THE DURESS DILEMMA:
POTENTIAL SOLUTIONS IN THE THEORY OF RIGHT

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Introduction

Duress defenses, prima facie, pose a serious dilemma for theories of punishment: an accused, committing an offense under duress, seems to be simultaneously guilty and not guilty. In an attempt to solve the dilemma surrounding the defense of duress, the Supreme Court of Canada (SCC) in R. v. Ruzic[1] *has chosen a nonviable quasi-retributivist solution while a viable one seems to be available.*

To explore this hypothesis, it will be necessary first to examine the paradox of moral culpability that inheres in duress. Since this paradox arises in the context of retributivist justifications of punishment, an in-depth analysis of these justifications will be conducted initially. The apparently harsh solution that retributivism, at first blush,

[1] [2001] 1 S.C.R. 687 (QL). [Ruzic]. A brief synopsis of the facts of Ruzic, although not in themselves relevant to my thesis, should be provided here. The accused was arrested and charged for the trafficking of drugs into Canada. Her defense was that she did so under duress. Allegedly, a third party had repeatedly threatened her mother's life in order to compel her to commit the offense.

provides for this dilemma of duress has prompted the SCC, among others, to scramble for ameliorative alternatives, which will be analyzed in the second part of this paper. Since none of these alternatives resolves the paradox, the paper will conclude with what I hope will be a more viable solution.

Retributivist Theories of Punishment: Kant & Hegel

The specific retributivist theories that I will draw on to highlight the dilemma duress are those promulgated by Kant[2] and Hegel.[3] Through the lens of their respective theories we can examine duress in its starkest and harshest light. For both, punishment is not a choice, but a duty, a duty owed to the criminal wrongdoer. This concept of obligatory punishment is not self-evident and requires further explanation.

The explanation rests on an understanding of the central tenet of their respective theories: the concept of the will. [4] [5] The will is at once universal and individualistic[6] - that is, the inherently individualistic nature of self-determination that the will embodies is shared universally as a necessary characteristic of all persons. Therefore,

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[2] I. Kant, Metaphysical Elements of Justice (1798), trans. J. Ladd (Indianapolis: Hacket, 1999). [Kant].

[3] G.W.F. Hegel, Philosophy of Right (1821), trans. T.M. Knox (Oxford: Oxford University Press, 1962). [Hegel].

[4] To avoid confusion, it is necessary here to draw attention to the two conceptions of the will articulated by Kant: the noumenal and phenomenal. The noumenal will is a universal will that exists a priori of human experience. In contrast, the phenomenal will exists in human agents and is our personal/individual deciding or volitionary force. See Kant, supra note 2 at 19.

[5] I realize that Kant and Hegel, although providing the foundations for the same theory, offer different approaches for justifying punishment. For Kant, the source of his justification lies in his formulation of the categorical imperative: "act according to a maxim that can at the same time be valid as universal law." See Kant, at 19. Hegel, on the other hand, grounded his theory in the equal and universal purposiveness or capacity of freedom that is directed towards some unconditioned end. See Hegel, at paras. 34-35.

[6] Hegel, supra note 3 at 7.

although the will is free, it is also constrained by a necessary respect for the wills of others.

The premise that men are all holders of equal rights to freedom entails a specific definition of wrong. A wrong consists in any interference or challenge to the validity of this equal freedom. In other words, a wrong can be defined as the treatment of another human being as some*thing*[7] of lesser worth. Hegel articulates a wrong as that which manifests itself as the invasion of one individual's sphere of liberty by another. The message conveyed by the wrongdoer through this invasion is that his/her right to liberty exceeds that of the person whose sphere he/she is invading.[8] As Hegel argued,

> [T]hat force or coercion is in its very conception directly self-destructive because it is an expression of the will which annuls the expression or determinate existence of a will. Hence force or coercion, taken abstractly, is wrong.[9]

Furthermore, if the wrongdoing, that is, the invasion of the sphere of liberty of another, is intentional,[10] then not only has the wrongdoer claimed too much liberty for him/herself and denied his/her victim's right to equal liberty, but his/her action also manifests as an explicit challenge to the normative order in which the right to equal liberty inheres.[11] The explicit challenge to the normative order that is now in

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[7] Emphasis is added to "thing" here to allude to Kant's second formulation of the categorical imperative in which he stated that it is always wrong to treat another human being as a means to an end rather than an end in himself. Hegel similarly emphasized this necessary respect for other persons: "Hence the imperative of right is: 'Be a person and respect others as persons.'" Ibid. at para. 36.

