



Winter 1-1-1985

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Recommended Citation

Herbert Fingarette, *Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape*, 42 Wash. & Lee L. Rev. 65 (1985).

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VICTIMIZATION: A LEGALIST ANALYSIS OF COERCION, DECEPTION, UNDUE INFLUENCE, AND EXCUSABLE PRISON ESCAPE

HERBERT FINGARETTE†

I. INTRODUCTION

This essay aims to develop and define a concept, Victimization, and to argue that it lies at the logical core of a varied group of legal excuses and pleas in avoidance. The thesis will be developed primarily in connection with various legal tests for coercion (or duress)¹ in both civil and criminal law.

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The basic research for this article was done in a semester when the author was Frances Lewis Scholar in Residence at the School of Law, Washington and Lee University. The generous invitation of the Center not only made possible the time to do this work, and provided outstanding facilities in support of it, but also introduced me into a stimulating intellectual and collegial setting. I wish to express my very great appreciation for all these things.

I. The terms "coercion" and "duress" are used interchangeably throughout this article. This is consistent with modern usage. See *U.S. v. Michelson*, 559 F.2d 567, 569 n.3 (9th Cir. 1977) ("coercion" and "duress" are used interchangeably throughout the literature on the subject"). The old distinction—in which the term "coercion," as distinguished from "duress," had specific reference to a wife's act in the presence of her husband—is acknowledged by most commentators to be largely defunct in modern law. See J. SMITH & B. HOGAN, *CRIMINAL LAW* 170 (3d ed. 1973) (coercion of wife is "an unnecessary anomaly"); G. WILLIAMS, *TEXTBOOK ON CRIMINAL LAW* 568 (1978) (coercion of wife "not sufficiently distinct to give it much practicality"). Smith and Hogan say that *R. v. Pierce*, 5 J. Cr. L. 124 (1941), is the only (English) reported case on the point. See J. SMITH & B. HOGAN, *supra*, at 169. Apparently, however, the well-known case of *R. v. Bourne*, 36 Cr. App. R. 125 (1952), was originally argued on the basis of coercion, although the Court of Criminal Appeals took it up as a plea of duress. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 437 (2d ed. 1960) (stating that coercion of wife is "little more than the vestige of the medieval conception of marriage"); W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 380-81 (1972) (strong trend to abolish rule for coercion of wife, although "a dwindling number of states probably still adhere to the old doctrine"); R. PERKINS, *CRIMINAL LAW* 918 (2d ed. 1969) ("the ancient rule [is] tending to disappear"); Edwards, *Duress and Aiding and Abetting*, 69 *LAW Q. REV.* 226 (1953) (explaining duress defense for wife). Unlike most commentators, Edwards argued for retention of the special defense of coercion of a wife. Edwards, *Compulsion, Coercion, and Criminal Responsibility*, 14 *MOD. L. REV.* 297, 312-13 (1951). However, Edwards' argument that there still remains a considerable proportion of married women who regard their husbands as their lord and master, to disobey whose commands would be unthinkable, reveals more about the distance we have come since 1951 in sex and marital relations than it does about the likely development of the law on this matter. See *id.* Edwards, along with some other writers, uses the term "compulsion" as equivalent to duress. See, e.g., R. PERKINS, *supra*, at 951. The term "compulsion" is not used herein for two reasons: (1) It is unnecessary and less commonly used; and (2) it can serve a useful role as a term reserved specifically for the use of sheer physical force to directly cause another person's body motions, i.e., grasping a person's wrist and physically forcing, that is, compelling, the hand to write a signature or to press a switch.

The general concept of Victimization also underlies concepts such as "undue influence,"² and it is directly relevant to certain prison-escape defenses,³ as well as types of excuse/avoidance concepts centering on deception and misrepresentation.⁴

In a plea of Victimization as a basis of excuse or avoidance,⁵ the commission of a certain act as legally defined is admitted, but avoidance of, or excuse from, ordinary legal burdens consequent on that act⁶ is claimed on the ground of the further special circumstances of Victimization. These further circumstances consist, in brief, in someone else's having wrongfully so arranged matters as to lead the otherwise innocent Victim to choose reasonably to commit the act in question.

