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I. Grounds for the Distinction between Justification and Excuse

1. A differentiation between justification and excuse is self-evident in some legal systems, but not in others. This requires explanation.

Penal codes, judge-made criminal law, and criminal theory in West Germany, Italy, Spain, Greece, Latin America, and Japan currently distinguish between wrongfulness (*Rechtswidrigkeit*) and culpability (*Schuld*). In contrast, this distinction is unknown, rejected, or at least not central to criminal thought in Anglo-American, French, and Israeli legal systems.[1]

At first glance, the differences seem irreconcilable and the consequences significant. However, at least two reasons indicate that the differences in current jurisprudential thought concerning the distinction between justification and excuse are not as sharp and as fundamental as one would believe from reading material on the conflicts between American and German criminal law theorists.[2]

First, German criminal law long existed without differentiating between justification and excuse. Such a differentiation was not recognized in the German Reich's Criminal Code of May 15, 1871, and German scholarship has only recognized a strict difference between justification and excuse since Beling's *Lehre vom Verbrechen* [The Doctrine of Crime] was published in 1906.[3]

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* Dr. jur., 1967; Habil. 1972; Prof., Johann Wolfgang Goethe-Universität, Frankfurt am Main, 1973.

1. G. Fletcher, Rethinking Criminal Law 466, 762, 817 (1978).

2. *See, e.g.*, Eser, *Justification and Excuse*, 24 Am. J. Comp. Law 621 (1976); Hall, *Comment on Justification and Excuse*, 24 Am. J. Comp. Law 638 (1976).

3. E. Beling, Lehre vom Verbrechen (1906). *See* E. Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege 385 ff. (3d ed. 1965); H. Mayer, Strafrecht: Allgemeiner Teil 96 ff., 104 ff. (1967); Eser, *supra* note 2, at 624-28; Hall,

Second, a differentiation between justification and excuse is not entirely unknown in American theory and legislation. The Model Penal Code distinguishes between justification and excuse (exculpation) in Articles 3 and 4, and George Fletcher, in particular, has advocated such a differentiation, in emulation of the German tradition.[4]

2. The differences in the legal systems are difficult to explain. At the outset, differences in both substantive and procedural criminal law, as well as in jurisprudential theory are notable.

With all due reservation for such a fundamental characterization, one can describe the German tradition as *conceptual and theoretical*, and the Anglo-American tradition as *practical and procedural*. This difference is illustrated by arguments concerning the meaningfulness of a differentiation between justification and excuse.

For example, Jerome Hall admits that justification and excuse "have long been parts of everyday speech" and that they had been used throughout Anglo-American law "since Bacon's 1630 treatise on the common law."[5] Nevertheless, he argues that this differentiation has no relevance in criminal law, chiefly because "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."[6]

Such an argument, oriented to procedure and results, is unconvincing for the German criminal law tradition. It is only persuasive—although then extremely so—when one focuses on the jury and analyzes the possible result of procedure in a bipolar scheme of acquittal and conviction. Then both justification and excuse are unquestionably "absolute defenses," and any ordinary distinction between the two is legally irrelevant. The German tradition, on the other hand, would in any case work out the distinction that is conceptually possible and normally made in ordinary language between justification and excuse, if it can be relevant to evaluative differences.[7] Although criminal proce-

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supra note 2, at 641-645.

4. G. FLETCHER, *supra* note 1, at 759-875; *see also* Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 199, 213-30 (1982).

5. Hall, *supra* note 2, at 639.

6. *Id.* at 644.

7. *See infra* notes 18-35, 63-76 and accompanying text.

dure does not, in practice, require a theoretical distinction, this has not hindered criminal law scholars in working one out where it was conceptually and systematically possible and enlightening.[8]

A further reason why criminal law systems do or do not view a differentiation between wrongdoing and culpability as necessary may be found in the concept these systems have of crime. I distinguish between an *"analytical"* and a *"holistic" concept of crime.* A differentiation between wrongdoing and culpability suggests itself only when the concept of crime is analytically structured. If the concept of crime is divided, as in the German criminal law system, into "levels of imputation,"[9] a distinction between wrongdoing and culpability will emerge of its own accord.

The American criminal law system is fundamentally different:

> 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 a harm of arson unless that fact is seen in the light of the culpability of the actor . . . . When guilt is ignored, analysis is focused on a fact or event that is not a penal harm . . . .[10]

This concept of crime unites objective and subjective, generalized and individualized elements. Without the keystone of mens rea, the structure of criminal concepts cannot be welded together. This keystone—and not some type of differentiation between wrongdoing and culpability—allows a crime to emerge as a phenomenon of criminal law.

The German tradition, on the other hand, divides the concept of crime into progressive levels of imputation.[11] Thus, the harm caused by an earthquake may be the first step in a theoretical inquiry into criminal behavior when, for example, a responsible person neglected to take precautions against this natural catastrophe. It is no different if an insane person is the cause of harm. Mens rea is only one of many elements in the concept

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8. W. HASSEMER, THEORIE UND SOZIOLOGIE DES VERBRECHENS: ANSÄTZE ZU EINER PRAXISORIENTIERTEN RECHTSGUTSLEHRE 12-15 (1973).

9. *See infra* notes 26-27 and accompanying text.

10. Hall, *supra* note 2, at 645.

11. *See* W. HASSEMER, EINFÜHRUNG IN DIE GRUNDLAGEN DES STRAFRECHTS § 22 (1981).

of crime, and it is neither the first nor the most important element; it is not the glue which holds the concept together.

It is easy to see that this concept has an internal connection with the theory of *legal realism.* In contrast to the continental tradition, legal realism denies the superiority of legal principles (*rechtlicher Entscheidungsprinzipien*) over the courts' actual decision in a particular case. "It is the merit of the common law that it decides the case first and determines the principle afterwards," said Oliver Wendell Holmes.[12] Law is what courts actually do, not what they should do, according to stare decisis. A holistic, non-analytical approach also underlies this concept. The theory of legal realism focuses on the result of a decision-making process, not on its steps or on the legal rules which determine the course of the decision-making process and the correctness of the result. According to legal realism, judges and juries create the principles of their decision; according to the continental tradition, they are subject to those principles. A differentiation between justification and excuse that logically precedes the result of the decision is only possible when the penal system is entrusted with the working out of rules which guide and are fruitful for decision. According to the jurisprudence of legal realism, however, a theoretical and conceptually-oriented system is not favorable.

3. Wrongfulness, culpability, justification, and excuse are well-known concepts used in everyday life, in philosophy and in theology.

It is remarkable that while the United States has produced the best empirical studies on the concept of justification and on the distinction between justification and excuse in everyday life, this distinction has not won broad acceptance there as a criminal law category. These studies, which have recently been intensively discussed in German criminal theory,[13] are based upon early empirical findings by Piaget concerning the development of moral judgment in children,[14] and focus on the manner in which we attribute responsibility in everyday life.

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12. Holmes, *Codes and Arrangement of Law,* 5 AM. L. REV. 1 (1870).

13. Bierbrauer & Haffke, *Schuld und Schuldunfähigkeit,* in 3 SOZIALWISSENSCHAFTEN IM STUDIUM DES RECHTS: STRAFRECHT 138 ff. (W. Hassemer & K. Lüderssen eds. 1978); W. HASSEMER, *supra* note 11, at 204 ff.; W. SCHILD, DIE "MERKMALE" DER STRAFTAT UND IHRES BEGRIFFS 93-96 (1979).

14. J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1932).

In this way, "justification" is viewed as a level of imputation in *American studies of attribution*, and stands in a differentiating relationship to association, commission, foreseeability and intentionality.[15] "Justification" is understood to mean that "anybody would have felt and acted as he [i.e. the justified person] did under the circumstances."[16]

The theoretical distinctions of ordinary language do not, of course, precisely and faithfully represent the differentiation between justification and excuse in criminal law. They are used in different contexts, under different requirements and conditions, and with different objectives. Furthermore, the investigative interest of the social psychologists, who direct their questions to everyday life, is not that of the criminal law jurist. This leads, for example, to the result that various types of justification are not adequately distinguished. Nevertheless, two lessons emerge from this research which are valuable for the criminal jurist. First, in the reciprocal ascription of responsibility in everyday life, people are used to distinguishing different and differentially serious imputations. Second, a distinction exists between a more readily generalized level of justification, and a level of intentionality and foreseeability with respect to which the person of the actor himself, as well as his particular situation, comes into view.

In everyday life, defense against an assault can be justified as "right," while an injury caused, for example, by a child or an insane person simply appears to be "unavoidable." In the first case we renounce attribution by referring to the higher-valued right of the defender; in the second case we renounce it "only" because of a defect of the person acting. In the first case we are inclined to say that the defense—even though it may have been injurious—is acceptable to everyday morals, while in the second case the actor escapes punishment only because he falls (unfortunately) below the standards of ordinary responsibility.

In *philosophical systems* as well, we of course fail to find a completely faithful reflection of criminal law conceptualization. Even so, there is a conceptually differentiated knowledge of the varying prerequisites for justification and excuse. For example,

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15. F. HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS 114 (1958).

