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SOCIAL JUSTICE IN THE MODERN REGULATORY STATE: DURESS, NECESSITY AND THE CONSENSUAL MODEL IN LAW

> The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions.
> – Mr. Justice Blackmun, dissenting in *The United States* v. *Bailey*, 444 U.S. 436 (1980).

ABSTRACT. This paper examines the role of the consensual model in law and argues that if substantive justice is to be the goal of law, the use of individual "choice" as a legal criterion for distributive and retributive purposes must be curtailed and made subject to substantive considerations. Substantive justice arguably requires that human rights to life, well-being, and the commodities essential to life and well-being, be given priority whenever a societal decision is made. If substantive justice is a collective societal responsibility, the individual cannot be justly rewarded or punished for his or her choices with respect to life, well-being and essential commodities insofar as these choices are justified or excused by standards of substantive justice. Societal conditions and institutional arrangements should be recognized as grounds for justification and excuse because they may impose limits and constraints on the choices available to an individual that are as unavoidable and compelling as those imposed by chance or by another human being.

"Choice" is a central concept in Anglo-American law and jurisprudence. The exercise of "free" and "deliberate" choice by an individual is taken to indicate that the locus of responsibility for the consequences of that choice lies with that individual. Where these consequences in turn entail liability to a legal sanction or entitlement to a legal benefit, it is the "fact" that the individual is responsible for the causation of the consequence that is seen to "justify" imposition of the sanction or distribution of the benefit in the individual case. This general approach to the allocation of legal liability and entitlement is referred to here as the "consensual model".

The consensual model is widely used in law to determine whether

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and when an individual can be held accountable at law for the consequences of his conduct. Where the individual is found to be legally responsible for the conduct, where the causal relationship between that conduct and the consequence in question is legally significant, and where the consequence is foreseeable in the requisite degree, the individual is also held to be legally responsible in whole or part for that consequence. This legal finding may then in turn serve to ground the conclusion that the individual – as an agent who has "freely" and "deliberately" caused a legally significant state-of-affairs – has a legal entitlement or liability, as the case may be, to a benefit, burden, or sanction. Subsequent action by the state in the form of a declaration of rights or an order of punishment, to implement or enforce the requirements of positive law in the circumstances as found, is taken to be morally justified by reference to the past conduct of the individual, the behavior in which he or she *chose* to engage. Where the law metes out benefits, burdens and sanctions by reference to criteria *other than* individual conduct, such as status, need, or chance, clearly the moral justification for differential treatment of individuals is not grounded on the "consensual model" – that is, as that term is being used in this discussion.[1]

Legislative departures from the consensual model are often made with reluctance and defended, *not* on the ground that the consensual model is inadequate in theory, but only by reference to the public interest in efficient decision-making, the mounting costs of the administration of justice and the evidentiary and enforcement problems associated with use of an unqualified consensual model.[2] The use

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[1] If the system of positive law in question were found to be validly based on a genuine social contract of all affected individuals, then the "consensual model" would have a broader use in providing a moral justification for legal decisions affecting individuals (including those based on status, need, chance, etc.) than that which is *presumed* here.

[2] Arguments in favor of qualifying the consensual model by introducing criteria for distribution and retribution other than criteria referring to "conduct" as an indicator of "choice" usually attempt to demonstrate either:

i) that limitations on the social resources available to decide distributive and retributive questions are such that a societal choice must be made between

of strict liability provisions in public health and safety legislation, legislative restrictions on freedom of contract in the areas of consumer and labor law, and the introduction of no-fault provisions in accident law and divorce settlement, have all been the subject of sharp controversy as they were introduced. This has occurred in part because of the impact of these measures on various vested economic interests (not the least among which have been those of lawyers). Going beyond motive, however, an examination of the substance of the arguments used shows that a common theme in arguments against legal developments that restrict reliance on the consensual model has been that it is fundamentally "unjust" to allocate burdens and benefits among individuals in a manner that is not explicitly dependent on the merits of the conduct of those individuals, or that prevents individuals from "freely choosing" the terms and conditions that shall govern their interaction with other individuals. Thus not only is the concept of "justice" strongly tied to the exercise of individual "choice" in the consensual model, but this particular conduct-based *concept* of justice itself has such a dominant position in modern Western thought about justice as to continue to appear "self-evidently" valid and thus escape scrutiny. "Choice" and "desert" remain fundamental reference points

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on the one hand providing general legal protection for statistical interests (involving considerations of justice to the unidentified members of the group) and on the other hand preserving an individualized approach to justice in specific cases (in which liability arising from legal rights and duties can be triggered only by the deliberate act or omission of an individual, and in which most rights and duties are grounded in contract or some other consensual relationship rather than on status or need alone);

or ii) that in the *average* case of the type in question the resultant allocation of benefits and burdens under the qualified model will in fact reflect the allocation of liability or the distribution of rights *which would have been* the result under the fault and freedom of contract or consensual model *if it could be corrected* for evidentiary lapses and inequalities in bargaining power – as, of course, it cannot be fully, and then only on a case-by-case basis;

and that iii) under either i) or ii) the net amount of justice or fairness to all relevant individuals with regard to the issues in question will be greater than it would be if the traditional consensual model were applied to determine their respective rights, duties, and liabilities.

in the cognitive map we use in Western society to interpret and evaluate human behavior.

