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Justification and Excuse

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I. CIVIL LAW DISTINCTION V. COMMON LAW CONFUSION

A Continental criminal scholar, looking at the Anglo-American classifications of self-defense, consent of the injured, insanity, mistake of fact or law, necessity or coercion, will probably be startled by the lack of clear differentiation between *justification* of the criminal act itself and mere *excuse* of the actor. This is not to say that Anglo-American law would not recognize certain differences between defenses such as self-defense or domestic authority on the one hand and lack of responsibility by insanity on the other. But as a matter of criminal practice, Stephen's statement that the common law distinction between justification and excuse "involves no legal consequences"¹ still seems to be valid, at least in the sense that it may be of some procedural value but is "fallacious and misleading"² for establishing separate categories of substantive law. This traditional handling of justification and excuse as somehow interchangeable or at least not fundamentally different notions certainly has not escaped revision. This is clear, in particular, if we consider the treatment of defenses and exclusion of responsibility in the Model Penal Code (art 2-4), which is said to be based on the "distinction between excuse and justification."³ But with the exception of George Fletcher, who seems to stand alone in fully recognizing the fundamental distinction between justification and excuse,⁴ all attempts in this direction lack clarity and conclusiveness.⁵

This rather harsh judgment on American criminal theory should not imply however that Continental legislation and theory have found

1. Stephen, 3 *History of the Criminal Law of England* 11 (1883).

2. Hall, *General Principles of Criminal Law* 233 (2nd ed. 1960). See also Hart, *Punishment and Responsibility* 13 (1968): "To the modern [English] lawyer this distinction [between justification and excuse] has no longer any legal importance. . . . But the distinction between these two different ways in which actions may fail to constitute a criminal offence is still of great moral importance."

3. ALI Modern Penal Code, Tentative Draft No. 8, at 12 (general survey, art 3).

4. Fletcher, "The Individualization of Excusing Conditions," 47 *So. Cal. L. Rev.* 1269 (1974).

5. This also applies to the ALI Model Penal Code, as Honig has shown in his German translation, *Entwurf eines amerikanischen Musterstrafgesetzbuches*, 86 *Sammlung Ausserdeutscher Strafgesetzbücher in deutscher Übersetzung* 35 n. 87 (Jescheck & Kielwein, eds. 1965).

the proper solution to the problems of justification and excuse. According to the new general part of the German Penal Code, the distinction between (objective) justification of the act and mere (subjective, individual) excuse of the actor is now expressly recognized as a matter of principle, even though some minor problems persist—in particular, the unavoidable question where to draw the line. The most obvious example is the distinction between “justifying necessity” (§ 34) and “excusing necessity” (§ 35). In § 34 the law calls the act *nicht rechtswidrig* (not unlawful) if it is committed for the purpose of saving a prevailing legal interest from imminent danger.⁶ On the other hand, § 35 deals with the situation in which the act remains unlawful since the interest violated may objectively prevail, but the actor may be held to act *ohne Schuld* (without guilt, in the sense of personal blameworthiness) if he intended to save his or his relative's life, limb or liberty.⁷ Similarly, an act committed in self-defense is considered “not unlawful” (§ 32), provided the actor has not exceeded the bounds of necessary defense; but even if he has done so (e.g. by killing instead of only wounding the aggressor) and therefore his act was unlawful, he might “not be punishable” (i.e. he would be *excused*) if he exceeded the bounds of the defense by reason of emotion, fear or fright (§ 33).⁸

Clearly the law would not and should not make a distinction between justification (recognizing an otherwise unlawful act as lawful) and excuse (treating the act as unlawful but exculpating the perpetrator) on purely theoretical grounds.⁹ But as was shown some decades ago by the late Professor Radbruch,¹⁰ this distinction is of some practical importance. Complicity may serve as an example. The law says that each participant is subject to punishment without regard to the guilt of the others (§ 29), but an accessory before or in the act is subject to punishment only if the act is unlawful (§§ 26, 27). An accessory is not subject to punishment if he has assisted in an act which is justified by “justifying necessity” (§ 34), in contrast to when he is only excused by “excusing necessity” (§ 35). The same applies to accessories after the fact (§§ 257, 258) as well as to receiving stolen property (§ 259). The imposition of sanctions may serve as an-

6. For more details see *infra*, text at n. 64-74.

7. For more details see *infra*, text at n. 80-84.

8. For more details and examples see *infra*, parts III-V.

9. Yet the distinction between justification and excuse is not merely a “juridical invention.” It has already been made in writings on philosophy. See Austin, “A Plea for Excuses,” in *Proceedings of the Aristotelian Society* 1 (1956-1957).

10. Radbruch, “Jurisprudence in the Criminal Law,” in 18 *J. Comp. Legislation and International Law* 218-219 (1936). Unfortunately, the author was misunderstood by Hall, *supra* n. 2 at 234-235, perhaps because he did not realize that Radbruch, at least in that respect, was not simply speculating but interpreting German statutory law.

other example of the important distinction between justification and excuse. Whereas punishment (in the narrow sense of a truly "criminal" sanction) requires an act which is objectively unlawful and subjectively guilty (§§ 38-45b), certain measures of rehabilitation or security may attach to an unlawful act: e.g. confinement in an institution for cure or care (§ 63), revocation of driver's license (§ 69), prohibition to exercise a certain profession (§ 70) or forfeiture of illegal profits (§ 73). So even though a defendant who killed an aggressor, exceeding the bounds of self-defense by reason of fright, may not be punished (§ 33), he can be sent to an institution for cure or care because, though he is excused, his act remains unlawful (provided, of course, that his possibly pathological fearfulness needs some treatment).

