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A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability

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I. INTRODUCTION: THE REQUIREMENT OF SOCIETAL HARM

All would agree that the criminal law seeks to prevent harmful results rather than to punish evil intent that produces no harm. Justice Holmes suggested that "the aim of the law is not to punish sins, but to prevent certain external results."[1] LaFave and Scott similarly claim that "[t]he broad purposes of the criminal law are, of course, to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable."[2] If the criminal law is extended to punish bad intent alone or the mere possibility of harmful conduct, it goes beyond its accepted role, appears unfair and overreaching, and ultimately loses its credibility and integrity.[3]

If one views deterrence as the proper function of the criminal law, a harm requirement is appropriate. To the extent that the criminal law punishes nonharmful conduct, it weakens the stigma and deterrent effect of criminal conviction for harmful conduct. If a defendant who has caused no harm feels that he is punished unjustifiably, rehabilitative efforts will be hampered. Indeed, one may ask: If no harm has been caused, what harm will be deterred by punishment, and what harm-causing characteristic will be rehabili-

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1 Commonwealth v. Kennedy, 170 Mass. 18, 20, 48 N.E. 770, 777 (1897).

2 W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 21 (1972) [hereinafter cited as LAFAVE & SCOTT].

3 This danger is reflected in the existence of such controversies as those concerning preventive detention, decriminalization of prostitution, marijuana, gambling, private sexual acts, and regulatory offenses.

tated? If one believes that the role of the criminal law is to provide retribution, a harm requirement is also proper; in the absence of harm there is nothing for which to seek retribution. Edward Livingston suggests that "[m]oral guilt must be united to injury in order to justify punishment."[4] The consistency of a requirement of harm with these fundamental purposes of the criminal law is reflected in the fact that harm has, from the earliest of civilized times, been treated as a de facto requirement. In ancient Israel where murder was a recognized societal harm but assault was not,[5] the victim's death was a prerequisite to imposition of any criminal sanctions,[6] even if the attacker struck the blow with intent to kill.

If the criminal law is limited in operation to situations involving a harm of some sort,[7] then an act found to be beneficial, or at

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[4] 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 235 (1873) [hereinafter cited as LIVINGSTON].

[5] A. PHILLIPS, ANCIENT ISRAEL'S CRIMINAL LAW 87 (1970). *Exodus* 21:18, 19 (King James) reads:

> And if men strive together, and one smite another with a stone, or with *his* fist, nad he die not, but keepeth *his* bed:
>
> If he rise again, and walk abroad upon his staff, then shall he that smote *him* be quit: only he shall pay *for* the loss of this time, and shall cause *him* to be htoroughly healed.

[6] Exodus 21:18f confirms that even if there is both intent and the requisite blow, this is immaterial as far as criminal law is concerned, unless the victim dies. If he is saved by the skill of the doctor, the case is one of assault.
PHILLIPS, *supra* note 5, at 87.

[7] The term "harm" as used here has its common meaning "physical or mental damage," "an act or instance of injury," or a "detriment or loss to a person." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1971). The concept of "societal harm" as used in this Article is similarly defined by these attributes—damage, injury, detriment, and loss—and includes not only harm done to individuals but also damage to the society or a part of it. Thus societal harm includes injury to an individual, a group, an institution, or a society. It may be to human beings directly, or indirectly through harm to the property or relationships of persons.

The concept of societal harm has an admittedly controversial fringe. It is currently debated, for example, whether gambling or private sexual acts cause societal harm. Some may claim that this concept of societal harm is so vague and amorphous as to be meaningless, but in fact the concept has a straight-forward and distinct meaning. For example, one could argue to a legislature that homosexual acts do not constitute a societal harm and should not be prohibited. One argues this by making and trying to document the claim that homosexual acts do not damage or injure society. It is not necessary to repudiate the requirement of societal harm to support legalization of homosexual acts.

Some acts will be neutral, causing neither a societal harm nor a societal benefit; and many acts will have both harmful and beneficial results. If an act causes more harm than benefit it is natural to look on the act as being harmful. This, of course, reflects an orientation toward the ultimate rather than an intermediate harm. The universal acceptance of such an orientation is reflected in the general acceptance by all of some limited principle of justification. Our willingness to forgo punishment for a killing reasonably done in self-defense, for example, illustrates our orientation toward the end result, not an intermediate result alone.

The nature of a neutral act merits special mention. It, like all other acts, must be either criminal or noncriminal. Because the standard for noncriminality has

least not harmful, should be of no concern to the criminal law. As Macaulay explains:

> When an act is of such a description that it would be better that it should not be done, it is quite proper to look at the motives and intentions of the doer, for the purpose of deciding whether he shall be punished or not. But when an act which is really useful to society, an act of a sort which it is desirable to encourage, has been done, it is absurd to inquire into the motives of the doer, for the purpose of punishing him if it shall appear that his motives were bad.[8]

Views of what is societally harmful may differ from time to time and from society to society. This occurs because, first, views of what is considered an injury may differ. Rape in one society may be an honor in another. Second, conduct which causes harm at one time or in one society may not cause harm in another. Broadcasting a wide range radio signal is a societal harm in the twentieth century but would not have been in the nineteenth. Similarly, the extent of the injury—the seriousness of the harm—may change, as in horsestealing. Third, the level of scientific achievement may affect the ability of society to detect injury. Failure to pasteurize milk could not have been seen as criminal before the germ theory of disease was understood.

Creation of a risk of harm is not necessarily a harm in itself. But acts which create only a risk of harm may in fact cause another harm. Swinging a fist at a person may not injure him as intended, but it may cause an apprehension of injury that is itself a harm. The possession of burglary tools, while only creating a risk of a burgla-

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been set as the absence of harm rather than the presence of a benefit, it follows that a neutral act would then be noncriminal. Note, however, that objective symmetry is not necessarily neutrality. For example, in the case of two shipwreck survivors clinging to a plank that can support only one, the societal harm of one death seems at first to be identical to another; thus if one pushed the other off to save his own life, it would be a neutral and hence noncriminal act. But it may well be that the required pushing prevents the act from being truly neutral. It might be contended, for example, that the use, and approval, of aggression in any situation tends to cause aggression by other persons, and does in fact result in clearly harmful results. Thus the aggression of one survivor toward the other would render the act harmful, rather than neutral, and hence criminal.

For an enlightening examination of the concept of harm and its role in criminal law, see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 213-46 (2d ed. 1960) [hereinafter cited as HALL]. Hall concludes, "[H]arm, in sum, is the fulcrum between criminal conduct and the punitive sanction; and the elucidation of these interrelationships is a principal task of penal theory." *Id.* at 213.

[8] 7 THE WORKS OF LORD MACAULAY 552-53 (H. Trevelyan ed. 1866). The passage continues:

> If A. kills Z. it is proper to inquire whether the killing was malicious; for killing is *primâ facie* a bad act. But if A. saves Z.'s life, no tribunal inquires whether A. did so from good feeling, or from malice to some person who was bound to pay Z. an annuity; for it is better that human life should be saved from malice than not at all.

Id.

ry, may cause in addition a separate harm in itself. The possession of such tools may support a system for producing and distributing tools which *are* used for burglaries. There are, however, other risks of harm that do not cause harm in themselves. For example, no harm results from a person shaking his fist at a rain cloud honestly expecting to cause the destruction of the world. If one adopts the theory that dangerous but nonharmful conduct should be punished, then why not punish one who shakes his fist at a rain cloud, since he has shown his dangerous intentions? Or why not punish a man for having sexual intercourse with a twenty-two year old woman he reasonably believed to be under sixteen, since such conduct is similarly dangerous? We do not do so because the harm requirement has not been met. Just as our common law tradition prevents punishment of evil thoughts or of potentially dangerous people, so too does it prohibit criminal liability for acts that create only the possibility of harm. Even criminal negligence, which is ostensibly punishment for creating a risk of harm, is punished only when the risk of harm has actually resulted in a harm.[9]

In many cases, rational men can disagree about whether a harm has occurred. It has been suggested, for example, that inchoate offenses such as conspiracy, solicitation, and attempt are by definition crimes from which no ultimate harm results—in other words, punishment is imposed for intending to do harm or for creating a risk of harm.[10] I will contend, however, that the inchoate offenses do not punish bad intent evidenced by overt acts, but rather punish conduct which is harmful to society in a way apart from the harm which might have resulted had the actor's intent been fulfilled.[11] The harm is intangible in character, and society is its object. Inchoate offenses not only create a risk of harm, they are harms in themselves. Thus the debate surrounding inchoate offenses does not focus on whether a harm shall be required, but on whether the harm from inchoate offenses is substantial enough to merit prohibition and punishment by the criminal law.