Examples of reliance on the consensual model for the purpose of specifying duties and obligations and allocating liabilities and entitlements can be found in almost any area of Anglo-American law. Choice is taken to be evidenced by a voluntary act or omission, a course of conduct, a waiver, consent, or an agreement. On theoretical grounds the consensual model appears to be more adequate than the strict liability or status models for the purpose of dispensing individualized "justice", or substantive rather than merely formal justice to the individual. This result follows almost by definition once it is recognized that the dominant concept of "justice" is "desert" based. On reflection, however, it becomes clear that the consensual model only generates "just" decisions insofar as the standards and tests applied to determine a legal result reflect the actual circumstances of the individuals whose conduct is at issue. Yet the interests of society as a whole are frequently seen to require that circumstances deemed relevant by particular individuals in actually *making* choices *not* be relevant for legal purposes. Legal standards are thus used not only to coerce individuals to accommodate their behavior to community norms or to penalize them for their failure or refusal to do so, but also to reinforce community beliefs about social and empirical reality. "Facts" and social "experiences" that are not relevant in the eyes of the law are not publicly and officially recognized as relevant to the justice of legal decisions.

Most judicial discussions of what the reasonable man would have done occur precisely in order to conjure up a representation of community norms and beliefs. Whether the court applies the community rationality test literally and rigorously, or qualifies and particularizes it to take into account the knowledge, experience, and capacities of a specific individual, depends on what is recognized to be at stake for the individual, what societal interests are seen to be threatened, and whether there are found to be mitigating or aggravating factors on either side, such as considerations of equity or public policy. But in the end it is the legal "facts" as found – often arrived at by means of legal fictions – not the facts as actually perceived by any of the parties

or even necessarily by most actual members of the community, that determine the legal result.

The consensual model as applied in practice thus allows policy considerations to influence the determination of such key issues as what constitutes a "choice" or a valid waiver, where the boundary lies between a voluntary and an involuntary act, and whether a choice was a reasonable one. We should not be surprised, therefore, to find that different and more and less exacting and comprehensive standards for voluntariness, choice, consent, waiver, and rationality are used in response to the distinct and evolving policy concerns *in each area of law.*

Where it is deemed to serve the public interest in social order and to be required to protect individual interests, legislation may be enacted or the courts may re-interpret the law to vitiate or restrict the legal efficacy of individual choices. Waivers of future interest, for example, are often included among the terms of a bargain or contract. The waiver represents a "choice" to forego a future entitlement or claim in exchange for some other "benefit". However, the law pertaining to family support obligations (of parents as well as children, and including that pertaining to inheritance regardless of legitimacy) requires that otherwise valid waivers of future interest be set aside when the circumstances of the waiver are sufficiently suspect to vitiate it on the grounds of effective duress or coercion *or* when the substantive effects on the parties are unconscionable. Standards for "unconscionability", which serve to set the limits beyond which consensual arrangements will be void or voidable, also vary depending on the interests perceived to be at stake in each area of law. Systems of workmen's compensation commonly *legislate* an effective double waiver – the employee is barred from suing the employer in negligence and the employer from alleging contributory negligence by the employee. Neither is permitted to contract out of the system. By contrast, where there has been no legislative qualification of the consensual model and the courts find no public policy reason for providing legal protection for the interests of one party rather than the other, persons bargaining from what are in law regarded as relatively equal positions of power (regardless of whether they are so

perceived by the parties or their peers) are free, in the absence of intentional misrepresentations, to exchange valid waivers as part of their bargain.[3]

The growth of the "informed consent" doctrine in medical law over the past thirty years is a good example of the process by which the standards applicable in law to determine whether a valid consent has been given can become more fully articulated through litigation.[4] Whether and how these standards will in turn influence the on-going development of standards of voluntariness and disclosure applied to evaluate the validity and scope of the authority granted by clients to their legal representatives remains to be seen.[5] Financial advisors, business consultants, engineers and architects are also involved in professional/client relationships in which authority is delegated. The standards imposed on the agreements struck by the parties to these relationships will inevitably reflect, not only the nature and relative gravity of the public and private interests involved, but also evolving social concepts of what constitutes abuse of delegated authority, and

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[3] See Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine', *Yale Law Journal* 94 (1985): 997–1114; Herbert Figarette, 'Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape', *Washington & Lee Law Review* 42 (1985): 65–118; and Anthony T. Kronman, 'Contract Law and Distributive Justice', *Yale Law Journal* 89 (1980): 472–511 at 478–83 for further discussion of unconscionability, coercion and involuntariness in the contractual situation.

