JUSTIFICATION AND EXCUSE IN THE PROGRAM OF THE CRIMINAL LAW

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Bishop Berkeley is reported to have said that those who engage in philosophical debate first kick up the dust and then complain that they cannot see.¹ There has been a good deal of this in discussions of justification and excuse. The particles of dust consist largely of language. Inferences from the meanings of words can aid or hinder the analysis of legal and moral problems, depending on the use that is made of them. But words alone can rarely solve such problems. There is a need to hose down some of the stray particles.

No doubt it is sometimes difficult to distinguish justifications from excuses in the law of crimes, but it is not as difficult as it may seem. Conceptually, justification and excuse serve quite different functions in the criminal law, as indeed they do in morality as well. Something is lost when the difficulty of distinguishing between the two is made more mysterious than it needs to be.

Some of the difficulties Professor Greenawalt identifies in his essay seem to me the result of what might be called "premature evaluation." Greenawalt begins with "warranted action as the central feature of justification" and "nonresponsibility as the central feature of excuse."² This characterization immediately puts the defenses of duress and necessity in the borderland between justification and excuse, because conduct resulting from duress or necessity can be characterized as "warranted," and at the same time those who engage in the conduct can be labeled "nonresponsible." Another phrase that bridges, even more broadly, the two exculpatory categories is the characterization of a defendant as having "no real choice." Defendants who act under duress, necessity, and insanity—all customarily denominated excuses—can be said to have "no real choice," and defendants who act in self-defense, in defense of others, or even in prevention of crimes—all customarily justifications—can also be said to have "no real choice." The source of the confusion, then, is the bridging language and not—or at least not yet—any necessary overlap between the two exculpatory categories.

Ordinary language fails us here, for the perhaps-curious reason that ordinary language is too rich. We are led to think that certain conduct partakes of both justification and excuse, because a chosen word or phrase

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1. I owe this aphorism to A. W. Coats, but its exact provenance remains obscure.

2. Greenawalt, *Distinguishing Justifications from Excuses*, LAW & CONTEMP. PROBS., Summer 1986, at 89, 91.

covers both. The problem is solved—or, more aptly, the confusion is created—by purely verbal means. A good way to begin the discussion of exculpation, therefore, is to ban words like *warranted*, since their usual function is to pronounce, and always to pronounce ambiguously, on the ultimate question of justification or excuse.³

A more fundamental methodological objection lurks in this criticism of the use of characterizing language. A situation is apprehended, and the defendant's conduct in that situation is then characterized. The ultimate purposes of various exculpations in the criminal law appear only as shadows in the evaluation of the transaction. Characterization of a situation, abstracted from the principles of responsibility and nonresponsibility, opens the way to playing with words like *warranted* and to the prejudgments that such words entail.

I propose to start the analysis back further, beginning with the purposes of exculpation, because it is on that basis that we should allocate conduct to the categories of justification and excuse. Purpose is criterial in this respect; characterizations of conduct without regard to purpose are not. My method is to use paradigm instances of justification and excuse to work back to purposes. With the aid of historical materials, it is not a particularly difficult task.

I

THE GOALS OF EXCULPATION

As Professor Greenawalt says, the criminal law ought to track more general moral notions; it "reflects and reinforces moral judgment."⁴ But it does not do this merely as a matter of retrospective evaluation of conduct. Evaluation is part of getting a job done. That job is to foster morality and, in the case of the criminal law, to foster noncriminal behavior and to discourage criminal behavior. The enterprise is prospective; it involves shaping conduct before the fact at least as much as it entails judging it after the fact.⁵

Both justification and excuse change crimes into noncrimes, but for fundamentally different reasons.⁶ Both form basic components in the overall program of the criminal law, and in a sense both are designed to send messages to prospective criminals—but not the same messages.

3. The same applies to the characterization of the defendant as "having no other choice." Robinson's description of excuse as requiring a "disability" is superior insofar as it is less ambiguous. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 221 (1982). But "disability" does not capture the situation of the defendant with a duress or necessity defense quite as well as it does that of a defendant with an insanity defense.

4. Greenawalt, *supra* note 2, at 90.

5. See H. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

6. The reach of exculpation by reason of excuse is sometimes less complete than the reach of justification. A defendant found not guilty by reason of insanity may be committed to a mental institution on the basis of the determination at the criminal trial. See *Jones v. United States*, 463 U.S. 354 (1983).

Acts that are deemed to be justified typically arise out of conduct that prevents or redresses harm, particularly harm involving illegality. Justification has a self-protection or law-enforcement component. Force that is applied in self-defense, in defense of others, in defense of property, in prevention of crime, or in apprehension of suspected criminals is often privileged because it is justified. Justification serves to preclude the prevention of evil from itself being called evil. The defense of justification is therefore an essential element in the program of the criminal law to discourage crime, as well as to recognize and approve human impulses to respond forcefully to wrongs.⁷

Excuse serves a completely different purpose. The usual excuses—insanity, duress (if we accept the traditional view of duress as an excuse), disease (epileptic seizures, for example), involuntary action, and occasionally intoxication—all relate to incapacity, disability, or infirmity, or an absence of conscious will to do evil. They go, in short, to the mental element in criminal liability.

The recognition of excuse serves to heighten the condemnation of all those who are not excused, for exculpation by excuse shows that the law will discriminate sharply between those who have and those who have not displayed criminal intentions. Without excuses, as H.L.A. Hart has explained,⁸ random behavior might fall within the reach of the criminal law. A criminal law without excuses would be a profoundly different criminal law from the one we have. It would put the accent on judging harmful consequences; it would be far more arbitrary in its treatment of defendants; and it might run afoul of a basic requirement of criminal law—namely, that it constitute a guide to conduct. Law of this kind would have some features in common with secret or unpublished law.⁹ Provisions for strict liability in the criminal law raise problems very much like those that would be encountered if the law were to abolish excuses. Criminal liability without fault constitutes an “open and official admission that crime can be respectable and criminality a matter of ill chance, rather than blameworthy choice.”¹⁰ The abolition of excuses would constitute a similar admission. Exculpation by excuse belongs to that part of the criminal law that removes from punishment defendants who have intended no wrong.