Whether a particular societal harm is sufficient to justify criminal punishment can cause considerable debate, as evidenced by the extensive and long-lived concern over the impossible attempt problem.[12] Some have concluded that an impossible attempt

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[9] The felony-murder rule, for example, punishes only felons who actually cause a death, not those who create the identical risk of such a death.

[10] *See, e.g.*, LA FAVE & SCOTT, *supra* note 2, at 9.

[11] *See, e.g.*, HALL, *supra* note 7, at 217-20. *See* notes 12-25 & accompanying text *infra*.

[12] Impossible attempts should be distinguished from the traditional attempt paradigm. In the latter, the actor can only be convicted of attempting to commit a substantive offense because his actions did not go far enough toward committing

does not cause societal harm sufficient for punishment. In *People v. Jaffe*[13] the defendant believed he was purchasing stolen cloth. Unknown to him, the police had discovered the theft and returned the stolen cloth, but continued the prearranged delivery to Jaffe in an attempt to apprehend the fence. The cloth Jaffe bought was not in fact stolen, and the court refused to convict.[14] A number of other cases have demonstrated a similar judgment that an impossible attempt, even with the requisite guilty intent, does not produce sufficient harm to warrant criminal liability.[15] One commentator supporting this view has concluded that "the act of attempt is not in itself harmful to the state. The crime is a mere shadow of the attempted offense."[16] Another states that "[n]either society, nor any private person, has been injured by [an attempt]. There is no damage, therefore, to redress."[17]

Other courts and commentators, however, have concluded that an impossible attempt does generate sufficient harm to warrant criminal liability. In *People v. Siu*[18] the defendant purchased what he believed was heroin. The seller was a police officer who had substituted sugar for the heroin seized earlier. The court concluded that it was sufficient that Siu believed he was purchasing heroin and went through all the necessary motions to make the purchase. Supporting this view Edward Livington has said, "every attempt, although it fail . . . of itself, is an injury."[19] Other writers have described criminal attempts as causing "a disturbance of the social order,"[20] "a sufficient social harm to be deemed criminal,"[21] "a

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the substantive offense. For example, he might have been caught lighting a fuse on dynamite sticks planted under a building. An impossible attempt is an entirely different situation in that the substantive offense not only was not committed, but *could not* have been committed, even if the actor had gone through all the motions. For example, if the "dynamite sticks" were, unbeknownst to the actor, only wooden sticks, he might still be prosecuted for an attempt, even though the substantive offense was impossible.

13 185 N.Y. 497, 78 N.E. 169 (1906).

14 The court's opinion, however, attempted to use traditional concepts by reasoning that, to be convicted of receiving stolen property, Jaffe had to *know* the property was stolen and since the cloth was not stolen, no man could have that knowledge. *Id.* at 501, 78 N.E. at 170.

15 *See* Wilson v. State, 85 Miss. 687, 690, 38 So. 46, 47 (1905); People v. Teal, 196 N.Y. 372, 377, 89 N.E. 1086, 1087 (1909); Rex v. Osborn, 84 J.P. 63 (1919).

16 Beale, *Criminal Attempts*, 16 HARV. L. REV. 491 (1903).

17 1 F. WHARTON, CRIMINAL LAW 307 (12th ed. 1932). This statement, however, does not appear in later editions.

18 126 Cal. App. 2d 41, 271 P.2d 575 (1954). *See also* Faustina v. Superior Court, 174 Cal. App. 2d 830, 345 P.2d 543 (1959) (noting and disapproving *Jaffe*); People v. Rojas, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961) (approving *Faustina*).

19 1 LIVINGSTON, *supra* note 4, at 235.

20 J. MAY, LAW OF CRIMES 191 (4th ed. K. Sears & H. Weihofen 1938).

21 Hitchler, *Criminal Attempts*, 43 DICK. L. REV. 211 (1939).

substantial but incomplete impairment of some interest,"[22] "a societal harm,"[23] and "a community disturbance."[24] The controversy over impossible attempts demonstrates the law's concern that harm be present whenever criminal liability is imposed.[25]

The issue whether a harm is sufficient to support criminal liability need not be endlessly disputed. It can for practical purposes be authoritatively decided by a legislature. But if the legislature fails to determine whether particular conduct causes sufficient societal harm, or if the legislature cannot make this decision—either because the situation cannot reasonably be anticipated or because the circumstances relevant to the decision are so numerous or varied that case-by-case decisions are necessary—the courts must undertake the determination. The question whether harm has occurred may appropriately be resolved in the same way as any other question of fact. The vehicle for raising such a question, as suggested in the next Part, is the defense of justification. The factors which are pertinent to such a determination have been discussed here; other factors which are mistakenly treated as pertinent are discussed in Part IV.

II. THE ROLE OF JUSTIFICATION

A society's need for a public statement of the conduct deemed impermissible and for guidance in determining whether given conduct has violated those standards often gives rise to a written criminal code. No such code, however, can accurately prescribe the correct conduct in all situations; it can only provide an approximation of society's intuitive judgments. This limitation may be attributed to a number of factors: First, in attempting to provide for the infinite variety of factual situations, a code must necessarily make generalizations which are subject to exceptions; second, and perhaps more important, human moral judgments may

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[22] Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 970 (1930).

[23] Curran, *Criminal and Non-Criminal Attempts* (pts. 1-2), 13 GEO. L.J. 185, 316 (1930-1931).

[24] 1 J. BISHOP, CRIMINAL LAW 530 (9th ed. 1923).

[25] The issue of the sufficiency of societal harm to justify criminal liability can also be seen in the considerable debate over whether the criminal law should be restricted to preventing an individual from harming others or whether it might properly be used to prevent a person from harming himself. *See* J. MILL, ON LIBERTY (1863); J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (2d ed. 1874). The debate generally centers on whether the criminal law should be used to enforce morality. *See* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963). Neither side would suggest that the criminal law may punish without a harm. Rather, they differ only on whether immoral conduct is a sufficient harm.

well be too complex to be represented by a set of rules, or at least any set now available.[26]

The imperfect correspondence between acts which are intuitively felt to be impermissible and acts defined as impermissible by a written penal code produces two groups of inaccurate results: Some undesirable acts are not prohibited by the code (*e.g.*, few codes prohibit eating the flesh of dead humans);[27] and some desirable acts are prohibited (*e.g.*, burning a field without permission in order to create a firebreak which will protect a town). The first category produces many interesting difficulties, often centering on what constitutes sufficient notice of criminal conduct, and the demands of a "higher" unwritten code of conduct. The concern of this Article, however, is with the second category.

It is contended here that the role of the principle of justification is to compensate for the limitations of a written code reflected in this second group of inaccurate results—to provide an exculpating exception for acts that are prohibited by the written code but nonetheless are proper because of justifying circumstances not accounted for in it.[28] Under this theory, the principle of justification is in a sense similar to a penal code: Both serve to limit the jurisdiction of the criminal law to acts deemed undesirable, or, more precisely, to consequences deemed harmful. The penal code identifies conduct that society normally considers harmful; the principle of justification further screens out those cases where, due to the special circumstances of the situation, no harm has in fact occurred.[29]

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[26] Sir James Stephen suggests:

> It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand.

2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 109 (1883).

[27] Punishment for an undesirable act not specifically prohibited by the code is generally forbidden under the maxim *nullum crimen sine lege.*

[28] As Serjeant Pollard expressed it in the case of Peniger v. Forgossa, 75 Eng. Rep. 1 (1550), one of the first cases formally recognizing the defense of necessity:

> [I]n every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so as the intent of the law is not broken. . . . [I]t is a common proverb, *Quod necessitas non habet legem.*

Id. at 29-30.

[29] The theory of justification presented here is in a sense the reverse side of strict liability and objective criminality: That is, a man may be convicted of a crime because of harm he has caused, notwithstanding his failure to intend to cause such harm; conversely, a man may be free from criminal liability if he intended to commit a crime yet committed no harm. While in the former case his behavior did not meet the objective standard of conduct society had set down, in the latter case it did.