[4] See Salgo v. Leland Stanford Jr. University Board of Trustees, 317 P. 2d 170 (Cal. Dist. Ct. App. 1957); Natanson v. Kline, 350 P. 2d 1093 (Kan. 1960); Cobbs v. Grant, 502 P. 2d 1 (Cal. 1972); Dow v. Kaiser Foundation, 90 Cal. Rptr. 747 (1970); Scott v. Bradford, 606 P. 2d 554 (Okla. 1979); see also the discussion of these cases in Jay Katz, *The Silent World of Doctor and Patient* (New York: The Free Press, 1984).

[5] For an examination of the significance of delegated authority for regulation of the lawyer-client relationship see Lucinda Vandervort, 'The Lawyer-Client Relationship in Ontario: Use and Abuse of the Authority to Act', *Ottawa Law Review* 16 (1984): 526–64.

in what situations effective use of bargaining power constitutes duress rendering agreements void or voidable.[6]

The standards for consent in rape cases and the reasonableness of the degree and type of force used in self-defense by women charged with murder have been undergoing some development in the case law. These cases demonstrate that alteration of the stereotypes used within the consensual model to interpret the same set of empirical facts can alter the court's findings of fact and the legal result.[7] The change in legal treatment of rape and self-defense cases reflects a shift in attitude toward the situation of women that has made it gradually easier for a female complainant or defendant to argue with credibility

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[6] It must be realized, however, that judicial recognition of the legal implications of fundamental principles for any particular type of social relationship does *not* guarantee that those changes in a legal system that would be required to implement those insights fully will occur. Change may appear formidable, especially when its details remain unknown and influential interest groups object or resist. The result may be lip-service to principle and only the illusion of change, just as Katz (*supra.*, note 4) found to be the case with the principle of self-determination and the doctrine of informed consent. Legislation may be enacted to qualify or curtail the legal effects that would otherwise flow from fundamental principles. Principles alone do not determine what the law shall be.

[7] See Sue Bessmer, *The Laws of Rape* (Landmark Dissertations in Women's Studies Series, ed., Ann Baxter, 1984); Toni M. Massaro, 'Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony', *Minnesota Law Review* 69 (1985): 395–470; Dolores A. Donovan and Stephanie M. Wildman, 'Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defence and Provocation', *Loyola of Los Angeles Law Review* 14 (1981): 435–68; Catharine A. MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence', *Signs: Journal of Women in Culture and Society* 8 (1983): 635–58; Jennifer Wriggins, 'Rape, Racism and the Law', *Harvard Women's Law Journal* 6 (1983): 103–41; Frances Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis', *Texas Law Review* 63 (1984): 387–432; Amy Eppler, 'Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't', *Yale Law Journal* 95 (1986): 788–809; and Lucinda Vandervort, 'Mistake of Law and Sexual Assault', *Canadian Journal of Women and the Law* 2 (1987): forthcoming.

(rather than "duplicity" or "hysteria", as the case may be) that the choices she made were reasonable ones given her past experience and present feasible alternatives.[8] Feasibility appears in a new light when it is evaluated with specific reference to an individual woman's capacities and the facts known to her and to the average female person in her situation, rather than by reference to an objective test of the reasonable man type or even the male projection of the reasonable female.[9]

Cases involving prisoners charged with escaping from custody present a problem analogous to that seen in the rape and self-defense cases, that is, how to assess whether persons who have chosen to act in a particular way have a justification grounded in the unique features of their circumstances or an excuse grounded on the extent to which their self-control was reduced by the circumstances as they perceived them. In the United States, however, it has been only recently in response to greater public and judicial awareness of prison conditions, that a few prisoners have been found to have acted justifiably or excusably in escaping from prison to avoid murder, rape, or cruel and unusual punishment.[10]

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[8] See Roberta K. Thyfault, 'Self-Defence: Battered Woman Syndrome on Trial', *California Western Law Review* 20 (1984): 485–510; Elizabeth Schneider and Susan B. Jordan, 'Representation of Women Who Defend Themselves from Physical or Sexual Assault', *Women's Rights Law Reporter* 4 (1978): 149–63; State v. Wanrow, 559 P. 2d 548 (Wash. 1977); State v. Hundley, 693 P. 2d 475 (Kan. 1985).

[9] And see Donovan and Wildman, *supra.*, note 7. The recent gradual legislative removal of the privilege to assault and maim one's wife (and husband in some jurisdictions) with immunity in tort and criminal law may reflect a related change in the view of what the reasonable standard for inter-spousal conduct is, or the realization that in point of fact the policy of non-regulation of intra-family disputes is more harmful than beneficial to the individuals involved, in that it effectively deprives them of protection by law without ensuring the availability of constructive alternative social mechanisms for the avoidance of violence.