We write the exception for excuses into the criminal law, in other words, not only to make the law fairer, but to make it a more powerful instrument, one that holds unexcused defendants accountable. Without free will, without strong conceptions of individual responsibility and equally strong exemptions for those who are incapable of responsibility, the criminal law can hardly serve

7. For a broader and more indeterminate view of justification, see Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1096 (1985).

8. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 47-48 (1968); see H.L.A. HART, THE CONCEPT OF LAW 174-75 (1961).

9. Cf. MODEL PENAL CODE § 2.04(3)(a) (1962); L. FULLER, THE MORALITY OF LAW 49-51 (rev. ed. 1969).

10. H. Hart, *supra* note 5, at 423.

as a guide to conduct. The defenses of insanity and duress—whatever their proper limits—are essential to the goals of the criminal law. How, after all, could we maintain a requirement of *mens rea* and not recognize such defenses?

The structure of exculpation, then, has deep roots in a common substratum: the desire to make criminal prohibitions comprehensible and effective. Justification defenses tell wrongdoers that others may freely resort to some of their very methods to prevent the consummation of their wrongs. Excuse defenses assure all those subject to the law that they can gauge their conduct to conform to it. Since punishment will not be indiscriminate, it pays to observe the law.

From that point forward, the two forms of exculpation have little in common. Excuse and justification have rather different histories that reflect their different functions.

II

THE ROOTS OF JUSTIFICATION AND EXCUSE

The concept of justification emerged early in English law. Although at least some justifications and some excuses received more or less common treatment, exculpatory excuses generally emerged later. The killing of felons resisting arrest was absolutely privileged as early as the twelfth or thirteenth century. The same result was achieved by statute in 1293 for the killing of trespassers by parkers and foresters.¹¹ Homicide in self-defense or by accident tended to be treated differently. The jury rendered a special verdict that did not exonerate the defendant but did entitle him to seek a pardon from the Crown. This practice was codified by the Statute of Gloucester in 1278.¹² The pardon was frequently accompanied by forfeiture of the defendant's goods. Eventually, pardons became so routine in accidental death and self-defense cases that the chancellor issued them as a matter of course. Self-defense emerged as a full-fledged justification only gradually over succeeding centuries, and it was confirmed as such by a statute (enacted in 1532) that exempted the defendant from forfeiture of his goods in such cases.¹³ Eventually, juries were permitted to render an explicit verdict of "not guilty."¹⁴ Self-defense thus joined the killing of fleeing felons and trespassers as justified homicide.

This history is by no means as free of confusion as I have presented it,¹⁵ but its thrust is nevertheless unmistakable. Early on, justifications gave rise to acquittals, whereas excuses were initially just that: pleas for discretionary remission of punishment. At a later point, the remission became more or less a matter of right rather than of royal grace. There was also some movement of particular defenses from one category of exculpation to the other,

11. 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 477-78 (1923).

12. *Id.* at 481; 3 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 36-37 (1883).

13. 3 J. STEPHEN, *supra* note 12, at 39-40.

14. 2 F. POLLOCK & F. MAITLAND, *supra* note 11, at 481 n.3.

15. For some of the complexities omitted here, see 3 J. STEPHEN, *supra* note 12, at 41-42.

confirming the longstanding character of the difficulty of assigning defenses to excuse or justification.

Excuse in its present form is a distinctly modern form of exculpation. The slow pace of its evolution over the centuries into the exculpatory category reflects the early and persistent tendency of the English criminal law to focus heavily on harm done as the basis for punishment.¹⁶ Excuse was not a recognized defense for the good reason that the element of culpability was not essential to guilt.

The matter goes beyond this. The correlative of punishment for harm done was the absence of punishment for harm that was contemplated but not yet accomplished. The so-called inchoate crimes—the “mental crimes” (or at least pre-harm crimes) of attempt, solicitation, and conspiracy to commit a crime—developed only slowly. In the early law, these were plainly not crimes.¹⁷ As late as the eighteenth century, solicitation to commit a crime was not itself a crime unless the crime solicited actually ensued.¹⁸ Eventually, attempts¹⁹ and conspiracies²⁰ were held generally to be punishable so long as they entailed overt acts, and solicitations were considered in themselves to constitute overt acts sufficient to take them out of the category of punishment for “mere intention.”²¹ For that was the sticking point: reluctance to punish anything that could be described as guilty mind alone. When Lord Mansfield declared in 1784 that “[s]o long as an act rests in bare intention, it is not punishable by our laws,”²² he was restating the conventional understanding; but he went on to add the modern but then still not firmly established view that evil intentions can color otherwise innocent acts and make them criminal:

[I]mmediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.²³

Even today, of course, attempts are typically punished less severely than are the consummated crimes to which they refer,²⁴ and the impossibility of consummating an attempt is often a complete defense to a prosecution for attempt.²⁵ Punishment in large measure regardless of culpability and no

16. For a fine survey of the intellectual history of this subject, see Binavince, *The Ethical Foundation of Criminal Liability*, 33 *FORDHAM L. REV.* 1 (1964).

17. On attempt, see 2 F. POLLOCK & F. MAITLAND, *supra* note 11, at 475.

18. *Regina v. Daniell*, 87 Eng. Rep. 856 (1704); *Regina v. Collingwood*, 87 Eng. Rep. 1029 (1704). These cases were finally disapproved in *Rex v. Higgins*, 102 Eng. Rep. 269 (1801).

19. *Rex v. Scofield*, 1 Caldecott's Magistrates Cases (pt. III) 397 (1784).

20. See *Rex v. Kinnersley and Moore*, 93 Eng. Rep. 467 (1731).

21. *Rex v. Higgins*, 102 Eng. Rep. 269, 275 (1801) (Lawrence, J.).

