

# Duress Is No Excuse

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## INTRODUCTION

Over his prolific career, Joshua Dressler has authored many important works devoted to criminal defenses. Among those is one of the most nuanced and compelling accounts of the defense of duress developed in his *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*<sup>1</sup> and other articles.<sup>2</sup> Today, these works are classics, and yet, as is so typical of Dressler's scholarship, they have not lost their provocative appeal. Like when they were first published, they invite dialogue, debate, and further exploration. In this article, I gratefully accept this invitation as I strive to find my own answers to some of the tantalizing questions raised by Dressler.

“Our society has a love-hate relationship with the criminal law defense of duress,”<sup>3</sup> says Dressler, and I could not agree more. Although firmly established,<sup>4</sup>

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<sup>1</sup> Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989) [hereinafter *Exegesis of the Law of Duress*].

<sup>2</sup> Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671 (1988) [hereinafter *Reflections on Excusing Wrongdoers*]; Joshua Dressler, *Reflections on Dudley and Stephens and Killing the Innocent: Taking a Wrong Conceptual Path*, in *THE SANCTITY OF LIFE AND THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS* 126 (Dennis J. Baker & Jeremy Horder eds., 2013) [hereinafter *Reflections on Dudley and Stephens*]; Joshua Dressler, *Some Very Modest Reflections on Excusing Criminal Wrongdoers*, 42 TEX. TECH L. REV. 247 (2009); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984) [hereinafter *New Thoughts*]; Joshua Dressler, *Duress*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* 269 (John Deigh & David Dolinko eds., 2011).

<sup>3</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1331.

<sup>4</sup> As developed under the common law, the defense provides:

A person who does an act specified for an offence with the fault required for commission of that offence, nevertheless does not commit the offence if he does the act because (as he knows or believes) another person has threatened that he or a third person will suffer death or serious injury if he does not do the act, and the threat is one which in the circumstances he cannot reasonably be expected to resist; which he has not knowingly courted; and the carrying out of which he cannot otherwise avoid.

LAW COMM'N, LEGISLATING THE CRIMINAL CODE: OFFENCES AGAINST THE PERSON AND GENERAL PRINCIPLES, CONSULTATION PAPER NO. 218, 48 (1993).

this defense has not had an easy ride in criminal law.<sup>5</sup> It has been severely criticized by authorities,<sup>6</sup> narrowly construed by judges, and rarely invoked with success by defendants.<sup>7</sup> Despite all that, “our society has retained the defense, expanded it over the years, and paid close attention to the calls of those who would apply the defense in novel ways.”<sup>8</sup>

Our ambivalence over the defense largely stems from our conflicting feelings toward the defendant. Who is he—a victim or a victimizer—and how shall we treat him?<sup>9</sup> We are torn between empathizing with his plight as a target of unlawful coercion, on the one hand, and despising his choice to commit a crime rather than withstand the threat, on the other.

Sometimes, our moral intuitions fall strongly on the side of the defendant. That happens when his criminal conduct is not as serious as the imminent harm with which he has been threatened. In those circumstances, we believe that the defendant’s choice was justified: if his life was truly in danger, it was better to go along with the criminal demand and, say, make a false insurance claim rather than be killed.<sup>10</sup> This choice is essentially the same as the paradigmatic justified choice of the mountaineers who, under the threat of an upcoming deadly snowstorm, break into a vacant cabin, spend the night there, and consume the owner’s provisions.<sup>11</sup> Who would blame them?

Not only should we exculpate those unfortunate folks, but we should also send a clear message to the community: it is permissible to break the law (commit a fraud, burglary, or theft) if doing so is necessary to avoid a greater harm or evil. In line with that, the Model Penal Code (“MPC”) and numerous state penal codes allow the defendant to plead the defense of necessity both to human and natural threats.<sup>12</sup> So, conceptually, a claim of duress plays only a secondary role when the defendant’s conduct has resulted in a desirable balance of harms and evils.<sup>13</sup>

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<sup>5</sup> See, e.g., *R v Brown* [1968] SASR 467, 479 (Austral.) (describing duress as a defense “as to which there is little direct authority and much theoretical discussion.”).

<sup>6</sup> See, e.g., 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 51 (London, T. Payne et al. 1778) (“[I]f a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant’s fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent . . .”).

<sup>7</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1332.

<sup>8</sup> *Id.* (footnotes omitted).

<sup>9</sup> *Id.* (“In a world that often seeks to avoid moral ambiguity by finding victims and villains, it is unclear which appellation more fairly describes a person who accedes to an unlawful threat.”).

<sup>10</sup> See *State v. Toscano*, 378 A.2d 755 (N.J. 1977) (reversing conviction of conspiracy to obtain money by false pretenses where there was evidence that defendant committed the crime because he and his wife were threatened with violence).

<sup>11</sup> MODEL PENAL CODE § 3.02 cmt. 1 (AM. LAW INST., Official Draft and Revised Comments 1985).

<sup>12</sup> See *id.* § 3.02(1)(a). See also 720 ILL. COMP. STAT. 5/7–13 (2017) (not restricting the source of necessity). This is a departure from the common law rule, which allowed the defense of

It is when we cannot fall back on other defenses and need to evaluate independently the moral quality of a harmful self-preferential choice that the real challenge of duress comes into focus. Considering that this defense is usually available only to the defendants who were exposed to a threat of death or serious bodily harm<sup>14</sup> (or such bodily harm that a person of reasonable firmness would not be able to resist),<sup>15</sup> it follows that those who have to rely on duress did something truly horrible—injured, raped, or killed innocent people—to avert a similar or lesser harm from themselves.

The Australian case of Bulent Topcu and Christovalantis Papadopoulos may serve as an example.<sup>16</sup> The two men raped a girl following the orders of their friend and leader, Canan Eken. Topcu and Papadopoulos claimed that they were afraid to be hurt by Eken who had gone “berserk” on the night of the attack, kicking, hitting, and beating the girl and trashing the apartment in a drug-induced rage.<sup>17</sup> “I saw [Eken’s] knife. I didn’t want to get stabbed again. I nearly died once. I just wanted the whole thing to be over. I couldn’t move from my seat. I couldn’t do nothing. I couldn’t stop it. I was too scared,”<sup>18</sup> testified Topcu. “I

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necessity only in cases of natural emergencies. See, e.g., R. Kent Greenawalt, *Violence—Legal Justification and Moral Appraisal*, 32 EMORY L.J. 437, 443 n.11 (1983) (noting that the common law necessity defense required the harm to be caused by natural, not man made, forces).

<sup>13</sup> See, e.g., MODEL PENAL CODE § 2.09, cmt. 2 (AM. LAW INST., Official Draft and Revised Comments 1985).

The problem of Section 2.09 [duress], then, reduces to the question of whether there are cases where the actor cannot justify his conduct under Section 3.02 [choice of evils], as when his choice involves an equal or greater evil than that threatened, but where he nonetheless should be excused because he was subjected to coercion.

See George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 958 (1985) (“The analysis of justification must precede the analysis of excuse.”). But see Douglas Husak, *On the Supposed Priority of Justification to Excuse*, 24 LAW & PHIL. 557 (2005) (critiquing this view).

<sup>14</sup> See, e.g., GA. CODE ANN. § 16-3-26 (2017) (defense applicable to crimes other than murder if the actor “reasonably believes that performing the act is the only way to prevent his imminent death or great bodily injury”); KAN. STAT. ANN. § 21-5206(a) (2018) (defense applicable to crimes other than murder or voluntary manslaughter if the actor “reasonably believes that death or great bodily harm will be inflicted upon such person or upon such person’s spouse, parent, child, brother or sister if such person does not perform such conduct”). See also *United States v. Kilgore*, 591 F.3d 890, 893 (7th Cir. 2010) (to prevail, the “defendant must ordinarily establish that he faced an imminent threat of serious bodily injury or death . . .”).

<sup>15</sup> See MODEL PENAL CODE § 2.09(1) (AM. LAW INST., Official Draft and Revised Comments 1985) (“It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”); N.Y. PENAL LAW § 40.00 (2017).

<sup>16</sup> *Papadopoulos v The Queen* [2007] NSWCCA 274 (Austl.).

<sup>17</sup> *When Duress Is No Argument for Rape*, SYDNEY MORNING HERALD (Feb. 20, 2006), <http://www.smh.com.au/news/national/when-duress-is-no-argument-for-rape/2006/02/19/1140283949222.html> [<https://perma.cc/XN99-5BS6>].

<sup>18</sup> *Id.*

obeyed him because of the way he was acting before and the way he was screaming. He seemed to have something in his hand when he pointed,” pleaded Papadopoulos.<sup>19</sup>

The jury was not persuaded by Topcu’s and Papadopoulos’s claims of duress and both defendants were convicted of gang rape; however, their initial lengthier prison terms were later reduced to three and a half years for Topcu and two years for Papadopoulos.<sup>20</sup> The appellate judge writing for the majority commented that their crime was “to a large degree the product of weakness rather than the criminality and unqualified abuse of power commonly involved in rape.”<sup>21</sup> The dissenting judge disagreed: “In my opinion, notwithstanding the fact that both Topcu and Papadopoulos became caught up in events for which they were not initially responsible, the circumstances of this offence require a sentence which adequately marks its seriousness.”<sup>22</sup>

In this case, the claim of duress did not exonerate the offenders; instead (rightly or wrongly), it ended up mitigating their sentences. Yet, even in that capacity, it caused a principled disagreement between the judges. That disagreement, reflective of our moral uncertainty about duress, underscores the essential question with which we struggle: does the natural human fear of pain and death present such a powerful moral argument as to overcome all the deontological moral taboos and completely relieve the actor of responsibility for doing horrible things to innocent people?

Analytically, the answer to this question depends at least on three premises—whether duress is: (i) a normative defense based on the defendant’s “just desert”; (ii) a defense of excuse; and (iii) a complete defense. If all three premises are affirmative, then yes, *any kind and amount of harm* is excusable.

On its face, Dressler’s account of duress is based on such affirmative premises. For Dressler, duress is:

- a normative claim for exculpation grounded in “just desert”<sup>23</sup> (and not an expression of compassion for the defendant; positive evaluation of the defendant’s character; or concession to the fact that most people would have behaved the way the defendant did);<sup>24</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> Jennifer Cooke, *Gang Rapists’ Sentences Slashed*, SYDNEY MORNING HERALD (Sept. 12, 2007, 12:37 PM), <http://www.smh.com.au/news/general/gang-rapists-sentences-slashed/2007/09/12/1189276775306.html> [<https://perma.cc/69TE-UKB9>].

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1371 (noting in the same article “I am presenting a retributive rather than utilitarian explanation of excuses. As is now commonly accepted by nearly all but the most die-hard utilitarians, deterrence theory does not adequately explain the existence of excuses in the criminal law”). *Id.* at 1357 n.155.

<sup>24</sup> *Id.* at 1385.

