Theory of the Excuses*, 83 NEB. L. REV. 1116 (2005) (arguing that causation can be a basis for excuse in the criminal law).

204. See *Freedom*, *supra* note 4, at 72–73.

205. See *id.* at 80–81.

206. See *id.* at 93.

objectification account: (1) that we will not excuse a person who acts from malevolence or disregard unless we take the objective attitude toward that person; and (2) that we do not naturally take the objective attitude toward a person unless that person is psychologically unfit for ordinary human relationships.²⁰⁷ If so, determinism should not lead us to universal excuse, for determinism does not entail that wrongdoers are psychologically abnormal (a psychologically normal person may be determined to do a wrong),²⁰⁸ and thus gives us no reason to take the objective attitude toward wrongdoers. Determinism, then, does not require us to excuse wrongdoers.²⁰⁹

Strawson acknowledges that, even where the wrongdoer is not psychologically abnormal, it is possible for us to summon (non-naturally) an objective attitude toward him.²¹⁰ This raises the possibility that, upon learning that determinism is true, we might (non-naturally) summon an objective attitude toward everyone²¹¹—thus arriving at universal excuse.²¹²

On the objectification account, however, this possibility is “practically inconceivable.”²¹³ In order to take up a universal objective attitude, we would have to “repudiate” the reactive attitudes.²¹⁴ This, in turn, would mean giving up normal adult interpersonal relationships for the reactive attitudes are essential to such relationships.²¹⁵ But, given our social character, giving up such relationships would be intolerable for us; we would

207. *Freedom*, *supra* note 4, at 81.

208. *Id.* To illustrate, suppose he was determined to do what he did by the interaction of his genes, his formative experiences, and the circumstances of his act. These forces may have made him the sort of person who chooses to do exactly what he did in the situation he was in—thus determining his action. In such a case, it would be perfectly natural to say that he chose to do what he did, and that there was nothing abnormal about his choice-making machinery. The determination of his act would not induce us to see him objectively.

209. Watson, *supra* note 31, at 225. Russell characterizes this as Strawson’s “rationalistic” argument (which, Russell says, Strawson weds to “naturalist” argument). See RUSSELL, *supra* note 2, at 146. It is “rationalistic” in the sense that it shows that determinism (in itself) gives us no “reason” for excusing wrongdoers. *Id.*

210. *Freedom*, *supra* note 4, at 81.

211. *Id.* (“We can sometimes . . . look on the normal . . . in the objective way. . . . And our question reduces to this: could, or should, the acceptance of the determinist thesis lead us always to look on everyone exclusively in this way?”). See also Watson, *supra* note 31, at 225 (“In effect, incompatibilists insist that the truth of determinism would require us to take the objective attitude universally.”).

212. “[T]his,” Strawson says, “is the only condition worth considering under which the acceptance of determinism could lead to the decay or repudiation of participant reactive attitudes.” *Freedom*, *supra* note 4, at 81.

213. *Id.* Russell characterizes this as Strawson’s “naturalist strategy,” which supplements Strawson’s “rationalistic strategy” for refuting incompatibilism. RUSSELL, *supra* note 2, at 146; see also McKenna & Russell, *supra* note 21, at 7 (examining this step in Strawson’s naturalist argument).

214. *Freedom*, *supra* note 4, at 81.

215. As Strawson wrote, “being involved in inter-personal relationships . . . precisely is being exposed to the range of reactive attitudes.” *Freedom*, *supra* note 4, at 81. Moreover, because we cannot give up the participant reactive attitudes, we cannot give up their moral analogs: “[A]s general human capacities or pronenesses,” these two categories of attitudes “stand or lapse together.” *Id.* at 87. Giving up the latter without giving up the former would require an extraordinary “change in our social world” and a “generalization of abnormal egocentricity.” *Id.*

not be able to bear the “human isolation” that giving up these relationships would entail.²¹⁶ Thus, we cannot adopt “a sustained objectivity of interpersonal attitude,” not even if “theoretical convictions”²¹⁷ (like the truth of determinism) give us reason to do so.²¹⁸

Per these arguments, determinism cannot drive us to universal excuse. Determinism does not entail that all offenders are psychologically abnormal so determinism does not (in itself) naturally trigger an objective attitude, and our intrinsically social nature would make it impossible for us to (non-naturally) adopt a universal objective attitude. Thus, “the truth of determinism” cannot drive us to the objective attitude or universal excuse.²¹⁹

b. Objectification and Causation in Individual Cases

These arguments suggest that causation should not be an excuse in individual cases.

