JUSTIFICATION AND EXCUSE IN SWEDISH CRIMINAL LAW

BY

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1. *The Concept of a Crime*

The structure of the Swedish criminal law system is greatly influenced by German doctrine. Its main author is Thyrén, a leading figure in the circles around von Liszt. This means that the developments in German doctrine since the Second World War have been less influential than the pre-war ones. Ideas of the kind reflected in the *Finale Handlungslehre*, for example, have not had a significant impact in Sweden, though it does not follow that German legal writing is taken lightly nowadays. On the contrary, there is no central dogmatic problem on which any scholar would dare to take a stand without consulting the leading German writing. But despite this some of the inspiration for conceptual changes has come from other sources, primarily British and American philosophy.

It is still common for Swedish laywers to speak in Thyrén's language: to speak about an "objective" and a "subjective" side of the crime. The terminology is, of course, misleading: we find a lot of "subjective" elements on the "objective" side and the "subjective" side contains a series of judgments of an "objective" character. Furthermore, it is not really appropriate to speak about the "sides" of a crime, as if there were some kind of complete symmetry between the two groups of prerequisites.

The present author prefers to represent the structure of a crime in the following manner:[1]

I	Criminalized act or omission	=	(a) a specific definition of the prohibited act or omission (b) attempt, preparation, conspiracy (c) complicity
II	Swedish law is applicable	=	Territorial and similar exclusions do not apply

[1] See Nils Jareborg, *Handling och uppsåt*, Stockholm 1969, pp. 345 ff., and the same author, *Brotten. Första häftet*, 2nd ed. Stockholm 1984, pp. 66 ff.

III	The deed is not justifiable	=	A rule or principle of justification is not applicable
I+II+III = UNLAWFUL DEED			
IV	Intention or Negligence *(dolus* or *culpa)*		
V	An act is not involuntary or—in the case of omissions—the act is not one that the actor cannot possibly perform: Exceptions connected with *actio libera in causa*-considerations (It is probably more convenient to treat this requirement as a part of the *dolus/culpa* problematics on level IV than as a separate prerequisite of a general character)		
VI	The deed is not completely excusable	=	A rule or principle of excuse is not applicable
IV+V+VI = CULPABILITY			
UNLAWFUL DEED + CULPABILITY = CRIME			

A crime, then, consists of an unlawful deed performed under circumstances that make the actor personally answerable for the deed. It is not uncommon for lawyers to use the Swedish words directly corresponding to *Rechtswidrigkeit* and *Schuld* in referring to the two main groups of general prerequisites.

It should be noted that the exceptional rules under III and VI may be written or unwritten, but that the exceptions must be fairly determinate, "typified". Swedish law does not recognize, as some German writers have suggested, a general possibility to balance conflicting interests in the concrete case, or a general requirement of "concrete culpability". Thus, we do not have room for a separate concept of *Zumutbarkeit* or *Vorwerfbarkeit*. In fact, Engisch's recommendation of 1930 states the Swedish position well:[2]

[2] Karl Engisch, *Untersuchungen über Vorsatz und Fahrlässigkeit im Strafrecht*, Berlin 1930, p. 22. (Italics deleted.)

> Richtiger ist es also schon, die Vorwerfbarkeit als solche aus der Verbrechensformel zu eliminieren und kurzerhand als Schuldmerkmale diejenigen Bedingungen auszugeben, denen das Verhalten des Täters entsprechen muss, damit es nicht nur als nichtgesollt, sonders auch als vorwerfbar und damit strafwürdig erscheint.

If someone commits an unlawful deed under circumstances that completely excuse him, he is of course exempted from punishment. But there are other grounds of exemption from punishment that have nothing to do with excuses. The actor has undoubtedly committed a crime, but he cannot legally be punished, e.g. because the crime was committed too long ago (there are some rules of limitations on sanctions).

If it is important to distinguish between

(a) a deed is criminalized, but not unlawful (because it is justified); and
(b) a deed is unlawful, but not a crime (because the actor is excused);

it is even more important to distinguish between

(1) an unlawful deed is not a crime (because the actor is excused); and
(2) an unlawful deed is a crime, but the actor cannot legally be punished.

