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CRIMINAL DEFENCES AND THE BURDEN OF PROOF

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Criminal trials are often conducted under uncertainty and involve risks of error. One of the main objectives of the law of evidence is to determine the extent to which persons accused of crimes can justifiably be exposed to such risks. Criminal defendants have to be exposed to at least some risk of being erroneously convicted. To immunize them completely from any such risk would require that no charges whatsoever should be pursued against the vast majority of offenders.[1] The law of evidence has, therefore, to maintain a framework of both realistic and morally justifiable burdens and standards of proof. This paper is primarily concerned with examining the distribution of these standards and burdens in relation to criminal defences, but before dealing with this issue a short statement of the general principles applicable to the proof of offences and the underlying rationale of these principles has to be made.

Justifying the criminal standard of proof

In English law, it is incumbent upon the prosecution to prove the defendant's guilt beyond all reasonable doubt.[2] Any harm suffered by society when, owing to this high standard of proof, guilty offenders are acquitted is thought invariably to be outweighed by the harm avoided by safeguarding innocent defendants from erroneous convictions. This principle of protecting the innocent applies to all kinds of charges, including the relatively minor ones, and to any defendant, irrespective of the actual amount of his suffering as a result of punishment.[3] Therefore, what seems to justify this principle is not merely its tendency to minimise the magnitude of physical or bare harm unjustly inflicted by mistaken convictions, such as pain, suffering and frustrated expectations. Bare harm is an empirical and contingent factor which varies from case to case and from person to person and as such can be balanced against the harm caused by acquitting guilty criminals, especially when those criminals re-offend. A non-compromisable standard of proof which defies the very idea of attempting any balancing of this kind was unlikely to be adopted by a consistent law-

maker who does not see in wrongful convictions anything besides physical harm. The only objection to this view can be grounded on linking the law-maker's desire to minimise the amount of the unjustly inflicted bare harm with the two-fold utilitarian justification.[4] It would, arguably, be enough if the whole practice rather than each of its instances be justifiable as minimising this harm in the aggregate, and each separate instance, not contributing directly to utility, would be justifiable by the practice itself. This argument has, rightly in my opinion, been suspected of petitio principii, viz. of "arguing backward from the fact that our moral intuitions condemn convicting the innocent to the conclusion that such a disability must be in the long-term utilitarian interests of any society."[5] For it is not only that no empirical evidence has been offered to support this view as a fact of our social life: no such proof can seriously be claimed to exist. On the contrary, it can be argued that the overall amount of physical harm would be minimised if we relax the presently stringent standard of proof, assume a greater risk of convicting innocent people and, owing to this relaxation, convict more harmful criminals.

Furthermore, it is highly uncertain that intelligent judges authorised to convict a possibly innocent person in special cases — when, for example, the amount of physical harm to be suffered by the accused is relatively small and his conviction would enormously help to deter potential offenders — would really do worse for long-term social utility.[6] When a retired tycoon is fined after being mistakenly convicted of insider dealing, the bare harm would relatively be little and the resulting deterrence very effective. Intelligent utilitarian judges could handle cases like this without great difficulties and yet our moral intuitions would treat any such decision with contempt. We would condemn an inadequately supported conviction of our tycoon even if we firmly believe that this obnoxious individual had probably been involved in insider dealing and other financial manipulations and we would do so despite the need to deter those who contemplate such crimes which is both difficult and expensive to detect.

There is therefore something more than just an ordinary bare harm in mistaken convictions. Such convictions involve, in addition to the bare harm of varying degrees, the "injustice factor" which is moral and constant,[7] and it is the recognition of this moral kind of harm that seems to be standing behind the rigid requirement of proof beyond all reasonable doubt. However, even under this rigid requirement, not any doubt, but only a "reasonable" one, leads to an acquittal. The law, as has been explained by Lord Denning long ago, "would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice."[8] Hence, the law makes allowance for practicality and utility: reasonable doubts are only those which are rationally capable of being perceived by

the court.[9] Imperceptible doubts are not regarded as "reasonable" and this, of course, imposes upon the accused a certain amount of the risk of error. How does this accord with the rationalization of the existing criminal standard of proof as aiming to avoid the special kind of "moral harm" which is said to be present in every case where an innocent person is convicted? A possible answer to this question rests on the distinction, which seems to be morally significant, between accidentally mistaken convictions that might well result from the imperceptibility of the unnoticed doubts and a deliberate imposition of the risk of error on a person known to be possibly innocent. Accidentally mistaken convictions can cause the same moral harm as deliberate ones, but such accidents would simply result from bad luck because the decision-makers' immunity to luck can never be absolute in conditions of uncertainty. Nevertheless, the decision-makers can and should do their best and exercise control over perceptible risks by translating such risks into acquittals.

