

Justifications and Reasons: Brief Restatement

Academic criminal lawyers often use the labels 'objective' and 'subjective' to describe aspects of their doctrines and arguments. The labels are dangerous because they are used to draw many different distinctions. One such distinction, which is the focus of my paper, relates to the elements of a justificatory defence. Lawyers who believe that justification is 'objective', as I use the label here, believe that whether an otherwise criminal action is justified depends on whether there were sufficient legally recognised reasons for its performance. Lawyers who believe in 'subjective' justification, by contrast, believe that whether an otherwise criminal action is justified depends on whether it was performed for sufficient legally recognised reasons. When they are expressed thus, the difference between these two positions is not entirely obvious. But it becomes clear as soon as one introduces the distinction between *guiding* reasons and *explanatory* reasons. Guiding reasons are reasons which apply to one, which determine what one ought to do. Explanatory reasons are reasons for which one acts. To act for an explanatory reason is to believe that there is a guiding reason for so acting. But there may not be. One may be mistaken. Thus guiding reasons and explanatory reasons may fail to match. There may be reasons for one to act as one does which are not among one's reasons for so acting. Conversely, the reasons for which one acts as one does may include reasons which are not truly reasons for so acting.

The thesis of my paper is that justification, in the criminal law and elsewhere, has both subjective and objective conditions. In other words, explanatory reasons and guiding reasons must match before one has a justification. One has a justification only if there are reasons for one to act as one does, *and one actually acts for those reasons*.

It sounds like a very demanding and narrow view of justification, but it is not as demanding or narrow as it sounds. To see where it can be mollified, one needs to begin as

far away as possible from the legal context, with the kind of decision that we all of us face every day. It is a decision uncircumscribed by requirements. It is just a decision between the raw pros and cons of some course of action which is neither compulsory nor forbidden. Say, I am thinking about whether to mow the lawn or finish writing my paper. One way to approach the decision is to draw up a kind of balance sheet in one's mind, so that one can weigh up the relative advantages. If one is lucky, the balance sheet gets results: one course of action turns out to be supported by more weighty reasons than the other. Then one could be justified in taking that course. The reasons in favour of that course of action are then, as I put it in the paper, 'undefeated'. The reasons in favour of the opposite course, on the other hand, are 'defeated'. My basic proposal is that in order to benefit from a justification one must act for an undefeated reason, i.e. an undefeated guiding reason must also be the explanatory reason for one's action. But one need not act for *all* of the undefeated guiding reasons. One is enough. It is enough that one mows the lawn because it is a nice day, if the fact that it is a nice day is *one* of the pros of mowing the lawn, and the pros of mowing the lawn are undefeated. It is not necessary that one's mowing the lawn is also motivated by the fact that the lawn needs a cut, the fact that one needs to get some exercise and fresh air, or the fact that one was asked to mow the lawn. *Any* undefeated guiding reason which is also an explanatory reason will do to found a justification.

You can now see why I do not regard this view of justification as particularly demanding. In spite of first impressions, it is compatible with setting aside, and even missing altogether, many of the guiding reasons in favour of doing as one does. Some will see an immediate problem with this claim. Surely, they will say, what makes a guiding reason undefeated is often enough the fact that it conspires with a number of other reasons to defeat the various countervailing reasons. It does not stand undefeated by itself. Just look at the lawn-mowing example: the fact that it is a nice day combines with the fact that the lawn needs a mow, the fact that I need some exercise and fresh air, and the fact that I was asked to mow the lawn, to defeat the case for staying in and writing my paper instead. Presumably were it not for these buttressing considerations the fact that it is a nice day

would not be sufficient to justify my action? So surely I must rehearse these various considerations in order to know that the reasons for mowing the lawn are undefeated? So how can it be alright for me to overlook these considerations, and just go on the fact that it is a nice day taken by itself, and mow the lawn for that reason taken alone? This question betrays an overly deliberative view of practical reasoning. It assumes that the balance sheet model for reasoning is mandatory. One must always weigh up all the pros and cons. I demur. Often enough it is better if one does not. It is better that one acts out of instinct, or on the basis of what is sometimes disparagingly called 'intuition', or out of passion, etc. The only claim I make is that, to act with justification in such a situation, one must still act for some undefeated reason. How one recognises it as undefeated is neither here nor there. It may be enough that one just woke up and saw it was a nice day and spontaneously went out to mow the lawn without thinking through the alternatives. Still the question arises of whether one's lawn mowing was justified, given the other things one might have done with the morning. And the answer is that it was justified if (a) the reasons in favour defeated the reasons against and (b) one acted for one of those reasons. But if one acted for a reason that was not really a reason in favour (e.g. one mowed the lawn at daybreak to annoy one's neighbours, and one was misguided to think that one's neighbours deserved to be annoyed) then one's lawn-mowing was not justified, even though there were sufficient real guiding reasons in favour of mowing one's lawn even at that hour of the day that one's lawnmowing, undertaken for a different explanatory reason, *could* have been justified.