[8] A. Brudner, "In Defense of Retributivism" in W. Cragg, ed., Retributivism and Its Critics: Canadian Section of the International Society for Philosophy of Law and Social Philosophy (CS, IVR) (Papers of the Special Nordic Conference, held at the University of Toronto 25-27 June 1990 (Stuttgart: Steiner, 1992) at 95.

[9] Hegel, supra note 3at 92.

[10] For the purposes of this paper, I will not address the notion of unintentional wrongs since they correspond to the civil law of tort, whereas this paper's focus is on the public law of criminal offenses.

[11] To recall the distinction drawn earlier between the noumenal and phenomenal definitions of the will: a wrongful act done intentionally not only interferes with the phenomenal will of the individual, but also challenges the underlying noumenal will.

play as a result of the agent's intentional wrong mandates that punishment is not merely an appropriate "choice" but rather a duty owed to the wrongdoer.

In this logical vein, the retributivist argues that the wrongdoer "deserves" his/her punishment not because he/she is evil, but rather that because in his/her denial of the normative order, the wrongdoer authorizes his/her own punishment. In other words, by his/her very actions, the wrongdoer places him/herself outside the normative moral order, thus defeating his/her own claim to liberty. To compensate for the negation of liberty he/she intentionally inflicts, the wrongdoer must be punished with the deprivation of his/her own liberty to a degree that is proportionate to the offense. Hegel expresses this compensation through punishment as the negation of the negation.[12] Therefore, we owe the criminal a duty of punishment in order not only to compensate for the wrong, but also to reestablish the normative rightness of the entire world order. As Hegel argued,

> That coercion is in its conception self-destructive is exhibited in the world of reality by the fact that coercion is annulled by coercion; coercion is thus shown not only right under certain conditions but necessary, i.e., as a second act of coercion which is the annulment of the one that has preceded.[13]

If one takes the above quotation and reads in the word "punishment" for the second manifestation of coercion, one gets the articulation of the retributivist's principled approach to punishment. Thus, there are two criteria of a criminal offense that must be met for punishment to be justified: first, a wrong must be committed – that is, an interference with the rights of another must occur; and, second, this wrong must be committed with intention.[14]

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[12] Hegel, *supra* note 3 at 97[A].

[13] *Ibid.* at para. 93.

[14] The Canadian criminal law defines intention as one of the following three mind-states. First, it can be the intention to do 'x'. Second, it can be recklessness with respect to the consequences of doing 'x'. Third, it can be willful blindness with respect to the doing of 'x'. For the purposes of this paper, I will not conduct any further analysis of these states of *mens rea*. All that is important to keep in mind here is that intention somehow incorporates the will of the agent and in so doing makes his action properly defined as his own – that is, the action and its consequences are imputable to him *qua* agent.

What the above analysis of Hegelian and Kantian retributivist models exemplifies is the potential for harshness in cases of duress. The obligation to punish cannot, it seems, be overridden except by a correspondent right not to be punished. The two situations in which this right to not be punished are manifest are (1) if it can be established that no wrong occurred, or (2) if it can be proven that the accused did not intend the wrong. Therefore, an accused who commits and intends a wrong while under duress can not *prima facie* be deemed the holder of a right not to be punished

A First Retributivist Response

An understanding of this first response depends on the distinction between justifications and excuses.[15] Briefly, when we say that someone is justified in doing 'x', we are in effect saying that the action was not wrong, and the agent, far from being the appropriate object for blame, might be a more appropriate object for praise.[16] In the absence of a wrong action, punishment is incoherent. Therefore, in the retributivist model, justificatory defenses are essentially rights not to be punished. On the other hand, in the case of excusatory defenses, we hold the action of the accused was a wrong action; however, we "elect" not to punish because of certain exigent circumstances that existed in the context of the offense and that are particular to the accused.[17] Here, the accused has no right not to be punished, and the withholding of punishment is tantamount to mercy, not annulment of a wrongdoing. The exculpatory power of an excuse, in contrast to that of a justification, rests not in a right not to be punished but rather in a choice by the punishing force to withhold its right to punishment out of a sensitivity to the particular circumstances faced by the accused.