16. *See* Fishbein & Ajzen, *Attribution of Responsibility: A Theoretical Note*, 9 J. EXPERIMENTAL SOC. PSYCHOLOGY 149 (1973); Keller, *Rechtfertigung—Zur Entwicklung Praktischer Erklärungen*, in SOZIALE INTERAKTION UND SOZIALES VERSTEHEN 253 ff. (Edelstein & Habermas eds. 1984); Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

Austin's *A Plea for Excuses*[17] formulates distinctions between accident and mistake, between harms that are caused by nature and those that are caused by people, between harmful acts which are good (justified) and harmful acts which are bad (morally unacceptable), but done without responsibility on the part of the actor. This work provides criteria of imputation which are conceived according to the concepts of generalization and individualization, and of objectivity and personalization. Levels of attribution are also identified. Thus, the question of excuse arises only if the actor was able to control the course of causation, and if the harm that occurred has an individual and personal effect. Through the distinction between "good" and "bad" actions, these steps of attribution are also furnished with a method of evaluative rating.

A comparable distinction can be found in Christian theology, especially in Protestant *theology*. This is the distinction between justification and grace in the doctrine of justification. Article 4 of the Augsburg Confession declared that man is freely justified beyond the human merit, by grace ("*gratis*"): "*propter Christum*" and "*per fidem.*" Justification is accordingly not the result of obedience to the law, but is rather a sign of divine grace. The differentiation between justification and grace seems even more clear in the Jewish tradition. At least, it appears that justification is an objective phenomenon, the status of a person who has been accepted by God.

Provisionally, then, we may note that justification and excuse are distinguished in everyday life as well as in philosophy and theology, and that the criteria of differentiation deal with generalization and individualization as well as with objective and subjective personal aspects. At a minimum, this shows that a differentiation between justification and excuse and the manner in which this differentiation is accomplished are part of the everyday human world with respect to which criminal law directs its commands, prohibitions and judgments. It leaves open the question whether, and if so, with what criteria, a criminal law system should adopt the differentiation between justification and excuse. This question can only be answered if one closely examines the marginal political, social, and legal conditions under which different criminal systems operate.

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17. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y 1 (1956-57); *see also* G. FLETCHER, *supra* note 1, at 487.

4. The fact that a criminal system distinguishes between justification and excuse is not conclusive. Whether the distinction is meaningful depends upon variable political, social and legal conditions.

Distinguishing in criminal law between wrongdoing and culpability, and justification and excuse, is not a timeless, natural law-like demand, but rather a *historically changing phenomenon* which depends upon varying cultural preconditions. Numerous earlier and contemporary criminal law systems have evidently had no difficulties in operating without this distinction; they employ functional equivalents, such as mens rea, to assist them in solving their concrete judicial problems. Moreover, the differentiation is, as previously shown,[18] relatively new.

The cultural preconditions under which a differentiation between justification and excuse gains its meaning cannot be treated here in a complete and methodologically satisfactory manner. For that, these preconditions are too long-range and fundamental, and the scholarly experience with comparative criminal law is still too rudimentary. Nevertheless, an investigation of the distinction between justification and excuse initiated in the interest of comparative law must also consider under what conditions a conceptually possible differentiation would be advisable for a criminal system. Therefore, some of these conditions, insofar as perceptible and plausible, should be specified, albeit with reservations due to incompleteness and inadequate methodical safeguards. These conditions are related to the previously named[19] preliminary conditions of criminal law and legal theory.

In general, one can expect a differentiation between justification and excuse when a criminal law system recognizes and uses in practice a differentiated conceptual system of decision criteria; i.e. when criminal law has a complex general part (*Allgemeiner Teil*). The more differentiated the institutions of the general part are, the more intensively the practice of criminal law works to keep these differentiations alive. Because the practice of criminal law works with such differentiations, the probability becomes much greater that one will discover in these differentiations a distinction between justification and excuse. If the general part is less complex, it exhausts itself in the concrete

18. *See supra* notes 1-4 and accompanying text.
19. *See supra* notes 5-12 and accompanying text.

descriptions of offenses, and a distinction between justification and excuse is less probable.[20]

The existence of a general part and the extent of the differentiations which it can contain for the decision criteria of criminal law depend, for their part, on certain preconditions.

One of these preconditions is the *separation of substantive and procedural criminal law.* If substantive criminal law and the law of criminal procedure are severed, then a more analytical and conceptual construction of substantive criminal law, especially in the general part, is promoted. In contrast, a close relationship between substantive and procedural criminal law would more likely favor a result-oriented criminal law system. Only if substantive criminal law, particularly the general part, has a merely limited significance in comparison to the law of criminal procedure—only when it is secondarily important to the law of criminal procedure—can it be argued that "there is no penal difference" in distinguishing between justification and excuse.[21] On the other hand, if substantive criminal law is separated from the law of criminal procedure, the worth of a distinction for the criminal system cannot be measured solely by the result of procedure; rather, its worth can also rest in a substantive penal meaning of the differentiation.

The existence and differentiation of a general part, as well as the separation of substantive and procedural law, may be linked to the degree of *professionalization of the criminal law practitioners and judges.* In the long run, substantive criminal law can only increase in complexity[22] when this complexity can be treated in the process of applying criminal law. This treatment capability increases with a judge's degree of education and professional experience. It also increases with a court's capability and its practice of citing complicated texts and using them as the foundation of its decisions. The conceptual differentiation of a legal system will not survive if it is not extended into practical decision making. Therefore, for example, if *lay judges* are common in criminal jurisprudence, there is less chance of developing

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20. *See* M. FINCKE, DAS VERHÄLTNIS DES ALLGEMEINEN ZUM BESONDEREN TEIL DES STRAFRECHTS 8 ff., 18 ff. (1975).

21. Hall, *supra* note 2, at 644.

22. *See* N. LUHMANN, RECHTSSOZIOLOGIE 136 ff., 210 ff., 221 ff. (2d ed. 1983); N. LUHMANN, AUSDIFFERENZIERUNG DES RECHTSSYSTEMS, AUSDIFFERENZIERUNG DES RECHTS: BEITRÄGE ZUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE 35 ff. (1981).

and using a conceptually-oriented general part in a national legal system.

The significance of a lay judiciary in a national system of criminal law appears, for its part, to be dependent upon numerous cultural and political preconditions. These conditions may, in the final analysis, be analyzed as part of the *social authority of judges and courts*. Further discussion along this line may lead too far from the point. Nevertheless, an aspect should be noted, which, together with chance, develops and gives life to a general part of the criminal law which will guide decisions. This is the degree of *conceptual control* and the extent of the criminal judge's *burden of grounding his decision*.[23] The more readily a criminal judge can persuade with *ex auctoritate* arguments, the less he is bound to working out a conceptual program, and the less his decisions are assessed in terms of their conformity to formulated decision programs, the lower the probability that such decision programs are meaningful. This connection is apparent in the West German criminal law system, for example, in the varying degrees of doctrinal structure with respect to the subsumption of fact situations under the definitions of crime on the one hand and sentencing on the other.[24]

Finally, the existence of a written penal code may also be significant. I believe that a written *penal code* promotes the ability of criminal theory and criminal practice to process complexity in doctrinal theories and in case law.[25] A code allows differentiated and differentiating literary commentary, which organizes the mass of information on court decisions according to the structure of the law. In this way, it simplifies the discovery of information, increases the transparency of a doctrinal system and enables courts to orient themselves in a complex structure.

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23. *See* Damaska, *Versuch zur Rationalisierung der Strafzumessung in den USA*, 93 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 703, 716 ff., 720 ff., 725 ff. (1981).

24. *See* W. HASSEMER, *supra* note 11, at § 15 (II).

25. W. HASSEMER, RECHTSSYSTEM UND KODIFIKATION: DIE BINDUNG DES RICHTERS AN DAS GESETZ, EINFÜHRUNG IN RECHTSPHILOSOPHIE UND RECHTSTHEORIE DER GEGENWART 72 ff., 83 ff. (A. Kaufmann & W. Hassemer 3d ed. 1981); W. HASSEMER, *supra* note 11, at 202 ff.

5. The distinction between justification and excuse is the central concept in a hierarchical (graduated) and normative system of imputation.

One can construe the prerequisites for the attribution of a criminally relevant result (e.g., act, causality, culpability, etc.) so that all count as necessary conditions for attribution. One can also administer all these conditions with equal weight: *conditiones sine quibus non.* This, I believe, is the structure of a system of attribution which considers a distinction between justification and excuse unnecessary. If a positive element is lacking (such as harm, intent, or causation) or if a negative element is given (such as consent, necessity, or insanity), then attribution is excluded. In such a system there is no reason to weigh the elements of attribution; they are all necessary and all carry equal weight.

It is clear that such a system of attribution satisfies all the practical interests of the criminal courts; every case can be clearly decided. It is also clear, however, that such a system neglects two other interests: the interests of the accused and the interests of criminal theory (*Strafrechtswissenschaft*).