To a limited extent, this concept of justification is currently reflected in the criminal law. The killing of another human being is normally a form of manslaughter or murder, yet the killing of a bank robber who is resisting lawful arrest with lethal force is justifiable homicide. Society's need to apprehend robbers, to protect its police, and to deter other robbers from using lethal force to resist arrest make the killing—on balance—more beneficial than harmful, and it should therefore be legal.[30] Many commentators agree that the absence of ultimate harm is at least a factor in permitting a defense of justification.[31] However, apparently no writer agrees that the presence or absence of societal harm is alone determinative of the justification issue.[32]

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30 Some writers, however, contend that the basis for a defense of justification is not that there is on balance an absence of harm, but an absence of the *mens rea* necessary to convict the actor. *See, e.g.*, W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES 462 (7th ed. 1967). But to be consistent, these writers must either exclude from the operation of the principle those offenses requiring a specific intent or assume that an element of every offense is a general intent to do something criminal. No commentator appears to have approved the first alternative. Indeed, such a theory does not correspond to any accepted meaning of the justification principle. The second alternative proves too much. The requirement of a general criminal intent would prevent criminal liability from being founded on theories of strict liability, criminal negligence, or even recklessness. It would require, at the very least, a purposeful or knowing state of mind, no matter how harmful the act. This view is inconsistent with our intuitive judgments of which acts, coupled with which states of mind, warrant punishment.

31 Justin Miller, for example, observes:

> [T]hese [justified] acts are ones, as regard which, upon balancing all considerations of public policy, it seems desirable that they should be encouraged and commended even though in each case some individual may be injured or the result may be otherwise not wholly to be desired.

J. MILLER, HANDBOOK OF CRIMINAL LAW 189 (1934). LaFave and Scott specifically note:

> The rationale of the necessity defense is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires. Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.

LAFAVE & SCOTT, *supra* note 2, at 382. Similarly, Jerome Hall points out that:

> [w]hat is common in these [justification] situations is that no crime was committed because there were special circumstances which made the commission of the injury in question . . . a 'privilege.' . . .
>
> . . . The accused has done something which, under the special conditions, is not a penal harm. . . .

HALL, *supra* note 7, at 232-33. Hall defines "penal harm" in a way different from "societal harm" as defined here, in that "penal harm" will have occurred, for example, even if an act is beneficial, if the actor did not have knowledge of the justifying circumstances. *Id.* at 233. Hall specifically rejects a concept in which "justification can be established solely by reference to the external situation." *Id.* This would presumably include the theory of justification presented here.

32 Though justification is often considered a "defense" (*see, e.g.*, MODEL PENAL CODE § 3.01(1) (Proposed Official Draft 1962)), it is more properly viewed as an "element" of an offense in the sense that no crime can be said to

III. THE PROCESS AND EFFECT OF MIXING JUSTIFICATION AND EXCUSE

The essence of the question of justification should be whether harm has occurred. Thus, as Macaulay suggests, actor-oriented considerations such as motive are not pertinent to the analysis.[33] Yet such considerations have been introduced; in all probability they have been derived from the other general principle of exculpation, excuse. Accordingly, to understand the principle of justification one must appreciate its contrast to the principle of excuse, as well as the process by which the two principles have been mixed.

A. *The Distinction*

The theoretical distinction between justification and excuse is well established.[34] Justified behavior is correct behavior and therefore is not only tolerated but encouraged. In determining whether given conduct is justified, the focus is upon the *act*, not the

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have occurred if the act is justified or, in other words, *unless* the act was *non*-justified. Although non-justification may conceptually be an element of each offense, it may be procedurally necessary to give the defendant the burden of coming forward with evidence of justification, or of at least raising the issue. On the other hand, one might argue that the state should be required to make a prima facie case that a legislatively recognized harm has resulted.

[33] 7 THE WORKS OF LORD MACAULAY (T. Trevelyan ed. 1866).

[34] In the case of 'justification' what is done is regarded as something which the law does not condemn, or even welcomes.[16] [note 16: "In 1811 Mr. Purcell of Co. Cork, a septuagenarian, was knighted for killing four burglars with a carving knife." Kenny, *Outlines of Criminal Law*, 5th edn., p.103, n.3.] But where the killing (e.g. accidental) is excused criminal responsibility is excluded on a different footing. What has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals.

H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 13-14 (1968).

"Justification" is defined as:

> The action of justifying or showing something to be just, right, or proper; vindication of oneself or another; exculpation. . . .
> *Law*. a. The showing or maintaining in court that one had sufficient reason for doing that which he is called to answer. . . .

5 THE OXFORD ENGLISH DICTIONARY 643 (1933). In contrast, "excuse" is defined as:

> I. To offer, or serve as, an exculpation for.
> 1. *trans.* To offer an apology for.
> a. To attempt to clear (a person) wholly or partially from blame, without denying or justifying his imputed action.
> . . . .
> b. To seek or extenuate or remove the blame of (an acknowledged fault).
> . . . .
> II. To accept an excuse for or from.
> 6. . . . .
> a. To accept a plea in exculpation of (a person); to judge leniently on the ground of extenuating circumstances.

3 THE OXFORD ENGLISH DICTIONARY 391 (1933).

actor; hence, a finding of justification is a finding that the act was justified. Traditional examples of justification include necessity, defense of others, actions in an official capacity, and some cases of self-defense. Excuse, on the other hand, focuses on the actor, rather than the act. A successful defense of excuse represents a legal conclusion that although the act was wrong, liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him. Insanity, duress, infancy, mistake, and some forms of self-defense are typical examples of excuse.

Justification and excuse are serial rather than alternative determinations. One asks whether an actor should be excused only after one has determined that the act was not justified. If the act were justified, there would of course be nothing to excuse.

B. *The Process of Mixing Justification and Excuse*

At early common law, the distinction between justification and excuse was not only theoretically clear but of crucial practical importance. A person with a defense of justification was acquitted "as if the finding had been that he did not do the killing,"[35] while a person with a defense of excuse was given a sentence identical to what he or she would have received without the defense—death and forfeiture of all goods. The excused defendant could, however, escape execution if pardoned by the Crown.[36] While pardons may originally have been special occurrences,[37] they were granted with increasing regularity until the chancellor issued them as a matter of course without consulting the monarch;[38] but a defendant was still held in custody, and later under bail, until the pardon was granted.[39] During this period of institutionalization of the pardon, a defendant's goods were still forfeited.[40] This practice too was gradually abandoned and the excused defendant was given a "writ of restitution of his goods" in addition to a pardon.[41] Throughout this evolution of the punishment for an excused defendant, a justified act resulted in complete acquittal.[42]

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35 R. PERKINS, CRIMINAL LAW 1001 (2d ed. 1969) [hereinafter cited as PERKINS].

36 *Id.* at 1001 n.56.

37 *Id.* at 1001 n.58.

38 *Id.* at 1001 n.59.

39 *Id.* at 1001 n.61.

40 *Id.* at 1001 n.60.

41 4 W. BLACKSTONE, COMMENTARIES *188. It was not until 1838 that forfeiture was abolished by statute. 9 Geo. 4, c. 13, § 10 (1838).

42 The historical distinction between justification and excuse is practically and theoretically identical to the distinction used here and by other writers. *See, e.g.*, H.L.A. HART, *supra* note 34, at 13-14. However, the defenses categorized under the respective principles differ slightly from the common law usage. Self-defense, for example, is under certain circumstances considered a form of justifica-

The early common law distinction between justification and excuse exists today only in theory.[43] For example, one writer, commenting on self-defense, explains:

> [T]he distinction between justifiable and excusable self-defense was, at one time, one of considerable importance. Moreover, it is still occasionally referred to in the cases and the two are still separately classified in the texts. However, so far as present day law is concerned, the distinction is one without a difference. . . . The terms are generally used synonymously and interchangeably.[44]

The remainder of this Article will explore the problems created by mixing justification and excuse.[45]

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tion. But at early common law it appears to have been considered an excuse. *See, e.g.*, 4 W. BLACKSTONE, COMMENTARIES *187. It has been suggested that at a still earlier period self-defense was neither a justification nor an excuse. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 476 (2d ed. 1898); Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903).

[43] Some practical vestiges remain, however. In California Penal Code sections 195, 196, and 197, for example, excusable homicide is described as that caused by an unfortunate accident, while justifiable homicide is that which might be considered necessary, privileged, or desirable under the circumstances. *See* CAL. PENAL CODE §§ 195-97 (West 1970). This is consistent with Blackstone's statement of the distinction between excusable and justifiable homicide.

> In these instances of *justifiable* homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error, or omission; so trivial however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of . . . punishment.

