Negrophobia and Reasonable Racism

Armour, Jody David

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(b) The same situation as above except that X is prevented from stopping by suddenly inoperative brakes. His alternatives are either to run down the drunks or to run off the road and down the mountainside. If X chooses the first alternative to save his own life and kills the drunks he will not be excused under [duress doctrine] even if a jury should find that a person of reasonable fortitude would have been unable to do otherwise.22

From the standpoint of the defendant’s blameworthiness (the sine qua non of just punishment for the retributionist), it is impossible to distinguish between these two hypothetical situations. In both cases the defendant faces equally severe and immediate external pressures compelling him to commit the same crime. His decision to run over the people lying across the road tells us no more about his “true” character in the second situation than in the first. And the following distinction between the two cases offered in the commentary to the Model Penal Code is embarrassingly strained: “In the former situation, the basic interests of the law may be satisfied by prosecution of the agent of unlawful force; in the latter circumstance, if the actor is excused, no one is subject to the law’s application.”23

“Disadvantaged Social Background”

Why does the excuse of duress cause mainstream thinkers to grasp at such threadbare distinctions to keep it rigidly restricted? The reason—openly confessed by mainstream academics24—is because determinist doctrines like duress severely threaten the coherence and cogency of the intentionalist assumptions of ordinary criminal law discourse. Once we admit
that decisions to break the law are sometimes blameless because those decisions are determined by preceding factors, and once we acknowledge that in some cases we must inquire into the roots of bad intentions and choices to evaluate blameworthiness, we naturally begin to wonder why we do not inquire into the roots of decisions to break the law in all criminal cases. Why not always broaden the time frame and consider the impact of background circumstances on a defendant’s capacity to choose? For example, why not weigh the impact of a disadvantaged social background on a defendant’s criminal behavior in all cases in which the defendant comes from such a background?

Judge David Bazelon proposed just such a defense, first in a separate court opinion in 1972 and then in a law review article a few years later. Bazelon’s proposal grew out of his assessment that a number of defendants suffered the same kinds of cognitive and volitional defects that constitute excuses in cases where mental illness is found, but that they could not meet some of the technical requirements of the definition of legal insanity. Upon further reflection, Judge Bazelon realized that the mental impairments afflicting these defendants were the product of social, economic, and cultural deprivations or of racial discrimination, rather than of a clinically defined mental illness. Accordingly, he proposed a jury instruction that would permit acquittal where the crime was caused by the defendant’s disadvantaged background. Specifically, he would instruct the jury to acquit if it found that, at the time of the offense, the defendant’s “mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act.” Although Judge Bazelon did not expect that his new instruction would generate a flood of new acquittals, he hoped the instruction would force jurors to confront the