The present Swedish criminal law is peculiar in that it ignores what should be an important excuse—mental incapacity. No actor under 15 can be punished, but even small children can commit crimes. Insanity and similar states are not dealt with within the concept of a crime, but as affecting the appropriate sanction. To my mind, this standpoint of the Swedish Criminal Code (*Brottsbalken*, BrB) of 1962 (in force 1965) is fundamentally wrong.[3]

2. *Legal-Historical Background: Swedish Doctrine*

The representation of the concept of a crime clearly reveals that the distinction between justification and excuse nowadays plays a major role in Swedish criminal law dogmatics. The existence and importance of the distinction is generally recognized, even if the grand old man of Swedish criminal law, Ivar Strahl, is somewhat reluctant to stress it and to use words reminding one of *Rechtswidrigkeit* and *Schuld*.[4] But Ivar Agge, writing a quarter of a century ago and still influential, shows no such reluctance; his doctrines could be charac-

[3] See BrB ch. 33, secs. 1 and 2, and also Jareborg, *Handling* och *uppsåt* (footnote 1 above), pp. 340 ff. The present law complicates the processing of cases involving mentally disturbed defendants: *dolus/culpa* must be proved against the defendant.

For citations from the Code, I have used *The Swedish Penal Code*, Stockholm 1984 (The National Council for Crime Prevention, Sweden. Report no. 13).

[4] See Ivar Strahl, *Allmän straffrätt i vad angår brotten*, Stockholm 1976, e.g. pp. 19 ff., 75 ff., 368 ff.

terized as a distillation of a century of German criminal law writing, adapted for Swedish conditions.[5]

Going half a century further back we come to Thyrén, outlining the principles for a revision of the criminal law. As already indicated, he stresses the existence of and the difference between an objective and a subjective side of the crime.[6] This means that the distinction between justification and excuse is at least indirectly recognized. In the fourth chapter of his (partial) Draft Code of 1916 he presents a mixture of "Grounds that exclude or lessen the criminality", i.e. justifications, complete excuses and partial excuses. There is a common terminology for justifications and complete excuses: their consequence is "freedom from punishment". Thus the difference between (1) not criminal, and (2) criminal, but not punishable, is not kept clear; nor is the difference between justifications and excuses. This lack of precision plagued the language of criminal law for decades. Also Agge speaks about "objective and subjective grounds for freedom of punishment" when he refers to circumstances that, respectively, justify and completely excuse from responsibility. Already in 1950 Nelson protested that the terminology is misleading,[7] but it was hard work to change the language habits. Nowadays, justifications and complete excuses are usually referred to as "grounds that exclude responsibility".

Completing this hop, step and jump backwards in history we reach another prominent criminal law professor, Hagströmer, writing in the last decades of the 19th century. Hagströmer was our first "modern" criminal law scholar. Also he was much influenced by his German contemporaries, in the field now under consideration most of all perhaps by Binding. In his comprehensive treatment of the general part of the criminal law he recognizes a distinction between *Rechtswidrigkeit* and *Zurechenbarkeit*, but he did not use a concept of *Schuld*. When discussing the general prerequisites of a crime Hagströmer, however, showed little sense for the difference between conceptual and criminal policy requirements; and like Thyrén later on he did not sufficiently draw the distinction between complete excuses and other grounds for exemption from punishment.[8] But in respect of the justification-excuse distinction, he at least got the justification side right.

[5] See Ivar Agge, *Straffrättens allmänna del. Andra häftet*, Stockholm 1961, and *Tredje häftet*, Stockholm 1964, pp. 244 ff., 325 ff.

[6] Johan C.W. Thyrén, *Principerna för en strafflagsreform. III*, Lund 1914, especially the summary on pp. 155 ff., Johan C.W. Thyrén, *Förberedande utkast till strafflag. Kap I–XIII (Allmänna delen)*, Lund 1916, pp. 27 ff.

[7] Alvar Nelson, *Rätt och ära*, Uppsala 1950, pp. 101, 110 f.

[8] Johan Hagströmer, *Svensk straffrätt. Första bandet*, Uppsala 1901–1905, pp. 97 ff., 108 ff., 151 ff., 170 ff.

3. *Swedish Legislation: The Background*

For at least a century, then, the distinction between justification and excuse has been an important one in criminal law dogmatics. But what about the legislation?