4 W. BLACKSTONE, COMMENTARIES *182.

[44] J. MILLER, *supra* note 31, at 199. Miller also notes that, "the distinction between justifiable and excusable homicide is unimportant in the law of to-day." *Id.* at 255. Jerome Hall considers the distinction "fallacious and misleading when . . . applied as notions of substantive penal theory." HALL, *supra* note 7, at 233. And in a recent criminal law hornbook the defenses of "ignorance or mistake," "entrapment," "duress," "necessity," "public duty," "domestic authority," "self-defense," "defense of another," "defense of property," "law enforcement," and "consent, conduct, or condonation by victim" are presented in that order, in a single chapter entitled "Justification and Excuse," and without any attempt at classifying the various defenses as one or the other. LAFAVE & SCOTT, *supra* note 2, at 356. *See also* GA. CODE § 26-1011 (1933), *as amended*, § 26-901 (1972): "There being no rational distinction between excusable and justifiable homicide, it shall no longer exist."

It might be argued that the gradual elimination of the penalty in the case of excuse was a conscious effort to reject the justification-excuse distinction. But the fact that, even after the abolition of a difference in penalty, the common law retained for two centuries a working conceptual distinction, would seem to refute this contention.

[45] In addition to the specific inequities discussed in notes 46-52 and accompanying text *infra*, the merger of justification and excuse creates a more general difficulty for the criminal justice system. The determination by a court that a defendant is excused, when in fact his conduct is justified, condemns conduct that the legal system should encourage. As people find that some excused conduct seems wrong (that which should be excused) and other excused

C. *The Effect of Mixing Justification and Excuse*

1. The Use of Defensive Force to Repel an Attacker

The propriety of using defensive force to repel an attack cannot be properly determined without reviving the distinction between justification and excuse. If an attack, an act normally prohibited, is justified, as in the case of a lawful arrest, then defensive force should not be approved. But if the attack is only excused, defensive force should be deemed justified.[46] The present

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conduct appears correct (that which should be justified), the condemnation of improper conduct by excuse is weakened. Thus all justification or excuse cases will necessarily serve less of a deterrent function, since the conduct sought to be deterred is confused with the conduct sought to be encouraged. This confusion is also likely to create a general feeling of judicial inconsistency, thus seriously affecting the credibility and integrity of the courts in all of their workings. This confusion is not only a problem for the public; the same conflict is necessarily felt by every judge who tries to reach a just conclusion. A judge may hesitate to exculpate a defendant whom he believes should be excused, since he does not want others to conclude that the defendant's actions were proper. In a system where the concepts of justification and excuse are well-distinguished, this would not be a problem; the condemning character of a grant of excuse would be clear.

The famous case of United States v. Holmes, 26 F. Cas. 360 (No. 15,382) (C.C.E.D. Pa. 1842), not only illustrates the problem, but also some of the creative, though makeshift, solutions to which the courts have resorted. Eight seamen and 32 passengers were adrift in a life boat following a shipwreck. The crowded quarters, rough seas, and need for constant bailing caused the passengers to panic. Eighteen passengers were jettisoned before a rescue ship arrived. The grand jury refused to return a murder indictment against Holmes, one of the crew who assisted in the jettison. He was ultimately charged with manslaughter, convicted, and sentenced to six months' imprisonment and fined $20. Shortly thereafter the penalty was remitted. While the initial conviction demonstrated the court's condemnation of the act, the subsequent remittance seemed to exculpate the defendant. This quick step, which only seems to operate in cases of great notoriety, is not an adequate substitute for a clear justification-excuse distinction.

The minimal punishment initially assigned to Holmes demonstrates another form of compensation, the "pardoning power of juries." *See* United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). The unstructured nature of this power makes it a possible substitute for justification or excuse principles; in other words, it can be used in any situation in which the law does not appear to provide an intuitively "just" result. But the perverseness of this solution can be seen in the fact that although this is an acknowledged power of juries, even after request of defense counsel, the court may refuse to tell the jury that it has such authority. *Id.* This position was explained as necessary to avoid encouraging jury "lawlessness"—apparently with reference to the jury's failure to follow legal rules which are in present form admittedly inadequate to do justice. Acknowledgement of a "jury pardon" power is an acknowledgement that general principles of justification and excuse are needed to temper the present criminal law. The treatment of the "jury pardon" power parallels the similarly confused and distorted treatment of justification and excuse. *See also* Beale, *Justification for Injury*, 41 HARV. L. REV. 553 (1928); Radbruch, *Jurisprudence in the Criminal Law*, 18 J. COMP. LEG. & INT'L L. (3d ser.) 212, 218-19 (1936).

[46] In certain situations, it is not entirely clear what the proper result should be. There is some dispute, for example, as to whether defensive force should be permitted against an insane assailant whose acts are excused but not justified. The

system protects some justified acts by specifying situations, such as lawful arrest, in which one may not use defensive force.[47] But by implication it is lawful to use defensive force in all other instances. It is suggested here that any justified attack—not just those specified by statute—should be free from defensive force. Failure to recognize a general principle of justification would, of course, prevent implementation of this rule.

Suppose that a forest fire is raging toward a town, and that the only possibility of stopping it is to start another fire in an adjacent field to create a firebreak.[48] Starting the second fire is a societally desirable, and thus justifiable, act. A person may or may not have an obligation himself to burn the field and save the town, but if burning the field is justifiable, it would be inconsistent to conclude that a person may lawfully prevent it. This is not to say that anyone who prevents the burning should be punished; if he was insane, or ignorant of the justified nature of the act, he might be excused. But only one of the acts can be justified, and the criminal code should require the nonjustified act to yield to the justified.[49]

Since present law condones the use of defensive force to repel a justified attack, it is legal for a person to prevent the burning of the field. This is true even if he has no excuse, such as insanity or ignorance of the danger to the town. This anomaly occurs because, using the approach of selective exceptions, one cannot define every situation in which a defense of justification is appropriate. What is needed is a general rule stating that it is illegal to prevent a justified act; such a rule follows from recognition of the general concept of justification.

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proper result, it is contended here, should be to allow the use of defensive force. This situation is analogous to the case where *X* is assaulted by *Y* who in turn is acting under duress applied by *Z*. In the duress situation, though *Y* may be excused for his attack on *X*, *X* is still justified in using defensive force against *Y* (assuming, of course, that *X* cannot shoot *Z*). Even though the case of the insane assailant is analogous in theory, some may intuitively feel that defensive force is not permissible against an insane attacker. But this hesitation may be attributed simply to our justice system's requirement of a volitional act and the fact that many people consider the actions of an insane man more akin to an act of nature. Consider a related problem: May *X*, his life endangered by a man suffering an epileptic seizure, use deadly force to defend himself? This is the issue of volitional act, not the distinction between justification and excuse. *Cf.* Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367 (1973).

47 *See, e.g.*, CAL. PENAL CODE § 148 (West 1970).

48 *Cf.* CAL. JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, THE CRIMINAL CODE § 610, Comment (Staff Draft 1971) [hereinafter cited as PROPOSED CAL. CRIM. CODE].

49 This also demonstrates the universal character of a justified act. Since justification is dependent not on the actor but only on the act, an act which is justifiable when performed by one actor is necessarily justifiable when performed by any actor.

2. The Propriety of Third-Party Assistance

The problem of third-party assistance is similar to the question of defensive force. The controlling question is whether the principal act is justified. If an act is justified, the conduct of anyone assisting in the act should also be justified. But if an actor is excused, the excuse should appropriately be limited to him and should not extend to others.[50] If *X* robs a bank because he is insane, *Y*, his accomplice, is not shielded by *X*'s insanity. Unfortunately, the individualized character of excuse is often applied to justification because of confusion in current legal theory; it is currently no defense that the actions of the principal, identical to the defendant's, are deemed justified.[51] It is possible, then, that the acts of one person will be found justified, while the identical acts of another will not.[52]

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[50] The excuse of one actor has been held to shield both when the crime, like conspiracy, requires an intent of both actors. *See* Regle v. State, 9 Md. App. 346, 264 A.2d 119 (1970). In *Regle* the court concluded that the insanity of one defendant exculpated a co-defendant because the latter could not have had a joint intent with a person who could have no criminal intent at all. An alternative—and perhaps more satisfying—analysis is that the case simply involved an impossible attempt to conspire.

[51] Thus the present system might, in the raging fire example, consider one actor justified in burning the field yet still consider a companion unjustified in assisting in the identical act. Such erroneous results are not always apparent. They only become visible when it is known whether a principal actor is exculpated under a theory of justification or excuse, information not available under the current system. The corollary, of course, is that without knowing whether or not the principal was exculpated under a theory of justification, it is impossible to determine whether the universality of justification should be applied.