The distinction between justifications and excuses can also be understood in the following more fundamental way. Justifications relate to the moral culpability of the accused in that they negate it. An

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[15] The following definitions and reasoning are primarily drawn from G.P. Fletcher's essay, "The Right and the Reasonable," in Justification and Excuse: Comparative Perspectives vol. 1, (New York: Transnational Juris Publications, 1987) 68. [Fletcher].

[16] *Ibid.* at 76.

[17] *Ibid.* at 77.

accused who acts in such a way that he/she commits a wrong, but his/her commission of the wrong is deemed justifiable, can not, and is not, held morally at fault. In contrast, an excuse does not, *ab initio*, negate moral culpability. Here, we hold an accused who is excused to be morally blameworthy and responsible for his/her actions; however, we choose not to punish.

To apply this distinction to the defense of duress: an accused it seems can have his/her punishment annulled through a defense of duress only when the actions committed under duress are justified. Occasions when duress justifies are strictly limited. The duress must either be tantamount to a negation of the intent of the accused or the accused's act itself works to rectify the rights infringement. Viewed in this narrow way, the defense of duress collapses into either a defense of automatism or self-defense. Thus, the narrow circumstances in which the retributivist would seem to allow for a defense of duress create a palpable harshness. Such harshness is illustrated by the following example: a mother who kills to protect the lives of her children can not avail herself of the defense of duress. The consequence of punishing the mother in this situation is deemed unpalatable by most; therefore, several attempts to provide alternative accounts of duress have been proffered to attempt to ameliorate its apparently intrinsic harshness.

Ameliorative Alternatives

A Modified Retributivist Response: Positive Law to the Rescue?

One ameliorative alternative to the application of the defense of duress resides in an interplay between the functioning of duress as an excuse and the legislative power of the state. Here, the legislative body would pass a statute outlining an excusatory defense of duress. If an accused has a right under positive law to an excuse of duress, then the retributivist would recognize such a statutory right as sufficient to embody a correspondent right not to be punished.

At first blush, this approach seems appealing since it appears to mitigate the harshness of the duress defenses limited to the narrow justificatory role sphere, while concurrently according with retributivist principles of desert; however, upon closer examination, this alternative reveals several problems. By allowing duress to

function as an excuse, we would be in effect saying, "Yes, you are morally culpable, but we choose not to punish you on the grounds that you have satisfied the criteria of the statutory defense of duress." Since the problem with duress inheres in that we do not consider the accused necessarily morally culpable, any solution that requires this stigmatization must be looked at skeptically. Furthermore, this solution fails to provide a rationale for determining the content of such a statutory defense. I will address both of these concerns more fully in the final portion of my paper where I will return to a retributivist approach in an attempt to articulate a sound rationale for a broader justificatory defense of duress than is on the table now.

The Supreme Court of Canada's Approach

The SCC is in fact operating within the sphere outlined by the modified retributivist response – that is, Parliament has enacted a statutory excuse of duress: s. 17 of the *Criminal Code*.[18] That the SCC strikes down a good portion of this provision – specifically, the present and imminent threat requirements – and reformulates a new excuse of duress is indicative of the shortcomings of this easily manipulatable retributivist solution.