This fundamental distinction between justification (treating the act as not unlawful) and excuse (merely considering that subjectively the perpetrator is not blameworthy), now firmly entrenched in German theory and practice, was not enshrined in the original version of the German Penal Code of 1871. Not unlike Anglo-American legislation and jurisprudence, justification and excuse were completely mingled in that Code. No statutory guidelines declared e.g. whether self-defense (§ 53, ¶ 1, 2 old version) should be treated as justification or excessive defense (§ 52, ¶ 3) as merely exculpating. The explanation of this confusion is quite simple: when the Code of 1871 was drafted, the distinction between unlawfulness and guilt was almost unknown in German criminal theory or at least far from generally accepted.¹¹ This makes the problem even more exciting for comparative purposes: the question may be asked why this distinction has not been accepted in one legal system while it developed in another? Certainly, in comparing different laws we always have to keep in mind different traditions and perhaps differently structured systems. But a theoretical system can be changed and refined to a remarkable extent. This can easily be illustrated by the development of a concept of crime composed of *Tatbestandsmässigkeit* (fulfillment of the statutory elements of a crime), *Rechtswidrigkeit* (unlawfulness of the act) and *Schuld* (guilt, blameworthiness) as it has evolved in German criminal theory and as it is basically recognized in most Continental (especially Italian and Spanish) and Latin American criminal theories.

II. THE TRIPLE ELEMENTS IN THE GERMAN CONCEPT OF CRIME

Justification and excuse can hardly be explained without regard to the distinction between *unlawfulness* (of the act) and *blameworthi-*

11. In one of the most popular textbooks on German criminal law of the time, Berner's *Lehrbuch des deutschen Strafrechts* (1857), adapted to the Penal Code of 1871 in its 6th ed. (1872), the terms justification and excuse are not even used.

ness (of the perpetrator). This distinction has its own important history in the German concept of crime which should be presented at least in its main stages of development. Yet this is not easy since the German legal literature has not used terms and notions uniformly, besides adopting divergent doctrinal approaches. Shortcomings are unavoidable in any brief presentation of such a highly complex development, including the impossibility of showing the relevance of the various factors of personal responsibility (capacity, consciousness of illegality, etc.) and of presenting the substantial changes in the notion of guilt.¹²

A fundamental prerequisite for distinguishing justifying defenses from exculpating defenses was the rise of *Rechtswidrigkeit* (unlawfulness of the act) and *Schuld* (guilt in the sense of subjective individual blameworthiness, not in the procedural sense of guilty plea) as systematic and distinct elements in the concept of crime. So far as "guilt" is concerned, this development goes back to the middle of the 19th century.¹³ Not that before this time the principle of *mens rea* was unrecognized in the German penal system.¹⁴ As an element of the criminal act, *mens rea* had been held essential long before, yet—and this is the important point—only as a sub-element of the broader concept of imputation, which reaches back to Samuel Pufendorf's *Imputationslehre*. Under this doctrine *mens rea* was a constituent element of the wrongfulness of the act. The function of imputation was to distinguish the criminal act as brought about by man from the mere happening of an event. Although at that time wrongfulness and *mens rea* were not yet understood in the sense of modern criminal theory, it may be fair to say that, by merging wrongfulness and *mens rea* in the notion of imputation, "guilt" was seen as a necessary constituent of wrongfulness. So even in 1867 Adolf Merkel could still state that there is no wrongfulness without *mens rea*,¹⁵ an opinion which—at least in his earlier writings—was also supported by Karl Binding.¹⁶

This was the consensus of criminal theory at that time. Hence, it is interesting to note that the first steps in developing a concept of wrongfulness independent of blameworthiness (and thus to distinguish objective wrongfulness from subjective guilt) were taken in the context of private law. Rudolph Jhering was the first to show that

12. Achenbach, in *Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre* (1974), is most instructive on this point.

13. See *id.* at 19 ff.; Jescheck, *Lehrbuch des Strafrechts, Allgemeiner Teil* 153 ff. (2nd ed. 1972).

14. Thus we can find interesting parallels to the common law concept of *mens rea*; see Mueller, "On Common Law *Mens Rea*," 42 *Minn. L. Rev.* (1958).

15. Merkel, 1 *Kriminalistische Abhandlungen* 42 ff. (1867); see also Wach, 25 *Gerichtssaal* 446 (1973).

16. Binding, 1 *Die Normen und ihre Übertretung* 135 (1872).

personal guilt is not necessarily essential for wrongfulness, that wrongfulness may result in certain legal consequences even if subjective blameworthiness is disregarded.¹⁷ There still remained the question of how to distinguish wrongfulness from guilt, but for the development of independent categories the evolution of "objective unlawfulness" was a basic step which proved to be decisive for the concept of crime as well. In criminal jurisprudence, E. Beling and F. v. Liszt were the leading scholars in transferring and refining "objective unlawfulness" as a notion of crime.

Before examining their theories more closely, a short comment on the preparatory doctrines by K. Binding may be useful. Binding was probably the first to give the concept of "guilt" a concise meaning within a comprehensive system.¹⁸ Keeping in mind that his *Normentheorie* (theory of norms) was much more complicated and odd than can be shown in these short observations, we should at least note that by separating "norm" from "penal provision," Binding had shown a way to separate the notion of unlawfulness from the statutory text and thus give unlawfulness an autonomous function. What is truly violated by the criminal act is not the penal provision, which provides a sanction, but rather the commands and prohibitions of the legal system, i.e. the "norms," which in theory exist before the written law. Therefore the whole concept of wrongfulness must be oriented to and conceived out of the substance of the norms.¹⁹ As for guilt, this meant to Binding the "will of a competent person as the cause of wrongfulness" or "the will directed to wrongfulness." Will and capacity are elements of guilt (*mens rea*), which—as a generic notion—comprises the perpetrator's intention and recklessness/negligence. Thus by giving the notion of guilt a specific connotation, Binding also contributed to the separation of wrongfulness from guilt. Nevertheless he cannot be put on a par with Beling and v. Liszt because he still adhered to the common opinion of his time that wrongfulness cannot be established without guilt.²⁰