This explanation may, however, still be questioned. The number of accidentally mistaken convictions and the corresponding amount of moral harm could still be diminished by investing more resources in both trial and pre-trial procedures, making these procedures more accurate than they currently are. Given that public investment in fact-finding procedures is far below the maximal, would it really be consistent to maintain that the main objective of the criminal standard of proof is to prevent a special kind of moral injustice which escapes the net of an ordinary utilitarian balancing? This question has to be answered in the positive. Unfortunately, the available resources are scarce. Instead of devoting most of them to attaining of the maximal accuracy of criminal procedures, they are invested in health, education, highway systems and many other socially beneficial amenities. This social choice, when it results from a democratic process of making decisions, is fair as long as each person participating in that process is antecedently as likely as any other to enjoy the amenities supported by public fundings and occasionally to share the harm caused by the underfunded criminal procedures. Hence, when a risky legal system works to somebody's disadvantage and an innocent person is occasionally found guilty, this regrettable outcome would not undermine the fairness of that system.[10] By contrast, if a person known to be possibly innocent is deliberately convicted, this would amount to a fresh political decision which imposes on this person an extra risk not shared by others. This decision would violate the principle of equality and fairness. In other words, although the prior determination of the protection given to the defendant is bound to be affected by some utilitarian considerations, his right to be acquitted as a result of any perceptible doubt is a genuine right which trumps utility. Like any other citizen, criminal defendants are

entitled to equal concern and respect, and it is the violation of their entitlement to equality that renders any deliberate imposition of the risk of error on any of them morally harmful.[11]

To sum up, certainty of criminal verdicts cannot be absolute. As such, it can never be justified in purely factual terms and should also be moral. To be morally justifiable, this certainty should account for the risk of error and reflect the entitlement of the individual accused of a criminal offence to equal concern and respect.

This equality-based rationale of the standard of proof should, in my view, be understood as reflecting the more general approach of the law to the distribution of risks of error in criminal trials. As such, it would have many important implications and among them the need to revise the traditional perception of the "presumption of innocence" as a mere restatement of the rule that guilt should be proved beyond reasonable doubt.[12] The presumption of innocence ought to be understood comparatively, as a requirement that those charged with crimes be given the same amount of protection as all other presumptively innocent citizens, and this would entail a set of procedural rights deriving from the treatment of others.[13] Freedom from risks of error in processes of applying the criminal law is one of the fundamental liberties of the individual, and it is the first principle of justice that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[14]

These complex issues are beyond the reach of the present paper.[15] This paper is devoted to criminal defences and the question which will now be discussed is who should carry the risks of error when decisions about the existence of facts relevant to these defences are made in conditions of uncertainty. The conclusions which will follow from this normative discussion will later be compared with the English law concerning proof of defences.

Excuses, justifications and verdicts under uncertainty

Would it be consistent for a system of law which insists that the guilt of the defendant be established beyond all reasonable doubt to adopt a different dispensation of the risks of error in regard to defences? Apparently, any definition of a criminal offence can easily be reformulated to include defences within the definition, and it would clearly be a mistake verbally to distinguish between "offences" and "defences" and use this verbal distinction for the purposes of risk-distribution.[16] It would also be a grave mistake to deviate from the ordinary burden and standard of persuasion in respect of defences merely because it is easier for the

defendant to establish them. Leaving aside the possible objection that the premise of this argument does not hold in all cases, the argument that forensic ease and convenience of the parties involved should have an effect on the distribution of the risks of error is based on a logical fallacy, viz. the failure to distinguish between the burden of producing evidence and the burden of persuasion.[17] The first burden has nothing to do with the distribution of the risks of error, a function which exclusively belongs to the second type of burden, and it is the imposition of the evidential burden only that can be motivated by the parties' forensic opportunities such as access to evidence and holding of information.[18] The mere fact that one party to the proceedings holds a relevant information or has a far better access to material evidence does not support the view that he must carry the risk of non-persuasion in relation to this evidence or information. Thus, once he produces his evidence for examination at the trial, his advantage evaporates and cannot be used against him any further.

