

Maurer School of Law: Indiana University

## Digital Repository @ Maurer Law

---

Articles by Maurer Faculty

Faculty Scholarship

---

1976

### Comment on Justification and Excuse

Jerome Hall

*University of California, Hastings College of the Law\**

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [Courts Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

#### Recommended Citation

Hall, Jerome, "Comment on Justification and Excuse" (1976). *Articles by Maurer Faculty*. 1457.

<https://www.repository.law.indiana.edu/facpub/1457>

This Response or Comment is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [rvaughan@indiana.edu](mailto:rvaughan@indiana.edu).



**LAW LIBRARY**  
INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

## COMMENT ON JUSTIFICATION AND EXCUSE

*Jerome Hall*

Any analysis of justification and excuse encounters two unusually difficult obstacles. First there are ethical issues that have agitated philosophers for centuries. Is one ever justified in killing an innocent person? If the killing saves the lives of two persons? Of many persons? Should one be excused if he kills two or more persons when that is the only way to preserve his life? If one man is afloat on a plank which can support only him, or if two men are reaching for the plank, is it right for one of them to attack or repel the other in order to preserve his own life?

Second, differences in the laws of various countries also affect discussions of justification and excuse since scholars are apt to approve the law of their country and to define those concepts on that implicit premise. If one country excuses a person who from fear or passion applies excessive force against an assailant and kills him, while another country would convict him of manslaughter, this discrepancy is likely to provoke discussions that never intersect. Complications arise when the law of one country includes the defendant's motives in e.g. its definition of criminal homicide, while that of another country allocates such questions to the pre-sentence hearing. If Anglo-American law distinguishes the danger caused by natural forces from that threatened by persons, while other countries do not, there are bound to be different rules and different ways of talking about justification and excuse. Accordingly, I hope the reader will bear in mind the writer's intended qualification of what follows and, in any case, I shall concentrate on questions that can be discussed with some degree of objectivity.

While Professor Eser's essay sheds light on German penal theory, it also reveals the serious difficulties experienced by anyone who wishes to understand the problematic aspects of a foreign legal system. Writing after many years of German scholarship devoted to a tripartite method of analysis in which "justification" and "excuse" play central roles, it is quite understandable that he finds these concepts confused or minimized in Anglo-American law. But Stephen's statement that the distinction between justification and excuse "involves no legal consequences" simply referred to the fact that so far as the criminal liability of a particular defendant was concerned, it made no difference whether he was justified in what he did or whether he was excused. And this writer's statement that "as categories of substantive law they are 'fallacious and misleading'" was plainly based on the fact that "category," as used by the writer, meant "ultimate prin-

principle."<sup>1</sup> I do not find any discussion of either of these points in Professor Eser's paper.

I believe that in addition to the antecedent or latent difficulties noted above, there are two salient facts that account for the divergence of Anglo-American and German methods of analysis of problems of penal law. First, Anglo-American writers from the very beginning of their discourse closely adhere to the maxim *actus non facit reum nisi mens sit rea*, and consequently use a contextual method of analysis, while German scholars divide their analysis into three stages. Secondly, Anglo-American writers on criminal law (with notable exceptions), when analyzing a problem of criminal law, keep rigorously within the confines of penal law discourse, while German writers seem to think it relevant and necessary, in their analysis, to take account of such rules as that an insane defendant may be committed to a hospital and may be compelled to pay damages for an injury caused by him.

Of course no legal system is perfect, and for many years I have criticized important rules of Anglo-American criminal law, e.g. the felony-murder rule (at long last abandoned in England), the "reasonable man" standard as the measure of criminal liability in homicide cases, the law on "transferred" intent and the legislative creation of crimes based on inadvertent negligence; happily, on all of these issues except the last I have found support in German penal law. It may also be the case that German law is more progressive in its wider recognition of excuses as complete defenses, although that question is debatable.

But our concern in this discussion is with basic issues of penal theory, and here I support the Anglo-American contextual approach in the analysis of criminal law problems. I therefore think German law took an unfortunate turn when it espoused Beeling's tripartite analysis with its reliance on "possibility," "unlawfulness," the assumption that excuses do not affect the definition of crimes, and other serious consequences.