22. *Rex v. Scofield*, 1 Caldecott's Magistrates Cases (pt. III) 397, 403 (1784).

23. *Id.*

24. See, e.g., ALA. CODE § 13A-4-2 (1982); CAL. PENAL CODE § 664 (West 1970). For a concise summary, see W. LA FAVE & A. SCOTT, JR., *CRIMINAL LAW* 452-53 (1972).

25. See Smith, *Two Problems in Criminal Attempts*, 70 *HARV. L. REV.* 422 (1957); Smith, *Two Problems in Criminal Attempts Re-Examined* (pts. I & II), 1962 *CRIM. L. REV.* 135, 212.

punishment even in the face of culpability are both aspects of the early tendency toward consequentialist thinking in the criminal law.²⁶

Over the course of several centuries, intention slowly became more and more important in defining crime, and harm alone became less important. Between the sixteenth and nineteenth centuries, children were increasingly excused from criminal liability,²⁷ and insanity entered as a defense.²⁸ Later, duress was introduced as a defense.²⁹ With the advent of modern conceptions of volition and mastery of nature, reinforced by both Christian and Roman-law emphasis on the mental element in wrongdoing,³⁰ criminal responsibility increasingly came to flow from culpability.³¹

The extirpation of consequentialist thinking from the criminal law was and continues to be a long and slow business. The issue had much to do with matters of proof, for it was thought that the source of a palpable injury was readily identifiable, whereas the intentions of defendants were more elusive. The commonsense notion was that it is more difficult to know what is in someone's mind than it is to know what he has done: harm is objective and therefore provable; mind is subjective and therefore debatable. "The thought of man shall not be tried, for the devil himself knoweth not the thought of man."³² Quoting this aphorism, Pollock and Maitland remark that it "might well be the motto for the early history of criminal law. It cannot go behind the visible fact. Harm is harm and should be paid for. On the other hand, where there is no harm done, no crime is committed. . . ."³³

Neither side of the evidentiary underpinnings of punishment for harm alone has held up very well. There has been a growing sense of the complexity of causation.³⁴ Palpable, objective facts no longer have the

26. I use the term *consequentialist* not, as commonly used in discussions of Utilitarianism, to denote judgment designed to avert undesirable consequences and foster desirable consequences, but rather to denote retrospective judgments of an act based on the harm that ensued.

27. Even in Saxon law, small children were excused from punishment in some circumstances. 1 HALE'S PLEAS OF THE CROWN 24-27 (1st Amer. ed. 1847). Stephen suggests that the reach of the principle of exempting children was uncertain at the end of the fifteenth century. 2 J. STEPHEN, *supra* note 12, at 98 n.1. As late as 1830, the case of a child of 10, charged with the felony of stealing coal, was sent to the jury, over an objection based on lack of capacity. *Rex v. Owen*, 4 Carrington & Payne Rep. 236 (1830). (The jury reached a verdict of not guilty, the foreman stating: "We do not think that the prisoner had any guilty knowledge.")

28. By about 1500, juries apparently began to acquit on grounds of insanity; the defense succeeded quite frequently by the eighteenth century. Walker, *The Insanity Defense Before 1800*, 477 ANNALS 25, 29-30 (1985).

29. Duress had its roots in the early refusal of courts to punish wives for most crimes committed on the orders of their husbands. 1 W. HAWKINS, PLEAS OF THE CROWN 2 (1st ed. 1716). But the defense did not develop beyond that for a considerable period. The defense of coercion was rejected in the famous Trial of Alexander MacGrowther, 18 State Tr. 391 (1746), but was apparently well recognized by 1831. See *Rex v. Crutchley*, 172 Eng. Rep. 909 (1831). But see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 437-39 (2d ed. 1960).

30. 2 F. POLLOCK & F. MAITLAND, *supra* note 11, at 476-77.

31. On the connections between free will and the criminal sanction, see J. HALL, *supra* note 29, at 415.

32. 2 F. POLLOCK & F. MAITLAND, *supra* note 11, at 474 (quoting Brian, C.J. in Y.B. 7 Edw. 4.f.2.).

33. *Id.* at 475.

34. See, e.g., H.L.A. HART & A. HONORÉ, CAUSATION IN THE LAW (1959); Dray, *Causation and Responsibility in Attributive and Explanatory Contexts*, LAW & CONTEMP. PROBS. Summer 1986, at 13.

compelling force they once did; they are likely to be pierced by alternative versions of both the purported facts and what brought them about. The modern world is suffused with more and less systematic and elaborate conceptions of how perceptions shape facts, and not the other way round. By the same token, the law has come to be filled with requirements for proof of a wide variety of mental states. And if the task of proving mental elements remains daunting, whole disciplines have come into being for just such purposes, even if we are from time to time disappointed with the performance of those disciplines. We no longer take mind to be the subjective, unverifiable terrain that it formerly was, just as we no longer take harm and its cause to be objective and indisputable. Neither has a special claim on elusiveness: both are elusive.

These changes in thinking made changes in the law possible, for with these changes came the realization that to hold people responsible for "causing harm" was not always easier than holding them responsible for "intending to cause harm." And so we have moved closer to, although we have not approximated, Juvenal's maxim that "Intended mischief stayed in time/ Has all the moral guilt of finished crime."

From the standpoint of exculpation, the point of all of this is really quite clear. The more one wishes to punish culpability rather than merely harm, the more one will wish to be sure to recognize excuses, in order to discriminate sharply between those culpable and those not culpable. The recognition of excuse as exculpatory forms an integral part of the long-term, glacial trend toward eliminating punishment for harm alone, a trend whose culmination is not yet in sight. And so excuse is related to a much larger complex of issues in the criminal law. The modernity of excuse defenses is underscored by noting this relationship.