[10] United States v. Bailey et al. and United States v. Cogdell, 444 U.S. 394 (1980), reversing 190 U.S. App. D.C. 142 and 190 U.S. App. D.C. 185, remains the leading case. The opinions in this case are representative of the broad spec-

The recent history of liability in tort and criminal law for inadvertent negligence also provides examples of the evolution in tandem of legal and policy considerations surrounding consent and choice. Recent case law regarding control of dangerous instrumentalities has given new life to the old common law duty of care for the general public. Inadvertence is no longer an automatic bar to liability in cir-

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trum of possible approaches to the very issues in the prison context that are the focus of the present article with respect to social institutions in general. Mr. Justice Rehnquist (as he then was) finds the affirmative defense of duress or necessity (the opinion makes no clear distinction between the two defences and does not decisively adopt either a justification or an excuse rationale) to be unavailable as a matter of law in the absence of sufficient evidence of a *bona fide* attempt to return to custody as soon as the alleged duress or necessity had lost its "coercive force". Mr. Justice Blackmun (in dissent) held that escaped inmates could not be required, "in order to preserve their legal defences, [to] return forthwith to the hell that ... compelled their leaving in the first instance" (at 420). Rehnquist suggests that Blackmun's view could only result in widespread *immunity* for escape (prison conditions being as poor as they are) and therefore that the opinion by Blackmun cannot provide a justification for the escape in the instant case. Rehnquist thus argues, in effect, that where full recognition of the implications of traditional common law principles would disrupt contemporary social arrangements, principles shall be suppressed and their implications avoided. In this case that end is accomplished by barring consideration of the defense of necessity or duress by the jury. Mr. Justice Stevens, in concurring reasons, implies that to immunize escape will only encourage self-help by inmates subjected to intolerable conditions. He suggests it would be unwise (at 419, note 11) to do this in the "hope" that it will motivate significant reforms. Mr. Justice Blackmun (in dissent) terms the opinion by Rehnquist "an impeccable exercise in undisputed general principles and technical legalism" and argues that the jury should have been permitted to determine as a matter of fact whether surrender was actually possible in the circumstances.

In this case the implications of fundamental principles of criminal responsibility were pitted against the legitimacy of social institutions mandated by legislated rules. The legal rules were then interpreted to bar a decision on the merits by a lay jury. Law was effectively used here to support the *status quo* and avoid a principled application of the "consensual model" to assess the culpability of the individuals accused in this case. Principle is simultaneously affirmed and the effects of its application deftly avoided in precisely those prison cases to which it would most often apply.

cumstances where a duty to advert to foreseeable hazards arguably flows from a general duty of care.[11] Resistance to what was traditionally seen to be the "injustice" of finding criminal or civil liability in an individual who was neither advertently negligent nor intentionally "wicked" and "malicious", but simply failed to advert to a hazard, is now crumbling in the face of recognition of the existence of the potentially greater injustice entailed in failing to protect and compensate the victims of avoidable inadvertence. The exercise of "choice" is now viewed more broadly and is seen to include *ignorance* of the *existence* of risk in cases where that ignorance *could itself* have been avoided. As the community normative balance has shifted in favor of liability for inadvertent negligence, prosecutors and courts have gradually followed. It now seems in no way unreasonable to allege that, as long as a person is in ordinary control of his thoughts and actions, he is as fully responsible at law in the absence of an adequate justification or excuse (to the determination of which policy considerations are also applicable *via* mechanisms of the test of reasonableness) for his avoidable inadvertent acts and omissions that expose others to hazards as he is for advertent ones.[12] Existing common law

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[11] At issue here are two questions: (1) *what* risks "ought" to have been foreseen and avoided?; and (2) to *whom* does the duty to avoid risks extend? Clearly the two questions are often intertwined. Some risks materialize only in relation to certain groups of potentially affected persons who may have no *personal* relationship with the defendant who is alleged to be "responsible" for creation of the risk. See MacPherson v. Buick Motor Co., 217 N.Y. 283, 111 N.E. 1050 (1916) and Donoghue v. Stevenson, [1932] A.C. 562 (H.L.), and note the discussion of these cases in Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: The University of Chicago Press, 1948) and Martin P. Golding, *Legal Reasoning* (New York: Alfred A. Knopf Inc., 1984) where they are used to illustrate the gradual development of legal doctrine on the extent of the manufacturer's and vendor's duty of care.

[12] For many years academic writers such as Jerome Hall argued that punishment of inadvertent acts was a departure from proper principles of criminal culpability in that punishment should be confined to acts for which there was moral culpability as a consequence of intention or recklessness. Culpability for actions performed with "a blank mind" was equated with adoption of 'strict' or 'absolute' responsibility in criminal law. However, H. L. A. Hart

presumptions (generalizations about what on the average constitutes a reasonable and fair inference from the facts) have thus been extended to protect the general public from needless victimization, while the defendant has not been disabled from alleging facts and circumstances which demonstrate that the presumption ought not apply to him in the case at hand.[13]

Perspective on the societal mechanisms used to fix legal responsibility and liability can be gained from comparative anthropological studies though concerns about ethnocentrism are good cause for caution in placing undue weight on them. In his study of Barotse jurisprudence Gluckman found that in determinations of responsibility "the less close the relationship ... the more absolute the liability, and the less regard paid to intention".[14] This rule of thumb apparently flowed from the view that because social distance entailed hostility it could be *presumed* that harm caused to a person to whom one was not closely related was intentional. Harm caused a close relative might have a plausible explanation not entailing outright hostility and

('Negligence, *Mens Rea* and Criminal Responsibility', in *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961)) argued that this approach was confused in that it ignored culpability grounded in the "failure to exercise the capacity to advert to, and to think about and control, conduct and its risks". It is submitted that Hart's view is the better view. The underlying principle here is the Kantian one that "ought implies can". The basis for culpability is thus not what was intended or intentionally placed at risk, but rather the failure to do what one *could* and therefore *should* have done to avoid the risk or the harm.