It might be possible to argue that an acquittal as the result of procedure (i.e., the judgment that the accused is not guilty) never makes a difference for the *court*: an acquittal is simply an acquittal. But for the *accused*, such equivalence is not always acceptable. For him, it makes a difference whether he was acquitted because he was not the person who killed the victim, because he rightfully killed the victim in self-defense, or because he killed the victim in a state of severe mental distress or in the heat of passion. An acquittal may even contain a partial conviction. The accused has a natural interest in an evaluation and hierarchical organization of the elements of attribution—in an acquittal which burdens him as little as possible. If one takes into account that the maintenance of criminal law is committed to the principle of proportionality and that it must choose the burden which it imposes with an eye to affording the greatest possible protection for the person concerned, it becomes apparent that this interest of the accused is also an interest of the *penal system* itself.

Criminal theory also has an interest in not merely compiling the elements of imputation, but also—when theoretically possible—in differentiating and valuing these elements. Scholarly work on the subjects of crime and imputation is not com-

pleted simply by replicating the expectations of practice; rather, it must outline distinctions when they are possible and meaningful.

These interests demand a graduated system of imputation which differentiates between *levels of imputation.* Levels of imputation have a character which is not merely analytical, but also normative. Such a system of imputation might appear as follows:

On the first level (*action*), all events which are not somehow controlled by a human being are eliminated from the system of penal attribution. The second level (the *elements of the offense: Tatbestandmäßigkeit*) excludes from attribution all harms which, although caused by human behavior, have no relevance to the criminal law. The third level (*justification: Rechtfertigung*), considers harms which are relevant to criminal law, but excludes some of these harms from the system of imputation where there was an objective and legitimate interest of greater importance in committing the harmful act. At the fourth level (*excuse: Entschuldigung*) the relevant consideration is whether attribution must fail because, for example, the act rested on an impulse which the actor, in his situation, could not direct and control.[26] A fifth level of attribution might also be added: whether the wrongful and inexcusable act should remain unpunished because the actor himself has already suffered enough through his act (the principle of *poena naturalis*) or because, in this case, the objectives of a criminal sanction are impossible to realize.[27]

That is—highly abbreviated and without consideration of details—the German concept of crime. Two characteristics in this system are important for the distinction between justification and excuse:

First, the system is *hierarchically* structured. Every "later" level of imputation presupposes the earlier levels; if an earlier level is missing, it is contrary to the system to continue the investigation on a later level. Hence, the question of a possible excuse should only then be posed when the question of justification has already been discussed and it has been determined that none is present. Second, this system of imputation is *normative.* The "later" the imputation fails, the greater the burden on the

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26. *See* Eser, *supra* note 2, at 628.

27. *See* W. NAUCKE, GRUNDLINIEN EINER RECHTSSTAATLICH-PRAKTISCHEN ALLGEMEINEN STRAFTATLEHRE 38 ff. (1979).

person concerned. Thus, the natural interest of the accused is directed toward excluding imputation at the earliest possible level. For example, the person who has not committed the crime at all is less burdened than the person who, even though he had a justifiable interest in so doing, actually did cause the harm; the latter person has a lesser burden of responsibility than the person who cannot rely upon an objective interest, but only upon some personal defect.

II. CRITERIA

6. *The distinction between justification and excuse must be based on the principles of gradation and normativity.*

The categories of gradation and normativity allow an initial insight into the meaning of a possible distinction between justification and excuse: in the criminal context, justification is, in relation to excuse, more fundamental and less burdensome for the person concerned.

When we more closely inspect the grounds for justification and excuse (as recognized, for example, in the German Criminal Code),[28] it becomes readily apparent that they may be not only graded in levels of imputation, but also *valued* on these levels. There is a normative difference between the right to exercise self-defense against a wrongful assault,[29] and refraining from imputation because the person being assaulted overstepped the limits of adequate force in self-defense through confusion, apprehension, or fear (proportionate and disproportionate self-defense).[30] From the standpoint of valuation, it is not an equivalent violation when a person defends a better right out of necessity[31] and when the person, by repelling a danger, cannot rely upon such a better right.[32] It is not the same violation of a norm, with respect to offenses such as defamation, when the injuring party can claim that he was safeguarding legitimate interests[33] and when he can only advance the argument that the

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28. STRAFGESETZBUCH [StGB] (W. Ger.).

29. *Id.* § 32.

30. *Id.* § 33. [In the common law world, the notions of proportionate and disproportionate self-defense are sometimes referred to respectively as perfect and imperfect self-defense.]

31. *Id.* § 34.

32. *Id.* § 35.

33. *Id.* § 193.

boundaries of his rights were not clear to him and that he would not have been able to avoid this error.[34]

The principle of *gradation* is equally clear and significant. Within a graded system of imputation, it is necessary to form the gradations into an ordered sequence and, for example, to inquire into the question of the elements of a disproportionate but excused self-defense only when it has first been established that the boundaries of legitimate self-defense were in fact overstepped.[35]

This does not explain the criteria by which the imputation levels of justification and excuse can be differentiated. It is only preparatory to such an inquiry. At this point, it can be seen that there are differences in gradation and valuation, but it is not yet clear precisely what these differences are based upon.

7. Justification and excuse cannot be distinguished on the ground that justified acts are "legal," while merely excused acts are not. Rather, the differentiation rests on the basis of a more fundamental "ought" criterion.

Some German literature[36] suggests that justification and excuse can be distinguished on the basis that justified acts are "*legal.*" This criterion is at best misleading, and is possibly unusable. If one understands it in the sense that a justified act is in accordance with the law while a merely excused act is not, one falls into contradictions when the law, as in the case of the German Criminal Code, also formulates grounds for excuse. In this setting, an act which is merely excused is also "legal." Even an injury inflicted in a situation of excusing necessity accords with penal provisions. The criminal code "allows" not only a defense despite injury to legally protected interests in the case of necessity, but also an injury to such interests when there was an unavoidable mistake of law. Considered at the level of statutory commands, both justification and excuse are statutorily designated forms of excluding imputation. The American criticism of a distinction between justification and excuse[37] is thus correct in

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34. *Id.* § 17.

35. *Id.* § 32.

36. *See* Eser, *supra* note 2, at 629: "The new (German) Code leaves no doubt that an act, although fulfilling the statutory elements of a penal provision, is held 'not unlawful' (*nicht rechtswidrig*) if supported by a rule of justification. In short, a justified act is deemed legal."

37. *See* Hall, *supra* note 2, at 644 (citing Glazebrook, *The Necessity Plea in English*

arguing that a criterion of the distinction cannot lie in the conformity of the given act with statutory elements of the crime which "allow" this act or exclude imputation.

Yet, a criterion which deals with legal norms does seem to underlie the cases of justification and excuse that have just been differentiated.[38] If it makes a difference whether a person has acted inside or outside of the boundaries of justified self-defense (even if in confusion, apprehension, or fear), then one could provisionally circumscribe this differentiation so that actions in self-defense "*should be,*" in contrast to an overstepping of the boundaries of self-defense (even when it is statutorily allowed, as under section 33 of the German Criminal Code). The person who justifiably acts in self-defense thereby also defends the validity of the legal system.[39] In this respect, the act "*should be.*" On the other hand, the actor who oversteps the limits of self-defense, according to the provisions of section 33, is acting in accordance with a statutorily formulated reason for excluding imputation. One cannot say, however, that he is defending a legal interest: that his act, in this respect, "should be."

This also is only a provisional perspective. Nevertheless, it demonstrates that a distinction between justification and excuse cannot be supported solely within the scope of statutory law. Rather, the distinction must have recourse to an "ought" criterion which stands behind the statutory provisions and is the basis for them.[40]

8. The "ought" criterion (as the basis of a distinction between justification and excuse) does not follow from a purely inductive conclusion. In particular, it does not result from regulations concerning a third party who intervenes in justified or excused acts.

Whether a third party may aid a justified or excused act, whether he has the right to aggressively defend himself against such an act, is an important criterion in the distinction between

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Criminal Law, 30 CAMBRIDGE L.J. 97 (1972)).

38. *See supra* notes 28-35 and accompanying text.

39. *See* E. SCHMIDHÄUSER, STRAFRECHT: ALLGEMEINER TEIL; LEHRBUCH, Marginal No. 9/86 (2d ed. 1975).

40. *See* Kaufmann, *Gesetz und Recht,* in FESTSCHRIFT FÜR E. WOLF 357 ff. (T. Würtenberger, W. Maihofer, A. Hollerbach eds. 1962); A. KAUFMANN, RECHTSPHILOSOPHIE IM WANDEL: STATIONEN EINES WEGES 131 ff. (2d ed. 1984).

justification and excuse.[41] The German discussion deals with this question under the heading of "*test of necessary defense*" (*Notwehrprobe*),[42] thereby indicating that two acts such as attack and self-defense which are aggressively opposed to each other in a particular situation cannot be simultaneously justified.[43]

It might be possible to derive criteria for a distinction between justification and excuse from the regulations which apply to the right of third parties to aid or defend against the justified or excused act. Since clear decisions must be made concerning the rights of the third person to participate in the given conflict, such an approach must promise clear criteria for a distinction between justification and excuse. At the same time, however, such an approach would not be methodically justified; it would be setting the cart before the horse.[44]

The decision concerning the rights of third persons to take sides with one of the parties in a conflict is the consequence of, but not the prerequisite for a distinction between justification and excuse. The rights of a third person who is indirectly involved in a conflict can only be determined when the rights of the persons who are directly involved in the conflict have been established. The privilege of third persons to aid one of the participants to a conflict and to aggressively oppose the other, is derivative (*akzessorisch*) from the rights of the directly engaged participant himself. The privilege of action which third parties have is, with regard to a distinction between justification and excuse, derivative rather than constitutive.