[52] Another practical problem which arises upon dissolution of the justification-excuse distinction, but one which under current law has little significance, is that of treatment. When the criminal justice system concludes that a person's act is justified, it is suggesting that the act was correct by the normative standards of society. The question of treatment is never considered. Since the act was "correct," the actor cannot be said to have manifested any deviance or abnormality. It is possible that an abnormal person could have done this normal, justified act; but since his abnormality was not manifested in the act he would not be subject to treatment under the criminal system, although he might properly be given treatment under some civil system.

When an act is judged unjustified, the individual may still escape punishment if it can be shown that he qualified for an excuse. When a person asks to be excused he admits that his action was not justified, was incorrect, but claims that he acted because of certain personal weaknesses, not of an evil nature, and thus, that he should not be punished. As Professor Fletcher suggests, this might be personified as "I couldn't help myself," or "I didn't mean to do it." Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974). The focus here has shifted from the act to the actor. When justification and excuse are merged it is no longer possible to determine which of the persons exculpated are persons whose behavior was criminal and caused by an abnormality and which are persons whose behavior was in fact laudable. This in turn prevents identification of persons who may require treatment.

It is assumed here that the successful plea of an excuse should lead to some sort of treatment. Since the defendant has claimed that he acted in an incorrect

IV. ACTOR-ORIENTED CONSIDERATIONS INTRODUCED INTO THE PRINCIPLE OF JUSTIFICATION

The preceding Part demonstrated the inconsistencies created by the improper merger of justification and excuse. This Part will independently establish that the principle of justification should not contain actor-oriented considerations, such as prior fault, motive, belief, and knowledge,[53] not simply because they are more properly associated with the principle of excuse, but also because their use generates results which are illogical and inconsistent with fundamental principles of criminal liability.

A. *Prior Fault as a Bar to Justification*

Justification statutes typically deny the defense of justification to a defendant who has created the necessity for the justified act. For example, section 610 of the Proposed California Criminal Code entitled "Justification; generally," provides in part, "A person is justified in conduct which would otherwise constitute an offense when such conduct is . . . necessary to avoid [certain enumerated

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way because of an abnormality in his character, it does not seem unreasonable for society to demand that this abnormality be corrected in order to avoid a similar harm in the future. Prevention of recurrence of the incorrect behavior is automatic in many excuse situations. In the case of mistake of fact, the defendant usually discovers his mistake immediately, thus preventing recurrence. In the case of mistake of law (if accepted as an excuse, a minority position) the trial is the treatment. The abnormality is the defendant's ignorance as to certain laws. In cases of duress and necessity the society may be content to allow the abnormalities to continue in the belief that they will rarely produce harm because of the infrequency of such situations. If the excuse is insanity, a successful plea should lead to immediate psychiatric treatment. But when a defendant is excused under present law, he is neither punished nor treated. Although the exact causal relationship between the absence of mandatory treatment and the demise of the justification-excuse distinction is not known, movement toward treatment of the excused defendant will be hampered by the absence of the justification-excuse distinction.

[53] Other typical statutory restrictions include requirements that the act be "*immediately* necessary," that it avoid an "*imminent* public *disaster*" or "*serious* bodily injury to a person" or "*serious* damage to property." *See, e.g.*, PROPOSED CAL. CRIM. CODE, *supra* note 48, § 610(b) (emphasis added); MODEL PENAL CODE § 3.04 (Proposed Official Draft 1962) (emphasis added). While these modifications are not theoretically inconsistent with the principle of justification, unlike those discussed in this Part, they are artificial limitations on the operation of the principle. There is no conceptually sound basis for excluding the principle from situations in which the threat is not "imminent" or "serious" in nature as long as the act is necessary to prevent a greater harm, a societal harm. Such restrictions may be tolerated, however, as simply an a priori balance of pertinent factors, a balance to which each citizen is bound.

> [In order to balance harms in a particular case], [t]he issue of competing values must not have been foreclosed by a deliberate legislative choice, as when the law has dealt explicitly with the specific situation that presents the choice of evils or a legislative purpose to exclude the justification claimed otherwise appears.

MODEL PENAL CODE § 3.02, Comment 1(b) (Tent. Draft No. 8, 1961).

harms] which [are] about to occur *through no fault of the actor* . . . ."[54] Though a prior fault restriction might be appropriate for an excuse provision, and indeed is found in a number of excuse situations,[55] such a restriction is inconsistent with the concept of justification. The prior acts of an actor cannot negate the social desirability of the act, which is the essence of the principle of justification. The prior fault may still be charged against the actor, of course, if it is itself illegal.

Suppose *D* is negligent or reckless in having a defective muffler on his camper, and sparks from his muffler start a forest fire. He would normally be justified in burning a field to serve as a firebreak to save the town from the forest fire.[56] But under the Proposed California Criminal Code, for example, he would be guilty of arson were he to burn the field; his initial negligence would bar the defense of justification. If he made no effort to

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[54] PROPOSED CAL. CRIM. CODE, *supra* note 48, § 610 (emphasis added). New York law provides:

> **Justification; generally**
>
> [C]onduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> . . . .
>
> 2. Such conduct is necessary . . . by reason of a situation *occasioned or developed through no fault of the actor*, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury sought to be prevented by the statute defining the offense in issue.

N.Y. PENAL LAW § 35.05 (McKinney 1965) (emphasis added). Similar provisions exist in other statutes. *See, e.g.*, WIS. STAT. ANN. § 939.47 (1958), *quoted in* note 60 *infra*.

> The Model Penal Code provides a somewhat more sophisticated restriction: *When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils* or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

MODEL PENAL CODE § 3.02(2) (Proposed Official Draft 1962) (emphasis added). The Proposed California Criminal Code would apparently bar the justification defense if the actor had even negligently caused the situation, no matter what the offense for which the defendant was being prosecuted. The Model Penal Code provides that if an actor was reckless or negligent in bringing about the situation, then the justification defense is not available in a prosecution for an offense for which recklessness or negligence suffices to establish culpability. *Id.* While both statutory restrictions are theoretically indefensible and likely to cause very real inequities, the Proposed California Criminal Code is certainly the more insensitive of the two.

[55] For example, intoxication may at times provide an excuse, analogous to insanity; but there is authority which denies the excuse in some cases of voluntary intoxication, under the theory that the actor has in some way "caused" the occurrence of the situation in which he acted in an incorrect manner because of his intoxication and for which he now seeks to be excused. *See, e.g.*, LAFAVE & SCOTT, *supra* note 2, at 341-42; MODEL PENAL CODE § 2.08(2) (Proposed Official Draft 1962).

[56] *See* Cope v. Sharpe (No. 2), [1912] 1 K.B. 496, where it was held justifiable to burn a strip of heather to prevent a fire from spreading.

save the town, he could not be charged with arson even for the original fire, since the Proposed Code has no negligent or reckless form of arson.[57] The law clearly urges him to let the town burn. This anomaly occurs because *D*'s initial fault in starting the forest fire is erroneously applied to his justified act of intentionally burning the field to save the town.

The Model Penal Code would hold *D* liable for burning the field only if arson could be committed negligently or recklessly.[58] Yet even the Model Penal Code's view is inappropriate since it is in society's interest to encourage *D* to burn the field and save the town even if he started the forest fire intentionally.

The prior fault bar to justification is even more clearly shown to be irrational in the situation where someone other than *D*, the person with the defective muffler, assists *D* in burning the field. In such a case, the second person would not be punished since he could assert the justification defense. Such a result would be new to the common law tradition. It would be difficult to explain why the criminal law should encourage one person to burn the field and save the town while discouraging another, or why it should punish one person for such an act but not another.[59]

More difficult cases arise when the necessity or other justifying situation is not simply the result of an actor's prior fault, but of a grand scheme in which the actor committed the prior act specifically to create justifying circumstances of which he could then take advantage. Consider the following: *D* starts a forest fire knowing that it will threaten the town and create justifying circumstances which will permit him to burn his enemy's field. In such cases, the defendant should be liable for acts committed under the justifying circumstances. *D* should be liable not only for the forest fire, but for the direct consequences which he intended or risked. Whether he burns his enemy's field or a passerby does so, he should be responsible. Liability should be imposed, however, not because the defendant's prior fault vitiates the defense of justification, but because the prior unjustified act directly caused the justifying circumstances *and* the subsequent justified act. The basis of liability is the first, unjustified act, not the second, justified act. Despite the previous circumstances, society would want him, or someone, to burn the field and save the town. Even though the actor with a "grand scheme" is subject to greater liability than one who is

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[57] *See, e.g.*, PROPOSED CAL. CRIM. CODE, *supra* note 48, § 1076.

[58] *See* note 54 *supra*.