Therefore, what can justify an imposition of a greater risk on an accused relying upon one of the defences is only a distinction in substance between an ordinary plea of "not guilty" and a special, inferior claim of innocence embedded in his defence. Without such distinction, an imposition of an aggravated risk in regard to the defence brought forward by the accused would violate his right to equal concern and respect. As was mentioned above, the principle of protecting the innocent rests on the wider notion of equality, and equality in allocating the risks of error demands that cogent reasons should exist to justify a different treatment of ordinary protestations of innocence like alibi, misidentification and lack of mens rea and special defences such as insanity. Similarly, the right of every citizen to equal concern and respect requires that good reasons support any differentiation in forensic treatment of exculpations based upon a mistake of fact, authorisation or self-defence and those grounded upon duress, automatism, intoxication, necessity, and so forth. These good reasons can only be found in the constant moral characteristics of different criminal defences and exculpations rather than in variable syntactic dichotomies of "offences" and "defences" or in contingent forensic opportunities of the parties. All these are matters of luck, and in order to be justifiable, allocation of the risks of error in criminal and any other adjudication has to be immunized from such fortuities. This immunization can only be maintained when particular ramifications of the law accord with its basic moral values.

The only sustainable distinction which can possibly justify an unequal treatment of different criminal defences and exculpations is that between "excuses" and "justifications". Excuse is a full or partial exculpatory defence granted to the accused not because his act is considered to be

socially tolerable and unblameworthy, but on the grounds of leniency, as a concession to human frailty, despite the fact that his act was damaging to the public interest protected by a criminal norm. By contrast, defences which justify the conduct of the accused do so because the existence of certain conditions renders it "morally neutral", i.e., socially tolerable and unblameworthy.[19] Both excuses and justifications may lead to either a complete acquittal or an appropriate modification of the offence in question. The reasons which support any such acquittal or offence-modification determine an "excusing" or a "justifying" character of each kind of those verdicts.[20]

Typically, excuses are individualised defences, shifting the main focus from the socially harmful act to the personal circumstances of its actor. Justifications are all-encompassing and convey more general normative messages upon which other people may base their future actions. In H.L.A. Hart's words, a justified act is an act which —

> ". . . the law does not condemn, or even welcomes"; an excused act ". . . 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".[21]

For example, self-defence, crime-prevention[22] and mistake of fact which negatives the required mens rea[23] are justifications rather than excuses. Similarly, different defences of holding a licence, prescription or authority for doing something which is otherwise prohibited are justifications. Each of those defences relates to the general features of the act, rendering it morally neutral and sometimes even socially desirable. A justified defendant, such as an individual defending himself or acting under authorisation, is therefore no different from an otherwise innocent individual. His actions do not belong to the kind which is sought to be prevented by the criminal law. In contrast, defences which are based solely upon personal circumstances or characteristics of the actor, such as insanity, diminished responsibility (including "infanticide"), infancy, intoxication, duress, necessity, and perhaps provocation and "suicide pacts", which mitigate charges of murder by reducing them into manslaughter, are excuses.[24] A withdrawal of one of the secondary offenders from complicity may probably also be regarded as an excuse if certain conditions are satisfied.[25] The defences of "no-negligence", qualifying some offences of strict liability, are also excuses,[26] and the same is true when a honest mistake is capable of exculpating a person charged with an offence which can be committed recklessly, i.e., without giving thought to the risk obvious to reasonably prudent people.[27] Similarly, in rare cases, a defence grounded on the defendant's motive may be an excuse.[28]

Following this distinction, it would not be inconsistent to argue that the principle of protecting the innocent should protect only those accused who have not been established to have infringed the public interest protected by the criminal law. Those who, having infringed such an interest, are asking to be excused ought not to be entitled to the similar degree of protection from the risks of error. Outright denials of taking part in criminal activities and justifications substantively differ from excuses. Hence, it would not be a violation of the state's duty to treat its citizens with equal concern and respect if those trying to defend themselves by excuses receive a diminished amount of forensic protection. This, however, is only capable of showing moral consistency in treating excuses differently from other criminal defences and exculpations and of demonstrating that it would be inconsistent and strikingly unjust if justifications be treated differently from all ordinary protestations of innocence. The desirability of treating excuses differently in allocating the risks of error under uncertainty is a question separate from that about consistency. Contrary to some weighty opinions,[29] it appears to me that there are at least four related reasons which support the view that the burden of proving excuses and the corresponding risks of error ought to be borne by the accused and that in order to benefit from an excuse, it ought to be established by the accused on the balance of probabilities.