It appears that even if a legal system does not explicitly recognize the distinction between justification and excuse, situations in which third parties intervene in a conflict still require such a distinction, if only an implied one. In every legal system there are situations which absolutely require a decision concerning the boundaries of the right to act aggressively. This can be studied, to some extent, in American cases concerning prisoners'

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41. *See infra* notes 92-97 and accompanying text.

42. *See* A. MONTENBRUCK, THESEN ZUR NOTWEHR 78 (1983); H. WAGNER, INDIVIDUALISTISCHE ODER ÜBERINDIVIDUALISTISCHE NOTWEHRBEGRÜNDUNG 52-54 (1984).

43. *See* G. STRATENWERTH, STRAFRECHT: ALLGEMEINER TEIL I; DIE STRAFTAT Marginal No. 424 (3d ed. 1981).

44. *See* Greenawalt, *supra* note 16, at 1919 ff., 1927.

escape from prison where the prisoners had been subjected to severe sexual assaults.[45]

Deciding whether a jailer is justified in preventing the escape of a prisoner who had been assaulted by other prisoners, and who had no other way of avoiding the assaults, requires that one first determine the "right" of the assaulted prisoner to escape from prison in this situation. The privilege of the jailer to prevent the escape depends upon the duty of the prisoner not to use escape from the institution as a means of defense against such assaults. The criteria which are developed in a criminal system to describe the prison officer's right to prevent escape (that the prisoner did not see any other way out of the situation other than escape, that he did not himself provoke such assaults, etc.) are, at the same time, criteria for the "right" of the prisoner to escape. If the prisoner has this right, it would be contradictory to grant the prison officer the right to prevent the escape.

Thus, a criminal system may also develop which does not explicitly recognize a differentiation between justification and excuse, but necessarily has *implied criteria* for situations involving the participation of third parties in conflicts, which amount to a distinction between justification and excuse. The rights of a third person cannot be determined without first deciding which of the persons involved in the conflict has the "right." The assumption that one can derive the borderline of a distinction between justification and excuse from the limits of the right which third persons must observe when participating in a conflict is therefore well-grounded in and of itself, but is incorrect in terms of its method. It is based on the position that every legal valuation of the privilege of third parties in such conflicts necessitates at least implied and preliminary decisions concerning the rights of the persons directly involved in the conflict. However, it would be *methodically correct* first to delineate the rights of the participants in the conflict, and then to deduce therefrom the rights of third persons to aid one of the participants.

9. The "ought" criterion does not follow from morals.

Kent Greenawalt's work concerning the distinction between justification and excuse argues at many points on the basis of

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45. *See* G. FLETCHER, *supra* note 1, at 811, 829 (discussing People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974) and People v. Harmon, 53 Mich. App. 482, 220 N.W.2d 212 (1974)).

moral principles. For example, one finds a type of moral justification that is related to a legal justification from which it could be derived.[46] The question of justification within legal systems is discussed in close connection with moral points of view.[47] Even if—or better yet, precisely because—it is not sufficiently clear what is meant by "morals" or "morally," moral principles cannot be viewed as useful for establishing a foundation for the sought-after "ought" criterion, or for determining the borders between justification and excuse.

Entirely apart from the fact that the *concept "moral"* can mean all things to all people (one need think only of the difference between ethics and morals, or between individual and social morals), one is faced with the difficulty of establishing the validity of moral principles before they are useful as legally relevant or as a possible basis for legal regulations. This is a problem similar to the problem of establishing *natural law.*

As investigations of *social norms* and their legal meaning demonstrate,[48] every society has different morals with different contents. Legal norms are distinguished from social norms chiefly by their claim to ubiquitous validity. Social norms do not assert such universality; rather, their validity is limited to particular *reference groups.*[49] Reference groups of juveniles have different concepts of what is moral than adults do. Moreover, within youth reference groups one finds social norms that differ from those of other groups. For example, youths attending a private high school have different social norms than youths living in a slum area. "The" human morals or "the" American morals do not exist. The law, on the other hand, demands rules of behavior which claim a *ubiquitous validity* and which may therefore consider moral concepts within a society only on a marginal basis, as when considering mistakes of law which result from different social norms.

In any event, individual morals lack a quality which is absolutely constitutive for the law itself: the institutional quality, or rather, the *institutionalization* of principles of behavior. In par-

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46. *See* Greenawalt, *supra* note 16, at 1898 ff.

47. *Id.* at 1902, 1913 ff.

48. *See, e.g.,* Endruweit & Kerner, *Unrechtsbewubtsein und soziale Norm,* in 3 SOZIALWISSENSCHAFTEN IM STUDIUM DES RECHTS: STRAFRECHT 67 ff., 70 ff. (W. Hassemer & K. Lüderssen 1st ed. 1978).

49. *See* Hassemer & Hart-Hönig, *Generalprävention im Strabenverkehr,* in SOZIALWISSENSCHAFTEN IM STRAFRECHT 230 ff., 251 ff. (Hassemer ed. 1984).

ticular, this means that rules of proper behavior are necessarily changed as soon as they are institutionalized, or executed through social institutions (such as the home, schools, and criminal courts). In these cases rules of proper behavior are bound to processes of *formalization*,[50] which means, for example, that penally reinforced rules of behavior must be formulated so as to be provable in criminal procedure, and consequently must be susceptible to empirical observation. This explains, for example, the fact that *motives* for behavior are of great importance for moral rules, while they are only marginally important for legal judgment of behavior.

Furthermore, one cannot simplify the relationship between moral and legal rules of behavior by bringing the regulative scope of morals and law into an overall context such that morals circumscribe the larger scope, and law the narrower. Certainly there are types of behavior which are morally reprehensible but are not legally forbidden, since moral systems, in this respect, make stricter demands on people. One need only think of lies and deceit in the interpersonal area which have no pecuniary results. On the other hand, there are also opposite examples, as may be shown by the legal concept of *civil disobedience* in both German and American law.[51]

Finally, it must be remembered that the criteria of moral systems, including everyday morals and the norms of reference groups, are distinguished from the criteria of legal systems, especially those of criminal law. Systems of moral valuation also typically contain a *positive scale* which defines degrees of merit or approval, while legal rules, especially in criminal law, sensibly limit themselves to defining where the circle of permissible behavior ends, and how degrees of impermissible behavior can be distinguished from one another.

Because of these considerations, *guilt feelings* and pangs of conscience, which have been suggested as criteria in the discussion of justification and excuse,[52] are important in the area of moral judgment, but are unsuitable or even dangerous in the

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50. *See* W. HASSEMER, *supra* note 8, at 127 ff., 294 ff.

51. *See* Hassemer, *Ziviler Ungehorsam—ein Rechtfertigungsgrund?*, in FESTSCHRIFT FÜR RUDOLF WASSERMANN 325 ff. (Ch. Broda, E. Deutsch, H.-L. Schreiber, H.-J. Vogel eds. 1985).

52. *See* Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1363 (1979); Greenawalt, *supra* note 16, at 1921.

area of legal judgment. Criminal law may not depend upon such psychic phenomena; above all, it may not derive any attributions or imputations of guilt from them. It must, of course, take notice of them, but it must assess them from a distance. In particular, this means that morally significant feelings of guilt must be critically investigated in order to determine whether they provide the source of the felt need to demand punishment, which, on the basis of deep psychic processes, runs directly counter to the rules of attribution which are valid in criminal law.[53]

10. The "ought" criterion does not follow from a distinction between generalizing or objective criteria (justification) and individualizing or subjective criteria (excuse).

Justification is commonly associated with generalized/objective factors, and excuse with individualized/subjective factors.[54] This expresses the idea that an action can never be justified when the actor relies only upon circumstances which are not amenable to generalization (i.e. individual) and which concern only the actor himself (i.e. subjective). In other words, justification requires behavioral situations and judgment criteria which may be generalized beyond the actor.

This argument is neither entirely false nor entirely true. Not only are such differentiating criteria inadequately defined (especially with regard to a difference between "individual" and "subjective," on the one hand, and "general" and "objective," on the other), but the characterization of "general" and "objective" describes the justified action only vaguely, at best.[55]

Of course, these criteria of the distinction between justification and excuse, though deemed insufficient in this thesis, may still provide a *first approach* to this distinction, and they also indicate significant points which are connected with such a distinction.[56] Thus, important types of situations involving justification (such as self-defense or the choice of the lesser evil) always have an "objective" and "superindividual" character; they describe the *objective "may"* that lies beyond every consideration of the person who acts in the situation of justification. In

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53. *See* T. REIK, GESTÄNDNISZWANG UND STRAFBEDÜRFNIS: PROBLEME DER PSYCHOANALYSE UND DER KRIMINOLOGIE (1st ed. 1971).