Although the development considered so far was primarily directed at separating wrongfulness from guilt, Beling's attention turned to wrongfulness as distinct from the fulfillment of penal law provisions. In his famous *Lehre vom Verbrechen* (1906), Beling developed the so-called *Tatbestand* as a comprehensive set of the statutory elements which constitute the various types of crimes. As such, *Tatbestandsmässigkeit* (in the sense of the act's statutory type) is an independent notional element of crime. And since *Tatbestandsmässigkeit*

17. Jhering, *Das Schuldmoment im Römischen Privatrecht* 4 (1867).

18. See Binding, *supra* n. 16; Kaufmann, *Lebendiges und Totes in Bindings Normentheorie* (1954); Achenbach, *supra* n. 12 at 27 ff.

19. See Jescheck, *supra* n. 13 at 154.

20. See *supra* n. 16 and Binding, 1 *Handbuch des Strafrechts* 159 (1885).

keit was thought of as indicating only the type of an act, without implying any final normative judgment as to its wrongfulness, the tripartite system of the German crime concept emerged: *Tatbestandsmässigkeit* (as the fulfillment of the statutory elements of a provision of penal law), *Rechtswidrigkeit* (as the objective conclusion that the act is unlawful) and *Schuld* (as subjective imputability of the act to the perpetrator).

Based on this tri-partition, F. v. Liszt in his own and still more refined system defined crime as an act (*Handlung*, in the sense of a willful physical motion) which is typified by a penal provision (*Tatbestandsmässigkeit*), unlawful (*rechtswidrig*) and guilty (*schuldhaft*, in the subjective sense).²¹ Thereby unlawfulness was related to the objective elements of the act, whereas "guilt" was understood as the subjective prerequisite for a criminal sanction. In later writings, v. Liszt clarified guilt in a more psychological sense: guilt as the subjective relation of the perpetrator to the proscribed harm. Thus by dividing the objective from the subjective elements of the crime, a system characterized by a hitherto-unknown clarity was established. It was acknowledged as a great doctrinal development compared with the criminal theories of the 19th century.

However, the Beling-Liszt crime concept had to undergo quite a few modifications in its further development. When v. Liszt related unlawfulness to the act and guilt of the perpetrator, he seemed to suggest that all objective factors of the *Tatbestand* had to do exclusively with unlawfulness, whereas all subjective factors had to be ascribed to guilt. Beling similarly expressed the opinion that wrongfulness and guilt could be neatly separated into external and internal, or objective and subjective elements—a distinction which was the basis of v. Liszt's psychological concept of guilt, but which later proved insufficient. At least two points should be made with respect to the most important modifications and refinements of the Beling-Liszt system: first, after August Hegler and Edmund Mezger demonstrated that the *Tatbestand* was composed not only of objective elements (such as taking away the property of another by larceny) but also of subjective ones (the intent to convert the property to the perpetrator's own use), the separation between purely objective elements of unlawfulness on the one hand and purely subjective elements of guilt on the other proved to be incorrect and superficial, in the sense that it was simply oriented to (objective or subjective) factual aspects.²² Instead of this "naturalistic" view, a more normative ap-

21. v. Liszt, *Lehrbuch des Deutschen Strafrechts* 110 ff. (21 & 22 ed. 1919). See also Beling, *Die Lehre vom Verbrechen* 5-47 (1906). For further developments, see Plate, *Ernst Beling als Strafrechtsdogmatiker* (1966).

22. Mezger, *Strafrecht* 168 ff. (1931); "Die subjektiven Unrechtselemente," 89 *Gerichtssaal* 207 ff. (1924); Hegler, "Die Merkmale des Verbrechens," 36

proach was gaining ground: whether objective or subjective, all typical elements of the crime constituting unlawfulness (*Rechtswidrigkeit*) began to be understood as constituting the material substance of its wrongfulness (*Unrecht*), whereas all (objective or subjective) elements which determined the blameworthiness of the motivation or established fault were essential for guilt.²³

Second, and later, guilt seen as blameworthiness necessitated revision of another doctrine of Beling-Liszt's system: the assumption that guilt could be predicated adequately on the establishment of a psychological relation between act and actor in the form of intent or recklessness/negligence. This "psychological" concept of guilt was soon replaced by the "normative" concept of guilt as developed by Reinhard Frank and James Goldschmidt: intent or recklessness/negligence are necessary but not sufficient conditions of guilt; beyond that psychological connection, guilt requires that the perpetrator can be "blamed" for his (intentional or negligent) act, i.e. that he would have been able to act according to the law and that such conduct "even by respecting his personal abilities and conditions could have been demanded from him."²⁴ As we will see, this doctrine of *Zumutbarkeit* was one of the corner stones for the present doctrine of excuse.

In sum, Beling-Liszt's system, although revised and refined on certain points, has proved to be stable insofar as the tripartite composition of crime is concerned.²⁵

III. THE FINAL STEP

Yet the distinction between guilt and unlawfulness did not lead *eo ipso* to an adequate separation and clarification of grounds for jus-

ZStW 19 ff., 31-38 (1915); id., "Subjektive Rechtfertigungselemente im Rahmen des allgemeinen Verbrechensbegriffes," in 1 *Festgabe für R. v. Frank* 251 (1930).

23. See Schmidt, *Geschichte der deutschen Strafrechtspflege* 183 ff. (3d ed. 1965).

24. v. Frank, *Der Aufbau des Schuldbegriffs* (1907) and *Das Strafgesetzbuch für das Deutsche Reich* 136 ff. (18th ed. 1931). Goldschmidt, "Normativer Schuldbegriff," in 1 *Festgabe für R. v. Frank* 428 (1930).