- a defense of excuse based on the limited choice available to the defendant, namely his lack of a fair opportunity to avoid acting unlawfully;<sup>25</sup> and
- a complete defense, available in prosecution for any crime.<sup>26</sup>

At a closer look, however, Dressler's account is more complex and less consistent. Even though Dressler identifies duress as an excuse, he adds to his test of duress features that are foreign to the excuse theory, specifically, a balancing component and a normative threshold of moral strength. To determine whether a person should be entitled to the defense, Dressler asks "whether, in light of *the nature of the demand and the expected repercussions from noncompliance*, we could *fairly expect a person of nonsaintly moral strength* to resist the threat."<sup>27</sup> The first italicized passage represents a balancing test that weighs the harmfulness of the threat against that of the demand; the second adds to the test an objective normative threshold of moral strength. These two features allow Dressler to avoid the morally problematic result of excusing the "inexcusable," but they also significantly weaken Dressler's characterization of duress as an excuse. Balancing tests belong to the theory of justifications, not excuses, and so do objective standards of permissible conduct. Dressler correctly intuited these non-excusatory elements of duress but he did not follow his intuition to assign to duress a proper place among criminal law defenses.

Before I proceed with my argument, I would like to list some foundational issues on which I agree with Dressler. First and foremost, I agree that duress is a normative claim based on the defendant's limited free choice. Like Dressler,<sup>28</sup> I approach this defense from the perspective of "just desert." I agree that balancing "the nature of the demand and the expected repercussions from noncompliance" is an inherent part of the duress analysis. I also agree that duress has an excusatory component. For me, it is not the "lack of a fair opportunity" but instead a significant volitional impairment caused by violation of the defendant's autonomy that affects the defendant's power to act in accordance with his long-term goals and values. Nevertheless, I agree that duress may not be interpreted adequately without an excusatory rationale.

In addition, at least for the purposes of this article, I follow Dressler in accepting certain traditional requirements of the defense of duress, such as the

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<sup>25</sup> *Id.* Dressler concludes that:

[T]he defense [of duress] must be based on the normative claim that the actor lacked a fair opportunity to avoid acting unlawfully. Such an opportunity is lacking if a person of reasonable moral strength cannot fairly be expected to resist the threat. So understood, duress is at once a fascinating and very troubling excuse . . . .

*Id.*

<sup>26</sup> Dressler approves of the MPC's position that allows duress to be pleaded as a defense to any crime, including murder. *Id.* at 1334, 1344, 1370–74.

<sup>27</sup> *Id.* at 1367 (emphasis added) (emphasis omitted).

<sup>28</sup> *Id.* at 1371; *see id.* at 1357 n.155, 1367, 1371 n.212 and the surrounding text.

requirement that (i) the threat to the actor be of physical harm; and (ii) the actor lack subjective culpability in putting himself in a situation of vulnerability to coercion. Like Dressler, I primarily consider such intentional acts that brought about the same or higher amount of harm than that with which the actor has been threatened.<sup>29</sup>

My disagreement with Dressler involves four issues:

1. the character of the defense of duress—I do not think that it is merely an excuse;
2. the meaning of duress—I am not persuaded by Dressler’s no-fair-opportunity theory;
3. the effect of duress—I argue that it should warrant a partial defense only; and
4. the need for this defense—I wonder whether there is an independent useful place for it in criminal law.

In what follows, I address these points of disagreement and certain related issues. I start with discussing how duress differs from all other excuses in its moral foundation and legal boundaries.

## I. THE CHARACTER OF THE DEFENSE OF DURESS

### A. *Duress v. Other Excuses: The Issue of Blame*

According to Dressler and the majority of scholars who have written about duress, duress is an excuse.<sup>30</sup> It is an excuse because, like other excuses, it is a

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<sup>29</sup> I leave for another day the questions of whether there is an important moral difference between committing a wrongdoing in order to avoid a human threat compared to a natural emergency and whether duress should be a “sliding scale” defense available to a defendant threatened with *any* (including non-physical) harm—for example, as when the actor, threatened with property destruction, follows the coercer’s demand and causes the same or more serious property damage to another.

<sup>30</sup> See, e.g., *Exegesis of the Law of Duress*, *supra* note 1, at 1365–67; GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 830 (1978) (describing duress as “a paradigmatic example of an excuse”); Kyron Huigens, *Duress Is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303 (2004). Duress has been described as justification by scholars who view it as a species of the choice-of-evils defense. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 433 (2d ed. 1986) (“it is better that the defendant, faced with a choice of evils, choose to do the lesser evil . . . in order to avoid the greater evil threatened by the other person.”). Duress has also been described as an agent-relative justification. See, e.g., ALAN WERTHEIMER, *COERCION* 165–69 (Marshall Cohen ed. 1987); Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1487 (1999) (suggesting that duress may be interpreted as a “personal justification”—a justification that only he, not third parties, can claim, and that does not preclude resistance by his victims.”). Finally, a creative argument has been made that duress is a justification on the theory that its characteristics as an unlawful, man-made, and purposely coercive threat “combine to affect the magnitude that threatened harms possess for purposes of the choice-of-evils defense.” Peter Westen & James

defense to a wrongful act committed by a non-responsible actor.<sup>31</sup> To determine whether this classification is accurate, it may be worthwhile to look more closely at *how* particular excuses render actors non-responsible and see whether duress fits in the same paradigm.

The most noncontroversial example of non-responsibility is the lack of capacity. Among such defenses are insanity, extreme minority, and involuntary intoxication.<sup>32</sup> In all those circumstances, actors essentially lack moral agency; due to a volitional or cognitive impairment, they are *powerless* to choose such course of actions that would increase their chances of not breaking the law. Accordingly, it would be patently unfair to blame them for the wrongdoing that they were incapable of avoiding.<sup>33</sup>

A mistake, even a reasonable mistake, is usually treated as an excuse too.<sup>34</sup> What puts it in that category is the cognitive impairment that takes away the actor's ability to make the right choices and not break the law. At the same time, a reasonable mistake is different from the incapacity excuses in that it encompasses morally appropriate conduct. Quoting Dressler, "[a] society realistically cannot ask more of people than to act in conformity with reasonable appearances."<sup>35</sup> This logic has led some scholars to classify reasonable mistake as a justification.<sup>36</sup>

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Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 836 (2003).

<sup>31</sup> J. L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y 1, 2 (1957) (by pleading justification for an act, "we accept responsibility but deny that it was bad"; by pleading excuse, "we admit that it was bad but don't accept full, or even any, responsibility.").

<sup>32</sup> See *Reflections on Excusing Wrongdoers*, *supra* note 2, at 702.

<sup>33</sup> See *Exegesis of the Law of Duress*, *supra* note 1, at 1357–58.

<sup>34</sup> See, e.g., FLETCHER, *supra* note 30, at 696–97, 762–69 (arguing that even a reasonable mistake regarding the presence of justifying conditions negates justification); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 239–40 (1982) (arguing that mistaken self-defense should be treated as an excuse rather than a justification); Alexander, *supra* note 30 at 1483–84 (supporting Robinson's view).

<sup>35</sup> *New Thoughts*, *supra* note 2, at 93.

<sup>36</sup> See, e.g., *id.* at 92–95 (critiquing Fletcher's theory of justification and excuse for, among other things, denying justification to a reasonably mistaken actor); Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89, 102 (1986) (arguing that "the actor's blameless perception of the facts ought to be sufficient to support a justification."). Many penal codes do not distinguish between putative (due to a reasonable mistake) and true (resulting in a better balance of evils) justifications. See, e.g., MODEL PENAL CODE § 3.04 (AM. LAW INST., Official Draft and Revised Comments 1985); MODEL PENAL CODE § 3.09 (AM. LAW INST., Official Draft and Revised Comments 1985); N.Y. PENAL LAW § 35.15(1) (2017) (justifying use of "physical force upon another person when and to the extent [the actor] reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person). See also SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 871 (10th ed. 2017) (observing that a reasonably mistaken self-defense should properly be characterized as excused rather than justified but "courts and commentators conventionally refer to self-defense in both settings as a justification").

Under this approach, a person would be justified if he shoots and kills an unoffending bystander pursuant to a mistaken but reasonable belief that the bystander was about to shoot him first. At least in some of his works, Dressler has been sympathetic to this view too.<sup>37</sup> For example, in his critique of George Fletcher's theory of justifications, Dressler posed a hypothetical:

Suppose undercover police officer, P.O., has probable cause to arrest X for a mass murder. Understandably, P.O. pulls a gun on X. Before P.O. can announce her identity, X, believing her life is in jeopardy, attempts to defend herself by killing P.O. X was not the mass murderer, nor was she guilty of any crime. How do we handle the resultant homicide? In one sense we have mutual mistakes. P.O. is mistaken in thinking that X is a dangerous criminal; X is mistaken about P.O.'s identity and therefore is mistaken about P.O.'s intentions. Our intuition may tell us that P.O. is justified—P.O. acted rightfully. Indeed, we usually justify a police officer's conduct if it is based on probable cause. What about X? . . . Do we not—or, at least, can we not—believe, however, that X is right to protect herself?<sup>38</sup>

I think we *should not* believe so. P.O.'s and X's circumstances are very different: P.O., being a public official, acts under the public duty defense;<sup>39</sup> X acts under self-defense. The former defense is a "right," the latter is merely a "privilege"; and in a conflict between a right and a privilege, the former should have priority.<sup>40</sup> Furthermore, the fact that X is not a mass murderer is irrelevant for P.O.'s justification; P.O. has the probable cause to arrest X and use of a gun in the course of the arrest (he is not mistaken about *that*) and that is all that matters to justify P.O.'s actions. Whereas P.O.'s justification requires him to be right only about the probable cause, X's justification requires him to be right about the deadly threat to which he is exposed—and she is not. Accordingly, P.O. is right and X is wrong. True, if X's mistake is reasonable, we would not blame her—through no fault of hers, she is not a responsible moral agent—just like we do not blame young children and the insane for the wrongdoings they commit. A reasonably mistaken

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<sup>37</sup> Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155 (1987); *New Thoughts*, *supra* note 2, at 93. In his other work, however, Fletcher referred to mistakes as excuses. See *Reflections on Excusing Wrongdoers*, *supra* note 2, at 702 (characterizing mistake not induced by mental illness or some other disabling condition as a no-fair-opportunity excuses).

<sup>38</sup> *New Thoughts*, *supra* note 2, at 94 (footnote omitted).

<sup>39</sup> The public duty defense is available to a person acting either under an official capacity (a public servant), or court order, or a duty or authority to assist or act on behalf of a public officer. WAYNE R. LAFAVE, CRIMINAL LAW 534–36, 558–59, 565–66 (4th ed. 2003).

<sup>40</sup> Vera Bergelson, *Rights, Wrongs, and Comparative Justifications*, 28 CARDOZO L. REV. 2481, 2488 (2007). See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 35–50 (Walter Wheeler Cook ed., 1923).



actor is excused and free from blame.

How does duress fit into this paradigm? Is a person who committed a crime under duress as blameless as a person who is legally insane or reasonably mistaken? An argument could be made that he is: due to a serious volitional impairment, his ability to choose a non-criminal course of action was diminished.