The first argument here closely tracks the first argument regarding determinism. As we saw above, that an act is determined does not lead us to take the objective attitude toward the actor for determinism does not mandate that actors be psychologically abnormal. The same thing can be said about individual cases of caused action. The fact that an act was caused in an individual case does not lead us to take the objective attitude toward the actor, for the fact that the act is caused does not mandate that the wrongdoer is psychologically abnormal. It follows that particular instances of causation are no more excusing than universal causation.

The second argument here springs from the second argument regarding determinism—though an extra twist is required. It may be that we can (non-naturally) push ourselves to take the objective attitude when we see that a particular act was caused even though the actor is psychologically normal and fit for social life. But proponents of the objectification account argue that we cannot go down this road. They say that if *any* conduct is caused, then determinism must be true because “partial determinism”—the idea that some acts are caused, but not all acts—is metaphysically absurd. It follows that we cannot treat a particular act as caused without holding that determinism is true. If this is right, then taking the objective attitude regarding a single act as being caused would mandate taking the objective

216. *Freedom*, *supra* note 4, at 81; *see also id.* (arguing that our “human commitment to participation in ordinary inter-personal relationships” is so “thoroughgoing and deeply rooted” that we would not be capable of such isolation); Bennett, *supra* note 23, at 54 (“If our lives are to have a measure of warmth and engagement and spontaneity,” then we cannot not keep our reactive attitudes “continuously under objective-teleological control.”); *id.* at 58 (“[I]f we try to imagine our lives without reactive feelings we find ourselves . . . confronted by a bleak desolation.”).

217. *Freedom*, *supra* note 4, at 81.

218. *See id.* at 74 (arguing that “it is not in our nature” to be able to give up the moral reactive attitudes); RUSSELL, *supra* note 2, at 146 (“[O]n this account . . . our ‘commitment’ to reactive attitudes is . . . insulated from skeptical doubts by our inherent nature or constitution.”).

219. *Freedom*, *supra* note 4, at 80.

attitude regarding all acts (because all acts would be caused), resulting (again) in the intolerable isolation entailed by universal objectivity.²²⁰ Thus, we cannot excuse individual acts for being caused.

2. Identification Account: More Sympathetic to Concerns about Causation and Determinism

A number of theorists have attacked these objectificationist arguments regarding determinism, causation, and excuse. For example, some have challenged the assumption that universal objectivity would be intolerable or impossible.²²¹ Here, I raise a different sort of challenge to the objectificationist arguments regarding determinism, causation, and excuse. I argue that if identification can drive excuse, then neither of the two objectificationist arguments described above has much force.²²²

a. Identification Undercuts the First Argument from the Objectification Account by Showing that Psychological Abnormality is not a Prerequisite for Excuse

On the first argument from the objectification account, determinism and causation are not excusing because they do not entail that wrongdoers are psychologically abnormal. This argument would be compelling if psychological abnormality were a prerequisite for excusing wrongdoers, but the identification account shows that this is not true. On this account, we also excuse wrongdoers with whom we identify, and identification does not require that the wrongdoer be psychologically abnormal. In fact, we can identify with wrongdoers who are not psychologically unfit for social life or psychologically abnormal in any way. If this is correct, then psychological abnormality is not a prerequisite for excuse, and the fact that determinism and causation do not entail psychological abnormality does not foreclose excusing determined and caused actors.

In fact, our tendency to have excusing attitudes when we identify may increase our tendency to excuse determined and caused actors. Consider how we come to see another's act as determined or caused. A defense

220. See Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1129–39 (1985); *Excusing*, *supra* note 5, at 687. I have argued that the universalizing move in this argument is in error. See Kaye, *supra* note 203.