"Justification" and "excuse" are very old concepts. Indeed these words have long been parts of everyday speech; Anglo-American law has used them for centuries and with some sophistication since Bacon's 1630 treatise on the common law. What is common to both concepts is that an injury or damage has been caused by a human being. The difference is that in the former, the actor did the right thing in the circumstances, e.g. he defended himself against an assailant or destroyed property to save life; while in "excuse" the rectitude of the actor or his action is simply irrelevant. What is relevant in excuse, i.e. relevant to penal law, is that for reasons either of incapacity or of extreme pressure, such as the threat of immediate death, the actor should not be held criminally liable; instead he is excused.

These terms, like most words of ordinary speech, are ambiguous. For example, "excuse" in a wide meaning includes all cases where

---

1. Hall, *General Principles of Criminal Law* 233 (2d ed. 1960).

there is no blame and no penal accountability. But in a narrower usage, one excuses only normal adults who were subjected to extreme pressure, i.e. "excuse" is applied to persons who, except for extreme pressure, would be held fully responsible. In this sense, we do not excuse children; we simply do not expect them to act as adults. Second, excusing facts are sometimes accompanied by justifying facts. When an action that caused an injury or damage is justified as the lesser of the threatened evils, it may also be said that the actor is excused since he cannot be blamed for what he did, e.g. a starving man takes food from a shop. Or suppose a bank robber points a gun at the cashier, who hands over a large sum of money.<sup>2</sup> Shall we say that the cashier is excused because he acted under great pressure or shall we say (and indeed would not most people say) that he was justified in what he did? Again, there are different laws in various countries regarding coercion. In American states, although there are exceptions,<sup>3</sup> homicide still limits the availability of coercion as a defense, while in Canadian law, rape, kidnapping, mayhem and other crimes have also placed limits on coercion as a defense. In these countries both justification and excuse are involved since excuse on the ground of inordinate pressure is limited by the balance of the respective values. It seems evident that even if these concepts were clear, precise, and sharply distinguished,<sup>4</sup> both of them would be operative in many situations.

The interaction of these concepts in actual cases does not negate that justification often has a logical priority since excuse implies that we must first decide, "excuse the actor for doing what?" and that may involve a decision regarding justification. This resembles the logic of California's bifurcated trial where, in its first stage, it is decided what crime, if any, was committed by the defendant, the assumption in that stage being that he was sane; then, if there is a conviction, the proceedings move into the second stage where insanity is the sole issue. That logic applies also to the usual procedure requiring the prosecution to make a *prima facie* case in terms of the definition of a crime committed with "normal" *mens rea* ("normal" statistically and also in the sense that neither justification nor excuse applies). The de-

---

2. I am indebted for this example to Baker, "Acting under Duress," 3 *Canadian J. of Philos.* 515 (1974).

3. See e.g. ALI Model Penal Code § 2.09(1) and D.P.P. for N.I. v. Lynch, [1975] 2 W.L.R. 641.

4. Even J.L. Austin's well known distinction (that in justification one accepts responsibility and claims that he did what was good, while in excuse one admits it was bad but does not accept responsibility for it, "A Plea for Excuses," reprinted in *Philosophical Papers* 124), was questioned by R.M. Chisholm, who said that as regards minor discourtesies to which one may think his position entitles him, one may say "I was within my rights," thus accepting responsibility for a bad act. Chisholm, "Austin's Philosophical Papers," *Symposium on J.L. Austin* (Fann ed., 1969). The late Professor Joseph Beale, one of America's most distinguished legal scholars, said: "Justification makes an offensive use of force lawful; excuse applies to a defensive force only. . . ." 41 *Harvard L. Rev.* 553 (1928).

fendant may plead "not guilty" or he may plead justification or excuse, but if he pleads only an excuse, lack of justification is assumed. But neither of these practices excludes *mens rea* from the initial hearing.

