

# EXCULPATION AS INCULPATION

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## ABSTRACT

*Should a criminal defendant who contrives, creates, or causes the conditions of her own defense forfeit the defense? For example, suppose a provocateur taunts a provocatee into unlawfully attacking so that the provocateur may justifiably kill in self-defense. There are two competing approaches. Under the principle that defense-contrivers have “unclean hands,” the predominant approach of the criminal law is to bar the defense (the Legal approach). Disagreeing, most criminal theorists advocate both granting the contrived defense and, seemingly paradoxically, imposing criminal liability for culpably contriving the defense (the Theoretical approach). That is, seeking exculpation is itself inculpatory. The Theoretical approach raises the following puzzle: how does coupling the intent to act lawfully (justifiably) with an independently lawful act (taunting) that causes a lawful (justified) result combine to create criminal liability? By appreciating the conditional nature of defense-contrivers’ strategy and applying the overlooked doctrine of conditional intent, this Article solves the puzzle but demonstrates that the Theoretical approach simply does not work. It fails to hold defense-contrivers liable for a wide variety of offenses. In contrast, the comparatively straightforward Legal approach—barring contrived defenses—avoids these failures, successfully imposes liability, and is therefore preferable.*

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#### INTRODUCTION

Should an actor who contrives, creates, or causes the conditions of her own defense to criminal liability receive the benefit of the defense? Consider the following examples: intentionally becoming intoxicated in order to commit a previously planned crime while in a state of irresponsibility; intentionally joining a criminal gang in order to be coerced into committing a previously planned crime under duress; intentionally starving oneself so as to steal food under conditions of necessity. Consider also some problematic, borderline examples: inviting attack by intentionally dressing provocatively and walking through a dangerous part of town late at night and then killing in self-defense; intentionally conceiving a child in order to be able to recklessly speed one's wife to the hospital some nine months later.<sup>1</sup> Our formal intuition suggests that defendants satisfying the legal requirements of a defense should receive it. But our deeper intuition senses something is

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1. See MODEL PENAL CODE § 3.02(2) cmt. 5, at 20 n.27 (AM. LAW INST., Official Draft & Revised Comments 1985).

amiss: rather than intentionally making defense conditions happen *by* us, defense conditions should happen *to* us.

The criminal law largely embraces this deeper intuition. While encouraging us to avoid satisfying the elements of offenses, the criminal law suspiciously eyes those seeking to satisfy the requirements for defenses.<sup>2</sup> To avoid liability through defenses, defendants must have “clean hands,”<sup>3</sup> or be without fault;<sup>4</sup> defense-contrivers have “dirty hands.”<sup>5</sup> The contrived-defense doctrine enjoys nearly universal support both in the law<sup>6</sup> and among criminal theorists<sup>7</sup> and applies to nearly all defenses.<sup>8</sup> Yet there is extensive disagreement as to the preferable approach to and theoretical foundations of the doctrine.<sup>9</sup>

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2. See Susan Dimock, *Actio Libera in Causa*, 7 CRIM. L. & PHIL. 549, 557 (2013) (“[W]hen one has culpably caused the conditions of an affirmative defence in order to (or knowing or suspecting that one will or might) commit an offence, the usual inference to lack of culpability on the basis of the defence is defeated.”).

3. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 289 (6th ed. 2012).

4. David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2387 (1992) (“The critical inquiry is whether, in acting in a way that creates an excuse, the individual is at fault for the offense excused.”).

5. See Stephen P. Garvey, *Passion’s Puzzle*, 90 IOWA L. REV. 1677, 1709–10 (2005) (“[Defense-contrivers] are in some fashion responsible for getting themselves into trouble. They all have ‘dirty hands,’ as a result of which the law denies them a defense to which they would otherwise have been entitled.”).

6. See Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 598 (2009) (“Can an actor justify criminal conduct when he was criminally culpable in creating the conditions making it necessary? Virtually every American jurisdiction answers that he cannot.”); see also sources cited *infra* note 10.

7. LEO KATZ, BAD ACTS AND GUILTY MINDS 43 (1987) (“Everyone’s intuition seems to be that the blameworthy [contriving] defendant forfeits his right to [escape liability].”); DeGirolami, *supra* note 6, at 614 (acknowledging “the universal intuition” that culpable defense-contriving should result in liability).

8. E.g., Paul Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 24 (1985) (“[T]he existence of statutory provisions that consider [the contrived defense doctrine] to some degree for a wide variety of defenses [including] . . . insanity . . . hypnosis . . . duress . . . lesser evils . . . self-defense . . . defense of others . . . [and] defense of property.” (footnotes omitted)).

9. Compare Larry Alexander, *Causing the Conditions of One’s Own Defense*, 7 CRIM. L. & PHIL. 623, 623 (2013) (“There are no theoretical problems that attach to one’s causing the conditions that permit him to claim a defense to some otherwise criminal act.”), with Garvey, *supra* note 5, at 1709 (“Such forfeiture [of contrived defenses] rules are well-known, though not uncontroversial, features of the criminal law.”).

Most criminal theorists maintain that holding defense-contrivers criminally liable by barring their defense (the Legal approach)<sup>10</sup> is wrong.<sup>11</sup> As Paul Robinson argues, “current law . . . is inadequate[,] . . . inconsistent, frequently irrational, and it is a poor approximation of our collective sense of justice.”<sup>12</sup> Following Robinson, most theorists advocate granting the defense but nonetheless imposing criminal liability for contriving the defense (the Theoretical approach).<sup>13</sup> While the Legal approach embodies only one of our conflicting intuitions about contrived defenses, the Theoretical approach captures both—contrived defenses both exculpate and inculpate. In a sense, the Theoretical approach mirrors the “have one’s cake and eat it too” strategy of defense-contrivers. Just as defense-contrivers craftily scheme to commit a crime yet escape liability, the Theoretical approach ingeniously exculpates the crime for which there is a contrived defense but inculpates the very contriving of the defense. That is, the very seeking of exculpation is itself inculpatory.

Regardless of which approach best captures our intuitions, enjoys conceptual advantages, or reflects sounder policy, this Article argues that the Theoretical approach simply does not work. It fails to hold defense-contrivers criminally liable for a wide variety of offenses. In contrast, the simple and straightforward Legal approach—barring contrived defenses—works and is preferable.

To illustrate the differing approaches,<sup>14</sup> suppose Able intends to kill Baker if and only if doing so constitutes justified self-defense. With that intent, Able

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10. See Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1413 (2003) (“Generally speaking, current law holds this [defense-contriving] against the accused, typically by prohibiting the defendant from raising the defense at all if he was at fault . . . in creating the excusing or justifying condition.”); accord Claire Finkelstein & Leo Katz, *Contrived Defenses and Deterrent Threats: Two Facets of One Problem*, 5 OHIO ST. J. CRIM. L. 479, 482–83 (2008) (noting that American law generally denies the contrived defense).

11. See, e.g., DeGirolami, *supra* note 6, at 599 (noting the disagreement between the law’s approach of barring the defense and most scholars who favor granting the defense).

12. Robinson, *supra* note 8, at 2.

13. See PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW § 8.0.3, at 293 (2d ed. 2012) (“An alternative approach to those taken in current law is to allow a defense for the immediate conduct constituting the offense, but to impose liability for the actor’s earlier conduct in causing the defense conditions.”); DeGirolami, *supra* note 6, at 599 (“Scholars generally follow Robinson’s view that [defense-contriving] should almost never bar the defense.”); Stephen P. Garvey, *What’s Wrong with Involuntary Manslaughter*, 85 TEX. L. REV. 333, 354 n.72 (2006) (referring to Robinson’s view as the “classic discussion” of defense-contriving).

14. The labels of the Legal and Theoretical approaches are helpful for the purpose of clarity in drawing a sharp contrast but are somewhat misleading. Not all jurisdictions bar contrived defenses. See ROBINSON & CAHILL, *supra* note 13, § 8.0.3, at 288–89 (“Under one approach to

taunts Baker to induce Baker to attack unlawfully. Enraged, Baker attempts to kill Able. Able kills Baker. The Legal approach bars Able's contrived self-defense.<sup>15</sup> But criminal theorists argue that because Baker's aggression is unlawful, Able justifiably killed in self-defense.<sup>16</sup> Despite granting Able's contrived defense, the Theoretical approach holds Able criminally liable for murder for culpably contriving the defense.<sup>17</sup> Seemingly paradoxically, the Theoretical approach both provides a defense to and holds the contriver criminally liable for one and the same murder.<sup>18</sup>

To partially defang this conceptual oddity of the Theoretical approach, it is helpful to highlight two distinct temporal stages.<sup>19</sup> Following a convention in the literature, let's distinguish the contriver's earlier conduct, at time T1, from his later conduct, at T2.<sup>20</sup> At T1, Able commits the voluntary act of taunting with the intent of (later) shooting and killing Baker at T2. The Theoretical approach claims that the taunting at T1, not the shooting at T2, causes Baker's death.<sup>21</sup> Therefore, at T1, Able satisfies the elements of the

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current law, a defense remains available even though the actor was culpable in bringing about its conditions."'). Similarly, not all criminal theorists advocate granting contrived defenses. *See infra* text accompanying notes 115–17.

15. *See* MODEL PENAL CODE § 3.04(2)(b)(i) (AM. LAW INST. 1985) ("The use of deadly force is not justifiable if: (i) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter."').

16. *See* Alexander, *supra* note 9, at 626 (finding provocatees to be "murderous culpable aggressors" against whom their provocateurs enjoy a right of self-defense); Robinson, *supra* note 8, at 5 n.14 ("It is hard to understand why the provoker should lose the right of self-defense when he is not culpable and when his conduct is too trivial to give rise to a right of self-defense for the person whom he provokes."').

17. *See, e.g.,* Leo Katz, *Entrapment Through the Lens of the Actio Libera in Causa*, 7 CRIM. L. & PHIL. 587, 589–91 (2013) (noting the "reigning" theoretical approach both grants the provocateur's defense to and holds the provocateur liable for murder); Robinson, *supra* note 8, at 27 (advocating allowing "the actor a defense for the immediate conduct constituting the offense, but . . . impos[ing] liability on the basis of the actor's earlier conduct in culpably causing the conditions of his defense").

18. *See* Kimberly Kessler Ferzan, *Provocateurs*, 7 CRIM. L. & PHIL. 597, 603 (2013) ("[W]ith respect to provocateurs, it seems rather odd to say that purposeful engagement in conduct at T1 renders one criminally culpable for murder because a dead body is caused at T2, but one is justified for the act of killing at T2."').

19. Katz, *supra* note 17, at 589 ("There are two pivotal points in time to consider here."').

20. *See* Ferzan, *supra* note 18, at 598–99 (dividing defense-contrivers' conduct into two phases, the early phase and the later phase, as demarcated by T1 and T2); Douglas Husak, *Intoxication and Culpability*, 6 CRIM. L. & PHIL. 363, 364–65 (2012) (same).

21. *See* Katz, *supra* note 17, at 593 ("The reigning [theoretical] approach . . . impose[s] liability on the defendant on the ground that he caused the victim's death . . . [at] the time at which the provocation began."); Robinson, *supra* note 8, at 31 ("Where the actor is not only culpable as to causing the defense conditions, but also has a culpable state of mind *as to causing himself to*

offense of murder—intentionally causing the death of another.<sup>22</sup> At T2, Able’s use of lethal force against Baker’s unlawful aggression constitutes justified self-defense.<sup>23</sup> Able’s T2 defense is unavailable, however, for the murder liability at T1 because Baker was not then unlawfully aggressing against Able.<sup>24</sup>

The key conceptual move of the Theoretical approach is the temporal division of the contriver’s conduct into two separate and independent stages.<sup>25</sup> This allows the Theoretical approach to have its cake and eat it too. It can both grant the contrived defense at the later stage and impose criminal liability at the earlier, defense-contriving stage. Because each stage is separate and independent, the assessment of neither stage impacts the other. Inculcation at the early stage does not preclude exculpation at the later stage which, in turn, does not preclude inculcation at the early stage.

If the outcome is generally the same under either approach—the defense-contriver (Able) is held liable (for murder)—what is their practical difference? While the Theoretical approach touts numerous practical and theoretical advantages,<sup>26</sup> the principal difference for justification defenses<sup>27</sup> is a clearer allocation of the rights of third parties to intervene in defense of one of the parties. Justified conduct (as opposed to excused conduct) is permissible, perhaps even beneficial, lawful conduct.<sup>28</sup> Third parties may lawfully aid, but not hinder, justified conduct.<sup>29</sup> Under the Legal approach in

*engage in the conduct constituting the offense, the state should punish him for causing the ultimate justified or excused conduct.”).*

22. *E.g.*, N.Y. PENAL LAW § 125.25(1) (McKinney 2017) (“A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person . . .”).

23. *See supra* notes 16–17.

24. *See* Claire Finkelstein, *Involuntary Crimes, Voluntarily Committed*, in CRIMINAL LAW THEORY 143, 157 (Stephen Shute & A.P. Simester eds., 2002) (noting that contrived defenses are unavailable for the earlier, defense-contriving conduct).

25. *See, e.g.*, Alexander, *supra* note 9, at 623 (“If one assesses the culpability of an actor at each of the various times he acts in a course of conduct, then . . . a nonculpable act at T2 has no bearing on whether an actor was culpable at T1 when he caused the circumstances that are exculpatory with respect to his act (or conduct) at T2.”).

26. *See infra* text accompanying notes 99–103.

27. *See* DRESSLER, *supra* note 3, § 16.03, at 204 (“Justified conduct . . . is a good thing, or the right or sensible thing, or a permissible thing to do. That is, a justified act is an act that is right or, at least, not wrong.”); GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 759 (1978) (“A justification speaks to the rightness of an act; an excuse, to [lack of responsibility] for a concededly wrongful act.”).

28. *See* sources cited *supra* note 27; sources cited *infra* note 242.

29. DRESSLER, *supra* note 3, § 17.05, at 219 (“[I]f *D* is justified in performing act *A* to protect her own rights, a third person, *X*, is also justified in doing *A* to protect *D*.”); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1900

which both Able and Baker are unjustified, it is unclear on whose side a third party could permissibly intervene—perhaps neither.<sup>30</sup> But under the Theoretical approach in which Able is justified and Baker is unjustified, a third party could permissibly use force only on behalf of Able against Baker.<sup>31</sup> The preferable allocation of third-party intervention rights raises significant ramifications for several recent high-profile self-defense cases, including the controversial George Zimmerman/Trayvon Martin case, that have contributed to a renewed focus on defense-contriving.<sup>32</sup>

Though enjoying greater precision in allocating the rights of third parties, the Theoretical approach may be unsound. The few scholars not endorsing the Theoretical approach focus their criticism particularly on its application to justification defenses.<sup>33</sup> Given that contrivers of justification defenses engage in justified, “wholly legal conduct,” Claire Finkelstein skeptically questions their criminal liability.<sup>34</sup> Leo Katz suggests that such contrivers’ intent to act justifiably (and thus lawfully) fails to constitute a sufficiently culpable *mens rea*.<sup>35</sup> To illustrate Katz’s point, Able does not merely have the intent to kill Baker. Rather, Able has the intent to kill Baker lawfully—in justified self-defense. Building on Finkelstein and Katz’s insights gives rise to a significant puzzle for the Theoretical approach: how does coupling the intent to act lawfully with an independently lawful act (taunting) that causes

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(1984) (“Justified . . . actions should not be interfered with . . . and such actions may be assisted.”).

30. See Ferzan, *supra* note 18, at 602 (“Why think that third parties ought to intervene when both sides are in the wrong?”).

31. See Alexander, *supra* note 9, at 626 (arguing that third parties may justifiably aid only provocateurs against provocatees’ unjustified attacks); Robinson, *supra* note 8, at 27 (“Where conduct is justified because it avoids a net harm for society, it provides little basis on which to fasten blame and it is against society’s interest to deter it . . . . [S]ociety wants any and all persons [to aid justified conduct] . . . . To withdraw a defense for such conduct is to punish and to discourage it.”).

32. See Joshua D. Brooks, Note, *Deadly-Force Self-Defense and the Problem of the Silent Subtle Provocateur*, 24 CORNELL J.L. & PUB. POL’Y 533, 536 (2015) (speculating whether Zimmerman contrived self-defense in his shooting of Martin); John D. Moore, Note, *Reasonable Provocation: Distinguishing the Vigilant from the Vigilante in Self-Defense Law*, 78 BROOK. L. REV. 1659, 1680–81, 1692–95 (2013) (discussing notable self-defense cases, including Zimmerman’s, as involving intentional provocation). For renewed theoretical interest in defense-contriving, see generally Dimock, *supra* note 2, at 549 (collecting essays from a conference devoted to defense-contriving).

