Justification, Excuse, and Mitigation in Criminal Law

'He was trying to strangle me and I had to protect myself.' 'He had been winding me up all afternoon and I finally lost my temper.' 'My new medicine had a strange effect on me so I had no idea what I was doing.' All of these are answers that people might give to the accusatory question: 'Why did you hit him?' They are answers that do not involve denying the accusation. 'You're right, I hit him,' the answer goes, 'but let me explain.' Lawyers call such answers 'defences'.

The three defences just listed are of different types. 'I had to protect myself' is an attempt to *justify* what one did. It is an attempt to explain why hitting was, all told, the right thing to do in the circumstances. 'I finally lost my temper', by contrast, is an attempt at an *excuse*. Although hitting was not the right thing to do, it was a perfectly understandable human reaction. 'I had no idea what I was doing,' finally, is an attempt to *deny responsibility for one's actions*. When one is not responsible for one's actions, one has no need to justify or excuse oneself.

Although criminal law tends to be sparing in which defences it recognises, most systems of criminal law recognise defences of all three types. In criminal law, the main justifications are self-defence, prevention of crime, and consent. The main excuses are duress and provocation. The main responsibility-eliminators are infancy and insanity. Different defences may, of course, be available in respect of different crimes. In English Law, for example, duress has (for most of its history) not been available as a defence to murder. Consent has likewise not been available as a defence to crimes involving physical injury.

Some defences are hard to classify in this tripartite scheme. Suppose a fire engine goes through a red light on its way to a fire, and causes a serious accident. When the driver is prosecuted for dangerous driving, is his defence of necessity to be thought of as

a justification (like prevention of crime) or an excuse (like duress)? Should we say that he acted rightly given the emergency or merely acted understandably under pressure? Different legal systems might think differently about the case. Indeed the same legal system may think differently about it depending on the details of what happened (how fast he was going, and so on).

In criminal law there is also a fourth class of *procedural* defences. These defences include diplomatic immunity and double jeopardy (the defence that one has already been tried for the same crime and found not guilty). In some legal systems, passage of time since the crime is also a procedural defence. It is in connection with these defences that onlookers are most likely to say that an accused person was 'let off on a technicality'. That is because procedural defences have no equivalent in ordinary life outside the law, whereas the other three types of defences mentioned above figure equally in personal relationships, political debate, and so on.

The result of mounting a succesful defence in a criminal court is that one is not convicted (found guilty) of the crime for which one is being tried. Since the result of mounting a successful defence is always the same, why bother to classify defences into different types? In many legal systems, there is no official classification of defences. The classification of defences is a task undertaken by legal commentators and theorists. Some argue that the classification is important because it can have secondary legal implications (for example, one might be justified in defending oneself against an excused assault, but not against a justified one). But mainly the classification matters for moral reasons. To develop the law intelligently, and to treat those who appear before them appropriately, courts need to be able to understand and explain not only what counts as a defence but also why it counts as a defence. So they need to know how the defence is supposed to function: whether it justifies the crime, or excuses it, or eliminates the accused person's responsibility for her actions, or whether it is merely a procedural defence.

Some commentators resist the tripartite classification of non-procedural defences. A common alternative classification is bipartite. On this view, there are only justifications and excuses. Denials of responsibility are simply a sub-type of excuses. Admittedly the word 'excuse' can be used loosely to cover denials of responsibility as well. But this loose sense of the word conceals an important distinction. The importance of this distinction is brought out by thinking about the defences available to those who are driven by repeated abuse to kill their abusive spouses or partners. Such people sometimes argue that they were acting in necessary self-defence (justification). They sometimes argue that the abuser provoked them to do it (excuse). And they sometimes argue that the abuse had finally made them mentally ill (denial of responsibility). The second defence is like the third (and unlike the first) in that it does not claim that killing the abuser was the right thing to do. It admits that it was a mistake. But it is also like the first (and unlike the third) in that it claims that the reaction to the abuse was a reasonable one, even if reasonably mistaken.

Someone charged with murder in this situation may well prefer to plead provocation rather than relying on their mental illness, even if relying on mental illness would be a more efficient way to avoid conviction. It is natural for human beings to want to stand up for their own reasonableness and to be judged accordingly. This is part of preserving one's self-respect. So here is another moral reason to care about the classification of defences. Justifications and excuses allow one to hold one's head up high in a way that denials of responsibility do not.

Some defences in the criminal law (e.g. provocation and diminished responsibility) have come to be known as 'partial' defences. But strictly speaking they are not partial defences. They are complete defences to one crime (e.g. murder) that are not defences to a lesser crime (e.g. manslaughter), of which one can accordingly be convicted instead. Strictly speaking there can be no partial defences in the criminal law because there is no such

thing as a partial conviction for a crime. Regarding any crime, one is either convicted or one is not.

Yet the punishment for the crime may, of course, be a matter of degree. So an unsuccessful defence (one that did not prevent one's conviction for the crime) may still be offered again as what lawyers call a *mitigating factor*: a reason for reducing the punishment. Mitigating factors may include (among other things) justificatory factors, excusatory factors and factors bearing on the offender's responsibility for her actions. The criminal law is typically much more relaxed about mitigating factors than it is about defences; while the list of possible defences is heavily regulated, the list of possible mitigating factors is almost a free-for-all. Outside the law, however, mitigating factors are not distinct from defences, because being guilty of a wrong outside the law is not an all-or-nothing affair. In everyday life there are degrees of justification and excuse (and perhaps – although this is trickier – degrees of responsibility for one's actions).