First, the primary goal of the law of evidence is to maximise the number of correct decisions. Although this utilitarian objective is subject to every individual's right not to be convicted if innocent, the same cannot be true about the right to be excused exercised by those who had committed a criminally blameworthy act and have normally to be punished. Since excuses are extrinsic to blameworthiness and are generally not granted but as a concession to human frailty, there is no reason for allowing them to "trump" social utility in making risk-distributive choices.

Second, judgments relating to socially harmful but excusable acts should not convey to the public any general message that could be relied on in the future.[30] If the benefit of doubt be granted to criminal defendants in regard to excuses, the latter might easily become the norm, tangibly reducing the level of deterrence to the detriment of society.[31] A lenient society recognising excuses must not do that in a self-destructive way. Excuses, to be relied on, should therefore require a detailed and cogent proof of their individualised conditions which apply to the actor rather than to his act. The number of mistakenly excused criminals would thus be kept to the minimum.

Third, if for some reason the availability of an excuse could not be

conditioned upon its being cogently proved by those relying on it, this would possibly be taken into account by the legislator as a factor against incorporation of the excuse into the criminal law. Hence, persons charged with offences might be denied this defence altogether and this is clearly undesirable.[32]

Last, most excuses are based on highly individualised decision-making which, as has already been mentioned, should not result in a crystallisation of general conduct-guiding standards. They have therefore to be dependent upon judicial discretion which needs to be exercised on a case-by-case basis and be contained in what can helpfully be described as "rules of decision" addressed to judges and other legal officials, which should acoustically be separated from the "rules of conduct" directed to the general public.[33] The relative indeterminacy of excusing conditions and their judgment-dependency can maintain this legal regime of acoustic separation. If criminal defendants are to benefit from any doubt in regard to any possible inference bearing on excusing conditions, most facts which should direct the existing discretionary choices would have to be assumed as proven. As most excuses involve mixed questions of fact and law,[34] this would effectively trivialise the judicial discretion needed to restrict the application of excuses to those who truly deserve them and keep such cases in acoustic separation from the rules of conduct. A more flexible standard of proof must therefore apply to this kind of defences.

These considerations support the view that defendants should bear the risk of non-persuasion in respect of excuses and the standard of proving their excusing circumstances must be such that correct decisions outnumber, in the long run of cases, the mistaken ones. The "preponderance-of-evidence" standard is capable of satisfying this requirement. According to this standard, the defendant would have to persuade the court "on the balance of probabilities" that it is more likely than not that all the facts constitutive of his excusing conditions have occurred. This standard, if consistently applied, would lead to a preponderantly greater number of correct outcomes with the overall amount of correct rejections of excuses being greater than that of the incorrect ones.[35] Bearing all this in mind, the relevant arrangements of the English law of criminal evidence will now be discussed.

Criminal defences and the burden of proof in English law

The principle requiring the prosecution to prove all the elements of the offence with which the accused is charged and disprove all his exculpatory explanations beyond reasonable doubt is qualified in England by three

exceptions. Each of those exceptions requires accused persons to prove the facts supporting certain defences on the balance of probabilities. First, if an accused relies on the defence of insanity he has to prove it.[36] As this rule deals with an excuse, it is justifiable. Second, in a number of cases the burden of persuasion is specifically imposed on the accused by statutory rules.[37] Some of those rules relate to excuses[38] and as such are justifiable. Some of them, however, shift to the accused the risk of non-persuasion in regard to justifications.[39] These rules have no justification, as they pay no regard to the accused's right to equal concern and respect and render the legal regulation of risk in criminal trials incoherent. Leading to situations in which the risks of error accompanying morally identical claims of innocence are distributed unequally, these rules ought to be criticised and rejected.[40] It is true that the facts giving rise to the defences covered by these rules are usually within the exclusive knowledge of the accused, and this, coupled with the accused's right not to testify, would have presented a difficulty to the prosecution, if it were required to disprove these facts beyond reasonable doubt. These difficulties, however, have no bearing on the allocation of the risk of non-persuasion and can be alleviated by requiring the accused to substantiate his defence by a prima facie proof, i.e., by imposing upon him the evidential burden. Once such evidence is produced, it would be for the prosecution to refute it beyond all reasonable doubt.