In the Penal Code of 1864 we find no trace of it. Chapter 5 has the title "On special grounds that exclude, lessen or cancel the punishability". Carlén's commentary characterizes youth, insanity, necessity, self-defence, acting by order, mistake of fact, consent, and other—written or unwritten—grounds that exclude "punishability" as "lack of culpability" (*Zurechenbarkeit*).[9] (But it is also said that the law reform was guided by the purpose to accomplish a comprehensive code "not less from an objective than from a subjective point of view".[10] This suggests that the distinction between justification and excuse is not totally foreign.)

In 1923 a royal commission presented a Draft Penal Code (General Part). Thyrén was a member of the commission and his ideas permeate the draft code. There is a feeble attempt to let the title of ch. 4 reflect the distinction between someone being "criminal" and being "punishable", but in general the latter word is used also in cases where the former is the appropriate one. The word "unlawful" (*rechtswidrig*) is used in ch. 4, sec. 4, and there are other indications that the authors have had the distinction between justification and excuse in mind. The *travaux préparatoires* to the draft code leave one in no doubt that this has been the case.[11]

The proposal of 1923 never led to legislation. The work on a new Criminal Code was reorganized after Thyrén's death a decade later. New provisions on crimes against property came into force in 1942 and were followed by new provisions on crimes against the state and the public in 1949. A proposal for legislation on crimes against the person and general rules concerning such crimes was presented by a royal commission in 1953. After considerable redrafting, ch. 24 of the Criminal Code of 1962 came to contain primarily general provisions concerning justifying circumstances. (Its title—"On Self-Defence and Other Acts of Necessity"—is not very accurate.) General provisions concerning excusing circumstances are more scattered.

The Criminal Code of 1962 is reasonably clear in drawing the general distinction between (1) no crime, and (2) crime, but no punishment. Although there is no doubt that the idea of an "objective" and a "subjective" side of a

[9] Richard Carlén, *Kommentar öfver Strafflagen*, Stockholm 1866, pp. 86 ff.
[10] Carlén, *op.cit.*, p. 1.
[11] *Förslag till strafflag allmänna delen ... jämte motiv avgivna av strafflagskommissionen, SOU* 1923:9, e.g. pp. 84 ff, 111 ff., 139 ff., 177 f.

crime was guiding the drafters,[12] the Code is, however, disappointingly unclear in distinguishing between justification and excuse. The statutory language dealing with exculpatory factors fails to specify with sufficient clarity whether these are intended to be justifying or excusing. To draw this distinction, the Swedish reader needs to look beyond the statute book and to the writings of the scholars.

4. *Overview of General Rules Concerning Justification or Excuse*

If we look at the statutory provisions on exculpation, they can be classified as justifying or excusing, as follows:

Provisions stating justifying circumstances:

- BrB ch. 24, sec. 1 (self-defence);
- BrB ch. 24, sec. 2, and Police Act (1984), secs. 10 and 23 (use of violence or force in performing an official duty);
- BrB ch. 24, sec. 3 (use of violence or force to maintain military discipline);
- Seaman Act (1973), sec. 53 (use of violence or force to maintain discipline on board a ship);
- BrB ch. 24, sec. 4 (necessity);
- BrB ch. 24, sec. 6 (acting by order).

Provisions stating completely excusing circumstances:

- BrB ch. 24, sec. 5, and Seaman Act (1973), sec. 53 (excessive use of violence, force, inflicting of damage, etc., in cases mentioned in BrB ch. 24, secs. 1–4, Police Act and Seaman Act): responsibility is excluded only if the circumstances were such that the actor had difficulty in coming to his senses;
- BrB ch. 23, sec. 5 (an accomplice has been induced to be an accessory to a crime by coercion, deceit or misuse of his youth, lack of comprehension or dependent status): responsibility is excluded only in trifling cases;
- BrB ch. 13, sec. 11, ch. 14, sec. 11, ch. 15, sec. 14, ch. 23, sec. 3, Tax Crime Act (1972), sec. 12, and some other provisions: voluntary retreat or correction. (It need hardly be said that it is a mistake to treat these cases as exemplifying excuses.)

[12] See NJA II 1962, pp. 16 ff., 341 ff., and section 7 below. The commentary to the Code, written by some of the lawyers primarily responsible for its format, is quite explicit on this point. See *Brottsbalken jämte förklaringar* (edited by Nils Beckman, Carl Holmberg, Bengt Hult, Ivar Strahl), vol. I, 4th ed. Stockholm 1974, pp. 17 f., 23 ff., vol. II, 5th ed. Stockholm 1982, pp. 664 ff., 705 ff.

