

exonerating evidence was discovered, it is important to ensure that attorneys who defend those facing our severest sanctions have the ability to be competent advocates.

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See also Counsel, Right to; Criminal Courts: Personnel; Due Process

Defenses to Criminal Liability: Justifications and Excuses

Introduction

A defense is a response made by the defendant to a charge in a criminal trial. It is raised after the prosecution has established its case, and permits the defendant to avoid liability even when the government has met its burden of proof on the elements of the offense. There are two general defenses of justification and excuse—these are the focus of this entry. Justification and excuse defenses are referred to as affirmative defenses, because the defendant must raise them in order for the jury to consider them. This is referred to as the burden of production. Generally, the defendant must also meet the burden of persuasion on an affirmative defense, by a “preponderance of the evidence,” although some states impose a greater burden of persuasion on the defendant for certain defenses such as the insanity defense, while other states require the prosecution to disprove an affirmative defense beyond a reasonable doubt (Dressler, 1995).

Justification Defenses

A justification defense is raised when the defendant admits responsibility for the act but claims that under the circumstances the act was not criminal, that what was done was lawful. Justified behavior precludes punishment because the conduct lacks blameworthiness. Examples of common justification defenses include self-defense, defense of others or property, consent, and the execution of public duties.

Self-defense

Self-defense may be successfully claimed if the defendants can demonstrate that they used force to repel an imminent, unprovoked attack that would have caused them serious injury (Fletcher, 1978). In such a situation the defendants may only use as much force as they honestly and reasonably believe is necessary to repel the attack—the defendants cannot use excessive force. Additionally, force may only be used against unprovoked attacks. This means the defendants cannot provoke the attack, or if they did, they must have withdrawn completely from the fight before asserting a right to self-defense. Force may be used only when the victims honestly and reasonably believe they are about to be killed or seriously injured. Threats that cannot be taken seriously do not justify the use of force. Force may be used only when an attack is either in progress or “imminent”—meaning it will occur immediately. It cannot be used to prevent a future attack. One cannot claim self-defense against one who is justified in using force, as during an arrest (Hemmens and Levin, 2000). Self-defense may be asserted only against an aggressor using unlawful force. Self-defense applies to both deadly and nondeadly uses of force. One may use deadly force only if faced with it. Less than deadly attacks authorize resort to less than deadly responses.

There are a number of limitations and exceptions to the general rules of self-defense. The retreat doctrine requires that a person must retreat rather than use deadly force if safe retreat is possible. This doctrine places a premium on human life and discourages the

use of deadly force unless absolutely necessary, and is endorsed by the majority of states. The true man doctrine, conversely, states that the victim of an attack need not retreat, and may use whatever force is necessary to repel an attack, even if a safe retreat was possible. It is based on the idea that the criminal law should not force a victim to take a cowardly/humiliating position. Few states follow this doctrine today. The castle doctrine states that a person attacked in the home does not have to retreat, even if retreat is possible. This exception to the retreat doctrine is based on the idea that a person's home is their castle, and that one should never be forced by the criminal law to abandon it (Brown, 1991).

Self-defense may also apply to defense of others and, in some circumstances, to the defense of property. Historically, defense of others was allowed only for family members. Most states have expanded this restriction to include other special relationships, such as lovers and friends, while other states have abandoned the special relationship requirement altogether. The "other" must have the right to defend himself for the defender to claim the defense. Thus if A provokes an attack by B, C could not use force against B and claim defense of B. Most states restrict the use of deadly force to defense of the person or the home, and allow only nondeadly force for defense of property. In contrast, some states, such as Texas, allow deadly force to protect land or certain types of property, such as natural gas.

Consent

Consent is a defense to some crimes. Most jurisdictions provide that persons may consent to suffer what would otherwise be considered a legal harm. The acts a person can consent to suffer are quite limited, however, and it must be demonstrated that the consent was voluntary, knowing and intelligent. There can be no duress, trickery, or incompetence involved in obtaining consent. Additionally, one cannot consent after the fact to injuries already received (Dressler, 1995).

Most jurisdictions allow consent only for minor injuries, or for activities society widely recognizes have a high potential for injury. An example of consent is professional athletes who choose to engage in activity where injury similar to an assault may occur, as when a boxer punches another boxer. One cannot consent to serious injury, as doing so is assumed irrational. Thus, one cannot claim consent as a defense in mercy killing or euthanasia cases.

Execution of Public Duties

The common law allowed a public official to use reasonable force in the execution of his official duties.

