Puzzling about State Excuses as an Instance of Group Excuses

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Puzzling About State Excuses
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François Tanguay-Renaud*

I. Why and How to Reflect upon State Excuses

Can the state, as opposed to its individual human members in their personal capacity, intelligibly seek to avoid blame for unjustified wrongdoing by invoking duress, provocation, a reasonable mistake in justification, or other types of excuses? Insofar as it can, should such claims ever be given moral and legal recognition? It is certainly not uncommon to encounter offhand statements to the effect that at least some state excuses are both conceivable and legitimate. However, the issue has yet to receive the sustained philosophical attention it deserves. Few theorists speak to it specifically, and those who do typically discard rather rashly the possibility of genuine state excuses. This theoretical neglect is symptomatic of a more general lack of analytical attention to the conditions that must obtain for the state to be legitimately held responsible for wrongdoing in law and morality. In this chapter, my aim is to start filling this gap by mapping out the topic of state excuses in a way that will, hopefully, spur a more systematic discussion of

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1 For example, in his recent book on The Constitutional State (Oxford: Oxford University Press, 2010) 131, N W Barber remarks in passing that 'A state which enters into an unjust war in a climate of moral panic is, all other things being equal, less reprehensible than a state which enters into that same war whilst fully aware of its injustice'. For an argument assuming the availability of at least some excuses for domestic state wrongdoing, see T Sorell, 'Morality and Emergency' (2003) 103 Proceedings of the Aristotelian Society 21, 33–4.
its various facets, including its relationship with the wider question of when the state may legitimately be singled out to bear adverse normative consequences for wrongdoing. I say that my aim is limited to ‘mapping out’ the topic because an important first step in understanding state excuses is to identify properly the many complex and controversial theoretical puzzles they raise.

In a bid to remain ecumenical, I adopt a wide understanding of excuses that comprises the core pleas which, for right or for wrong, have sometimes been treated as excuses in recent theoretical debates about individual responsibility in morality and law. By that, I mean claims that although a given course of conduct was, all things considered, wrong, it was not blameworthy—or was less blameworthy, in the case of a partial excuse—because it was (1) ‘justified’ or ‘warranted’ from the epistemic perspective of the actor, (2) reasonably motivated by reasonable emotions or other understandable cognitive or affective attitudes, (3) non-responsible, or (4) a hybrid of two or more of these claims. Of course, there are important differences between these four types of claims. In fact, some think of these differences as being so salient that they exclude the first type of claim from the category of excuses altogether and reclassify it as justificatory. Others, who argue that excuses are primarily reasons-based and responsibility-affirming, would differentiate the third type of claim, and perhaps some instances of the fourth, as claims of exemption from, or denial of, responsibility simpliciter. While these reclassifications often track deep and important dissimilarities, they remain contentious. Given the exploratory nature of my project, I avoid pre-empting meaningful discussion of any possible state excuses by assuming that restrictive views such as these can simply be transposed onto the domain of state responsibility.

Claims of state justification tend not to elicit the same amount of suspicion as claims of state excuses. For example, arguments about the justification of state coercion, state punishment, and state-led warfare pervade moral, political, and legal philosophy. Yet, it is not unusual to find moral and criminal law theorists who, like Andrew Simester, maintain that excuses ‘are simply inapplicable to artificial actors such as the state’. This assumption is also deeply entrenched in other legal fields concerned with the regulation of state wrongdoing. For example, Alan Brudner writes that, while they may be

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justified in infringing rights, ‘States cannot be constitutionally excused for violating rights’.4

Such brisk rejections of state excuses are intriguing, especially given the fact that the law of several oft-theorized jurisdictions provides for blame and even punishment of the state and state organs for wrongdoing. For example, the Criminal Code of Canada makes clear that ‘municipalities’ and other ‘public bodies’ may, like private organizations, be held responsible and punished for criminal wrongdoing.5 In the context of some civil actions, public authorities may also be subjected to punitive damages.6 The constitutional context is no exception. Admittedly, constitutional law continues to be primarily understood in terms of the regulation of the legal validity of exercises of state powers, rather than in terms of the regulation of state wrongdoing, as evidenced by the remedies usually granted for rights violations—that is, legal invalidity and procedural remedies such as exclusion of evidence or stay of proceedings. That being said, state constitutional wrongdoing is regularly condemned and may even be punished. For example, punitive damages are sometimes deemed an ‘appropriate and just remedy’ for egregiously unjustified violations of rights under s 24(1) of the Canadian Charter of Rights and Freedoms.7 In international law, the possibility of criminally censuring and punishing states for wrongdoing has often been contemplated and defended over the years, even if the legal status of ‘international crimes of state’ remains uncertain.8 Be that as it may, condemnation of state behaviour in United Nations resolutions, as well as through diplomatic channels, is

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7 See eg Crossman v The Queen (1984) 9 DLR (4th) 588 (Federal Court, Trial Division); Patenaude v Roy (1988) 46 CCLT 173 (Superior Court of Quebec); Freeman v West Vancouver (District) (1991) 24 ACWS (3d) 936 (Supreme Court of British Columbia). More generally, see Douzet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62, par 87, where the Supreme Court of Canada establishes that ‘[a] superior court may craft any remedy that it considers appropriate and just in the circumstances’, for violations of constitutional rights.
a commonplace. Last but not least, popular and political indictments of states and state bodies as ‘wrongdoers’ or ‘criminal’ abound, as do philosophers’ characterizations of such entities as moral agents susceptible of moral censure for wrongful deeds.9

Of course, the questions of whether and how the state may legitimately be blamed or punished for wrongdoing, as well as what understandings of ‘the state’ render such enquiries intelligible, require further investigation in their own right.10 In this chapter, though, I start with the assumption that at least some of the practices of blame and punishment listed above are legitimate and target entities which detractors of state excuses would, or should, themselves readily incorporate in their understanding of the state.

The question then becomes what reasons there may be for thinking that exculpatory claims of excuses—as opposed to, say, claims of justification—are unavailable to the state and, thus, should not be recognized. Some do not share my working assumption, and believe that whatever the state does is necessarily justified. Therefore, they argue, the question of state excuses never arises. This position finds both moral and legal instantiations. At the moral level, some equate the state with the justified pursuit of the public interest and characterize as private, or non-state, any actions that depart from it. At the legal level, the argument is usually that the state is no more and no less than a (domestic) legal system, such that no deed can be attributed to it at the domestic level unless that deed is legally authorized or permitted in some way—for example, through the recognition of a legal justification. Such challenges to the intelligibility of unjustified state wrongdoing and, thus, to the possibility of state excuses are myopic. As I argue elsewhere, they fail to give sufficient consideration to the complexity of what many modern states’ socio-legal constitutions enable them to do, sometimes in defiance of morality or extralegally. They also fail to give adequate attention to existing practices of moral and legal censure for behaviour that can be said, to a meaningful extent, to be organizationally programmed by the state.11 What is more, they tend to ride roughshod over many important puzzles related to

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what specific justifications should be afforded (or not) to the state for prima facie wrongdoing. Thus, I mostly disregard such contentions here.

I say ‘mostly’ because there may still be a methodological lesson to be drawn from such challenges. Even if we accept that unjustified state wrongdoing is intelligible, there remains an important debate to be had about how it can best be explained. Should we think of states, and state bodies or institutions, as real and irreducible moral agents who, like individual human agents, can perpetrate wrongs and, possibly, also claim excuses for themselves? Or should we instead concede that wrongdoing states are no more than fictions to which the conduct, wrongs, blameworthiness and, perhaps, excuses of certain human agents may legitimately be attributed? This controversy about the nature of the state and state responsibility is not new in moral and legal theory circles, and parallels in many ways debates about the responsibility of organizations more generally.¹² As I indicated earlier, I cannot get to the bottom of it here. Yet, I cannot ignore it completely, given its undeniable relevance to the question of whether and how we should think about state excuses. Therefore, in sections II and III below, I appraise the plausibility of state claims of excuses in terms of both of these leading paradigms, and suggest that some such claims are indeed consistent with both. Note, however, that since excuses are primarily rebuttals of blameworthiness, since the core case of blame is blame that has a blameworthy moral agent as its direct object, and since the attribution of blameworthiness to, and blaming of, a posited fiction is at best a non-standard case, I will consider the realist paradigm first, and the fiction paradigm second. Note further that, in both cases, I will primarily focus on the possibility of state excuses in morality. While, often, my arguments will also bear directly on the possibility of state excuses in law, and while I will sometimes even explicitly discuss legal excuses, I wish to leave open the further question of whether moral excuses should always be given legal effect.