[13] This statement does not apply to those jurisdictions that, as yet, have not recognized that in the absence of *opportunity* to act differently there is no *actus reus*, or modified their use of strict liability provisions to allow for an affirmative or reverse onus defense. I say, "not yet", for I regard this refinement as required on theoretical grounds to prevent the finding of liability in circumstances where the actor did not have an opportunity to avoid the risk. In those cases where the circumstances or the nature of the evidence make such an affirmative defence impossible to establish, the prosecution should be estopped from relying on strict liability provisions to convict; otherwise the result is *de facto* absolute liability without legal authorization.

[14] Max Gluckman, *The Ideas of Barotse Jurisprudence* (New Haven: Yale University Press, 1965), p. 231.

malice, and thus in these cases examination of intent might go to mitigation. What Gluckman believed he observed was a strong presumption in favor of absolute or strict liability. He concluded, however, that it was grounded not, as he first had believed, on disregard for the "mental" elements of offenses, but to the contrary on a world-view in which witchcraft and sorcery had a central place. The Barotse believed that negative or vicious *thoughts alone* have a causal effect on the person who is their object. *Any* harm was presumed to have been "caused" by someone's ill-will. There was no need to examine the mental element; it was inferred from the occurrence of harm.[15]

As in Barotse jurisprudence, so too in Anglo-American law and jurisprudence world-views and social circumstances mould legal theory.[16] Applications of the resulting theory will be perceived by the community and the individuals concerned to be "just" precisely insofar as they accept the validity of the underlying world view and believe that the circumstances of the case at hand which are salient for members of the community and individual agents can fairly be subsumed under the social circumstances recognized as relevant by law. A sense of injustice is most apt to arise in the face of a lack of unanimity on these points; both the affirmation of the validity of a world view and the assertion of the relevance of a particular set of social circumstances have strong normative implications. Social heteronomy therefore generates disagreement over what is "just". Dominant norms shift in their relative significance as societal conditions change. New or modified standards are created for human conduct in circumstances that may appear to be the same from a narrow standpoint. These modifications may occur in response to a change in either the world view or the social relationships and related circumstances given legal recognition by the courts and other societal enforcement mechanisms. A non-legal norm, imperative, or prohibition can obtain recognition

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[15] Special caution is required in weighing this conclusion because other remarks in the book make it clear that Gluckman regarded absolute or strict liability provisions with personal distaste.

[16] This is the essential point of Gluckman's conclusions about Barotse jurisprudence for my purposes.

in law or be firmly outlawed. Non-legal norms that are regarded as irrelevant for legal purposes may still have significant impact on court decisions insofar as they are seen to constitute part of the social fabric or framework within which individuals make decisions and pursue courses of conduct. Anglo-American courts have often relied on principles of equity and arguments based on considerations of public welfare to grant recognition and effect to changing societal conditions or altered societal awareness of the actual impact of existing conditions on individuals.

In the course of this discussion it has been argued that within the consensual model findings of voluntariness or involuntariness and reasonableness or unreasonableness are policy based determinations and only superficially findings of legal fact. In case after case, policy masquerades as fact. The concepts of choice, waiver, consent, etc., the key operative concepts in the consensual model, are highly subject to conscious and unconscious manipulation, explicit or covert, to achieve the results deemed desirable by a particular decision-maker on policy grounds. Decision-makers, including judges, often must "make" law in order to dispose of a particular case, and their decisions invariably contain a normative component where the consensual model is relied on.[17] Where the manipulation of the operative legal concepts is perceived to be apt or appropriate, the result will be regarded as just. The community and the defendant or applicant will regard the determination of legal guilt or acquittal, liability or non-liability, entitlement or non-entitlement, as a reflection of the moral "desert" of the individual.[18]

We have seen that the consensual model, through the use of the concept of "free choice" to determine moral "desert", can operate as an effective subterfuge to conceal the policy aspects of formal decisions that apply positive law to individual cases; we have seen why it succeeds, and seen how the standards it employs may evolve over

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[17] Cf. Fingarette, *supra*, note 3.