33. See, e.g., DeGirolami, *supra* note 6, at 601 (arguing that contrivers of necessity defenses should forfeit the defense); Ferzan, *supra* note 18, at 616 (contending that provocateurs should generally be ineligible for self-defense).

34. Finkelstein, *supra* note 24, at 160.

35. See Katz, *supra* note 17, at 593 (“[H]aving the intention of killing someone in self-defense is arguably a perfectly innocent intention . . . .”).

a lawful result (the justified killing of an unlawful aggressor) combine to create criminal liability for murder? Stated another way, why does the intent to use lawful force make the use of that lawful force unlawful? The puzzle only deepens upon considering that absent the intent to act lawfully there is no criminal liability whatsoever.<sup>36</sup> The Theoretical approach incurs this puzzle by allowing the contrived defense; the Legal approach avoids this puzzle by disallowing the defense.<sup>37</sup>

This Article solves the puzzle, as well as others generated by the Theoretical approach,<sup>38</sup> by appreciating the conditional nature of contrivers' plans and applying the overlooked doctrine of conditional intent.<sup>39</sup> For example, Able does not simply intend to kill; he has a conditional intent. Able conditions his intent to kill on being able to do so justifiably and thus lawfully. Under the Model Penal Code's influential formulation, conditional intent suffices as actual intent "unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."<sup>40</sup> Other formulations similarly establish that placing a lawful condition on an actor's intent precludes actual intent.<sup>41</sup> By conditioning his intent to kill on killing only justifiably, Able places a lawful condition on his intent thereby negating the harm and evil of his offense of murder. Therefore, Able's conditional intent fails to suffice as actual intent.<sup>42</sup> Lacking the requisite intent, Able is not criminally liable for intentional murder. As a result, the conditional intent doctrine solves the puzzle: the intent to act lawfully, coupled with a lawful

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36. Cf. Joachim Herrmann, *Causing the Conditions of One's Defense: The Multifaceted Approach of German Law*, 1986 BYU L. REV. 747, 751 ("[T]he act justified by self-defense cannot become illegal only because the actor had it in mind when he provoked the attack of the other party.").

37. Under the Legal approach, the contriver intends to act in a way that law will regard, by barring the defense, as unlawful. Criminal liability resulting from coupling the intent to act in a way that is unlawful with conduct that is independently lawful but that causes an unlawful result is not puzzling.

38. See *infra* Part III.B.

39. See, e.g., Kenneth Campbell, *Conditional Intention*, 2 LEGAL STUD. 77, 77 (1982) (conceptualizing conditional intent as the intent to perform an act "only if some contingency occurred"); Gideon Yaffe, *Conditional Intent and Mens Rea*, 10 LEGAL THEORY 273, 273 (2004) (formalizing conditional intention as "'I intend to A if X'" where A represents some act and X represents the condition). For the Supreme Court's interpretation of conditional intent, see *Holloway v. United States*, 526 U.S. 1, 4 (1999).

40. MODEL PENAL CODE § 2.02(6) (AM. LAW INST. 1985).

41. See *infra* Part II.C.

42. Cf. R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY 56 (1990) ("[A] landlord might have had the *conditional* intention to demolish her building *if* she could obtain the appropriate licenses; but before she obtained the licenses she could not be said to intend, though she might hope, to demolish the building.").

act that causes a lawful result, appropriately results in *no* criminal liability for intentional murder.

Yet this solution to the puzzle exposes a fatal flaw. The crux of the Theoretical approach is that the defense granted to the contriver's later conduct is inapplicable to her earlier culpable conduct of contriving the defense.<sup>43</sup> But the doctrine of conditional intent makes the defense relevant to the earlier conduct as well. Understanding the contriver's intent as conditional necessarily bridges the two separate temporal stages. Rather than the contriver merely having intent at T1, the contriver has intent at T1 conditioned on a future event at T2.<sup>44</sup> Because the nature of the condition determines whether conditional intent suffices as actual intent,<sup>45</sup> the defense at T2 may preclude the contriver's conditional intent from sufficing as actual intent at T1. When the defense is a justification defense, the contriver has a conditional intent to act justifiably and thus lawfully. Conditioning one's intent on acting lawfully negates the harm and evil the offense seeks to prevent and thus precludes conditional intent from sufficing as actual intent.<sup>46</sup> Returning to our example, Able's lack of the requisite mens rea of intent at T1 forecloses Able's liability for intentional murder at T1. Granting justification defenses to contrivers at the later stage precludes the Theoretical approach from holding them liable for the earlier stage. In contrast, by barring contrived defenses, contrivers' conditional intent suffices as actual intent, allowing the Legal approach to hold contrivers liable.

This Article demonstrates that conditional intent is a powerful analytical tool with which to assess contrived defenses. While the conditional intent doctrine solves the troubling puzzle of the Theoretical approach, it also precludes the Theoretical approach from holding contrivers of justification defenses liable. Even apart from the doctrine, merely the conditional nature of defense-contrivers' plans precludes the Theoretical approach from holding contrivers of any type of defense liable for some types of offenses. To the extent that defense-contrivers should be held liable—a nearly universal intuition and one embraced by both approaches—this Article argues that the Legal approach is correct and the Theoretical approach incorrect.

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43. See Alexander, *supra* note 9, at 623 (“[A] nonculpable act at T2 has no bearing on whether an actor was culpable at T1 . . . .”); Robinson, *supra* note 8, at 31 n.115 (providing an example of how a nonculpable act at T2 does not factor into an analysis of whether the actor was culpable at T1).

44. See Case Comment, *Criminal Law—Conditional Intent as Satisfying Specific Intent Requirement for Aggravated Assault*, 1956 WASH. U. L.Q. 479, 479 (“A conditional intention is the intention that one's conduct will be governed by the occurrence or nonoccurrence of a *future* event.” (emphasis added)).

45. See *infra* Part II.B–C.

46. See *infra* Part II.B–C.

This Article unfolds in the following parts. The first two Parts supply overviews of the contrived defense and conditional intent doctrines. Part I explains the Legal and Theoretical approaches to contrived defenses, discusses the debate over whether to allow or disallow contrived defenses, and canvasses criticisms of the Theoretical approach. After explicating the conditional nature of defense-contriving, Part II presents the Model Penal Code's influential formulation of the conditional intent doctrine and sorts courts' application of non-Model Penal Code formulations into three groups. Under all four formulations, conditional intent fails to constitute actual intent where the condition is based on entirely lawful conduct.

Part III applies conditional intent to contrived defenses. After explaining conditional intent's relevance, it presents and solves a number of troublesome puzzles incurred by the Theoretical approach. Part III next demonstrates that for an entire class of defense—justification—the Theoretical approach fails to hold contrivers criminally liable for offenses requiring the mens rea of purpose, intention, or knowledge. Additionally, the Theoretical approach fails to hold contrivers of excuse defenses liable for offenses requiring the mens rea of knowledge. Finally, Part III anticipates, presents, and rebuts two possible objections. The Article concludes that because the Theoretical approach fails to hold contrivers of both justification and excuse defenses liable for a wide variety of offenses, the Legal approach is preferable.

## I. CONTRIVED DEFENSES

This Part presents the two contrasting approaches to the contrived-defense doctrine. It illustrates the Legal approach through the justification defenses of self-defense and necessity as well as the excuse defense of duress. This Part next explicates the Theoretical approach that, like the Legal approach, holds the defense-contriver criminally liable, but, unlike the Legal approach, allows the contrived defense. After exploring the principal advantages of each approach, it canvasses criticisms of the Theoretical approach's inability to establish various requisite elements of criminal liability.

### A. *Legal Approach—Bar the Defense*

Most jurisdictions generally bar contrived defenses and hold contrivers criminally liable.<sup>47</sup> But the issue is not treated systematically by reference to

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47. See *supra* notes 6, 10 and accompanying text.

a single principle.<sup>48</sup> Rather, differing standards as to what type of conduct forfeits a defense apply across different jurisdictions and for different defenses.<sup>49</sup> Even within the same jurisdiction, different standards apply to different defenses.<sup>50</sup> Despite these variations, the predominant Legal approach holds contrivers liable by barring their defense.<sup>51</sup>

The issue of defense-contriving is perhaps most prominent regarding self-defense.<sup>52</sup> The overarching principle is that self-defense is unavailable unless

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48. Robinson and Cahill explain the law's lack of a systematic treatment of contrived defenses:

Most of the important issues in defenses are specific to a single defense or type of defense . . . . However, one issue—the problem of an actor who causes the conditions of his or her own defense—transcends the defense groupings. Theoretically, the issue can arise with regard to any defense. Current doctrine takes different approaches to the problem in different contexts, even though the problem is conceptually analogous in each.

ROBINSON & CAHILL, *supra* note 13, § 8.0.3, at 288.

49. Robinson identifies four different approaches to the issue in legal doctrine. Robinson, *supra* note 8, at 3–26. First, deny a defense if the contriver makes any causal contribution to the circumstances of the defense arising. *Id.* at 3–8. Second, deny a defense based on some minimum *culpable* causal contribution; the actor must be at fault. *Id.* at 8–13. Third, deny the full exculpatory effect of the defense and allow for a reduced level of liability. *Id.* at 14–17. Fourth, deny the defense and impose liability based on the degree of culpability in causing the defense conditions. *Id.* at 17–20.

50. *See id.* at 20–23 (explaining that the Model Penal Code takes five different approaches to five different defenses).

51. *See supra* notes 6, 10, 49 and accompanying text.

52. *See supra* note 32 and accompanying text. For an example of a self-defense provision, see MODEL PENAL CODE § 3.04(1) (AM. LAW INST. 1985) (“[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”).

one is “free from fault.”<sup>53</sup> What constitutes fault is not so readily articulated.<sup>54</sup> Clearly, an actor loses the right of self-defense if she is the initial aggressor.<sup>55</sup> One becomes an initial aggressor by committing unlawful acts or uttering unlawful threats intended to cause a physical conflict with the recipient of those acts or threats.<sup>56</sup> In contrast to initial aggressors, provocateurs commit lawful acts or utter lawful words that produce a physical confrontation.<sup>57</sup> Typical standards include that the defendant “provoke[s]” the confrontation<sup>58</sup> or “bring[s] on the difficulty.”<sup>59</sup> Generally, a provocateur loses eligibility for

53. *United States v. Peterson*, 483 F.2d 1222, 1231 (D.C. Cir. 1973).

54. *See Robinson*, *supra* note 8, at 9 (terming as a “difficulty . . . that it is unclear what it means to be ‘at fault’ in causing the justifying circumstances”). Joshua Dressler argues that the actor, despite not being entirely free from fault, should retain his right of self-defense in the following hypothetical:

[I]f *D* asks *V*, an acquaintance, “how in the world can you be a stupid Yankee fan?” to which *V* take[s] such umbrage that he pulls out a gun and threatens *D* with it, *D* is justified in killing *V*. . . although *D* was not entirely free from fault in the conflict.

DRESSLER, *supra* note 3, § 18.02, at 224. While intent or purpose to cause a physical confrontation suffices as fault barring a right of self-defense, see *infra* notes 60–62 and accompanying text, does knowledge or recklessness suffice as fault? Consider the following examples involving knowledge furnished by Kim Ferzan. “One may know he is inciting a bully by leaving one’s home. One may know she is encouraging rapists by dressing scantily.” Ferzan, *supra* note 18, at 599. Ferzan concludes that “we are free to leave our homes and dress immodestly. Knowledge that one might have to fend off the bully or the rapists does not render this conduct culpable or impermissible.” *Id.* at 599–600. Consider the following example involving recklessness. Suppose someone consciously disregards a substantial risk that by painting her house blue, her crazy neighbor will attack her. Robinson, *supra* note 8, at 5–6. If the crazy neighbor does attack her, does she lose the right of self-defense? *See id.* at 6 (criticizing legal standards barring self-defense in the absence of any culpability).

55. *See, e.g., Dressler*, *supra* note 3, § 18.02, at 224 (“An aggressor ‘has no right to a claim of self-defense.’” (quoting *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986))).

56. *See, e.g., id.* (“[A]n aggressor . . . [is] one whose ‘affirmative unlawful act [is] reasonably calculated to produce an affray foreboding injurious or fatal consequences.’ Alternatively, he is one who threatens to unlawfully commit a battery upon another.” (quoting *Peterson*, 483 F.2d at 1233)).

57. *See Brooks*, *supra* note 32, at 541 (terming a provocateur as “someone who uses language or conduct that is nonthreatening and nonviolent . . . to intentionally incite (or provoke) an attack so that the provocateur may then have a pretext for killing the other in ostensibly lawful self-defense”); Ferzan, *supra* note 18, at 607 (“[W]hat aggressors do, but provocateurs do not, is engage in behavior that renders them liable to defensive force.”).

58. *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995) (barring self-defense where the defendant “provoke[s] the trouble”); *Smith v. State*, 965 S.W.2d 509, 513 (Tex. Crim. App. 1998) (utilizing the standard of “provoking the difficulty” to bar self-defense).

59. LA. STAT. ANN. § 14:21 (2017) (barring self-defense to a defendant who “brings on a difficulty”); *see also State v. Slater*, 644 S.E.2d 50, 52 (S.C. 2007) (denying defendant’s request for a jury instruction on self-defense).

self-defense only if she intended to induce a confrontation.<sup>60</sup> Some standards require further that the actor provoke with the intent or purpose to cause physical harm or death.<sup>61</sup> For example, the Model Penal Code bars self-defense for the use of deadly force if “the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter.”<sup>62</sup>

The contrived-defense doctrine also applies to the necessity (also known as choice of evils or lesser evils) justification defense.<sup>63</sup> As Joshua Dressler explains, “the defendant must come to the situation with clean hands. That is, he must not have ‘substantially contribute[d] to the emergency’ or wrongfully ‘placed himself in a situation in which he would be forced to engage in criminal conduct.’”<sup>64</sup> For example, the Code bars the choice of evils defense “[w]hen the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils” and the actor is charged with an offense in which recklessness or negligence is sufficient to establish mens rea.<sup>65</sup> Michael Hoffheimer concludes that “[a]ll states exclude the necessity defense when the actor’s wrongdoing brought about the claimed necessity.”<sup>66</sup> As with self-defense, an actor’s merely causal contribution to the emergency situation requiring a choice of evils should not suffice to bar the defense in the absence

60. See *State v. Jackson*, 382 P.2d 229, 232 (Ariz. 1963) (barring self-defense where the provocation is “willingly and knowingly calculated to lead to conflict”); Ferzan, *supra* note 18, at 615 (“With respect to provocateurs, the law typically requires something extraordinarily narrow—purpose to provoke the affray.” (emphasis omitted)).

61. See, e.g., *State v. Whitford*, 799 A.2d 1034, 1046 (Conn. 2002) (“[I]n order to prove provocation, the state must demonstrate that the defendant possessed a ‘dual intent: (1) the intent to cause physical injury or death, and (2) the intent to provoke.’” (quoting *State v. Turner*, 637 A.2d 3, 4 (Conn. App. Ct. 1994))).

62. MODEL PENAL CODE § 3.04(2)(b)(1) (AM. LAW INST. 1985).

63. Necessity may be a defense if the actor’s conduct avoids more harm than it causes or constitutes the lesser evil. *Id.* § 3.02(1) (“(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . .”).

64. DRESSLER, *supra* note 3, § 22.02, at 289 (first quoting *People v. Pepper*, 48 Cal. Rptr. 2d 877, 880 (Ct. App. 1996); then quoting *United States v. Paoello*, 951 F.2d 537, 541 (3d Cir. 1991)).

65. MODEL PENAL CODE § 3.02(2) (AM. LAW INST. 1985). More precisely, if reckless in creating situations of necessity, actors lose the defense if charged with offenses requiring either recklessness or negligence. If merely negligent, actors lose the defense if charged with offenses requiring negligence. *Id.*

66. Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 242 (2007); see also DeGirolami, *supra* note 6, at 600 (“Like the Code, no jurisdiction that has addressed the question permits the necessity defense in cases of purposeful created culpability.”).

of some wrongfulness or culpable fault. For example, the Code's commentary supplies the example of a husband claiming the necessity defense for speeding his pregnant wife to the hospital to deliver their child.<sup>67</sup> Under a causal contribution standard, the husband's defense-contriving conduct of conceiving the child some nine months ago that caused the present emergency would absurdly bar the defense. But surely the husband should retain the defense in the apparent absence of any culpability or wrongdoing.