With such caveats in mind, let me ask again: assuming that unjustified wrongdoing can be attributed to the state, and that the state can be blamed and, perhaps even, punished for it, why should excuses be unavailable to it? Objections are typically of two kinds. Some are metaphysical. They rest on the assumption that excuses reflect profoundly human characteristics and are, therefore, unavailable to organizations such as states and institutional state bodies. Other objections are moral and hold that, even if the state and its institutional organs are entities that can invoke excuses, such claims should

not be recognized given the moral position of the state. In what follows, I discuss objections of both kinds.

It is worth noting, at this stage, that many objections of the first kind, and perhaps also some of the second, may be aimed at organizations more generally, and not only at the state and its corporate organs. Accordingly, my inquiry will also be of relevance to the question of whether organizations, considered as a class, can intelligibly and legitimately make excuses.13 I choose to focus on the state, however, out of concern that organizations such as private companies with more restricted constitutional aims and purposes and more constrained means of action may not as persuasively or generally be subject to blame qua irreducible agents—the first paradigm to be investigated.14 I am also of the view that state excuses call for a discussion of further interesting moral objections that do not apply, or do not apply with the same force, to other organizations. That said, it is my hope that, insofar as my analysis is applicable to other organizations, the reader will be inclined to employ it, mutatis mutandis, to elucidate the intelligibility and legitimacy of their excuses.

II. Excusing the State Qua Irreducible Moral Agent?

A. Philip Pettit’s model of corporate/state agency

An increasing number of contemporary theorists conceive of the state as a kind of corporate (group, collective—I use these terms as synonyms) organization that can itself be a moral agent. How can this be if, according to the time-honoured objection, corporate organizations have no discernible bodies or minds of their own? The argument tends to rest on the assumption that some groups of interacting human beings can be relatively autonomous agents—that is, that they can form action-directing attitudes such as intentions, develop plans, and perform concerted actions, that cannot be fully reduced to those of their members—thanks at least in part to the operation of

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13 The question of the availability of excuses to non-state organizations, such as private corporations, is also notoriously under-theorized. Some theorists assume that corporations can simply ‘mak[e] use of any available general excuses’. See J Horder, Excusing Crime (Oxford: Oxford University Press, 2004) 262. However, most leading theorists of corporate responsibility just ignore the topic altogether. See eg C Wells, Corporations and Criminal Responsibility (Oxford: Oxford University Press, 2001).

14 About this concern, see further T M Scanlon, Moral Dimensions: Permissibility, Meaning, Blame (Cambridge, Mass: Belknap Press, 2008) 165.
a normative framework. Modern states, which are made up of various institutional organs themselves reliant on the agency of countless individuals whose identity changes over time, are often thought to fall into this category, alongside other similarly integrated corporate bodies. These states all have a constitution that constitutes and divides labour between their various organs, lays out principles of governance, and institutes authoritative decision-making, control, and review mechanisms. By jointly committing and adhering to this constitution to a reasonable extent, individual members allow their state qua corporate entity to form judgements and exhibit attitudes as a coherent whole, and to make reasonably consistent decisions over time on the evaluative propositions (including moral and legal reasons) that they present to it for consideration. Individual members also enable their state to execute its decisions by complying with constitutionally-adopted action plans—in the form of rules, practices, directives, and commands—devised to implement them.

The thought, then, is that modern states often have what it takes to be moral agents proper. Like other moral agents, they are regularly confronted with normatively significant choices, involving the possibility of doing right or wrong. Through the intercession of their individual members, they may also have the understanding and access to evidence necessary for making normative judgements about these choices, as well as the capacity to implement them in the world. Crucially, though, as I imply above, if they are to count as moral agents in their own right, states qua corporate organizations must also have the required control over the said judgements. That is, they must be able to judge and plan for action in ways that are irreducible to the judgements and plans of other agents, including those of their members. To see how this is possible, Philip Pettit’s recent account of group agency is most helpful. Pettit’s account remains one of, if not the, most careful and sophisticated account of irreducible group agency to date, and it is also one of the only such accounts to be quite transparently applicable to complex groups like states.15 As a result, I use it as the main backdrop for my analysis, with the hope that most of the general insights I derive from its scrutiny will hold even if specific aspects of the account end up being refuted in future arguments.

Pettit argues that groups whose judgements depend on the judgements of more than one individual can be agents insofar as they respond rationally to

15 See especially P Pettit, ‘Responsibility Incorporated’ (2007) 117 Ethics 171. Many of Pettit’s insights were developed in collaboration with Christian List, as noted in their recent comprehensive restatement of the argument in C List and P Pettit, Group Agency: The Possibility, Design, and Status of Corporate Agents (Oxford: Oxford University Press, 2011). Since the separate articles on which I rely most were authored by Pettit himself, I keep referring to him alone, as a shorthand.
their environment on a reasonably consistent basis. Constitutions facilitate
group agency by assigning decisional roles to the group’s members and
setting limits on what they can and cannot do. To the extent that the group’s
constitution provides sufficient constraints against internal inconsistencies,
the group operating under it may then be a relatively autonomous agent over
time (despite deriving all its matter and energy from its individual human
members). Pettit argues that constitutional constraints are sufficient for a
group to be autonomous in this sense when they ensure that, under normal
conditions, reason is ‘collectivized,’ such that majority views do not always
prevail and the group’s attitudes cannot be described as a simple majoritarian
function of the members’ attitudes. In Pettit’s own words: ‘Autonomy is
intuitively guaranteed by the fact that on one or more issues the judgement of
the group will have to be functionally independent of the corresponding
member judgements, so that its intentional attitudes as a whole are more
saliently unified by being, precisely, the attitudes of the group.’
He also
insists that decision procedures must be in place to guarantee that the group
can change and correct its irreducible attitudes over time, so as to ensure the
minimal rational coherence and integrity that we expect of agents proper.

The claim, then, is that state constitutions often ensure such relative state
autonomy and minimal diachronic rational coherence and integrity by imposing
a variety of balances and checks on state decision-making—for example,
separation of powers, federal division of powers, judicial review of adminis-
trative and legislative action, stare decisis, elections, impeachment procedures,
and so forth. Depending on how they are constituted, discrete institutional
state organs pertaining to the executive, legislative, or judicial branch—
sometimes at both federal and state, or provincial, levels—can also be imbued
with such relatively autonomous agency. Commonly-discussed examples
include municipalities, public corporations, the army, provincial governments,
various administrative agencies, as well as the executive as a whole.
When
such suitably-constituted group organizations arrange for moral or legal wrongs
to be perpetrated, given the decisions they license and the constitution by
which they channel those decisions, they are fit to be held responsible and,
possibly, blamed for them qua irreducible ‘source of the deed’.