This defense recognizes the value society places on obeying the law, and in permitting those charged with official duties the necessary authority to carry out those duties. Today an agent of the state, such as a police officer or soldier, is permitted to use reasonable force in the lawful execution of his or her duties. This defense allows the use of deadly force under the proper circumstances, and also allows police to engage in activities that are otherwise criminal if they are doing so as part of their law enforcement efforts, such as posing as a drug dealer.

In the early development of English common law, sheriffs and posses could use deadly force to apprehend any fleeing felon. At this time, felonies were capital offenses, and it was particularly difficult to apprehend fleeing criminals. This was known as the fleeing felon rule. The U.S. Supreme Court, in *Tennessee v. Garner* (471 U.S. 1, 1985), held that police use of deadly force to apprehend fleeing criminal suspects was limited by the Fourth Amendment that requires that all seizures be conducted in a reasonable manner. The ruling limited the use of deadly force against fleeing felons who pose a threat to public safety (e.g., armed, violent offenders).

Excuse Defenses

The second type of affirmative defense is the excuse defense. With an excuse defense the defendant admits what he did was wrong but argues that under the circumstances he is not responsible for the improper conduct. Examples of excuse defenses include duress, intoxication, mistake, age, and insanity,

Duress

Duress may be raised as a defense in a limited number of situations. An example of duress is as follows: A is forced to rob a store by B, who holds a gun to A's head and threatens to kill A unless A does as instructed. In this instance A committed a serious crime, the robbery, but did so only to avoid a more serious crime, being murdered by B. Duress is allowed as a defense under the rationale that those forced to commit a crime in such circumstances do not act voluntarily, and the criminal law, as a practical matter, cannot force people to act irrationally against their own self-interest (Kadish, 1987).

At common law, the defense of duress was permitted only when the defendant was threatened with both imminent and serious harm, and the act committed under duress resulted in less harm than the threatened harm. Most states now allow the defense for all crimes except murder (which is never excused), while some still limit the defense to minor crimes. Some states

allow the duress defense only under fear of "instant harm," but most still follow the common law "imminent harm" rule. Threats to harm a third person or property do not constitute duress.

Intoxication.

There are two forms of intoxication, voluntary and involuntary. Intoxication here refers to the effects of either alcohol or drugs. The effect of intoxication on criminal liability differs according to whether it was voluntary or involuntary (Ward, 1974). Voluntary intoxication never provides a complete defense, but it may be used to mitigate the punishment. Involuntary intoxication may provide a defense if it can be shown that the actors were unaware that they were being drugged. In such cases the actors are excused because they are not responsible for becoming intoxicated; consequently it would be unfair to hold them liable for the resulting uncontrollable and unintended action. Interestingly, the Supreme Court has held that due process does not require that states allow the defense of intoxication (*Montana v. Egelhoff*, 518 U.S. 37, 1996). Obviously, intoxication is also never recognized as a defense in situations where intoxication is an element of the crime, such as drunk driving or public intoxication.

Mistake

There are two types of mistake defenses—mistake of law and mistake of fact. The cliché "ignorance of the law is no excuse" is actually a misstatement. Mistake of law has always excused some (but very little) criminal responsibility. Ignorance is an excuse if the defendant undertakes reasonable efforts to learn the law, but is still unaware that he has violated some obscure, unusual law (Fletcher, 1978). The constitutional prohibition on vague laws means persons must be provided with reasonable notice of what constitutes criminal conduct before they are punished for such conduct.

Mistake of fact excuses criminal liability when it negates a material element of the crime. The mistake must be both reasonable and honest. An example would be if an airline traveler took another passenger's luggage by mistake, thinking it was theirs. Although they have taken the property of another, as in larceny, they lack the requisite intent to deprive another of their property.

Age

Historically, youth has been treated as a defense to criminal liability on the ground that persons below a certain age lack the requisite mental capability to form *mens rea*,

or criminal intent. At common law there was an irrefutable presumption that children under the age of seven years were incompetent. Children between the ages of seven and fourteen were presumed incapable, but this presumption could be rebutted by the prosecution. Children over the age of fourteen were presumed to have the mental capacity to form *mens rea*, but the defense could rebut this presumption (Feld, 2000). Today the various jurisdictions define the age of maturity differently, ranging from sixteen to twenty-one.

Those classified as juveniles are processed through the juvenile justice system rather than the criminal justice system. The juvenile court was established as an alternate, more forgiving approach to juvenile offenders, and was based on the *parens patriae* doctrine, which holds that the state should act in the best interests of a child. Today the *parens patriae* doctrine of the juvenile court is slowly giving way to an increased desire to treat juveniles similarly to adult offenders; hence a number of states have removed juvenile court jurisdiction for serious crimes or repeat offenders, or have lowered the age at which a juvenile can be transferred to adult criminal court (Fritsch and Hemmens, 1996).

