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IS THERE REALLY A DIFFERENCE BETWEEN JUSTIFICATION AND EXCUSE, OR DID WE ACADEMICS MAKE IT UP?

Linda A. Malone

"[T]hose who engage in philosophical debate first kick up the dust and then complain that they cannot see."¹

In 1986, Don Horowitz of Duke Law School published an article entitled *Justification and Excuse in the Program of the Criminal Law* in *Law and Contemporary Problems*.² Professor Horowitz's article was, in part, a response to an article in the same issue by Kent Greenawalt of Columbia Law School on distinguishing justifications from excuses.³ I found Professor Horowitz's explanation of the difference between justifications and excuses to be very compelling and convincing. Unfortunately, his predictions for the direction of justifications and excuses in the criminal law are fundamentally off the mark today.⁴ That led me to wonder: Is it possible to engage in an academically correct analysis, which nevertheless leads to incorrect predictions when it comes to justifications versus excuses, with the shifting social paradigms of the importance of culpability versus harm?

Professor Horowitz critiques Greenawalt's approach as suffering from premature evaluation.⁵ Greenawalt characterizes "warranted" action as central to justification and "nonresponsibility" as central to excuse.⁶ According to Horowitz, this characterization moves duress and necessity into the borderland between justification and excuse and away from being classified as excuses because both defenses can be characterized as warranted conduct or actions by a nonresponsible actor.⁷ If nonresponsibility is equated with lack of choice, then insanity can also be

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¹ Marshall-Wythe Professor of Law, William and Mary Law School. This Article is based upon the author’s participation in the 2009 Criminal Law Symposium: *Excuses and the Criminal Law*, held at Texas Tech University School of Law on April 3, 2009. The author would like to thank her friend and colleague Professor Don Horowitz, who always seems to be at both the ground level and the frontier of every issue in our shared fields of scholarship, for his input into this Article.


3. Id. at 116-20.

5. Id. at 109.

6. Id.

7. See id.
thrown into the borderland between justification and excuse, although generally insanity, duress, necessity, disease, involuntary action, and pathological intoxication are viewed as excuses. Incidentally, Horowitz says he prefers Paul Robinson's description of excuse as requiring a "disability" to Greenawalt's characterization of nonresponsibility.

What Professor Horowitz then proposes is to distinguish justification and excuse by evaluating their purposes by reference to their historical origins. With this framework, he determines that justification "arise[s] out of conduct that prevents or redresses harm, particularly harm involving illegality," and "has a self-protection or law-enforcement component." Excuse, in contrast, has a much different purpose:

The usual excuses—insanity, duress (if we accept the traditional view of duress as an excuse), disease (epileptic seizures, for example), involuntary action, and occasionally intoxication—all relate incapacity, disability, or infirmity, or an absence of conscious will to do evil. They go, in short, to the mental element in criminal liability.

Excuse, therefore, makes the law fairer by not focusing just on consequences but on fault.

Professor Horowitz contends that the history of the defenses that fall within excuse or justification demonstrates their different functions. Justification emerged as a defense early in English law, but "excuses were initially just that: pleas for discretionary remission of punishment." Historically, justification was essentially equivalent to a dismissal of criminal charges due to individual enforcement of law for the benefit of oneself or for the public. Excuse developed later and began as a plea for mercy by those who lacked the culpability to be held responsible under criminal law. As a more "modern" defense, excuse became tied more to the expanding psychological developments of responsibility, while justification was more a reflection of societal evaluations of the validity of status or authority. Thus, justification applies toward "leveling or uniformity," while excuse is directed more toward an individualized, psychological assessment of personal responsibility. To put it another

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8. See id.
9. Id. at 110 n.3.
10. Id. at 110.
11. Id. at 111.
12. Id.
13. Id. at 112.
14. Id.
15. See id.
17. See id. at 116.
18. See id. at 118.
At this juncture, I was totally in agreement with Professor Horowitz's approach. Not only was his analysis logical, it was substantiated by the historical development of the defenses of justification and excuse, and as a faculty member of the oldest law school in the United States, I must respect history. 19 I am sad to report, however, that from this point forward in his analysis the dust once again obscured my vision. Within this analytical framework, Horowitz noted that developments in the science of psychology were expanding the concept of excuses, such as insanity, while the growing societal skepticism of law enforcement authority was shrinking the nature of justifications for the use of force to defend the home. 20 If Professor Horowitz was in a Lost television episode, in which the time-traveling characters can ask when they are rather than where they are, he might have stopped his analysis before his predictions.

Let us start with justification. Nearly twenty states today have adopted the so-called "make my day" laws, which allow for the use of deadly force to counter an unlawful home invasion without a reasonably perceived threat of serious injury. 21 Surely we are not less skeptical of law enforcement authorities today than we were in 1986? Defense of others, however, has also expanded. 22 If we assume as a society that we are indeed more skeptical of law enforcement authorities than we were in 1986, would we not generally be more tolerant of our individual ability to enforce the law as citizens? In this sense, leveling or uniformity of authority actually leads to greater assumption of individual law enforcement authority and thus, expansion of justification.