Focusing on the state as a whole for the sake of simplicity, one may
interject here that, even if this account is sound in respect of developed

17 Even if such state organs obviously do not constitute ‘the state’ as a whole, they typically form
significant parts of it, such that consideration of their agency and possible excuses dovetails with a
discussion of state excuses. An explanation of the precise nature of their connection to the state is
outside the ambit of this chapter.
liberal democratic states, other states may not be sufficiently well organized to respond rationally to their environment on a consistent basis qua irreducible corporate agents. How should we think of such states? Are they states to which a plea of insanity, mental disorder, or straight-out non-responsibility should be available against allegations of wrongdoing? I am tempted to answer with a qualified yes. Insofar as they do not have a sufficiently well-developed constitutional apparatus, or that their individual members do not commit to and comply with it enough, such states do not qualify as relatively autonomous moral agents capable of acting contrary to reason and answering to it. At best, they may be deficiently-constituted ‘quasi-states’, whose decisions and actions are, in general, reducible to the decisions and actions of some of their individual members. At worse, they are utterly disorganized ‘failed states’ that possess almost none of the characteristics of what we normally conceive as states.\textsuperscript{18}

Here, one may think, lies the main difference with cases of individual insanity or mental disorder. Even when mentally-disordered individuals are thoroughly incapable of responding to reason, they, unlike quasi-states or failed states, remain embodied, identifiable and, in a sense, irreducible entities. Some may also argue that, as mentally disordered as they may be, human beings are deserving of a kind of respect and dignity that is not necessarily warranted, or warranted in the same way, in the case of degenerate forms of human organization like failed and quasi-states. There is certainly some truth to this line of argument. However, I still think the analogy between individual and state insanity can be preserved to a meaningful extent if we insist that failed and quasi-states can remain identifiable in some respects—say, territorially and in the eyes of certain relevant national and international actors—and that, like the mentally disordered, they might, in some possible world, be ‘cured’ or re-organized in a way that makes state agency possible. For example, it is conceivable that, through its own resources and international assistance, the failed state of Somalia (as we know it today) could one day develop out of its debilitating predicament. Thus circumscribed, the analogy would also seem to be applicable to identifiable institutional state organs and other sub-state corporate entities that lack irreducible agency, yet are susceptible of reorganization that would make it possible.

Unfortunately, this stretched analogy is only the beginning of our troubles. The next and more difficult question is whether a model of irreducible state

\textsuperscript{18} I borrow this distinction from T Erskine, ‘Assigning Responsibilities to Institutional Moral Agents: The Case of States and “Quasi-States”’ (2001) 15 Ethics and Int’l Affairs 67, 79.
agency such as Pettit's can be consistent with claims of excuses that extend beyond claims of complete lack of responsibility.

B. The challenge of affect-based excuses with a cognitive twist

It is sometimes objected that many common individual excuses are grounded in conscious phenomenal experiences such as affective experiences and that, since states and corporate state bodies do not have such experiences of their own, they simply cannot claim these excuses. Consider the excuse of duress, which Andrew Simester, who champions this objection, explains in terms of unjustified wrongdoing perpetrated out of fear, when the fear in question may have driven a reasonable person to act thus.\(^\text{19}\) This affect-based account of the excuse of duress is generally accepted and, arguendo, I shall assume its soundness. Simester's objection is that, since corporate organizations such as the state cannot experience the fear that is necessary to ground this excuse, it is not available to them. No doubt, their individual members can experience the required fear, and may sometimes be excused for their wrongdoing on that basis, but states and state bodies qua irreducible corporate agents cannot.

I could not hope to do justice here to the deep and complex metaphysical question of whether corporate entities like states and state bodies can have affective experiences and other conscious phenomenal states of their own. However, some general remarks seem apposite. If functionalist thinkers like Pettit are right about corporate agency, then given some plausible empirical claims about states—that they have decision-making mechanisms, that their decisions can have reasonable coherence over time, etc—there seems to be no principled difficulty in ascribing genuine and irreducible cognitive states to them. According to such a view, states and other appropriately constituted corporate entities can quite literally make judgements, acquire beliefs about what they judge to be the case, intend actions, and so forth. However, the case for corporate affective states and other phenomenal experiences is more difficult to make.

Admittedly, there may be emotions, like anger, that arise among group members (who, by hypothesis, are otherwise never angry) when they are acting as part of a given group—that is, within the processes and relationships that constitute it. This anger might then be described as group, or group-related, anger. However, more needs to be said if the claim that this anger is irreducible to the anger experienced by individual members is to be made

\(^{19}\) Simester, 'Necessity, Torture, and the Rule of Law', n 3 above, at p 299.
out. One could perhaps seek to extend the functionalist argument and claim that phenomenal states are also best explained functionally. Yet, I find it difficult to imagine how this claim could be persuasively developed. As Pettit himself recognizes, functionalist claims that corporate entities have emotions that are relatively autonomous from those of their individual members are generally suspect. It is one thing for states and corporate state institutions to be able to form distinct judgements, beliefs, intentions, and other action-directing attitudes by following, to a reasonable extent, whatever steps are prescribed in their constitution. It seems to be quite another for irreducible affective states to be generated in a similar way. In other words, there seems to be more to phenomenal states—say, to the experience of fear or anger—than mere questions of organizational structure and function. Accordingly, it is at least plausible that Andrew Simester, who appears to think that such states are distinctively human (or, at least, animal as opposed to artificial), is correct.

To be sure, some theorists do defend the possibility of irreducibly collective emotions. However, their arguments tend to rest on the dubious premise that emotions can exist without affective experience. Thus, Margaret Gilbert, the most prominent advocate of collective emotions, adopts early on in her argument Martha Nussbaum’s claim that some emotion-types may have no necessary phenomenal concomitant, citing the non-conscious fear of death as an example. Besides the fact that the existence of non-conscious, non-affective emotional states is questionable, it is important to note the difference between the claim that every emotional state does not necessarily come with a specific and distinctive affective experience, and the claim that affect can altogether be absent from emotional experience. While the former claim is admittedly plausible, the latter is rather more counter-intuitive. It may well be true that, unlike moods, which refer to purer forms of affective experience—think of free-floating depression, sadness, elation,
or euphoria—emotions also have cognitive components, such as being directed at objects and involving beliefs about them. My fear of a dog, for example, does seem to involve a cognitive construal of a number of the dog’s features (its salivating maw, its ferocious bark, its running towards me) as frightening. However, it does not follow that the relevant cognitive aspects of emotions can altogether be devoid of affective experience. Such a position seems radically out-of-touch with the phenomenology of emotions, and much current research has sought to discredit it.\footnote{See eg M Stocker, \textit{Valuing Emotions} (Cambridge: Cambridge University Press, 1996); J Pankseep, \textit{Affective Neuroscience} (Oxford: Oxford University Press, 1998); P Greenspan, \textit{Emotions and Reason: An Inquiry into Emotional Justification} (New York: Routledge Chapman and Hall, 1988).}

Then again, to the extent that affect-free ‘emotional states’ do exist or, following Nussbaum, that some ‘emotions’ are best explained in purely cognitive terms—say, as evaluative judgements that ascribe great importance to certain things or persons—it seems more accurate to treat them generically alongside other cognitive states, rather than as part of a distinctive emotional genre. Indeed, insofar as an ‘emotion’ is best explained as a mere configuration of beliefs or as a cognitive attitude, I see no reason not to label it and treat it as such. To repeat, according to an account such as Pettit’s, suitably-constituted states and state institutions can have cognitive states (such as beliefs) and action-directing attitudes (such as intentions) of their own. It is phenomenal states, such as affective states, they cannot experience.\footnote{Insofar as conative attitudes such as wishing, desiring, longing, or craving have phenomenal components, it may also be that corporate agents cannot have them, or can only have them partially. Pro-attitudes devoid of phenomenal components are more straightforwardly available to corporate agents. In this respect, intentions and other cognitively-defined pro-attitudes are least problematic.}

Does this view entail that states cannot claim excuses grounded in their own affective experiences? The conclusion seems to follow, and follow as much in the realm of domestic law as in the realms of international law and morality writ large. Note, however, that even if states and corporate state institutions cannot claim affect-based excuses—or, more broadly, excuses grounded in their own phenomenal consciousness—they may still be able to claim excuses that are derivative from the phenomenal experiences of their individual members. Remember that, even if the account of group agency on which I am basing my analysis is an account of relatively autonomous group agency, it is still individual group members who supply all its matter and energy. So, for example, it is a state’s individual members who introduce information and option-related evaluative propositions for its consideration. Insofar as the information and propositions thus introduced are distorted by, say, the fear experienced by the individuals introducing them, state judgements and intentions formed on their basis may turn out to be mistaken.
Arguably, the greater and the more widespread the fear experienced by the members—which, in a liberal democracy, may include not only officials, but a large part of the citizenry—the likelier it is that their affective experience will influence state decision-making and cause corporate errors.