In addition to justification defenses, the contrived-defense doctrine applies to excuse defenses,<sup>68</sup> including duress.<sup>69</sup> "All jurisdictions that bar the necessity defense where an actor culpably created its conditions also do so for duress."<sup>70</sup> The Code, for example, bars the duress defense entirely "if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress."<sup>71</sup> If negligently placing herself in such a situation, the Code limits liability to offenses requiring a mens rea of negligence.<sup>72</sup> The most common example of contrived duress occurs when an actor joins a criminal organization.<sup>73</sup> As an English court explained, if a defendant "voluntarily and with knowledge of its nature, joined a criminal organisation or gang which he knew might bring pressure on him to commit an offense . . . he cannot avail himself of the defence of duress."<sup>74</sup> Despite

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67. MODEL PENAL CODE § 3.02(2) cmt. 5, at 20 n.27 (AM. LAW INST. Official Draft & Revised Comments 1985).

68. Dimock, *supra* note 2, at 553 (noting that actors who otherwise satisfy the excuse defense of duress "will be barred from relying upon that defence if they have culpably created the conditions under which they are subsequently coerced").

69. Duress is a defense to criminal conduct where the actor was coerced into committing the crime by a threat of sufficient unlawful force. The Model Penal Code provision on duress, in relevant part, is as follows:

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

MODEL PENAL CODE § 2.09(1) (AM. LAW INST. 1985).

70. DeGirolami, *supra* note 6, at 645.

71. MODEL PENAL CODE § 2.09(2) (AM. LAW INST. 1985).

72. *Id.*

73. See, e.g., *Williams v. State*, 646 A.2d 1101, 1110 (Md. Ct. Spec. App. 1994) ("[W]e hold that where an actor recklessly . . . places himself or herself in a situation where it is probable that he or she would be subjected to duress [by joining a criminal enterprise], the defense of duress is unavailable."); *DRESSLER*, *supra* note 3, § 23.01, at 299 ("[I]f *D* voluntarily joins a criminal organization that she knows or has reason to know is likely to subject her to coercive threats at a later time, she will not be permitted to claim the defense [of duress] if that foreseeable event arises.").

74. *R. v. Sharp* [1987] QB 853 (HL) 861 (appeal taken from England).

being an excuse defense, the same general rationale as to the justification defenses of self-defense and necessity applies to duress: “[T]he requirement that the coerced actor come to the situation free from fault is consistent with the nature of the defense as an excuse. A person should not be permitted to plead blamelessness, as an excuse implies, if he was culpably responsible for [being subjected to duress].”<sup>75</sup> As Marc DeGirolami explains, the contriver of a duress defense “is unexcused because he does not *deserve* to be excused given his created culpability.”<sup>76</sup>

### B. Theoretical Approach—Grant the Defense

While consideration of alternative approaches to the contrived-defense doctrine came into prominence in German criminal law scholarship in the 1960s,<sup>77</sup> perhaps the first American scholar to critique the Legal approach was George Fletcher in 1978.<sup>78</sup> Fletcher branded the law’s approach of barring contrived necessity defenses as “irrational.”<sup>79</sup> But it was not until Paul Robinson’s “seminal”<sup>80</sup> and “classic”<sup>81</sup> 1985 article, *Causing the Conditions of One’s Defense*, that the doctrine captured the attention of American scholars.<sup>82</sup> Michael Moore chronicled the reception of Robinson’s article when it was first presented at a conference: “The reaction to Robinson’s paper

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75. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1342 (1989).

76. DeGirolami, *supra* note 6, at 646. DeGirolami further explains how the rationale for the contriving doctrine applies equally to justification and excuse defenses:

Whether an otherwise wrongful act is excused depends in part upon those salient circumstances—circumstances that are relevant universally and irrespective of the special qualities of an individual actor—that attend the act. Likewise, whether an otherwise wrongful act is justified also depends upon an evaluation of the pertinent circumstances.

*Id.*

77. See Katz, *supra* note 17, at 588 (noting that while the doctrine was “unjustly neglected” in America it has not been “elsewhere, most notably German criminal law scholarship, which has for several decades now paid it the attention it deserves, largely through the efforts of a single scholar, Joachim Hruschka, who breathed new life into this topic starting in the late 1960s”). For other acknowledgements of the contribution of German scholarship, see Finkelstein & Katz, *supra* note 10, at 480 (noting that the doctrine is discussed in the German literature under the rubric of “*Actio Libera in Causa*”); Finkelstein, *supra* note 24, at 147 (tracing the roots of Michael Moore’s approach to German law).

78. FLETCHER, *supra* note 27, § 10.2, at 797.

79. *Id.*

80. DeGirolami, *supra* note 6, at 615.

81. Garvey, *supra* note 13, at 354 n.72.

82. See Robinson, *supra* note 8, at 2.

by the leading Anglo-American and German criminal-law scholars . . . was ‘Of course—that is what we all teach.’”<sup>83</sup> Though there are a number of different accounts of the Theoretical approach offered by scholars,<sup>84</sup> my focus will be on the “traditional,”<sup>85</sup> “orthodox,”<sup>86</sup> “reigning,”<sup>87</sup> or “causal”<sup>88</sup> view. “[It is] the most widely accepted[] view . . . among Anglo-American criminal law scholars”<sup>89</sup> and has “dominated the literature.”<sup>90</sup> “It is the view most forcefully articulated by Michael Moore and Paul Robinson.”<sup>91</sup> Most “scholars generally follow Robinson’s view that [creating the conditions for the defense] should almost never bar the defense.”<sup>92</sup>

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83. MICHAEL S. MOORE, *ACT AND CRIME* 36 n.49 (1993).

84. For discussion of the principal alternative theoretical approach, see *infra* note 98.

85. Finkelstein & Katz, *supra* note 10, at 482.

86. Dimock, *supra* note 2, at 558.

87. Katz, *supra* note 17, at 589.

88. Dimock, *supra* note 2, at 559.

89. Katz, *supra* note 17, at 589.

90. Finkelstein & Katz, *supra* note 10, at 482.

91. Katz, *supra* note 17, at 589. Moore’s articulation of this traditional, causal view explains the basis for holding defense-contrivers liable for their early stage, defense-contriving conduct: “[If a] court can find a voluntary act by the defendant, accompanied *at that time* by whatever culpable *mens rea* that is required, which act in fact and proximately causes some legally prohibited states of affairs, then the defendant is *prima facie* liable for that legal harm.” MOORE, *supra* note 83, at 35–36. Under this view, if all of the requisite elements for criminal liability are present at the early, defense-contriving stage, the contriver is criminally liable based on the early stage conduct alone, regardless of whether the contriver does or does not have a defense for conduct at the later stage.

For example, intending to kill a victim under circumstances where the killing would be justified in self-defense, at T1 a provocateur provokes the victim into unlawfully and unjustifiably aggressing against the provocateur. At T2, facing the victim’s unlawful and unjustifiable aggression, the provocateur kills the victim and claims justified self-defense. While justified in self-defense at T2, the provocateur lacks a defense for her conduct at T1. The traditional, casual view maintains that the provocateur’s conduct at T1 satisfies the offense elements of murder. At T1, the defendant with the intent to kill commits the voluntary act of provoking the victim. Despite the act of killing appearing to occur at T2, the traditional, causal view insists that the act of provocation at T1 is both the factual, or but for, and proximate cause of the victim’s death. As Finkelstein & Katz characterize it, the provocateur “voluntarily and intentionally caused himself [at T1] to attack [at T2].” Finkelstein & Katz, *supra* note 10, at 483 (“Because the defendant possessed the requisite *mens rea* at the earlier moment [T1] at which he voluntarily and intentionally caused himself to attack, he is liable for the attack [at T2], and the claim of self-defense should be unavailable to him.”). Because the provocateur satisfies the offense elements of murder at T1 (for which there is no justification defense because the victim has not yet posed a threat), the defendant is liable for a murder committed at T1 despite having a justification defense at T2. The key to understanding this causal view is the specification of the act that is the cause of death not at the more obvious time at T2—when the provocateur pulls the trigger of the gun—but instead at T1—the act of provocation.

92. DeGirolami, *supra* note 6, at 599. Robinson’s view is most closely associated with his article from thirty years ago (Robinson, *supra* note 8) that has been termed “the most exhaustive

Illustrating his account, Robinson considers the following hypothetical involving the necessity defense: “Assume that an actor sets a fire that threatens a nearby town to create the conditions that will justify his using his enemy’s farm as a firebreak.”<sup>93</sup> Robinson explains that if an actor “is not only culpable as to causing the defense conditions, but also has a culpable state of mind as to causing himself to engage in the conduct constituting the offense, the state should punish him for causing the ultimate justified or excused conduct” that he subsequently performs.<sup>94</sup> The actor’s liability “is properly based on his initial conduct of causing the defense conditions with his accompanying scheming intention, not on the justified or excused conduct that he subsequently performs.”<sup>95</sup> Robinson’s account “allow[s] the actor a defense for the immediate conduct constituting the offense, but would separately impose liability on the basis of the actor’s earlier conduct in culpably causing the conditions of his defense.”<sup>96</sup>

Fully understanding Robinson’s analysis of the hypothetical requires carefully distinguishing between two temporal stages. At T1, the actor intentionally sets a fire with the further accompanying intention of creating the justificatory circumstances by which he can burn down his enemy’s farm. At T2, with the fire threatening a nearby town, the actor intentionally burns down his enemy’s farm as a firebreak that saves the town. The actor receives the defense of necessity for his T2 conduct of burning down his enemy’s farm. That the actor contrived to do so at T1 is irrelevant in assessing the T2 conduct. Similarly, the actor’s justified T2 conduct is irrelevant in assessing his T1 conduct. At T1, the actor committed the voluntary act of setting a fire with the accompanying intention that he would ultimately burn down his enemy’s farm under circumstances supporting a necessity defense. By intentionally “causing himself [at T1] to engage in the conduct constituting the offense [at T2],”<sup>97</sup> the actor is liable for the intentional destruction of the enemy’s property based on his T1 conduct alone. That is, the initial act of

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scholarly treatment of created culpability . . . [and] seminal,” DeGirolami, *supra* note 6, at 615; “the classic discussion of this general problem,” Garvey, *supra* note 13, at 354 n.72; and “the most fully developed proposal [regarding the issue],” Luban, *supra* note 4, at 2387. For other scholars agreeing with Robinson’s view, see DRESSLER, *supra* note 3, § 22.02, at 289 n.38 (regarding the necessity defense); WAYNE R. LAFAVE, CRIMINAL LAW § 10.1, at 564 (5th ed. 2010) (regarding the necessity defense); Dressler, *supra* note 75, at 1342 n.63 (regarding the duress defense when conceptualized as a justification defense).

93. Robinson, *supra* note 8, at 28.

94. *Id.* at 31 (emphasis omitted).

95. *Id.*

96. *Id.* at 27.

97. *Id.* at 31 (emphasis omitted).

setting the fire at T1, not the burning of the enemy's farm as a firebreak at T2, constitutes the cause of the destruction of the enemy's farm. While the T2 conduct enjoys a justification defense of necessity, the T1 conduct does not. At T1, when the actor set the initial fire, there were no justifying conditions of necessity.<sup>98</sup>

Robinson catalogues the advantages of allowing contrived defenses (the Theoretical approach) and the disadvantages of disallowing them (the Legal approach).<sup>99</sup> First, barring the contriver's defense "may reduce his incentive to set the firebreak and save the town."<sup>100</sup> Second, "[w]here a forest fire has been set, for whatever reason, society wants any and all persons to set a firebreak and save a threatened town. To withdraw a defense for such conduct is to punish and discourage it."<sup>101</sup> Third, denying the contrived defense inappropriately allows the owner of the field, who values his crop more than he does the lives of the townspeople, to lawfully interfere with the actor's

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98. The principal alternative to the traditional, causal view is the "perpetration-by-means" view. Finkelstein & Katz, *supra* note 10, at 488–89; Katz, *supra* note 17, at 591–92 (referring to the causal view as the "reigning" view and referring to the causal view and the perpetration-by-means view collectively as "the Two Dominant" views). It is similar to the doctrine that holds an actor liable for causing a crime to be committed by an innocent. Robinson, *supra* note 8, at 36 (referring to his own account as supported by the principle of and "analogous to liability for causing a crime by an innocent"). The contrived-defense doctrine "treats the justified, excused, or unaware actor as the 'innocent actor' who was caused to engage in the criminal conduct by the actor's prior culpable actions." *Id.* The contriver is the innocent "principal while he is committing the crime [at T2] and an accomplice to his own future self while he is preparing for the crime [at T1]." Finkelstein & Katz, *supra* note 10, at 488–89. It might be helpful in understanding this view to think of the contriver "as essentially two actors, an 'early self' and a 'later self,' who act in complicity with each other." Katz, *supra* note 17, at 591. The early self (as instigating accomplice) contrives that the later self (as principal) will commit the crime under circumstances where the later self will have a defense. *Id.* at 594. "[A]lthough the Later Self has a defense, the Earlier Self does not, which is why we can hold the Earlier Self liable for using the Later Self as an innocent means for committing the crime." *Id.*

Because both the traditional, causal view and the perpetration-by-means view "will usually produce the same outcome," little turns on which approach is employed. Finkelstein & Katz, *supra* note 10, at 489. As Susan Dimock concludes, "[t]here seems to be no substantive moral difference between the person who brings about the death of his intended victim through the agency of an innocent, subordinate, co-conspirator or himself as a mere means." Dimock, *supra* note 2, at 567. "Somewhat analogous objections [as levied against the traditional, causal view] can be registered to . . . the so-called perpetration by means approach." Katz, *supra* note 17, at 594. For criticisms of the perpetration-by-means view, see Finkelstein & Katz, *supra* note 10, at 491–92; Katz, *supra* note 17, at 594–95. The traditional, causal view and perpetration-by-means view are simply different versions of the Theoretical approach.

99. See Robinson, *supra* note 8, at 27–29.

100. *Id.* at 28.

101. *Id.* at 27 (footnote omitted).

attempt to set fire to the field.<sup>102</sup> Fourth, allowing the contrived defense avoids “an anomalous situation in which the actor and another person may work side-by-side engaging in the same conduct—here, setting fire to the same field—yet one will be justified and the other will not.”<sup>103</sup>

Though Robinson views allocating the rights of third parties to either aid or hinder the defense-contriver as an advantage of the Theoretical approach, Larry Alexander reasons in the opposite direction.<sup>104</sup> He defends the Theoretical approach’s granting contrived defenses by reasoning from the rights of third parties.<sup>105</sup> Through the following example, drawn from the film *Dolores Claiborne*, Alexander first establishes that a defense-contriver is criminally liable at the early, contriving stage:

At T1 [Claiborne] plies her abusive husband with drink, says things to him that she believes will almost certainly lead him to attack her physically, and begins running from him in the direction of her [pre-established] booby trap. At T2 she runs past the booby trap with her husband in hot pursuit, resulting in his death [when he runs into the booby trap].<sup>106</sup>

According to Alexander, at T1 Claiborne consciously created a risk that she would have to kill her abusive husband, who was a culpable aggressor, in self-defense at T2.<sup>107</sup> If Claiborne not only intended to kill if culpably attacked but intended the culpable attack to occur, then Claiborne would be liable for an intentional murder based on her T1 conduct.<sup>108</sup> Nonetheless, should Claiborne be justified in self-defense at T2 against her husband’s culpable aggression?

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102. *Id.* at 28.

103. *Id.* (“It is the nature of justified conduct that it either is or is not justified—depending on whether it causes a net societal benefit—regardless of the particular state of mind, past or present, of the actor.”).

104. *See* Alexander, *supra* note 9, at 626.

105. *See id.*

106. *Id.* (citing *DOLORES CLAIBORNE* (Castle Rock Entertainment 1995)).

107. *Id.* at 627.

108. *See id.* at 625.

To confirm that Claiborne should retain her defense despite contriving it, Alexander modifies the Claiborne example:

Suppose a third party knows . . . Claiborne's plans and watches [her] plans unfold. . . . [S]uppose Claiborne's husband manages to dodge the booby trap and is now about to strangle her. May the third party, who has a gun, intervene and shoot . . . the husband? Or must the third party remain neutral?<sup>109</sup>

Alexander answers that the third party is justified in intervening on Claiborne's behalf and shooting the husband.<sup>110</sup> Despite Claiborne initiating the incident, the husband is a "murderous culpable aggressor[] whose attack[] [is] neither justified nor excused by the provocations."<sup>111</sup> As a result, despite Claiborne's intentional murder liability (based on T1 conduct), Claiborne is less culpable than the husband at T2 given that he is a culpable aggressor and she is not.<sup>112</sup> Because a third party "should come to the defense of the less culpable actor," a third party should aid Claiborne and not her husband.<sup>113</sup> If a third party should intervene on Claiborne's behalf, then, Alexander concludes, Claiborne is justified in self-defense.<sup>114</sup>

Not all criminal theorists agree. Some take the position, like the Legal approach, that contriving a defense bars the defense.<sup>115</sup> The earlier culpable conduct at T1 taints, undermines, or precludes the otherwise exculpatory effect of a defense for conduct at T2.<sup>116</sup> Kim Ferzan and Marc DeGirolami advocate barring contrived self-defense and necessity, respectively.<sup>117</sup> Ferzan concedes, however, that the determination of third-party rights to intervene is more difficult under the Legal approach.<sup>118</sup> While the intervention of third parties is still possible, "there would be complex questions about whom the

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109. *Id.* at 626.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See infra* notes 116–117 and accompanying text.

