

Chapter Ten: Excuses.

1

In making an *Excuse*, the defender admits doing the act and admits that it was wrong, but still claims that she should not be blamed for it. "I didn't mean to hurt you" is what the defender says. Often, it suggests that something went amiss as the defender decided to act. And indeed, Excuses seem to arise from breakdowns or errors in the way we plan and prepare to act.

Ordinarily, we come to do something in the following steps:

- We are confronted by a choice.
- We gather information about that choice.
- We think through the information, trying to foresee what will happen if we act one way or another and comparing these predictions with our basic values.
- We decide what to do and carry out our plan; and ordinarily, if we have planned prudently and execute the plan carefully, things will come out pretty much as we expected.

When these steps go wrong, we get the following Excuses:

- *No Choice*: the defender didn't really have a choice; all the other options were so bad as to be unchoosable. For example: throwing cargo overboard in order to save the ship.
- *Ignorance/mistake*: the defender missed or misunderstood some vital piece of information, which led to her doing harm. For example: an emergency room doctor gives an unconscious patient a drug to treat a serious health problem; but unbeknownst to the doctor the patient is allergic to that drug; the patient dies.
- *No Capacity*: the defender was unable to think rationally about the choice. For example: insanity.
- *Accident*: the act somehow goes wrong; outside forces intervene and cause a result that the defender could never have foreseen (even with full information) or prevented (even with care). For example: The kid's homerun goes awry and breaks the neighbor's window.

Contemporary accident law is quite complex; in a highly organized industrial society, the fact that something happened by accident is no longer a good excuse. Therefore we're going to skip Accident cases here, and stick to No Choice, Ignorance, and No Capacity.

2

The defender admits that she something wrong, but claims she had *No Choice* under the circumstances. "I had to do it" she says. For example:

Duress: driving a getaway car because the bank robber is holding a gun to her head.

Necessity: running a red light getting a woman in labor to the hospital; throwing the cargo overboard to save the ship in a storm. Nature causes necessities; human beings impose duress.

On orders: shooting the unarmed peasants because the Lieutenant has ordered it.

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Defense of self, others or property.

Abused person syndrome: the battered wife kills her husband; Menendez bros.

Many of these examples seem to overlap with the examples of Justification. How can you tell the difference? A situation may produce a Justification or an Excuse depending on where the "accent" falls in the defense. It's a Justification if the defender claims that what she did was right—she may even be proud of it. It's more an Excuse if the defender allows that it was indeed wrong, but still "the lesser of two evils"—she isn't proud of having done it, but is rather resigned to her bad luck at being in such a situation. The topoi for this defense thus closely resemble those for the Justification; if you are arguing such a case, you should re-examine the previous chapter. Here are a few additional topoi, just for excuses:

1. Were there really no other choices? In particular, why not:

(a) Retreat: Did the defender have an opportunity to get out of the situation before it became really bad? For example: if she was attacked, could she have retreated and not have had to defend herself? Or: could the battered woman have left her abuser?

(b) Delay: Couldn't defender have at least waited to see if the situation got better on its own? For example, could she have resisted carrying out the orders of the gunman, giving the police time to show up?

(c) Warn: Couldn't the defender have warned the other party that she would injure him?—an alternative choice in a case of self-defense; maybe the attacker would have just gone away.

(d) Use another, comparatively less harmful, ways of achieving the same result. Under duress from a gunman, could the defender have just shot the victim in the shoulder, not killed her?

2. Did the defender afterwards show regret?—Regret being a topos common to all Excuses. It is expected that people who commit wrong acts, though unwillingly, regret having had to do it. If there is no regret, then maybe the defender didn't really do it because he had to, but for some other reason (topos 2a). Notice that this topos isn't shared with Justification: in a Justification case, the defender claims she has nothing to regret.

3. Do we want to allow people to take these judgments into their own hand?—as with Justification, the "public policy" topos. In No Choice cases, the defender is essentially asking for

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her own judgment of what to do to substitute for the judgment of the courts and legislature. Should we allow this? Check the Justification topoi for a fuller discussion.

4. A final topos for accusers in No Choice cases: **Tough luck!** "You, the defender, found yourself in a bad situation. Part of that situation, unfortunately, was the law that punishes conduct such as yours. You took the lesser of two evils; now you have to bear the consequences." For example: people who damage property in order to save themselves usually have to pay for it.

3

The defender did not know (Ignorance) or did not understand (Mistake) some crucial aspect of the situation, leading her to do harm without really meaning to. "I had no idea" she says. For example:

Mistaken identity: a father shoots his daughter's boyfriend sneaking into the house late one night, mistaking him for a burglar. Or in a famous example in philosophy: a person looks out a window and shoots a passing mule, believing it to be his own mule; but it really belongs to his neighbor.

Ignorance of consequential fact: the emergency room doctor kills a patient, not knowing his drug allergies.