[59] Consider also the case where a passerby had begun burning the field to save the community. If he needed additional help and called upon another person, would it be rational to suggest that of the two actors working side by side, one is justified and the other is not?

merely negligent, the law would still encourage him to burn the field once the fire is started. If he does not, the town will be destroyed as a result of his initial unjustified act, and he might then be liable for homicide as well as arson.

B. *Mistaken Belief as a Basis for Justification*

Many jurisdictions provide a defense of justification if the defendant "reasonably believed" his conduct was justified, even though in fact it was not. The Model Penal Code's provision is representative: "Conduct *which the actor believes* to be necessary to avoid a harm or evil to himself or to another is justifiable . . . ."[60] This rule is endorsed by most commentators. LaFave and Scott, for example, explain:

> An honest (and, doubtless, reasonable) belief in the necessity of [one's] action is all that is required . . . so that [one] has the defense [of justification] even if, unknown to him, the situation did not in fact call for the drastic action taken. Thus if *A* kills *B* reasonably believing it to be necessary to save *C* and *D*, he is not guilty of murder even though, unknown to *A*, *C* and *D* could have been rescued without the necessity of killing *B*.[61]

Here again an actor-oriented factor is introduced into the justification defense: the actor's belief. As noted before, such factors are erroneously adopted from the doctrine of excuse.[62] If a person reasonably, but mistakenly, believes his acts are justified, the proper legal determination is that the act was not justified or socially

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[60] MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962) (emphasis added). A comparable Wisconsin statute provides:

> Pressure of natural physical forces which causes the actor *reasonably to believe* that his act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to himself or another and which causes him so to act, is a defense to a prosecution for any crime based on that act except that if the prosecution is for murder the degree of the crime is reduced to manslaughter.

WIS. STAT. ANN. § 939.47 (1958) (emphasis added). Illinois has a similar provision:

> Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and *reasonably believed* such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.

ILL. ANN. STAT. ch. 38, § 7-13 (Smith-Hurd 1972) (emphasis added). While the comparable New York statute contains no reference to the actor's belief (N.Y. PENAL LAW § 35.05 (McKinney 1965), *quoted in* note 54 *supra*), some writers claim that such a "belief" restriction can be implied. *See, e.g.*, LAFAVE & SCOTT, *supra* note 2, at 386 n.35.

[61] LAFAVE & SCOTT, *supra* note 2, at 386 (footnote omitted).

[62] Mistaken belief is like other traditional excuses such as duress or insanity; it has been viewed as generating a form of involuntary conduct. "Those things, then, are thought involuntary, which take place under compulsion or owing to ignorance." THE NICOMACHEAN ETHICS OF ARISTOTLE, BOOK III, ch. I, at 48 (Ross transl. 1954).

desirable, but since the actor made a reasonable mistake he should be excused. For example, if the actor burns a field with the mistaken belief that a raging fire is threatening the town, the proper result would be to excuse him. Such mistakes of fact are traditional grounds for excuse.[63]

C. *Bad Motive and Lack of Knowledge of Justifying Circumstances as Bars to Justification*

1. Bad Motive

Bad motive is another common bar to the defense of justification. In *Laws v. State*,[64] for example, a Texas statute provided that it was justifiable homicide to kill a person burglarizing one's house at night. The defendant was convicted of murder for killing such a burglar, despite the statute, because the jury was persuaded that the defendant's primary motivation was malice toward the burglar. The court explained, "[I]t is not the intention of the statute to justify *murder*. Such a construction of the statute would to our minds be unreasonable and exceedingly dangerous."[65]

Three observations are in order concerning *Laws* and related cases. First, all concern the weakest case for justification, self-defense. In self-defense, society does not encourage the resulting death, as it does in necessity situations, but merely tolerates it; no benefit occurs, rather the defender is permitted to take the life of the attacker in order to save his own. Thus in self-defense cases the courts are more inclined to improperly consider any bad motives of the actor. Indeed, it has been observed, erroneously however, that:

> [A]ll justifications will fall into one or the other of these two classes; the first where the objects sought for are so important that motive must be ignored, the second where the objects are not so important but that the presence of ill-will may turn the scale.[66]

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[63] Whether the actor will in fact be excused for his mistake depends on the nature of the mistake, his own personal characteristics, and other individual circumstances. *See, e.g.*, MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962).

[64] 26 Tex. Crim. 643, 10 S.W. 220 (1888).

[65] *Id.* at 655, 10 S.W. at 221 (emphasis in original). Similar conclusions have been reached in other cases. In Lyons v. People, 137 Ill. 602, 27 N.E. 677 (1891), the defendant, a member of the gang that had previously killed a relative of the deceased, was denied the defense of justification though the deceased attacked him, because the jury believed he had killed the deceased out of malice. The defendant in Wortham v. State, 70 Ga. 336 (1883), was denied a defense when he shot the deceased after being struck by him with a stick; again the jury believed the defendant acted out of vengeance and not self-defense. *Accord*, People v. Williams, 32 Cal. 280 (1867); Josey v. United States, 135 F.2d 809 (D.C. Cir. 1943). *See also* Garcia v. State, 91 Tex. Crim. 9, 237 S.W. 279, 281 (1922).

[66] Note, *Effect of Bad Motive in the Law of Torts*, 26 HARV. L. REV. 740, 741 (1913).

Second, bad motive on the part of the defender may call into question his need to have injured the attacker;[67] that is, bad motive may be evidence that the injuring response was not in fact justified. Such a determination is uniquely difficult in self-defense cases. In the firebreak case, by comparison, the need for the response is obvious. The actions of the judges and the juries in self-defense cases may be only a misarticulation: They say that the defendant's act was unjustified because of his malice when they mean that his response was unreasonable and thus not justified.

The third point to be made concerning these cases is that they are contradicted by a number of decisions reaching opposite results under similar circumstances. For example, in *Golden v. State*[68] the court explained:

> Whenever the circumstances of the killing would not amount to murder, the proof even of express malice will not make it so. One may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account. This principle is too plain to need amplification.[69]

Although bad motive may bar a defendant's defense of excuse,[70] it should not preclude the defense of justification, which focuses on the act and not on the actor's motive. This position has been expressed most eloquently by Macaulay:

> If A. sets on fire a quantity of cotton belonging to Z., it is proper to inquire whether A. acted maliciously; for the destruction of valuable property by fire is *primâ facie* a bad act. But if Z.'s cotton is burning, and A. puts it out, no tri-

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67 *See* LAFAVE & SCOTT, *supra* note 2, at 206 n.22.

68 25 Ga. 527 (1858).

69 *Id.* at 532. Other cases have reached similar conclusions. *See, e.g.*, Giblan v. National Amalgamated Labourers' Union, [1903] 2 K.B. 600 (1902); Allen v. Flood, [1898] A.C. 1 (P.C. 1897). A number of related cases making the same point involve the more extreme situation where the defendant not only acts out of malice, but is unaware of justifying circumstances. *See* notes 86-88 & accompanying text *infra*.

70 Inherent in the existence of a motive is the attribution of knowledgeable free will. An actor may be excused if he was insane, if he acted upon reasonably mistaken facts, or if he acted under duress; but an act stemming from a defendant's bad motive will tend to preclude these possibilities, and will therefore generally bar an excuse. Bad motive may also operate to bar an excuse in a more subtle way. In Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875), for example, Prince was charged with taking an unmarried girl of under 16 from her father. He was denied a defense of mistake of fact even though he reasonably believed that the girl was eighteen, because the court believed that taking a girl of eighteen was an immoral, though not illegal, act. As one writer suggests, "[A] defense of mistake rests ultimately on the defendant's being able to say that he has observed the community ethic, and this Prince could not do." P. BRETT, AN INQUIRY INTO CRIMINAL GUILT 148-49 (1963). Any act upon bad motive would of course fail to meet this requirement.

> bunal inquires whether A. did so from good feeling or from malice to some other dealer in cotton, who, if Z.'s stock had been destroyed, would have been a great gainer; for the saving of valuable property from destruction is an act which it is desirable to encourage, and it is better that such property should be saved from bad motives than that it should be suffered to perish.[71]

Most commentators who have considered the question disagree and suggest that bad motive should vitiate the defense of justification. Perkins explains:

> Suppose a grave felony is about to be committed under such circumstances that the killing of the offender to prevent the crime would be justified by law. At that very moment he is shot and killed. If the slayer was prompted by the impulse to promote the social security by preventing the felony he is guilty of no offense. If he had no such impulse but merely acted upon the urge to satisfy an old grudge by killing a personal enemy, he is guilty of murder. The intent is the same in either case, to kill the person. The difference between innocence and guilt lies in the motive which prompted this intent.[72]

But in the same discussion he acknowledges that an executioner who carries out the sentence of a competent court is guilty of no crime even if his motivation is not to serve society but "to satisfy an old grudge by killing a personal enemy." Perkins concludes that carrying out the mandate is the "only legally recognized motive for his act,"[73] although he does not explain why.