116. *See* Dimock, *supra* note 2, at 557–59 (arguing that contrivers' "moral fault at T1 defeats the normally exculpating influence of [their] defence at T2").

117. DeGirolami, *supra* note 6, at 601 ("[T]he defendant's purpose, knowledge, or recklessness in engaging in conduct that directly causes a choice of evils should create a rebuttable presumption that the defendant is barred from asserting the necessity defense."); Ferzan, *supra* note 18, at 616 ("[P]rovocateurs forfeit their defensive rights when they consciously disregard the substantial and unjustifiable risk that their words or conduct will cause another person to attack them.").

118. *See* Ferzan, *supra* note 18, at 615.

third party ought to privilege.”<sup>119</sup> If “sometimes, there are just two wrongdoers,” each unjustified, that complicates the justifiability of a third party intervening to aid either the unjustified provocateur or the unjustified provocatee.<sup>120</sup>

Yet the greater clarity and precision of the Theoretical approach in allocating third-party rights may come at the cost of less accuracy. Our intuitions may be unclear as to who is the more culpable party and who is comparatively more deserving of third-party aid. Consider the above example of Able and Baker.<sup>121</sup> True, Able’s act of taunting is independently lawful and Baker’s provoked attempt to kill Able is unlawful.<sup>122</sup> Nonetheless, one might view Able as more culpable for culpably initiating and instigating the confrontation. Consider also the highly controversial case of George Zimmerman and Trayvon Martin.<sup>123</sup> Suppose, as some speculated, that Zimmerman intentionally contrived his claim of self-defense by following and harassing Martin into attacking him.<sup>124</sup> Which party is more culpable and on whose behalf could third parties have intervened? By granting Able and Zimmerman a defense-contriving justified self-defense, the Theoretical approach privileges third parties to intervene only on contrivers’ behalf—Able and Zimmerman. By barring Able and a defense-contriving Zimmerman self-defense, the Legal approach makes it unclear on whose behalf third parties could intervene. In its very lack of clarity, the Legal approach might well be more accurate in more closely reflecting our uncertain intuitions as to which party is more culpable and on which side third parties should intervene. The Theoretical approach, though enjoying greater clarity and precision, may be less accurate in that it may yield the intuitively wrong result. As Kim Ferzan asks, “Why think that third parties ought to intervene [at all] when both sides are in the wrong?”<sup>125</sup> Whether the Theoretical approach’s greater precision is a virtue or vice, however, is irrelevant if it simply does not work. The next section presents criticisms of the Theoretical approach that question whether it succeeds in holding contrivers liable.

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119. *Id.*

120. *Id.*

121. See *supra* text accompanying notes 14–24.

122. Daniel M. Farrell, *What Should We Say About Contrived ‘Self-Defense’ Defenses?*, 7 CRIM. L. & PHIL. 571, 585 (2013) (terming provoked victims’ aggression against contrivers as “voluntary, wrongful attacks”); Robinson, *supra* note 8, at 5 n.14 (characterizing a provocatee’s force against a provocateur as “an unjustified attack”).

123. For an account of the case and the surrounding controversy, see Moore, *supra* note 32, at 1671–73.

124. See, e.g., Brooks, *supra* note 32, at 536 (entertaining the possibility that Zimmerman intentionally contrived the circumstances for his claim of self-defense).

125. Ferzan, *supra* note 18, at 602.

### C. Criticisms of Theoretical Approach

There are two principal bases for criticism of the Theoretical approach. Through the same analytical tool of conditional intent, this Article resolves and neutralizes the first basis for criticism but builds on and advances the second. First, the Theoretical approach is overbroad and yields a number of absurd results, troublesome counterexamples, and conceptual puzzles. Part III.B both presents these criticisms as well as resolves them. Second, the Theoretical approach imposes criminal liability for contriving defenses despite the absence of requisite offense elements. Criminal liability without satisfying requisite offense elements generally violates the Legality principle.<sup>126</sup> As Susan Dimock notes, “[g]iving up the principle of legality [in order to implement the contriving defense doctrine] would be a bitter pill to swallow, as likely to kill the patient as cure him.”<sup>127</sup>

This section presents arguments that the Theoretical approach holds contrivers liable in the absence of the requisite elements of proximate causation and *mens rea*.<sup>128</sup> Perhaps neither of these criticisms is entirely successful. The foremost critics of the Theoretical approach, Claire Finkelstein and Leo Katz, concede that “none of the objections deals the

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126. See, e.g., Husak, *supra* note 20, at 367 (“Legality requires that persons are not subject to punishment unless they breach a penal statute, and a defendant who does not satisfy the *mens rea* of a statute is no more worthy of punishment than a defendant who does not satisfy its *actus reus*.”); see also Robinson, *supra* note 8, at 60–61 n.199 (referring to the “illogic of conviction absent proof of a required element”).

127. Dimock, *supra* note 2, at 564.

128. There are two additional requisite elements that some commentators claim defense-contrivers do not satisfy. First, the *actus reus* for attempts. See Finkelstein & Katz, *supra* note 10, at 487 (arguing that the Theoretical approach imposes attempt liability without contrivers committing the requisite substantial step toward the completed offense); Katz, *supra* note 17, at 594 (maintaining that the Theoretical approach finds contrivers “guilty of an attempt at a counterintuitively early stage of wrongdoing”). Second, the *actus reus* of conduct offenses. Finkelstein and Katz explain as follows:

[I]t seems to strain ordinary meaning to say that a person is entering a building just because he is doing something that will later *cause* himself to enter a building, especially when the thing he is doing is an action as different from entering a building as visiting a hypnotist [or consuming alcohol]. . . . [T]o cause a burglary is not to burglarize.

Finkelstein & Katz, *supra* note 10, at 485 (emphasis added). Similarly, neither consuming alcohol nor becoming hypnotized can satisfy the *actus reus* requirement of rape—nonconsensual intercourse. Katz, *supra* note 17, at 592. Getting oneself hypnotized or intoxicated is not itself engaging in nonconsensual intercourse. *Id.* (noting that “the act of causing oneself to have intercourse strikes many as ethically quite different from the act of having intercourse”). As Finkelstein and Katz characterize it, “to cause a rape is not to rape.” Finkelstein & Katz, *supra* note 10, at 485.

approach a mortal blow.”<sup>129</sup> They merely “diminish its attractiveness.”<sup>130</sup> But one of the criticisms—contrivers of justification defenses lack the requisite mens rea for liability under the Theoretical approach—serves as a building block in a more persuasive argument, in Part III, utilizing the doctrine of conditional intent.

### 1. Proximate Causation

Perhaps the element most commonly cited as unsatisfied by defense-contrivers under the Theoretical approach is proximate causation.<sup>131</sup> Margaret Raymond finds that Robinson’s account holds contrivers liable despite the absence of causation.<sup>132</sup> Raymond considers the situation of “X taunts Y, and Y responds with unlawful violence, at which point X kills Y in self-defense.”<sup>133</sup> Under Robinson’s account, if X knew or intended that Y would respond with lethal force, then X is liable for Y’s death based on X’s initial taunt.<sup>134</sup> But Raymond observes that perhaps “Y’s unlawful and homicidal act is a supervening cause of his own death,” thereby excluding X as the proximate cause of Y’s death.<sup>135</sup> “It may have been foreseeable that [Y] would act unlawfully, but his decision is an act of ‘free, deliberate and informed’ human intervention which can break the causal chain.”<sup>136</sup> Other

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129. Finkelstein & Katz, *supra* note 10, at 484.

130. *Id.*

131. Dimock, *supra* note 2, at 558–59 (“The problem . . . is that normally the intervening actions of other agents or highly unusual situational circumstances (the actions of the attacker, provocateur . . . [or] coercer . . . ) would break the chain of causation, and so undermine the finding of proximate causation.”); *see infra* notes 132–37 and accompanying text. Even Robinson appears to concede that the requisite causation element is absent:

It is likely, however, that without a special rule expressly permitting liability under such a causing-one’s-defense analysis, the causation requirement might frequently be held to be unsatisfied, i.e., the ultimate offense might be “too remote” from the actor’s conduct in causing the conditions of his defense for the actor to be held accountable for the offense.

Robinson, *supra* note 8, at 37 n.128. Robinson’s solution is the contriving defense doctrine itself—“a special rule expressly permitting liability under such a causing-one’s-defense analysis.” *Id.* That is, the doctrine supplies the missing requisite causation element by fiat or by a legal fiction.

132. Margaret Raymond, *Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287, 335 (2010).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14.03[C][6] (5th ed. 2009)).

commentators agree that contrivers often fail to satisfy the requisite element of proximate causation under the Theoretical approach.<sup>137</sup> But proximate causation is notoriously vague,<sup>138</sup> and even Katz concedes that the requisite element of proximate causation is not *clearly* missing.<sup>139</sup>

## 2. Mens Rea

For the purposes of this Article, the most important requisite element arguably absent under the Theoretical approach is mens rea. Finkelstein and Katz illustrate the lack of mens rea with the following example: “Imagine the defendant who drinks and drinks, hoping to acquire enough courage to carry out his intended crime. He eventually lapses into an irresponsible state in which he has finally acquired the resolution he needs to carry out the killing.”<sup>140</sup> Under the Theoretical approach, the defendant has the requisite mens rea of intent to kill prior to his drinking or at least prior to reaching a state of irresponsibility.<sup>141</sup> But according to Finkelstein and Katz, the

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137. See Ferzan, *supra* note 18, at 603 (“[T]he respondent’s [Y’s] behavior should be a voluntary action that cuts the causal chain.”); Finkelstein & Katz, *supra* note 10, at 485 (“The problem is that the defendant’s action must be the *proximate* cause of the victim’s death in order for him to be liable on the basis of his earlier act. But many of the cases that fall in the domain of the [defense-contriving doctrine] exemplify ‘but for,’ and not proximate, causation.”); Katz, *supra* note 17, at 593 (“[T]he victim’s [Y’s] reaction to the provocation was an intervening cause. That is, someone might say that the victim’s reaction was a voluntary act of the sort that is deemed to break the chain of proximate causation.”).

138. DRESSLER, *supra* note 3, § 14.03, at 189 (“The concept of ‘proximate causation’ is obscure.”); see also GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 70 (1998) (noting the “degree of fluidity and uncertainty in the concept of causation”); SANFORD KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 576 (9th ed. 2012) (referring to the “elusive concept of proximate cause”).

139. Katz, *supra* note 17, at 593. Though suggesting that the victim’s reaction might be a supervening cause precluding the contriver from being the proximate cause, Katz explains why this is not clear:

To be sure, ordinarily the chain of proximate causation is deemed to be broken chiefly when someone deliberately takes an action that is intended to bring about the ultimate victim’s death. That was obviously not the case here, since the intervening actions of the victim were not intended to bring about the victim’s death. (He did not commit suicide.)

*Id.*

140. Finkelstein & Katz, *supra* note 10, at 488.

141. *Id.* (citing Robinson, *supra* note 8, at 7–8).

defendant merely exhibits “the *intention to acquire the intention to kill*. And this is probably not sufficient for the mens rea for murder.”<sup>142</sup>

In addition, the presence of exculpatory circumstances may suggest the absence of culpable mens rea.<sup>143</sup> Katz argues that a defense-contriver does not simply have the intent to commit an offense, but the intent to commit an offense under exculpatory circumstances.<sup>144</sup> “And that arguably changes his mens rea from blameworthy to not.”<sup>145</sup> Katz considers the common situation of the provocateur seeking to kill in self-defense.<sup>146</sup> The provocateur does not simply have the intent to kill, but the intent to kill in self-defense.<sup>147</sup> “But since having the intention of killing someone in self-defense is arguably a perfectly innocent intention, unlike the intention to kill him pure and simple, it is not clear that this defendant has the kind of guilty mind we require for conviction.”<sup>148</sup>

While none of these criticisms may be clearly persuasive,<sup>149</sup> this Article builds on Finkelstein and Katz’s analysis. It adopts Finkelstein’s broad suggestion that the Theoretical approach may simply not work for justification defenses,<sup>150</sup> and advances Katz’s narrower point that a self-defense-contriver does not simply have the intent to kill but the intent to kill in self-defense.<sup>151</sup> (Or more generally, contrivers of justification defenses do not simply have the intent to commit crime X but the intent to commit crime X justifiably.)

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142. Finkelstein & Katz, *supra* note 10, at 488 (maintaining that “he does not necessarily display the intention to kill”).

143. Though not taking a position on whether mens rea is absent, Ferzan seems to recognize the issue as genuine:

Is the correct question, “May one engage in conduct so that one may purposely kill?” or is the question, “May one engage in conduct so that one may purposefully and justifiably kill?” That is, can the provocateur build in the justifiability of his conduct at t2 in determining whether his [conduct is] culpable and therefore impermissible at t1?

Ferzan, *supra* note 18, at 618. Ferzan’s focus is less on whether the provocateur has the requisite mens rea and more on whether the provocateur forfeits a right of self-defense against the wrongfully aggressing provocatee. *See id.* at 614–21.

144. *See* Katz, *supra* note 17, at 593.

145. *Id.*

146. *Id.*

147. *Id.* (“The defendant who provokes his victim into attacking him is not simply aiming to kill his victim. He is aiming to kill his victim in self-defense.”).

148. *Id.*

149. Finkelstein & Katz, *supra* note 10, at 484.

150. *See* Finkelstein, *supra* note 24, at 160 (“[S]omeone might want to question whether the causing-the-conditions approach is even correct for justifications.”).

151. *See* Katz, *supra* note 17, at 593.

Katz's insight runs into two possible difficulties. First, the requisite mens rea of an offense is often more narrow and technical.<sup>152</sup> For example, the requisite mens rea of murder is the intent to kill.<sup>153</sup> There may be no particular requirement that the intent to kill be sufficiently blameworthy.<sup>154</sup> That is, all that may be required is a particular mental state, not a level of blameworthy culpability.<sup>155</sup> As a result, whether an actor has merely the intent to kill or the intent to kill justifiably or the intent to kill cruelly or the intent to kill gently and humanely, each could satisfy the requisite mens rea of murder. Stating it differently, Katz's point is more morally persuasive than legally persuasive. Second, the Theoretical approach asserts that defenses at T2 are completely independent of, and unavailable to, contrivers' T1 conduct.<sup>156</sup> As a result, contrivers' justification at T2 is unavailable to inform the assessment of their mens rea at T1. That contrivers are justified at T2 cannot be used to claim, as Katz does, that contrivers, at T1, have the intent to act justifiably.

As discussed in the next two Parts, the conditional intent doctrine supports Katz's insight. If the intent of contrivers of justification defenses is conditional—conditioned on engaging in conduct if and only if justified—the conditional intent doctrine avoids both of the above possible difficulties for Katz's view. Applying the doctrine to contrivers of justification defenses not only allows Katz's insight to find a footing in existing criminal law doctrine but also *requires* consideration of contrivers' justification defenses at T2 in order to assess their mens rea at T1. The next Part introduces this doctrine of conditional intent.

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152. See DRESSLER, *supra* note 3, § 10.02, at 118 (distinguishing between the older, broader, morally culpable or blameworthy meaning of mens rea versus the more modern, narrower, elemental meaning of mens rea as a mental state).

153. *E.g.*, N.Y. PENAL LAW § 125.25 (McKinney 2017) (“A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or a third person . . . .”); 18 PA. CONS. STAT. § 2502(a) (2017) (“A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.”).

154. See FLETCHER, *supra* note 27, at 397 (noting the distinction between “normative and descriptive” conceptions of mens rea, Fletcher explains that “‘intent’ may refer either to a state of intending (regardless of blame) or it may refer to an intent to act under circumstances . . . that render an act properly subject to blame”).

155. See DRESSLER, *supra* note 3, § 10.02, at 119 (noting that under the more modern, narrow, elemental approach to mens rea all that is required is that the actor have the mental state of an intent to kill regardless of whether that intent is otherwise morally blameworthy or culpable).