In addition, there is reason to recognize some unwritten general exceptional rules:

Justifying circumstances:

- some cases of consent;
- cases of "permitted" taking of risks;
- some cases of conflict of duties;
- some cases of conditions similar to necessity (e.g. *negotiorum gestio*);
- some cases of "military necessity" during war or warlike conditions.

Completely excusing circumstances:

- some cases of mistake of law (when mistake of law is irrelevant for the *dolus/culpa* requirement);
- temporary loss – without one's own fault – of the use of one's senses;
- cases of putative excess corresponding to BrB ch. 24, sec. 5, and Seaman Act, sec. 53.

The excusing circumstances mentioned in this section will all have to be placed on level VI in the table depicting the structure of the concept of a crime in section 1 above. But the history of legal dogmatics shows that it is very tempting to speak about the "backside" of levels IV and V as constituting excusing circumstances, i.e. ignorance and mistake relevant for the *dolus/culpa* requirement are seen as excuses and so are (non-culpable) involuntariness and inability to perform a certain act. There is nothing wrong in this, but it is, of course, important to separate excusing circumstances that only negate a positive prerequisite from excusing circumstances that stand on their own feet.

5. *Exemplifying the Distinction*

(1) *Necessity.* According to BrB ch. 24, sec. 4,

> A person who in a case other than those referred to previously in this chapter acts out of necessity in order to avert danger to life or health, to save valuable property or for other reasons, shall also be free from punishment if the act must be considered justifiable in view of the nature of the danger, the harm caused to another and the circumstances in general.

(The Swedish original does not say "free from punishment" but "free from responsibility" and it would be more accurate to speak about "distress" than about "necessity".)

The language of ch. 24, sec. 4, clearly treats necessity as a *justification* only—and not an excuse.[13] Thus the Dudley-Stephens type case, of the starving person in the life-boat who kills to save his own life, would not be covered by the provision.[14]

There is, however, another provision[15]—BrB ch. 24, sec. 5—that might cover such cases. If someone acting in a state of necessity has used greater force or caused more serious harm than is permissible (i.e. his deed is not justifiable) he has nevertheless not committed a crime, if "the circumstances were such that he had difficulty in coming to his senses". The person in the life-boat would argue that his conduct was *excusable*, because the circumstances vitiated such self-control.

There is also another doctrine that operates as *excuse*—and that is where someone acts in an imagined, but not real state of necessity. The general Swedish position is that the requirements of *dolus/culpa* apply to the justification as well as the underlying prohibition. Thus the actor who mistakenly believes justifying circumstances to be present will be exonerated on grounds of lack of the requisite intent, if his act would have been justifiable in case his belief were true. (If negligence is criminalized, he will be exonerated only if his mistake is reasonable.)[16]

BrB ch. 24, sec. 5, concerns "real excess"; it presupposes a real state of necessity. If the state of necessity is imagined, there is no corresponding statutory rule. But the commentary to BrB recommends that ch. 24, sec. 5, is applied analogously in such cases of "putative excess".[17]

> As indicated in the previous section it is probable that the courts would recognize non-statutory necessity, at least in some situations corresponding to what is called *negotiorum gestio* in civil law. But there is no guiding case law. Also in such cases necessity would be a justifying factor. There is no reason to believe that an actor could be completely excused in cases of excess.

[13] *Brottsbalken jämte förklaringar* ... vol. II (footnote 12 above), pp. 698 ff. The phrase "in order to avert" is not interpreted literally. A person acting in a state of necessity is considered justified even if he himself did not notice the danger and thus in fact did not act "in order to avert" it. This position of the law seems to be motivated by the wish to avoid problems of disproof in relation to the existence of a certain purpose in acting. There is also the inclination to see a justification as something inherently "objective".

[14] See Andrew von Hirsch, "Review Essay/Lifeboat Law", *Criminal Justice Ethics*, vol. 4, 1985, pp. 88 ff..

[15] *Brottsbalken jämte förklaringar* ... vol. II (footnote 12 above), pp. 705 ff.

[16] This means that absence of a justifying circumstance amounts to a negative prerequisite for an unlawful deed. Not all negative prerequisites are found in rules stating justifying circumstances; many specific crime definitions contain such prerequisites.