This is a straightforward excusatory argument. And yet, the coerced actor differs dramatically from other excused actors. He is a moral agent, capable of understanding his choices and acting on those choices. Unlike an insane or mistaken actor, he has the capacity not to break the law but, under the circumstances, he finds it preferable to break it.<sup>41</sup> His disabilities, compared to other excused actors, are, at best, partial. Considering all that, it seems fair to blame the actor who saves his skin by throwing others to the wolves. Sometimes, we feel sorry for him but we blame him nonetheless the way we do not blame a reasonably mistaken person or a two-year-old child. This is inconsistent with the theory of excuses—at least complete excuses. A complete excuse eliminates the defendant's responsibility for the wrongful act and, accordingly, eradicates his blameworthiness.<sup>42</sup>

Unlike excuses, justifications leave room for blaming the actor. Take a paradigmatic case of necessity: to save a town from flooding, the actor detricks the water and floods a farm.<sup>43</sup> If prosecuted for criminal mischief, he would certainly have a strong defense of necessity, but shouldn't the farmer whose home, pets, and livestock were destroyed by that actor have the right to blame him? I think he should. Similarly, if the actor flooded the farm not because of the natural necessity but because he was threatened with violence in case of his disobedience, the farmer should have the right to blame him. In contrast, the farmer should not have the right to blame a legally insane actor who flooded his farm because of a schizophrenic delusion.

The blameworthiness of the coerced actor sets him apart from all excused actors and, conversely, reveals his family resemblance with justified actors, which suggests that duress is only a partial excuse and that it has a strong justificatory component. Let's test this proposition by, first, comparing the legal requirements

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<sup>41</sup> Dressler holds similar reservations about duress even though he still classifies duress as an excuse. See *Exegesis of the Law of Duress*, *supra* note 1, at 1359–60. See *Reflections on Excusing Wrongdoers*, *supra* note 2, at 710 (“In cases of duress . . . the actor knows what he is doing, knows that his conduct is wrong, and has the physiological and psychological capacity to obey the law, yet he nonetheless asks to be excused for his wrongdoing.”).

<sup>42</sup> See, e.g., H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 158, 174 (1968):

[M]ost lawyers, laymen and moralists, considering the legal doctrine of *mens rea* and the excuses that the law admits, would conclude that what the law has done here is to reflect, albeit imperfectly, a fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it.

<sup>43</sup> MODEL PENAL CODE § 3.02 cmt. 3 (AM. LAW INST., Official Draft and Revised Comments 1985).

of duress and other excuses, and then exploring what additional considerations may strengthen or weaken the defense of duress.

*B. Duress v. Other Excuses: Legal Requirements and Limitations*

Duress possesses important requirements and limitations that distinguish it from a typical excuse defense. Among those are the following:

1. Duress is limited to *external* inducements affecting the defendant's *motivations*, whereas all other excuses (e.g., minority, insanity, involuntary intoxication, and mistake) are *internal* impairments affecting the defendant's *capacities*. If the defense of duress were like other excuses, internal fears, pressures, and phobias should be eligible for the defense too. For example, a defendant, who killed the victim out of sincere and overpowering fear that the victim would reveal a shameful secret and thus destroy the defendant's career, should be acquitted. But he is not, and this is morally appropriate.<sup>44</sup>
2. Duress requires "*clean hands*," namely, the lack of the subjective fault on the part of the actor in finding himself in the coercive situation. A reckless actor loses the defense entirely not only under the common law but under the much more liberal MPC too.<sup>45</sup> Other excuses have no similar limitations (at least with respect to intentional offenses).<sup>46</sup> Suppose, a person became legally insane because he had spent his youth recklessly enjoying illegal drugs—he still would be allowed to plead insanity in any prosecution. In contrast, an actor who had recklessly made himself vulnerable to coercion would have no defense in prosecution for the crime he was forced to commit. For example, a defendant who had voluntarily joined a criminal gang engaged in petty thefts would not be able to claim duress if he were

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<sup>44</sup> United States v. Moore, 486 F.2d 1139, 1180 (D.C. Cir. 1973) (opining that the defense of duress is "inapplicable to a purely internal psychic incapacity").

<sup>45</sup> MODEL PENAL CODE § 2.09(2) (AM. LAW INST., Official Draft and Revised Comments 1985).

<sup>46</sup> Even a mistaken actor whose mistake is a result of his own recklessness usually may raise the defense in prosecution for an intentional crime. See, e.g., MODEL PENAL CODE § 2.04(1)(a) (AM. LAW INST., Official Draft and Revised Comments 1985) ("Ignorance or mistake as to a matter of fact or law is a defense if . . . the ignorance or mistake negatives the purpose, knowledge [or] belief . . . required to establish a material element of the offense"). Some courts, however, ignore this logic and allow the defense of mistake only when the mistake is reasonable. This approach has been properly criticized by the MPC commentators: "There is no justification . . . for requiring that ignorance or mistake be reasonable if the crime or the element of the crime involved requires acting purposely or knowingly." *Id.*

later coerced by a credible threat of injury to take part in an armed robbery.<sup>47</sup>

3. All other excuses are *subjective*: they are based on individual disabilities of the actor. Surely, it would be silly to allow the defense of insanity only to a “reasonably insane” actor. Even the more moralistic defense of mistake is usually available in prosecution for intentional crimes to the actor who was honestly (if unreasonably) mistaken.<sup>48</sup> Duress is different; it is largely based on an *objective* standard. Naturally, to be able to claim duress, the defendant has to feel threatened. But even this subjective element is severely curtailed by the limitation placed on the kind of threat that may be claimed as the cause of this feeling: the threat has to be of physical harm to a person. A threat of slaying dear sweet Lassie who is practically a family member does not qualify for the defense. Were duress like other excuses, any threat, which indeed broke the will of the actor, would be allowed as a predicate to the defense. The objective character of duress is underscored by further restrictions. This defense would be denied to an actor who honestly but unreasonably believed that he would be seriously hurt.<sup>49</sup> It would also be denied to an actor whose will was truly overborne, provided that “a person of reasonable moral strength,”<sup>50</sup> or “a person of nonsaintly moral strength,”<sup>51</sup> could resist the threat.<sup>52</sup>

Take the defendants of the famous *R v. Dudley and Stephens*.<sup>53</sup> Dressler has argued that their convictions were unjust. Thomas Dudley and Edwin Stephens should have been allowed to plead to the jury that they had killed Richard Parker under coercive circumstances, and thus deserved to be excused.<sup>54</sup> Perhaps so, but if

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<sup>47</sup> *R v. Sharp* [1987] 3 WLR 1 at 8–9 (Lord Lane) (UK) (holding that, where defendant “voluntarily, and with knowledge of its nature, joined a criminal organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such pressure, he cannot avail himself of the defence of duress.”).

<sup>48</sup> See MODEL PENAL CODE § 2.04(1)(a) (AM. LAW INST., Official Draft and Revised Comments 1985).

<sup>49</sup> *R v. Hurst* [1995] 1 Cr. App. R. 82 (Lord Beldam) (UK).

<sup>50</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1367.

<sup>51</sup> *Id.* (emphasis omitted).

<sup>52</sup> GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 1129 (Dennis J. Baker ed., 4th ed. 2015) (“The objective limitation upon the defence means that the threat must be such that a similarly situated defendant could not reasonably be expected to resist.”).

<sup>53</sup> *R v. Dudley & Stephens* [1884] 14 QBD 273 (Lord Coleridge) (UK).

<sup>54</sup> *Reflections on Dudley and Stephens*, *supra* note 2.

duress by circumstances included the same objective requirements of moral strength as the traditional duress, these defendants would have been unlikely to succeed. After all, Edmund Brooks (who was not very saintly) was on that lifeboat too, and he refused to participate in the killing.<sup>55</sup>

4. In most jurisdictions, duress is not available as a *defense to murder* (and sometimes, other grave offenses).<sup>56</sup> No other excuse is limited in this way. A person who committed homicide due to insanity, involuntary intoxication, or a reasonable mistake would be completely exonerated. In contrast, intentional killing under duress would either not be excused at all or (as in a handful of the U.S. jurisdictions) be mitigated to homicide of a lesser degree.<sup>57</sup>

### C. Moral Factors Relevant to the Defense of Duress

The difference between the requirements and limitations of duress and other excuses raises doubt whether these defenses in fact belong together. This doubt grows as we consider another fundamental difference: all other excuses are categorical. As long as the defendant crosses the line of the relevant incapacity and fits into a certain category, he is exonerated. We do not question what the defendant actually did and how much harm he caused in his excused condition. Duress is different—the determination of the actor’s volitional impairment is only the first step in the duress analysis. Further steps involve balancing numerous

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Call this a necessity excuse, or call this duress by circumstances, but by whatever label, the men in that lifeboat were entitled to the opportunity to try to persuade a jury of their peers that as a matter of *justice*—not “mere” compassion or exercise of executive mercy—they should be exculpated.

*Id.* at 145 (footnotes omitted). *See also Exegesis of the Law of Duress, supra* note 1, at 1374 (critically observing that “[n]either the common law nor the MPC excuses such actions”) (footnote omitted).

<sup>55</sup> *See* A. W. B. Simpson, *Cannibals at Common Law*, 27 LAW SCH. REC. 3, 4–7 (1981) (discussing the facts of *R v. Dudley & Stephens* in light of the “custom of the sea”).

<sup>56</sup> *See, e.g.,* KAN. STAT. ANN. § 21-5206(a) (2018) (excluding murder and voluntary manslaughter); KY. REV. STAT. ANN. § 501.090 (2017) (excluding intentional homicide); COLO. REV. STAT. § 18-1-708 (2017) (excluding all class 1 felonies); WASH. REV. CODE § 9A.16.060 (2017) (excluding murder, manslaughter, and homicide by abuse).

<sup>57</sup> *See* 40 AM. JUR. 2D *Homicide* § 115 (noting that as a general matter “neither duress, coercion, nor compulsion are defenses to murder”). *See also* *State v. McCartney*, 684 So. 2d 416, 425 (La. Ct. App. 1996) (noting that the defense of compulsion is unavailable in murder prosecutions); *State v. Weston*, 219 P. 180, 185 (Or. 1923) (stating that “[f]ear, duress or compulsion due to the act of another, seems to be considered no excuse for taking the life of a third person.”). For examples of statutes mitigating the gravity of homicide committed under duress *see, e.g.,* N.J. REV. STAT. § 2C:2-9 (2013) (“In a prosecution for murder, the defense is only available to reduce the degree of the crime to manslaughter.”); WIS. STAT. § 939.46 (2017) (reducing first-degree intentional homicide to second-degree intentional homicide).

factors, which play at least a moral, if not always a legal, role in determining the relative strength or weakness of the defendant's claim for the defense. Let's consider some of those factors.

### 1. The Heinousness of the Defendant's Conduct

The absolute<sup>58</sup> heinousness of the specific acts performed by the defendant (not merely the crime of conviction) should affect the strength of his defense. It has been argued, that, contrary to the traditional common law rule, sometimes duress should be allowed in prosecution for murder.<sup>59</sup> The circumstances of the crime can make one murder less heinous than another.<sup>60</sup> "Heinousness is a word of degree, and that there are lesser degrees of heinousness, even of involvement in homicide, seems beyond doubt."<sup>61</sup> Conversely, a high degree of heinousness should make the defendant's plea for the defense of duress quite weak. Take the case of John Bannister and Michael Howe who, under a threat of violence, participated in several atrocious crimes. One of their victims was a young boy, Elgar.