[18] See Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (Dordrecht: D. Reidel Publishing Company, 1985) for an extended examination of the role of the concept of "desert" in theories of law and justice.

time or vary depending on what is seen to be at stake.[19] There is no question but that the legal system makes routine use of such subterfuges to allocate liability and entitlement, and, in effect, choose victors and victims, and at the same time conceal or deny societal responsibility for structuring key social determinants of the outcome for which the individual alone is held liable – all in the name of impartial justice under a system of formal positive law.[20]

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[19] As was suggested above, the history of many different areas of law can be used to illustrate the thesis that judicial use of the consensual model masks the policy aspects of formal decisions that apply positive law, legal rules, to individual cases. Contributory negligence and assumption of risk, for example, have been seen to be issues in the context of: (1) labor law, (2) consumer protection law, and (3) rape law. In the past the worker, the consumer and the complainant repeatedly saw their cases dismissed on the grounds that by their choice to be some place at a particular time in the circumstances in question they either assumed the risk of injury or assault or were at least contributarily negligent. The outcome of such cases was said to turn on the voluntary and deliberate action of the victim. Legal responsibility for the occurrence of the harm was thus attributed to the victim. It is clear that in such cases a choice (conscious or not) was made to regard the acts or omissions by other agents as irrelevant in law although they also contributed to causation of the harm. Life-threatening working conditions, lethal product designs, and failure to control aggressive impulses, have all been viewed as if they, like the hazards of the Gobi desert or Mt. Everest, were attributable to no human agency for legal purposes. (*Of course* the factory, the widget, or the park are dangerous, but so are the Gobi and Mt. Everest. Woe to the poor fool who doesn't have a good camel or the right ice pick. Send him flowers, but don't let him in the courthouse door.) Such a *laissez-faire* approach to protection of the worker and the consumer has now been abolished or curtailed in most jurisdictions by legislation and judicial decisions. Rape cases, even in those jurisdictions with new protective legislation, often provide contemporary examples, however, of the ease with which the consensual model can be used to mask a *de facto* policy – in this case that of gender discrimination.

[20] The sacrifice of individual interest on public policy grounds is an inevitable consequence of the operation of *any* system of formal positive law and not uniquely the result of use of a "desert" based allocation system. A "need" or "status" based allocation system that relied on a formal "rule of law" approach to interpretation and application of the rules in individual cases would merely choose different "victims" and "victors" and the arguments in

General recognition that legal criteria for legal responsibility and "desert" are shaped by policy considerations would not only eliminate the duplicity now often entailed in the use of the consensual model by judges and other decision-makers, but at the same time would direct increased attention and criticism towards the formation of public policy in the political forum. Overtly political first order determinations – involving fundamental issues of social justice and affecting great numbers of persons – would receive greater scrutiny. Judicial decisions about individual legal responsibility would more frequently be seen to be concerned not with individual choice alone, but rather with the consequences of social policy *mediated* by individual choice.[21]

This adaptation of the consensual model would encourage society to view itself collectively as morally accountable for structuring many aspects of the situations within which individuals make choices. A society that viewed itself in this manner – as a collaborator – would be less punitive towards some individuals and less lavish in its praise of others. Identification of classes of cases in which the application of positive law often led to unconscionable results for the individuals affected would be understood to imply shared societal responsibility for the outcomes. As the community became aware of situational determinants that render choices made by individuals ones which it is "grossly unfair" to regard as "free", the rudimentary elements of a program for social change would be established. The only alternative

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marginal cases would focus on different issues. And see Duncan Kennedy, 'Legal Formality', *Journal of Legal Studies* 2 (1973): 351–98.

[21] This position is diametrically opposed to that taken by G. Calabresi, who argues that the honesty costs entailed by concealing the impact of prior societal decisions on the choices that individuals are said to make "freely" are justified by the "irreparable harm" to society's ideals thereby avoided. See Guido Calabresi and Philip Bobbit, *Tragic Choices* (New York: W. W. Norton and Company, 1978). The present article contemplates an approach to societal decision-making in which deceit and concealment would have no such role. A lack of congruence between social ideals and the effects of social policy would indicate the need to reflect and to act to achieve some changes or readjustments. There is no place here for duplicity.

to commitment to social change would be fundamental changes in society's vision of itself as a collectivity comprised of individuals who are responsible for their choices, and the relinquishment of the cherished ideals of "desert" and "merit". It is suggested that any society confronted with such a stark choice will tend to prefer to pursue social change with the aim of maintaining the credibility of those ideals regarded as essential to the existing social order. An established ideology will be abandoned only as the last resort.

Once it is agreed that the conditions of life – the life-world – of persons in the contemporary state are significantly shaped by political decisions, and that those conditions constitute the context within which individuals make choices, it follows that the traditional legal concepts of necessity (choice dictated by life threatening circumstances)[22] and duress (choice dictated by an agent)[23] must be re-interpreted. Re-interpretation of these concepts is required to adapt the consensual model to accommodate contemporary social realities. It must be recognized that choices made by individuals are often influenced and sometimes "dictated" by socio-economic factors that are themselves the *product* of collective societal *decisions*. For the individual who must make a choice, factors comprising the context in which the choice is made are not less "real" simply because some of the conditions that constitute the immediate threat to life and well-being and generate the pressure or impetus to act have an "institu-

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[22] Acts required to protect life against immediate and otherwise unavoidable risks are justified if the harm they cause is less than the harm avoided. Aggression by another person justifies the causation of harm to that person equivalent to the harm avoided where escape is otherwise impossible.