The Victimization concept may be characterized as a "legalist" one. It is so in several respects: (1) The key terms of the definition that will emerge out of the analyses are legal ones, not psychological, moral, or otherwise

2. See *infra* text accompanying notes 176-86.

3. See *infra* text accompanying notes 159-71.

4. See *infra* text accompanying notes 138-58 & 191.

5. The logical point at issue is best expressed by the term "avoidance," *i.e.*, one avoids certain otherwise normal legal effects of the act. One can speak of coercion as an "excuse," which it is when used as a defense to a criminal charge, *i.e.*, coercion as an excuse for the act. But when used as a basis for, for example, avoiding payment under a contract, "coercion" is not, properly speaking, an "excuse," unless we stretch the meaning of "excuse" beyond its normal legal meaning; in the everyday idiom we might say it is not *an* excuse *for* signing the contract but instead is a request *to be* excused *from* paying. Since no handy legal noun form for "avoid" analogous to an "excuse" exists, I have adopted the convention of speaking of "coercion" (and later in this paper, speaking of Victimization) as "an excuse/avoidance concept," and in variant contexts as the "excuse/avoidance force" or as "excuse/avoidance" pleas.

6. The significance and legitimacy of this usage will be discussed in more fundamental terms in section IV of this article. But since the analyses that follow are intended to develop, among other things, the foundation for relying on this usage, and since the analyses themselves do not depend upon this usage, it should suffice merely to explain the usage and to note that it is verbally plausible. Thus, *Black's Law Dictionary* defines "avoidance" as: "The allegation or statement of new matter in opposition to a former pleading, which, admitting the facts alleged is such former pleading, shows cause why they should not have their ordinary legal effect." BLACK'S LAW DICTIONARY 125 (5th ed. 1979). Defining the phrase "confession and avoidance," *Black's Law Dictionary* states: "A plea...which avows and confesses the truth of the averments of fact in the complaint or declaration, either expressly or by implication, but then proceeds to allege new matter which tends to deprive the facts admitted of their ordinary legal effect, or to obviate, neutralize or *avoid* them." (emphasis in original). *Id.* at 269.

The terms "avoid" and "excuse" as used in this article are intended to convey the force and meaning of those clauses in the above definitions that follow the phrasing as to "new matter"; but the "confession" element is intended to be more specific in this article than it is in the dictionary definition. In the phrase "avoidance or excuse" as used herein, one who offers the excuse is, specifically, one who admits having done a certain *act* as defined by law, and who asks to avoid the ordinary legal effects of that act. Thus, a person may do an act that fits the definition of first degree murder, but ask to be excused from conviction and punishment because of insanity; or a person may sign a contract under conditions that fulfill all the legal requirements for executing a contract, but ask to avoid (be excused from) performance on the ground that the signing was done under economic coercion.

extra-legal; (2) the role of the concept is determinable entirely within the framework of legal concepts; and, finally, (3) a sufficient justification of the excusing/avoiding force of the concept can be provided solely on the basis of legal principle. In developing this concept of Victimization, the object is not to substitute it in legal practice for the extant pleas. Instead, the object is to provide insight, theoretical understanding, and an analytical tool in the handling of traditional legal doctrine.

The first major phase of the argument⁷ begins with an analysis of the concept of coercion as it appears in the criminal law and, more specifically, in the defense to a criminal charge. Subsequently, other uses of "coercion" in both the criminal and civil law will be examined. The second major phase of the argument⁸ consists of an explicit formulation of the general concept of Victimization, and a discussion of its meaning as well as its applicability to excuse/avoidance pleas other than coercion. Finally, there is a brief explanation of why Victimization justifies excuse or avoidance.

II. THE RATIONALE FOR COERCION CLAIMS IN EXCUSE OR AVOIDANCE

A. Coercion as Defense to a Criminal Charge

The criminal defense of coercion is plainly a main model on which legal reasoning about coercion generally has been based. By the 19th and 20th centuries the common law regarding coercion as a defense to a criminal charge was well established.⁹ The legal test has undergone no fundamental

7. See *infra* section II.

8. See *infra* section III.

9. The elements of the test for the common law coercion defense are as follows (the citations and comments supporting the italicized terms are keyed to the letters in parentheses): (a) The otherwise *innocent* defendant (b) must have had a *well-grounded* belief (c) in a threat of *imminent* (d) *death or serious injury* (e) from which there was *no escape* except through compliance with the demands of the threatener; (f) if the defendant did comply and in so doing committed the alleged criminal act, the *defendant is to be excused* by being found Not Guilty (g) *except* where the alleged criminal act is *murder*.