From thenceforwards Elgar, who was naked, sobbing and begging for mercy, was tortured, compelled to undergo appalling sexual perversions and indignities, he was kicked and punched. Bannister and Howe were doing the kicking and punching . . . . It is unnecessary to go into further details of the attack on Elgar which are positively nauseating. In brief the two appellants asserted that they had only acted as they did through fear of Murray, believing that they would be treated in the same way as Elgar had been treated if they did not comply with Murray's directions.<sup>62</sup>

Bannister and Howe did not have a strong claim for the defense to start with (in part, because they recklessly made themselves vulnerable to coercion) but, even if they did not have that obstacle, the sheer heinousness of their actions should make their claim for exculpation extremely weak.<sup>63</sup>

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<sup>58</sup> I am focusing here on the heinousness of the defendants' *actions* independently of the relative heinousness of the *threat*.

<sup>59</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1370–74.

<sup>60</sup> *D.P.P. for Northern Ireland v. Lynch* [1975] AC 653 (HL) 680–81 (Lord Wilberforce).

<sup>61</sup> *Id.* at 681.

<sup>62</sup> *R v. Howe* [1987] AC 417 (HL) 424 (Lord Hailsham) (UK).

<sup>63</sup> Dressler should agree with that conclusion. See *Exegesis of the Law of Duress*, *supra* note 1, at 1373–74 (trusting jury to demand more moral strength when defendants are forced to take even a minor part in "an especially barbaric scenario, such as the Holocaust").

## 2. The Gap Between the Threat and the Harm

As noted above, the defense of duress acquires its independent significance only when the harm the defendant inflicted is equal to or higher than the harm with which he was threatened. The smaller the gap between the two harms, the stronger the defendant's claim for the defense should be, and vice versa.<sup>64</sup> So, a man acting under the threat of impending death would have a stronger defense if, in order to avoid the death, he shot one innocent person, and a weaker defense if he shot a hundred. Similarly, a man threatened with a severe beating will have a stronger defense if, in order to avoid it, he gave an innocent victim a commensurable beating and a weaker claim if he beat the innocent victim to death. Dressler in his own way holds the same: "Society . . . has a right to expect a person to demonstrate a higher level of moral strength when ordered to kill a hundred innocent children than when commanded to kill one."<sup>65</sup>

## 3. Would the Harm Happen Anyway?

If the victims would suffer the same kind and amount of harm, regardless of whether or not the actor complied with his coercers' requests, the actor should have a stronger defense. Take the case of Drazen Erdemović prosecuted by the International Criminal Tribunal for the Former Yugoslavia for his participation in a mass execution of unarmed Muslim men and boys in 1995. Erdemović raised the defense of duress, telling the Tribunal that, when his unit was ordered to shoot the civilians, he first refused and conceded only after he was threatened with instant death: "If you don't wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you."<sup>66</sup>

Considering that Erdemović's refusal to shoot would not have changed anything in the plight of the civilians, his claim for the defense should be stronger than if his choice would have determined whether the civilians lived or died.<sup>67</sup>

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<sup>64</sup> D.P.P. for Northern Ireland v. Lynch [1975] AC 653 (HL) 681 (Lord Wilberforce) (UK) ("Nobody would dispute that the greater the degree of heinousness of the crime, the greater and less resistible must be the degree of pressure, if pressure is to excuse.").

<sup>65</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1373–74.

<sup>66</sup> Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment ¶ 8 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

<sup>67</sup> Luis Chiesa makes a similar observation but, unlike me, considers this factor sufficient for full acquittal. See Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT'L L. 741, 771 (2008) ("Because the actor effectively lacked the capacity to prevent the harm threatened from occurring, punishing the actor for deciding to save her own life instead of dying to protect innocent people who were going to die anyway would be unfair"). I am not persuaded by this argument; in response, I would like to quote Lord Hailsham's opinion in *R v. Howe*, in which he said that, if we believe that duress exculpates murder, "some hundreds who suffered the death penalty at Nuremberg for murders were surely the victims of judicial murder at the hands of their conquerors owing to the operation of article 8"). See *R v. Howe* [1987] AC 417 (HL)

Erdemović's situation can be compared to a classic example of necessity in which, according to a vastly respected authority, the defendant should be exculpated: "Several men are roped together on the Alps. They slip, and the weight of the whole party is thrown on one, who cuts the rope in order to save himself. Here the question is not whether some shall die, but whether one shall live."<sup>68</sup>

#### 4. What was Defendant's Role in the Offense?

The defendant should have a much stronger claim for the defense if his coerced participation in the crime was minor and non-essential. For example, if he was "an innocent passer-by seized in the street by a gang of criminals visibly engaged in robbery and murder in a shop and compelled at the point of a gun to issue misleading comments to the public, or an innocent driver compelled at the point of a gun to convey the murderer to the victim."<sup>69</sup> An accomplice in a crime usually carries a lesser moral responsibility than the principal; however, this is not always the case. Lord Griffith wrote in *R v. Howe*:

[A]s a matter of commonsense one participant in a murder may be considered less morally at fault than another. The youth who hero-worships the gangleader and acts as lookout man whilst the gang enter a jeweller's shop and kill the owner in order to steal is an obvious example . . . . However, it is not difficult to give examples where more moral fault may be thought to attach to a participant in murder who was not the actual killer; [One] example [is] contract killing, when the murder would never have taken place if a contract had not been placed to take the life of the victim. Another example would be an intelligent man goading a weakminded individual into a killing he would not otherwise commit.<sup>70</sup>

Dressler shares this intuition. While advocating for the availability of duress as a defense to homicide, he puts his trust in the jury, supposing that "juries would probably excuse many coerced accomplices to murders, especially those whose participation in the crime was relatively minor, while usually punishing triggermen."<sup>71</sup>

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434 (Lord Hailsham) (UK); *see also* Charter of the International Military Tribunal art.8 (1945) ("The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.").

<sup>68</sup> JAMES FITZJAMES STEPHEN, *A DIGEST OF THE CRIMINAL LAW* 25 n.1 (5th ed., London, MacMillan & Co. 1894).

<sup>69</sup> *R v Brown* [1968] SASR 467, 494 (Austl.) (Bray, C.J., dissenting).

<sup>70</sup> *R v. Howe* [1987] AC 417 (HL) 444–45 (Lord Griffith) (UK).

<sup>71</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1373 (footnote omitted).

English courts addressed this issue in several important decisions—*Lynch v. Director of Public Prosecutions*; *Abbot v. The Queen*; and *R v. Howe* among others.<sup>72</sup> At the time of the *Lynch* decision, an aider and abettor to murder was not entitled to the defense of duress in the same way as the principal was not. Yet when the assistance was minor and non-essential, the harsh treatment seemed unfair, and the court allowed Joseph Lynch, who merely drove assassins to the place of the murder, to claim the defense.<sup>73</sup>

A year later, the *Abbot* court had to reconsider this issue in a case in which the defendant's participation was much more essential: he was holding the resisting victim down while the killer was stabbing her with a cutlass.<sup>74</sup> The court distinguished the facts of *Abbot* from those of *Lynch* and refused the defendant's plea for duress over the dissenting judges' warnings that it was impossible to draw a principled line between the two cases.<sup>75</sup> Finally, in *R v. Howe*, the court overruled *Lynch* and went back to the original rule that the defense of duress is never available in prosecution for murder.<sup>76</sup> The *Howe* defendants, who pleaded duress as a defense to two counts of murder and one count of conspiracy to commit murder, were directly involved in torturing and killing their victims.<sup>77</sup>

I believe that the *Howe* court erred in failing to see the dramatic difference between the facts of *Lynch*, on the one hand, and *Abbot* and *Howe* on the other. In *Lynch*, the defendant, by driving the principals to the victim, only made possible their independent intervening act of killing.<sup>78</sup> His driving was an act separate from and nonessential to the act of killing. In contrast, in *Abbot* and *Howe*, the defendants' conduct was an integral part of the killings; they *did* the harm while Lynch merely *enabled* it. This difference is morally significant<sup>79</sup> and it should put Lynch in a different category than Abbot, Howe, and Bannister. Moreover, the harmfulness of Lynch's *personal conduct* (bringing the dangerous and violent people to the victim) was, arguably, lower than the harm he sought to avoid (being shot on the spot). Properly understood, the choice of evils defense should look to the defendant's *conduct*, not the crime of conviction. If Lynch could claim that

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<sup>72</sup> D.P.P. for Northern Ireland v. Lynch [1975] AC 653 (HL); Abbott v. The Queen [1976] 3 WLR 462 (PC) (Lord Salmon); R v. Howe [1987] AC 417 (HL) (Lord Hailsham) (UK).

<sup>73</sup> D.P.P. for Northern Ireland v. Lynch [1975] AC 653 (HL).

<sup>74</sup> Abbott v. The Queen [1976] 3 WLR at 465 (PC) (Lord Salmon).

<sup>75</sup> *Id.* at 471–76 (Lord Wilberforce and Lord Edmund-Davies, dissenting).

<sup>76</sup> R v. Howe [1987] AC 417 (HL) (Lord Hailsham) (UK).

<sup>77</sup> The first victim, Elgar, was strangled to death by another person but the court found that the kicks and punches inflicted by the defendants “would have resulted in death moments later even in the absence of the strangulation.” *Id.* at 424. The defendants kicked, punched, and then strangled to death their second victim. Their third intended victim managed to escape. *Id.*

<sup>78</sup> MICHAEL MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 697 n.68 (1997).

<sup>79</sup> See, e.g., Philippa Foot, *Morality, Action, and Outcome*, in MORAL DILEMMAS: AND OTHER TOPICS IN MORAL PHILOSOPHY (2002).



defense, he would not even need to rely on duress—his actions would have been deemed justified.

### 5. Doing v. Allowing

There is a morally important distinction “between what one does or causes and what one merely allows.”<sup>80</sup> The former involves the violation of a negative duty not to do morally impermissible things, whereas the latter involves the violation of a positive duty not to allow morally impermissible things where one can prevent them.<sup>81</sup> It is usually recognized that negative rights and duties are much more stringent than positive ones.<sup>82</sup> A woman who, under the threat of violence, does not stop the beating of her little child by her abusive boyfriend should have a stronger claim for the defense than a woman who, under the same threat, does the beating herself.

### 6. Saving Self v. Saving Another

There appears to be a moral difference between protecting oneself and protecting another. We praise people who save lives of others; we do not “praise” people for saving their own lives. By the rule of the converse, if threatened with the harm to an innocent bystander, the defendant commits a grave crime he should have a stronger claim for the defense than if the threat was directed at him personally.<sup>83</sup>

### 7. Conflicting Duties

The defendant should have a stronger claim for the defense if his duty not to follow the coercer’s order conflicted with his other preexisting duty—for example, the duty to protect the person whom the coercer threatens to harm. Such a duty of protection may be owed to a close family member; a person whom the defendant

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<sup>80</sup> See *id.* at 89–90; PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of Double Effect*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 26 (1978); Fiona Woollard & Frances Howard-Snyder, *Doing vs. Allowing Harm*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 1, 2016), <https://plato.stanford.edu/archives/win2016/entries/doing-allowing/> [<https://perma.cc/XB8W-XNF6>]. For a critique of the moral distinction between doing and allowing, see *e.g.*, James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78 (1975); JONATHAN BENNETT, *THE ACT ITSELF* (1995).

<sup>81</sup> See MOORE, *supra* note 78, at 689 (discussing Philippa Foot’s viewpoint).