Let us next examine the interrelation of these two variables with *mens rea* (*Schuld*) in the sense in which they are usually employed, at least in Anglo-American law.

1. Justification implies lack of *mens rea*. This is perhaps the usual situation, i.e. one who defends himself within proper bounds is justified and, having chosen the lesser of two evils, he does not have a guilty mind.

2. So too, usually, one who is *not* justified, e.g. in striking someone, does have a guilty mind.

3. But one may *not* be justified in what he did, but still *not* have a guilty mind because of a mistake of fact.

In the above cases, justification or lack of it is based on an objective view of the facts, the facts as they "really" exist. But suppose a police officer sees a man running away at night and shoots him. It turns out later that, unknown to him, the man in flight was an escaped felon armed with a gun. Are we to say that the policeman was *justified* in shooting him but that he had a guilty mind? In English law, the policeman was held criminally liable,<sup>5</sup> and it is well established in American law that if a search is illegal because the policeman had no reasonable ground to search, the fact that it turns up contraband, e.g. narcotics or a gun, does not validate the search and the evidence may not be used. How shall we speak about these situations? If we say that the officer was justified, i.e. he did the right thing, but that he had a guilty mind, the plain implication is that he is punished not for what he did, but only because of his guilty mind. In terms of ordinary speech it seems absurd to say that although the officer did the right thing, he must be punished; and in terms of penal theory, on the above view that he was justified, where is the criminal act? If on the other hand the law of some countries ignores the officer's state of mind and holds that he was justified in what he did, that extends the objectivity of "justification" to a point that would legalize actions that ought to be illegal, perhaps even criminal, and the word is used in a sense that is not consistent with the "pro" attitude towards justification. In view of the ambiguity of "excuse" and "justification" and, even more, in view of their concomitant operation in many cases and the final decisions regarding the actor's penal liability, one must ask: (1) when is it important to distinguish these concepts, and (2) is not confusion rather than clarity the consequence of efforts to separate and deal with these concepts in sharp isolation from each other?

In light of the above complexities, I hope I will not be thought unappreciative of its many achievements when I submit that German law took a mistaken turn when it abandoned Merkel and embraced

---

5. Dadson (1850) 2 Den. 35, 169 E.R. 407.

Beling. Beling was apparently a positivist, and in current terms a behaviorist who imagined that he could formulate the typical pattern of every crime without reference to the actor, and who insisted that analysis should concentrate first on that *typus*. Certainly that thesis is persuasive for some purposes. A policeman who sees a man breaking a window and entering a house at night has seen enough to set him into action. But what apparently emerged as basic in German penal theory is the *Tatbestand*. Since German scholars have for many years debated the meaning of that term, I can only ask some questions about it: (1) does *Tatbestand* refer only to the external facts described in the specific definitions of crimes? (2) is the actor's intention included in *Tatbestand*? (3) does it refer to the entire definition of a crime, excluding justification and guilt, or excluding justification and only excuse?

As to the first question, it need only be said that if German sociology (*Verstehen, Einfühlung*) has taught us anything, it is that human actions cannot be understood unless we know the actor's state of mind. But we need not belabor this point since present German theory seems to require that the actor's intention be included in the *Tatbestand*. I take it that this reflects recognition of the need to introduce a personal datum if the relevant harms are to be distinguished from merely natural events such as being struck by lightning.

But has German penal theory completely extricated itself from Beling's fallacy by incorporating "intention" in the *Tatbestand*? "Intention" alone is ambiguous; it has an innocuous connotation and it has that of *mens rea*. If X puts a spoonful of sugar into V's cup of coffee, thinking it is arsenic, is it his intention to put sugar or arsenic in the coffee? In one sense, he saw the substance in the spoon and he intended to put that in the cup; in another sense, X intended to put arsenic in it. But X may be insane or he may have seen his enemy's concealed revolver.