25. To be quite correct however it should be noted that there is still a dispute whether *Tatbestandsmäßigkeit* is an element of the same rank as unlawfulness, which would result in a truly three-pronged concept of crime; see Lenckner in Schönke-Schröder, *Kommentar zum Strafgesetzbuch* (18th ed. 1976), prel. n. 14 ff. to § 13 with more details, or whether *Tatbestandsmäßigkeit* is merely a sub-element of wrongfulness as constituted by fulfillment of the elements of crime typified in legal provisions, in absence of any grounds of justification (see Schmidhäuser, *Strafrecht, Allgemeiner Teil* 141 ff. (2d ed. 1975). In this two-element approach (which probably is more convincing), wrongfulness as judgment on the act and guilt as judgment on the actor's personal blameworthiness are the fundamental prerequisites for punishability. For our purposes however, the dispute between the scholars advancing the three-element and two-element theories is without relevance since both approaches are based on the fundamental distinction between unlawfulness and guilt as well as justification and excuse.

tification and excuse. Although the term *Schuldausschliessungsgründe* (grounds for exclusion of guilt) was found in earlier doctrines, it did not have any precise meaning. Thus besides the classical ground of exclusion of guilt, incapacity, this term was sometimes applied even to justification.²⁶

If we disregard various intermediate (but important) steps of development, we could say that James Goldschmidt was virtually the first scholar to construct a system of justification and excuse which proved valid and comprehensive. Although a full understanding of his distinction would require a detailed presentation of his *Pflichtnormentheorie* (doctrine of norms of responsibility or duty), we must restrict the present brief observations to his approach and result. Goldschmidt found that the statutorily typified *Rechtsnorm* (legal norm), which postulates a certain external conduct, is implicitly accompanied by a *Pflichtnorm* (norm of responsibility) which obliges the individual to condition his internal attitude in such a way that it directs external conduct in accordance with the legal norm.²⁷ Just as the unlawfulness of the violation of a legal norm can be waived by reason of justification, the violation of a norm of responsibility may be held not blameworthy if the perpetrator can invoke a ground of exculpation through which his personal responsibility is excluded. Goldschmidt also tried to find an explanation for this parallel in the rationale of the different grounds for excluding punishability: in the last analysis, justification is based on the principle of the superior objective and legitimate interest;²⁸ exculpation can be rationalized by a superior subjective and approvable motive, i.e. it can be applied to the case of an "abnormal motivation," a situation in which—under the given conditions—the perpetrator did not have to submit to the "motive of duty." Such a superior and approvable motive can be seen e.g. in cases of necessity falling short of "justifying" self-defense or necessity, but in which—as in transgressing the bounds of defense by reason of fear—the actor nevertheless cannot be blamed for seeking to protect his own interest.²⁹

Though Goldschmidt's doctrine also had to be corrected and refined in various respects, it developed at least two points essential for our discussion. It differentiated justification from excuse (*Differenzierungstheorie*), and it explained justification as a superior objective interest and excuse as a superior subjective motive. Thus the distinction between justification and excuse is nowadays fully accepted

26. See Achenbach, *supra* n. 12 at 117.

27. Goldschmidt, "Der Notstand, ein Schuldproblem," 4 *Österr. Zeitschrift für Strafrecht* 144 ff. (1913).

28. See *infra*, text at n. 33-41.

29. See Goldschmidt, *supra* n. 24 at 162 ff.

in principle by German criminal theory and practice.³⁰ The legislative distinction is found in the explicit terminological differentiation between justifying and excusing necessity in § 34 and § 35 of the new Penal Code.

IV. RATIONALE AND GROUNDS OF JUSTIFICATION

The new 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.³¹ In short, a justified act is deemed legal.

The structural concept on which this result is based can perhaps be best explained by considering criminal law as a system of norms which prohibit or permit some acts: on the one hand the proscribing provisions (*Verbots-, Gebotsnormen*), which in the form of specific rules (*Tatbestände*) have the function of evaluating and protecting certain legal interests by way of prohibiting certain harmful acts (or, in cases of omission, by demanding an act to prevent the proscribed harm);³² on the other hand permissive rules (*Erlaubnissätze*), by which the law recognizes that in exceptional cases the protected interest may be outweighed by another legitimate interest, the general prohibition may not apply and violation of the protected interest be permitted. Thus even though an act is illegal, at least "in general" since it is typically harmful, the general unlawfulness of this act may be excluded *in concreto* where allowed by a specific rule of justification.³³

But what is the reason for such permission? Could it be based in each case on the same common principle? By these questions aimed at the material rationale of justification, we are touching problems which are still quite controversial in German criminal theory. In general one can see a clear trend away from "monistic" toward "pluralistic" theories of justification. The "monistic" theories try to explain

30. See Achenbach, *supra* n. 12 at 118 ff.; Jescheck, *supra* n. 13 at 358. For certain modifications of this theory see Eser, *Strafrecht I* at 123 ff., 193 (2d ed. 1976) and *infra*, text at n. 33-41.

31. See § 32 StGB: "Whoever commits an act necessary for self defense does not act unlawfully." § 34 StGB dealing with justifying necessity is similar.

32. For the still controversial question whether the proscribed harm is primarily to be seen in the detriment to some objective legal interest or whether the substance of wrongfulness consists in the personal blameworthiness of the act, see Eser, "The Principle of 'Harm' in the Concept of Crime," 4 *Duquesne Univ. L. Rev.* 345-418 (1966) and in contrast to this the extremely subjective approach by Zielinski, *Handlungs und Erfolgsunwert im Unrechtsbegriff* (1973).