<sup>82</sup> *Id.*; Philippa Foot, *Killing and Letting Die*, in MORAL DILEMMAS: AND OTHER TOPICS IN MORAL PHILOSOPHY, *supra* note 79; Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 PHIL. REV. 287 (1989); FIONA WOOLLARD, *DOING AND ALLOWING HARM* (2015).

<sup>83</sup> For recognition of this difference see, *e.g.*, *R v. Gotts* [1992] 2 AC 412 (HL) 436 (Lord Lowry, dissenting) (suggesting that “a threat not to the killer, but to others, in particular his wife and children . . . fundamentally alters the moral problem”).

has put in peril; or a person whom the defendant is contractually obligated to protect.<sup>84</sup> So, if a group of first-graders is kidnapped together with their teacher, and the teacher, threatened with the imminent execution of the children, helps to plant a bomb under a post office thus causing an explosion and numerous casualties, the teacher should have a stronger claim for the defense than if he did the same in order to protect a group of strangers to whom he owed no duty of care.

#### 8. Intending v. Foreseeing v. Risking

The coerced defendant should have a stronger claim for the defense if he did not intend the harm to happen but merely foresaw it.<sup>85</sup> He should have an even stronger claim if he committed the criminal act that only contained a risk of the harm. Thus, a person who, under the threat of death, plants a bomb under a post office, does not *intend* the bomb to explode; he merely *foresees* that it will. Similarly, a person forced to participate in an armed robbery may recognize the *risk*—but not *foresee* it—that the robbery would turn deadly. Utilizing those distinctions, Lord Morris, in *Lynch*, argued that the defense of duress should be allowed in prosecution for homicide to the defendant who facilitated the killing but was not the killer.

Let two situations be supposed. In each let it be supposed that there is a real and effective threat of death. In one a person is required under such duress to drive a car to a place or to carry a gun to a place with knowledge that at such place it is planned that X is to be killed by those who are imposing their will. In the other situation let it be supposed that a person under such duress is told that he himself must there and then kill X. In either situation there is a terrible agonising choice of evils. In the former to save his life the person drives the car or carries the gun. He may cling to the hope that perhaps X will not be found at the place or that there will be a change of intention before the purpose is carried out or that in some unforeseen way the dire event of a killing will be averted. The final and fatal moment of decision has not arrived. He saves his own life at a time when the loss of another life is not a certainty. In the second (if indeed it is a situation likely to arise) the person is told that to save his life he himself must personally there and then take an innocent life. It is for him to pull the trigger or otherwise personally to do the act of killing. There, I think, before allowing duress as a defence it may be that the law will have to call a halt.<sup>86</sup>

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<sup>84</sup> See KADISH, SCHULHOFER & BARKOW, *supra* note 36, at 245–51.

<sup>85</sup> See, e.g., Alison McIntyre, *Doctrine of Double Effect*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY. (Sept. 23, 2014), <https://plato.stanford.edu/entries/double-effect/> [<https://perma.cc/PWT2-SAE4>].

<sup>86</sup> D.P.P. for Northern Ireland v. Lynch [1975] AC 653 (HL) 671 (Lord Morris).

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The examination of the factors listed above reveals that the coerced actor should have a stronger claim for the defense of duress if, on the scale of “low to high,” he scored relatively low for:

- (i) the amount of harm he inflicted—(1);
- (ii) his personal involvement in furthering the crime—(4), (5);
- (iii) his culpability (“guilty mind”)—(1), (8);
- (iv) the causal impact of his actions—(3), (4); or
- (v) the disparity between two evils—the one he was able to avoid (admittedly, the lesser or equal) and the other (the graver or equal) which he inflicted in order to avoid the former—(2), (6), (7).

I think that Dressler could agree with these conclusions, at least up to this point. These conclusions, however, present a problem to Dressler’s theory of duress. All the variables above relate to the act’s wrongfulness, not the actor’s responsibility, and thus strongly confirm the justificatory component of the defense. Surely, the “relatively low” level of wrongfulness does not yet make the act right. The coerced harmful act remains wrongful—it is not justified—but it is *less* wrongful than it would be if these variables measured high. That is why the coerced act is only *partially justified*.<sup>87</sup>

It is important to underscore here that, despite all its justificatory characteristics, duress does not completely justify the coerced actor. Erdemović, whose refusal to execute the civilians would not have saved their lives, nevertheless is a killer; and in no circumstances shall we send a message to the community that it is permissible to participate in mass executions.<sup>88</sup> Similarly, a mother who does not stop the beating of her child by her abusive boyfriend is not justified. We may feel sorry for her but by no means shall we send out a message that not defending one’s child is “a good thing, or the right or sensible thing, or a permissible thing to do.”<sup>89</sup> To the extent duress is a justification, its justificatory component does not carry enough moral weight to merit complete exculpation.

We could try to put together another set of variables, such that would affect the actor’s responsibility rather than the wrongfulness of the act. That set would be rather short though—what matters for the issue of responsibility is the severity of the actor’s *impairment*; the severity of the *threat* is *per se* unimportant. Thus,

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<sup>87</sup> Douglas N. Husak, *Partial Defenses*, 11 CAN. J.L. & JURIS. 167, 169 (1998) (pointing out the *desert-based* nature of partial justification and excuses).

<sup>88</sup> I thus reject Peter Westen and James Mangiafico’s theory of duress that provides the coerced actor with complete justification on the notion that, due to the unlawful, purposely coercive relationship created by duress, the same or greater harm imposed by the actor may still be a lesser *evil* for the purposes of justification calculus. See Westen & Mangiafico, *supra* note 30, at 836.

<sup>89</sup> John L. Austin, *A Plea for Excuses*, in FREEDOM AND RESPONSIBILITY: READINGS IN PHILOSOPHY AND LAW 6 (Herbert Morris ed., 1961).

the defense should be denied to an actor who, even though threatened with a severe harm, committed a crime not because of the debilitating fear but for other reasons (a personal grudge against the victim, for example).

On the other hand, as soon as it is determined that the actor committed the crime (solely) because he feared the threatened retaliation and his fear significantly limited his ability to comply with the requirements of the law—the reasonableness of that fear; the standard of conduct of a law abiding citizen (or any other objective standard); the particular circumstances of the actor; the disparity between the harm threatened and the harm inflicted—should be irrelevant for the plea of excuse. Yet, all these factors are at the core of Dressler’s normative theory of duress. To retain them, Dressler would have to admit that duress is not reducible to an excuse.

To be clear, duress certainly has an excusatory component, namely the volitional impairment of the actor, but this component carries only a portion of the normative weight of the defense. If we focused on the actor’s reduced responsibility alone, we would have to allow the defense whenever the actor acted under the influence of fear, including the unreasonable fear and the fear of minor injuries or non-physical harm. And we would have to allow duress as a defense to any crime—including gang rape, deadly torture, and mass execution of innocent people—whenever the actor *chooses* to commit these crimes to avoid harm to himself. It is unlikely that such a defense may be acceptable morally or analytically in any society recognizant of individual rights.

So, where does this discussion bring us? I believe it brings us to the recognition that it is inaccurate to characterize duress as an excuse (or justification) alone. To the extent duress may do any normative work, it has to function as a partial justification in addition to a partial excuse. Duress is not unique in this way. A few other defenses combine elements of justification and excuse. For example, excessive use of force in self-defense is wrongful—to the extent it is excessive—and, even though, generically, self-defense is a justification, disproportionate self-defense is at best an “imperfect” justification, which does not exonerate the defendant.<sup>90</sup>

Another example of the combination of a justification and an excuse is the defense of provocation, or the heat of passion, which reduces murder to manslaughter. Unlike the imperfect self-defense, it does not have a “perfect” pair; however, it too is based on the defendant’s overreaction to an assault on his interests. Predictably, Dressler and I disagree about the nature of provocation—for

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<sup>90</sup> The doctrine of imperfect self-defense is available in some jurisdictions to provide a partial defense to the defendant who acted unreasonably in defending himself; the charge of murder is reduced to manslaughter. *See, e.g.*, 18 PA. CONS. STAT. § 2503(b) (2015) (reducing murder to voluntary manslaughter); *State v. Faulkner*, 483 A.2d 759, 761 (Md. 1984) (holding that the honest but unreasonable belief, although not a complete defense, “mitigates murder to voluntary manslaughter”); Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57, 82 (2010) (“Because the defender is partially justified in his commission of reactive violence, and because he is mistaken as to the degree of force warranted by the threat, he should not be convicted of the charge of murder, but rather the lesser charge of voluntary manslaughter.”).

him, provocation is an excuse only.<sup>91</sup> I have discussed the difference in our views elsewhere,<sup>92</sup> so I will not expand on it here. Instead, I would like to underscore just one argument relevant to the current discussion for why provocation not only renders the actor less responsible but also makes the killing less wrongful.<sup>93</sup> It is less wrongful because it is responsive, and responsive acts do not carry the same moral weight as independent acts.<sup>94</sup> The killing would not have happened but for the provocation; it is the provoker who, in a large part, is responsible for the killer's "guilty mind"; and thus the killer should not answer for *all* the harm caused by his actions—a portion of that harm is attributable to the provoker. It has been powerfully argued that harm has an independent moral significance and the amount of harm caused by one's actions has a direct impact on the wrongfulness of those actions.<sup>95</sup> Accordingly, a provoked killing is not as wrongful as the

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<sup>91</sup> Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 974 (2002) [hereinafter *Provocation Defense*] ("The modern defense is . . . about excusable loss of self-control. . . . Under no circumstances is the provoked killing justifiable in the slightest; indeed, the actor's violent loss of self-control is unjustifiable.") (emphasis omitted).

<sup>92</sup> See generally Vera Bergelson, *Justification or Excuse? Exploring the Meaning of Provocation*, 42 TEX. TECH L. REV. 307 (2009); Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385 (2005) [hereinafter *Victims and Perpetrators*].

<sup>93</sup> Andrew Ashworth makes a similar argument: "Surely it is the combination of the elements of partial excuse and partial justification . . . which raises sufficient exculpation to warrant a reduction to manslaughter." ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 245–46 (1991).

<sup>94</sup> Dressler insightfully compares duress to proximate causation: "we determine when the exceptional nature of a threat causes us to believe that the actor's conduct, although 'an antecedent but for which the result in question would not have occurred,' is morally 'too remote . . . to have a [just] bearing on the actor's liability . . .'" *Reflections on Excusing Wrongdoers*, *supra* note 2, at 710 (quoting MODEL PENAL CODE § 2.03(1)(a) (AM. LAW INST., Official Draft and Revised Comments 1985); MODEL PENAL CODE § 2.03(2)(b) (AM. LAW INST., Official Draft and Revised Comments 1985)). This comparison, however, only underscores my point that the responsiveness of the act makes the act less wrongful. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 192 (6th ed. 2012) (explaining how, generally, a responsive intervening act does not relieve the initial wrongdoer of criminal responsibility). "This outcome is justifiable. The defendant's initial wrongdoing caused the response. Since he is responsible for the presence of the intervening force, the defendant should not escape liability unless the intervening force was so out-of-the-ordinary that it is no longer fair to hold him criminally responsible for the outcome." *Id.* The same logic applies to a provoker who should be deemed responsible, at least in part, for the responsive act of the defendant.