In *R* v. *Ruzic* ("*Ruzic*") the alternative adopted with respect to the defense of duress was the constitutionalization, as a principle of fundamental justice, that one cannot convict an accused who exhibited "moral involuntariness." The SCC defines "moral involuntariness" as a situation in which the accused "retains conscious control over her bodily movements … [and whose] will is overborne … by threats of another," the bottom line being that "[h]er conduct is not, in a realistic way, freely chosen."[19] According to the Court, it is contrary to the principle of fundamental justice to have someone held criminally responsible and punished for an act that they did not freely choose.

Initially, the SCC's decision seems to accord with the principled account of punishment provided by retributivism, since the retributivist would agree that an agent cannot be held criminally responsible for actions which are not products of his/her will – that

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[18] R.S.C. 1985, c. C-46, s. 17.

[19] *Ruzic*, *supra* note 1 at 44.

is, actions over which the agent has no control. However, the SCC's conception of "moral involuntariness" is not limited to actions over which the agent had on choice, but rather is so broad that it includes all actions over which the agent felt he/she had not realistic choice. By distancing itself from the clear line drawn by retributivism between choice and no choice, the SCC leaves itself open to the question of how much pressure is sufficient to create a circumstance of "no realistic choice."

The SCC's articulation of "moral involuntariness" raises fundamental questions. When is the pressure exerted by the duressor sufficient to constitute an overwhelming of another individual's will? Moreover, what kind of pressure is necessary to create this overwhelming effect? Is it limited to fear of bodily harm or death or can it extend to anger or some other emotion that (under the SCC's broad analysis of moral involuntary behavior) can be characterized as effectively overbearing an individual's will such that he/she is not making the decision he/she would reasonably make if he/she were totally free from external pressure? In his acute critique of the SCC's judgment in *Ruzic*, Stephen Coughlan succinctly stated, "[w]hat the court has done by articulating this new principle of fundamental justice is to create a new defense: irresistible impulse."[20]

The SCC renders itself vulnerable to the above "slippery-slope" brand of criticism[21] in part because of its conclusion that moral involuntariness does not necessarily entail moral blamelessness. Once it has been established that the accused committed and intended the crime, the Court finds it impossible to consider him/her morally blameless.[22] However, as Coughlan pointed out in the cases of justification the two elements of the offense are satisfied; however, we do not consider the accused to be morally blameworthy.[23] Apparently

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[20] S. G. Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change" (2002) 7 Canadian Criminal Law Review, 206 [Coughlan].

[21] An example of this "slippery-slope" argument in this context is embodied in the infamous "Twinkie Defense." Briefly, such an argument maintains that if one can say that one ate so many Twinkies that one's blood sugar was high to the point of irresponsibility, then the question is how many Twinkies is too many: one, ten, a hundred?

[22] *Ruzic*, *supra* note 1 at 32.

[23] *Coughlan*, *supra* note 20 at 188.

unaware of the situation to which Coughlan referred, the Court, faced with the dilemma of duress where the accused has both done and intended the crime, created a need for a separate excuse of moral involuntariness. Thus, they argued – incoherently – that although the accused was blameworthy – that is, responsible morally for his/her actions – he/she committed the offense absent a fully functioning will, and, therefore, cannot be punished since his/her actions were morally involuntary.

As result of the SCC's confusion and its subsequent overcompensation, it is now possible to acquit an accused who is morally culpable but who argues that he/she committed the crime without free moral volition. In isolation this result would not be problematic. But because moral involuntariness does not speak to proportionality, only to reasonableness, several unpalatable consequences arise. Arguing from a reasonableness criterion, we would say that a reasonable person in the "clothes" of the accused would have acted in a similar fashion. Proportionality, on the other hand, is objectively measured: the act committed under duress must be proportionate to the threat the accused was under. Without a proportionality criterion, a situation could be envisioned, after *Ruzic*, where the accused quite reasonably on the objective-subjective test viewed him/herself to be not making a truly free choice, and thus, reacted disproportionately to the perceived threat. Since he/she acted in a morally involuntary way, he/she cannot be punished as a matter of fundamental justice as now constitutionalized in s. 7 of the *Charter*.[24]

One can argue that the problems that the SCC runs into, as outlined by Coughlan, are a direct result of its "mis-definition" of the term "moral involuntariness." According to a retributivist, moral involuntariness is tantamount to automatism – that is, a situation of no choice not, as the SCC would have one believe, a situation of limited choice. A retributivist analysis of what "moral involuntariness" actually means sheds light on why the SCC runs into the problems it does; however, it still leaves us with the problem of when it is appropriate to annul punishment in cases of duress.