(a) The Model Penal Code, § 2.09(2), provides that the defense should not be available where the "actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress...[or] was negligent in placing himself in such a situation, wherever negligence suffices to establish culpability for the offense charged." MODEL PENAL CODE § 2.09(2) (Official Draft 1962). Perkins states that "it is clear that [coercion]...will excuse one *not otherwise at fault* for almost any harm [except murder]." (emphasis added). R. PERKINS, *supra* note 1, at 953. "[T]here appears to be accord that the defense [of duress] cannot be claimed if the compulsion arose by the defendant's own fault, negligence or misconduct [citations omitted]." *Id.*; see *Frasher v. State*, 8 Md. App. 439, 449, 260 A.2d 656, 662, *cert. denied*, 400 U.S. 959 (1970); *State v. Fowler*, 37 Or. App. 299, —, 587 P.2d 104, 103-05 (1978); *State v. Patterson*, 117 Or. 153, 156, 241 P. 977, 978 (1926) (duress not a defense where defendant's prior act of embezzlement made threats of exposure possible). See also *People v. Simpson*, 66 Cal. 2d 319, 327, 152 P.2d 339, 343-44 (1944); *State v. McKinney*, 19 Wash. App. 23, 573 P.2d 820 (1978); 34 CAN. REV. STAT. § 17 (Canadian Criminal Code allows excuse of

compulsion "if he is not a party to a conspiracy or association whereby he is subject to compulsion"). In regard to English law, a key case in point states that one "one who [voluntarily joins a criminal organization] has no cause for complaint if he is debarred from the defence of duress in respect to threats afterward made to him." *R. v. Fitzpatrick*, 1977 N. Ir. 20. See LAW COMMISSION, CRIMINAL LAW § 83, REPORT ON DEFENCES OF GENERAL APPLICATION 5-6, 13 (1977) (discussing and applying theme of *R. v. Fitzpatrick*) [hereinafter cited as REPORT ON DEFENCES].

(b) *United States v. Gordon*, 526 F.2d 406, 407 (9th Cir. 1975) (coercion defense requires "well-grounded apprehension"); *Gillars v. United States*, 182 F.2d 962, 976 n.14 (D.C. Cir. 1950) (same); *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935) (same); *State v. St. Clair*, 262 S.W. 2d 25, 27 (Mo. 1953) (same). The requirement of a well-grounded apprehension is generally accepted in the United States, although the Model Penal Code, § 2.09, does not require it. It is less clear that it is required in English law. See REPORT ON DEFENCES, *supra* note 9(a), at 203 (stating that no decision has as yet turned on the "well-grounded apprehension" point and quoting Lord Simon as explicitly uncertain on the point). On the other hand, modern English criminal law formulations of duress have been cast in terms of what one could "reasonably expect" of the victim, in the light of the victim's beliefs and state of mind, the circumstances, and the threat itself. This leaves it possible—there are no pertinent cases—that the requirement of a "well-grounded" (*i.e.*, reasonable) belief is imported indirectly into the concept of belief. For if a belief in the credibility of a threat, given all the circumstances and the victim's state of mind, was unreasonable, would this not imply that one could *reasonably expect* that conduct would *not* be based on that belief? See D.P.P. for Northern Ireland v. Lynch, [1975] A.C. 653; G. WILLIAMS, *supra* note 1, at c. 25; REPORT ON DEFENCES, *supra* note 9(a), at 10. The interweaving of "subjective" and "objective" elements here is complex and not entirely clear. See *infra* text accompanying notes 94-96.