Insanity

Insanity is a legal term that describes mental illness. It is not a medical term. Insanity excuses criminal liability by impairing the *mens rea* of the defendant. If a defendant is determined to be insane, then he is not blameworthy or culpable (Morris, 1982). There are several different legal tests for insanity that have been developed over time, usually in response to a particularly egregious crime. They focus on the reason and willpower of the defendant. These tests include the right-wrong test (also called the M'Naghten rule), the irresistible impulse test, and the substantial capacity test. Each of the tests of insanity is slightly different.

The M'Naghten test for insanity focuses on the defendant's intellectual capacity to know what they are doing and to distinguish right from wrong. It is a two-prong test: (1) the defendant must suffer from a disease or defect of the mind; and (2) this must cause the defendant either to not know the nature and quality of the criminal act or to not know right from wrong. This definition prompts a number of questions. (1) What constitutes a "disease of the mind"? Is it any mental problem, or just a severe psychosis? (2) What does "knowing" mean? Most courts have held that it means intellectual awareness, which nearly everyone has. Other courts say it means being able to grasp an act's true significance. (3) What is "wrong"? Does it refer to what is defined as wrong by the law, or rather what is considered immoral?

The irresistible impulse test for insanity is an excuse for criminal liability when defendants are unable to control their conduct or compelled to commit a crime because they suffer from a mental disease or impairment. This test holds that the defendants may not be responsible for controlling their conduct, even if they know the conduct is wrong. This test is broader than the right-wrong test, but critics have argued that it ignores the ability of the mentally ill to engage in reflection. There is great difficulty in distinguishing between irresistible impulses and mere unresisted impulses (Morse, 1985).

The substantial capacity test is defined as when defendants lack substantial capacity to either control their conduct or appreciate the wrongfulness of the conduct. This test was developed by the American Law Institute, which drafted the *Model Penal Code*, and was adopted widely by the states during the 1960s and 1970s. It is a modified version of the right-wrong and irresistible impulse tests. This test states that defendant is not responsible if he lacks "substantial capacity to appreciate criminality of act or to conform his [sic] conduct." It requires that defendants lack substantial, rather than total, capacity. The right-wrong and irresistible impulse tests are ambiguous on this point.

All of these tests have been criticized as either too difficult or too easy for the defense to prove insanity (Dressler, 1995). Courts and legislatures have limited the use of the insanity defense or shifted the burden of proof. This movement stems from a fear that insane defendants will not be adequately punished, or will be released too soon. An example is the 1984 Federal Comprehensive Crime Control Act, passed shortly after John Hinckley was found not guilty by reason of insanity for attempting to assassinate President Reagan. This legislation shifted the burden of proof from requiring the prosecutor to prove sanity beyond a reasonable doubt to requiring the defense to prove insanity by clear and convincing evidence (a tougher standard than the preponderance of the evidence standard usually applied to affirmative defenses). The *Model Penal Code* rejects this approach, and requires the state to prove sanity beyond a reasonable doubt. Some states allow a verdict of "guilty but mentally ill," but require the state to treat the defendants in a hospital instead of putting them in prison. Some states have abolished the insanity defense altogether.

Conclusion

Affirmative defenses have a long history in the criminal law. Most were developed in English common law, and have been codified subsequently in criminal codes. As with any legal doctrine, these defenses are subject to modification over time. As society changes, so does

the criminal law. An example is the insanity defense. First adopted by courts as a means of providing clearly incompetent defendants with the opportunity to avoid criminal liability, the insanity defense has been altered so that it is harder to claim.

Although they differ in their elements, justification and excuse defenses provide an important limit to the application of the criminal law. These defenses represent a recognition that not every person who does something that appears to be a crime should be punished for their actions. Whereas the basic elements of an offense (act, intent, and harm) may be present, the law recognizes that some persons still should not be subject to criminal sanction for their conduct. This is because what they did was in fact appropriate (a justification), or because there is some factor that eliminates their personal culpability (an excuse).

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See also Accident as a Defense to Criminal Liability; Battered Woman Defense to Criminal Liability; Consent as a Defense to Criminal Liability; Duress as a Defense to Criminal Liability; Entrapment as a Defense to a Criminal Liability; Infancy and Immaturity as Defenses to Criminal Liability; Insanity and Diminished Responsibility as Defenses to Criminal Liability; Intoxication as a Defense to Criminal Liability; Mistake of Fact as a Defense to Criminal Liability; Necessity as a Defense to Criminal Liability; Self-Defense as a Defense to Criminal Liability; Statute of Limitations as a Defense to Criminal Liability; Superior Orders as a Defense to Criminal Liability.