[23] No one is responsible for acts which he or she has performed only because of threats to his or her life or physical well-being made by another person who is reasonably believed to have the power to cause the harm threatened in the immediate future. As any student of legal responsibility appreciates, the precise boundaries of the defenses of "necessity" and "duress" or "coercion" have not been (and probably will never be) agreed upon. See the 1987 symposium issue of the *Wayne Law Review* on necessity (forthcoming) and the sources cited by Fingarette, *supra*, note 3, for an introduction to the debate.

tional" source and cannot be uniquely attributed to any *specific* human agent or to fortuitous natural causes.

Decisions about the allocation of resources (distribution) can be distinguished from decisions to impose sanctions (retribution). But the most difficult and politically significant decisions of both types are those that are concerned with scarce but essential commodities and direct or indirect threats to life and well-being. In retributive judgments social vindictiveness would be deflected where societal conditions for which there is a collective responsibility, even if only as a consequence of non-feasance, were seen to have had significant influence as determinants of individual choice. Reference to social factors in mitigation is familiar from sentencing law. Sentencing law is relevant, however, only if a *conviction* has been entered. At issue here instead is the prior question of whether socio-economic duress and necessity, arising from socio-economic causes for which there is collective responsibility, may not sometimes "excuse" or "justify" acts that would be "criminal" but for the excuse or justification. Such arguments have been rejected in the past to protect "social order". But the query raised here is: is such a negative response consistent with the exceptions to the principles of legal responsibility recognized within the traditional consensual model? Is it not instead the case that the *source* of the threat to life and well-being that provides the justification[24] or excuse[25] is irrelevant to the determination of

[24] A deliberate choice to act contrary to law is arguably "justified" where it minimizes net harm to values protected by law. However, defences of justification, including necessity, have been viewed with suspicion by Anglo-American legal systems. A defence which asserts that it is sometimes *legitimate* for an individual to exercise discretion in deciding whether to obey the law, clearly condones self-help, and to this extent appears to threaten social order. For this reason defences of justification are generally restricted in Anglo-American jurisdictions to circumstances in which an "innocent" person acts to defend him or herself, or a third party, against physical aggression by another.

A "justification" makes reference to facts and circumstances and to social values. To state that a particular choice was "justified" is at the same time to state a *general* proposition of law which is applicable to *all* analogous cases

individual legal responsibility? If so, we must acquit where the other prerequisites of excuse or justification are present. And if the concern with social order and the values it is said to protect is more than rhetoric, presumably the underlying and collectively created conditions that justify or excuse order threatening behavior must be changed. This requires re-examination of distributive practices and principles.

Distributive decisions deal with the problem of scarce essential commodities more directly than retributive decisions do. Recognition

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and is not contingent on the firmness of will or other psychological characteristics of a particular accused. It is therefore not surprising that judges have often preferred to use the individualizing "excuse" model to avoid attributing responsibility for the full legal consequences of his or her conduct to an individual, even in circumstances where a cogent argument could also have been made that the conduct was justified in the circumstances. In criminal cases justice requires only that those specific individuals presently before the court not be found guilty in the absence of criminal culpability. Defences of excuse suffice to achieve that limited end. In civil cases an individual likewise often seeks only to avoid the full legal consequences of a choice made under conditions that impaired deliberation. Each individual case requires only that relief be given to the particular "victim" of the flawed bargain which is in question. To excuse in a contract case in no way grants a general licence to contractors to unilaterally re-write the terms of any contracts to which they may be parties according to their personal conceptions of what is fair, any more than to excuse an individual accused in a criminal case authorizes self-help in the part of the public in general. An excuse is a shield, not a sword, nor even a spot at the bargaining table. It serves to protect individuals from the consequences of their choices which can be shown not to have been informed and voluntary, but can never be used to empower those same individuals to assert their right to essential commodities. Or, to use Fingarette's metaphor (*supra*, note 3 at 117 and note 191), excuses are used by courts to protect "victims" from the legal consequences of the choices they made as result of "victimization". Intervention is triggered only where an individual "wrong-doer" takes undue advantage of a "vulnerable and reasonable innocent". The role of the law *vis à vis* "victimization" in Fingarette's sense is thus clearly limited to that of protector of the "negative liberties" of the individual, after the fact, and solely on a case-by-case basis.