54. *See supra* notes 26-27 and accompanying text; Eser, *supra* note 2, at 628.

55. *See* Greenawalt, *supra* note 16, at 1915 ff., 1918.

56. *See supra* notes 26-27 and accompanying text.

the same manner, important grounds for excuse (such as insanity or unavoidable mistake of law) cannot be constructed and understood without *consideration of the person* whose behavior is concerned.

One might even say that the capability of generalization (which is expressed in the terms "objective" and "general") in a graded and normative system of imputation[57] indicates that criteria which are capable of being generalized may be more readily established at an earlier (justifying) level of imputation rather than at a later (excusing) level.

However, the suitability of the differentiating criteria criticized here is limited. Its usefulness ends at the point where the inner structure of grounds for justification and excuse are considered. At that point, it becomes apparent that grounds for justification cannot be constructed without considering the actor himself, and that grounds for excuse do not truly extend themselves to the actor, but merely remain at the level of objective and generalized descriptions.

a. Justification. A system of criminal law which considers not only the externally produced results of an action, but also the inner participation of the actor, to the extent it is externally evidenced,[58]—in other words, every modern system of criminal law—cannot condone as justified a "chance" self-defense or the correct choice of the lesser evil where the actor was unaware of the choice. Whoever defends himself against a wrongful assault or protects a more highly valued legal interest at the expense of a lesser legal interest must also individually and personally realize what he is objectively doing. Whoever aids another person in need must be aware that the other is in need. A criminal law system which excludes responsibility for chance occurrences cannot tolerate an "accidental" justification; rather, it must incorporate something like a "*desire to defend*" or a "desire to rescue" in its scheme of justification.[59] By so doing, however, it has added individual/subjective factors to the objective level of justification. This is more clearly substantiated by a further impor-

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57. *See supra* notes 28-35 and accompanying text.

58. W. HASSEMER, *supra* note 11, at 199, 203, 206.

59. *See* Spendel, *Gegen den "Verteidigungswillen" als Notwehrerfordernis*, in FESTSCHRIFT FÜR PAUL BOCKELMANN 245 ff. (A. Kaufmann, G. Bemmann, D. Krauss & K. Volk 1979); A. SCHÖNKE, H. SCHRÖDER, T. LENCKNER, P. CRAMER, A. ESER & W. STREE, STRAFGESETZBUCH: KOMMENTAR § 32, Marginal No. 63 (21st ed. 1985) [hereinafter A. SCHÖNKE & H. SCHRÖDER] (P. Cramer).

tant ground for justification: *consent* to the damage or injury. When an object of legal protection is in question, with respect to which only one person is authorized to make decisions or take action, German criminal law usually[60] accepts consent as a justification even if the person's decision appears irrational. The consenting decision need not be reasonable; it is sufficient if it appears to be autonomous. Consequently, this type of justification invariably has a subjective/individual core.

b. Excuse. Grounds for excuse cannot be adequately described with individual/subjective criteria. The chief reason for this is that criminal law—with minor qualifications in the area of sentencing—neither has nor wishes to have access to the individual as such. This may be deduced from the statutory definitions which apply to subjective attribution. Under the German Criminal Code,[61] the definition of the insane person, the family member or the mistaken person is not the description of an individual, but rather that of a *role* in which the individual is acting. Such statutory categorizations are not individual/subjective, but are more a description of a certain group of actors, with personality characteristics which are capable of being objectivized, as in the case of offenses by public officials.[62] The criminal laws describe individuals only in generalized, superindividual concepts. It is then the duty of the finder of fact to extend these descriptions to a concrete person and his situation.

11. The sought-after "ought" criterion follows from a distinction between norms and penal provisions. An act is justified if it is in conformity with norms and the penal provision; it is merely excused if it conforms to the penal provision, but violates a norm.

Anticipations of this thesis may be found in earlier definitions of crime, particularly in the works of Feuerbach and Binding. In the philosophy of criminal law which was influenced by the Enlightenment, crime was not designated as the violation of a duty ("coercive duty"), but rather as the violation of the rights of other persons.[63] Feuerbach defined a crime as an "action

60. StGB § 216, 226a; *see also* W. Hassemer, *supra* note 8, at 187.
61. *Id.* §§ 17 (mistake), 20 (insanity), 35 (family members).
62. *Id.* § 331 ff.
63. *See* W. Hassemer, *supra* note 8, at 27, 34.

which is contrary to the *rights of another.*"[64] The provisions of criminal statutes were, at first, the logical reflection of such rights, and the punishability of an act depended upon the existence of these rights, not merely on that of a duty. An action was acceptable, among other things, when it "was determined by a legal ground" ("*Handlung . . . durch einen Rechtsgrund bestimmt wird*")[65] or "when the law which was the object of the violation was suspended by a special legal ground" ("*wenn das Recht, welches die Verletzung zum Gegenstand hatte, durch einen besonderen Rechtsgrund aufgehoben war*").[66]

The process of development in the concept of crime[67] or in the concept of culpability[68] cannot be traced here. Of sole importance for our purposes is the fact that justification of actions is determined at a normative level which precedes the penal statute, a level which penal statutes must presuppose. Only at this level can the sought-after "ought" criterion for a distinction between justification and excuse be found. The distinction of statutory elements of an offense, on the one hand, and norms which precede them, on the other, also explains why criteria are sought for a determination of justified behavior in morals or natural law.[69] In both cases, it concerns a level which precedes positive law.

Binding's theory of norms[70] contains a further preliminary answer to the question of the "ought" criterion which can substantiate a distinction between justification and excuse. Although Binding did not distinguish between wrongdoing and culpability, he did separate the concepts of "*norm*" *and* "*penal provision*" and thus opened the way for a more profound under-

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64. P. FEUERBACH, LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS § 21 (K. Mittermaier 14th ed. 1947) (emphasis added).

65. *Id.* at § 32.

66. *Id.* at § 33; *see also* R. VON HIPPEL, 2 DEUTSCHES STRAFRECHT. DAS VERBRECHEN. ALLGEMEINE LEHREN 184-85 (1930).

67. *See, e.g.*, F. SCHAFFSTEIN, DIE ALLGEMEINEN LEHREN VOM VERBRECHEN IN IHRER ENTWICKLUNG DURCH DIE WISSENSCHAFT DES GEMEINEN STRAFRECHTS 63 ff. (1930); R. MOOS, DER VERBRECHENSBEGRIFF IN ÖSTERREICH IM 18. UND 19. JAHRHUNDERT: SINN- UND STRUKTURWANDEL (1968); Zippelius, *Die Rechtswidrigkeit von Handlung und Erfolg*, in ARCHIV FÜR DIE ZIVILISTISCHE PRAXIS 157, 390 ff. (1958-1959).

68. *See, e.g.*, H. ACHENBACH, HISTORISCHE UND DOGMATISCHE GRUNDLAGEN DER STRAFRECHTSSYSTEMATISCHEN SCHULDLEHRE 19 ff. (1974).

69. *See supra* notes 46-53 and accompanying text.

70. 1 K. BINDING, DIE NORMEN UND IHRE ÜBERTRETUNG 44 ff. (4th ed. 1922); *see also* A. KAUFMANN, LEBENDIGES UND TOTES IN BINDINGS NORMENTHEORIE: NORMLOGIK UND MODERNE STRAFRECHTSDOGMATIK 3, 36 (1954).

standing of a possible distinction between justification and excuse.[71] A comparable distinction is found in Greenawalt's description of the justified action as "*warranted action*" and the excused action as "unwarranted action for which the author is not to blame."[72] Translated back into Binding's language, "warrant" would be the norm, and the grounds for non-punishment of the actor would be found in the statutory elements of the offense.

A distinction between justification and excuse, therefore, cannot be found in the sphere of penal provisions;[73] rather, it extends into the sphere of norms which are the foundation of these penal provisions and provide a basis for them. The norms formulate the central goals, which penal laws are erected to protect. In our society, examples of these norms include allowing defense of a more highly valued legal interest at the expense of a lesser one, or prohibiting killing an innocent person, even if so doing would save the life of another innocent person (the prohibition of weighing one life against another). A justified action is in accordance with these norms in that it, for example, protects the more highly valued legal interest in situations of self-defense or necessity. *Justification defines the sphere of the normative order in a society.*

Excuse indicates the limits within which a society, through criminal sanctions, demands obedience to this normative order. These limits are apparent in criminal excuse provisions [*Schuldausschließungs- und Entschuldigugsgründen*]. On the level of excuse, one finds permission to abandon the sphere of the normative order in situations in which obedience to the norm would impose an excessive burden on the actor.[74] An excused action is thus a violation of the norm but not of the penal provision. *Excuse marks the limits within which behavior by citizens in accordance with norms may be expected.*

Both justification and excuse are subject to *social change.* Neither the sphere of a society's fundamental norms, which determines the limits of justification, nor the particular limits

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71. *See* Eser, *supra* note 2, at 625.

72. Greenawalt, *supra* note 16, at 1927.

73. *See supra* notes 36-39 and accompanying text.