Justification has nothing to do with these issues of harm versus culpability. The archetypical justifications, to the extent that they depend on the existence of an antecedent crime to which the defendant is in turn responding, are not concerned with the element of culpability in that antecedent crime. One can be justified in using force to apprehend a criminal or to prevent a crime or to defend oneself, regardless of whether the crime being resisted is one defined by harm alone, or by culpability alone, or by some combination of the two. Justification arises simply because of the need to prevent and redress harm. The justification of self-defense may therefore be rejected because the apprehended harm is not yet imminent.³⁵ And, on the other side, even misperceptions of an apparently imminent harm may give rise to justified action—but only if the misperceptions are deemed reasonable.³⁶ There is no room in justification for the pathological misperception. The short of the matter is that justification is very much at home—as excuse is not—in the old

35. *State v. Freeman*, 427 So.2d 1161 (La. 1983); *State v. Schroeder*, 103 Kan. 770, 176 P. 659 (1918).

36. For a concise discussion, see W. LA FAVE & A. SCOTT, JR., *supra* note 24, at 393-94. *Cf. Baker v. Commonwealth*, 677 S.W.2d 876, 878 (Ky. 1984).

regime of the criminal law, which took as its mission the punishment of harm done.

The function of justification, then, is to aid in preserving social order, and not to advance increasingly discriminating conceptions of free and unfree wills or the psychologically informed doctrines that excuse defenses require. Conceptions of justification change as our understanding of the social order changes, whereas conceptions of excuse change as our understanding of illness, incapacity, and the psychological order changes. Justification and excuse thus differ in their origin, function, and relation to extralegal bodies of knowledge. These differences have also resulted in different lines of development for the two categories of exculpation in the modern period.

III

CHANGING EMPHASES IN EXCULPATION

For nearly a century, legal exculpation due to excuse—especially insanity and, to a lesser extent, duress—has been growing, along with the refinement of concepts of culpability. These developments go hand in hand with the increasing influence of science, especially psychology, in legal decision making.

The most obvious and well known example is the insanity defense, which has been in a state of slow expansion from the standards of the *M'Naghten* rule.³⁷ In the late nineteenth century, American courts began to require acquittal of defendants who actually knew they were doing wrong, if their mental disease prevented them from controlling their actions.³⁸ Subsequent decisions went a good bit further, excusing the defendant if his conduct was "the product of disease or defect."³⁹ Thereafter, the Model Penal Code (M.P.C.) required the acquittal of a defendant who, "as a result of mental disease or defect 'lacked' substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."⁴⁰ By 1982, half the states had adopted some version of the M.P.C. standard. In recent years, there have been powerful and partially successful attempts to roll back the insanity defense,⁴¹ but there can be no doubt of the overall expansive thrust of developments in this century.

Much the same trend can be identified in cases of duress. Indeed, the two are closely connected. In one of the early state cases expanding the insanity defense, the Supreme Court of Alabama spoke of "the duress of such disease" as destroying "the power to choose between right and wrong,"⁴² so close is

37. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

38. *Davis v. United States*, 165 U.S. 373 (1897); *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1886).

39. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *overruled*, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

40. MODEL PENAL CODE § 4.01 (1962).

41. See, e.g., Comprehensive Crime Control Act of 1984 § 402(a), 18 U.S.C.A. § 20(a) (West Supp. 1985); *United States v. Lyons*, 731 F.2d 243 (5th Cir.) (en banc), *cert. denied*, 469 U.S. 930 (1984).

42. *Parsons v. State*, 81 Ala. 577, 585, 2 So. 854, 859 (1886).

the link between the two defenses. The conventional view is that both involve loss of independent mental capacity.⁴³

The early duress cases, like the early insanity cases, recite requirements later abandoned as inconsistent with what was regarded as a proper scientific view of the matter. What is different is that the changes have been fewer, less dramatic, and less widely adopted. In large measure, one suspects, this is because mental health professionals have had a less influential role in shaping the duress defense. Commonsense interpretations of events and circumstances preceding the alleged crime have had a larger part to play. Still, the strictness of the old rules has been and is being eroded. To be excused by reason of duress, the fear apprehended by the defendant had to be "well grounded," had to be imminent, had to extend to death or at least grievous bodily harm, and had to relate to the defendant's person.⁴⁴ The Model Penal Code and more recent cases have modified several of these requirements. The M.P.C. replaces the imminent and grievous harm requirements with a flexible standard that permits acquittal if a "person of reasonable firmness,"⁴⁵ situated as the defendant was, could not have resisted the threat. Likewise, in some states, the defense may be invoked even if the threat giving rise to duress extends to family members, rather than to the defendant,⁴⁶ and even if the threat does not extend to imminent bodily harm.⁴⁷

Clearly, duress is a form of circumstantial or contextual incapacity; that is, duress is induced by a specific, ephemeral, and contemporaneous external stimulus, in contrast to insanity, the source of which is likely to be both more diffuse and more historical. Because the presence of external stimuli permits easier verification by finders of fact in duress cases than is possible in insanity cases, duress has been a more easily bounded defense. On the other hand, a great many psychological disabilities are only partial and may be triggered by changing context. The physiological concomitants of a variety of emotional states in the same person are just now beginning to be exposed, so that duress-type defenses, based on incapacities induced by changing external circumstances—or, perhaps more accurately, hybrids of duress and insanity defenses—may have more room for expansion over the long term than does the traditional, more or less steady-state insanity defense. As this line of prophecy suggests, however, duress is plainly in the same category of mental incapacity as is insanity.

The slow expansion of excuse over the past half century or more is well known. I pretend to no originality in presenting these trends. What I think is new is the significance of contrasting trends in excuse with trends in justification. The result of such a contrast is the conclusion that trends for the

43. See W. LA FAVE & A. SCOTT, JR., *supra* note 24, at 375.

44. See, e.g., *State v. Nargashian*, 26 R.I. 299, 58 A. 953 (1904). See generally J. MILLER, *CRIMINAL LAW* 164-67 (1934).