33. For more details and references to this structural problem, see Hirsch in *Leipziger Kommentar zum Strafgesetzbuch* (19th ed. 1974), prel. n. 14 ff. to § 51; Lenckner, *supra* n. 25, prel. n. 4 to § 31.

the grounds of justification by one general principle, mostly by the *Zwecktheorie* (purpose theory, justifying an act if it was "an appropriate means for achieving a legally-recognized objective."³⁴ But while this theory can explain self-defense, perhaps also necessity, it is hardly applicable to consent by the victim. The same goes for other similar theories—such as the principle of "more benefit than loss"³⁵ or the "balancing of interests"³⁶—explanations which are certainly appropriate for some but not for all grounds of justification if the explanatory principle is to retain any predictive sense.³⁷ Therefore "pluralistic" explanations are gaining ground, in particular the "dualistic" approach based on the premise that all grounds of justification can be traced to two basic situations: a) cases in which an interest was invaded because it conflicted with other more important interests and was therefore preempted (e.g. self-defense, necessity, collision of duties); and b) where the person whose interest was at stake has renounced its protection (as by consent).³⁸ It was Mezger who placed these situations into the dualistic formula of justification by reason of superior or absent interest.³⁹ Unquestionably these principles are still too abstract to be useful in application to concrete cases.⁴⁰ But if we treat the rationale of superior or absent interest as a general rule of justification, we have at least an important starting point for applying recognized grounds of justification or for developing new ones.⁴¹

To get an idea of its broad range, we should point out some of the more important grounds of justification recognized by German law. Keep in mind that the permissive rules by which a criminal act may be justified are not only found in criminal law. According to the principle of "unity of the legal system," any permitting norms regardless of where they may be found—in criminal, administrative or

34. zu Dohna, *Die Rechtswidrigkeit als allgemeingültiges Merkmal im Tatbestände strafbarer Handlungen* (1905); v. Liszt & Schmidt, 1 *Lehrbuch des Deutschen Strafrechts* § 32 B I, at 187 ff. (26th ed. 1932); Lenckner, *supra* n. 25, *prel.* n. 6 to § 32.

35. Sauer, *Grundlagen des Strafrechts* 275 ff. (1921); similarly, Fletcher, *supra* n. 4 at 1274.

36. See Noll, "Tatbestand und Rechtswidrigkeit: Die Wertabwägung als Prinzip der Rechtfertigung," 77 *ZStW* 1, 9 (1965); similarly, Roxin, *Kriminalpolitik und Strafrechtssystem* 15 (1970), speaking about the "socially just regulation of interests and counter-interests." See also Schmidhäuser, *supra* n. 25 at 228, according to whom the actor is justified because he has respected a superior interest in a concrete situation.

37. See Hirsch, *supra* n. 33 at *prel.* n. 34 to § 51.

38. See Lenckner, *supra* n. 25 at *prel.* n. 7 to § 32.

39. Mezger, *supra* n. 22 at 207, 225; see also Lenckner, *supra* n. 25 at *prel.* n. 7 to § 32; Heinitz, *Das Problem der materiellen Rechtswidrigkeit* 120 (1926); Blei, *Strafrecht I, Allgemeiner Teil* 118 f. (16th ed. 1975).

40. See Maurach, *Deutsches Strafrecht, Allgemeiner Teil* 295-275 (4th ed. 1971).

41. See Lenckner, *supra* n. 25 at *prel.* n. 7 to § 32.

even private law—have to be taken into consideration.⁴² If we classify the grounds of justification with respect to their source or purpose, we can distinguish four main groups:

- 1) *Consent* (express or implied) of the injured person as proof that he waives protection of his interest.⁴³ The result is an "absent interest."
- 2) Rights of defense against some invasion: particularly self-defense (§ 32 StGB or § 227 BGB).⁴⁴
- 3) Acting in a state of necessity or conflict of interests: in addition to "justifying necessity" (§ 34 StGB) or collision of duties (*Pflichtenkollision*, not yet regulated by law),⁴⁵ we should also mention "aggressive necessity" (§ 904 BGB) by which destruction or other damage to another's property is justified if necessary for preventing other, disproportionate damage.⁴⁶
- 4) Lastly we can group together those grounds of justification in which the actor violates a penal norm by exercising a certain right (such as freedom of opinion (§ 193 StGB) offending another's social reputation)⁴⁷ or by fulfilling a legal duty (e.g. acting *pro magistratu* or similar cases of public or domestic authority).⁴⁸

Quite obviously it is impossible to discuss all grounds of justification in more detail in this paper, but in order to show at least some of the characteristics and problems of justification, we should take a special look at the most important instances of justification by reason of a superior interest: self-defense and justifying necessity.

1. Self-Defense

Self-defense, the oldest ground of justification in all legal systems, is in German law an almost universal ground for excluding the unlawfulness of a statutorily proscribed act. Yet though the old rationale of "law does not have to yield to lawlessness"⁴⁹ is still upheld in principle, its range and reach is being controverted.⁵⁰ What is the

42. See 61 RGSt 242/247 (1927); Englisch, *Die Einheit der Rechtsordnung* 55 ff. (1935).

43. See Noll, *Übergesetzliche Rechtfertigungsgründe, im besonderen die Einwilligung des Verletzten* (1955); Hirsch, supra n. 33 at prel. n. 110-131 to § 51; Lenckner, supra n. 25 at prel. n. 29-60 to § 32.

44. See Jescheck, supra n. 13 at 250 ff., 263 ff.

45. See Otto, *Pflichtenkollision und Rechtswidrigkeitsurteil* (1965) (with supplement, 1974); Lenckner, supra n. 25 at prel. n. 71-77 to § 32.