74. That a reasonable excuse is given does not change the fact that the excused act violates normal conduct; the penal law merely excuses the violation. For this reason the violation remains a "special permissive act" and a reason for justification in the eyes of penal dogmatists. *Cf.* A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 52, Vorbemerkungen, § 32, Marginal No. 4.

within which behavior of citizens which deviates from norms is still tolerated, which determines the limits of excuse, can be determined without reference to the historically variable "*normative understanding*"[75] of society. From this, it may be concluded first that the criterion for a distinction between justification and excuse must be fundamental as well as abstract. Furthermore, a consideration of social change and its consequences in criminal law shows that this proffered criterion for a distinction is both fruitful and plausible.

This should be briefly illustrated both for the sphere of justification and for the sphere of excuse. In my estimation, the most important changes in the sphere of justification in recent times have been the *"social-ethical" restrictions* on the right of *self-defense.*[76] Roughly stated, these changes restrict the right to exercise self-defense against an unlawful assault when the defender, because of "social-ethical" factors, has the duty to take his particular relationship to the aggressor into consideration. These restrictions may be based upon social closeness (marriage), upon diminished social competence of the aggressor (insanity) or upon the fact that the defender himself was at least partially responsible for the conflict (provocation).

The fact that the more recent theory of criminal law works out such duties of the defender with regard to the aggressor and extracts from them consequences in criminal law doctrine is a manifestation and consequence of a change in the sphere of fundamental social norms. A criminal law system which rejects such considerations in the sphere of criminal law has an extremely different idea of man and has an entirely different view of the manner in which everyday violent conflicts between private citizens are to be solved. Such a criminal system follows a *"liberal" pattern*, which prefers not to intervene in such private conflicts, leaving these conflicts to their own dynamics as much as possible.

In contrast, a criminal law which elaborates "social-ethical" restrictions follows a *"social" pattern.* It tends to subject private conflicts to penal evaluation and control at an early stage and to intervene in such conflicts with the intent of "humanizing" them or bringing them into conformity with the law. A change in the

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75. *See* W. HASSEMER, *supra* note 8, at 25 ff., 151 ff., 221 ff.

76. *See* Hassemer, *Die provozierte Provokation oder über die Zukunft des Notwehrrechts*, in FESTSCHRIFT FÜR PAUL BOCKELMANN 225 ff. (A. Kaufmann, G. Bemmann, D. Krauss & K. Volk eds. 1979).

intended concerns of criminal law is only superficially the basis for "social-ethically" based restrictions of violent conflicts. These intended concerns are, for their part, controlled by a more fundamental normative change concerning the "fairness" of private management of conflicts. Such fairness is determined with regard to proportional reaction by the person who is being assaulted, i.e., with regard to the standards of sensibility and consideration which may be expected of this person.

In the sphere of excuse as well, changes may be easily discerned through the changes in normative social understanding, and the limits of excuse vis-a-vis justification can be plausibly determined. In this way, an expansion of *mental incapacity* (German Criminal Code section 20) or *unavoidable mistake of law* (section 17) may be understood as a result of the changing social standards toward the normative behavior of individuals. Such changes in the sphere of excuse have nothing to do with the sphere in which what is "right" and what "should be" are debated (in other words, a debate concerning the sphere of norms). Rather, they indicate a changed conception of the conditions under which norm violations should be tolerated and behavior conforming to the norm may be expected.

On the other hand, in a criminal system which excludes mistake of law as a legal excuse or which restricts mental incapacity to an extremely limited group of defects, the norms (i.e. that which is "right" and socially expected) remain unaltered. In such a criminal law system, the demands on the person who has violated the norm are different. Such a system also expects norm-conforming behavior from those who have normatively erred or who are suffering under severe mental deficiencies. All of these factors in the sphere of excuse focus on the *limits of tolerance for norm violations*. If these limits are extended (as in sections 17 and 20 of the German Criminal Code), this indicates an expanded tolerance for violations, but not a relative shrinkage in the sphere of fundamentally social norms. A shrinkage could only be presumed if an alteration in the realm of justification were involved.

III. CONSEQUENCES

12. A mistake of fact as such can never be the basis for justification. Whether it may be the basis for excuse depends upon whether or not the actor could have avoided it.

The clarity and the usefulness of a distinction between justification and excuse is most apparent when the actor does not completely understand the factual circumstances of the situation in which he acts. An example is the situation in which he is a third party intervenor who intends to aid another in need, but unavoidably (i.e., reasonably) mistakes the roles of aggressor and defender.[77] These situations are complicated because, on the one hand, they necessitate a connection between justification and wrongful negligence, but on the other hand, they demand a distinction between mistake of fact and reasonable conduct.[78]

If one speaks of justification when the injurious conduct is in accordance with norms which underlie the statutory elements of the offense,[79] it is clear that mistake of fact and justification are incompatible. From the normative standpoint, a mistake in perception is a circumstance which deviates from fundamental normative expectations and which, precisely for that reason, does not fulfill the presupposition that "members of society expect, indeed hope, that other persons placed in the same position will act similarly."[80] Even if the actor took into account all available correct perceptions, there is still the *mistake*, from the norm's point of view, of an unfortunate *deviation from expected behavior*, and the action based upon this mistake can only be excused, not justified. In this connection, it should make no difference whether the error extends to one of the elements of the crime itself (the victim who has been killed is not an animal, but a person) or whether the error concerns one of the elements of an otherwise justified situation (the actor makes a mistake concerning the elements of an "assault" which would justify aid to a person in need). In both cases, the actor is disoriented concerning the factual presuppositions of his conduct, and is thus not in a position to appreciate the legal significance of his conduct.[81]

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77. *Cf.* Greenawalt, *supra* note 16, at 1919.

78. Taken together, these propositions conflict with the propositions stated in notes 77-91 and accompanying text.

79. *See supra* notes 63-76 and accompanying text.

80. Greenawalt, *supra* note 16, at 1899.

81. Error about the factual circumstances in relation to justification cannot be han-

If the actor is also to *blame* for the *mistake*—in other words, if the mistake occurred because the actor did not do everything in his power to avoid the mistake—then the harm which occurred as a result of the mistake is not only unjustified, but is also unexcused. Whether criminal liability results therefrom depends upon whether a penalty is provided for such avoidable harms. *Justification and negligence* come into contact with each other at this point. The *sedes materiae,* or critical element of such cases of mistake does not lie in the differentiation of justification and excuse, but rather in the theory of negligence.

13. Mistake of fact must be distinguished from "correct" prognosis and reasonable behavior. Decisions which are made lege artis *are amenable to justification.*

Under the heading of "mistake of fact,"[82] Greenawalt discusses problems of distinguishing between justification and excuse in a certain case[83] whose central problem only appears to be in the area of justification and excuse. Actually, however, the problem lies in the area of negligence (and within this area, involves the problem of an objective violation of a duty of care). To judge from the way the case is described, in this area "mistake" is only superficially concerned; the case is actually concerned with prognoses concerning reasonable behavior, or *lege artis* decisions with unexpected results: the wind blows "in a wholly unexpected way."[84] The "wrong" decision was based upon "the most advanced techniques for predicting."

Under these conditions, the decision in question was not wrong, but the exact opposite of a mistake. When, in a given situation, every possibility was exhausted in an effort to avoid the "mistake" and no other person could have made a "mistake"-free decision, then this decision has been made *lege artis.* The problem with such situations lies in an unavoidable *prognosis,* and must be distinguished from the problem of mistake.

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dled differently than an error of fact. *Cf.* A. SCHÖNKE & H. SCHRÖDER (P. Cramer), *supra* note 59, at § 16, Marginal No. 13 ff.

82. Greenawalt, *supra* note 16, at 1907 ff.

83. *Id.* at 1908-11.

84. I read "wholly unexpected" as "unexpectable;" only then is one confronted with the problem of correct prognosis. If the situation is "unexpected" and yet "expectable," then the situation described *supra* in notes 77-81 and accompanying text exists.

Every prognosis is an *ex ante* decision, and the correctness of such a decision can only be judged *ex ante*.[85]

In situations concerning an inescapable prognosis, behavior according to norms, or "warranted action," is not that which is correct in result, but rather that which is correct at the time of the decision. That which is humanly possible is here limited to a methodically correct consideration of all relevant and available information. Neither in everyday life nor in ethics nor in law can one demand more than this. Expectations which exceed the possible behavior for a person in the given situation contravene the fundamental principle of *ultra posse nemo obligatur*: no one is expected to do more than he possibly can do. More stringent expectations thus oppose the norms which are the basis of justification. To the extent that the further conditions of correct behavior were given in the above scenario, the decision in question was justified, even when it proves to be wrong in result.

Consequently, this analysis is invalid when "the choice has rested on a *personal inadequacy*."[86] Under such conditions, the behavior cannot be justified because it falls short of the objective requirements. The question which must then be considered is that of the limits of criminal liability for the violation of the duty of care. This can only be a question at the level of *excuse*.

These examples have been frequently construed. Their *practical* problems do not lie in the doctrine of justification, but rather in the limits of liability for *negligence*. At issue is the selection of the elements of the offense and of the standard of objective care which the actor must observe in such a situation. If he fulfills these requirements, he cannot be accused of wrongdoing.