45. MODEL PENAL CODE § 2.09 (1962).

46. See W. LA FAVE & A. SCOTT, JR., *supra* note 24, at 376 n.14.

47. *State v. Toscano*, 74 N.J. 421, 378 A.2d 755 (1977).

two are quite different, and this can only be because they are founded on different premises.

When an act is excused, we say that it was not really committed by the defendant, in the sense that it was not freely performed by him. Psychoanalytic thinking has convinced us that some people are not responsible, are not really willing actors, even though they may appear to be. To choose a free-will approach to criminal responsibility is to be required, willy-nilly, to recognize the possibility of unfree will. Justification, on the other hand, rests not on psychology but on authority or status, the authority of a police officer or the status of a person being victimized by a criminal or being unlawfully arrested. As excuse has been growing, justification has, if anything, been shrinking. Just as psychoanalysis has undermined our faith in notions of universal free will, thereby broadening the incidence of excused conduct, so, too, has the growing intolerance of unequal statuses all through the law affected the breadth of justification we are willing to accept. Excuse as a product of psychology thus goes in one direction, toward individuation. Justification, as a product of social theory, goes in a different direction, toward leveling or uniformity.

We are particularly unwilling these days to accord very great latitude to police officers to shoot fleeing suspects with impunity. The traditional view was that a police officer was entitled to use deadly force to prevent the escape of a felon or to overcome his resistance.⁴⁸ This privilege is now much modified. In most jurisdictions, the officer will have to show a reasonable belief that the use of deadly force was truly necessary to effect an arrest.⁴⁹ Even this formulation does not capture the strict scrutiny now applied to the officer's conduct. Contemporary decisions typically contain language to the effect that, even when arresting a felon, "the law does not clothe an officer with authority to arbitrarily judge the necessity of killing, and such a course must be the last resort."⁵⁰ The Supreme Court has recently held unconstitutional a state statute that authorized the police to shoot an unarmed fleeing felon.⁵¹

Similar limitations apply to the use of force to defend persons and property. In general, life-threatening force may be met with life-taking force.⁵² This rule is unchanged, but there is probably closer scrutiny of the need for self-defense killing in individual cases now than there was formerly.⁵³ More substantial changes are visible in the use of force to defend the home. Deadly force, long sanctioned to protect what was regarded as a vital interest of the person, has been limited by the Model Penal Code⁵⁴ and by statutes

48. J. MAY, *LAW OF CRIMES* 44-45 (J. H. Beale 2d ed. 1893).

49. See generally W. LA FAVE & A. SCOTT, JR., *supra* note 24, at 402-06.

50. *State v. Boles*, 598 S.W.2d 821, 823 (Tenn. Crim. App. 1980).

51. *Tennessee v. Garner*, 471 U.S. 1 (1985).

52. See 2 P. ROBINSON, *CRIMINAL LAW DEFENSES* 82-83 (1984).

53. For an example, see *Crawford v. State*, 231 Md. 354, 190 A.2d 538 (1963). Cf. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871 (1976).

54. MODEL PENAL CODE § 3.06 (1962).

and decisions permitting killing only when the intrusion is for the purpose of committing a felony with a potential for violence.⁵⁵ Just as the status of police officers no longer protects to the extent it once did, there is also reluctance to place even criminals beyond the pale of protected persons. That, too, is a form of uncounatenanced status distinction.

As excuse is supported by the state of psychology, so justification is thus underpinned by our conventional sociology. To put the point more sharply, justification has contracted most where it impinges most on our relatively newfound intolerance for unequal status and authority, and excuse has expanded most where it has been touched most closely, in this Freudian century, by psychoanalysis. Hence the most prominent changes in justification are those which relate to police privileges to shoot fleeing suspects. By the same token, with respect to excuse, the insanity defense, dependent on state of mind irrespective of contemporaneous external stimuli, has thus far been expanded more than other excuses. Common to both developments are changing conceptions of criminal responsibility linked to much broader intellectual currents. That the currents are different in each case—with expansion on one front and contraction on the other—is further evidence that the two forms of exculpation derive from different sources.⁵⁶

There is, of course, another reason for the long-term expansion of excuse compared to justification. To recognize a justification defense is effectively to change the law and, at least in some cases, to weaken the prohibitions of the criminal law. For if a person in a given situation is justified in doing an act that would otherwise be denominated criminal, then all others similarly situated are likewise privileged to do the same act.⁵⁷ Hence there is real

55. See 2 P. ROBINSON, *supra* note 52, at 84; W. LA FAVE & A. SCOTT, JR., *supra* note 24, at 400-01.

56. To be sure, there has been some loosening of the requirements of imminent threat in battered spouse cases. In a recent case, the Supreme Court of New Jersey reversed the murder conviction of a wife who had stabbed her husband as he came running toward her sometime after an altercation she had provoked. *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984). The trial judge had excluded battered-spouse expert testimony supporting defendant's belief that she felt in danger of death or serious injury. The appellate court held the testimony to be relevant to the question of whether the defendant, from her experience as a battered spouse, could predict when a new and serious attack on her was imminent. For similar issues regarding a battered child, see *Jahnke v. State*, 682 P.2d 991 (Wyo. 1984).

Two things, however, are notable about such decisions. The first is that the evidentiary change, which goes only to the admissibility of expert evidence, is readily accommodated within existing doctrine, which remains unchanged. The second and more pertinent point for present purposes is that the change takes place in an area of justification that happens to be sensitive to changing psychological conceptions. In this case, they relate to the impact of repeated beatings on the reasonableness of the apprehensions of the victim of those past beatings. This, of course, only reinforces what I said earlier about the sensitivity of the criminal law to changes in psychology. The fact that this particular change has an impact in justification rather than excuse does not undercut the more general proposition that justification defenses are mainly the product of our conventional sociology. Psychology enters only insofar as beliefs about imminent harm might turn out to be wrong. Whether the beliefs were nonetheless reasonable, as the defendant must have formed them, is an issue on which an inquiry into the mind of someone situated as the defendant was becomes pertinent. But, in the global view of justification *vis-à-vis* excuse, this is a subsidiary issue.