156. See *supra* note 25 and accompanying text.

## II. CONDITIONAL INTENT

After explaining how defense-contrivers' intent is conditional, this Part supplies a brief overview of the doctrine of conditional intent. It presents and explains the Model Penal Code's formulation of the doctrine, its codification in state statutes, and its application in state and federal case law. Next, this Part canvasses the non-Model Penal Code formulations of the doctrine and sorts them into three groups. The common denominator of these three groups and the Code is that intent conditioned on entirely lawful conduct does not suffice as the requisite intent satisfying the mens rea of an offense.

### A. Conditionality in Defense-Contriving

Defense-contrivers' intent is not merely to commit the conduct constituting the crime. It may not even be to commit the conduct under circumstances satisfying a defense. Rather, the intent is generally to commit conduct if and only if doing so satisfies the conditions of a defense.<sup>157</sup> That is, a contriver's intent is conditional—conditioned on satisfying the requirements of a defense. Consider again the above example of Able and Baker. Contriving to kill Baker in justified self-defense, Able intends at T1 to kill Baker at T2 and under the Theoretical approach thereby satisfies the requisite mens rea element of intent to kill for the offense of murder at T1. But does Able truly have intent, at T1, to kill? If Baker does not unlawfully aggress against him, Able will not kill Baker. If Baker does unlawfully aggress against Able but only uses non-lethal force, Able will not kill Baker. Able only intends to kill on satisfaction of the conditions that (i) Baker does unlawfully attack him, (ii) Baker uses lethal force, and, more generally, (iii) killing Baker constitutes justified self-defense. Therefore, Able does not merely have the intent to kill or even the mere intent to kill justifiably. Rather,

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157. See Alexander, *supra* note 9, at 627 (finding, after considering various examples, that provocateurs intend “to kill their attackers if—but only if—the latter culpably attacked them”); cf. Farrell, *supra* note 122, at 583 (“[T]he manipulator’s [provocateur’s] plan leaves him free to respond or not respond to his target’s response to his provocation.”).

To further highlight how Able's intent to kill is conditional in the above example, contrast that with the following example involving Able 2 and Baker 2. All the same facts apply except that Able 2 intends to kill Baker 2 regardless of whether justificatory circumstances are present. Able 2 would prefer to kill Baker 2 in self-defense. But if the justificatory circumstances are absent, then Able 2 will kill Baker 2 anyway. Both Able and Able 2 might share the intent not merely to kill but to kill justifiably. But only Able has a conditional intent to kill (Able will kill if and only if justificatory circumstances are present). Able 2's intent is unconditional. Cf. Ferzan, *supra* note 18, at 619 (contrasting contrivers intending to kill versus contrivers intending to kill only in limited circumstances).

Able has a conditional intent to kill—conditioned on the killing satisfying the requirements of self-defense. The next sections explore the various formulations of the conditional intent doctrine. The doctrine determines whether conditional intent suffices as the requisite mens rea of intent. The significance of the doctrine, for our purposes, is that it reveals the inability of the Theoretical approach to establish the requisite mens rea necessary to hold contrivers criminally liable.

### *B. Model Penal Code*

The most influential formulation of the conditional intent doctrine is from the Model Penal Code.<sup>158</sup> The Code's provision, expressed in terms of purpose rather than intent,<sup>159</sup> is as follows: "When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."<sup>160</sup> That is, conditional intent suffices as actual intent unless the condition negates the harm or evil that the offense seeks to prevent. The Code's formulation is codified in numerous

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158. See *United States v. Anderson*, 108 F.3d 478, 484 (3d Cir. 1997) (noting that the Code's test almost supplants the issue itself, the court stated "the question becomes not *whether* a defendant's conditional intent is sufficient to satisfy an intent element of a statute, but *which* conditions negative the harm sought to be prevented by a statute and which will not"); Yaffe, *supra* note 39, at 276 ("The Model Penal Code has had a strong influence on the view of conditional intent espoused by philosophers of criminal law and has also influenced judges' decisions . . . and it is accepted verbatim in . . . a standard [criminal law] reference text."); *id.* at 309 (referring to "the almost wholesale acceptance of the Model Penal Code's approach" to conditional intent); see also LAFAVE, *supra* note 92, § 5.2, at 267 (noting that "[t]he Model Penal Code sums . . . up" existing case law and supplies the "reasoning" that the Supreme Court employed in its most recent case involving conditional intent).

159. For the equivalence of conditional purpose and conditional intent, see sources cited *supra* note 158 and *infra* note 161.

160. MODEL PENAL CODE § 2.02(6) (AM. LAW INST. 1985).

state statutes<sup>161</sup> and utilized in many jurisdictions' case law.<sup>162</sup> The Code's Commentary notes that the Code's provision is both "a statement and rationalization of the present law."<sup>163</sup>

The Commentary supplies some examples. "[I]t is no less a burglary if the defendant's purpose was to steal only if no one was at home or if he found the object he sought."<sup>164</sup> That is, the conditions of the burglary occurring only if the dwelling was empty and a particular item was present fail to negate the harm or evil that the offense of burglary seeks to prevent.<sup>165</sup> As a result, conditional intent suffices as actual intent and the defendant satisfies the requisite mens rea necessary for liability for the offense of burglary. "But it would not be an assault with intent to rape, if the defendant's purpose was to accomplish the sexual relation only if the mature victim consented; the condition negatives the evil with which the law has been framed to deal."<sup>166</sup> That is, the defendant's lawful condition—consensual and therefore lawful intercourse—negates the harm or evil that the offense seeks to prevent. Therefore, the defendant's conditional intent fails to suffice as actual intent.<sup>167</sup> Lacking the requisite mens rea of intent, the defendant is not liable for assault with intent to commit rape. However, if the defendant conditioned his intent

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161. See, e.g., DEL. CODE ANN. tit. 11, § 254 (2017) ("The fact that a defendant's intention was conditional is immaterial unless the condition negatives the harm or evil sought to be prevented by the statute defining the offense."); HAW. REV. STAT. § 702-209 (2017) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense."); MONT. CODE ANN. § 45-2-101(65) (2017) ("When a particular purpose is an element of an offense, the element is established although the purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."); 18 PA. CONS. STAT. § 302(f) (2017) ("When a particular intent is an element of an offense, the element is established although such intent is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.").

162. See, e.g., *McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) (affirming conviction for burglary where defendant conditioned his intent to commit assault on victim's non-compliance with a demand that defendant had no right to impose because "[e]ntering an occupied dwelling with such an intent is within the range of evils the burglary statute was intended to prevent"); *State v. Ferrel*, 679 P.2d 224, 229 (Mont. 1984) (reversing conviction for theft where defendant conditioned her intent to permanently deprive victim of his property on victim's failure to make lawful restitution because the condition negated the harm or evil sought to be prevented by the theft statute).

163. MODEL PENAL CODE § 2.02 cmt. 8, at 247 (AM. LAW INST., Official Draft & Revised Comments 1985).

164. *Id.*

165. *Id.* ("The condition does not negative the evil that the law defining burglary is designed to control, irrespective of whether the condition is fulfilled or fails.").

166. *Id.*

167. *Id.*

to have intercourse with the victim only if the victim resisted, then the condition would fail to negate the harm or evil that the offense seeks to prevent.<sup>168</sup> As a result, conditional intent would suffice as actual intent and satisfy the requisite mens rea necessary for liability.<sup>169</sup>

Lacking a federal statute embodying the conditional intent doctrine, federal courts have relied on the Code's formulation in interpreting federal statutes requiring the mens rea of intent.<sup>170</sup> In *Holloway v. United States*, the Supreme Court considered the issue of whether a carjacker who has a conditional intent to kill if the victim resists satisfies the mens rea element of the carjacking statute requiring "an intent to cause death or serious bodily harm."<sup>171</sup> In upholding the defendant's conviction and finding that his conditional intent sufficed as actual intent, the Court surveyed the leading cases and scholarly authority<sup>172</sup> and found that such authority "reflects the views endorsed by the authors of the Model [Penal] Code."<sup>173</sup> Applying the Code's formulation, the Court found the carjacker's "condition that the driver surrender the car was the precise evil that Congress wanted to prevent."<sup>174</sup> As a result, the carjacker's conditional intent sufficed as actual intent under the Code's formulation.<sup>175</sup> In concluding its survey of case law and scholarly authority, the Court stated that "[t]he core principle that emerges from these sources is that a defendant may not negate a proscribed intent by requiring

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168. *Cf. id.* ("If his purpose was to overcome her will *if* she resisted, he would of course be guilty of the crime.")

169. Wayne LaFave supplies two additional examples applying the Code's formulation:

For one to take another's property intending to give it back if he inherits other property involves a condition that does not negative the evil which larceny seeks to prevent; but taking it intending to restore it if it is not his own property does involve a condition which negatives that evil.

LAFAVE, *supra* note 92, § 5.2, at 267.

170. *See, e.g.,* *United States v. Anderson*, 108 F.3d 478, 484 (3d Cir. 1997) (relying on and applying the Code's formulation, the court reasoned "[t]he fact that a defendant is able to achieve the goal of obtaining the car [in a carjacking in which defendant had a conditional intent to kill victim upon non-compliance with demand to relinquish the car] without resorting to the infliction of death or serious bodily harm obviously does not negate the intent to cause such harm in order to obtain the car"); *United States v. Holloway*, 921 F. Supp. 155, 159 (E.D.N.Y. 1996) (applying the Code's formulation to a carjacking where the defendant conditioned his intent to kill on the victim's non-compliance with a demand to surrender the car, the court concluded "[t]he evil sought to be prevented by [the federal carjacking statute] is not 'negatived' by the condition, it is the condition").

171. 526 U.S. 1, 6 n.4 (1999).

172. *See id.* at 9–11.

173. *Id.* at 10–11.

174. *Id.* at 11 n.11.

175. *See id.*

the victim to comply with a condition the defendant has no right to impose.”<sup>176</sup>

### C. Non-Model Penal Code Formulations

Apart from the Code’s formulation, cases applying the conditional intent doctrine fall into three groupings. Most cases applying the doctrine involve defendants charged with assault with intent to kill for making conditional threats to harm their victims upon non-compliance with defendants’ demands.<sup>177</sup> First, a substantial minority of courts holds that conditional intent fails to satisfy the mens rea element of an offense requiring intent.<sup>178</sup> They reason that if the defendant’s intent is conditioned on a future event that may or may not occur, the defendant lacks the intent required by the offense.<sup>179</sup> Second, when intent is conditioned on a threatened victim complying with a demand that the defendant has no lawful right to impose, the defendant’s conditional intent suffices as actual intent.<sup>180</sup> The Supreme Court of Illinois

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176. *Id.* at 11.

177. See Samuel E. Peckham, Note, *Holloway v. United States: The United States Supreme Court Examines “Conditional Intent” in the Anti Car Theft Act of 1992*, 30 SETON HALL L. REV. 602, 605 (2000) (“Conditional intent is best exemplified by an assault during which a defendant merely threatens to inflict injury unless the victim complies with certain demands, but never actually harms the victim.”).

178. See, e.g., *United States v. Randolph*, 93 F.3d 656, 664–65 (9th Cir. 1996) (reversing conviction for carjacking requiring an intent to kill where defendant’s “mere conditional intent to cause harm if [the victim] resists is simply not enough to satisfy . . . [the] specific intent requirement” of the offense); *Craddock v. State*, 37 So. 2d 778, 778–79 (Miss. 1948) (reversing conviction for assault with intent to kill where defendant conditioning his intent to kill on an arresting police officer moving toward him failed to establish intent to kill); *State v. Irwin*, 285 S.E.2d 345, 349–50 (N.C. Ct. App. 1982) (reversing conviction for assault with intent to kill, where defendant threatened to kill prison guard if he was not allowed to escape, because defendant’s conditional intent to kill only established an “intent to intimidate”); *State v. Kinnemore*, 295 N.E.2d 680, 683 (Ohio Ct. App. 1972) (reversing conviction for assault with intent to kill where defendant threatening to kill victim if he was not allowed to leave a crime scene only established intent to escape).

179. See, e.g., *Stroud v. State*, 95 So. 738, 738 (Miss. 1923) (“[I]t is the conditional threat, whether such condition is right or wrong, that relieves the assaulter of the intent to kill . . . .”); *id.* (reasoning that conditional intent fails to suffice as actual intent because “the intent is conditioned upon some other event which may not happen”).

180. See, e.g., *People v. Vandelinder*, 481 N.W.2d 787, 789–91 (Mich. Ct. App. 1992) (affirming conviction for solicitation for murder where defendant conditioned his intent to kill on his estranged wife’s refusing to comply with an unlawful demand that she reconcile with him); *Thompson v. State*, 36 S.W. 265, 266 (Tex. Crim. App. 1896) (upholding conviction for assault with intent to murder where defendant conditioned his intent to kill on a prison guard’s non-compliance with an “unlawful demand”).

in *People v. Connors*,<sup>181</sup> regarded as “the leading case” holding that conditional intent sometimes suffices as actual intent,<sup>182</sup> reasoned that a defendant should not be able to benefit from combining the intent to kill with an “unlawful condition or demand.”<sup>183</sup> The court found that “the unlawful character of the demand eliminates it from consideration and the act will be judged in its naked criminality.”<sup>184</sup> Third, when intent is conditioned on a threatened victim complying with an entirely lawful demand imposed by the defendant, conditional intent fails to suffice as actual intent.<sup>185</sup>

Considering all four approaches, including the Code’s formulation, intent conditioned on unlawful conduct will likely constitute actual intent under three of the four approaches. But intent conditioned on entirely lawful conduct will *not* constitute actual intent under any of the approaches.<sup>186</sup> There appears to be no case holding that intent conditioned on entirely lawful conduct suffices as actual intent.

Because justified conduct is lawful conduct,<sup>187</sup> contrivers’ intent to engage in conduct on the condition that the conduct is justified fails to suffice as actual intent. Such conditional intent fails to constitute the requisite mens rea of intent under any of the four approaches to the conditional intent doctrine. As a result, the conditional intent doctrine has significant implications for contrived justification defenses, as the next Part explores.

### III. CONDITIONAL INTENT IN DEFENSE-CONTRIVING

This Part reveals how conditional intent is a powerful tool for analyzing the Theoretical approach to contrived defenses. It first explains the relevance

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181. 97 N.E. 643, 645–49 (Ill. 1912) (upholding defendants’ conviction for assault with intent to murder where, in a union dispute, defendants threatened to kill employees if they continued working).

182. *Holloway v. United States*, 526 U.S. 1, 9–10 (1999); Chris Norborg, Note, *Conditional Intent to Kill Is Enough for Federal Carjacking Conviction*, 90 J. CRIM. L. & CRIMINOLOGY 985, 986 (2000) (“Although it was decided almost ninety years ago, the leading case for the proposition that conditional intent is sufficient remains the Supreme Court of Illinois’ *People v. Connors*.” (footnote omitted)).

183. *Connors*, 97 N.E. at 648.

184. *Id.*

185. See, e.g., *Hairston v. State*, 54 Miss. 689, 693–94 (1877) (reversing conviction for assault with intent to murder where defendant conditioned intent to kill on victim’s non-compliance with a lawful demand); *id.* at 694 (“[An intent to kill] must be actual, not conditional, and especially not conditioned upon non-compliance with a proper demand.”).

186. For an explanation of the possible basis for the unlawful/lawful demand distinction as determining whether a conditional intent suffices as actual intent, see *Connors*, 97 N.E. at 648.

187. See *supra* note 27 and text accompanying note 28.

of the conditional intent doctrine to the Theoretical approach. Second, it presents and resolves, through application of the doctrine, what some term the most fundamental objection to the Theoretical approach<sup>188</sup> as well as a number of related puzzles. Third, in light of the doctrine, this Part demonstrates that the Theoretical approach simply does not work—it cannot both grant contrivers a justification defense and hold them criminally liable. Fourth, this Part delineates the scope of the conditional intent doctrine’s application to the Theoretical approach by considering various types of mens rea, offenses, and defenses. Finally, it anticipates and rebuts two possible objections to this Part’s argument that the Theoretical approach fails to hold contrivers of justification defenses liable.

#### *A. Relevance of Conditional Intent to Theoretical Approach*

The conditional intent doctrine not only allows for but also requires bridging what the Theoretical approach maintains is separate and independent. The Theoretical approach temporally divides the contriver’s conduct into two separate and completely independent stages.<sup>189</sup> As separate and independent, contrived defenses granted at the later stage are unavailable to exculpate the criminal liability imposed at the earlier, defense-contriving stage. The conditional intent doctrine, however, spans both stages. While the assessment of an unconditional intent at T1 can be complete without considering the time period of T2, the assessment of a conditional intent—conditioned on something at T2—cannot be cabined to T1 but must necessarily include T2.<sup>190</sup> Because the conditional intent doctrine requires an assessment of the nature of the condition,<sup>191</sup> the doctrine requires an assessment of the T2 stage. This affords the possibility that the defense granted at T2 informs the assessment of the T1 stage. That is, the defense granted at the later stage might also have some exculpatory effect on the earlier stage. If negating the harm or evil of the offense, the defense precludes a contriver’s conditional intent from sufficing as the requisite intent under the conditional intent doctrine.<sup>192</sup> That a contriver’s conditional intent does not satisfy the requisite mens rea of intent resolves some existing problems of, as

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188. See *infra* note 194 and accompanying text.