221. These theorists have argued that universal objectivity would not, in fact, entail intolerable isolation, and it would actually be compatible with deep connections. DERK PEREBOOM, *LIVING WITHOUT FREE WILL* 199–213 (2001); TED HONDERICH, *THE CONSEQUENCES OF DETERMINISM* (1988); Tamler Sommers, *The Objective Attitude*, 57 PHIL. Q. 321 (2007).

222. Although Dressler does not engage the various arguments for and against causal excuse in laying out his (subsequently repudiated) compassion-based account of excuse, he does speculate that there may be a connection between compassion and causal excuse. *Excusing*, *supra* note 5, at 688 (“Stripped of its sophisticated veneer, the causal theory of excuses degenerates into, simply, the compassion theory of excuse.”). Dressler also warns, in this context, that compassion should not be the touchstone of excuse. *Id.* at 689.

attorney or a psychologist or a novelist explains a man's violent outburst in causal terms. She gives a detailed account of certain formative incidents in the violent man's childhood; she describes certain psychological mechanisms implicated in the act; she spotlights certain situational triggers, telling a story about how those triggers interacted with the violent man's psychological mechanisms. As this picture highlights, our deterministic and causal explanations of specific acts are usually particularistic narratives full of personal detail. And, as we have seen, such detailed, personal narratives about a person can catalyze identification. The more we know about another's psychology and history, the more potential points of contact and similarity there are between us and him. In this light, the conventional form of a causal explanation is one that is conducive to identification. If this is right, then our susceptibility to identification may make us susceptible to excusing those about whose acts we know a detailed, particularistic causal story.

In short, the identification account shows that the first argument from the objectification account stumbles on its unduly narrow psychology of excuse. Because that account assumes we only excuse the psychologically abnormal, it assumes we have no reason to excuse the determined or caused actor. The identification account shows that psychological abnormality is not a prerequisite for excuse and thus that we cannot dismiss the possibility that we have reason to excuse the determined or caused actor. Further, the identification account suggests that we may actually be characteristically susceptible to excusing determined or caused acts insofar as deterministic or causal explanations of such acts are typically well-suited to catalyze our identifying attitudes.

b. Identification Undercuts the Second Argument from the Objectification Account Because It Shows Excusing Determined and Caused Acts Need Not Lead to Intolerable Isolation

The second argument from the objectification account is that excusing determined or caused actors would result in a social isolation intolerable to social creatures like ourselves. The identification model undercuts this argument. It does so by showing that excusing the determined or caused actor need not entail a universal objective attitude, and thus need not result in intolerable isolation.

The objectificationist argument here is that that excusing determined or caused acts requires us to take the objective attitude toward everyone, and that this would result in an intolerable isolation. The identification account of excuse shows, however, that to excuse someone is not necessarily to take the objective attitude toward that person. Rather, we can excuse because we identify with the wrongdoer. Thus, even if it were true that excusing caused conduct required us to excuse everyone, it would not follow that this would entail taking the objective attitude toward everyone. We may identify with wrongdoers rather than objectify them.

Therefore, like the first objectificationist argument, the second argument fails because it is grounded in an impoverished account of the moral psychology driving excuse. On the objectification account, we cannot excuse caused action because that would mean taking a universal objective attitude, and that would be intolerable for us. But the identification account shows that we can excuse without taking the objective attitude. It follows that we could excuse universally without immersing ourselves in intolerable isolation.

Indeed, on the identification account, it appears that universal excuse might involve not total isolation, but something that tends in the other direction. Identification, after all, strengthens interpersonal bonds—connecting and integrating individuals rather than severing and isolating them. Thus, it might be that we would universally excuse not for the intolerably isolating reason that we have taken the objective attitude toward all our fellow persons, but for the connecting and integrating reason that we identify with them. That is, we might cease to blame in a way that would make life better, not worse, filling life out with richer and more frequent connections to other people.