If the "intention" now allocated to *Tatbestand* has a meaning consistent with the continued allocation of *Schuld* to the final stage of analysis,<sup>6</sup> the submission must be that although Professor Welzel's amendment to Beling's *typus* was a step in the right direction, it did not go far enough because it does not describe a datum of penal significance and raises other difficulties that I shall discuss. In the alternative, if the "intention" ascribed to the *Tatbestand* is used to mean *mens rea*, it follows that there are no sharply separated stages of inquiry—*Schuld* is involved from the outset.

In further support of these statements, it is necessary to emphasize that *mens rea* (*Schuld*) is not synonymous with the negation or exclusion of justification and excuse. In many, perhaps most cases, the defendant pleads neither justification nor excuse; he simply pleads "not guilty." If he is found guilty, that means that he acted with *mens rea*, the tacit premise being that he was neither justified nor

---

6. See the statement in Professor Eser's text ending with n. 25.

excused. If there is a valid excuse, that of course negates *mens rea*; but, as stated, the rejection of excuse and justification does not *ipso facto* imply *mens rea*. How could the *exclusion* of justification and excuse lead logically to the *affirmative* conclusion that the defendant acted with *mens rea*? All that is implied is a vacuum—unless there has been included from the outset a definition of a crime that includes its “normal” *mens rea*. For example, if we start with the statement, “A intentionally took B’s property,” we have no reference to the *animus furandi* and the exclusion of justification and excuse does not imply that A took with *animus furandi*. If it is said that we must add other facts required by the definition of the crime (apart from facts connoting justification and excuse), it can only mean that facts signifying the relevant *mens rea* in its “normal” sense must be added.

It was suggested above that the tripartite analysis has resulted in the unfortunate construct of “unlawfulness,” a dubious treatment of excuse and the untenably sharp separation of justification and excuse. There is of course wide recognition of the rule that one may defend himself against an excused action but not against one that is justified, and Anglo-American law accepts that as valid.<sup>7</sup> But, as regards both that system and German law, one must ask if it is actually the law that one may defend himself against an attack by a person known to be insane in the same way that one may defend himself against an attack by a normal adult? Anglo-American law permits one to “carry on” as long as his defense remains within proper bounds; but could one continue to strike an insane person? Again, suppose one does not believe that an action is justified: e.g. in the San Francisco earthquake and fire, Mayor Geary destroyed certain houses to prevent the spread of the fire; but if the owner of one of those houses did not think it necessary to raze it and opposed that justified action, he would presumably have been exculpated. What remains of the above distinction?

Let us advance, next, to more critical cases. Suppose A points a gun at B and orders him to rob C. Since B is “only” excused, C may resist the attempt to rob him. In German theory, I believe it is said that B’s act, though excused, is “unlawful.” “Unlawful” implies a violation of law, but the fact that B’s act violates tort law is not relevant to anyone’s criminal liability. Moreover, in the above case, A was violating the criminal law and B was merely his instrument; hence C was resisting a criminal act and there is no need to rely on “unlawfulness” in analyzing that situation. But suppose A, mistaken as to material facts, strikes B, thinking B is attacking him or is about to do so. B can certainly defend himself, but if he knows that A is mistaken, just as when he knows his assailant is insane, a question must be raised regarding “self-defense.” Finally, suppose B does not know A is mistaken and he defends himself within proper

---

7. There are conflicting decisions regarding the reasonable intervention of a third person to assist the apparent victim of an attack when the “victim” turns out to be one who was resisting arrest by an officer.

limits. Is it *necessary* then to say that A's act was "unlawful" (but excused)? We can analyze that situation without reliance on a term which has the unfortunate connotation of "unlawfulness." We simply say that A's mistake of fact excuses him and that B's defense of himself was justified. We do not say that A's act was unlawful *and* excused because that distorts the legal significance of "excuse." "Unlawfulness" lingers on, apparently because it would be awkward to say that the excused person's act was "lawful." But in an advanced system a child or an insane person does not commit a crime, nor does a man commit burglary when he enters a house under pressure of being killed.

In sum, the reasons for excluding "unlawfulness" from penal theory are:

(1) The term implies that a law has been violated, but if the only law violated is tort law or the law of civil commitment, the violation is not relevant to penal liability.