Consider, for example, the effect that the deep and widespread fear of sudden murderous attacks—which exists amongst important segments of Israel’s general population and state officials—might have on state decisions. All else being equal, could this fear excuse, at least partially, some of Israel’s harshest reactions, as well as some of the unjustified reactions of specific governmental and defence institutions, to events that do not constitute threats but are collectively perceived as such? All else being equal, could the dread of terrorist strikes that prevailed in the US after the events of 11 September 2001 at least partially excuse some of the state’s legally and morally wrongful and unjustified responses—including indefinite preemptive detentions of both adults and children at Guantanamo Bay, official sanction and perpetration of degrading forms of treatment as means of interrogation, as well as unwarranted invasive military campaigns? At one point in his brief discussion of state excuses, Simester seems to open the door to this possibility by qualifying his argument, and recognizing that it might just be possible for states to invoke epistemic mistakes as excuses for wrongdoing. ‘Epistemic mistake’, he writes, is ‘a quite different type of case’.24

Although Simester does not explain this statement any further, one important distinction is readily identifiable. Unlike duress, epistemic mistake is a cognition-based, as opposed to an affect-based, ground of exculpation. If, indeed, states and corporate state bodies can have cognitive abilities, they too may sometimes fall prey to epistemic failures and, thus, are vulnerable to making mistakes. Beyond what Simester recognizes, they may also fall prey to more radical distortions grounded in irresistible ignorance, as well as in other non-belief-based cognitive attitudes. Even more importantly for our immediate purposes, though, what Simester fails to acknowledge is that the factors that can cause state cognitive distortions not only include individual epistemic limitations—such as misleading or unavailable evidence—and other purely cognitive failings, but also phenomenological distortions experienced by individual members. In other words, when it comes to states and other irreducible corporate agents, cognitive distortions may not always be entirely cognitive. For example, affective distortions of the practical rationality of individual members may sometimes lie at the root of their corporate organization’s cognitive failings. In this sense, it might sometimes be possible to speak of states and corporate state institutions that act while being ‘blinded

by fear' or 'blinded by anger' and then seek to be excused on that ground, with the proviso that the fear or anger in question is the fear or anger of their individual members. The same could also be said of states and state institutions acting in the grip of the (popular) mood of the moment.

Of course, this argument does not amount to a claim that Israel, the US, or any of their institutions should be excused for their unjustified wrongs on the ground of affectively-induced epistemic mistakes. What it does, however, is to elucidate further some key intricacies of cognitive distortion as a conceivable ground of excuse for them.

C. Some \textit{sui generis} state qua corporate excuses?

These last remarks warrant a parenthetical note of methodological caution. The analysis as I have conducted it so far assumes that commonly-encountered individual excuses constitute the standard against which the intelligibility of excusatory claims by group agents should be assessed. In other words, my argumentative strategy has so far been to think of excuses in terms of commonly-encountered individual excuses—such as duress, provocation, and mistake in justification—and ask whether such claims are also available to irreducible group agents. Insofar as these agents have what it takes to claim such excuses—and they may not, as in the case of affective experiences—I see no reason why we should not, at least in principle, recognize their possibility (or so I will continue to assume). Then again, my remarks at the end of the last section highlight the fact that irreducible group agents form a special category of agents. Unlike individual agents, their existence and agency depend on, yet are irreducible to, the existence and agency of other (individual) agents. Doesn't this constitutional difference warrant a distinct, or perhaps more complex, approach to understanding at least some conceivable claims of group excuses? I think it might.

What it means for individuals to act appropriately qua ordinary individuals may differ from what it means for them to act appropriately qua members of a group agent, or so they may think or feel. While full commitment of individual members to the group, its constitutional operation, as well as its rational coherence and integrity over time, may ensure that the group behaves in the fashion of a virtuous agent, various members may sometimes be moved, for good or bad reasons, to act in less than committed ways. They may, for example, temporarily turn their eyes away from the group in order to act fairly, charitably, or humanely qua individuals, or because of affective or cognitive distractions, or simply because of selfish or biased inclinations. When this happens, the group may not act in the minimallyrationally
consistent way that we would expect of an agent proper. Indeed, such lapses may even put the status of the group as an irreducible agent in jeopardy. At the same time, notice that they may not challenge this status to the same extent, as more fundamental structural deficiencies may, as we saw, generate failed or quasi-states.

Consider the case of the United States’ failure to join the League of Nations in the 1920s. Although its president at the time, Woodrow Wilson, led an American charge for the League’s creation and ensured that its constitutional covenant—contained in the Treaty of Versailles—would be crafted in a way that assumed US membership and leadership, the US Senate refused to ratify the treaty and, therefore, to join the organization. This senatorial rejection, primarily attributable to the opposition of a number of ideologically uncompromising Republican members, sowed the seeds for the League’s collapse, which culminated in its inability to prevent the Axis Powers’ aggressions that led to World War II. Could Wilson, acting in the name of the United States, have claimed an excuse for his state’s harmful volte-face by invoking the erratic character of the US’s dualist system of reception of international treaty law—which involves negotiation and signature of treaties by the Executive, and ex post facto ratification by Congress? In other words, if a state (or other irreducible group agent) is imperfectly organized in a way that facilitates rational inconsistency of the sort just exemplified, could such a constitutional disorder ground an excuse?

The question is tantalizing since such organizational deficiencies, coupled with individual members’ lapses in commitment to group rational integrity, may indeed explain a state’s failure to live up to relevant behavioural standards. This kind of explanation may be especially forceful in cases, such as the one just described, where the deficient mode of organization is inherited from the past and is not easily changed, due to constitutional restrictions. Pettit claims that groups that fall prey to such momentary, yet radical, failures in rational coherence and integrity can retain their overall status as irreducible agents. They can do so, he argues, insofar as the bulk of their members remain generally disposed to play their part in the integration of the group as an agent proper. Such groups must also ‘prove capable of acknowledging and denouncing the failure and, ideally, reforming their behaviour in the future—or if not actually achieving reform, at least establishing that the

25 A minimum of rational coherence and integrity also seems necessary for individual human moral agency, even if the required threshold likely falls well short of perfection.

failure is untypical’. In circumstances in which a group meets these conditions, Pettit speaks of rational unity of ‘a second-best sort: a unity that can exist in spite of the disunity displayed in actual behaviour’. In respect of my League of Nations example, it could be argued that the volte-face at issue was untypical of US behaviour (at the time, at least), and that the US subsequently made significant efforts to impress upon other international actors that it should generally be trusted to live up to its representations and commitments (insofar as it made any). Thus, an exculatory claim to the effect that, given its entrenched constitutional ordering, the US could understandably fail to act as a rationally unified agent in circumstances like the ones that led to its failure to join the League, is at least imaginable. Claims of this sort could also conceivably be made by more discrete state institutions acting within the national sphere.

When, if at all, these claims should be recognized is a further question. For what are mostly prudential (or strategic) reasons, international law tends to be reluctant to acknowledge states’ internal deficiencies as acceptable grounds for exoneration. For example, it is often said that such an acknowledgement would inevitably lead to undue erosion of international regimes of state responsibility. However, there is no absolute moral bar against the invocation of internal deficiencies as exculatory grounds. To return to the analogy with individual defences for a moment, criminal law sometimes recognizes that people who perpetrate harmful deeds while having momentarily lost touch with reason might legitimately be able to deny responsibility for these deeds, either fully or partially. Consider, for example, the oft-encountered defences of automatism and diminished responsibility.