46. See Jescheck, supra n. 13 at 261 ff., 264 ff.

47. See Eser, *Wahrnehmung berechtigter Interessen als allgemeiner Rechtfertigungsgrund* (1969).

48. See Jescheck, supra n. 13 at 273 ff., 288 ff.; Lenckner, supra n. 25 at prel. n. 83-91 to § 32.

49. 21 RGSt 168/170 (1890).

50. As to the various requirements of self-defense in German law, see the

"law" or right which does not have to yield? What is "lawlessness"? Just any formally illegal attack? What about the proportionality of the various interests involved?⁵¹ With respect to these and similar questions two observations may be of general use:

a) Although self-defense was for a very long time seen primarily as an individualistic right to hold one's own against assault,⁵² nowadays the social function of self-defense is given similar (or perhaps even more) weight: besides defending the individual interest of the defender, self-defense is regarded as the actualization of the legal interest in promotion of general peace.⁵³ By thus combining individual self-protection and social preservation of law and order, the concept of self-defense undergoes an expansive as well as a restrictive development: expansive in that, from the social point of view, the right of self-defense is not necessarily limited to the attacked person but also extends to third persons in the form of assistance [in principle, such assistance can also be rendered in favor of a public interest (*Staatsnothilfe*)];⁵⁴ restrictive in that self-defense is not an absolute right that may be exercised at any cost but only in a manner by which its social function is not perverted. This is the root of two very important limitations on self-defense: the defender's duty of stepping aside if he can thus evade the attack without losing face (*Ausweichpflicht*),⁵⁵ and the prohibition of self-defense if the need for it was provoked (*Notwehrprovokation*).⁵⁶

commentaries to § 32 StGB and e.g., Baumann, *Strafrecht, Allgemeiner Teil* 306 ff. (7th ed. 1975); Maurach, *supra* n. 40 at 306 ff.; Schmidhäuser, *supra* n. 25 at 339 ff.

51. See Schröder, "Die Notwehr als Indikator politischer Grundanschauungen" in *Festschrift für Reinhart Maurach* 127 ff. (1972).

52. "Naturalis ratio permittet se defendere": see Jescheck, *supra* n. 13 at 250.

53. "Deficiente magistratu populus est magistratus": see *id.* at 251.

54. In practice however, the defense in favor of public interests is not easily sustained since in the first place public authorities may avail themselves of this defense; most instructive on this point is a case reported in 5 BGHSt 245 (1954): the defendant tried to justify the interruption of an obscene motion picture by invoking self-defense in favor of public interests, but without success. For more details see Lenckner, *supra* n. 25 at § 32 n. 6s.

55. A landmark case on the application of the "Ausweichpflicht" can be found in 71 RGSt 133 (1937) where the defendant, who had been attacked in the courtyard of an inn by another guest, was held bound to withdraw into the inn or to summon help from others before shooting the aggressor: "Where the self-defender can evade a present and illegal assault without surrendering or endangering his own legitimate interests by going out of the direction of the attack, he is not justified in violating a legal interest of the aggressor if this is not necessary for defense. Thus, circumstances permitting, an attacked person should be expected to accept the help of a third person able and ready to assist him." Though this duty of withdrawing has been limited in recent years (see esp. BGH in 1975 NJW 62) in principle it is near-generally accepted. For more details see Jescheck, *supra* n. 13 at 257 ff.; Lenckner, *supra* n. 25 at § 32 n. 53, 58.

56. For various doctrinal constructions and distinctions (in particular be-

b) Closely related to the abusive exercise of self-defense is a second point of our discussion: "disproportionate" self-defense in cases where the defense causes damage out of proportion to the interest endangered by the aggressor. Thus, though older theory and practice did not hesitate e.g. to justify the owner of an apple tree defending his fruit by shooting a thief and wounding him quite seriously,⁵⁷ more recent theories are reluctant to recognize self-defense in cases where e.g. a guard killed a person who stole a small bottle of syrup.⁵⁸ The older position is based on the idea that the aggressor is somehow outlawing himself by his illegal act and thus takes the risk of any damage inflicted by necessary defense; consequently, there was no need to pay attention to proportionality. Although this view is still accepted by quite a few authors on the ground that the right of self-defense would otherwise be considerably weakened,⁵⁹ a growing trend is clearly going the other way by excluding self-defense in cases in which the attacked and defended interests are strikingly out of proportion.⁶⁰ If this new approach is accepted, it is of minor significance whether self-defense in such cases is excluded by reason of "abuse,"⁶¹ by denying the normative need (*Gebotenheit*) of defense,⁶² or simply (and more honestly) by requiring "proportionate" defense.⁶³ The only decisive point is that self-defense is not automatically recognized as a permissible counterattack. The interests involved are of some (restrictive) relevance.

This means that self-defense also turns out to be a case of justification by reason of superior interest. However, this need not necessarily mean that self-defense requires the preservation of an interest which itself is more valuable than that harmed by the defense. Moreover, as we have seen before, self-defense has both an individual and a social function. Since the self-defender is not only defending his own interest but also preserving the general peace, this social interest must also be put on the defender's scale. Therefore self-defense

tween intentional provocation and mere careless involvement in a risky situation), see Bertel, "Notwehr gegen verschuldete Angriffe," 84 ZStW 1 (1972); Eser, *supra* n. 30 at 112-116; Lenckner, *supra* n. 25 at § 32 n. 54-61.

57. See 55 RGSt 82 (1920). The same position was taken by most criminal scholars of that time; see v. Frank, *Strafgesetzbuch*, *supra* n. 24 at 163; Hippel, 2 DStr 2116 (1930).

58. See OLG Stuttgart, 1949 DRZ 42.

59. See Baldus in *Leipziger Kommentar*, *supra* n. 33 at § 53 n. 21; Bockelmann, *Strafrecht, Allgemeiner Teil* 94 (2d ed. 1975).