(2) To say that an action was unlawful but not criminal is puzzling, since for the present inquiry "law" is either non-criminal or criminal; non-criminal is excluded as not relevant, and criminal is excluded by recognition of the defense. What then does "unlawful" mean and what useful function does it serve?

(3) A canon of scientific inquiry is that of economy. A concept that is not needed is not merely superfluous, it also clouds analysis. For example, the unfortunate influence of the tripartite analysis and its reliance on "unlawfulness" is shown in such statements as, "we excuse the actor, but not the action." As regards such statements it is only necessary to note that in law, at least, and many would say in morals also, we are what we do. Action is a reflection of a person's state of mind and character; hence the isolation of the act from the concomitant state of mind (including infancy, insanity, extreme pressure) is artificial and fallacious.

(4) The use of "unlawfulness" in correlation with "excuse" obscures the fact that "excuse" functions in the definition of crimes just as effectively as does "justification." So far as particular defendants are concerned, with no third-party involvement, there is no penal difference whether a jury finds that an act was or was not justified or finds that the defendant was or was not excused. To say that he was "merely" excused, implying that the law is not changed, is to ignore the legal doctrines regarding excuses, which are just as operative as those concerning justification.<sup>8</sup> One need only advert to primitive times when self-defense was not recognized, when there was penal liability for accidental killing or for injury by one's animals and no recognition of infancy, insanity or coercion, to see that a legal system is changed when these facts are recognized as defenses.

---

8. "The opportunities for necessity pleas given by the very varied definitions of offences are, in short, both numerous and, in large measure, lacking in any consistent principle." Glazebrook, "The Necessity Plea in English Criminal Law," 30 *Camb. L.J.* 97 (1972).



In the analysis of a legal system, we use the terms "right," "duty," "privilege" and others.<sup>9</sup> "Justification," because of our favorable attitude towards it, is easily recognized as a "privilege." But "excuse" functions with equal potency to determine the meaning of "power" (competence) and the extension of "duty." The weight of ordinary language keeps us from saying that an insane person is "privileged" to injure anyone; and some may find it difficult to say he is excepted from the duties imposed by penal law.<sup>10</sup> We say he is "excused." In sum, the propositions which I have called "doctrines" (justification, excuse, degree of harm) are just as much part of the criminal law as are the rules defining specific crimes. It is only a matter of linguistic convenience and of logic that some propositions are placed in one part of the Code and others are placed in another part.

The postponement of the question of "guilt" until the third stage results in the superfluous or fallacious formulation of other concepts, e.g. "act" and "harm," that are untouched by the concept of guilt. But we cannot understand the concepts of penal law until we see them in their interrelations. The death of a human being is not a harm in penal law unless that death was caused by one acting with *mens rea*. So too a burning house is not the harm of arson unless that fact is seen in light of the culpability of the actor. The harm caused by the defendant is given the meaning of a penal harm by its relation to action which includes *mens rea*, on the one hand, and by its relation to punishment on the other. When guilt is ignored, analysis is focused on a fact or event that is not a penal harm; and the later reference to guilt, focused wholly on the issue of liability, does not of itself transform the injury or damage into a penal harm. That does not occur until one reconstructs the concepts and sees, at last, the true nature of a penal harm or unless there has been a latent association of the caused event with guilt from the outset.

Finally, quite apart from the questions previously discussed regarding tripartite analysis, it must be granted that justification and excuse are not ultimate concepts of penal theory. We must ask, *Why* justified? *Why* excused? and relate our answers to the categories of penal law. Until we do that we have left undone what is essential in any scientific endeavor, namely the interrelation of the concepts of the discipline, including their reference to its ultimate principles.

---

9. Hall, *Foundations of Jurisprudence* ch. 5 (1973).

10. "There is a place, not only for *excuse*, by which that which seemed a crime is proved to be none at all. . . . That which totally excuseth a fact, and takes away from it the nature of a crime, can be none but that which, at the same time, taketh away the obligation of the law." Hobbes, *Leviathan* 142 (23 *Great Books of the Western World*, Hutchins ed., 1952).