Interestingly, Pettit would likely resist categorizing group claims of momentary constitutional disorder that make reliable decisions difficult as sheer denials of responsibility. He prefers to think of the group failures in question in terms of conflicts of ‘inner voices’—that is, the voices of different members—that are analogous to conflicts between ‘voices of the heart’ and ‘voices of the head’ that give rise to more reasons-based (and responsibility-affirming) individual excuses such as normal cases of duress and provocation. Of course, this kind of analogy between the excuses-generating ‘inner voices’ of individuals and groups is bound to be imperfect. The types of conflicting ‘inner voices’ at play and their role in promoting or impeding

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29 On the distinction between denials of responsibility and more reasons-based excuses, see J Gardner, Offences and Defences: Selected Essays in the Philosophy of Criminal Law (Oxford: Oxford University Press, 2007) 131–2, 179–82.
agency undoubtedly differ significantly as between groups and individuals. However, argues Pettit, insofar as we conceive of reason as a certain unified sort of pattern, the analogy can be instructive. Notably, it invites us not to overlook the complex role of reason, broadly understood with all its cognitive and affective components, in group claims such as claims of excuses other than sheer insanity.

Pettit’s reluctance to analogize too easily cases of group constitutional disorder and individual denials of responsibility also has the potential to shed contrasting light on the alluring analogy between exculpatory pleas of individual infancy and claims that developing states and state institutions may make in relation to various developmental hiccups. While normal young human infants are only minimally responsive to reason, they progressively acquire a more refined understanding of themselves and their surroundings as they age. The range of actions for which they are basically responsible—in the sense of being able to provide rational explanations for them—tends to increase correspondingly. Thus, many modern juvenile justice systems appropriately strive, with varying degrees of success, to hold children responsible only for wrongdoing for which they are basically responsible in this sense, and to modulate their remedies and sanctions accordingly. I say that this approach is appropriate since pleas of human infancy are not claims of conflicting ‘inner voices’ in Pettit’s sense, which may be amenable to appraisal in light of excusatory standards. They are denials of responsibility for alleged wrongdoing (at least in the form in which such wrongdoing is alleged).

States and state institutions may also make exculpatory claims of developmental infancy, yet it is not as clear that all such claims are best explained as sheer denials of responsibility. Consider, for example, the predicament of post-apartheid South Africa where, within a short period of time, a myriad of people of colour who had previously been excluded joined the civil service, and started implementing the Interim Constitution. Although these new state officials were gradually trained and mentored, and their transitional constitutional framework was progressively fleshed out, individual inconsistencies and mistakes were initially bound to take place, resulting in blunders, slip-ups and, possibly, wrongdoing at the corporate level. While, in such a case, it is also the group’s capacity to respond appropriately to reason that is at

31 On the nature and importance of the distinction between ‘being basically responsible’ and ‘being held responsible’, see J Gardner, ‘Hart and Feinberg on Responsibility’ in M Kramer, C Grant, B Colburn and A Hatzistavrou (eds), The Legacy of H.L.A. Hart (Oxford: Oxford University Press, 2008) 121.
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stake, Pettit teaches us that the developmental deficiencies in question may not obliterate the group’s basically responsible agency, and susceptibility to be held responsible and blamed for its wrongful exercise. To repeat, there remains for Pettit a ‘second-best’ sense of unified, irreducible corporate agency which, in the face of teething problems, rests on the group’s members’ persistent and general commitment to its integration as an irreducibly constituted agent, as well as on the group’s ex post reaffirmation and readjustment of this integration. Thus, unlike in cases of individual human infancy, corporate bodies that are initially unable to respond to reason appropriately due to developmental hiccups might still at times appropriately be held responsible and blamed for related wrongdoing. Then again, it is also conceivable that these groups’ blameworthiness—like the blameworthiness of older, more established groups struggling with constitutional disorders—may sometimes be mitigated, when relevant excusatory standards of institutional resilience, due diligence, as well as ex post facto denunciation, are met.

Here, I am not denying that some states and state institutions with infant, frail, or limited decision-making structures may sometimes be basically responsible for some specific actions, while not being basically responsible for others. Indeed, such teetering reality may be especially frequent in infant states with constitutional deficiencies that exceed the mere inability to train officials adequately. In large part, this is because constitutional structures including agency-enabling balances and checks, such as the separation of powers, the rule of law, parliamentary democracy, and judicial review, take time to develop. As it were, France and the United Kingdom did not emerge from the state of nature overnight, and were likely non-responsible for many harms associated with their evolution. My goal here is simply to point out that there is almost certainly more to the corporate agency story than this, and that the possibility of sui generis corporate excuses, differing from common individual excuses, should not be overlooked. At the same time, the complex nature of these sui generis claims and the magnitude of the philosophical apparatus that would be needed to elucidate them fully prevent me from saying any more here, for fear of losing sight of my initial goal of mapping

32 Note, however, Pettit’s subsidiary and fiction-based ‘developmental rationale’ for holding both children and ‘embryonic group agents’ responsible and punishing them in some way for harm to which they are merely causally related: it incentivizes them to pull themselves together so as to avoid such harm in the future. Pettit, ‘Responsibility Incorporated’, n 15 above, at pp 198–201.

33 This point finds reflection in discussions of how the existence of effective ‘compliance programmes’ in private corporations may affect how blameworthy they are, and how much they should be punished, for criminal wrongdoing. See eg C Gómez-Jara Díez, ‘Corporate Culpability as a Limit to the Overcriminalization of Corporate Criminal Liability: The Interplay Between Self-Regulation, Corporate Compliance, and Corporate Citizenship’ (2011) 14 New Crim L Rev 78.
out the many theoretical puzzles related to state excuses. Then again, I think have said enough to build at least a prima facie case for the intelligibility of group claims of excuses on the ground of constitutional disorder (short of sheer non-responsibility).

D. The lack of valuable self-interest objection to state excuses

Another prominent set of objections to the possibility of state qua corporate excuses has both metaphysical and moral aspects, which tend to be run together in argument. According to it, even if we grant that states have much of what it takes to make excuses—for example, that they are normally rational agents that can make errors in cognition and perhaps even undergo some forms of affective experiences—we should still never recognize their excusatory claims. The general thought is that corporate agents like states are purely instrumental creations that have no real interests or subjective values of their own. Insofar as they do—after all, the paradigm of corporate agency explored allows for irreducible group judgements and attitudes about what matters to the group’s survival and what is important to the realization of its constitutional goals—then such group self-interest and values should never be given weight in law or morality more generally. Corporate agents exist, or should exist, exclusively to promote the interests and values of others—that is, of non-instrumental agents like human beings. Therefore, the objection holds, no recognition should ever be given to their self-interested excusatory claims. No matter what affective pressures they incur, or what mistakes they commit, states and state institutions should never be excused for wrongfully privileging themselves. Nor should they be excused for any tendency they may have to do so. For example, they should never be excused under the heading of duress for acting wrongfully due to what were perceived as overbearing threats to their interests or subjective values.

In my view, the apparent strength of this line of argument comes primarily from its close affinity with the principle of value individualism, according to which the worth of the state (and, indeed, of anything else) must ultimately be appreciated in terms of its contribution to human life and its quality. If, indeed, it is only human interests and values that matter (here, some allowance may also be made for interests of other non-human conscious beings), then there seems to be no residual moral space for the recognition of the so-called interests or subjective values of irreducible corporate agents. One possible rejoinder might be that value individualism does not necessarily commit one to a purely instrumentalist view of corporate agency. If one could demonstrate that corporate agents like states or state institutions are
intrinsically valuable as necessary constituents of goods that intrinsically enrich human life, then some limited recognition and protection of ‘their interests’—or of their natural tendency to protect their interests—could, perhaps, be warranted (for example, in the form of excusatory concessions). Some have recently mounted spirited arguments in favour of the existence and value of groups’ irreducible interests along related lines, and it may be that they are onto something. However, powerful objections—questioning the metaphysical soundness of such arguments and the acceptability of their possible moral implications—continue to dominate current debates, and invite great theoretical caution.