60. See Schröder, *supra* n. 51 at 137 ff.

61. This is the solution of recent cases: see BGH, 1962 NJW 308, 24 BGHSt 356; along the same lines Jescheck, *supra* n. 13 at 258; Lenckner, *supra* n. 25 at § 32 n. 46.

62. See Baumann, *supra* n. 50 at 314; Dreher, *Strafgesetzbuch* § 32 n. 4c (35th ed. 1975).

63. Eser, *supra* n. 30 at 98 ff.; Schröder, *supra* n. 51 at 137 ff.

will lose its justifying function only if, after also taking the interests of social peace into account, the defended value falls short of the harm done to the aggressor.⁶⁴

2. Necessity

Although the wording of the self-defense provision (§ 32) does not explicitly require a balancing of interests, but does so by interpretation, justifying necessity (§ 34) provides a clear case of justification by reason of superior interest.⁶⁵ Strangely enough this was the last ground of justification to be expressly integrated into written law. The most decisive step in its development was taken in a 1927 decision of the *Reichsgericht* legalizing abortions performed to save the mother's life or health.^{66a} German law at that time already recognized certain instances of necessity, but these were restricted to interference with tangible property⁶⁶ and thus did not apply to the destruction of a human fetus. The law may have provided a ground of excuse⁶⁷ for the mother, but not for the physician since he was not personally endangered. Still, these legal provisions were sufficient ground for the general principle, already developed by the courts, that the actor may be justified if, balancing the interests at stake, he was furthering the greater value.⁶⁸ Once recognized by the *Reichsgericht* in such a general way, this *übergesetzliche Notstand* (extra-statutory necessity) came to be invoked in a long line of cases.⁶⁹

Thus the new § 34 is actually nothing more than a formal codification of a very well established ground of justification by balancing conflicting interests. Nevertheless quite a few problems remain as to the proper handling of this rule. One major point of debate is the

64. Eser, id. For an American view on problems of disproportionality in cases of self-defense, see Fletcher, "Proportionality and the Psychotic Aggressor," in 8 *Isr. L. Rev.* 367 (1973).

65. § 34 StGB reads as follows: "Whoever in a present and otherwise not preventable danger to life, limb, liberty, honor, property or any other legal interest acts to prevent the damage to be inflicted on himself or another person, does not act unlawfully if the balance of the conflicting interests, in particular the legal interest involved and the intensity of the imminent danger, shows that the defended interest is entitled to prevail over the one which is infringed. This is admissible, however, only in so far as the act is an adequate means for preventing the damage."

65a. 61 RGSt 242 (1927).

66. Such as "aggressive" or "defensive necessity" according to §§ 229, 904 BGB.

67. Such as "necessity" according to the old version, § 54 StGB, now § 35.

68. Fletcher, *supra* n. 4 at 1274 ff.

69. Thus, for instance, violation of confidentiality by a physician has been justified because committed in order to prevent an incapable person from driving (BGH, 1968 NJW 2288), or trespass in order to uncover a drug deal (OLG München, 1972 NJW 2275). For more cases, see Lenckner, *supra* n. 25 at § 34 n. 2.

role of the adequacy clause of § 34, ¶ 2. By allowing justification only so far as the act is adequate to prevent the danger, the legislator quite obviously tried to combine the principle of balancing of interests (*Güterabwägungsprinzip*) with the theory of purpose (*Zwecktheorie*)⁷⁰ and thus confine justifying necessity to cases in which "the conduct of the perpetrator acting out of necessity appears to be an adequate and legally acceptable solution of the conflict, with regard to generally recognized values of the public."⁷¹ Many writers see no practical need for such a limitation, at least if the balancing of interests is understood to include all the values involved.⁷² However it cannot be denied that the adequacy clause has a certain declaratory function in the sense of requiring a comprehensive social-ethical evaluation of the act.⁷³

Regardless of which interpretation of the adequacy clause is correct, the wording of § 34 leaves no doubt that justification requires more than simply a balancing of conflicting legal interests, such as where a comparison is made between the life of the fetus and the life or limb of the mother (mere *Güterabwägung*). What is called for is a comprehensive evaluation of all significant interests, such as the degree of risk or damage, the cause of danger, the legal duty to accept a risk, etc. (*Gesamtinteressenabwägung*).⁷⁴ If after a comprehensive balancing of all values involved the act can be deemed to have served the clearly superior interest, the act can be treated as justified, with the consequence of legalizing behavior otherwise falling into the criminal category.

V. RATIONALE AND GROUNDS OF EXCUSE

Unlike justification, excuse does not affect the unlawfulness of the act; it merely removes the personal blameworthiness of the actor: he is (only) excused. Excuse is granted only to those participants who are acting under excusing conditions; all other participants remain punishable for the illegal act.⁷⁵ Contrary to the common law tradition, which seems to limit excuse to insanity, duress and to some extent mistake of law,⁷⁶ German law has recognized for quite some

70. See *supra*, text at and n. 34.

71. Official grounds of the 1962 Draft at 159.

72. Lenckner, *supra* n. 25 at § 34 n. 46; see also Maurach, *supra* n. 40 at 330.

73. See Jescheck, *supra* n. 13 at 269; Samson SK (*Systematischer Kommentar zum Strafgesetzbuch* 1975) at § 34 n. 22. For more details see Eser, *supra* n. 30 at 127 ff.

74. Lenckner, *Der rechtfertigende Notstand* 96 ff., 127 ff. (1965) and in Schönke-Schröder, *supra* n. 25 at § 34 n. 2, 22 ff. with more details.