The executioner exception made by Perkins may reveal that his view on the effect of bad motive is due to the confusion between the evidentiary and conceptual impact of bad motive noted above. In an execution there is no doubt as to the justified nature of the killing as there is in the self-defense situation, where bad motive may cause the defendant to kill an attacker when killing is not in fact necessary. To be consistent, Perkins must agree that bad motive has no pertinence if the need for the defensive killing in the self-defense situation—its justifiable nature—is as well established as the justified nature of an execution.[74]

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[71] 7 THE WORKS OF LORD MACAULAY 553 (H. Trevelyan ed. 1866). Lord Macaulay was advocating that truth be an absolute defense to defamation in the Indian Penal Code. The passage goes on:

> Since, then, no act ought to be made punishable on account of malicious intention, unless it be in itself an act of a kind which it is desirable to prevent, it follows that malice is not a test which can with propriety be used for the purpose of determining what true imputations on character ought to be punished, and what true imputations on character ought not to be punished; for the throwing of true imputations on character is not *primâ facie* a pernicious act.

Id.

[72] Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 923 (1939) (footnote omitted); PERKINS, *supra* note 35, at 832.

[73] PERKINS, *supra* note 35, at 833.

[74] Hitchler makes a point similar to Perkins':

The pertinence of bad motive is analyzed in a manner similar to that employed to examine prior fault. Consider the following: A passerby sees a forest fire and begins to burn an adjacent field to save the town. He finds, however, that he cannot do it in time without assistance. A second passerby is an old enemy of the owner of the field who would burn the field simply to injure the owner rather than to save the town. Should the law prevent this person from acting by convicting him of arson?[75] Is it rational to convict the second man of arson and not the first, even though they work side by side? Finally, if the passerby helps, should the law convict him of a crime when in the final analysis not only was no harm done but society was in fact benefited? If the justified act benefits society, it should be performed no matter what the motive and, further, if no harm has occurred, then the act is not a proper concern of the law.[76]

> The lawfulness of the killing in these cases depends upon the motive with which it was done, i.e., to prevent a felony or defend oneself. It follows therefore that though all the external circumstances exist which would justify one in killing to prevent a felony or in self-defense, he would be guilty of murder if he killed solely for revenge and not with the motive to prevent the commission of a felony or to save life.

Hitchler, *Motive As An Essential Element of Crime*, 35 DICK. L. REV. 105, 114 (1931) (footnote omitted). Both Hitchler and Perkins agree that their view of motive as a determinative factor is an exception to the general rule that motive is normally irrelevant. *Id.*; PERKINS, *supra* note 35, at 833.

[75] Failure to exculpate those who commit justified acts may create the potential for unjust results. In cases such as Laws v. State, 26 Tex. Crim. 643, 10 S.W. 220 (1888), for example, it might encourage prospective burglars to break into the houses of people who already hate them, since those persons may not be privileged to assault the burglar. *See* text accompanying notes 64-65 *supra*.

[76] One modern authority would agree with this position, at least in part:

> There is, however, at least one good reason to resist characterizing the defenses, such as necessity and self-defense, as instances in which a good motive serves a defense. Such a characterization leads to analytical difficulties, for it suggests that these defenses are available only if the actor, in each case, had as his primary inducement the objective recognized as lawful by the defense. Although this position has sometimes been taken, the better view is that the law is not concerned with motive once facts supporting the defense have been established. Thus, when a person authorized to carry out a death sentence does so, he is acting lawfully whether he pursues his duties with regret, joy, or indifference. Similarly, when an individual finds himself in a position where the law grants him the right to kill another in his own defense, it makes no difference whether his dominant motive is other than self-preservation.

LAFAVE & SCOTT, *supra* note 2, at 206-07 (footnotes omitted). But the writers continue:

> This does not mean, of course, that the defense can be manufactured after the event by resort to facts not known to the actor when he engaged in the conduct. Thus, in the prison-break illustration described earlier, the defendant would not have a defense if he escaped from prison and then later learned, to his pleasant surprise, that when he left it was on fire and that he would have been burned to death had he remained.

Id. at 207 (footnote omitted). Apparently their position is that while bad motive will not bar a defense of justification, lack of knowledge of the justifying circumstances will. *See* text accompanying notes 77-80 *infra*.

2. Lack of Knowledge of Justifying Circumstances

The inappropriateness of granting a defense of justification, rather than excuse, to a defendant who honestly but erroneously believed his conduct was justified has already been considered. This Part will examine the converse situation: when a defendant believes his conduct is not justified because he is unaware of circumstances which in fact render his conduct beneficial to society. Such situations are analytically similar to instances where the defendant acts because of bad motive; in both cases, an act intended to be harmful results in a benefit to society which would otherwise have provided the actor with a recognized defense of justification. And in many instances the fact that the defendant lacked knowledge of the justifying circumstances may compel an inference that he acted out of bad motive.

Of the commentators who have considered this situation, almost all have concluded that a defense of justification should not be available.[77] LaFave and Scott, for example, explain:

> To have the defense of necessity, the defendant must have acted with the intention of avoiding the greater harm. Actual necessity, without the intention is not enough. If *A* kills his enemy *B* for revenge, and he later learns to his happy surprise that by killing *B* he saved the lives of *C* and *D*, *A* has no defense to murder. In other words, he must believe that his act is necessary to avoid the greater harm.[78]

They provide no authority or further explanation for this conclusion, however.[79] And interestingly enough, while they would deny a defense of justification to a defendant who lacked knowledge of justifying circumstances, they would not deny the defense to one who acted out of bad motive.[80]

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[77] Even these writers might exculpate an unknowingly justified actor, but on a theory of excuse. For example, an actor might burn a field reasonably but mistakenly believing it to be his own, and save the town from an approaching fire about which he knew nothing.

[78] LAFAVE & SCOTT, *supra* note 2, at 386 (footnote omitted). *See also id.* at 207 n.25.

[79] They do refer the reader to "§ 29, supra, for a discussion of motive in criminal law." *Id.* at 386 n.31. Their discussion in this earlier section has been reviewed in note 76 *supra*.

[80] Perkins, also without explanation, denies the defense to those acting in ignorance. PERKINS, *supra* note 35, at 832 n.37. This is at least more consistent than LaFave and Scott. Perkins may believe that bad motive may be inferred from ignorance or justifying circumstances, and thus that the two must be treated similarly. This is not necessarily true. Suppose *A*, ignorant of an onrushing fire, burns the field of his neighbor under the mistaken belief that he is burning his own field. Inadvertently, *A* saves the town. Although *A* had no knowledge of the justifying circumstances, it cannot be said that he acted out of bad motive.

Beale's view of the effect of ignorance on the justification defense is similar to Perkins', but more fully explained:

A number of cases support the views of these commentators. In the best known, *The Queen v. Dadson*,[81] the defendant was a police officer who, in order to prevent an escape, shot a person whom he had just arrested for stealing wood. Such killings were ordinarily permitted only to prevent the escape of a felon. While the offense for which the person had been arrested would not normally have been a felony, the fact that the arrestee had previously been convicted, a fact unknown to Dadson, made it a felony. Dadson was convicted and punished for the shooting.[82]

It is argued here, however, that *Dadson* and related cases have been decided incorrectly; the justification defense should be available even to defendants who lack knowledge of the justifying circumstances. One's mental state simply cannot convert otherwise harmless conduct into a crime,[83] and it is irrational to claim that of two actors working side by side to burn the field to save the city, the one who knows of the fire is justified, while the one who is innocently helping his friend is not justified.[84] More funda-

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> Justification, then, is a legal power to act offensively. The power is the power to act, not the right to cause the result. Though the result would be desirable, it is not justified unless the defendant's personal action was done in exercise of the power.

Beale, *Justification for Injury*, 41 HARV. L. REV. 553 (1928). Characterization of justification as a "power" (or "privilege" as many writers suggest) granted to the defendant sharply contrasts with this Article's position of justification as a limitation on the criminal law.

[81] 169 Eng. Rep. 407 (1850).