(c) *United States v. Gordon*, 526 F.2d 406, 407 (9th Cir. 1975) (coercion defense requires imminent threat); *D'Aquino v. United States*, 192 F.2d 338, 358 (9th Cir. 1951) (same); *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935) (same); *State v. St. Clair*, 262 S.W.2d 25, 27 (Mo. 1953) (same); *Nall v. Commonwealth*, 208 Ky. 700, 271 S.W. 1059 (1925) (same). The Model Penal Code omits reference to the imminence of the threatened harm. See MODEL PENAL CODE § 2.09 (Official Draft 1962). However, United States courts have held to this requirement. See *United States v. Bailey*, 444 U.S. 394, 410-11 (1980); *United States v. Boomer*, 571 F.2d 543, 545 (10th Cir.), *cert. denied*, 436 U.S. 911 (1978); *People v. Richards*, 269 Cal. App. 2d 768, —, 75 Cal. Rptr. 597, 602-03 (1969). In England the situation is a bit more ambiguous. Williams states flatly that the threat must be "immediate and pressing." G. WILLIAMS, *supra* note 1, at 580. Smith and Hogan report that the imminent threat rule is "generally stated" to be the case. J. SMITH & B. HOGAN, *supra* note 1, at 163. However, these later commentators raise doubts because of *R. v. Hudson*, [1971] 2 All E.R. 244, which allowed a defense of duress even though the threatened harm was not to occur until later in the day. Nevertheless, *Hudson* still retains the idea behind the "imminence" concept—that no reasonable alternative exists between the moment the threat exerts its power over the will and "destroys" or "neutralizes" it, and the moment the victim must decide how to act. *Id.* at 247. This concept is the kernel of the "imminence" criterion that is reflected in the concept of Victimization. See *infra* section III. In regard to economic coercion, see, *e.g.*, *Bayshore Industries, Inc. v. Ziats*, 232 Md. 167, —, 192 A.2d 487, 491 (1963) (threat to bar from future employment is similar to threat to cause loss of present employment, sufficing for duress).

(d) For English law, see D.P.P. for Northern Ireland v. Lynch, [1975] A.C. 653, 665 (Lord Morris); see also REPORT ON DEFENCES, *supra* note 9(a), at 304 ("Under the present law it is clear that only threats of death or serious personal injury...."). United States law concerning the coercion defense usually speaks of "death or serious bodily injury." See, *e.g.*, *State v. St. Clair*, 262 S.W.2d 25, 27 (Mo. 1953). There is also precedent in the common law for demanding only that the threat be such that some hypothetical person, such as the "constant man" or the person of "ordinary firmness" could not in the circumstances resist the threat. See *Dawson, Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 255 (1947) (reviewing early

change in recent years.¹⁰ The test for coercion amounts to a set of criteria for applying the concept in the criminal defense context, that is, the test amounts to a set of conditions that are, jointly, necessary and sufficient to establish the defense of coercion. It does not provide, however, a *general definition* of the concept of coercion, a concept also applied in other legal contexts that call for different tests. Nor does the test state the *justification*

history of "constant man" concept); *see also* *Bata v. Central Penn Nat'l Bank*, 423 Pa. 373, _____, 224 A.2d 174, 180 (1966) (example of "person of ordinary firmness" as used in modern American law). And plainly the same basic idea is incorporated in the Model Penal Code test for duress. *See infra* note 13. An analysis and proposed rationale for making demands that differ, for different contexts, in their stringency with respect to the nature and severity of the threat, are presented in the course of the argument in this article. *See infra* text accompanying notes 46-48, text following note 104 & text accompanying notes 138-63.

(e) *United States v. Michelson*, 559 F.2d 567, 569 (9th Cir. 1977) (duress defense requires lack of opportunity to escape threat); *United States v. Gordon*, 526 F.2d 406, 407 (9th Cir. 1975) (same); *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935) (same); *State v. St. Clair*, 262 S.W.2d 25, 27-28 (Mo. 1953) (same); *Arp. v. State*, 97 Ala. 5, ____, 12 So. 301, 304 (1893) (same); *R. v. Hudson*, [1971] 2 All E.R. 244, 247 (same, under English law).

(f) The precise grounds on which the defendant is excused are not well settled, and the positions taken on this issue vary widely. This, of course, is one of the chief questions this study is designed to resolve. Some commentators have argued that duress is a justification rather than an excuse. *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 1, at 374-78. Others have treated coercion as an excuse. *See, e.g.*, G. FLETCHER, *RETHINKING CRIMINAL LAW* 830-31 (1978); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 14 (1968). "In searching for a rationale for the defense of duress one encounters a mass of inconsistencies in the doctrine as it has developed." Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110, 121 (1975). *See infra* note 154 (discussion and citations pertaining to theories of coercion).