75. For this and similar divergent consequences of justification and excuse see *supra*, text at part I.

76. See Fletcher, *supra* n. 4 esp. 1280 ff.

time that excessive self-defense by reason of distress, fear or fright (§ 33), necessity (§ 35) and conflict of duties are also grounds of excuse. German criminal theory even makes a distinction between *Schuldausschliessungsgründe* (such as insanity and unavoidable mistake of law) by which the perpetrator is both excused and, lacking *mens rea*, even deemed to act without guilt, and *Entschuldigungsgründe* which excuse an act that is unlawful and "guilty" since committed with *mens rea*.⁷⁷ Only in this second group (duress, necessity, conflict of duties or excessive self-defense by reason of fear) can we speak of an excuse for an otherwise "culpable" act. And only these grounds of "excuse" are of major concern in our present context.

Although the grounds for exclusion of guilt (*Schuldausschliessungsgründe*) are characterized by a lack of cognitive (mistake of law) and/or willed (insanity) elements of guilt, grounds of excuse (*Entschuldigungsgründe*) are rooted in extraordinary psychological pressure on the perpetrator. This at least was Goldschmidt's explanation,⁷⁸ which is still accepted by many scholars.⁷⁹ The question has been raised however whether all grounds of excuse can indeed be explained simply by this subjective motivation. Thus in the case of excessive self-defense, blameworthiness can be diminished by reason of fear (§ 33), but beyond that we also notice a diminishing of the objective wrong since the perpetrator was reacting—albeit excessively—to an illegal assault. The same applies to excusing necessity (§ 35), where exculpation is based both on acting out of necessity and on preventing damage to a certain legal interest. Therefore, without denying the subjective basis of excuse in some psychological states of necessity or pressure, most German criminal scholars of today treat diminished objective wrongfulness as one of the grounds for excusing the perpetrator.⁸⁰

In order to consider at least one ground of excuse in some detail, we should perhaps choose "excusing necessity" (§ 35) as distinct from "justifying necessity" (§ 34), which we earlier discussed as a ground for justification. In contrast to justifying necessity, which permits an act in promotion of *any* legal interest, excusing necessity is restricted to the saving of life, limb or liberty.⁸¹ This restriction might at first appear paradoxical unless we keep in mind that justifying nec-

77. For this distinction see Lenckner, *supra* n. 25 at prel. n. 108 to § 32.

78. See *supra*, text at part II.

79. In particular, see Baumann, *supra* n. 50 at 475 and Schmidhäuser, *supra* n. 25 at 465, for the point that *Unzumutbarkeit* is to be understood in the sense that, with regard to the personal conditions of the perpetrator, law-abiding conduct cannot be expected. See also Fletcher, *supra* n. 4 at 1300.

80. See Eser, *supra* n. 31 at 193; Lenckner, *supra* n. 25 at prel. n. 111 to § 32; Rudolphi SK, *supra* n. 73 at § 35 n. 3.

81. § 35 StGB reads as follows: "Whoever commits an unlawful act in order to prevent a present danger to the life, limb or liberty of himself, a relative or a close person acts without guilt. However this does not apply if under

essity requires protection of a superior interest,⁸² whereas § 35 does not require a predominance of the protected over the damaged value. Therefore excusing necessity may even be granted in cases where life stands against life.⁸³ However this gap in the objective balance of interests has to be supplemented—and this is the essential feature of excuse—by the presence of personal danger: the actor is required to have acted for the sake of his own or a relative's life, limb or liberty. This requirement of extraordinary personal danger is expressly stressed by § 35, ¶ 2 which states that excuse may not be granted if, under given conditions, the actor must be expected to cope with the danger (*zumutbar*). That is to say, exculpation is primarily based on considerations personal to the perpetrator. If he caused the danger himself, or if he (e.g. a guard or fireman) agreed to take certain risks, he should be expected to assume some risks that may be extraordinary for others but not for him.⁸⁴ Thus personal *Unzumutbarkeit*⁸⁵ is recognized as a decisive element of excuse; it has also been frequently suggested as a general ground of exculpation.⁸⁶ But since such extreme individualization could lead to weakening or incapacitating criminal law, such broad statements are widely rejected today.⁸⁷

This does not mean that the criterion of *Unzumutbarkeit* could not be used as an element of excuse in situations which are somehow analogous to excusing necessity, such as conflict of duties: if the perpetrator can choose only between two evils—e.g. a physician in a Nazi concentration camp, between participating (restrictively) in the selection of insane persons for the gas chamber or making room for another more cooperative colleague—he may be excused if he felt bound to select the lesser.⁸⁸ Furthermore, *Unzumutbarkeit* can also be of relevance so far as it may exclude culpability for negligent conduct.⁸⁹

In sum, by granting justification the law permits the furtherance of the objectively greater value, while by granting excuse it recognizes a subjectively overwhelming motivation. But as with all exemptions, these are tolerable only so long as they do not become the rule.

the circumstances, and in particular if he has brought about the danger or has a special legal obligation, the perpetrator should be expected to cope with the danger."

82. See *supra*, text at n. 64-74.

83. Fletcher, *supra* n. 4 at 1278 ff.

84. For more details about these and other requirements of excusing necessity, see the commentaries to § 35 StGB, and also Baumann, *supra* n. 50 at 468-471; Eser, *supra* n. 31 at 194-197.

85. See n. 79 *supra*.

86. Freudenthal, *Schuld und Vorwurf im geltenden Strafrecht* 25 ff. (1922).

87. See Lenckner, *supra* n. 25 at prel. n. 122 ff. to § 32.

88. For more details about this and similar highly controversial cases see Lenckner, *supra* n. 25 at prel. n. 115 ff., 122 ff. to § 32 with further references, in particular to excuse by respecting the personal conscience of the perpetrator.

89. A landmark case in this respect was 30 RGSt 25 (1897); see Eser, *Strafrecht II* 37 ff. (2d ed. 1976). For similar restrictions in cases of omission see Jescheck, *supra* n. 13 at 48.