According to the third exception, it is for the accused to prove any "exception, exemption, proviso, excuse or qualification" to a statutory offence.[41] It can be noticed that neither this nor any other exception covers the common law excuses such as duress and, to the extent of their recognition by the criminal law, the defences of intoxication and necessity.[42] For the purposes of the standard and burden of proof these defences are treated as justifications, the prosecution being required to disprove them beyond reasonable doubt.[43] A rather more serious problem is, however, that of justifications. Are they covered by this exception and have thus to be established by the accused? There is no suggestion to this effect in the wording of this exception, and it is submitted that it ought to be interpreted as dealing only with excuses.

In the leading case R v Hunt,[44] this exception has, however, been interpreted differently. Having rejected the proposition that the syntactical distinction between the "definitions" of offences and their various "exceptions", "exemptions", etc. should be decisive in ascertaining this exception's scope,[45] the House of Lords laid down the following directives. First, the courts should be "very slow" in classifying defences as falling within the ambit of this exception. The principle of protecting the innocent requires that its exceptions be approached with great caution. Second, the

ease and convenience of the parties, and especially of the accused, in proving the relevant facts should be taken into account. Thus, if these facts are not within the peculiar knowledge of the accused, this would be a good reason not to classify his defence as one of the "exceptions" or "exemptions". Arguably, Parliament could not have intended that accused persons carry the burden of persuasion in such circumstances. Finally, the seriousness of the offence in question has also to be considered, as it is unlikely that Parliament intended those charged with serious crimes to bear the risk of non-persuasion.

The weakness of these directives lies in their being incapable of preventing fortuitous outcomes in classifying different defences. If allocation of the risks of non-persuasion is to be grounded on solid principles rather than forensic contingencies of particular litigations, the suggested distinction between justifications and excuses is bound to be adopted. It seems to be fairly clear that without this distinction in substance, the courts would hardly be certain about when to be "very slow" in imposing the risk of non-persuasion on the accused. What the courts will almost always be certain about would be that the accused holds better knowledge as to the facts behind his defence. Hence, if the charge in question is not too serious, the accused would probably end up bearing the risk of error. As a consequence of these directives, some of the justifications could be treated in distributing the risk of error as if they were excuses, and some of the excuses could be treated as justifications. Hence, in some cases, the accused would be put at an unjustifiable risk of being wrongfully convicted, whilst in other cases, an increased risk of erroneous acquittals would have to be absorbed by society.[46] The basic principle of equal concern and respect would thus be violated.

The only plausible objection against the suggested interpretation is that the distinction between excuses and justifications is not altogether clear and open to disagreement. There are two answers to this objection. First, the proposed approach is less ambiguous than the indeterminate directives of R v Hunt. Thus, had it been applied to that case, it would have presented no difficulty. Hunt was charged with unlawful possession of morphine. The statute had exempted from the prohibition possession of an amalgam containing not more than 0.2% of this drug. The question under consideration was who has to carry the risk of non-persuasion in regard to this defence? This defence relates to the act of possession and not to its actor. It thus indicates that there is no serious social harm in possessing a small portion of morphine mixed with unprohibited ingredients. If possession of a substance containing any quantity of morphine, however small, were socially harmful, there would be no reason to excuse someone merely because he decided to mix this drug. It is clear therefore

that the defence in Hunt ought to be classified as a justification which is intrinsic to the accused's blameworthiness. Once raised by the accused, this defence has to be refuted by the prosecution beyond all reasonable doubt.[47]

Second, if we are to take the principle of equality seriously, an aggravation of the risks of error to be imposed on the accused in connection with one of his defences has always to be supported by preponderantly cogent reasons. So long as the blameworthiness of his act has not been established, his right to equal treatment by the criminal law must prevail and he ought to be treated like any other presumptively innocent individual. We can therefore adopt a rule of thumb: in hard cases of classification the defence raised by the accused ought to be treated as a justification rather than excuse and the prosecution should be required to refute it beyond all reasonable doubt.