(g) 1 HALE, *PLEAS OF THE CROWN* 434 (1800); 4 W. BLACKSTONE, *COMMENTARIES* 30 (15th ed. London 1809); *R.I. Recreation Center v. Aetna Casualty & Sur. Co.*, 177 F.2d 603 (1st Cir. 1949); *Brewer v. State*, 72 Ark. 145, 78 S.W. 773 (1904); *Watson v. State*, 212 Miss. 788, 55 So.2d 441 (1951); *State v. Dowell*, 106 N.C. 722, 11 S.E. 525 (1890); *State v. Nargashian*, 26 R.I. 299, 58 A. 953 (1904). "The authorities seem to be conclusive that, at common law, no man can excuse himself under the plea of necessity or compulsion for taking the life of an innocent person." *Arp. v. State*, 97 Ala. 5, ____, 12 So. 301, 303 (1895). Some state statutes do, however, recognize duress as an excuse available for any crime. *See, e.g.*, DEL. CODE ANN. tit. 11, § 431 (1979); HAWAII REV. STAT., § 702-231 (1976 & Supp. 1983); PA. STAT. ANN. tit. 18, § 309 (Purdon 1983); TEX. PENAL CODE ANN., § 8.05 (Vernon 1974). In *General Principles of Criminal Law*, Hall reports that while the murder exception to the duress defense is maintained verbally, the courts have not decided any United States cases squarely on that basis, managing always to find some additional reason, for example, failure to seize an opportunity to escape, as a basis for affirming murder convictions where duress was claimed. *See* J. HALL, *supra* note 1, at 439-40. For the English doctrine, *see infra* notes 10-11.

10. There has been a tendency in recent English law to extend the meaning of "imminent." In *R. v. Hudson*, the court held that a threat to do injury at a future time, when the two young women defendants had left the courtroom and gone home, was immediate enough for the purposes of a duress defense to the charge of perjured testimony, the option of requesting police protection not sufficing to negate the strength and immediacy of the threat. *See* *R. v. Hudson*, [1971] 2 All E.R. 244, 247. *See also infra* note 11 (modifications of murder exception in English law).

for excusing a person who was coerced. It does not explain certain puzzling constraints on the defense.

One example of the kind of question the coercion test leaves unanswered is why the defense is barred with respect to the charge of murder.¹¹ This has caused controversy that is of special theoretical interest. A small body of literature has grown up in the attempt to challenge and reject, or to justify and make sense of this exception.¹² This exclusion of coercion as a defense to murder seems to present a situation in which public policy rides roughshod over both legal analysis and psychological reality.

Other questions have arisen in connection with the coercion defense. If duress excuses, why need the threat *always* be one of death or serious injury? Why not allow lesser threats to excuse if they are adequate to motivate a person of "reasonable firmness" in the circumstances?¹³ There are, after all, other contexts of law where no threat of serious harm is necessary to establish coercion (*e.g.*, coerced confessions).¹⁴ And there are legal contexts in which a threat of harm to the person is not at all necessary for the excuse of

11. The leading English cases of *D.P.P. for Northern Ireland v. Lynch*, [1975] A.C. 653, and *Abbott v. R.*, [1976] 3 All E.R. 140, 145, 146, seem to have established that duress can be a defense for a person charged with murder as "a principal in the second degree" (aider and abettor), but not for a person charged as a "principal in the first degree" (the actual perpetrator). Even this limitation on use of the defense has recently been rendered a shade less certain by the decision in *R. v. Graham*, which held that even a principal in the first degree may offer the defense if the prosecution does not object. *See R. v. Graham*, [1982] 1 W.L.R. 294, 300-01. In *R. v. Graham*, however, the absence of objection was due to the special circumstances of the case, and it seems that the substantive point of the limitation was respected even though the form was not.

12. *See Dennis, Duress, Murder, and Criminal Responsibility*, 96 L. Q. REV. 208 (1980); Gardner, *supra* note 9(f), at 121; O'Regan, *Duress and Murder*, 35 MOD. L. REV. 596 (1972); Smith, *A Note on Duress*, 1974 CRIM. L. REV. 349; REPORT ON DEFENCES, *supra* note 9(a), at 15.