<sup>95</sup> Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 87 (1999) (arguing that "the amount of harm caused determines the seriousness of the wrong done"). See also MOORE, *supra* note 78 at 193 (arguing that, in addition to culpability, "wrongdoing independently influences how much punishment is deserved"). Other scholars disagree that harm has independent moral significance. See, e.g., Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183 (1994) (critiquing Moore's position).

unprovoked, and the reduced wrongfulness of that killing makes provocation (among other things) a partial justification.<sup>96</sup>

A similar argument applies to duress. A coerced actor is not as guilty as an actor with the unrestricted free choice. Quoting Lord Kilbrandon's argument in *D.P.P. for Northern Ireland v. Lynch*:

[T]he decision of the threatened man whose constancy is overborne so that he yields to the threat, is a calculated decision to do what he knows to be wrong, and is therefore that of a man with, perhaps to some exceptionally limited extent, a "guilty mind." But he is at the same time a man whose mind is less guilty than is his who acts as *he* does but under no such constraint.<sup>97</sup>

Of course, the fact that the actor's "guilty mind" is not as guilty as it would have been in the absence of duress does not eliminate the wrongfulness of the actor's criminal actions but it makes them less wrongful. Likewise, a coercive threat does not eliminate the actor's power of moral choice but it limits that power. How much weight shall be given to the reduction in the wrongfulness of the act and the responsibility of the actor depends, to a large degree, on the *meaning* we assign to duress.

## II. DURESS AS A DEFENSE OF NO-FAIR-OPPORTUNITY

Dressler's theory of excuses accedes to H.L.A. Hart's theory of punishment. Hart insisted that the moral license to punish is needed by society and "unless a man has the *capacity* and a *fair opportunity* or chance to adjust his behaviour to the law its penalties ought not to be applied to him."<sup>98</sup> Dressler's theory is focused on the actor's personhood, but he too argues that an actor may not be reached by blame or punishment unless "he had the capacity and fair opportunity to function in a uniquely human way, *i.e.*, freely to choose whether to violate the moral/legal norms of society."<sup>99</sup> Duress is a defense of no-fair-opportunity.<sup>100</sup> Fair

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<sup>96</sup> Husak, *supra* note 87, at 169.

<sup>97</sup> *D.P.P. for Northern Ireland v. Lynch* [1975] AC 653, (HL) 703 (Lord Kilbrandon).

<sup>98</sup> HART, *supra* note 42, at 181 (emphasis added).

<sup>99</sup> *Reflections on Excusing Wrongdoers*, *supra* note 2, at 701 (footnote omitted). "Free choice' exists if the actor has the substantial capacity and fair opportunity to: (1) understand the pertinent facts relating to his conduct; (2) appreciate that his conduct violates society's moral or legal norms; and (3) conform his conduct to the law." *Id.*

<sup>100</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1365 ("A person acting under duress is excused, although he possessed the capacity to make the right choice, if he lacked a fair opportunity to act lawfully or, slightly more accurately, if he lacked a fair opportunity to avoid acting unlawfully.").

opportunity “is lacking if a person of reasonable moral strength cannot fairly be expected to resist the threat.”<sup>101</sup>

At first glance, the “lack of fair opportunity” theory seems very attractive from the desert perspective. Indeed, if an actor lacks a “fair opportunity” to conform his conduct to the law, how can we blame him? There are, however, at least two problems with this theory: one, conceptual; the other, line-drawing.

The conceptual problem of the “fair opportunity” theory is its vagueness and circularity. What is a “fair opportunity”? On the one hand, as Dressler acknowledges, *any* person who is coerced into choosing between suffering harm and committing a crime lacks the fair opportunity he would have had in the absence of coercion.<sup>102</sup> And yet we do not excuse people who commit crimes in order to protect their property, career, or reputation even though their freedom of choice may be significantly impaired. Neither do we excuse those who yield to lawful threats,<sup>103</sup> even though lawful threats can be very coercive. And Dressler does not argue that we should excuse them. Then what is the lack of a “fair opportunity”? For Dressler, this is a prescriptive rather than descriptive concept—it encompasses a set of circumstances in which it would be unfair to blame the coerced actor who broke the law.<sup>104</sup>

Unfortunately, this concept does not provide much guidance. In fact, it is rather circular. All it tells us is that it is unfair to blame an actor who has yielded to a threat in the circumstances, in which it would be unfair to blame the actor for yielding to such a threat. I am doubtful that this standard may serve as a basis for a coherent and morally sound legal rule. Unlike the much narrower MPC rule, which defines duress in terms of the actor’s *incapacity*,<sup>105</sup> Dressler’s rule exculpates those who were *capable* of resisting the threat but *chose* not to.<sup>106</sup> Why

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<sup>101</sup> *Id.* at 1385.

<sup>102</sup> *Id.* at 1366.

<sup>103</sup> See, e.g., ALASKA STAT. § 11.81.440 (2017) (listing “unlawful force” as a requirement of duress); ARIZ. REV. STAT. § 13-412 (2017); ARK. CODE ANN. § 5-2-208 (2017); COLO. REV. STAT. § 18-1-708 (2017); HAW. REV. STAT. § 702-231 (2017); KY. REV. STAT. ANN. § 501.090 (2017); N.Y. PENAL LAW § 40.00 (2017); UTAH CODE ANN. § 76-2-302 (2017). See also Westen & Mangiafico, *supra* note 30, at 905 (making a similar observation).

<sup>104</sup> *Reflections on Excusing Wrongdoers*, *supra* note 2, at 702 (maintaining that “the excusing process involves a normative judgment about the degree to which people may fairly be expected to apply their capacities in the defendant’s immediate circumstances.”).

<sup>105</sup> See MODEL PENAL CODE § 2.09(2) cmt. 2 (AM. LAW INST., Official Draft and Revised Comments 1985) (comparing the coerced actor’s “psychological incapacity” to physical incapacity, which negates voluntary act under section 2.01). See also The American Law Institute, *37th Annual Meeting*, 1960 A.L.I. PROC. 106, 120 (1961) (Herbert Wechsler, the Chief Reporter of the MPC, in discussion of the defense, stating, “I emphasize those words ‘unable to resist,’ because we really mean, as the comments indicate, unable to resist—not, would have decided not to resist, but would have been unable to resist.”).

<sup>106</sup> *Reflections on Excusing Wrongdoers*, *supra* note 2, at 711 (maintaining that in extreme circumstances “[w]e will choose (it is a choice) to take the wrong route”).

those actors *deserve* exculpation requires a morally compelling normative explanation.

Dressler recognizes this difficulty<sup>107</sup> but does not offer an explanation other than that “we as humans are sufficiently fallible that in extreme circumstances we will nearly inevitably (the near inevitability seems critical) succumb to our weaknesses.”<sup>108</sup> This explanation is intended to provide context to Dressler’s general principle of punishment that “society does not and should not expect the *impossible*; indeed, it should not always expect even the *possible*.”<sup>109</sup> In the abstract, this is a good principle, except that the less moral agency society expects of its members, the more likely it is that “difficult” moral choices will be seen as “impossible.”

As a descriptive matter, I do not dispute Dressler’s assessment of our fallibility; in fact, I would go a step further to suggest that we as humans are so fallible that, with due incentives, we will succumb to our weaknesses even in the absence of extreme circumstances—that is, unless we have good reasons not to succumb. The fear of punishment and the moral authority of criminal law often provide such reasons. Without those, most of us would succumb to our weaknesses when overcome by strong passions (infatuation, despair, jealousy) or temptations (of wealth, fame, power). So, if, following Dressler, we were to agree that our fallibility is a sufficient moral ground for the defense of duress, should we not also provide defenses for those other instances of fallibility? But if we do not think that violating the rights of others under the influence of passions or temptations *deserves* exculpation, it is less than clear to me why doing the same under the influence of fear *does deserve* it.

The second problem is line-drawing. For Dressler, the condition of no-fair-opportunity may arise from both human and non-human threats<sup>110</sup> and duress is available as a defense in prosecution for any offense, which, naturally, significantly enlarges the scope of potentially excusable situations.<sup>111</sup> Dressler

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<sup>107</sup> *Id.* at 710 (conceding that, as a defense of no-fair-opportunity, duress “raises troubling questions of legitimacy”).

<sup>108</sup> *Id.* at 711.

<sup>109</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1366 (footnote omitted).

<sup>110</sup> *Id.* at 1374–76.

<sup>111</sup> I am sympathetic to opening the defense to those who were forced to commit a crime by coercive circumstances, not only other individuals. I also agree with Dressler’s critique of the MPC explanation of why duress is available only as a defense to a human threat. According to the MPC drafters, the “significant difference” between excusing the two classes of cases is that in the case of human threats “the basic interests of the law may be satisfied by prosecution of the agent of unlawful force,” whereas with natural threats, “if the actor is excused, no one is subject to the law’s application.” MODEL PENAL CODE § 2.09(3) cmt. 3 (AM. LAW INST., Official Draft and Revised Comments 1985). To that Dressler correctly responds: “But why should it be the case that before the criminal law excuses a person there must exist another actor with a wrongful will who potentially can be punished for the wrongdoing? Certainly, as a descriptive matter, this claim is inconsistent with other excuses.” *Exegesis of the Law of Duress*, *supra* note 1, at 1376.



recognizes that, pursuant to his theory, “[s]ome, but not all, persons who are forced into a corner and wrongfully choose to harm innocent persons rather than accept the threatened consequences will be excused.”<sup>112</sup> But is there a principled way to draw the line between those who deserve to be excused and those who do not? Consider some scenarios.

1. Through no fault of his, Derek finds himself in a situation in which he is threatened with violence unless within a short period of time he pays back a significant debt. He has no realistic chances of escaping, receiving protection from the police, or obtaining the money lawfully. So, should Derek be excused if, in desperation, he: (i) burglarizes a grocery store; (ii) forces his little sister to prostitute herself; or (iii) kidnaps a child from a wealthy family for ransom?
2. Alfred is in desperate need of a significant amount of money for his life-saving surgery. Through no fault of his, Alfred has no opportunity to obtain the money lawfully. Should he be excused if he does the same things as Derek in order to obtain the money?
3. Rita is in desperate need of an urgent kidney transplant. Rita knows that her half-sister Marina would be an ideal organ donor, but Marina refuses to donate her kidney. Should Rita be excused if she arranged for Marina’s kidnapping and a forcible removal of Marina’s kidney?

Unfortunately, Dressler’s theory gives us no tools for answering these questions. Neither the general principle that “society does not and should not expect *impossible*; indeed, it should not always expect even the *possible*”<sup>113</sup> nor the recognition of human fallibility helps us in distinguishing between these scenarios. In all of them, the defendants face a credible threat (human or non-human) of death or serious bodily harm; lack a fair opportunity to escape that threat without breaking the law; and succumb to their weaknesses. Should all of them be excused? Should none?

Dressler seems to put his reliance in the jury’s ability to sort out the facts of each particular case. He writes:

Justification defenses amend the law; excuses provide justice to the individual who violated it. In general, it is proper for legislatures to define justifications, but juries are better suited to *determine desert of punishment in particular cases*, especially when the issue is whether an actor has lived up to society’s legitimate expectations of moral courage.<sup>114</sup>

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<sup>112</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1367.

<sup>113</sup> *Id.* at 1366.

<sup>114</sup> *Id.* at 1374 (emphasis added) (footnotes omitted).