57. Even here, however, there is a problem, because justification (as in self-defense, for example) will turn on the reasonableness of the defendant's apprehensions of threat, and this in turn may be related to the defendant's individual circumstances. Hence the law may end up

reluctance to expand the doctrine.⁵⁸ In principle, the same is true of excuse. A person similarly situated to the insane defendant would have the same defense of insanity. Still, insanity remains, by virtue of its subjective mental quality, an idiosyncratic defense, one that has to be proved anew by reference to the internal state of each defendant. And it is well known that relatively few such defenses succeed. The expansion of the doctrine provides no indication of how many people will be situated in a position to invoke the doctrine. The mental quality of excuse defenses prevents their recognition in individual cases from effectively changing the law, whereas the objective, general, and principled quality of justification defenses means that their recognition in individual cases really does change the law.

To be sure, there are qualifications on both sides of this proposition. The standard for duress, for example, is not wholly subjective. Under the Model Penal Code standard,⁵⁹ the defendant must resist those threats "which a person of reasonable firmness in his situation" would be able to resist. Plainly, this is an amalgam of objective and subjective elements. On the other side, self-defense requires an imminent and reasonably apprehended threat, but the idiosyncratic position of the defendant is nevertheless not wholly irrelevant to determining reasonableness.⁶⁰ Still, the general point remains: the overall thrust of justification defenses is objective and general, whereas excuse defenses are, on the whole, *ad hoc* and individual. This contrast is attributable to the fundamentally different functions and characteristics of the two types of exculpation.

IV

THE CONTINUING NEED TO LABEL CORRECTLY

It goes practically without saying that if I am right about the quite different sources of justification and excuse in the program of the criminal law, the need to label defenses appropriately derives at bottom from the desirability of pursuing that program in the most efficient manner. It is important to keep straight what is excused and what is justified, so that the legal boundaries of each form of exculpation will conform as closely as possible to what is required to effectuate the goals of each: discouraging crime by legitimating forcible responses to crime and encouraging responsibility for the avoidance of criminal behavior by exempting those incapable of avoiding it.

In this respect, exculpation is no different from any other branch of law. Cases arise on their facts. Apparent similarities in facts, similarities typically deriving from the everyday transactions from which facts spring, create

countenancing idiosyncratic misapprehensions, even in justification. See *infra* text accompanying note 60.

58. To the extent that there is an objective element in the duress defense, there is a similar reluctance. A good example is provided by the prison escape case, *United States v. Bailey*, 444 U.S. 394 (1980).

59. MODEL PENAL CODE § 2.09(1) (1962).

60. See *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977) (en banc).

impulses in decision-makers to treat the apparently similar cases similarly, unless it is brought home at an early point that the apparently similar facts actually implicate different purposes of the law. When this happens, the intuitive grasp of the facts will be jarred by the intellectual understanding of the rules. It is in this sense that law is a counterintuitive discipline, a discipline that requires sophisticated training and that is often at odds with what passes for commonsense evaluation.⁶¹

There are further reasons to distinguish sharply between excuse defenses and justification defenses. Some of these have been articulated so often as merely to require mention, and others have been so rarely articulated as to be visible only in outline form.

It has frequently been noted⁶² that if an act is justified, a third party may assist the actor in accomplishing it. If an act is excused, a third party will generally not be privileged to assist. These different consequences are not ineluctable. I shall note later an instance of an excused act in which a third party might be privileged to assist. In general, however, the different consequences follow from the differing purposes of the two defenses identified earlier. The prevention of harm underlying justification usually supports the efforts of third parties to assist, although the scope of their privilege to assist will not necessarily be the same as that of the primary actor.⁶³ To the extent that justification depends on the reasonableness of the primary actor's apprehension of harm, the reasonableness of the assisting actor's apprehension may vary; his vantage point may be different. Similarly, to the extent that the inability to reach the requisite threshold of intention is idiosyncratic to the primary actor claiming excuse, few if any assisting actors will be able to make derivative claims to the same excuse. The privileges of third parties to assist a defendant claiming exculpation will, then, generally vary with the way in which the defense is labeled.

This much, as I say, is conventional,⁶⁴ and there is hardly a need to rehearse it in any detail here. There is something beyond this, however, that is less often present in legal discussions of exculpation, except obliquely, although it has potential legal as well as moral implications. That something is the status of the victim of an alleged crime that is found to be either excused or justified.

There has been something of a debate in the legal literature over whether justifiable action is appropriately denominated as good or merely permissible and not necessarily good.⁶⁵ Killing in self-defense, it has recently been argued,⁶⁶ is not good, for we do not see the death of an attacker as necessarily

61. It is precisely this aspect of law that led me to object to the method of categorizing a defense by apprehending a situation and then characterizing it. See *supra* p.110.

62. Most recently by Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 77 (1984).

63. See *id.* at 95-98. See also *Fersner v. United States*, 482 A.2d 387, 391 (D.C. 1984).

64. See, e.g., G. FLETCHER, *RETHINKING CRIMINAL LAW* 759-62 (1978).

65. Again, the latest entry is Dressler, *supra* note 62, at 83-86.

66. *Id.* at 83-84.

a good thing, but merely as a tolerable outcome in view of the alternative outcome: death of the innocent person attacked. On this issue, as on others, it will be noted, the use of the term *warranted action* to indicate justification is ambiguous; it provides no guidance about whether the outcome was desirable or merely permissible.⁶⁷