13. *See* MODEL PENAL CODE, § 2.09(1) (Official Draft 1962). The test proposed in § 2.09 is as follows:

(1) 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, which a person of reasonable firmness in his situation would have been unable to resist. (2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged. (3) [Presumptions about husband and wife are abolished.]

Id. Thus, the Model Penal Code test, as compared to the common law test, omits the requirements as to imminence and death or serious bodily injury. *See id.* The Model Penal Code test also omits the murder exception. *See id.* Whether the victim's belief in the credibility of the threat must be "well-grounded" seems unclear. If a "person of reasonable firmness" means one who is reasonable in deciding how firm to be, the "well-grounded" requirement would seem in substance to be retained. For a lengthy review of the literature preceding adoption of the Model Penal Code test, see *State v. Toscano*, 74 N.J. 421, 432-40, 378 A.2d 755, 760-64 (1977).

14. *See infra* text accompanying notes 111-16.

coercion to exist (*e.g.*, economic coercion).¹⁵ The legal tests of coercion in these latter two contexts differ substantially from each other, and each test in turn differs substantially from the coercion test in the criminal defense context. Nor do these three by any means exhaust the list of different types of legal coercion.¹⁶ That the tests of coercion differ is well established, but why they differ has hardly been discussed.

Ultimately one wonders what general concept, if any, is guiding the judges who have created the case law in this area. To find the general concept one must turn from the concreteness of the various different legal tests or criteria of coercion, to seek further for the underlying *general meaning* of the concept that purportedly generates these different sets of criteria for different types of contexts.

1. Coercion as the "overborne will"

One kind of answer to the request for a general concept of coercion is ubiquitous in the legal literature on the topic. This answer is that coercion, whatever the context, generally has to do with the individual's *will*, and that, specifically, coercion consists in "overcoming," "overbearing," "overpowering," "breaking," "destroying," "subverting," "removing," "neutralizing," or otherwise through some traumatic inner ordeal, rendering the individual's will impotent. Coercion is spoken of as being a "pressure" that "compels the will to yield," or on the other hand as a "suction process" that "drains it of its capacity for free choice."¹⁷

15. See *infra* text accompanying notes 55-80.

16. Broadly speaking, the excuse or avoidance claim of coercion can apply wherever a legally crucial action occurs, that is, wherever a legal outcome hinges upon the act in question. The coerced act may be an act which warrants or elicits initiation of some action at law, or it may be some crucial act that is itself part of an already ongoing legal process. One can classify the uses by reference to the area of law in which the legal process lies (criminal law, economic law, wills, adoptions, labor relations, etc.); or one can classify the uses by reference to the stage of a process (by reference to the initial act, such as committing the crime; or by reference to subsequent acts in a legal process, such as confessing, pleading guilty, testifying, etc.).

17. See, *e.g.*, *Haynes v. Washington*, 373 U.S. 503, 513 (1963) ("overborne" will used with respect to coerced confession); *Culombe v. Connecticut*, 367 U.S. 568, 634 (1961) ("broken" will used with respect to coerced confession); *id.* at 576 ("suction process" used with respect to coerced confession); *Stein v. United States*, 346 U.S. 156, 185 (1953) ("overborne" used with respect to coerced confession); *Alcoa S.S. Co. v. Velez*, 285 F. Supp. 123, 125 (D.P.R. 1968) ("compels" used with respect to economic coercion); *Wise v. Midtown Motors, Inc.*, 231 Minn. 46, _____, 42 N.W.2d 404, 407 (1950) ("destroyed" will used with respect to economic coercion); *McFadin v. Catron*, 120 Mo. 252, _____, 25 S.W. 506, 512 (1894) ("coerced force destroying the free agency or will power"); *Rubenstein v. Rubenstein*, 20 N.J. 359, _____, 120 A.2d 11, 13 (1956) ("overcome" will used with respect to economic coercion); *State v. Gann.*, 244 N.W.2d 746, 752 (N.D. 1976) ("removed" free will used with respect to coerced criminal act); *Talmadge v. Robinson*, 158 Ohio St. 333, _____, 109 N.E.2d 496, 500 (1952) (same); *De Grassi v. De Grassi*, 533 S.W.2d 81, 85 (Tex. Ct. App. 1976) ("subvert and overthrow the will" used with respect to undue influence); *Great Northern Railway Co. v. State*, 200 Wash. 392, _____, 93 P.2d 694, 706 (1939) ("pressure" and "break