The quote above raises many interesting questions, but I will address just one—that juries should have the freedom to “legislate” excuses. This idea appears to be an important element in Dressler’s vision of how the defense of duress should operate. But if we were willing to delegate this authority to the jury, why would we even bother distinguishing between different kinds of excuses? Wouldn’t it be better, following Dressler’s logic, simply to instruct the jurors that they may excuse the defendant for any reason if they found that he has lived up to society’s legitimate expectations? I doubt that it would be a good idea though. Not only would such practice be pregnant with inconsistent verdicts and discrimination against the least powerful groups, but it would also be unfair in the most profound way—if people are not given advance notice of what conduct society excuses, they cannot be sure of how to avoid breaking the law.

I do not mean to trivialize the problem of defining the boundaries of duress or criticize Dressler for an imperfect solution. The problem is systemic: if duress is a *complete excuse* not rooted in *complete incapacity*, it is practically impossible to draw a principled line between the self-preferential harmful conduct that is permissible and that is not.

### III. DURESS AS A PARTIAL DEFENSE

What could be an alternative theory of duress? Let’s go back to my earlier suggestion that the defense of duress combines elements of justification and excuse. Duress does not entirely eliminate either the actor’s responsibility or the act’s wrongfulness—it only reduces them. Like provocation and excessive self-defense, duress is best understood as an *imperfect justification and imperfect excuse*.

The excusatory component all these defenses share is a temporary volitional impairment resulting in the reduced power to act in accordance with one’s long-term goals and values. The justificatory component, as I said before, lies primarily in the responsive nature of duress. The inflicted harm is not the defendant’s “project”; someone else forced that project upon the defendant. To a degree, the defendant may be compared to a person used by another as an “innocent instrumentality.” Both under the common law and the MPC, all the responsibility for the harm inflicted by an “innocent instrumentality” falls on the perpetrator who causes that person to act criminally.<sup>115</sup> Of course, the coerced defendant is not a completely “innocent instrumentality”; at best, he is a “partially innocent instrumentality.” Only with respect to that part, he is justified.

Shall the combination of two partial defenses—partial justification and partial excuse—produce a complete defense of duress? I do not think so, at least not from

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<sup>115</sup> See, e.g., MODEL PENAL CODE § 2.06(2)(a) (AM. LAW INST., Official Draft and Revised Comments 1985) (“A person is legally accountable for the conduct of another person when[,] acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct”).

the perspective of just desert. Like the actors in the cases of excessive self-defense and provocation, the coerced actor does not deserve a complete defense because he was a moral agent (he did not lack the capacity to make the moral choice) who exceeded the limits of his rights and produced an overall regrettable balance of harms and evils.

The responsive anger of a provoked actor may be warranted and understandable, and the responsibility for his harmful outburst may be partially imposed on his provoker,<sup>116</sup> and yet the actor is not entirely exculpated. His actions are still regrettable, and he does not completely lack the volitional capacity to escape the blame. Similarly, the fear of a coerced actor may be warranted and understandable and the responsibility for the harm he caused in compliance with the coercive demand may be partially imposed on his coercer, and yet—for the same reasons as in the case of provocation—the actor does not deserve a complete exculpation.<sup>117</sup>

The doctrine of imperfect self-defense operates in a similar fashion. Where this doctrine is recognized, the actor who used excessive force in self-defense and killed his attacker is not completely exonerated but the killing is mitigated from murder to manslaughter.<sup>118</sup> Likewise, a few U.S. jurisdictions mitigate murder to manslaughter in cases of duress.<sup>119</sup> By analogy with the imperfect self-defense,

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<sup>116</sup> For more detailed discussion of similarities and distinctions between duress and provocation, see Jeremy Horder, *Autonomy, Provocation and Duress*, in 1992 CRIM. L. REV. 706–15 (1992).

<sup>117</sup> Dressler recognizes similarities between provocation and duress. However, he believes that these defenses are rooted in different theories of excuse—unlike the no-fair-opportunity basis for duress, the basis for provocation is the defendant’s “partial-loss-of-capacity-for-self-control.” Dressler explains:

In duress cases, we sense that the coerced party *chooses* to accede to the coercer’s threat; it is in a real sense a *rational*, albeit perhaps socially unjustifiable, choice. . . . [W]ith provocation, the killing is the result of an emotional explosion almost immediately following the provocation. The homicidal act here is the antithesis of rationality.

*Provocation Defense*, *supra* note 91, at 975 n.68. This explanation raises questions. If a provoked act is truly irrational, why is it only partially excused? And if a coerced act is *in a real sense* a rational choice, why is it excused completely? If provocation and duress were merely excuses, the allocation of punishment between the two should have been the reverse: a wrongdoer with a limited capacity deserves a lesser punishment than a wrongdoer with full capacities. Even assuming the theory of no-fair-opportunity could adequately explain duress, why does *no-fair-opportunity* impede free choice more than *partial-loss-of-capacity-for-self-control*? Dressler’s theory does not explain that.

<sup>118</sup> *State v. Faulkner*, 483 A.2d 759, 761 (Md. 1984).

<sup>119</sup> See, e.g., N.J. REV. STAT. § 2C:2-9 (2013) (mitigating killing to manslaughter); ARIZ. REV. STAT. § 13-1103 (2018) (same); MINN. STAT. § 609.20(3) (2017) (mitigating killing to manslaughter in the first degree); WIS. STAT. § 939.46(1) (2017) (mitigating killing to 2nd-degree intentional homicide).

duress (particularly when expanded to include non-human threats) may be conceptualized as *imperfect necessity*.<sup>120</sup>

Duress and necessity are based on very similar principles (and often are confused by judges and commentators alike).<sup>121</sup> Both require: an objective, external threat to some vital interests of the actor or others that can be avoided only by breaking the law; an actor who is not at fault in finding himself in that situation; and the subjectively honest (plus, under most laws, objectively reasonable) belief of the actor in the necessity to break the law in order to avoid the harm.<sup>122</sup> The biggest difference between the two defenses is in the “balance of evils”: unlike necessity, duress is not foreclosed to the coerced actor who consciously chose to, and in fact did, bring about the same or more significant harm than that with which he was threatened.<sup>123</sup> The “imperfection” of duress, just like that of excessive self-defense, is in the negative balance of evils. And just like excessive self-defense is only a partial defense, so should be duress.

Courts in the United Kingdom have discussed extensively the illogical and controversial application of the defense of duress.<sup>124</sup> How can it be a complete defense to any crime other than homicide,<sup>125</sup> and no defense at all to homicide?<sup>126</sup> As an alternative of making duress a complete defense to homicide, some judges thought it more appropriate to allow duress as a partial defense. In *R v. Gotts*, for example, Lord Lowry argued:

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<sup>120</sup> In the same spirit, Kyron Huigens has suggested that one way to look at duress may be through the lens of “mistaken” justification. See Huigens, *supra* note 30, at 312 (critiquing Westen & Mangiafico, *supra* note 30).

<sup>121</sup> See, e.g., *United States v. LaFleur*, 971 F.2d 200, 205 (9th Cir. 1991), *cert. denied*, 507 U.S. 924 (1993) (including a balance of harms element in duress); LAFAVE & SCOTT, *supra* note 30 at 433 (requiring that defendant’s choice to break the law in order to avoid the threat be the lesser harm under the circumstances). LaFave’s work has been often cited by courts; however, in later editions of the treatise the requirement of the lesser evil has been removed. See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* 73–74 (2nd ed. 2003) (describing MPC approach, which eliminates the “balance of harms” element for duress, as the majority approach).

<sup>122</sup> See, e.g., KADISH, SCHULHOFER & BARKOW, *supra* note 36, at 993–94.

<sup>123</sup> See MODEL PENAL CODE § 2.09 cmt. 3 (AM. LAW INST., Official Draft and Revised Comments 1985).

<sup>124</sup> See, e.g., *R v. Gotts* [1992] 2 AC 412 (HL) (Lord Jauncey); *R v. Howe* [1987] AC 417 (HL) (Lord Hailsham) (UK); *Abbott v. The Queen* [1976] 3 WLR 462 (PC) (Lord Salmon); *D.P.P. for Northern Ireland v. Lynch* [1975] AC 653 (HL); *R v. Kray* [1970] 1 Q.B. 125 (Lord Widgery); *R v. Brown* [1968] SASR 467 (Austral.).

<sup>125</sup> Under common law, duress was also not available as a defense to treason. See, e.g., *R v. Gotts* [1992] 2 AC 412 (HL) 420 (Lord Jauncey) (observing that, under common law, treason and murder were the only crimes to which duress was not a defense).

<sup>126</sup> See *R v. Howe* [1987] AC 417 (HL) 438 (Lord Brandon) (UK) (“It is not logical, and I do not think it can be just, that duress should afford a complete defence to charges of all crimes less grave than murder, but not even a partial defence to a charge of that crime”).

[T]he defence of duress, as a general defence available at common law which is sufficient to negative the criminal liability of a defendant against whom every ingredient of an offence has otherwise been proved, is *difficult to rationalise or explain by reference to any coherent principle of jurisprudence*. The theory that the party acting under duress is so far deprived of volition as to lack the necessary criminal intent has been clearly shown to be fallacious . . . . No alternative theory seems to provide a wholly satisfactory foundation on which the defence can rest. The law, therefore, might have developed more logically had it adopted the view of Stephen, expressed in his *History of the Criminal Law of England* . . . that duress should be a matter, not of defence, but of mitigation. If this course had been followed, it might sensibly have led to the further development that, in the case of murder, duress, like provocation, would have sufficed to reduce the offence from murder to manslaughter.<sup>127</sup>

Following the same logic, in *Abbot v. The Queen*, Lord Salmon opined:

There is much to be said for the view that on a charge of murder, duress, like provocation, should not entitle the accused to a clean acquittal but should reduce murder to manslaughter and thus give the court power to pass whatever sentence might be appropriate in all the circumstances of the case.<sup>128</sup>

At least some U.S. courts made similar observations. In *Wentworth v. State*,<sup>129</sup> for example, the court observed:

One who is coerced by another person, or forced by the pressure of natural physical circumstances (e.g., thirst, starvation) into committing what is otherwise a crime, may have in some circumstances a complete defense to the crime, but not if the crime in question consists of intentionally killing another human being. Thus one who, not in self-defense or defense of another, kills an innocent third person to save himself or to save another is guilty of a crime. But it is arguable that his

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<sup>127</sup> R v. Gotts [1992] 2 AC 412 (HL) 430–31 (Lord Lowry, dissenting) (citations omitted). See also R v. Howe [1987] AC 417 (HL) 439 (Lord Griffiths) (UK) (opining that “it would have been better had [duress] . . . been regarded as a factor to be taken into account in mitigation as Stephen suggested in his *History of the Criminal Law of England*”); 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 107 (London, MacMillan & Co. 1883) (“No doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender’s punishment.”).

<sup>128</sup> *Abbott v. The Queen* [1976] 3 WLR 462 (PC) 471 (Lord Salmon).

<sup>129</sup> 349 A.2d 421 (Md. Ct. Spec. App. 1975).

crime should be manslaughter rather than murder, on the theory that the pressure upon him, although not enough to justify his act, should serve at least to mitigate it to something less than murder.<sup>130</sup>

I agree with the arguments above that the doctrine of duress should be available in prosecution for any crime, including homicide. However, the illogical application of the defense to different offenses will not be cured if duress be a partial defense to homicide and a complete defense to all other offenses. Very soon, courts will be struggling again with the questions they so unhappily tried to resolve in recent decades: what should be the effect of duress in the cases of *attempted* homicide; *conspiracy* to commit homicide; and *aiding and abetting* in homicide? Other painful questions would include distinguishing between homicide-related offenses and, say, severe torture or brutal rape, endangering the life of the victim but not resulting in the victim's death.