[82] An American case, People v. Burt, 51 Mich. 199, 16 N.W. 378 (1883), makes a similar point: "Where the life of an actual felon is taken by one who does not know or believe his guilt, such slaying is murder." *Id.* at 202, 16 N.W. at 379. A similar result was reached in Collett v. Commonwealth, 296 Ky. 267, 176 S.W.2d 893 (1943), where the court concluded that "[the defendant] cannot be excused from his wilful malicious act by a showing of circumstances of which he was unaware." *Id.* at 273, 176 S.W.2d at 896. The allusion to *excusing* the defendant, instead of justifying, is revealing. Part III of this Article attempted to show how the introduction of the actor-oriented factors discussed in this Part was due to a confusion and mixture of the principles of justification and excuse. The language in *Collett* appears to bear this out. *See also* Trogdon v. State, 133 Ind. 1, 8, 32 N.E. 725, 727 (1892) (defendant was denied a defense of self-defense because he was not aware of the actual danger to himself when he killed the deceased); Strang v. Russell, 24 N.Z.L.R. 916, 922 (1905) (defendant rowed upon a lagoon to which the plaintiff claimed title in order to contest that title. Defendant was fined £1 for trespass when it was determined that plaintiff did have title, even though it was also found that defendant had a license to enter of which he was not aware).

A fairly recent discussion of the same point is contained in People v. Taylor, 3 Cal. 3d 578, 592, 477 P.2d 131, 140, 91 Cal. Rptr. 275, 284 (1970) (Peters, J., dissenting), where a dissent noted that if it was fortuitous whether a situation in fact turned out to be justified, then the justifying circumstances must be logically irrelevant to his culpability. The writer would agree with this statement, but would go on to note that culpability, without a resulting harm, is an insufficient basis for conviction of a crime.

[83] PERKINS, *supra* note 35, at 236, *citing* State v. Holder, 81 N.C. 527 (1879); Sentell v. New Orleans & C.R. Co., 166 U.S. 698, 701 (1897).

[84] The argument concerning the desirability of having a justified act done, even with bad motive for example, is obviously inapplicable here since the actor who does not know of the justifying circumstances cannot be encouraged to act

mentally, since no harm has occurred, the incident should be of no concern to the criminal law.[85]

This position is supported by a number of cases. For example, *Regina v. Clarke*,[86] decided one hundred years after *Dadson*, reached a contrary result on similar facts. Clarke was arrested for loitering with intent to commit a felony. He was deemed a "suspected person," as required for that offense, because of his previous convictions. Yet at the time of his arrest the police officers had been unaware of his previous convictions. His conviction was upheld because "knowledge [of the previous convictions] on the part of the police is irrelevant and certainly not essential."[87] Analogous tort cases are found in the area of malicious prosecution. It is generally held that the bad faith initiation of prosecution is not tortious if the person who is the object of the prosecution is found guilty, even if the person responsible for prosecution had no knowledge of the plaintiff's guilt when he initiated the suit.[88] It is

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accordingly, for any reason. In other words, in the case of lack of knowledge, the conduct-modifying function of law is irrelevant; only the punishment-for-past conduct function is applicable.

[85] One writer, Glanville Williams, would apparently agree with this position. He notes: "Where . . . the objective situation is one that the law actively wishes to promote, it cannot be turned into a crime by *mens rea*." G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 12, at 23 (2d ed. 1961). He goes on to criticize the leading case on point, The Queen v. Dadson, 169 Eng. Rep. 407 (1850), and makes a point similar to the one presented here:

> The point of interest here is that the rule hardly accords with the requirement of an *actus reus*. In *Dadson* the arrester had *mens rea*, for he intended to arrest the other and on the facts as he knew them the arrest was unlawful. But common sense would suggest that the arrest was nevertheless not criminal, because there was no *actus reus*.

G. WILLIAMS, *supra* § 12, at 24. *See* note 81 & accompanying text *supra*.

Another English commentator analyzing impossible attempts appears to agree with Williams. *See* Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 445 (1957). Williams defines "*actus reus*" as the "whole situation forbidden by law with the exception of the mental element . . . ." G. WILLIAMS, *supra* § 12, at 22. Although Williams fails to explain the "common sense" of his conclusion, his position on this point appears to support at least in part the theory proposed here.

Williams' theory would support the one presented here entirely except that he exempts from application of his definition of *actus reus* the case of attempt. He would admit that attempts are an exception because the *actus reus* of attempt must include the actor's intent. Thus, presumably the presence or absence of intent might affect the applicability of a justification defense to a charge of attempt. In contrast, it is proposed here that no such exception need be made, that attempt, like any other offense, may have a justification defense available if no harm occurs, without regard to an actor's intent.

[86] [1950] 1 K.B. 523.

[87] *Id.* at 530. *See also* The Abby, 165 Eng. Rep. 765 (1804) (action against a ship for violating a prohibition of entering an enemy port dismissed even though the ship's officials learned only after arriving that the enemy port had been captured by friendly forces).

[88] Mooney v. Mull, 216 N.C. 410, 5 S.E.2d 122 (1939); Newton v. Weaver, 13 R.I. 616 (1882); W. PROSSER, HANDBOOK ON THE LAW OF TORTS 840 (4th ed. 1971).

conceded here, however, that a beneficial act done with no knowledge of the justifying circumstances or for bad motive arguably gives rise to an intangible harm similar to that associated with impossible attempts. The differences of opinion over criminal liability for impossible attempts are also applicable to the no-knowledge and bad motive situations. If wrongful intent combined with an act that fails to prove harmful does not suffice for criminal liability for impossible attempts, neither should it here since the intentions, acts, and results are analogous. If it is sufficient for impossible attempts, so would it be here. But note that when punished, such conduct is punished as an "attempt," a special classification of crime for punishing the intangible harm stemming from acts done upon a bad intent but which do not result in the harm expected.

One must conclude, then, that conduct based on bad motive or on ignorance of justifying circumstances may only be punished —if at all—as an attempt to commit the ultimate act. In the firebreak case, if the actor does not know of the threatening forest fire or knows but acts out of bad motive, he may be punished at most for attempted arson.[89] Again it can be seen that the defense of justification should remain available in every situation for which no resulting harm can be demonstrated, regardless of any actor-oriented considerations such as prior fault, motive, belief, or knowledge.[90]

V. CONCLUSION

This Article has presented a new theory of the principle of justification in which justification compensates for the inherent limitations of a written criminal code. It excludes from the jurisdiction of the criminal law those cases where a defendant engages in conduct which the code prohibits, but which, because of special circumstances, does not in fact harm society or its members and

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[89] Although his reasoning might differ somewhat, Glanville Williams would apparently agree to this in certain circumstances. *See* G. WILLIAMS, *supra* note 85, at 27.

[90] While one may properly argue that an intangible yet sufficient harm exists in the impossible attempt and unknowingly justified situations to support conviction for a crime of attempt, no such argument is available in the prior fault and bad motive situations. Nor are the previous conclusions concerning mistaken belief affected. No such extensions have been made for prior fault or bad motive. Nowhere in the criminal law has prior fault plus otherwise legal activity, or bad motive plus otherwise legal activity, yet been made a crime. Note, however, that preventive detention statutes do approach it, in the case of prior fault. And many, according to one commentator, may wish it in the case of bad motive. J. AMES, LECTURES ON LEGAL HISTORY 438 (1913).

which therefore should not be prohibited or punished. Inherent in this theory of justification is the view that harm is a prerequisite to criminal liability. As a penal code prohibits only harmful acts, so does justification, in refining the application of the code, exculpate nonharmful acts.

The proposed role of justification as a corrective device for the penal code, and the application of that device to require a societal harm, are admittedly inconsistent with today's common use of actor-oriented factors in the justification determination. The use of such factors, however, undermines the purpose of the penal code and the principle of justification to prohibit certain acts (sometimes defined in terms of the result they cause, sometimes only as the acts themselves) and to punish those who commit such acts without excuse. With regard to the requirement of societal harm, it is similarly clear that the use of such factors would be inconsistent with the claim that justification should depend on the presence or absence of a societal harm, since harm is a characteristic of the act, not the actor.

A theoretical analysis entirely independent of the proposed theory demonstrates that the actor-oriented considerations which have been introduced into the principle of justification—prior fault, belief, motive, and knowledge—cause results inconsistent with fundamental legal principles, while the proposed theory does not. The contradiction between the proposed theory and actor-oriented considerations thus lends the theory independent support. Adoption of a general theory of justification in the form proposed would eliminate the incongruous results caused by actor-oriented factors introduced through mixing justification and excuse, and would provide a more accurate and comprehensive method of defining prohibited conduct within the framework of a written code system.