This use of language is rhetorically rich, dramatic, and correspondingly lacking in objective specificity of meaning. The language and imagery suggest that the topic is an "inner," psychic event, the outcome of ordeal or trauma: A psychic capacity has been seriously disabled, the person has been deprived of the psychologically effective use of a mental agency or function. If one tries to spell out more fully, literally, and exactly what the imagery portrays, difficulties and doubts arise. This core idiom, nevertheless, is so familiar and commonly used that it is plausible to suppose it has a legitimate, intelligible use, even if one cannot offhand state exactly what it is. Since this idiom is so pervasive in the case law on coercion, its role in legal reasoning deserves careful examination. To this inquiry we now turn.

One obvious tack to take in conducting the inquiry is to examine contexts where the idiom is used paradigmatically. Indeed the idiom suggests two paradigmatic situations: "Gun-at-the-head" coercion threats, and torture-induced confessions. The legal use of the concept of coercion has greatly extended the use of the idiom of the broken will beyond these paradigms. Nevertheless it will be a useful foundation for analysis if we begin by accepting the language at face value, or at least in a sympathetic spirit, in order to see what *legal* cogency it might have as applied, to begin with, in the gun-at-the-head paradigm. Since the gun-at-the-head paradigm has its paradigmatic home in the context of coercion as a defense to a criminal charge, it is to this context that we turn first.

Since coercion is said to be the breaking or overbearing of the victim's will, coerced behavior is often characterized as "involuntary."¹⁸ One obvious way in which this could be taken is to assume it implies absence of effective power to will, that is, unwilling behavior. One may then argue that, as unwilling, the behavior could not constitute the *actus reus* of the crime.¹⁹

down the resistance" used with respect to economic coercion); *R. v. Hudson*, [1971] 2 All E.R. 244, 246-47 ("destroyed" and "neutralized" used with respect to coerced criminal act); *R. v. Bourne*, 36 Crim. App. 125, 128 (1952) ("overborne" will used with respect to coerced criminal act); *The Attorney-General v. Whelan*, [1934] Ir.R. 518 ("overborne" will used with respect to criminal act), *quoted in* D.W. ELLIOTT & J.C. WOOD, *CRIMINAL LAW* 47 (3d ed. 1974).

18. J. SMITH & B. HOGAN, *supra* note 1, at 164; J. ARCHBOLD: *PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES* § 17, at 55 (41st ed. 1982). "[I]t is clearly established that duress provides a defence...[if] the commission of the alleged offence was no longer the voluntary act of the accused." *R. v. Hudson*, [1971] 2 All E.R. 244, 246.

19. The uses of "involuntary" in the law are protean. Inevitably there are differing usages and opinions in regard to the meaning and interrelations of the terms "involuntary," "unwilled," "act," and "*actus reus*." There is, however, an important line of interpretation and usage in which "involuntary" implies "unwilled behavior" and hence absence of an "act" or "*actus reus*." See Cook, *Act, Intention, and Motive in the Criminal Law*, 26 *YALE L. J.* 645-52 (1917); see also O.W. HOLMES, *THE COMMON LAW* 73-74 (1963). And as recently as the Model Penal Code, § 1.13(2), (3), and § 2.01(2), the same idea was proposed in substance. LaFave and Scott also expound this approach. See W. LAFAVE & A. SCOTT, *supra* note 1, at 179-81; see also G. WILLIAMS, *supra* note 1, at 31-34; Dennis, *Duress, Murder and Criminal Responsibility*, 96 *L. Q. REV.* 208, 220 (1980).

The intent in the main text above is not to argue that "unwilled" does necessarily imply

Since there can be no crime if there is no *actus reus*, this would logically be a complete defense.²⁰ Thus the idiom of the broken will, taken at face value, is verbally adequate to establish coercion as a general defense.