The general conclusion deriving from the foregoing discussion can be stated in a few words. The moral link between the fundamental principle of equality and both legislative and judicial decisions affecting the distribution of the risks of error should always be maintained. As a basic moral value of the legal system, equality has a virtue of at least partially immunizing such decisions from luck.[48] Without maintaining this link with equality, the outcomes of legal decision-making are bound to be fortuitous, inconsistent and thus unjustifiable.*

Notes

1. J. Bentham, *A Treatise on Judicial Evidence* 196–97 (1825); R. Posner, "An Economic Approach to Legal Procedure and Judicial Administration," (1973) 2 Jo. Leg. Stud. 399, 410.
2. Woolmington v DPP [1935] AC 462, 481–82. For historical accounts see G. Williams, *The Proof of Guilt*, ch. 7 (3d ed, London, 1963); T. Waldman, Origins of the Legal Doctrine of Reasonable Doubt, (1959) 20 Journal of the History of Ideas 299; B. Shapiro, 'To a Moral Certainty': Theories of Knowledge and Anglo-American Juries 1600–1850, (1986) 38 Hast. L. J. 153. For recent analysis of the law see A. Zuckerman, *The Principles of Criminal Evidence* ch. 9 (1989).
3. Several writers have argued that gravity of the crime and severity of the expected punishment should necessarily affect and in fact affect this standard. See, e.g., J. F. Stephen, *History of the Criminal Law of England*, vol. 1, 438 (1883) and E. Cahn, *The Moral Decision*, 296 (1955). Although it may be true that these factors sometimes influence determinations of guilt, there is no legal or moral reason which could support a relaxation of this highest possible standard of proof in relation to the less serious offences. See Williams, supra n. 2, at p. 188. See, however, Lord Denning's dictum in Bater v Bater [1950] 2 All ER 458, 459.
4. Another utilitarian rationalization, namely, that the main reason for protecting the innocent is the need to prevent "alarm" in the public at large was suggested by

Bentham (supra n. 1). His speculation that the disutility generated by feelings of fear and insecurity outweighs the utility of bringing more guilty offenders to justice seems to reflect his personal "... attitudes and scale of values rather than ... [a] necessary consequence of a utilitarian analysis". W. Twining, *Theories of Evidence: Bentham & Wigmore* 99 (1985). Furthermore, the vast majority of the citizens seem to be more concerned with being protected by rather than from the criminal law. Hence, from the point of view of this majority, acquittals of guilty individuals owing to the principle of protecting the innocent would appear to be no less "alarming". Lacking empirical support, Bentham's rationalization is incapable of justifying the rigidity of the criminal standard of proof.

5. R. Dworkin, *A Matter of Principle* 82 (1986).
6. Id. Cf. Zuckerman, supra n. 2, at pp. 125–34.
7. Dworkin, supra n. 5, at p. 80.
8. Miller v Minister of Pensions [1947] 2 All ER 372, 373–74.
9. Zuckerman, supra n. 2, at pp. 134–40.
10. Dworkin, supra n. 5, at pp. 84–87.
11. Id.
12. See R. Cross, *On Evidence* 114–15 (6th ed. by C. Tapper, 1985).
13. Cf. W. Twining, *Rethinking Evidence* 207–8 (1990).
14. J. Rawls, *A Theory of Justice* 60 (1972).
15. Some of them have been taken up in my Ph.D. dissertation "The Law of Evidence and the Problem of Risk-Distribution", ch. 9 (University College London, 1990).
16. See G. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, (1968) 77 Yale L. J. 880, 902–3; and G. Williams, The Logic of Exceptions, (1988) 47 Camb. L. J. 261, 276–9. See also K. Campbell, Offence and Defence, in I. Dennis (ed), *Criminal Law and Justice* (1987).
17. This fallacy has been spotted long time ago by the father of the modern law of evidence, James Bradley Thayer, who had also introduced the distinction between the two different burdens. See J. B. Thayer, The Burdens of Proof, (1890–1) 4 Harv. L. R. 45 and his pioneering book *A Preliminary Treatise on Evidence at Common Law* ch. 9 (1898; reprinted in 1969).
18. This factor, which is undoubtedly relevant for allocating evidential burdens, might not be sufficient per se for justifying an imposition of such a burden on the defendant who, for privacy-protecting reasons, should not be required to account for himself before the prosecution implicate him by some prima facie evidence about his possible guilt. See Zuckerman, supra n. 2, at pp. 140–2.
19. The literature on this subject is vast. The main sources expressing diverging views about this important distinction are: G. Fletcher, The Individualization of Excusing Conditions, (1974) 47 So. Cal. L. R. 1269; P. Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, (1975) 23 UCLA L. R. 266; G. Fletcher, *Rethinking Criminal Law*, ch. 10 (Boston & Toronto, 1978); P. Robinson, Criminal Law Defences: A Systematic Analysis, (1982) 82 Colum. L. R. 199; G. Williams, The Theory of Excuses, [1982] Crim. L. R. 732; J. Dressler, New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking, (1984) 32 UCLA L. R. 61; K. Greenawalt, The Perplexing Borders of Justification and Excuse, (1984) 84 Colum. L. R. 1897; M. Moore, Causation and Excuses, (1985) 73 Cal. L. R. 1091; A. Eser, Justification and Excuse: A Key Issue in the Concept of Crime, in A. Eser & G. Fletcher (eds.), *Justification and Excuse – Comparative Perspectives*, 19 (Freiburg, 1987); B. Chapman, A Theory of Criminal Law Excuses, (1988) 1 Canadian Journal of Law & Jurisprudence 75; J. C. Smith, *Justification and Excuse in the English Criminal Law* (1989).