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[24] *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

Judicial Mercy: The Compassionate Approach

Given the narrow role of the defense of duress as supported by the retributivist theory of punishment in combination with the obfuscating take on duress as promulgated by the SCC, one must wonder how duress should fit in our legal framework. This brings us to the third ameliorative alternative: the compassionate approach. Here, acquittal does not follow because the accused has a right not to be punished, as would be the case if the defense were a justificatory one, but rather that the court chooses not to punish on the basis of humanitarianism, altruism, and/or mercy. It should be noted that this alternative is necessarily entailed by the retributivist theory if one wants to mitigate the harshness of confining the defense of duress to the justificatory sphere and if a statutory excuse of duress is absent.

It has been argued by some, notably Fletcher, that retributivism can encompass this altruism; however, I think Fletcher committed an error in his analysis of retributivism. Fletcher argued that duress can excuse because the governing body (that is, the court) can choose not to exercise its right to punish. Fletcher's mistake here is in characterizing punishment as a right and not a duty.[25] When a crime is committed, the equilibrium of the normative order shifts, and this demands a correspondent punishment to reaffirm the normative baseline; therefore, punishment is not a right that can be withheld at will or mercy, but rather a duty mandated by the concept of Right.

As stated earlier, justifications are equivalent to a right not to be punished. Justifications fit neatly into the retributivist framework outlined by the notion of the theory of right; excuses do not. An excuse, a compassionate alternative proponent would argue, might still be accommodated by the retributivist scheme. On this interpretation, the retributivist's concern for the inherent dignity and freedom of human beings is emphasized and serves as a justification for legislative and/or judicial sensitivity to particular situations of partial agency. Thus, the harshness of the retributivist regime, it is argued, can and ought to be mitigated by a sensitivity to human agency and its limitations in exigent circumstances that affect its functioning. It behooves us to be sensitive to this situation of partial agency. An accused who commits an act under partial agency should

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[25] Fletcher, *supra* note 15 at 100.

not be held as responsible for his act as one who commits an act under full agency. If we are not sensitive to this difference, the argument runs, then the unmitigated punishment of the accused acting under duress is disproportionate. Therefore, far from undercutting the retributivist doctrine's duty to punish the wrongdoer, excuses can serve to mitigate the harshness of this doctrine by paying close attention to the *ad hoc* circumstances that inhere in a situation that would make it disproportionate to punish.

Although this approach seems promising, it contains a fundamental problem. Duress acting as sentence mitigation does not really address the dilemma of duress. A mitigation in sentence includes a verdict of moral culpability – we still consider the accused to have committed a wrong. In addition, sentencing discretion is manipulatable. Whom should this power of acquittal go to? A judge, a jury, an elected body? Furthermore, what considerations ought such a body take into account when mitigating sentences? It seems obvious to say that we would prefer not to leave something as significant and nuanced as a defense of duress solely to the discretion of judges. Moreover, the situation of duress is conceptually different from most mitigating situations. If a person acting under duress refuses to succumb to the will of his/her duressor, then we do not simply consider his/her actions to be morally right, but morally saintly. We consider him/her to have acted superogatorily. It seems odd that if the accused succumbs to the threat, we hold him/her guilty, but withhold punishment; and if the accused does not succumb, we write him/her into our hagiography.

A Return to a More Nuanced Retributivism: Alan Brudner's Viable Approach

What then would be a more appropriate solution to the dilemma of duress? How can we maintain the logic of the retributivist scheme that leads to the obligation to punish without falling prey to the unpalatable results that the harshness of the retributivist doctrine leads to? I believe Professor Alan Brudner, in his paper "A Theory of Necessity,"[26] offers this very solution. His solution rests in the very theory of right, and thus it not only mitigates the harshness of the

[26] A. Brudner, "A Theory of Necessity" in Thomas Morawetz, ed. *Criminal Law* (University of Connecticut: Dermouth, 2000). [Brudner].

defense of duress, but also, by making duress a justificatory defense, retains the solidity of the retributivist principles that justify punishment.