3. Not Resolving the Issue, but Reviving It

On this timeless issue, the objectification account and the identification account suggest quite different views. The objectification account funds arguments that causation is not excusing (either universally or in particular cases), while the identification account undercuts these arguments (and even offers some reason to think that causation can fuel excusing attitudes).

Of course, this is not to say that taking identification into account definitively resolves this notoriously difficult issue. But it is to say that if we take identification into account, the resolution offered by the objectification account loses some of its power and competing resolutions become more plausible. Thus, taking identification into account revives the possibility that causation might be excusing—a possibility the objectification account seemed to suppress.

D. Ramifications – In Sum

The objectification and identification accounts have different ramifications for three important issues in the theory of excuse. While the objectification account presents our excusing attitudes as suspect, the identification account shows them to be rooted in some of our most appealing features. While the objectification account resists character influence excuses, the identification account is receptive to such excuses. And while the objectification account has been used to fend off causal excuses, the identification account shows that the objectification account can only do so by virtue of an impoverished account of the psychology of excuse.

In several different ways, then, the objectification account favors a theoretically conservative account of the excuses. In contrast, the identification account invites a more flexible and receptive attitude toward innovations—expanding the scope of the excuses.

V. Conclusion

As fundamentally social creatures, healthy and normal human persons have a deep and well-developed capacity for identification with other persons. We are susceptible to such identification when we see others as similar to ourselves and especially when we have extensive particularized knowledge about such other persons. In this Article, I have argued that identification can play an important role in excusing and that naturalist psychological accounts of excuse should therefore take identification into account.

To date, the leading naturalist accounts of excuse have made no room for identification. Instead, they hew to the rigidly bifurcated psychology of the objectification account in which our excuses are explained by reference to either our reactive attitudes or the objective attitude. While criminal theorists have sometimes speculated or suggested that other social attitudes might play an important role in the excuses, none have tried to give a systematic account of those attitudes or the role they play in excuse.

In this Article, I have made a preliminary attempt to do so. I have set out a detailed description of one such attitude—identification—and I have parsed it into component judgments and attitudes. I have shown how these component judgments and attitudes—and some of the insights they generate—are conducive to excusing. I have explained how taking identification into account helps us understand a long-standing mystery in excuse law—*tout comprendre, c'est tout pardonner*—and how identification might drive or contribute to some of our most central excuses (those involving understandable emotions and those involving incapacity). I have also suggested that taking identification into account helps us understand why certain long-standing controversies in excuse theory persist, including debates about rotten background excuses and about the significance of causation and determinism for excuse. These controversies persist, at least in part, because the dominant, objectification-based accounts of excuse offer intuitively unsatisfying answers—answers that do not take into account identification's important role in excuse. The conflict between dominant theory and powerful but inconsistent intuitions fuels perpetual controversy.

Having laid out this detailed and systematic account of identification and its role in excuse, I have also shown that identification has important ramifications for excuse theory. For one thing, where the conventional objectification account makes excusing a disreputable practice sprung from suspect regions of the human psyche, the identification account shows how excusing is connected to our social and imaginative capacities—some of the

best parts of the human psyche. As a result, taking identification into account should make us more receptive to innovation in, and expansion of, the criminal law excuses. For another thing, where the objectification account resists character influence excuses, the identification account is open to such excuses. And where the objectification account denies the possibility of causal excuses, the identification account offers powerful reasons to think such excuses are possible. These are deep and important differences between the two accounts that only emerge clearly once we have a systematic account of identification in mind.

Once we have this account in mind, and once we have seen these differences, we can also see one more important advantage of taking identification into account: doing so gives us a naturalist account of the excuses we can identify with. The objectification account yokes excuse to a weird and detached psychological outlier (the objective attitude). It is not easy to see this attitude as an important part of who we are or how we live. We do not naturally see ourselves in the objective attitude. In contrast, the identification account connects excuse to a central and valued feature of our social psychology. It is easy to see identification as an important part of ourselves and our lives. It is something we can easily identify with. In this sense, the identification account of the excuses gives us a naturalist account of the excuses that is natural, not jarring, and helps us understand why we value and persist in the practice of excusing.