The distinction makes a difference. Suppose for the sake of argument that we denominate the results of all justified actions as good and the results of all excused actions as bad but not blameworthy. It would probably follow that we should feel sympathy for the victims of excused actions but not for the victims of justified actions. If, on the other hand, justified actions are sometimes good and sometimes merely permissible, the duty to extend sympathy may turn on that subsidiary distinction. Turning the matter around to focus on the exculpated defendant, perhaps an excused defendant, who is not responsible for what he did, has a moral claim for forgiveness from the victim. At least this would arguably be true for the defendant exculpated by duress, provided the duress were ephemeral and did not impair capacity for choice indefinitely. The defendant who is excused by reason of permanent insanity, on the other hand, might be so incapacitated as to be incapable of requesting or receiving forgiveness. A justified defendant, who took at least permissible action and perhaps action we wish to label good, would seem to have no need for forgiveness.⁶⁸

Some of these are issues that reside not only in the field of morality but in law as well. As the legal system becomes increasingly concerned with compensating the victims of crime, it will have to deal with the claims of victims of excused and justified action, and it may well end up making distinctions between them. Powerful arguments can be made for compensating the victims of excused actions. The arguments in behalf of victims of justified actions are much less powerful.⁶⁹

Beyond this, the victim of justified action has no right to resist it, whereas the victim of excused action generally does have such a right. Not only does it therefore make an important difference whether we denominate conduct as justified or excused, but, reciprocally, this difference may help us to label the appropriate species of exculpation more accurately. Take the celebrated case of *Regina v. Dudley and Stephens*,⁷⁰ in which two members of the shipwrecked crew of a sloop killed and consumed the flesh of another crew member in order to keep themselves alive. For a long time, the defense of necessity in this case was analyzed in terms of justification, and, not surprisingly, the justification was found to be inadequate. A better analysis of necessity is cast

67. *But see* Greenawalt, *supra* note 2, at 91: "Insofar as others are responsible and have the power of choice, they would do well to replicate a justified action but to avoid an act like that excused."

68. See the useful discussion by Martin Golding, *Forgiveness and Regret*, 16 *PHILOSOPHICAL FORUM* 121, 131 (1984-85).

69. This point would not apply, of course, to victims against whom action had been taken on the basis of a misperception of threat.

70. 14 Q.B.D. 273 (1884).

in terms of excuse.⁷¹ Besides focusing attention, as it ought to be focused in such cases, on the defendant's capacity for choice (as well as on the innocence of the victim in precipitating the defendant's act⁷²), analysis in terms of excuse makes clear that the victim would have been privileged to ward off the defendant's attack, even if the attack were ultimately to be excused. Proper categorization can be made more reliable by examining the privileges we would be willing to accord to the victim in resisting the defendant's conduct.

The ability of the legal system to make all such distinctions will depend in part on our ability to think clearly about the conceptual differences between excuse and justification in the first instance. Indeed, in the next section, I shall suggest that the prior conduct of the victim has much to do with the denomination of the form of exculpation that is appropriate.

V

HARD CASES AND METHODS OF ANALYSIS

Perhaps a good test of the analysis thus far is to see how well it handles some of the cases Professor Greenawalt finds difficult to categorize. Three in particular are worthy of examination, because in unraveling them we can gain some further insight into the source of the problems they present. These three are the cases of the defendant who is told that, unless he steals a bicycle, three bystanders will be killed,⁷³ the defendant who drives a getaway car for murderers who will otherwise kill him,⁷⁴ and the mountain climber who, in a snowstorm, must break into a cabin to save his life.⁷⁵

If a threat emanates from a person who demands that the defendant take what would ordinarily be unlawful action against another and, because of the nature of the threat, the defendant has no effective free will, the resulting crime is excused. This principle excuses both the bicycle theft and the facilitation of the getaway. Why, then, does a justification argument appear plausible in these two cases? If, instead of focusing on the coercion applied to the defendant, we focus on the act performed and the consequence thereby averted, the bicycle theft and the driving of the getaway car appear to be trivial acts compared to the death threats to which they responded—so trivial, in fact, that we can easily call the acts justified (or “warranted”), as indeed, in common parlance, they are under the circumstances. But that characterization is not the same as applying the appropriate legal categorization to the defense invoked. The defense, it seems to me, arises out of the inability of the defendants to be capable of freely choosing to commit or avoid committing a crime.

71. For a very useful discussion, see von Hirsch, Book Review, CRIM. JUST. ETHICS, Summer/Fall 1985, at 88-94. Cf. MODEL PENAL CODE § 3.02.

72. See *infra* pp. 124-25.

73. Greenawalt, *supra* note 2, at 103-04.

74. *Id.* at 96.

75. *Id.* at 96. The example is probably drawn from the Model Penal Code commentary on necessity. See MODEL PENAL CODE § 3.02 Comment 3 (Tent. Draft No. 8, 1958).

The word *justified* rolls off our tongue so easily in these two cases for a special reason: the enormous disparity between the act performed by the defendant and the consequences threatened if he fails to act. There can be, of course, no moral equivalence between driving a getaway car or stealing a bike, on the one hand, and murder, on the other. Comparing the harms leads—or, rather, misleads—us into the realm of justification.

The contrast in harms misleads, in large part, because it induces observers to focus on the act alone rather than on the actors as well. Once we ask instead whether the act was freely willed by the actor and whether the recipient of the action was an innocent party, we quickly return to the realm of excuse rather than justification. Focusing on the act alone by comparing the harms is not an adequate method for resolving these questions of categorization. The entire transaction—the threat, the act, the actor, and the recipient of the action—requires scrutiny.

The evaluation of comparative harm in these two cases is, however, redolent of yet another defense that is typically formulated in such terms: the defense of necessity. That is the defense that would be invoked by the mountain climber who was forced by a snow-storm to break into a cabin. In a case of duress, it could be said that the defendant had no capacity for rational choice, because of the coercion exerted upon him. In the mountain climber's case, such a description might not characterize his assumed mental state accurately. His defense arises, not because he was incapable of making a rational choice of whether to violate the criminal law, but because he made the only rational choice. In both cases, however, we would be correct in concluding that free will was absent. Still, there is a difference in the instrumental rationality of the acts.