What is perhaps a less metaphysically doubtful and morally hazardous way of challenging the interest objection to corporate excuses is to cast doubt on another assumption that underlies it. I am referring here to the assumption that claims of excuses can be reduced to calls for moral or legal leniency for agents who wrongfully, though understandably, disregard the interests of others in order to protect their own. This assumption is unwarranted. It is simply untrue that valid excuses can only arise in the context of dilemmas between self-interest and the interests of others, where the wrongdoer is deemed to have stricken a balance between the two that is sufficiently virtuous to block or attenuate inferences of blame. Many excuses have nothing to do with self-interest, so that the question of whether or not corporate entities like states and state bodies have interests of their own is often quite irrelevant to their ability to make such claims legitimately.

It is true that some claims of excuses, such as those relying on sufficient displays of courage in the face of coercive threats, may be connected to questions of self-interest. As Aristotle once dramatized it, using the example of the citizen who risks being killed on the battlefield for the sake of his homeland, courage is a virtue of character that tends to arise out of a struggle between personal safety and external considerations, such as collective victory. However, not all displays of virtue that may yield legitimate claims of excuses have the same structure. For example, loyalty, which the state may invoke in a bid to excuse wrongfully favouring citizens over non-citizens, is a virtue that, at its core, is other-regarding. A theory of morality that would

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only account for dilemmas between the pursuit of self-interest and the pursuit of the interests of others, exclusively allowing for excuses in such contexts, would be radically deficient. As the example of loyalty-highlights, dilemmas of moral life can also arise between different ways of engaging with pursuits that have others’ valuable interests at their heart, and valid claims of excuses might well be made in such contexts as well. Moreover, some claims of excuses have very little, if anything, to do with questions of interests writ large. Think, for example, of claims of epistemic mistake, constitutional disorder, or claims more akin to full or partial denials of responsibility (insofar as they are appropriately categorized as excuses). Thus, even if one concedes that states, like other corporate bodies, have no valuable interests of their own, the possibility of state excuses must not necessarily be ruled out. The range of available grounds of state excuses may then differ from the range of available grounds of individual excuses, as may the range of available grounds of corporate excuses in general, but this should not be taken to mean that states, or other irreducible corporate entities, may never make valid excuses.

E. Questioning the irreducible corporate agency model and related-excursory claims

A more sweeping moral objection to state excuses, understood as excuses claimed by states or state institutions qua irreducible corporate agents, denies the very necessity for such excuses in the first place. Such excuses are thought to be unnecessary since practices consisting in holding corporate agents responsible for wrongdoing and, say, blaming and punishing them for it, are morally redundant. According to this line of objection, both the moral and legal regulation of human actions, be they individual or collective, and practices of accountability for wrongdoing can and should be articulated in exclusively individualistic terms. That is, insofar as we understand grounds and practices of moral and legal accountability for wrongdoing in suitably complex and nuanced ways—allowing for sufficiently broad accounts of complicitous and joint wrongdoing—the possibility of holding irreducible groups responsible, blaming them, and punishing them really becomes superfluous.\[37\] Thus, the question of whether irreducible group agents can invoke excuses turns out to be moot.

One possible rejoinder is as follows: an account of irreducible group agency like Pettit’s has the advantage of providing a distinct ground for holding groups

\[37\] Christopher Kutz’s work seems at least partly animated by this idea in his *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000) and related subsequent essays.
such as states and their corporate institutions responsible and blaming them—say, because their actions made harm likely or inevitable—at times when no similar ground is available for holding individual contributors responsible and blaming them. This kind of shortfall of individual responsibility may arise when, for example, individual contributors to state action avoid being held responsible and blamed for their deeds owing to reasonable mistakes or ignorance, due care, duress, or other relevant excuses. Practices of state qua irreducible group responsibility may guard against such scenarios, as well as diminish the incentive for people to arrange things so as to increase their likelihood.

Here, one may be tempted to retort that, even if this rejoinder is sound, it is nevertheless self-defeating. Indeed, if the state can be excused for its wrongs when its individual members are excused for their own wrongful contributions, aren’t shortfalls of responsibility unavoidable? This worry is largely unwarranted. First, excusable individual contributions to state action do not necessarily entail excusable state behaviour, and vice versa. For example, it is not because specific individual state members act mistakenly or under duress that their state or corporate state institution will necessarily act mistakenly. Multiple checks and balances are typically in place to reduce the likelihood of the former automatically translating into the latter. Grounds of responsibility may also be different for the state and its members, such that the excuses of one may have nothing to do with the wrongs of the other.

What is more, in respect of reasons-based excuses such as epistemic mistake or normal cases of duress or provocation, role-based considerations must also be factored in. In law, as in morality, excusatory standards often vary according to the roles played by those who claim excuses. Thus, the standards of excusability applicable to individual state officials, although possibly more stringent than the standards applicable to ordinary people, may be nowhere near as stringent as the standards applicable to given corporate state institutions or, perhaps even more strikingly, to the state in all its grandeur. States are typically designed and built to be outstandingly strong and knowledgeable, in order to solve social problems that individuals and smaller corporate entities acting in unco-ordinated ways are unable to solve—such as the securing of social order, safety, trust, and other conditions of societal co-operation. They tend to have access to multiple and often better sources of information than other social actors (including their members taken individually). They also tend to have greater resources, authority over many more people, and more extensive opportunities for contingency

38 See generally Gardner, Offences and Defences, n 30 above, at pp 121–39, 245.
planning and training than other agents. With such attributes come greater responsibilities and greater (arguably, much greater) expectations of virtue, skill, and reasonableness. Insofar as the idea of capacity to do otherwise matters to some excuses, different standards may also be applicable to states and their individual members in this regard. Therefore, even in situations where all individual state members are excused for their contributions to state wrongdoing, the state and its institutions may well not be. Of course, the possibility of a shortfall of responsibility always remains. However, if I am correct, such shortfalls are likely to be rare.

Now, it might also be possible to resist the shortfall of responsibility argument at a more general level by arguing that the exonerating force of epistemic limitations and other types of pressures inherent in organizational settings is less significant than has traditionally been believed. One salient reason for this scepticism is as follows: insofar as individuals know—or, perhaps, ought to know—that they are participating in the operation of a group decisional framework that may, by its very constitutional design, yield bad or harmful outputs, it is questionable whether they should ever be able to escape consequential responsibility by invoking the irreducibility of these outputs. Alternatively, it may be that these individuals should only ever be entitled to partial excuses that mitigate their blameworthiness for wrongful participation in collective harm, as opposed to negating it altogether. Of course, this analysis also leaves open the possibility that there may be scenarios in which the conduct of no individual contributor to harmful state action quite amounts to wrongdoing, or only amounts to relatively insignificant wrongdoing. Yet, if the line of argument just outlined is sound, the shortfall of individual responsibility argument may not provide as forceful a case for holding irreducible group agents responsible as some think it does.

Furthermore, even insofar as the shortfall of responsibility argument provides a compelling case for group responsibility, including the possibility of blame and its cognates, some sceptical minds may still object. They may object that, on any plausible account, conditions for irreducible responsibility will be so demanding that many states and state institutions, such as courts, legislatures, ministerial cabinets, and administrative agencies, are unlikely to meet them, or to meet them on any consistent basis. It cannot simply be assumed, they might insist, that states and their institutions are agents capable of being held responsible and blamed in an irreducible sense, like Pettit and others sometimes seem inclined to do. More radically, some might also advance objections to the very metaphysical possibility of irreducible

group agency and responsibility, and simply reject accounts such as Pettit’s as misguided.

Even if, arguendo, one accepts these objections, care should still be taken not to throw the baby out with the bath water. If, indeed, the shortfall of individual responsibility argument is a valid one, as I think it at least sometimes is, then there will likely remain considerable pressures—grounded in reasons of deterrence, justice, expressiveness and symbolism, as well as various other pragmatic concerns—for practices of group accountability for collectively facilitated harm that cannot be blamed, in whole or in part, on individual wrongdoers. Thus, there may sometimes be good reasons to treat the state—even if only understood as a socio-legal or functional grouping without irreducible moral agency—as if it could intelligibly and legitimately be held responsible, blamed, and perhaps even punished, like a fully-fledged responsible agent. In other words, we may sometimes be justified in erecting fictions (or, more loosely put, figurative accounts) of state responsibility and blameworthiness. This may be the case when, for example, such holdings would have significant expressive value—think of situations in which there is mass popular support for, or acquiescence to, unjustified official wrongdoing. Such fictions may also lead to critical reforms in state members’ behaviour and contribute to forestalling future misconduct. Such a consequentialist way of thinking about state responsibility for wrongdoing could conceivably complement, or perhaps even replace, more robust models such as Pettit’s. Thus, its implications for the possibility of state excuses must also be examined.