189. See *supra* note 25 and accompanying text.

190. See, e.g., Case Comment, *supra* note 44, at 479 (“A conditional intent is the intention that one’s conduct will be governed by the occurrence or nonoccurrence of a *future* event.” (emphasis added)).

191. See discussion *supra* Part II.B–C.

192. See discussion *supra* Part II.B–C.

well as creates new ones for, the Theoretical approach. The next section utilizes the conditional intent doctrine to resolve some objections to and puzzles of the Theoretical approach.

### *B. Solving Puzzles of Theoretical Approach*

In addition to defense-contrivers failing to satisfy requisite elements of criminal liability, as discussed above,<sup>193</sup> the other principal basis for criticism of the Theoretical approach is that it incurs conceptual puzzles and reaches absurd results. Finkelstein and Katz pose the following hypothetical that forms the basis for what they identify as “the most crucial of all the objections.”<sup>194</sup> Suppose an actor “goes into a shop, sees a painting he hates, buys it, and destroys it. Has he committed the crime of destroying the property of another? No, of course not.”<sup>195</sup> But Finkelstein and Katz argue that under the Theoretical approach he has committed the crime.<sup>196</sup> At T1, he intends to destroy the property of another by contriving the defense of the property being his own by (later) purchasing it.<sup>197</sup> At T2, after purchasing the painting, the contriver destroys it. According to the Theoretical approach, that the conduct at T2 is lawful does not preclude liability for the earlier contriving conduct at T1.<sup>198</sup> At T1, the contriver has the requisite mens rea of intent to destroy property (which at that time is the property of another). With that intent, he commits the voluntary act of purchasing that property which inaugurates a chain of events causing and resulting in the property’s destruction. Based solely on the contriver’s conduct at T1, he satisfies the requisite elements of the crime of destroying the property of another. That he would have a defense of the property being his own at the T2 stage is inapplicable to the T1 conduct. As a result, the Theoretical approach would absurdly impose criminal liability on the painting-hater for the offense of destroying the property of another. Finkelstein and Katz conclude that the scope of the Theoretical approach needs, but lacks, some limitation<sup>199</sup> to avoid the approach’s absurd application.<sup>200</sup>

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193. See discussion *supra* Part I.C.

194. Finkelstein & Katz, *supra* note 10, at 488.

195. *Id.*

196. See *id.*

197. See *id.* They also refer to the defense as “consent.” *Id.*

198. See *supra* notes 17, 96, 98 and accompanying text.

199. See Finkelstein & Katz, *supra* note 10, at 488 (maintaining that the doctrine “must be limited to certain kinds of scenarios”).

200. *Id.* Kim Ferzan suggests a limitation that she illustrates through the following hypotheticals. Ferzan, *supra* note 18, at 618–19. May “Carl . . . apply for a job as an executioner

The conditional intent doctrine provides a solution.<sup>201</sup> The Theoretical approach maintains that the painting-hater, at T1, has the requisite mens rea of intent to destroy the property of another. But does he truly have such intent? He will not destroy the painting if he does not own it. His intent is conditioned on (i) the painting being available for purchase, (ii) the price of the painting not exceeding the value to him of destroying it, (iii) his having sufficient money to buy the painting, and, more generally, (iv) the painting being in his actual and legal possession before he destroys it. Because his intent to destroy property is conditioned on owning that property, his intent is conditioned on destroying the property justifiably and lawfully. Lawful conduct—destroying one’s own property—is not a legally cognizable harm

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because he wants to justifiably kill people”? *Id.* at 618. May “Debbie [apply for a job as an ambulance driver] . . . because she wants to justifiably speed through red lights”? *Id.* That is, are Carl and Debbie intentionally contriving a defense at T1 for conduct each will, at T2, justifiably commit? The logic of the Theoretical approach might suggest that each are liable for a crime because at T1 they lack a justification for their intending to kill and speed, respectively. *See supra* note 24 and accompanying text. But Ferzan argues that they should not be liable because “they do not engage in conduct *in order to create those very [justificatory] circumstances.*” Ferzan, *supra* note 18, at 619. Carl is not creating or manufacturing opportunities to execute capital offenders and Debbie is not creating or manufacturing opportunities to speed.

While Ferzan’s limitation on the scope of the Theoretical approach prevents it from reaching absurd results in the above examples, the limitation may still not be sufficient. It fails to prevent the approach from reaching an absurd result in Finkelstein and Katz’s example. *See supra* text accompanying notes 194–200. In Ferzan’s examples, neither Carl nor Debbie engages in conduct that creates their exculpatory circumstances. *See Ferzan, supra* note 18, at 619. Neither Carl nor Debbie is increasing the supply of capital defendants to be executed or sick people needing to be rushed to the hospital, respectively. Carl and Debbie are content to wait for persons warranting execution and requiring to be sped to a hospital, respectively. But the painting-hater is not content to merely destroy property that he already owns. The actor is creating or manufacturing opportunities to destroy property justifiably. By the act of purchasing the painting, the actor is, in Ferzan’s terms, “engag[ing] in conduct *in order to create those very [justificatory] circumstances.*” *Id.* As a result, Ferzan’s limitation would not preclude the Theoretical approach from reaching the absurd result of imposing liability on the painting-hater.

201. It also provides a solution to Ferzan’s examples. *See supra* note 200 and accompanying text. Under the Theoretical approach, at T1 both Carl and Debbie have the intent to kill and speed, respectively. But do Carl and Debbie truly have such intents? If there is no one whom the state has authorized as ready for execution and there is no one who needs to be rushed to the hospital, then Carl will not kill anyone and Debbie will not speed. Carl will only kill and Debbie will only speed on the condition that doing so is authorized by law or justified. Thus, Carl and Debbie do not have the simple intent to kill and speed, respectively. Rather, Carl and Debbie have a conditional intent to kill and speed, respectively. Both intents are conditioned on the justifiability and lawfulness of their conduct. That condition negates the harm or evil of murder and speeding. *See infra* text accompanying notes 202–203. Lawful and justified conduct is not a legally cognizable harm or evil. *See infra* note 202 and accompanying text. Their conditional intent does not suffice as the requisite actual intent. Lacking the requisite mens rea, they cannot be held criminally liable.

or evil.<sup>202</sup> The condition negates the harm and evil that the offense of destruction of the property of another seeks to prevent. Under the conditional intent doctrine, the actor's conditional intent does not suffice as actual intent.<sup>203</sup> Unable to establish the requisite mens rea of intent for the offense, the Theoretical approach cannot hold the painting-hater liable for destruction of the property of another. The conditional intent doctrine dispels the absurdity.

If Finkelstein and Katz's example is thought to be a narrow outlier easily dismissed, the following example is significantly broader.<sup>204</sup> Consider what each and every one of us does when we visit a grocery store. We buy food that we plan to consume and thus destroy. Is each and every one of us criminally liable for the destruction of property each and every time we shop for groceries? Under the logic of the Theoretical approach we are.<sup>205</sup> At T1, we intend to destroy the property of another (the grocery store's) under the exculpatory circumstances of the property being our own at the time of destruction of the property (at T2). With that intent we commit the voluntary act of placing the property in our shopping carts that inaugurates a chain of events causing the destruction of the property. At T2, we do consume and thus destroy the property under circumstances that are exculpatory. But we are liable for our contriving conduct at T1 because the defense that is available at T2 is not available at T1. That each and every one of us is criminally liable for the destruction of property of another each and every time we go to the grocery store is surely absurd. Yet that is the logic of the Theoretical approach.

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202. For the view that lawful conduct constitutes neither a legally cognizable harm nor evil, see *McMillan v. City of Jackson*, 701 So. 2d 1105, 1107 (Miss. 1997) (ruling necessity defense inapplicable to offense of trespass at abortion clinic for the purpose of preventing abortions because abortion "is not a legally recognized harm"); *State v. Sahr*, 470 N.W.2d 185, 193 (N.D. 1991) (ruling the same because "a lawful abortion is not a legally cognizable evil").

203. See discussion *supra* Part II.B–C.

204. Katz offers another example of conduct that nearly all of us commit for which the Theoretical approach would impose liability. "According to the logic of the reigning view [of the contrived-defense doctrine], the person who cashes a check in a bank should be guilty of bank robbery because he removed money under what he contrived to be exculpatory conditions." Katz, *supra* note 17, at 594. That is, at T1, the actor intends to obtain money from a bank under conditions in which she cannot be held liable for theft. With the intent to obtain money from a bank, she creates the exculpatory circumstances by opening an account and depositing money. At T2, the actor withdraws money from the bank by cashing a check against her account. Though not criminally liable for theft from the bank based on her T2 conduct, she is criminally liable based on her T1 conduct when she intentionally created the circumstances of her own defense without a defense for that conduct. Of course, that the Theoretical approach would impose liability for theft in that example is absurd.

205. See discussion *supra* Part I.B.

The conditional intent doctrine again solves the puzzle. When we go to the grocery store, we do not merely have the intent to consume and thus destroy the property of another (the grocery store's property). Rather, we have a conditional intent to consume (and thus destroy) the property of another—conditioned on our lawful ownership of the food or other items. And that condition—lawful ownership of the property to be destroyed—negates the harm or evil that the offense seeks to prevent. Because the condition negates the harm or evil, our conditional intent fails to suffice as actual intent under the conditional intent doctrine.<sup>206</sup> Lacking the requisite intent precludes our liability under the Theoretical approach. Application of the conditional intent doctrine avoids the absurd result reached by the Theoretical approach.

The broadest puzzle generated by the Theoretical approach applies to any contrived justification defense. Consider again the example of Able who intends to kill Baker if and only if doing so constitutes justified self-defense. With that intent, at T1, Able taunts Baker into unlawfully aggressing and Able kills Baker at T2. The Theoretical approach grants the contrived justified self-defense at T2 but imposes liability for murder based on the defense-contriving conduct—the taunting at T1.<sup>207</sup> The Theoretical approach incurs the following puzzle: how or why does coupling an intent to act justifiably and lawfully with an independently lawful act (taunting) that causes a justified and lawful result (the death of unlawful aggressor Baker) combine to create criminal liability (the murder of Baker)?

The conditional intent doctrine again solves the puzzle. At T1, Able's intent to kill Baker is conditioned on the occurrence of the future event at T2 that the killing is justified self-defense. The Theoretical approach grants the contrived justification defense at T2. Justified and lawful conduct is not a legally cognizable harm or evil.<sup>208</sup> Killing justifiably and lawfully negates the harm or evil of murder. Because the condition negates murder's harm or evil, Able's conditional intent does not suffice as actual intent under the conditional intent doctrine.<sup>209</sup> Lacking the requisite mens rea of intent, Able is not liable for intentional murder. That solves the puzzle incurred by the Theoretical approach. That the intent to act justifiably (lawfully) coupled with an independently lawful act that causes a justified (lawful) result

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206. See discussion *supra* Part II.B–C.

207. See discussion *supra* Part I.B.

208. See *supra* note 202 and accompanying text.

209. See discussion *supra* Part II.B–C.

combine to *not* create criminal liability for murder is neither absurd nor puzzling.<sup>210</sup>

Application of the conditional intent doctrine resolves “the most crucial of all the objections”<sup>211</sup> to the Theoretical approach and other related puzzles and absurd results. The painting-hater has no criminal liability for destroying a painting after he purchases it. None of us have criminal liability for intending to destroy (consume) food after we have purchased it from the grocer. And an intent to act justifiably (lawfully) coupled with an independently lawful act that causes a justifiable (lawful) result no longer puzzlingly results in criminal liability. While the conditional intent doctrine resolves these objections to the Theoretical approach, the next section demonstrates the doctrine also exposes new problems.

### C. *Conditional Intent in Contrived Justification Defenses*

Application of the conditional intent doctrine reveals that the Theoretical approach simply does not work regarding an entire class of defenses—justification. Contrivers of justification defenses condition their intent to commit conduct on the justifiability of their conduct. The Theoretical approach grants such contrivers their justification defense. Because justified conduct is lawful conduct,<sup>212</sup> contrivers of justification defenses condition their intent to commit conduct on the lawfulness of their conduct. Under the influential Model Penal Code formulation, conditional intent suffices as actual intent unless the condition negates the harm or evil the offense seeks to prohibit.<sup>213</sup> Lawful conduct is not a legally cognizable harm or evil.<sup>214</sup>

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210. The puzzle does not arise under the Legal approach. For example, the Model Penal Code bars lethal force from qualifying as justified self-defense if the actor provoked the victim’s aggression “with the purpose of causing death or serious bodily harm.” MODEL PENAL CODE § 3.04(2)(b)(1) (AM. LAW INST. 1985). Able provoked with this purpose, is unjustified in self-defense, and is criminally liable for murder. By barring his justification, the Legal approach regards Able as intending to act in a way that is unjustified and unlawful. That the intent to act in a way that the criminal law regards as unjustified and unlawful coupled with an independently lawful act that causes an *unjustified, unlawful* result combine to create criminal liability for murder is hardly absurd or puzzling.

Application of the conditional intent doctrine would have no effect. Because the Legal approach assesses Able’s mens rea at the time that Able employs self-defense force (rather than at the time of the provocation), Able has no conditional intent at T2. Able’s intent to use force is not conditioned on the occurrence of any future event.

211. See Finkelstein & Katz, *supra* note 10, at 488.

212. See *supra* note 27 and text accompanying note 28.

213. See discussion *supra* Part II.B.

214. See *supra* note 202 and accompanying text.

Therefore, conditioning intent to commit conduct on its lawfulness surely negates the harm or evil that criminal offenses seek to prevent. Under non-Model Penal Code formulations of the conditional intent doctrine, conditional intent does not suffice as actual intent when the actor conditions intent on lawful conduct of the actor.<sup>215</sup> As a result, under the Theoretical approach, the conditional intent of contrivers of justification defenses fails to suffice as actual intent under all formulations of the conditional intent doctrine. Unable to establish the requisite mens rea of intent, the Theoretical approach cannot hold contrivers of justification defenses criminally liable.

Consider again the example of Able and Baker. At T1, Able induces Baker to unlawfully aggress with the conditional intent to kill Baker if and only if doing so is justified self-defense at T2. The Theoretical approach grants Able's justification defense for killing Baker at T2. Because Able's conduct is justified, it is lawful; lawful conduct is not a legally cognizable harm or evil. Conditioning killing on its lawfulness negates the harm or evil murder seeks to prevent. Under the conditional intent doctrine, Able's conditional intent fails to suffice as actual intent. Able lacks the requisite mens rea of intent at the defense-contriving stage (T1). As a result, the Theoretical approach cannot hold Able liable for the offense of intentional murder for contriving the defense (at T1). Granting Able's contrived justification defense for killing Baker (at T2) blocks the Theoretical approach's ability to establish Able's liability (at T1) for contriving the defense.<sup>216</sup>

The Legal approach does not share the Theoretical approach's difficulty. Application of the conditional intent doctrine has little impact on the Legal approach for two reasons. First, while Able's intent to kill is conditional at T1, the Legal approach need not base liability on the earlier T1 conduct. Instead, it may base liability on the later T2 conduct (because it disallows a defense for the T2 conduct).<sup>217</sup> At T2, Able's intent to kill is no longer conditional—Baker is presently unlawfully aggressing against Able. At T2, Able satisfies the elements of murder—intentionally causing the death of another.<sup>218</sup> Barring Able's contrived defense, the Legal approach successfully holds Able liable for murder. Second, even if Able's intent to kill Baker at

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215. See discussion *supra* Part II.C.

216. That many state homicide statutes explicitly include as a requisite offense element that the killing be unlawful or unjustified, see *infra* notes 259–63 and accompanying text, further supports the condition negating the harm or evil that the offense seeks to prevent. Such homicide statutes are explicitly stating that the harm or evil that homicide statutes seek to prevent are not killings per se but unjustified or unlawful killings. That a defense-contriver conditions her intent to kill on the killing being justified and lawful would clearly negate the explicit element that the killing be unlawful or unjustified.