The first step of Brudner's argument is to recognize that rights, although inherent and universal, are not absolute. Rights are universal, but they do not exist on a level playing field – that is, there is an ordering of rights. Some rights are "worth more than others" so to speak. Although he does not explicitly elaborate on this point, Brudner's theory could also prove invaluable in articulating the proper content for a statutory justificatory defense of duress.

In his scheme, it becomes possible to justify actions committed under duress by characterizing them as necessary rights infringements. If one accepts the premise that rights to personhood are rights upon which all other rights are predicated, then it follows that any threat to one's personhood could give rise to a right in the one threatened to act in such a way that one's personhood is protected, even if this means infringing on the rights of others. To maintain this solution within the rights system, however, several factors are necessary: (1) there must be a "conflict of rights," (2) the danger must be imminent, and (3) the rights must be infringed as minimally as possible or not at all if some legal recourse is available.[27] It would be prudent for the legislature to adopt these criteria in creating a statutory defense of duress, for it offers a potential way out of the dilemma of duress. By keeping the matter within the notion of rights and with the above strict limitations, Brudner allows us to avoid the "slippery-slope" of the excusatory model, but still mitigate the apparent harshness of retributive justice.

Conclusion

In sum, a look at the defense of duress through the retributivist lens provided by Hegel and Kant throws the dilemma into sharp focus. Under retributivism, the criminally culpable are owed a strict duty of punishment. On the flip side of this, the criminally not culpable are owed an equally, if not more, strict duty not to be punished. Therefore, in cases of duress, in which the accused seems to be both

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[27] Brudner, *supra* note 26 at 362-63.

culpable and not culpable at the same time, the retributivist approach seems to face an insurmountable paradox.

In this paper, I outlined several potential solutions for this paradox; none satisfied. In the first, what I referred to as "the first retributivist response," the exculpatory power of the defense of duress was limited to the justificatory sphere. Although this limitation is appropriate, logically speaking, since only justifications and not excuses provide the right not to be punished that can negate the duty to punish, it creates a harsh doctrine of duress.

In response to this harshness, several ameliorative alternatives have been offered. In one such alternative, what I have called the "modified retributivist approach," a justification of duress is created by legislating an excuse of duress. In other words, the invocation of the positive law creates a right not to be punished where one did not exist before. The flaw in this approach is that it fails to provide a rational basis for the content of such an excuse, and thus is incoherent with the retributivist principles of desert. Another alternative is manifest in the SCC's verdict in *Ruzic*. The SCC's approach also fails to solve the dilemma of duress because it allows for the possibility of too many people – including the morally culpable – to avail themselves of the defense of duress. A third alternative is embodied in what I have called the "compassionate approach." It fails for two reasons. First, like the "modified retributivist approach," it does not offer a principled account for why punishment ought to be mitigated, relying on the manipulatable discretionary power of judges. Second, it does not address the dilemma of duress since it still holds those who act under duress are guilty, thus ignoring our intuitions that speak to the contrary.

Given the failures of the above approaches, it is obvious that for an alternative to be successful it must first, remain faithful to retributivist principles, and second, resolve the dilemma of duress. Brudner's approach, which provides a justificatory foundation for the defense of duress, serves to solve the dilemma of duress. Through careful attention to the nature of rights in the retributivist framework – that is, that they are not absolute – Brudner was able to formulate a justificatory defense of duress. The benefit of justificatory defense of duress over an excusatory one is that, in the case of the former, the accused is not considered morally culpable and thus is not the proper

object of punishment, not merely because we *feel* bad about punishing him/her, but because he/she has a right not to be punished. By introducing the notion of a hierarchy of rights within the retributivist model, Brudner turned the monolithic notion of moral culpability into a more flexible one without sacrificing the strength of the retributivist model.