III. From Realism to Pragmatic Fiction

A. The general problem

In both law and morality, groups are sometimes treated as agents even when they are not, and held responsible, blamed, and punished for conduct and outcomes that are only fictionally ‘theirs’. A case in point is that of regimes of corporate criminal liability which rely on doctrines of identification or vicarious responsibility to hold corporations accountable and blame them for some of the wrongs and harms perpetrated by their members, either individually, aggregatively, or jointly. Many such regimes are premised on the imputation to the corporation of a package, comprising some designated individuals’ conduct (including their acts and mental states), that amounts, or is relevantly related to, wrongdoing. Other such regimes involve the
sheer attribution of individuals’ blameworthiness to the corporation. The question for us is this: insofar as the imputed conduct or blameworthiness is that of individual human beings who are at least partially excused for their own deeds, can their individual excuses ever limit or affect that for which the corporation can legitimately be blamed and punished?

Indeed, the structure of regimes like the ones just mentioned does not necessarily preclude the concurrent imputation to the group of related individual excuses—with all their components, be they cognitive, affective, etc. Insofar as state institutions such as local governments or other public bodies are targets of moral blame or criminal liability in this imputed way, such a structural observation also seems to apply. So does it to cases in which the state as a whole may, in similar ways, be blamed and threatened with sanctions. That is, the excusatory claims of individuals whose conduct or blameworthiness is at stake may conceivably also be imputed to the state and its institutions by means of fictions.

But should individual excuses be imputed to groups in such ways? As I indicated at the end of the last section, theorists who think of collective responsibility, blame, and punishment as fictions often justify associated practices in pragmatic terms. Christopher Kutz, for example, argues that such practices can be justified as a means of changing collective behaviour for the better, or as a means of expressing symbolically more significant criticism for the joint perpetration of harm. Now, insofar as the attribution of individual excuses to a group can at least partially exonerate it and, consequently, pre-empt the realization of such valuable reformative and symbolic ends, it is easy to see why pragmatist theorists are reluctant to admit that such attribution is ever warranted. Attribution of individual excuses to groups, their thinking goes, would threaten to undermine the very rationale for blaming and punishing them for the acts of individuals.

The mistake that should not be made here is to assume that the reasons invoked to justify blaming and punishing groups by means of fictions always trump countervailing reasons. Admittedly, there will at times be strong

40 For a good survey, see Cane, Responsibility in Law and Morality, n 12 above, at pp 148–58. Such fictions are also commonly found in morality, even if some seminal discussions of them are prone to exaggeration. See eg J Feinberg, ‘Collective Responsibility’ (1968) 65 J of Philosophy 674, who treats collective moral responsibility as an inherently and necessarily vicarious form of responsibility.

41 Kutz, Complicity: Ethics and Law for a Collective Age, n 37 above, at pp 191–7. Note that the idea of shortfall of individual responsibility tends to underlie discussions of justifications of the second kind.

42 Thus, in Complicity: Ethics and Law for a Collective Age, n 37 above, at p 3, Kutz speaks about pleas for excuse in primarily individualistic terms.
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reasons in favour of group accountability, group blame, and even group punishment for harmful wrongdoing. However, there may also be significant competing reasons that can defeat these strong reasons. For example, blaming and punishing groups may stigmatize innocent individual members and cause them to suffer unfairly. The problem of unfair dispersion of group blame and punishment has plagued theorists of collective responsibility for years, and there does not seem to be any easy cure. To be sure, some think that, in light of the seriousness of the problem, we should simply refrain from blaming and punishing groups—and perhaps especially large and complex groupings like states and state institutions. Then again, justice—and, more broadly, morality—may not demand such a radical conclusion, and attribution to groups of relevant excuses, in tandem with wrongdoing, might form part of a more nuanced position that gives due consideration to reasons for blaming and punishing groups as well as to reasons against it, such as unfair dispersion concerns. Attribution of individual excuses to groups may also serve important expressive ends. For example, it may provide a meaningful acknowledgement that, in certain circumstances, there are duties which individual group members should not be blamed, or should not suffer, for failing to discharge either on their own or together. What is more, imputation of excuses to groups might matter outside the context of straightforward blame and punishment. At times, such imputation may suitably mitigate crippling compensatory obligations that befall group members for the erratic and generally detrimental conduct of a few individuals acting, in the group’s name, under, say, duress or epistemic misapprehensions. Or in the case of the declaration of an unjust war, attribution of excuses to the declaring state may modulate its members’ overall liability to harmful self-defensive action. Of course, all these claims are controversial and arguments beyond what I can provide here would be needed to vindicate them, insofar as they can be. That said, I offer them as plausible candidates of areas in which fictions of group excuses may play an important role and as provocations for further theoretical scrutiny.

One of the fiercest opponents of (legal) fictions, Jeremy Bentham, used to deride them as ‘lies’ that ‘may be applied to a good purpose, as well as to a bad one: in giving support to a useful rule or institution, as well as to a pernicious one’. For Bentham, the only appropriate response to this ambivalent and
rather unpredictable character of fictions was to get rid of them altogether. However, since fictions of group responsibility can serve important ends, this remedy seems drastic. A more discerning position may be to insist that such fictions must always be justified, in the sense of being deployed for undefeated reasons. As suggested above, it is at least plausible that imputation of individual excuses to groups might, on occasion, help ensure that practices of group—and, more to the point, state—blame, punishment, and their cognates remain so justified.

The point also applies if groups such as states can be irreducible agents and one asks whether the emotions, moods, valuable interests, etc, of their individual members may ever be imputed to them by means of fiction—in ways that could contribute to grounding claims of group excuses. Here again, the issue is one of justification. Yet, in the case of the state, many are reluctant to concede even the very possibility of such justified fictions given what they perceive as the slipperiness of the concession. The state is a purely instrumental creature, they claim, and given its role and position in society, it should embody the epitome of self-control and knowledgeability. As I claimed earlier, there is certainly some truth to this suggestion. But should states—however we understand them—really always be held to standards of perfection in virtue, skill, and reasonableness, such that any talk of state excuses and related talk of state emotions, moods, and interests are really moot ab initio?

B. The state as an inexcusable beacon of virtue?

A challenging group of objections take aim at the suggestion that states may legitimately be excused in situations where their ‘special relationship’ with their human subjects is at issue. The assumption is that, given the nature of the state as an entity whose every function and action should be instrumentally tailored to the well-being of its subjects, such situations are bound to be very common. They are common, if not the norm, and give rise to expectations of state virtue that are so exacting as to create a virtually insurmountable barrier to the legitimate recognition of state excuses. The objections in question tend to target primarily the possibility of domestic state excuses, understood either according to the irreducibility or fiction paradigm, given the profound and inevitable interplay between a state’s domestic actions and its subjects’ well-being. Yet, international variants are conceivable.

A first such objection rests on the fact that not only does the modern state typically have great resources and opportunities for action; it also characteristically claims a pre-eminent social role for itself as wielder of
supreme and legitimate authority over a territory and its occupants. The objection is that, given such attributes, the state should not only seek to be, but be expected to be, a model of virtue for all those who live under it, work on its behalf, or otherwise relevantly cross its path. Indeed, what standing would it have to guide them, hold them responsible, and sometimes even blame and punish them were it not to live up to what it preaches and more? Besides, wouldn’t excusing the state for unjustified wrongdoing risk creating erroneous perceptions amongst individual state officials and ordinary subjects that no more is actually expected of them? Such moral concerns, and there are no doubt many related others, deserve serious consideration. For some, though, they are so salient as to require holding the state to a standard of virtuous perfection in its dealings with its subjects. In such contexts, the thought goes, even if states can face exigent circumstances and, say, undergo debilitating affective experiences—real or fictionally attributed—they must always be expected to tower above them, with complete equanimity. Therefore, there ought to be no excusatory concessions to state frailty.