217. See discussion *supra* Part I.A.

218. See *supra* notes 22, 153.

T2 was somehow conditional, the condition fails to negate the harm or evil murder seeks to prevent. Ineligible for self-defense, Able's killing Baker is unjustified and unlawful. Unjustified and unlawful killing fails to negate the harm or evil murder seeks to prevent. Therefore, Able's conditional intent suffices as actual intent and satisfies the requisite mens rea for murder liability. Regardless of whether Able's intent is conditional or not, Able's intent suffices as the requisite actual intent thereby allowing the Legal approach to find Able liable.

The Theoretical approach's difficulty extends beyond self-defense to any justification defense. Consider again Robinson's example involving the justification defense of necessity: "Assume that an actor sets a fire that threatens a nearby town to create the conditions that will justify his using his enemy's farm as a firebreak."<sup>219</sup> The Theoretical approach grants the contrived necessity defense for setting fire to the enemy's farm at T2.<sup>220</sup> But it maintains that the actor is liable for destroying the enemy's farm based on his defense-contriving at T1: with the intent of destroying the enemy's farm, the actor commits the voluntary act of setting a fire that threatens a town, and that act is the cause of the destruction of the enemy's farm.<sup>221</sup>

At T1, however, does the actor merely have intent or instead conditional intent? At T1, the actor's intent is conditioned on the occurrence of future events: (i) the fire will not die out by itself, (ii) someone else does not put out the fire, (iii) the winds do not shift so that the fire no longer threatens the town, and more generally, and (iv) the circumstances and conditions are such that the actor will receive the necessity defense for setting fire to the enemy's farmhouse. If any of these conditions do not apply, then the actor will not set fire to the enemy's farm. Therefore, the actor does not merely have intent; the actor has conditional intent.

Conditional intent triggers application of the conditional intent doctrine. The doctrine looks to the nature of the condition placed on the intent.<sup>222</sup> The Theoretical approach grants the contrived justification defense.<sup>223</sup> Justified conduct is lawful conduct.<sup>224</sup> Lawful conduct is not a legally cognizable harm or evil.<sup>225</sup> Under the conditional intent doctrine, conditioning intent to commit conduct on its lawfulness negates the harm or evil that criminal offenses seek

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219. Robinson, *supra* note 8, at 28.

220. *See id.* at 31.

221. *See id.*

222. *See* discussion *supra* Part II.B–C.

223. *See* discussion *supra* Part I.B.

224. *See supra* note 27 and text accompanying note 28.

225. *See supra* note 202 and accompanying text.

to prevent.<sup>226</sup> The actor's conditional intent thus does not suffice as actual intent. Unable to establish the requisite mens rea of intent at T1, the Theoretical approach cannot hold the actor liable for her defense-contriving conduct at T1. In contrast, the Legal approach successfully holds the actor liable because her contrived defense and the conditional intent doctrine are inapplicable.<sup>227</sup>

To summarize, application of the conditional intent doctrine demonstrates that the Theoretical approach does not work with respect to contrived justification defenses.<sup>228</sup> It fails to hold contrivers of justification defenses criminally liable. By granting contrived justification defenses, the Theoretical approach is unable to impose liability for the defense-contriving conduct. In contrast, the conditional intent doctrine has little impact on the

226. See discussion *supra* Part II.B–C.

227. See discussion *supra* Part I.A and note 210 and accompanying text.

228. The same problem demonstrated to arise under the reigning version of the Theoretical approach—the traditional, causal account—also arises under the principal, alternative version of the Theoretical approach, the perpetration-by-means account. See *supra* note 98 and accompanying text. Larry Alexander illustrates this latter account by drawing on and modifying a scene from the film *Shane*, in which the actor Jack Palance, playing the gun-slinging villain, contrives to kill a good-guy farmer under circumstances of self-defense. Alexander, *supra* note 9, at 625 (citing *SHANE* (Paramount Pictures 1953)). For a longer exposition of the narrative of the film, see Ferzan, *supra* note 18, at 619. Alexander imagines that there are two Palances—Palance 1 who provokes (“Early Self”) and Palance 2 who kills in self-defense (“Later Self”). Alexander, *supra* note 9, at 628. “Palance 1 tells the farmer that Palance 2 has called the farmer ‘Confederate scum.’ The farmer sets out to shoot Palance 2, but Palance 2 is quicker on the draw and kills the farmer, which Palance 1 hoped would happen.” *Id.* Alexander concludes that the justifiability of Palance 2’s killing of the farmer, a culpable aggressor, does not foreclose liability for Palance 1 for the farmer’s death. *Id.*

Application of the conditional intent doctrine demonstrates that granting a justification defense to Palance 2 precludes Palance 1 from liability for the farmer’s murder. Palance 1 does not merely have the intent to kill the farmer. Palance 1’s intent is conditioned on the following future events: (i) the farmer being provoked, (ii) the farmer unlawfully aggressing against and attempting to kill Palance 2, and more generally, (iii) Palance 2 kills the farmer in justified self-defense. (As alter egos of the same self, Palance 1 only intends Palance 2 to kill the farmer if doing so is justified and Palance 2 will only kill the farmer if doing is justified.) As a result, Palance 1 has conditional intent. The condition—that Palance 2 is able to kill the farmer in justified self-defense—negates the harm and evil that the offense of murder seeks to prevent under the conditional intent doctrine. See *supra* notes 202–03 and accompanying text. Justified killing is lawful killing and lawful conduct is not a legally cognizable harm or evil. See *supra* notes 27, 202 and accompanying text. Therefore, Palance 1’s conditional intent does not suffice as the intent satisfying the requisite mens rea of murder. As a result, Palance 1 is not liable for intentional murder. Granting a justification defense to Palance 2 precludes holding Palance 1 liable. For a different argument as to why the perpetration-by-means account cannot hold a contriver of a justification defense liable, see Finkelstein & Katz, *supra* note 10, at 489 n.40 (arguing that accomplices (an Early Self or Palance 1) generally share in the justification defenses of principals (a Later Self or Palance 2)); Katz, *supra* note 17, at 594–95 (contending that the perpetration-by-means account may fail to hold contrivers of justified self-defense criminally liable).

Legal approach. By barring contrived justification defenses, the Legal approach successfully imposes liability. To the extent that such contrivers deserve liability—a nearly universal intuition and one embraced by both approaches—the Legal approach gets it right and the Theoretical approach gets it wrong.

*D. Scope of Theoretical Approach's Failure to Hold Defense-Contrivers Liable*

This section delineates the extent of the Theoretical approach's failure to hold defense-contrivers criminally liable. First, while the conditional intent doctrine precludes contrivers of justification defenses from liability for offenses requiring the mens rea of purpose or intention, simply the conditional nature of such contrivers' plans precludes liability for offenses requiring the mens rea of knowledge. Second, that such contrivers lack purpose and intention forecloses attempt liability. Third, the conditional nature of the plans of contrivers of excuse defenses prevents liability for offenses requiring knowledge. Fourth, the above difficulties for the Theoretical approach apply only to paradigmatic contrivers who will commit the offense if and only if a defense applies.

1. Justification Defenses and Mens Rea

Contrivers of justification defenses may lack the mens rea of knowledge. While the conditional intent doctrine precludes purpose and intention, the conditional nature of such contrivers' plans (apart from the doctrine) may preclude satisfaction of knowledge. Because contrivers condition their planned conduct on future events that are uncertain to occur, contrivers may lack knowledge as to that future conduct. Consider again our example of Able and Baker. At T1, Able taunts Baker with the intent to kill Baker on satisfaction of the conditions (at T2) that (i) Baker does unlawfully attack him, (ii) Baker uses lethal force, and, more generally, (iii) Able killing Baker constitutes justified self-defense. The Model Penal Code defines knowledge with respect to a result crime like homicide as the actor being "practically certain that his conduct will cause such result."<sup>229</sup> For Able to be practically certain that his taunting at T1 will cause Baker's death, Able would have to be practically certain that all three above conditions would apply. Because there's no particular reason why Able would be practically certain that even

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229. MODEL PENAL CODE § 2.02(2)(b)(ii) (AM. LAW INST. 1985).

condition (i) will apply, Able would be even less practically certain that all three conditions will apply. Therefore, Able fails to satisfy a mens rea of knowledge as to the result element of the death of Baker.<sup>230</sup> As a result, the Theoretical approach fails to hold contrivers of justification defenses liable for offenses requiring knowledge.<sup>231</sup>

The conditional intent doctrine and the conditional nature of contrivers' plans prevents the Theoretical approach from establishing only some, but not all, types of mens rea. As discussed above, the Theoretical approach is unable to impose liability for offenses requiring mens rea of purpose, intention, or knowledge. But neither the conditional intent doctrine nor the conditional nature of contrivers' plans forecloses contrivers of justification defenses from satisfying mens rea of recklessness or negligence.<sup>232</sup> As a result, the Theoretical approach may well succeed in holding such contrivers liable for offenses requiring those lesser mens rea.

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230. At T2, while Baker is unlawfully aggressing against him, Able might well have practical certainty that he will kill Baker. But at T2, the Theoretical approach grants Able a justification defense. As such, the Theoretical approach is limited to establishing mens rea at T1. But at T1, Able still lacks practical certainty that he will kill Baker because the three conditions have not yet been satisfied.

231. The Legal approach does not share the Theoretical approach's difficulty. While Able would lack knowledge at T1 as to Baker's death, the Legal approach need not base Able's liability on T1 conduct. Instead, it could base Able's liability on his T2 conduct. At T2, because all of the conditions apply, Able is practically certain as to Baker's death, thereby satisfying the mens rea of knowledge (as well as intention). Therefore, unlike the Theoretical approach, the Legal approach successfully holds contrivers of justification defenses liable for offenses requiring mens rea of knowledge.

232. For example, Able would satisfy a mens rea of recklessness or negligence. The Model Penal Code defines recklessness, in part, as when an actor "consciously disregards a substantial and unjustified risk." MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985). The Code similarly defines negligence as when an actor "should be aware of a substantial and unjustified risk." *Id.* § 2.02(2)(d). By taunting or provoking Baker, Able both consciously disregards and should have been aware of the risk that Able might kill Baker. Though the uncertainty of the conditions arising precludes Able's practical certainty that Baker would attack and he would kill Baker, the uncertainty of the conditions probably do not preclude that the risk is substantial. But is the risk unjustified? Though justified at T2 when Able kills Baker, the risk was unjustified at T1. Here, the Theoretical approach's claim that the justification at T2 has no relevance to assessing the actor's conduct at T1 holds true. While the conditional intent doctrine made relevant the justification at T2 in assessing the actor's conditional intent at T1, the conditional intent doctrine does not apply to recklessness and negligence. As a result, the Theoretical approach is able to hold Able liable for homicide based on the mens rea of recklessness or negligence.

## 2. Justification Defenses and Attempts

The Theoretical approach maintains that it imposes attempt liability on defense-contrivers who fail to commit the target offense for which they contrived a defense.<sup>233</sup> Consider again the example of Able and Baker. At T1, with the intent of killing Baker in justified self-defense, Able commits an act—taunting Baker—that would be the cause of death of Baker if Baker does unlawfully aggress against Able and if Able does then kill Baker. But suppose that Able does not kill Baker—because either Able tries to do so but fails or Baker does not unlawfully aggress against Able and Able declines to kill in the absence of justificatory circumstances. Based solely on Able’s conduct at T1, the Theoretical approach would hold Able liable for an attempt.

Application of the conditional intent doctrine, however, precludes the Theoretical approach from imposing attempt liability on contrivers of justification defenses in most jurisdictions. Under the majority rule, the requisite mens rea for attempt is specific intent;<sup>234</sup> under the Model Penal Code, the requisite intent is purpose (for a result crime like homicide).<sup>235</sup> At T1, Able has a conditional intent and the condition—justifiably and lawfully killing Baker—negates the harm or evil that the offense seeks to prohibit.

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233. See ROBINSON & CAHILL, *supra* note 13, § 8.0.3, at 295 (“Another useful characteristic of this approach is that where the ultimate offense is never committed, the defendant may nonetheless be liable for an attempt to commit the offense.”); Robinson, *supra* note 8, at 34 n.122 (same).

234. *E.g.*, DRESSLER, *supra* note 3, § 27.05, at 384 (“[A]n attempt is a specific-intent offense, even if the target offense is a general intent crime.” (emphasis omitted)); KADISH ET AL., *supra* note 138, at 613 (“Both the common law and most American statutory formulations agree . . . that an attempt requires a purpose (or ‘specific intent’) to produce the proscribed result, even when recklessness or some lesser mens rea would suffice for conviction of the completed offense.”); *see, e.g.*, ROBINSON & CAHILL, *supra* note 13, § 11.2, at 455 (“At Common Law, attempt was said to be ‘specific intent offense,’ requiring a higher level of culpability than a ‘general intent offense,’ for which the actor’s intention could be assumed from his conduct.”).

235. MODEL PENAL CODE § 5.01(1)(a)–(c) (AM. LAW. INST. 1985). Robinson and Cahill explain the Code’s somewhat convoluted approach as follows:

The Model Penal Code’s commentary explains that it generally seeks to follow the common-law rule for attempt, elevating the culpability required for a result element. “The general principle is . . . that the actor must affirmatively desire . . . to cause the result that will constitute the principal offense.” This is said to follow from the Common Law’s rule that attempt is a specific intent offense. In this respect, the Code’s drafters appear to adopt the broad interpretation of (1)’s “purpose” language . . . . The drafters fear that punishing cases where an actor recklessly or negligently disregards a possible result, but where the result does not occur, would unduly extend criminal liability.

ROBINSON & CAHILL, *supra* note 13, § 11.2, at 458 (footnotes omitted) (quoting MODEL PENAL CODE § 5.01 cmt. 2, at 301(AM. LAW. INST. 1985)).

Therefore, Able's conditional intent does not suffice as the requisite specific intent or purpose.<sup>236</sup> While the conditional intent doctrine does not preclude Able from satisfying the lesser mens rea standards of recklessness and negligence,<sup>237</sup> these lesser mens rea fail to suffice for attempt liability under the majority rule. As a result, the Theoretical approach is unable to hold contrivers of justification defenses liable for an attempt in most jurisdictions.

### 3. Excuse Defenses and Mens Rea

In addition to offenses with mens rea of recklessness or negligence, application of the conditional intent doctrine creates no problems for the Theoretical approach's treatment of contrived excuse defenses. Consider the following example:

Suppose Frank knows that the Mob wants to kill Frida . . . . Frank also wants to kill Frida . . . [but] fears being convicted for her killing. So Frank goes to the headquarters of the Mob, hoping they will threaten him with death unless he . . . kills her. They in fact so threaten him, and he does what they have coerced him to do. When charged with Frida's murder, he pleads duress.<sup>238</sup>

Duress applies where an actor has been coerced by threats of unlawful force that a reasonable person would have been unable to resist.<sup>239</sup> Frank conditions his intent to kill Frida on the presence of circumstances supporting the excuse defense of duress.<sup>240</sup> Unlike conditioning intent on the existence of justificatory circumstances, conditioning intent to commit offenses on the existence of excusatory circumstances does not negate the harm or evil that offenses seek to prevent. While justified conduct is permissible and lawful,<sup>241</sup> excused conduct is wrongful and unlawful.<sup>242</sup> Because of the wrongful and

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236. See discussion *supra* Part II.B–C.

237. See *supra* note 232 and accompanying text.

238. Alexander, *supra* note 9, at 625.

239. For the Model Penal Code's provision on duress, see MODEL PENAL CODE § 2.09(1) (AM. LAW INST. 1985).

240. See *id.* § 2.09 (placing the duress provision in Article 2, General Principles of Liability, rather than in Article 3, General Principles of Justification); Dressler, *supra* note 75, at 1349–67 (treating duress as an excuse).

241. See *supra* note 27 and text accompanying note 28.

242. See, e.g., DRESSLER, *supra* note 3, § 16.04, at 205 (terming excused conduct as “wrongful, intolerable, and censurable”); FLETCHER, *supra* note 27, at 759 (“[C]laims of excuse concede that the act is wrongful.”); ROBINSON & CAHILL, *supra* note 13, § 8.0.1, at 284 (“Excuses apply to actors who have caused a net societal harm or evil.”); Mitchell Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 4 (2003) (“[A]n excused defendant has committed a crime . . .”).

unlawful nature of excused conduct, Frank's condition fails to negate the harm or evil of murder under the conditional intent doctrine.<sup>243</sup> As a result, Frank's conditional intent to kill does suffice as actual intent. Granting Frank his contrived excuse defense of duress does not preclude the Theoretical approach from establishing the requisite mens rea at the defense-contriving stage. Establishing Frank's mens rea of intention, the Theoretical approach successfully holds Frank liable for the intentional murder of Frida.