With regard to both the structure of the problem and the result, the findings leading to an inescapable prognosis can be carried over into *reasonable*[87] and *procedurally correct behavior*. The latter, in particular, plays an important role in the discussion concerning justification and excuse.[88] As with prognosis, it is norm-conforming, *lege artis* behavior that is here at stake. That this conformity to norms, even if it *ex post* or "in reality"

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85. *See* R. PRIM & H. TILMANN, GRUNDLAGEN EINER KRITISCH RATIONALEN SOZIALWISSENSCHAFT. STUDIENBUCH ZUR WISSENSCHAFTSTHEORIE §§ 8.3-8.6 (2d ed. 1975).

86. Greenawalt, *supra* note 16, at 1910.

87. *See* R. WIETHÖLTER, DER RECHTFERTIGUNGSGRUND DES VERKEHRSRICHTIGEN VERHALTENS (1960).

88. *See* Greenawalt, *supra* note 16, at 1911.

produces harm, can lead to justification of the behavior can be shown briefly using the example of the conviction of an innocent party.

It is, of course, true that the person who did not perform the criminal action is *de facto* innocent, even if he was legally adjudged guilty because of this action, and that this person realizes this. Nevertheless, one cannot, in the strict sense, speak of a "mistake" by judicial authorities, if they have acted *lege artis*—in other words, when they have strictly observed the rules of procedure, especially those governing evidence. The problem lies in the fact that the only person who knows "the truth" (the accused) cannot impart this truth to a third person. This is the *meaning of the law of procedure*: to formulate rules which promote the search for truth while protecting the rights of those who are involved in the procedure, especially the accused. For this reason, the "*material truth*" which is the goal of criminal evidentiary proceedings, is not the "real" truth, but rather the "truth" which is found on the basis of formalized methods, which is not the same thing.[89] Beyond such a procedure the criminal jurist cannot speak of "truth," and therefore also not of "mistake." It is in accordance with the *fundamental norms of a state governed by law* that a procedure is available, in the case of a suspected offense, which controls the search for truth while at the same time protecting the rights of the accused. With the establishment of such a procedure, it is also a given fact that the "real" truth may not be reached. For this reason, criminal procedure justifies criminal sanctions against a suspect even when he is *de facto* innocent.

This construction, as well as the (*ex ante* correct, *ex post* wrong) prognosis and the procedure conducted *lege artis*, rests upon the limits of the human ability to discern (*menschliche Einsichtsfaehigkeit*). These limits are an anthropological condition. If this is so, then the norms which underlie criminal provisions must take these limits into consideration and justify—even demand!—behavior which actualizes these limits in that it demands legally tolerable methods of seeking the truth, but at the same time takes into account that it may not reach the truth. There is no alternative to such a process, because "the truth" is not accessible to anyone. Therefore, "correct law" always accords with "correct procedure." Nothing more is suggested by

89. *See* W. HASSEMER, *supra* note 11, at 135, 137, 144.

the concept of a "*procedural natural law.*" Though we may not hope to find that which is true in substance, we should still at least observe procedures in searching for this truth which will bring us as close to it as possible.

The anthropologically-based limits of the human ability to discern are also reason and justification for the fact that, in such extreme situations, *lege artis* decisions may give rise to an "area free from law" (*rechtsfreier Raum*).[90] In private conflicts, it is theoretically possible that both parties act *lege artis* and thus act justifiably. There would only be a contradiction in this "*double justification*" if both a certain behavior and its opposite were deemed, at the same time, to conform to the law. This, however, is not the case. Rather, the basis of justification is that both of the conflicting parties have exercised all care that may be objectively expected of them. For this reason, they may not be differently treated, and wrongdoing may not be ascribed to either of them.

For practically significant situations, such as citizen's arrest of suspected persons[91] or error on the part of institutions of justice, the law can formulate particular *duties of tolerance* or *rules of preference.* For example, it can provide that the risk of arresting an innocent person remains with the arresting person, or that also the innocent person, after a conclusive end to the criminal proceedings, has only extremely limited possibilities of a new trial in order to bring to light "the truth."

14. Justified behavior may not be resisted by defense, but it may be supported. Merely excused behavior may not be supported, but defense against it is permitted.

These consequences of the intervention of third parties are necessary and follow from the distinction of justification and excuse which has been set forth.[92] If justified behavior is "warranted action" and if it conforms to the fundamental norms of the society, then there can be no legally approved action which aggressively opposes the justified behavior, and every third person must be legally permitted to support the normatively ap-

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90. *See* Kaufmann, *Rechtsfreier Raum und eigenverantwortliche Entscheidung. Dargestellt am Problem des Schwangerschaftabbruchs,* in FESTSCHRIFT FÜR REINHART MAURACH 327 ff. (F.-Ch. Schröder & H. Zipf eds. 1972).

91. STRAFPROZESSORDNUNG [StPO] § 127.

92. *See supra* notes 63-76 and accompanying text.

proved behavior. On the other hand, if a merely excused behavior violates the norms which underlie the criminal laws, then an action which supports this behavior can hardly be treated otherwise, and it must be permitted to aggressively oppose this behavior by actions which conform to fundamental norms. These *consequences of the intervention of third parties* clearly demonstrate the distinction between justification and excuse.[93] All this follows from the command to avoid contradictions within the criminal law system.

The categories of defense and support describe situations which arise in every criminal law system. Even legal systems which do not distinguish between justification and excuse[94] must solve such problems in some fashion. I suspect that when answering the question of who may aggressively support whom in which situations, a distinction between justified and nonjustified actions must be utilized (and thus also a distinction between justification and excuse), even if this distinction is not categorically worked out in the criminal law system.

The decision concerning the permission of defense and support must be *unequivocal* in all situations which are not indebted to theoretical development, but rather to practical experience. If this demand is not met, the criminal law system dispenses with taking a stand in aggressively handled conflicts and with allowing some actions while forbidding others. In the final analysis, this would mean a partial abandonment of government's monopoly on force. Thus, in practically significant situations, "double justification" cannot mean that force is permitted on the part of both parties, and an "area free from law" cannot mean that criminal law dispenses with a consequence-laden evaluation of—in themselves justified—harmful acts. "Double justification" means solely that criminal law must refrain from qualifying an action as wrongful when the actor has taken all due care, when he has behaved according to norms (*lege artis*), and when a suitable alternative was not available to him: in other words, when the action rested on the limitations of the human ability to discern.[95]

The experiences of a criminal law system which practices the distinction of justification and excuse show that the possibil-

93. *See supra* notes 41-45 and accompanying text.
94. *See supra* notes 1-3 and accompanying text.
95. *See supra* notes 90-91 and accompanying text.

ity of double justification *does not lead to unsolvable problems.* In conflict situations structured by public law, duties of sufferance and rules of preference are provided for the case which was handled *lege artis,* but "in actuality" was handled "wrongly." The notion of a suspected offense and the associated possibilities,[96] based on public law, of intervening against a person who may be considered innocent (and perhaps "in reality" actually is), demonstrate a possibility in the criminal system of practically and legitimately administering prognostic decisions (in uncertainty about "the truth").[97] In addition to this, one must take account of the fact that the numerous requirements for justification in a criminal system that works with the distinction of justification and excuse[98] operate for the most part to preclude the extension of theoretically possible situations of double justification into actual situations (the weighting of conflicting interests, the nearness of the danger, or the possibilities of non-dangerous or less dangerous alternatives).

15. Grounds for excuse define the limits within which the state can legally expect its citizens to behave according to norms. They are therefore unsuitable for the pursuit of general preventive (deterrent) aims.

One argument[99] asserts that grounds for excuse could weaken the citizen's willingness to obey the law, because they make violation of a law legally exempt from punishment in certain situations.[100] From this follows the suggestion not to inform the public very precisely about the scope of exemptions from liability.[101] The fear that grounds for excuse could weaken the general preventive strength of the criminal law and the recommendation that follows therefrom, that one should treat grounds for excuse carefully and discreetly, are partially naive, partially inconsistent and partially dangerous.

This belief is *naive* because it assumes that a citizen in-

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96. *See* StPO § 112, 152 (II), 170 (I), 203 (W. Ger.).

97. *See* K. Amelung, Arbeitskreis Strafprozessreform, Die Untersuchungshaft. Gesetzentwurf mit Begründung 28 ff., 60 ff. (1983).

98. *Cf.* StGB §§ 34-35.

99. *See* Greenawalt, *supra* note 16, at 1917 n.63; G. Fletcher, *supra* note 1.

100. *See supra* notes 36-40 and accompanying text (discussing the "legality" of the excused conduct).

101. *See* Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,* 97 Harv. L. Rev. 625 (1984).

forms himself with the help of the literature of legal theory and judicial decisions concerning the existence and extent of grounds for excuse and the resulting doctrinal structures, and regulates his behavior accordingly. One must remember, however, that the most important grounds for excuse describe precisely the disoriented and uninformed citizen (for example, the insane person or the person who makes a normative mistake[102]). If one were able to proceed validly on the assumption that the citizens who are affected understand the criminal law and its practical application, which I doubt,[103] then more plentiful and more precise information concerning, for example, the grounds for excuse in sections 17 and 20 of the German Criminal Code would be more likely to reinforce the *general preventive effect* of the criminal law than diminish it, because it could then be made clear to the citizens[104] that an excuse for violation of a norm is only reasonable and just in extreme cases, and why this is so.