20. Following Paul Robinson (1982), supra n. 19, an additional concept of "offence-modification" may be introduced to adjust the existing terminology. See, however, Campbell, supra n. 16, at pp. 78–80.
21. H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 13–14 (Oxford, 1968). Hart clarified (id., at p. 49) that excuses are to be recognised –

> ... as a matter of protection of the individual against the claims of society for the highest measure of protection from crime that can be obtained from a system of threats. In this way the criminal law reflects the claims of the individual as such ... and distributes its coercive sanctions in a way that reflects this respect for the individual.

22. For conditions of these defences see J. C. Smith & B. Hogan, *Criminal Law* 240–49 (6th ed., 1988).
23. See DPP v Morgan [1975] 2 All ER 347; Beckford v R [1987] 3 All ER 425.
24. For a recent statement of these defences and the lenient concessions to human frailty on which they are based see Smith & Hogan, supra n. 22, chs. 9.1–9.3; 9.5–9.7; 11.4–11.5; and pp. 331ff. The defence of duress has explicitly been treated as an excuse in R v Howe [1987] 1 All ER 771, 782–90. The status of "necessity" is somewhat unclear: R v Conway [1988] 3 All ER 1025. One should, perhaps, distinguish between necessity as an excuse and necessity as a justification and the same can be said about duress as well. This distinction should depend on a balance between the interests that had been saved and sacrificed by what is regarded as a prima facie criminal conduct. When any of these defences is granted not merely as a concession to the human instinct of self-preservation but because the social interest that had been saved outweighs the interest that had been sacrificed, it ought to be classified as a justification. In all other cases such defences should be treated as excuses. This view, has, however, not gone unchallenged. See M. Gur-Arye, Should the Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?, (1986) 102 L. Q. R. 71.
25. An updated account of this defence and its justifications appears in K. J. M. Smith, *A Modern Treatise on the Law of Criminal Complicity*, ch. 10 (1990).
26. E.g., Food and Drugs Act 1955, s.3(3); Offices, Shops and Railway Premises Act 1963, s.67; Trade Descriptions Act 1968, s.24(3); Misuse of Drugs Act 1971, s.28(3)(b); Financial Services Act 1986, s.4(2); Public Order Act 1986, s.19(1)(b) and (2). For discussion of some of these arrangements see G. Williams, *Textbook of Criminal Law* 940–46; 978–80 (2d ed., 1983).
27. In English law, this state of mind in known as "Caldwell-recklessness" as a result of R v Caldwell [1981] 1 All ER 961 and other cases following this decision, which regarded "not thinking about an obvious risk" as a subjective fault. Arguably, this kind of fault differs from negligence taking place when a person gives his thought to the obvious risk, but (unreasonably) rules it out. See G. Williams, The Unresolved Problem of Recklessness, (1988) 8 Leg. Stud. 74; D. Birch, The Foresight Saga: The Biggest Mistake of All?, [1988] Crim. L. R. 4. The defence referred to in the text is exemplified by s.5 of the Criminal Damage Act 1971, granting such an excuse. Had it been a justification, the mens rea requirements of the criminal damage offences to which it applies would clearly be self-contradictory. The decision in Jaggard v Dickinson [1980] 3 All ER 716 seems to support this view. For another example see s.2(2) of the Child Abduction Act 1984.
28. See s.3(1)(a) of the Company Securities (Insider Dealing) Act 1985, exempting insider dealers acting "otherwise than with a view to the making of a profit or the avoidance of

a loss . . ." For the scope of this defence see B. Hannigan, *Insider Dealing*, 82—85 (London, 1988). As a general principle, the existence of a "good" motive does not constitute a valid defence. See Chandler v DPP [1962] 3 All ER 142; G. Williams, *Criminal Law — The General Part*, 48—50 (2d ed, London, 1961).