Obviously, the translation of these remarks into a legal setting is not straightforward. The reason is that the law does not normally deal in raw pros and cons. It deals in requirements and prohibitions. The fact that something is legally wrong may be, in some people's eyes, just another disadvantage of doing it to be added to the list. But in the law's eyes, the fact that something is legally wrong is decisive against it. In the eyes of the law, all the countervailing considerations are to be written off automatically. Thus there are, in the eyes of the law, no undefeated reasons in favour of prohibited actions. The point of justification defences in the law is to recognise specific exceptions to this general

proposition. What the law does, when it grants a justification defence, is to *permit* certain actions which would otherwise have been prohibited. This is achieved by *cancelling* the decisive exclusionary effect of the legal prohibition so far as certain specified reasons for those actions are concerned. Those reasons (e.g. reasons of self-defence, prevention of crime, necessity) are then rescued, so to speak, from the status of being automatically defeated by the legal prohibition in question. They become legally undefeated reasons for an action in an ocean of defeated reasons for that same action. It means that the basic condition of justification, that one always act for an undefeated reason, becomes a tougher requirement than it would be in a situation of raw pros and cons like the lawn-mowing case. For whereas *all* the valid reasons in favour of the lawn-mowing are undefeated if *any* are, the same is not true of all the valid reasons in favour of, e.g., murder or theft. Most are excluded in the eyes of the law. Only a few are allowed in. Thus to benefit from a justification one must act for one or another of *those* reasons. It is not enough to act for another reason, even though it may be a reason for the same action.

Some will say that this ladders the law gratuitously with distinctions and themes drawn from beyond the law. Am I a natural lawyer? Do I believe that the law cannot but be structured around moral categories? To this the short answer is no. My paper makes no moral argument for the conclusion just drawn. It makes an argument of rationality. Rationality is not to be contrasted here with, e.g. emotionality. As I explained already, emotions, passions, desires etc. may be rational phenomena. One may do better, rationally speaking, by acting from spontaneous outrage than from cold deliberation. Principles of rationality are merely principles which apply in all areas of reasoning, be it legal, moral, strategic, etc. They are principles which enable one to follow whatever reasons apply to one. My view which I attempt to convey as plausibly as possible in my paper is that the principle 'always act for an undefeated reason' is a requirement of rationality, so that its appeal cannot be avoided by the mere observation that the reasons one is attempting to follow are legal rather than moral. That this must structure legal doctrines of justification may be thought a somewhat large conclusion to draw. But it seems a much more modest

conclusion as soon as it is remembered that (a) a legal system might in principle refuse to recognise any doctrines of justification in its criminal law at all and (b) it might in any case refuse to apply the label 'justification' to any justifications that it does recognise. It is worth dwelling for a moment on this last point. My account of justification is not a piece of linguistic analysis, or even a stipulation about how the word 'justification' ought to be used by lawyers. So far as I am concerned the word can be used by lawyers to serve any technical or specialised purpose under the sun. My account is, as I said earlier, phenomenological. It attempts to situate the *idea* of justification among the ideas which structure our understanding of the world and most particularly its practical dimension. Lawyers can play humpty dumpty with words. But they cannot make the law immune from the logical structure imposed upon it by the nature of our thinking.

There is, however, a familiar phenomenological objection to my claims about justification. It is that it confuses justifications and excuses. Many lawyers think that excuses are more subjective than justifications, so that introducing subjective elements into justifications involves smuggling in alien excusatory concerns. To my mind this brings out more confusions over the categories 'subjective' and 'objective' than over the categories 'justification' and 'excuse'. In one sense, excuses are more subjective than justifications. In another sense they are not. My key point on this score is that the category of excuses is derivative of that of justifications. An excused action is an unjustified action out of a justified belief, a justified emotion, a justified decision, a justified desire, etc. (I should qualify this: some excuses relate to how an action is performed rather than why, e.g. 'I did as well as I could'. My remarks do not apply to this kind of case.) This means that excuses are more subjective than justifications in the sense that they point to facts about how the agent saw or felt about the world around her rather than how that world really was. But excuses are no more subjective than justifications in the sense that concerns me when I claim that justifications have both a subjective and an objective component. This is the claim that justifications depend upon explanatory as well as guiding reasons. Exactly the same is true of excuses. Excuses depend on the combination of guiding and explanatory

reasons when it comes to the beliefs, emotions, decisions, desires, etc. upon which one acted. Justifications depend on exactly the same combination when it comes to the action itself. One was justified if one acted for an undefeated reason. One was excused if one acted on a belief, decision, emotion, or desire which one held or reached or experienced or felt for an undefeated reason. The real importance of this point lies in the justificatory aura which it casts over excuses. The controversy over how the law should deal with battered women who kill brings this out. To those who have argued that such women kill in despair, which the law of provocation with its focus on 'hot anger' fails to recognise, it has sometimes been replied that the law of diminished responsibility can always be invoked where the law of provocation runs out. But this misses the point. What battered women who kill want the law to recognise is that, while their actions were unjustified, their despair was justified. Action out of that despair was therefore at least partly excused. That confirms their standing as responsible agents to whom the category of justification, and therefore the category of excuse, is capable of applying. To claim 'diminished responsibility' automatically calls that standing into question. If one cannot have a justification for one's actions, one hopes at least to have an excuse. Only if one lacks an excuse as well as a justification does one scrape the bottom of the evaluative barrel, raising questions about whether one is a responsible agent at all.