[25] "Excuse" is widely, though not always systematically, used to refer to understandable human fallibility and weakness in the face of stress and grave

that some forms of scarcity are the product of first order political decisions, combined with the recognition that it is dishonest and unconscionable to deny some potential recipients an essential resource on the grounds of a subterfuge based determination of "desert", should generate political pressure to alter those first-order determinations to permit universal distribution of essential commodities[26] in those cases where this is possible, and, where it is not, to use an alternate basis for distributive decisions with respect to these goods.[27]

In summary: the optimal response, when one recognizes that social conditions affect both the choices individuals make and legal interpretation of the significance of these choices, and sees that sometimes

threat and is used as a ground to avoid responsibility for conduct for which the individual would otherwise be fully accountable. It is submitted that in the criminal context reliance on an "excuse" implies that the accused has committed an act which was wrongful, i.e., illegal or contrary to a criminal prohibition, and not "justified" (*supra*, note 24) in the circumstances. "Excuse" implies that either self-control or the capacity to exercise deliberation was impaired, or that the actor lacked the knowledge and awareness required for deliberation. Excuse arises where the conditions required for deliberate choice are absent or inadequate. Thus "excuse" is significantly different from "justification". An act which appears to be contrary to law is "justified" only when the deliberate choice to act in that particular manner is *not* "wrongful", but legitimate, in that it is congruent with social values protected by law and defensible as a choice which maximizes the achievement of social goals in the circumstances. It should be noted that the distinction between "excuse" and "justification" is the subject of wide-spread debate and, moreover, that some academics and judges use the two terms interchangeably.

[26] "Essential commodies" are here understood to include those "essential" for life and well-being, but it is clear that the term is open to broad as well as narrow interpretations. Conceptually it *is* the "nose of the camel", but that poses a problem of political priorities which pragmatists would deal with if and when "surplus" wealth is available. See, for example, Charles L. Black, Jr., 'Further Reflections on the Constitutional Justice of Livelihood', *Columbia Law Review* 86 (1986): 1103–117.

[27] Need, status and chance are possible alternative criteria.

the legal consequences of these choices as interpreted at law are unconscionable and unjust in that they ignore claims grounded on human rights, is *not* denial of the ultimately political nature of legal decisions – denial that legal decisions presuppose a value-laden, policy-directed view of the world. To the contrary, the most constructive response is to admit that this is the case, to recognize that this is an inevitable feature of decisions within a system of formal positive law, and then to develop a fuller account of what constitutes consent, coercion, and unconscionability under social conditions in the modern regulatory state. This must be done in order to provide guidance for policy-makers and decision-makers who must be able to ascertain the limits beyond which use of the consensual model is not justified and must be foregone in favor of new and more honest approaches.[28]

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[28] The view taken in this paper of the implications for law of those socio-economic conditions that threaten life and well-being, and therefore arguably justify or excuse acts which would otherwise be "criminal", may be usefully compared with the approach developed by Alan Norrie (see 'Freewill, determinism and criminal justice', *Legal Studies* 3 (1983): 60–74). We differ over the analysis of "duress". Norrie views duress as an excuse only; I have argued that duress is primarily a defence of justification and only secondarily an excuse. Characterisation of duress as an excuse would arise only in the residual class of cases in which the coerced choice could *not* be justified in the circumstances and yet the individual's inability to resist the coercion in question was understandable.

My position is that legal determinations of individual responsibility clearly must recognize what Norrie describes as "situated reasoning" (at p. 72) or the results will not be just. To this point we appear to agree. However, I submit that the simple recognition, in the pursuit of justice, that individual human beings do make decisions within specific social contexts, does not require full abandonment of a responsibility model and the espousal of complete "determinism" as Norrie suggests. We need not and should not wait for final definitive proof that human behavior is "determined" in either the "hard" or "soft" sense before we recognize *as a matter of fact* that on some

occasions some individuals must be excused from responsibility for their actions because the impact of the circumstances on them did overwhelm their capacity to reflect, act in a deliberate manner, or exercise self-control. Likewise, I fail to see why "law" (in either "form" or "function" (Norrie, p. 73)) requires for any reason other than tradition (and that is no reason) that we be so hypocritical as to condemn as criminal acts performed by individuals in situations where to fail to violate the law would have placed or left life and well-being at risk, while violation of the law created no risk or harm similar in nature or of equal magnitude. Individuals whose actions are congruent with social values must be seen to act justifiably, legitimately, not criminally, as long as no alternate effective lawful means to achieve the result are available to them. Social order is not an end in itself and, like any other merely instrumental social good, must be foregone insofar as it becomes an impediment to social ends.

In my approach human action *is* viewed as the exercise of choice within a social context. This is why, it is submitted, the criminal law requires the concepts of both excuse *and* justification if it is to use the consensual model of criminal responsibility to achieve justice, not merely the application of "law". This is one example of how the form and function of "law" can be transformed into a more effective mechanism for achieving justice. When and to what extent the defences of excuse or justification are to be available to an individual accused surely *are in the end nothing but* questions of social polity; (cf. Norrie at 73). To answer these questions we must draw on *both* empirical studies of human behavior (for whether and to what extent an individual is capable of deliberation and self-control under certain circumstances is a question of fact) *and* normative and political theory (for whether any particular action maximizes the net social good so as to confer legitimacy on an action otherwise in defiance of the criminal law is a normative question, one which presupposes a view of mutual rights and claims between all individuals who are members of the group with respect to life, well-being, and the commodities essential for life and well-being).