Only a mistake, and not ignorance, can exclude *dolus/culpa* in relation to a negative prerequisite. See e.g. Arthur Kaufmann, *Schuld und Strafe*, Cologne, Berlin, Bonn and Munich 1966, p. 137, Günther Schewe, *Bewusstsein und Vorsatz*, Berlin 1967, p. 27.

[17] *Brottsbalken jämte förklaringar* ... vol. II (footnote 12 above), p. 707.

(2) *Conflict of duties.* "Legal necessity" means that the actor cannot avoid committing an unlawful deed whatever he does. He is then obliged to choose the lesser evil. Although there is no support from legislation or case law, the theoretical position seems to be quite clear: the state of "legal necessity" justifies the performance of the less harmful deed; responsibility for a *culpa* crime is, however, possible if the position of necessity was due to the actor's carelessness, and he may also be responsible for a *dolus* crime if he intentionally put himself in a position where he had to commit an unlawful deed.[18]

Conflict of duties is a justificatory concept. It gives no opportunity for a complete excuse (except a mistake excluding *dolus/culpa).*

(3) *Acting by order.* The general provision is BrB ch. 24, sec. 6:[19]

> An act committed by someone by order of the person to whom he owes obedience shall not lead to his punishment if he had to obey the order in view of the nature of the condition of obedience, the character of the act and the circumstances in general.

(Here, too, "responsibility" is translated as "punishment".)

The provision does not say much more than that certain interests are to be balanced. It is primarily applicable in the armed forces, the police and in connection with rescue operations and other situations when a person is duty-bound to obey. When someone acts within a private enterprise there is little scope for justifying a criminalized deed by reference to ch. 24, sec. 6. Even if the *travaux préparatoires* include some hints that also "subjective" circumstances might be relevant, it can hardly be doubted that the provision indicates the border between right and wrong, and hence is justificatory.

The only connected complete excuse is a mistake excluding *dolus/culpa.*

To conclude this brief summary of Swedish law: there is no doubt that the distinction between justification and excuse has been recognized in Sweden, although not always as clearly as one might hope. It now remains to consider *why* the distinction should be drawn.

6. *The Concepts of Justification and Excuse*

While English criminal law sticks to its 18th century foundations and does not much care whether a defence concerns a justifying or an excusing factor, we find the most eloquent elucidations of the distinction among English philosophers. Thus J.L. Austin writes:[20]

[18] Nils Jareborg, *Förmögenhetsbrotten*, Stockholm 1975, pp. 35 f.
[19] *Brottsbalken jämte förklaringar* ... vol. II (footnote 12 above), pp. 708 ff.
[20] J.L. Austin, *Philosophical Papers*, Oxford 1961, pp. 123 f. and 125. See also Jareborg, *Handling och uppsåt* (footnote 1 above), pp. 343 ff.

> In general, the situation is one where someone is *accused* of having done something, or (if that will keep it any cleaner) where someone is *said* to have done something which is bad, wrong, inept, unwelcome, or in some other of the numerous possible ways untoward. Thereupon he, or someone on his behalf, will try to defend his conduct or to get him out of it.
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> One way of going about this is to admit flatly that he, X, did do that very thing, A, but to argue that it was a good thing, or the right thing or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion. To take this line is to *justify* the action, to give reasons for doing it: not to say, to brazen it out, to glory in it, or the like.
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> A different way of going about it is to admit that it wasn't a good thing to have done, but to argue that it is not quite fair or correct to say *baldly* 'X did A'. We may say it isn't fair just to say X did it; perhaps he was under somebody's influence, or was nudged. Or, it isn't fair to say baldly he *did* A; it may have been partly accidental, or an unintentional slip. Or, it isn't fair to say he did simply A— he was really doing something quite different and A was only incidental, or he was looking at the whole thing quite differently. Naturally these arguments can be combined or overlap or run into each other.
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> ...
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> ... it has always to be remembered that few excuses get us out of it *completely*: the average excuse, in a poor situation, gets us only out of the fire into the frying pan— but still, of course, any frying pan in the fire. If I have broken your dish or your romance, maybe the best defence I can find will be clumsiness.