Simester emphasizes a distinct, yet related, objection when he argues that ‘it is not open for the State, or its officials, to prefer the interests of one person to another, since the State is not entitled to be closer to one person than another. It is equidistant, impartial to all’. Here, the underlying assumption seems to be that, insofar as states have valuable interests and personal values, they are expected never to act on them in their relationships with their subjects. Insofar as they do not have such interests and values, yet one embraces a conception of morality that admits of primarily other-regarding dilemmas, such as dilemmas of loyalty, states are also expected to refrain from engaging in them. Accordingly, even if valid excuses may sometimes be available to individual wrongdoers in similar circumstances, such excuses should never be recognized when invoked by or in the name of the state.

Part of the apparent strength of this last objection derives, in my view, from the powerful liberal idea that states should administer justice impartially and impersonally. Were states not to behave in this way, liberals argue, the very idea of state justice would be severely undermined. I take this position to be quite uncontroversial. However, the administration of justice does not exhaust the activities of the modern state. States also seek to thwart the spread of diseases and risks of natural disasters, they make administrative decisions in matters of taxation, immigration, healthcare and national security, they wage war and engage in all sorts of other pursuits that are not strictly tied to the administration of justice. In the context of these further pursuits, could it

45 This objection was first suggested to me, in spirit, by John Gardner.
not sometimes be excusable for states, state institutions, as well as officials acting in their name and on their behalf to be partial on account of relevant allegiances? For example, whereas it may be morally wrong, all things considered, to expel illegal immigrants who have resided and integrated in, as well as contributed to, a state for a long time, must it really always be inexcusable for such a state to give in to intense expulsion pressures stemming from its citizenry?

Some, like Simester, seem to believe that state partiality is indefensible domestically, and that states should be expected to adopt a perfectly impartial and impersonal standpoint in their dealings with their subjects (or, at least, their citizens). Some strict cosmopolitan moral theorists endorse an even more far-reaching version of this view, arguing for equally stringent duties and standards of justice, respect, and beneficence owed to all human beings regardless of territorial jurisdiction, social ties, and political affiliations. These are theorists for whom the objection to state excuses considered here would likely extend to key international dimensions of states’ conduct, such as those impinging on the human rights of people who are outside their jurisdiction and are not their subjects. For example, such theorists would likely resist the grant of any excuses to states declaring unjust wars to protect their citizens. This position stands in stark contrast with that of various particularist and pluralist communitarians who readily reject as unrealistic and unreasonable any such premise of perfect state impartiality.47

Who is right? I do not intend to delve at length into this debate, nor into the issue of which precise standards of virtue should apply to states. My intention is rather to emphasize an oft-neglected, yet plausible defence of official public attitudes which, despite being conducive to partiality and lesser equanimity, may be consistent with a proper, instrumental account of the role and value of the state.

Consider the gap that sometimes exists, at both state and non-state levels, between what I will call the morality of motives and the morality of actions. For example, take the case of the army officer whose hot-headedness sometimes leads them to be less than impartial, treat many of their subordinates harshly, and deal with enemy combatants mercilessly. All things considered, their hot-headed actions may not always be justified. However, for army officers in many important roles, such hot-headedness is a morally desirable

attitude. We would not want them to be such cold fish that they are unable to motivate their troops. Hot-headedness might also be a condition of their success in battle. In short, hot-headedness may be instrumental to the realization of some of the legitimate state purposes that army officers exist to serve qua officials whose conduct is imputable to the state. I believe that this point also holds with respect to a wide range of individual and, possibly, irreducible corporate attitudes that are crucial to the fulfilment of state functions, yet can sometimes drive a wedge between morally acceptable thinking about actions and morally acceptable actions. Think of risk-averseness, carefulness in planning, dedication to people’s welfare and responsiveness to their needs, efficiency-mindedness, and so forth.

If not necessarily admirable, unjustified wrongdoings perpetrated on account of morally desirable attitudes may still be understandable and, when relevant standards of virtue are met, warrant excuses. When such excuses are grounded in attitudes instrumental to legitimate state functions, it may then be appropriate to attribute them to the state. Of course, if states and state institutions do not have personal values, valuable interests, or conscious phenomenal experiences of their own qua irreducible group agents, not all types of motivational attitudes that may lead to valid individual excuses may be available to them under that specific understanding of state responsibility. Yet, states and state institutions so understood may still have reasonable cognitive attitudes that are defensible as instrumental to their proper functions, and claim legitimate excuses based on them.

Again, I am not denying that many excusatory standards to be applied to states and state institutions should, as a matter of course, be demanding. Yet, for reasons like the one just introduced, I am unconvinced that virtuous perfection is the required threshold. What is more, if states are, at bottom, collectives of individuals, it seems that our expectations of them should at least partly depend on our expectations of these individuals acting together. Since individuals may sometimes be excused for wrongs perpetrated with others, it would be surprising if state agency arising from their group action could itself never be.

To be sure, we could plausibly conceive of different excusatory standards of virtue applicable to different realms of state activity, with the most stringent perhaps applicable to activities that impinge most severely on basic human rights. We could also conceive of different excusatory standards for the state’s domestic as opposed to international incarnations, for the

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state as a whole as opposed to discrete state institutions, for different such institutions, for states and state institutions at different stages of development, for state institutions as opposed to private corporations or individuals discharging state functions, and so forth. Likewise, even if the state should be expected to be expertly knowledgeable about certain things, excusatory standards for epistemic mistakes may well vary between domains of activity. Indeed, in some such domains, liberal restrictions on what the state should know, and seek to know, may themselves be quite stringent. As discussed earlier, other kinds of excusatory grounds such as complete or partial lack of basic responsibility, the modulating potential of group excuses for concerns associated with group blame and punishment, and valuable symbolism, may also warrant the recognition of at least some state excuses. None of these excusatory grounds are virtue-driven and, like for epistemic mistake and constitutional disorder, they have nothing to do with the permissibility of state partiality. Therefore, the possibility of legitimate excusatory concessions to the state is plainly not as unthinkable as many seem to believe.

IV. Conclusion

In this chapter, I have sought to highlight central theoretical puzzles related to the question of whether state claims of excuses may ever be intelligible and, if so, legitimately recognized. The arc of my argument has been that even if the range of excuses available to the state does not overlap neatly with excuses available to ordinary individuals, excuses may indeed be morally available to states. For some, my argument may raise the spectre of murderous, torturing, or otherwise wicked states being offered unconscionable paths to absolution. I disagree. What my argument does, or at least attempts to do, is to expose the challenge of state excuses for what it is, so that it must be addressed in all its complexity and not simply wished away. Of course, much work remains to be done to determine the appropriate grounds, precise internal structure, and apposite standards of virtue, skill, and knowledge for specific state excuses, in specific contexts. A more refined understanding of the state, its functions, and its susceptibility to holdings of moral and legal responsibility, blame, and punishment would likely assist with this multifaceted task. So might closer scrutiny of the concepts of blame and punishment—individual and collective—and their relationship with excuses, as well as of my generic categorization as ‘excuses’ of exculpatory pleas that may in fact be saliently different. Finally, it remains an open question whether all excuses morally
available to states should be recognized by the law or whether, in some cases, additional concerns stand in the way.

My aim here was merely to map out issues that appear salient to me. For all I know, when all is said and done, the realm of legitimate state excuses may turn out to be very limited indeed. Still, I hope to have said enough to convince you that, in respect of many facets of this debate—as well as of the broader question of corporate excuses considered as a class—the jury is still out. The theoretical road ahead is rich and challenging, and I certainly hope that, in the near future, many more will be travelling it with me.