According to Professor Horowitz, his framework is also supported by two other considerations: (1) third parties are entitled to act on behalf of those who could act with justification (as argued by Joshua Dressler) and (2) the victim of excused conduct is "innocent of any wrongdoing." 23 Yet, he acknowledges that a person who helps a mountain climber break into a

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19. Id. at 120.
20. See id. at 116-18.
21. Id. at 118-19.
22. See, e.g., FLA. STAT. ANN. §§ 776.013-.032 (West 2005 & Supp. 2009); S.B. 436, 107th Leg., Reg. Sess. (Fla. 2005). See generally Adam Liptak, 15 States Expand Right to Shoot in Self-Defense, N.Y. TIMES, Aug. 7, 2006, at A12 (explaining the new Florida law regarding self-defense). Basically, these laws give individuals the right to protect their homes or vehicles with deadly force against any unlawful or forceful intrusion, even if they do not in fact fear, reasonably or otherwise, for their safety or the safety of others. Id. These laws also abolish any duty to retreat when threatened in public. Id.
23. See, e.g., IOWA CODE ANN. § 704.3 (West 2003) ("A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force.").
24. See Joshua Dressler, New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking, 32 UCLA L. REV. 61, 77 (1984); Horowitz, supra note 1, at 121, 125 (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 415-16 (2d ed. 1960)).
cabin to save the mountain climber's life might be justified in doing so.\textsuperscript{25} He considers that specific hypothetical to be a case of excuse rather than justification.\textsuperscript{26}

One final example really stirs up the dust. The expansion of the "battered woman's syndrome" as a justification for what would otherwise be homicide, not to mention the expansion of the syndrome to encompass other types of victims, causes trouble for Horowitz's analysis.\textsuperscript{27} In fairness to Professor Horowitz, he predicts this problematic example for his framework even in 1986.\textsuperscript{28} Horowitz distinguishes the expanding battered woman's syndrome in 1986 as follows:

The first is that the evidentiary change, which goes only to the admissibility of expert evidence, is readily accommodated within existing doctrine, which remains unchanged. The second and more pertinent point for present purposes is that the change takes place in an area of justification that happens to be sensitive to changing psychological conceptions.\textsuperscript{29}

Horowitz asserts valid points, but if the purpose of any justification defense is based on changing perceptions of social order and authority, not psychological evaluations of choice, what social order has shifted with the battered wife, the Vietnam veteran with post-traumatic stress disorder or the Holocaust victim?

Here is another problem: If someone points a gun at my head and tells me to shoot someone else or I am dead, am I going to weigh my options? To be painfully honest, my choice might turn on whether I am told to kill an innocent child, a pornographer, or a ninety-eight-year-old person (whom I would desperately hope has a terminal illness and days to live). That decision is very much a psychological assessment. So why has the defense of duress as an excuse not reflected more psychological studies on how many people would kill someone else to save their own lives whatever the circumstances, as opposed to a blanket acceptance that one life is completely worth the value of another?

Professor Horowitz asserts that shifting notions of the importance of preventing harm as opposed to punishing culpability are a critical factor in determining excuses but not in determining justification.\textsuperscript{30} Because "[j]ustification has nothing to do with these issues of harm versus culpability," but "simply \ldots the need to prevent and redress harm \ldots ."

\textsuperscript{25} See Horowitz, supra note 1, at 124.
\textsuperscript{26} Id.
\textsuperscript{27} See id. at 119 & n.56.
\textsuperscript{28} See id. at 119.
\textsuperscript{29} Id. at 119 n.56.
\textsuperscript{30} Id. at 115.
There is no room in justification for the pathological misperception.\textsuperscript{31} The genesis and explosion of make my day laws and the expansion of syndrome notions of self-defense, however, continue to broaden the defense of justification despite misperceptions. In both instances, there is a societal evaluation that the harm to be redressed (home invasions or a pattern of abuse) is sufficiently blameworthy that the mistaken defendant is less culpable than would otherwise be the case for justification. Moreover, each defense illustrates how increased societal disillusionment with the ineffectiveness of the police in preventing home invasions or protecting battered persons leads to greater acceptance of individual law enforcement authority in justification.

It may be unavoidable that every aspect of criminal law, including justification and excuses, always comes down to societal balancing of culpability versus harm. Unfortunately, those societal norms will always fluctuate in terms of whom we are willing to punish. In turn, we are back to the very dusty, blinding questions of what society can punish as a matter of morality. Professor Greenawalt, as Professor Horowitz acknowledges, identifies the limits of legal categories in moral evaluation "with perception and grace."\textsuperscript{32} We can all agree to disagree and identify the messiness of justification and excuse with academic, if not clairvoyant, precision.

\begin{footnotes}
\footnotetext{31}{\textit{Id.}}
\footnotetext{32}{\textit{Id. at 125.}}
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