H.L.A. Hart, after noting that the distinction nowadays lacks legal importance, continues:[21]

> But the distinction between these two different ways in which actions may fail to constitute a criminal offence is still of great moral importance. Killing in self-defence is an exception to a general rule making killing punishable; it is admitted because the policy or aims which in general justify the punishment of killing (e.g. protection of human life) do not include cases such as this. In the case of 'justification' what is done is regarded as something which the law does not condemn, or even welcomes. But where killing (e.g. accidental) is excused, criminal responsibility is excluded on a different footing. What has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals.

There is no need to enlarge on this topic. The distinction between justification and excuse is the distinction between

(a) a deed being not wrong (although it is *prima facie* wrong); and
(b) a deed being wrong, but the actor not culpable (he is not blameworthy although what he did was wrong).

[21] H.L.A. Hart, *Punishment and Responsibility*, Oxford 1968, pp. 13 f. See also Eric D'Arcy, *Human Acts*, Oxford 1963, pp. 77 ff.

Little fantasy is needed to see that this is a distinction that any sophisticated morality must respect and make use of in moral teaching. Blame as an automatic response to a wrongful deed is too primitive a reaction. Consideration for other human beings requires that their point of view and their individual circumstances are made relevant. On the other hand, to overlook the distinction between justification and excuse is to forget the very point of having a morality or a criminal code.

7. *What Practical Difference?*

One might ask what practical difference the distinction makes, since the defendant is exonerated in any case. But there *can* be a practical difference. One striking instance, in Swedish law, concerns accomplice liability. Consider cases where B abets A in commission of a crime, and then A, the principal, successfully offers a defence. Does B remain liable as an accomplice? That depends on whether A's act is justified or excused. If justified, no unlawful act has occurred at all and B is not liable. If excused, then an unlawful act has occurred, although the principal is exonerated from blame for it. In that event, the accomplice, B, may still be liable if *he* has the requisite culpability.[22]

The applicable provision is BrB ch. 23, sec. 4:

> Punishment provided in this Code for an act shall be inflicted not only on the one who committed the act but also on anyone who furthered it by advice or deed. A person who is not regarded as the actor shall, if he induced another to commit the act, be punished for instigation of the crime or else for being an accessory to the crime.
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> Each accomplice shall be judged according to the intent or the carelessness attributable to him. ...

The provision is somewhat cryptic and impossible to interpret without the advice given in the *travaux préparatoires*. It is, however, fairly evident that an accomplice may commit a crime although the principal does not commit a crime because he lacks *dolus/culpa*. This makes it clear that "the act" in the first sentence cannot refer to a deed amounting to a crime, but something less. In fact, "act" here means "unlawful deed".

The Swedish doctrine of complicity emphasizes a distinction between "circumstances of objective relevance" and "circumstances of subjective relevance". The former affect the possibility of someone being an accomplice, the latter affect the possibility of someone committing a crime (as a principal or an accomplice). As already indicated, an unlawful deed committed by the princi-

[22] *Brottsbalken jämte förklaringar* ... vol. II (footnote 12 above), pp. 644 ff.

pal is a circumstance of objective relevance and *dolus/culpa* is a circumstance of subjective relevance.

This means, of course, that all justifying circumstances relating to the principal are circumstances of objective relevance, i.e. they exclude the criminality of all persons involved. And, as should be suspected, all completely excusing circumstances—irrespective of to whom they relate—are circumstances of subjective relevance, i.e. they affect the criminality of no one except the person to whom they relate.

8. *The Basis for the Distinction*

Beyond such practical differences between justification and excuse—which may vary from jurisdiction to jurisdiction—lie fundamental moral and criminal policy reasons for the distinction.

The act of criminalizing any deed is motivated by the need to suppress that kind of deed. The criminalization threatens anyone who commits such a deed with punishment. Thus, if we want to explain any act of criminalization we must refer to ideas of general prevention, compassing both general deterrence and the creation of habits and consciences. (Of course, it is not totally out of the question to criminalize a type of deed just to express societal disapproval. But the threat of a criminal sanction—with its purposeful infliction of suffering—cannot *generally* be explained without reference to its preventive effects. Were punishment to have *no* such effects, the material-deprivation elements in the criminal sanction would involve the infliction of unnecessary suffering. Were moral disapproval the *only* point of sanction, then the sanction should consist only of formalized censure without the accompanying infliction of suffering.)[23]

If we ask for the intentions behind accepting a rule stating a justifying circumstance we must find that *exactly the same kind of considerations* apply as when we ask for the intentions behind criminalization generally. When there are justifying circumstances we do not want to suppress the otherwise criminalized behaviour; the balancing of interests and values has resulted in the conclusion that we do not want to discourage people from committing such deeds; we do not want to teach them to refrain from such deeds and we do not want to express disapproval if someone commits such a deed. Instead, we might even want to encourage people to perform an otherwise criminalized act, because it is the "right thing to do". In any case the message is: this is all right, it is not wrong to do this.