Such an assumption is *inconsistent* because it misconstrues both the basis for and the function of excusing conditions in criminal law. If the excusing conditions define the limits, validated by criminal law, outside of which behavior conforming to norms may no longer be expected from citizens, then determinations of these limits on the basis of excusing conditions lose their function in the system of criminal law when they are converted into a strategical instrument. In its excusing conditions, criminal law formulates the limits of what may fairly be expected of citizens,[105] and thus, a part of the *ethos* of the criminal law. The functionalization of excusing conditions in the general preventive interest would be incompatible with this ethos.

Finally, such suppositions would be *dangerous* because they would violate a fundamental principle of law: that legal regulations must be free from deception. As a formalized subdomain of social control,[106] criminal law must itself obey the rules that it

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102. *See* StGB §§ 17, 20.

103. *See* Hassemer, *Generalprävention und Strafzumessung*, in HAUPTPROBLEME DER GENERALPRÄVENTION 29 ff., 42 ff. (W. Hassemer, K. Lüderssen & W. Naucke eds. 1979).

104. Lüderssen, *Die generalpräventive Funktion des Deliktssystems*, in HAUPTPROBLEME DER GENERALPRÄVENTION 54 ff. (W. Hassemer, K. Lüderssen & W. Naucke eds. 1979) (concerning insight and acceptance by those concerned, as prerequisites of general preventive effectiveness of criminal law).

105. *See supra* notes 63-76 and accompanying text.

106. *See supra* notes 46-53 and accompanying text; W. HASSEMER, *supra* note 11, at 199, 203, 206.

protects and defends. It may not deceive citizens as to strategic interests and withhold correct information from them. Furthermore, clarity, exactitude and open public transmission of penal norms are a fundamental constitutional right.[107] Moreover, strategically abridged, veiled, and selected information concerning penal norms would, in the long run, almost certainly diminish social acceptance of the criminal law, and would endanger democratic legitimization of the legal system.

Independent of these objections, it is naturally true that the existence and extent of grounds for excuse have an influence on the limits within which the criminal law is effective. Of course, grounds for excuse do not alter the fundamental "ought" criterion in criminal law;[108] nevertheless, they provide a basis for renouncing the execution of penal measures against norm-deviating behavior in certain types of cases. As shown by mistake of law,[109] this can have at least some influence on *de facto* validity. The more broadly the excuse of unavoidable mistake of law is conceived (based on a statute or the interpretation of the statute), the more situations it comprehends, and the lower the demands made upon, for example, the concept of unavoidability, the more the following occur: the criminal system renounces more emphatically the claim that its norms are generally known and observable; the acceptance of a difference between normative and empirical validity becomes more likely,[110] and the actual enforcement power of the norms of criminal law diminishes. One can study this problem in the criminal proceedings against Nazi war criminals, who based their behavior upon a socialization of many years' standing which deviated from legal principles and which hindered them from developing a legal consciousness which would conform to norms.[111] The more extensively such an argument is accepted under section 17 of the German Criminal Code, the lower the possibility of executing penal norms in such criminal proceedings.

Of course, the consequence of this view cannot be the utilization of excusing conditions for general preventive purposes.

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107. StGB art. 103 (II); Grundgesetz § 1.

108. *See supra* notes 38-41 and 76 and accompanying text.

109. StGB § 17.

110. *See* Neumann & Schroth, *Das Problem der Geltung von Rechtsnormen,* 11 Wahlfach Examinatorium (Rechtsphilosophie) 77 ff. (1976).

111. *See* H. Jäger, Verbrechen unter totalitärer Herrschaft. Studien zur nationalsozialistischen Gewaltkriminalität 166 ff. (1982).

Rather, the consequence must consist of a further public and non-deceptive development of grounds for excuse, according to the legal culture which has been developed in a society.

16. If the distinction of justification and excuse is adopted in a legal system, further distinctions must be worked out upon this basis.

Part II of this article investigated the possibility of a fundamental distinction between justification and excuse. Part III pointed out some of the consequences of such a distinction. However, this article has not attempted an exhaustive study of the area which constitutes the doctrine of justification and excuse. From the great number of conceptual specifications and distinctions which cannot be here presented, three examples illustrate, at least roughly, the scope of the above doctrine. These are the inaccessibility of better aids in situations of justification; the distinction between justified situations and justified means; and the distinction between excusing conditions according to the degree of incrimination of the person concerned.

A *situation of necessity* is a prerequisite for self-defense, for necessary aid to others and for a necessity defense. This means that injury to the legally protected interests of another in such a situation may only be justified if noninjurious (or less injurious) alternatives were not available. The defense or the aid must be "necessary;" the danger must not be such that it could be disposed of by interest-conforming (less drastic) means.[112]

This specification helps to solve problems such as the one[113] in which a stronger third person (or institution) stands ready to intervene in a conflict between two weaker opponents. The presence of this third person and his preparedness to intervene in the conflict influence the circumstances of justification. The weaker, wrongfully assaulted defender must end his defensive efforts at the moment when the third person intervenes in his behalf; his defense is no longer necessary. However, he may continue his defense as long as the third person remains inactive, or if the third person intervenes on behalf of the aggressor. If the assaulted person continues his defense despite the aid of the third person, he may no longer rely on the right to defend himself; nevertheless, he may still be excused if his action falls

112. *See* P. FEUERBACH, *supra* note 64, at § 37.

113. Greenawalt, *supra* note 16, at 1924.

within the definition formulated by section 33 of the German Criminal Code.

One can analyze justification situations more precisely, and therefore better deal with various interests, if one distinguishes between the justified *situation* and the *means* which may be justifiably employed in such a situation. Even if a situation of justification exists, this does not necessarily mean that the actor in this situation may use every available means to safeguard a legally protected interest. The limits in employing permissible means in situations of justification also form part of the fundamental—and changeable—norms of a society, which determine what violations, injuries and means of injury will be normatively tolerated.[114] By means of this distinction, cases involving defense against wrongful assaults by children or by insane persons[115] may be analyzed and solved.

Not only with regard to a distinction between justification and excuse in general,[116] but also with regard to the grounds for excuse themselves, a *scale of progressive incrimination* of the excused—and therefore acquitted—suspect becomes apparent. A few prominent points of this scale should be noted. The scale begins more or less with the wrongful injury of another with the intent to thus avert a present danger to oneself;[117] proceeds to situations of temporary mental incapacity (such as intoxication[118]); and extends to permanent mental incapacity (such as feeblemindedness[119]). In the case of unavoidable mistake of law[120] the degree of incrimination for the person concerned depends upon the reasons why the unavoidability of the error should be conceded to him.

It might be thought that those who enact criminal laws must designate systematic consequences, not only with regard to a distinction between justification and excuse, but also with regard to a distinction between the grounds for excuse themselves. However, this is by no means imperative. The maker of criminal laws is free in his judgment—as are also those who apply the criminal statutes in their practice—to decide whether the theo-

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114. *See supra* notes 63-76 and accompanying text.
115. *See* Greenawalt, *supra* note 16, at 1925.
116. *See supra* notes 26-27 and accompanying text.
117. StGB § 35.
118. *Id.* § 20.
119. *Id.*
120. *Id.* § 17.

retically possible distinctions are sufficiently important that conclusions for the practice of criminal law and criminal procedure can be drawn from them.[121]

IV. Summary

Distinguishing justification from excuse accords with common practice. A precise and sound distinction is possible even in the concepts of a criminal law system. Such a distinction is not derived from that which is permitted by natural law, from morals or from categories such as generalization and individualization. Rather, it follows from a distinction between norms and penal provisions and, on this basis, can become the core of a graded and evaluated system of imputation.

A distinction between justification and excuse complies with the interest of criminal theory in knowledge and systematization, as well as the interest of the acquitted defendant in being incriminated to the least extent possible. The distinction helps to illustrate more exactly and to judge changes in the system of penal imputation, and it facilitates a precise and clear classification of situations of imputation.

Whether a distinction between justification and excuse recommends itself to an actual criminal law system depends upon two factors. First, the organization of this system must be considered. Factors such as the utilization of lay judges, the existence and significance of written laws, the reviewability of judicial decisions, the distinction between substantive and procedural criminal law and the formulation of a general part of the criminal law must be analyzed. And second, adopting a distinction between justification and excuse depends upon the the significance of knowledge won by criminal theory in the practice of criminal law.

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121. An instructive, and in my opinion regrettable, example of the possibility that criminal legal theory will totally abandon the difference between justification and excuse is the refusal of at least the German judicial system to concede the presumption of innocence to those who endure an incriminating trial but are acquitted. *See* Judgment of Nov. 24, 1961, Bundesgerichtshof, Senat, W. Ger., 16 Entscheidungen des Bundesgerichtshofes in Strafsachen, 374, 379.