Mistake of law: the worker who moved out of state didn't know she had to pay taxes to her old residency.

Mistaken reliance: the mother gives her baby the medicine her doctor prescribed; the doctor is a quack and the baby dies.

Mistake as to justification: a person who mistakenly believes she's been "deputized" and can function as a police officer shoots a criminal in the process of arresting him. If she were right, her conduct might be justified; but she's wrong. (Only law professors worry about Mistaken Justifications being Excuses).

Topoi for Ignorance/Mistake:

1. Did the defender in fact not know or understand the information? Perhaps the father knew quite well who was entering the house, and he's only offering the Excuse to try to avoid blame.

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2. Should the defender have known or understood the information? After all, we can on occasion be studiously ignorant: "Don't tell me that!" we say. For example: perhaps the father heard a noise, and instead of investigating as he should have just rushed into shooting. Again, imagine a drug company deciding not to fully test a drug; when sued, should it be allowed to claim that it just didn't know of the side-effects? Some things, further, are thought to be obvious to all: perhaps the mother should have known that the "doctor" was a quack, and never relied on what he said.

3. Did the lack of knowledge really contribute to the act? Maybe the defender would have done same even knowing the information: the father may have shot the boyfriend thinking he was a burglar, but he would have shot him even if he had known it was the boyfriend, disliking the boyfriend's intimacy with his daughter.

4. Did the defender afterwards show regret? If not, it suggests that she wasn't really ignorant.

5. Should we encourage ignorance by allowing it as an Excuse? —this is the "public policy" topos again. Holding people responsible for what they do, even by mistake, encourages them to investigate very carefully before acting and thus tends to prevent harms from occurring. If we let people excuse themselves too easily, we will encourage laziness in inquiry. For example, "ignorance of the law is no excuse;" so people are forced to investigate the laws carefully before acting.

4

The defender admits she did something wrong, but claims she wasn't in her right mind at the time, so she couldn't think through her decision properly—the Excuse of No Capacity. For example:

Insanity, permanent or temporary: mental dysfunction.

Physiological state impairing mental functioning: epilepsy, blackout, low blood sugar, Tourette's syndrome, sleep. (Increasingly, the boundary between mental and physical dysfunction is becoming blurred).

Impaired states less than insanity: e.g. post traumatic stress disorder.

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Rotten social upbringing: the defender's upbringing (in a slum, by abusive parents, watching violent TV, etc.) rendered her incapable of understanding the wrongfulness of what she did and/or controlling herself.

Heat of passion: a wife finds husband in bed with another; enraged, she kills him; "road rage": a commuter goes berserk when another car cuts in front of him, pulls out his gun and shoots.

Brainwashing: e.g. Stockholm syndrome—the hostages begin to work for the terrorists who have kidnapped them.

Intoxication.

Hypnosis: The stuff of horror movies: a person is hypnotized and ordered to do some wrong.

Minority: people under certain ages are deemed not to be capable of acting and not held responsible.

These examples range from physical conditions which prevent the defender from having any state of mind at all, so that she really can't be said to have acted at all—e.g., epilepsy and being three years old—to states of mind only slightly different from normal, and much less excuse-worthy—e.g. "heat of passion."

Question: What is "insanity" anyhow? Or more generally: what are the capacities a person needs to make a decision, so that if she lacks them, she isn't responsible? The law has been chewing on this question for 150+ years now, and few satisfactory answers have been reached. We'll discuss it in class, but come prepared with some ideas of what a person has to prove to get off on a No Capacity Excuse.

Topoi for No Capacity:

1. Was the defender really in the alleged state of mind at the time of the act? Maybe she was faking it: for example, taking advantage of her intermittent insanity to commit a murder during one of her lucid periods.

2. Would the defender's state of mind really prevent her from making a responsible decision? For example: kids on the edge of maturity may or may not be tried as adults; a person may not be so drunk as to be completely out of control.

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3. Was that state of mind the real cause of the behavior? For example, an intoxicated person might meet the man she was planning to kill and kill him, according to plan.

4. Was the defender responsible for putting herself in that state of mind? For example: did she get drunk intentionally, or was she drinking spiked punch by mistake? If she's insane, did she intentionally not take the medications which might have controlled her disorder?

5. If the defender became lucid again, did she show regret? —the Regret topos again.

6. Do we really want to let people in that state of mind off?—the Public Policy topos again. For example: "heat of passion" used to be a better defense than it probably now is. We have as a society decided that we don't want to encourage such violent sexual jealousy; those who fall into it are rightfully punished. Again, we are now in the middle of a long debate as to when insanity ought to be an Excuse. The law here is seen to function as an external discipline encouraging people to be more careful about their own, internal, states of mind. And finally, these mental states may be easy to fake. To prevent fakes, we might want to prohibit the offense.