[23] See Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, New Brunswick, N.J. 1985, ch. 5.

(There should be no need to argue for the irrelevance of ideas of special prevention in connection with criminalization.)

Let us ask why we should accept a rule that completely excuses someone from responsibility for a wrongful deed.

Looking closer at the different kinds of excuses we find that any one of them can be seen as a specification of one of two principles:[24]

(1) *The principle of conformity:* Someone should not be held responsible for an unlawful deed if he could not conform to the law, either because of the force of outside circumstances or because of mental disabilities of his own (including lack of knowledge). The idea underlying this principle is familiar enough: there should be no blame when the actor could not choose to do the right thing.

(2) *The principle of equity:* Although someone who has committed a wrongful deed could conform to the law, to ask for such conformity would be to demand far too much of him. This is the idea that persons should not be censured for failing to act as saints. The starving castaway in the boat may have had a choice not to kill his companion for food, but persons should not be blamed for their understandable preference for their own survival. It is this principle that requires fuller exploration: just what, and why, is "demanding too much"?

It often has been asserted that a doctrine of excuses could be accounted for on preventive grounds. Jeremy Bentham, John Austin, Glanville Williams—and some recent German writers as well[25]—have so contended. An example is the following statements by Glanville Williams:[26]

> It may be said that any theory of criminal punishment leads to a requirement of some kind of mens rea. The deterrent theory is workable only if the culprit has knowledge of the legal sanction; and if a man does not foresee the consequences of his act he cannot appreciate that punishment lies in store for him.
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> ... Although deterrence is not the sole object of the criminal process, it is assumed that a person convicted of crime belongs to a class of people who are capable of being deterred by the threat of punishment.
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> ... Owing to our imperfect knowledge we generally cannot tell until after the event whether a threat of punishment will deter a particular person; and having threatened we must carry out (in some measure) if threats are to be effective for the future. It is only in certain classes of case that we can say with reasonable probability that the threat of punishment will not deter. When we can say this, utilitarian theory demands that the threat of punishment be not employed, for it can result only in useless suffering.

[24] See Jareborg, *Handling och uppsåt* (footnote 1 above), pp. 355 ff., Hart, *loc.cit.*, Gary V. Dubin, "Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility", *Stanford Law Review*, vol. 18, 1965–1966, pp. 322 ff., Nils Jareborg, "The Two Faces of Culpa", *Revue internationale de droit pénal* 1979, pp. 307 ff., von Hirsch, *op.cit.* footnote 14 above.

[25] See e.g. Claus Roxin, "Zur Problematik des Schuldstrafrechts", *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 96, 1984, pp. 641 ff.

[26] Glanville Williams, *Criminal Law. The General Part*, 2nd ed. London 1961, pp. 30, 428 and 738.

H.L.A. Hart has, however, demonstrated that this kind of reasoning involves a fallacy:[27]

> Before a man does a criminal action we may know that he is in such a condition that the threats cannot operate on him, either because of some temporary condition or because of a disease; but it does not follow—because the *threat* of punishment in his case, and in the case of others like him, is useless—that his *punishment* in the sense of the official administration of penalties will also be unnecessary to maintain the efficacy of threats for others at its highest. It may very well be that, if the law contained no explicit exemptions from responsibility on the score of ignorance, accident, mistake, or insanity, many people who now take a chance in the hope that they will bring themselves, if discovered, within these exempting provisions would in fact be deterred. It is indeed a perfectly familiar fact that pleas of loss of consciousness or other abnormal mental states, or of the existence of some other excusing condition, are frequently and sometimes successfully advanced where there is no real basis for them, since the difficulties of disproof are often considerable. The uselessness of a *threat* against a given individual or class does not entail that the *punishment* of that individual or class cannot be required to maintain in the highest degree the efficacy of threats for others. It may in fact be the case that to make liability to punishment dependent on the absence of excusing conditions is the most efficient way of maintaining the laws with the least cost in pain. But it is not *obviously* or *necessarily* the case.