Though the conditional intent doctrine fails to impact the Theoretical approach's treatment of contrived excuse defenses, simply the conditional nature of contrivers' plans may preclude contrivers of excuse defenses from satisfying the mens rea of knowledge. Consider a modified version of the above example making explicit what is merely implicit. Frank's plan is conditional: Frank will kill Frida if and only if (i) the mob coerces him, and, more generally, (ii) the circumstances and requirements for a successful duress defense pertain. The Model Penal Code defines knowledge with respect to a result crime (including homicide) as "practically certain that his conduct will cause such result."<sup>244</sup> Is Frank practically certain (at the defense-contriving stage) that his conduct of going to the Mob headquarters will cause Frida's death? Because his plan is conditional, he may not be practically certain that conditions (i) and (ii) will occur, and thus not be practically certain at the defense-contriving stage that he will subsequently kill Frida. As a result, Frank may fail to satisfy the mens rea of knowledge. The Theoretical approach may be unable to hold contrivers of either type of defense—justification or excuse—liable for an offense requiring a mens rea of knowledge.

#### 4. Conditional and Unconditional Defense-Contriving

While the paradigmatic defense-contriver commits the crime if and only if a defense applies, some defense-contrivers might hope a defense will apply but will commit the crime even in the absence of a defense.<sup>245</sup> The former might be termed conditional defense-contrivers and the latter unconditional defense-contrivers. For example, contriving to kill Baker in justified self-defense, Able will kill Baker if and only if Able satisfies the requirements for the defense. Contrast that with Able 2 who hopes to kill Baker 2 in justified self-defense but Able 2 will kill Baker 2 even if the requirements for the defense are absent. Able is a conditional defense-contriver; Able 2 is an

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243. See discussion *supra* Part II.B–C.

244. See MODEL PENAL CODE, § 2.02(2)(b)(ii) (AM. LAW INST. 1985).

245. See Alexander, *supra* note 9, at 623.

unconditional defense-contriver. As discussed above, while the Theoretical approach is able to hold *unconditional* defense-contrivers criminally liable, it is unable to hold some *conditional* defense-contrivers criminally liable.

Summing up, the Theoretical approach does not work as to, and fails to impose criminal liability on, paradigmatic (or conditional) contrivers of: (i) justification defenses when charged with offenses requiring mens rea of purpose, intention, or knowledge, (ii) justification defenses when charged with an attempt (under the majority rule), and (iii) excuse defenses when charged with offenses requiring knowledge.<sup>246</sup>

### E. Objections

This section anticipates, presents, and rebuts two possible objections to this Article's central claim that the conditional intent doctrine reveals the Theoretical approach's inability to establish the requisite mens rea to hold contrivers of justification defenses liable. First, one might object that conditioning intent on acting justifiably does not prevent the harm that offenses seek to prevent and thus such conditional intent does suffice as actual intent. Second, one might object that conditioning intent on the presence of justification—as extrinsic to offenses' elements—negates neither the harm nor evil that offenses seek to prevent and thus the conditional intent of contrivers of justification defenses suffices as actual intent. Neither of these objections, however, is persuasive.

#### 1. Condition Fails to Negate Harm of Offense

One might object that the condition that contrivers of justification defenses place on their intention fails to negate the harm of an offense. As such, contrivers' conditional intent suffices as the requisite intent necessary for liability. For example, if a murder statute prohibits intentionally causing the death of another,<sup>247</sup> then the harm the offense is trying to prevent is intentionally caused deaths of others. Contrivers killing in justified self-defense intentionally cause the deaths of others no less than other intentional murderers. Victims killed by contrivers of justification defenses suffer the same harm as victims killed by other intentional murderers. Both types of

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246. The Theoretical approach does work as to and is able to impose criminal liability on: (i) contrivers of justification defenses charged with offenses requiring recklessness or negligence, (ii) such contrivers charged with an attempt in a jurisdiction following the minority rule, (iii) contrivers of excuse defenses charged with an offense requiring any mens rea except knowledge, and (iv) non-paradigmatic (or unconditional) defense-contrivers.

247. See *supra* notes 22, 153.

victims suffer the equal harm of intentionally caused death. As a result, the conditional intent of such contrivers suffices as the requisite mens rea for intentional murder and application of the conditional intent doctrine fails to expose difficulties for the Theoretical approach.

Even if the premise of the objection is true—that the condition fails to negate the harm of the offense—the conclusion does not follow that contrivers’ conditional intent suffices as actual intent. The Model Penal Code formulation states that conditional intent does not suffice for actual intent if the condition negates *either* the harm *or* the evil of the offense.<sup>248</sup> That is, even if the condition fails to negate the harm of the offense, the condition may negate the evil of the offense. The evil that murder or any homicide offense is designed to prevent is not killing in general but unlawful killing. Justified killings are lawful; lawful killings are not legally cognizable evils.<sup>249</sup> Conditioning a killing on its justifiability and lawfulness does negate the evil of a homicide offense.<sup>250</sup> That the condition negates the evil of an offense precludes the actor’s conditional intent from sufficing as actual intent.<sup>251</sup> Unable to establish the requisite mens rea, the Theoretical approach cannot impose intentional murder liability on contrivers of justification defenses. Therefore, the objection fails.

## 2. Condition Negates Neither Harm nor Evil of Offense

One might object that the condition that contrivers of justification defenses place on their intention negates neither the harm nor the evil of an offense. The harm and evil that offenses seek to prevent are best understood by their elements. If the actor satisfies the elements of an offense, then the actor is not avoiding the offense’s harm or evil. Nothing outside of or extrinsic to offenses’ elements have any bearing on offenses’ harm and evil. As a result, justification defenses, as extrinsic to offenses’ elements, fail to negate offenses’ harm or evil. Therefore, the conditional intent of contrivers of justification defenses suffices as actual intent. By establishing the requisite mens rea, the Theoretical approach successfully holds such contrivers liable.

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248. MODEL PENAL CODE § 2.02(6) (AM. LAW INST. 1985) (providing that conditional purpose suffices as actual purpose “unless the condition negatives the harm *or* evil” (emphasis added)).

249. See *supra* notes 27–28, 202 and accompanying text.

250. See discussion *supra* Part II.B–C.

251. See discussion *supra* Part II.B–C.

In addition to the previous objection's response—justified and lawful conduct is not a legally cognizable evil<sup>252</sup>—there are a number of responses to this objection. First, the Model Penal Code Commentary's paradigmatic example of a conditional intent negating the harm and evil of an offense defeats this objection. The Commentary states that “it would *not* be an assault with the intent to commit rape, if the defendant's purpose was to accomplish the sexual relation only if the mature victim consented.”<sup>253</sup> That is, the actor's intent to have sexual relations is conditioned on the victim consenting. That condition negates the harm or evil the offense seeks to prevent. Under the Code, the victim's non-consent is neither an element of the offense of rape nor of assault.<sup>254</sup> Rather, the Code conceptualizes consent as a defense.<sup>255</sup> As a result, a condition pertaining to that which is both a non-element and extrinsic to the offense—a defense—does negate the harm or evil the offense seeks to prevent. The Commentary's paradigmatic example demonstrates that conditioning intent on acting under a defense does negate the harm or evil that the offense seeks to prevent. If a defense that the Code only sometimes views as a justification<sup>256</sup> negates offenses' harm or evil, then *a fortiori* justification defenses clearly negate offenses' harm or evil. Thus, the Commentary on the Code's influential formulation of the conditional intent doctrine clearly rejects the objection.

Second, the objection's premise is false. Offenses' elements do not exclusively embody offenses' harm or evil. Even if technically extrinsic to offenses' elements,<sup>257</sup> justification defenses may also address offenses' harm or evil. As Kyron Huigens explains, an offense or “crime consists of the violation of a prohibitory norm. The absence of justification is part of the prohibitory norm, even though we enact it into law separately from the offense for the sake of clarity and convenience.”<sup>258</sup> That is, the absence of a

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252. See discussion *supra* Part III.E.1.

253. MODEL PENAL CODE § 2.02(6), cmt. 8, at 247 (AM. LAW INST., Official Draft & Revised Comments 1985) (emphasis added).

254. See MODEL PENAL CODE § 211.1 (AM. LAW INST. 1985) (lacking as an element the victim's non-consent for an “assault” offense); *id.* § 213.1 (lacking as an element the victim's non-consent for “rape and related offenses”).

255. See *id.* § 2.11(1) (“The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent . . . precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.”).

256. See *id.* § 2.11(2) (“When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if . . . the consent establishes a justification for the conduct under Article 3 of the Code.”).

257. For discussion of jurisdictions including the absence of justification defenses as part of the elements of offenses, see *infra* notes 259–263 and accompanying text.

258. Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO L. J. 387, 425 (2002).

justification defense is implicitly part of or intrinsic to an offense. For example, even if the elements of a murder statute prohibit intentionally causing the deaths of others, the prohibitory norm is intentionally causing the deaths of others unjustifiably or unlawfully. As a result, placing a condition on the intent to commit conduct—only if the conduct is justified and lawful—does negate the harm or evil the offense seeks to prevent.

Third, even if offense elements exclusively embody offenses' harm or evil, some jurisdictions explicitly include unlawfulness or absence of justification as offense elements. For example, some jurisdictions' homicide and murder offenses contain the offense element that the killing is unlawful or unjustified. Various formulations of this offense element include that the killing is committed "unlawfully,"<sup>259</sup> "without the authority of law,"<sup>260</sup> "without lawful justification,"<sup>261</sup> or simply that the killing is "unlawful."<sup>262</sup>

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259. *E.g.*, GA. CODE ANN. § 16-5-1(a) (2017) ("A person commits the offense of murder when he *unlawfully* . . . causes the death of another human being." (emphasis added)); OKLA. STAT. tit. 21, § 701.7(A) (2017) ("A person commits murder in the first degree when that person *unlawfully* . . . causes the death of another human being." (emphasis added)); WYO. STAT. ANN. § 6-2-105(a) (2017) ("A person is guilty of manslaughter if he *unlawfully* kills . . ." (emphasis added)).

260. *E.g.*, MISS. CODE ANN. § 97-3-19(1) (2017) ("The killing of a human being *without the authority of law* . . . shall be murder . . ." (emphasis added)); *id.* § 97-3-19(2) ("The killing of a human being *without the authority of law* . . . shall be capital murder . . ." (emphasis added)); S.D. CODIFIED LAWS § 22-16-4 (2017) ("Homicide is murder in the first degree: (1) If perpetrated *without authority of law* . . ." (emphasis added)).

261. *E.g.*, FLA. STAT. § 782.07(1) (2017) ("The killing of a human being by the act, procurement, or culpable negligence of another, *without lawful justification* . . . is manslaughter." (emphasis added)); 720 ILL. COMP. STAT. 5/9-1(a) (2017) ("A person who kills an individual *without lawful justification* commits first degree murder . . ." (emphasis added)); *id.* 5/9-3(a) ("A person who unintentionally kills an individual *without lawful justification* commits involuntary manslaughter . . ." (emphasis added)); N.M. STAT. ANN. § 30-2-1(A) (2017) ("Murder in the first degree is the killing of one human being by another *without lawful justification* or excuse . . ." (emphasis added)); 18 PA. CONS. STAT. § 2503(a) (2017) ("A person who kills an individual *without lawful justification* commits voluntary manslaughter . . ." (emphasis added)); *id.* § 2507(c)(1) ("[A person commits manslaughter of a law enforcement officer in the first degree if the person] *without lawful justification* kills a law enforcement officer . . ." (emphasis added)).

262. *E.g.*, CAL. PENAL CODE § 187(a) (West 2017) ("Murder is the *unlawful* killing of a human being, or a fetus, with malice aforethought." (emphasis added)); *id.* § 192 ("Manslaughter is the *unlawful* killing of a human being without malice." (emphasis added)); FLA. STAT. § 782.04(1)(a) (2017) ("The *unlawful* killing of a human being . . . [is murder]." (emphasis added)); IDAHO CODE § 18-4001 (2017) ("Murder is the *unlawful* killing of a human being . . ." (emphasis added)); *id.* § 18-4006 ("Manslaughter is the *unlawful* killing of a human being . . ." (emphasis added)); NEV. REV. STAT. § 200.040 (2017) ("Manslaughter is the *unlawful* killing of a human being . . ." (emphasis added)); N.M. STAT. ANN. § 30-2-3 (2017) ("Manslaughter is the *unlawful* killing of a human being without malice." (emphasis added)); 11 R.I. GEN. LAWS § 23-1 (2017) ("The *unlawful* killing of a human being with malice

Therefore, a killing that satisfies a justification defense would fail to satisfy this offense element.<sup>263</sup> In such jurisdictions, and with respect to such offenses, contrivers conditioning their intent on the justifiability and lawfulness of their conduct negate the harm or evil the offenses seek to prevent by negating an explicit element of the offenses.

Consequently, the objection fails for four reasons. First, that a lawful killing can be a legally cognizable evil is implausible. Second, the Code's Commentary clearly states that conditions pertaining to defenses do negate the harm or evil an offense seeks to prevent. Third, scholars understand justification defenses to pertain to the harm or evil an offense seeks to prevent. Finally, some jurisdictions explicitly include the absence of justification as an offense element. As such, conditioning intent on the presence of justification clearly negates the harm or evil of an offense by negating an explicit element of the offense itself.

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forethought is murder.” (emphasis added)); S.C. CODE ANN. § 16-3-50 (2017) (“[M]anslaughter, or the *unlawful* killing of another . . .” (emphasis added)); TENN. CODE ANN. § 39-13-201 (2017) (“Criminal homicide is the *unlawful* killing of another person, which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide.” (emphasis added)).

263. In addition, there are two further responses to the objection. First, the Model Penal Code itself defines the absence of justification to be an “element of an offense.” MODEL PENAL CODE § 1.13(9)(c) (AM. LAW INST. 1985). As a result, the presence of justification negates the harm or evil that an offense (including the element of the absence of justification) seeks to prevent. Moreover, the Code defines “material element of an offense” as any element relating to “(i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification . . .” *Id.* § 1.13(10). Second, the objection relies on a distinction—between elements of offenses and defenses—for which there is no clearly persuasive rationale. Whether a defense is treated exclusively as a defense or as a negative element of an offense is widely viewed as arbitrary. *See, e.g.*, MODEL PENAL CODE § 1.12, cmt. 4, at 196 (AM. LAW INST., Official Draft & Revised Comments 1985) (“There is admittedly no certain principle by which to gauge when a qualification of the scope of a prohibition should be viewed as a matter of excuse or justification as distinguished from an aspect of the basic definition of the crime.”); DOUGLAS HUSAK, *Willful Ignorance, Knowledge, and the ‘Equal Culpability’ Thesis: A Study of the Deeper Significance of the Principle of Legality*, in *PHILOSOPHY OF CRIMINAL LAW* 200, 209 (1987) (noting that most theorists find satisfactorily accounting for the distinction to be an “impossibility”); MOORE, *supra* note 83, at 178–79 (opining that the distinction “makes no sense to me”); Paul Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 757 n.65 (1990) (“Defenses, even general defenses of justification and excuse, similarly might be defined as negative elements of offenses. Given its manipulable nature, some additional refinement is needed before we can assume that the conceptual structure of the criminal law ought to revolve around the inculcation-exculpation distinction . . .”).

## CONCLUSION

Defendants who contrive, create, or cause the conditions of their defense and condition committing offenses on the applicability of such defenses pose a thorny dilemma for the criminal law. Our formal intuition suggests that defendants satisfying the legal requirements of a defense should receive it. But our deeper intuition suggests that only defendants with “clean hands” should succeed in avoiding criminal liability through a defense. By culpably contriving a defense, the contriver has “unclean hands.” The predominant resolution of the dilemma in the criminal law is simple: bar the contrived defense and hold the contriver liable (the Legal approach). Most criminal theorists argue that the preferable approach is to both grant the contrived defense and impose criminal liability for the culpable contriving of it (the Theoretical approach). Despite seemingly paradoxically granting a defense to, and imposing criminal liability for, one and the same offense, the Theoretical approach enjoys some advantages. It ingeniously captures our conflicting intuitions—contrived defenses both exculpate and inculpate—and more clearly allocates the rights of third parties to aid or hinder the contriver’s conduct. But these advantages are for naught because the Theoretical approach simply does not work. Either because of the conditional nature of contrivers’ plans or through application of the doctrine of conditional intent, it fails to hold defense-contrivers criminally liable in three broad categories: first, contrivers of justification defenses charged with offenses requiring the mens rea of purpose, intention, or knowledge; second, such contrivers charged with attempted offenses; and third, contrivers of excuse defenses charged with offenses requiring the mens rea of knowledge. In contrast, the Legal approach does work. It does not succumb to any of these failures. To hold defense-contrivers criminally liable, the Legal approach’s simple method of barring the defense is preferable.