This difference ought to lead to yet another difference. In the duress case, a third-party volunteer, not himself operating under coercion, would not be privileged to assist the defendant commit the crime. In the mountain climber's case, however, a third-party volunteer, not himself operating under the pressure faced by the mountain climber, should be privileged to assist in breaking into the cabin. A pilot, for example, unable to land his plane for a rescue but able to drop equipment to facilitate the cabin break-in, ought not to be liable for aiding the mountain climber to commit what would otherwise be a crime.

Having said this, however, it seems to me that this remains a case of excuse rather than justification. Although the lawfulness of third-party assistance ordinarily signals justification, it is not criterial in that respect: all acts that third parties can assist in accomplishing are not necessarily justified.

What, then, determines the outcome of the cabin case? The capacity for free choice and the part played by the victim. Not merely is it accurate to say that the mental element in criminal intention was absent but that the cabin owner, like the bicycle owner, had no role in bringing about the action committed by the defendant. Both might be free to resist the act of the defendant. In the justification cases, the defendant is responding to action

taken by the person who then becomes the target of the defendant's action. In self-defense, for instance, the defendant attacks one who had threatened to attack him. Excuse, however, involves "harms to persons innocent of any wrong-doing, which were inflicted on them under extraordinary pressure."⁷⁶

This formulation aptly brackets both duress and necessity. It also implicitly reinforces the important methodological point that the way to answer these questions is not merely to compare harms but to scrutinize the whole transaction. Such scrutiny includes, in addition to comparing harms, inquiring into the ability of the perpetrator to form a criminal intention of his own volition and the role of the victim as a stimulus of the action for which the defendant seeks exculpation. The person on the receiving end of a justified act has no ground for complaint. The person on the receiving end of an excused act does have a legitimate ground for complaint. A defendant is justified because of the antecedent conduct of the person against whom he took action; a defendant is excused in spite of the absence of such antecedent conduct on the part of his victim. That is precisely why the term *excuse* is so appropriate in the one case and *justification* in the other.

One final word about necessity as a defense. Where necessity exculpates, that is not because we approve of the conduct it permits, but because we have come increasingly to believe that dire necessity may affect free choice.⁷⁷ Professor Jerome Hall noted some decades ago that, on these matters, "the relevant stock of ideas is a very limited one We think of human conduct as more or less controlled or as free; and we think of the controls in terms of influence by other persons or as the pressure of physical conditions."⁷⁸ Many of the problems raised by justification and excuse are indeed the product of our conceptual poverty, a poverty reinforced by the antiquity of the general framework in which the criminal law operates. Yet our conceptions about the capacity for free choice have been changing, as noted earlier, and these changes have had a strong, albeit slow, impact on the theory of exculpation. Ultimately, such changes may widen the domain of excuse yet again.

VI

ACTIONS AND TRANSACTIONS IN THE EVALUATION OF EXCULPATION

Rather than highlighting my differences with Professor Greenawalt's original and elaborate paper, I have attempted to advance an alternative approach to the problems of exculpation. In stating my own views, I have omitted the many important points on which I concur with his views—most notably, perhaps, his nicely framed section on "The Necessary Crudeness of Legal Categories."⁷⁹ The law has its limits as an instrument of moral evaluation, and Professor Greenawalt has identified many of those limits with perception and grace.

76. J. HALL, *supra* note 29, at 415-16.

77. See *United States v. Bailey*, 444 U.S. 394, 409 (1980).

78. J. HALL, *supra* note 29, at 419.

79. Greenawalt, *supra* note 2, at 106-07.

Perhaps it would be useful, if only for the sake of clarity, to summarize some of the points on which our approaches do differ. For I think what is at stake are not only the substantive questions of the extent to which justification and excuse defenses do or do not overlap, but some significant methodological issues in legal analysis as well.

The substantive matters are more easily stated. In my view, justification and excuse serve fundamentally different purposes. That fact is illustrated by their quite different histories. Justification defenses evolved earlier, largely in connection with privileges accorded to recognized authorities to take forcible action against law-breakers. Excuse defenses evolved later, in tandem with the slow growth of the idea of culpability as integral to the criminal law. As their functions are different, so are their links to bodies of knowledge outside the law. The divergent recent histories of justification and excuse are largely accounted for by their relationships to broader intellectual currents.

Excuse is very much the product of the modern mind, as justification is not. Justification is at home with authority, including the pre-modern feudal and royal authorities. Excuse, on the other hand, calls out for individuation and is indeed linked to the growth of individualism as well as to the later growth of psychology, that preeminently individualist science.

Methodologically, it seems to me a mistake to rely on language-based evaluations of conduct in judging whether a defendant is justified or excused. To ask whether we think his act was warranted is to jump past the question of why we wish to exculpate him or not. And that question is the more important. By the same token, it is not adequate to compare harms—the act committed by the defendant versus the threat with which he was confronted—for that comparison excludes the source of the threat and the recipient of the act. Justification evolved precisely to exonerate defendants acting against recipients who posed an unlawful threat. Excuse evolved to exculpate defendants generally acting against recipients who did not pose an unlawful threat. It can only enlighten the analysis, then, to consider the active parties in the action, rather than the action alone. In short, a transactional analysis is a more accurate guide to exculpation than is a more narrowly focused comparative-harm analysis, especially if the comparative-harm analysis consists of a linguistic evaluation.

Needless to say, I hope I have done justice to Professor Greenawalt's extremely stimulating work. If I have failed to do so, I offer in exculpation one excuse and one justification. My excuse is that I lack any intent to inflict harm as such on Professor Greenawalt's well-developed arguments. The intention, as I mentioned, has rather been to present an alternative view. My justification derives from the richness of life—and its concomitant disorderliness—which throws up situations that can scarcely be captured by any neat conceptual scheme. When to this is added the skeletal quality of even the best conceptions in this field, a plurality of efforts would seem to be, as Professor Greenawalt would say, warranted.