A much more principled solution would be to treat duress as a partial defense to *all* offenses. After all, duress has independent significance only when the actor inflicts on another a serious bodily harm that is equal to or higher in gravity than the very serious bodily harm with which the actor has been threatened—in other words, the defense of duress is *always* a defense to severe crimes of violence. There is no reason to treat those crimes categorically differently from homicide. If duress should only partially exculpate murder, it should also be only a partial defense to torture, rape, and serious battery.

#### IV. THE OPERATION OF THE DEFENSE OF DURESS

Assuming I have succeeded in my argument that duress should be a partial defense only, the next question is whether this separate defense is even needed. As a partial defense combining elements of justification and excuse, duress conceptually represents a subspecies of an already existing defense, the MPC version of provocation, namely the extreme mental or emotional disturbance for which there is a reasonable explanation or excuse (“EMED”).<sup>131</sup> True, EMED is an offense-specific defense; it applies only to homicide. Elsewhere, I have argued that provocation, including its EMED version, should be a general partial defense.<sup>132</sup> It is very strange indeed that criminal law grants a partial defense to a killer provoked by a victim; yet, if the reasonably outraged actor, instead of shooting, slapped the victim on his face (assault) or threw a valuable vase on the floor (criminal mischief), there would be no similar mitigation in most U.S. jurisdictions. It is hard to justify a rule that allows mitigation for a graver crime

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<sup>130</sup> *Id.* at 427–28 (quoting LAFAVE & SCOTT, *supra* note 30, at 585).

<sup>131</sup> MODEL PENAL CODE § 210.3(1)(b) (AM. LAW INST., Official Draft and Revised Comments 1985).

<sup>132</sup> *Victims and Perpetrators*, *supra* note 92, at 432–36.

but denies it for a lesser crime. As a matter of both logic and public policy, such rule makes very little sense.<sup>133</sup>

If this aberration is to be corrected and EMED be properly recognized as a general partial defense, it would subsume the defense of duress. Indeed, what mental or emotional disturbance has a more reasonable (and powerful) explanation than a realistic threat of death or serious bodily harm? And why would we need a separate defense of duress if it has the same elements and effect as the more general defense of EMED?<sup>134</sup>

Naturally, when the circumstances of the case warrant other defenses too, the existence of the defense of EMED should not preclude such other defenses, including those that may result in a complete exoneration. Among such other defenses may be: necessity (when the harms caused by the coerced actor are lesser than the harms avoided); all excuses of complete incapacity; diminished capacity (when the coerced actor lacked the capacity to form the required mens rea); and the failure of proof argument of the lack of actus reus (e.g., when the coerced actor prosecuted for culpable omission lacked the capacity to move).

Whether lawmakers agree to treat duress as a subspecies of EMED or retain duress as an independent defense is not as important to me as establishing that duress ought to be a partial defense only. Thus understood, the claim of duress, including duress by circumstances, should be allowed in prosecution for any offense to mitigate the gravity of the offense—for example, reduce aggravated assault to assault; murder to manslaughter; or a felony of the first degree to a felony of a lesser degree. In addition, considerations of duress should be taken into account during sentencing.<sup>135</sup>

To determine whether the defendant deserves conviction of a lesser offense, the factfinder should first determine whether the criminal act was committed while the actor suffered from a severe volitional impairment due to duress; this is a threshold question. If this threshold is passed, the factfinder should consider the justificatory factors, including those listed in Part I(C) above. For example, in the

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<sup>133</sup> See *id.* at 435.

<sup>134</sup> Today too, courts often include fear induced by a threat of violence in the list of the emotional conditions that may trigger the defense of provocation. For example, in *Minor v. State*, No. CACR 02-672, 2003 WL 1300873, at \*5 (Ark. Ct. App. Mar. 19, 2003), the appellate court found that the defendant was entitled to the provocation jury instruction where the victim had previously threatened the defendant, twice with a gun, and, on the day of the killing, the victim reached into his pocket, and ran after the defendant while cursing and threatening to kill him. See also *Rainey v. State*, 837 S.W.2d 453, 455 (Ark. 1992) (opining that, in combination with adequate provocation, the “passion that will reduce a homicide from murder to manslaughter may consist of anger or sudden resentment, or of *fear or terror*”) (emphasis added) (citations omitted).

<sup>135</sup> See, e.g., U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 5K2.12 (2016) (authorizing downward departure from the Guidelines range when defendant acted under “serious coercion, blackmail or duress, under circumstances not amounting to a complete defense”). See also *United States v. Amor*, 24 F.3d 432, 438 (2d Cir. 1994) (affirming downward departure where the district court found that the defendant would not have purchased and altered the firearm but for the threats he received and the shots fired at his vehicle).

case of Topcu and Papadopoulos discussed in the beginning of this article, the jury could consider:

- (i) the heinousness of the rape committed by the defendants;
- (ii) the gap between the violence with which they were threatened and the harm of forcible rape suffered by the victim;
- (iii) whether the victim would have been raped by someone else if the defendants refused to do that;
- (iv) the defendants' respective roles in the crime;
- (v) the fact that Topcu merely allowed the nonconsensual fellatio to be performed on him whereas Papadopoulos was much more actively involved in the nonconsensual intercourse;
- (vi) the defendants' claim that they were afraid not only for themselves but also for the victim and that the fear for her motivated them to do whatever Eken requested;
- (vii) whether they had any conflicting duties; and
- (viii) the fact that they acted intentionally.

It is likely that the defendants would have been convicted upon the jury's consideration of these factors too, but it would have been a much more nuanced and morally reasoned decision.

The lesser the wrongfulness of the coerced actor's conduct, the stronger his claim of duress, and the lesser should be his offense and punishment. What is important in any case, however, is for the court to recognize that the actor bears responsibility for what he did. Society should respect its citizens, both victims and perpetrators, and it should show that respect by siding with the victims who have suffered and by treating the perpetrators as responsible moral agents capable of answering for their actions and worthy of censure.

#### CONCLUSION

I had two reasons for writing this article. One is many years of my admiration for Joshua Dressler and his scholarship; the other has to do with my personal background. The first is obvious to anyone who has ever met Dressler or read his work; the second I ought to explain.

I have never met my maternal grandmother; she was gone years before I was born. In 1950, she was executed, one of many innocent victims of Stalin's terror.<sup>136</sup> In recent years, the official line of Russian historiography and

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<sup>136</sup> For information about my grandmother Mirra Zheleznova, *see, e.g.*, STALIN'S SECRET POGROM: THE POSTWAR INQUISITION OF THE JEWISH ANTI-FASCIST COMMITTEE (Joshua Rubenstein & Vladimir P. Naumov eds., Laura Esther Wolfson trans., 2001); НАДЕЖДА ЖЕЛЕЗНОВА-БЕРГЕЛЬСОН, МОЮ МАМУ УБИЛИ В СЕРЕДИНЕ XX [NADEZHDA ZHELEZNOVA-BERGELSON, MY MOTHER WAS MURDERED IN THE MIDDLE OF THE 20TH CENTURY (2014)].



intellectual discourse close to the Russian government has been that, in those “difficult” times, everyone was a victim, both the executioner and the executed.<sup>137</sup> The sense of fear was so prevalent and overpowering that people did whatever was asked of them: fabricated false accusations against their neighbors and coworkers; tortured the accused; convicted and killed the innocent. All in all, there was no meaningful difference between the victim and the victimizer. Fear explains and exculpates everything.

I agree, fear is a very powerful emotion, we all know that. It does explain many wrongdoings, but in my mind, it should not exculpate them. That belief was the second reason for my decision to explore the defense of duress—the ultimate defense of fear.

It is impossible today to think about duress without paying close attention to Dressler’s work on the subject. Not only did he analyze the meaning and boundaries of this defense; confronted head-on the problems of its moral legitimacy; and cleared numerous conceptual confusions. He also set the field for future scholarship and invited scholars and lawmakers to study the moral questions presented by duress with the hope that, if they do so, “the law may ultimately make more sense and more closely correlate with our moral intuitions.”<sup>138</sup> On top of that, Dressler raised a question that goes far beyond the scope of duress—the question of people’s capacity for moral choices, and he did that with breathtaking humility. He wrote:

There is another, more compelling reason to think about duress. An honest view of coercion teaches or reminds us that countless ordinary people, like ourselves, have weaknesses and susceptibilities that allow us to contribute to the world’s injustices and cruelty. That we are human really means, at times, that we are all too human. It is not as easy as we sometimes think to “plac[e] the greatest distance between us and responsibility for evil.” Perhaps there are fewer moral monsters in this world than “ordinary men [who] . . . do monstrous things.”<sup>139</sup>

This is a powerful moral argument—but this is an argument for *forgiveness*, not for *non-responsibility*.<sup>140</sup> The difference is important: unlike forgiveness, which does not have to (or indeed *cannot*)<sup>141</sup> be deserved, a claim of non-

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<sup>137</sup> See Лев Аннинский, *Палачи и жертвы* [Lev Anninskiy, *Executioners and Victims*] (June 5, 2017), <https://rg.ru/2017/06/05/rodina-palachi-i-zhertvy.html> [<https://perma.cc/F6FV-EACH>] (discussing, among other things, how victimizers would later become victims and wondering whether there was a clear line between the two groups).

<sup>138</sup> *Exegesis of the Law of Duress*, *supra* note 1, at 1386.

<sup>139</sup> *Id.* (footnotes omitted) (citations omitted).

<sup>140</sup> See, e.g., Jeffrie G. Murphy, *Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview*, 27 *FORDHAM URB. L.J.* 1353, 1355–56 (2000) (discussing the difference between justifications, excuses, and forgiveness).

<sup>141</sup> See Leo Zaibert, *The Paradox of Forgiveness*, 6 *J. MORAL PHIL.* 365 (2009).

responsibility is desert-based. A person who begs for forgiveness admits responsibility for doing “monstrous things” and only asks not to be punished as he deserves. And we may have good reasons to forgive someone who deserves punishment and forego some or all of the punishment. A person who claims non-responsibility does not have to beg. Duress is an affirmative defense, a defense of right: the actor who satisfies its requirements is *entitled* to it.

As I was going through Dressler’s arguments, questioning my own intuitions, and reading numerous cases involving claims of duress, I was thinking about all those who, like my grandmother, were falsely accused, tortured, and murdered, and all those who falsely accused, tortured, and murdered them—and later denied responsibility for what they did because they did all that out of fear. If Dressler is right and duress is an excuse and a complete defense, all those reasonably scared people may be correct: perhaps they did not have a “fair opportunity” not to harm the innocent. If I am right, and duress is a partial defense, which combines elements of justification and excuse, society should hold those people responsible. They may not all be “monsters,” but moral agents who do “monstrous things” at the very least deserve criminal indictment, trial, and conviction. I think I am right: it is critical for a just society to recognize and enforce the rule that fear does not exculpate intentional wrongdoings against innocent people. Duress is no excuse.