The present author is inclined to agree with Knud Waaben when he says, speaking about the excuse of insanity, that considerations of general prevention might give a reason *for* punishing the insane, but *not* a reason *against* punishing the insane.[28] If we really want to suppress some kind of behaviour, why not use every possible opportunity to show that a wrongful deed has been committed? (Why not punish the members of the perpetrator's family, as in *Lex Quisquis* of A.D. 397?)

We could, of course, speculate about the population revolting against laws that prescribe punishment for deeds committed without fault. But strict liability has been borne for centuries by millions with little complaint. And in any case, if such protests occur it only shows that something else than utilitarian considerations are seen by ordinary people as relevant (i.e. some moral ideas or principles recognizing excuses).

A quick look at other preventive rationales will show that they have little to add:[29]

Individual deterrence: it might be most efficient to use the opportunity to frighten someone who has committed a wrongful deed and thus keep him from

[27] Hart, *op.cit.* footnote 21 above, p. 43; see also pp. 18 f.
[28] Knud Waaben, *Utilregnelighed og særbehandling*, Copenhagen 1968, pp. 51 f.
[29] Jareborg, *Handling och uppsåt* (footnote 1 above), pp. 367 ff., von Hirsch, *op.cit.* footnote 23 above, chs. 9 and 11.

doing something wrong in the future; it is not possible to say generally that someone who has done something wrong under excusing circumstances does not "need" a reprimand.

Incapacitation: the fact that the wrongful deed was committed under excusing circumstances does not make a "dangerous" person less dangerous; if incapacitation can ever by justified, it depends on the defendant's social and criminal history; possible exculpatory circumstances of the present act may have little bearing on the offender's dangerousness.

Rehabilitation: similarly it is impossible to argue that someone who commits a wrongful deed under excusing circumstances does not "need" to be rehabilitated; the specific deed does not reveal anything about such a need and it is, of course, always an open question whether someone who does something wrong needs some rehabilitative treatment.

A final preventive argument that might be offered concerns what Andenæs calls punishment's "socio-pedagogical" effects.[30] The idea is that punishment can best perform a long-run preventive role—of reinforcing the citizen's own moral inhibitions against crime—when citizens perceive the sanctioning system to be just; and recognition of excuses helps to reinforce respect for law.

Plausible as this may at first sound, there are numerous difficulties.[31] What evidence is there that punishment prevents crime primarily through such effects on citizens' consciences? What evidence is there that citizens are even aware of the law's treatment of excuses, and hence might accord the system more respect if excuses are recognized? What evidence is there that citizens would be more favourably impressed with a penal system, if excuses are recognized? (In the United States, for example, the law's recognition of some excuses, such as the insanity defence, is a frequent cause of popular dissatisfaction.) Finally, why *should* the citizens think that recognition of excuses makes a legal system more just? This last question cannot, without circularity, be explained through punishment's pedagogical effects. And if a satisfactory answer cannot be given it, then perhaps the law should abolish excuses—and use its influence on citizen morality to persuade citizens to change their own popular morality so as to ignore excusing circumstances!

The upshot of all this is that we must look elsewhere for the reasons behind rules making excusing circumstances relevant. The obvious place to look for guidance is in *normative ethics* and certainly the relevance of excusing circumstances is to be explained as a legislative response to moral demands on the legal order: only those who are morally blameworthy for their deeds should be

[30] See e.g. Johannes Andenaes, "The Morality of Deterrence", *University of Chicago Law Review*, vol. 37, 1970, pp. 649 ff.

[31] See von Hirsch, *op.cit.* footnote 23 above, ch. 3.

punished as criminals, irrespective of whether this will make the legal threat less efficient. This will also be consistent with the objective of having the criminal justice system work as a means of expressing and distributing blame.

To spell out, in detail, why we should accept the various types of circumstances as excuses is a laborius task. Here, it is enough to emphasize that the reasons for accepting a rule stating a justifying circumstance are *not the same* as the reasons for accepting a rule stating an excusing circumstance. In both cases we must fall back on value judgments. But in the first case the question is what deeds are objectively "wrong", all things considered; and in the second case the question is to what extent legal repression should be counteracted from a moral point of view also in cases when the first judgment is a sound one.[32]

[32] The present author is greatly indebted to Professor Andrew von Hirsch for a series of helpful suggestions.