29. See G. Williams, Offences and Defences, (1982) 2 Leg. Stud. 233, 236—38; Williams, supra n. 16, at pp. 279—82; Fletcher, supra n. 16, at pp. 919ff; Fletcher (1978), supra n. 19, at pp. 545—52. Cf. Robinson (1982), supra n. 19, at pp. 256—63.
30. See Fletcher (1974), supra n. 19.
31. Cf. Posner, supra n. 1, at p. 412.
32. See Zuckerman, supra n. 2, at pp. 149—51.
33. See M. Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, (1984) 97 Harv. L. R. 625.
34. Such as questions about "honestly held belief" (s.5(3) of the Criminal Damage Act 1971); "abnormality of mind substantially impairing mental responsibility" (s.2(1) of the Homicide Act 1957 and s.1 of the Infanticide Act 1938, where a more or less similar definition can be found); dominant motives relevant for s.3(1)(a) of the Companies Securities (Insider Dealing) Act 1985; inability of distinguishing between right and wrong, affecting the insanity defence and partly that of infancy, and the like. For discussion of evidentiary problems presented by mixtures of fact and law see A. Zuckerman, Law, Fact or Justice?, (1986) 66 B. U. L. R. 487.
35. For elaborate explanation of this standard as optimal for augmenting the number of correct decisions see D. Kaye, The Limits of the Preponderance of Evidence Standard, [1982] Amer. Bar Found. Res. J. 487.
36. Woolmington v DPP, supra n. 2; Cross, supra n. 12, p. 115.
37. For examples see R. May, *Criminal Evidence*, 49 (1986).
38. See, e.g., the statutes referred to above in n. 26; s.1(3)(a) of the Obscene Publications Act 1964; and s. 2(2) of the Child Abduction Act 1984.
39. See, e.g., the provisions requiring the accused to prove: that he had a "lawful authority" to carry an offensive weapon in a public place (s.1(1) of the Prevention of Crime Act 1953); that having in a public place a sharply pointed article or one with a blade, he had it with him for good reason or under authorisation, for use at work, for religious reasons or as part of his national costume (s.139(4) and (5) of the Criminal Justice Act 1988). In a few cases, the burden was shifted to the accused in relation to some parts of the actus reus. Thus, the accused has to prove that a present given to him as a public servant involved no corruption (s.2 of the Prevention of Corruption Act 1916) and that his life with a prostitute did not involve living on her earnings (s.30(2) of the Sexual Offences Act 1956).
40. Such rules have been described and criticised by Dworkin as "checkerboard solutions". See R. Dworkin, *Law's Empire* 179ff. (1986).
41. This exception, recognised both at common law and by sec. 101 of the Magistrates' Courts Act 1980, applies to all courts in both summary proceedings and trials on indictment. See R v Hunt [1987] 1 All ER 1, 9—10; 14—15.
42. Smith & Hogan supra n. 22, at pp. 209—29 set out the doubts concerning the recognition of those two as full-fledged defences. It is also arguable that "necessity" can be regarded as an excuse as well as a justification. See supra n. 24.
43. Cross, supra n. 12, at p. 111, fn. 11 and the cases referred to therein.
44. Id., n. 41.
45. The decision of the Court of Appeal in R v Edwards [1974] 2 All ER 1085 which, being based on this unsound distinction, was severely criticised (see A. Zuckerman, The Third Exception to the Woolmington Rule, (1976) 92 L. Q. R. 402), has been treated in Hunt (pp. 11; 19) as merely guiding and was effectively confined to its own facts. See Zuckerman, supra n. 2, at pp. 144ff; Campbell, supra n. 16, at p. 76; Williams, supra n. 16.
46. Hence, Fletcher's critique that "Neither Woolmington nor its progeny confronted the general significance of moral guilt in burden-of-persuasion cases" still obtains. (supra n. 16, at p. 919) The decision in Hunt has provoked divergent reactions. See, among others, Williams, supra n. 16; Zuckerman, supra n. 2, at pp. 144—49, and the articles referred to therein.
47. According to the "peculiar knowledge" rule, in some cases involving justifications the accused would have to be required to produce some evidence in support of his justification in order to raise the issue. See Cross, supra n. 12, at pp. 110—12; R v Gannon (1988) 87 Cr. App. Rep. 254, 256.
48. Cf. B. Williams, *Moral Luck*, 21 (Cambridge, 1981).

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