The difficulty with this approach arises at the factual level. The shift from the idiom of the broken will to the more specific and technical legal claim that the behavior was "unwilled" generates what most commentators have viewed as unacceptable factual implications.²¹ In the typical coercion case, the person who acts under coercion is not a mere automaton, a mere bodily extension of the coercer's will. If we do use the idiom of the "will," the correct characterization of the facts requires us to say that the victim of coercion is one who *wills* to comply. True, it would also be idiomatically correct to say that the victim acts "unwillingly."²² In short, the English idiomatic use of "will" and its verbal variant forms is complex and not designed for the purpose of science or even of *prima facie* logical consistency. The substance of the matter, however, requires us to recognize that a victim of coercion may deliberate and choose how to act, and may continuously

"involuntary" and, therefore, absence of an "act" or "*actus reus*," but to pursue that line of thought to see where it goes. Then the discussion will take up other ways of interpreting these notions and their interrelations. In remarks on coercion, compulsion, and necessity, the court in *Gillars v. United States* characterizes necessity (and, by implication, coercion) as a case of having "no choice." See *Gillars v. United States*, 182 F.2d 962, 976 n.14 (D.C. Cir. 1950). Lord Simon, in the leading case of *D.P.P. for Northern Ireland v. Lynch*, says that "'Volition' I take to be synonymous with 'will'...and an involuntary physical movement is not an 'act.'" [1975] A.C. 653, 689. Lord Simon, however, then goes on to say that in duress the act is voluntary. *Id.*; see *id.* at 709-10 (discussion of Lord Edmund-Davies of what he calls "theory 2"). The Report on Defences of General Application seems to wander into at least suggesting that duress produces incapacity to act lawfully when it says that "[t]he underlying analysis of duress is that it takes account of the infirmity of human nature, and recognizes that ordinary people cannot be compelled by the fear of a criminal sanction when by duress they are deprived of their proper judgment." REPORT ON DEFENCES, *supra* note 9(a), at 14. On the whole, however, the Report on Defences views behavior under duress as willed, and as including both *actus reus* and *mens rea*. See *id.*

20. In the sense of the word as used herein, such a defense would not be an excuse, for it would amount to a denial that the criminally forbidden act had been committed, rather than a confession that the criminal act had been committed, along with a plea to avoid condemnation and penalty. For a discussion of concepts of excuse that have a close relationship to this, see G. FLETCHER, *supra* note 9(f), at 456-58, and Fingarette, *Rethinking Criminal Law Excuses*, 89 YALE L.J. 1002 (1980).

21. See, e.g., J. HALL, *supra* note 1, at 446; W. LAFAVE & A. SCOTT, *supra* note 1, at 374; G. WILLIAMS, *supra* note 1, at 577-78; Dennis, *supra* note 12, at 234-35; Wasik, *Duress and Criminal Responsibility*, 1977 CRIM. L. REV. 453, 455. See also *D.P.P. for Northern Ireland v. Lynch*, [1975] A.C. 653 (Lord Kilbrandon); *id.* at 707 (Lord Edmund-Davies). The famous argument of the English jurist, James Fitzjames Stephen, viewing duress as a matter of competing threats by the coercer and by the law, implies that duress is a matter of competing motives for choice rather than a lack of will. See 2 J.F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 107-08 (1883); see also REPORT ON DEFENCES, *supra* note 9(a) (same view taken). Sir Rupert Cross emphasizes duress as choice under constraint, rather than as "*non voluit*." See Cross, *Murder Under Duress*, 28 U. TORONTO L.J. 369, 372-73 (1978).

22. "[W]hat is done will be done most unwillingly but yet intentionally." *D.P.P. for Northern Ireland v. Lynch*, [1975] A.C. 653, 670 (Lord Morris).

act intentionally and purposefully—as an intelligent agent of the coercer—in order to keep conduct in accord with the current demands of the coercer. All this establishes in fact what is incompatible with the meaning of the legal concept of “unwilled behavior.”

Thus, if we say that in coercion the will is “bent,” or “overborne,” we certainly do not mean “bent” in the way an axle is bent, or overborne in the way a soldier is overborne by an advancing tank—that it is rendered inoperative, put out of service. Nor, if we speak of the will as “broken” or “destroyed,” do we intend a case of losing the use of one’s mind, nor even losing the use of a “part” of it. On the contrary, coerced conduct is plainly a case of *using* one’s mind.²³ The victim’s decision as to what to do may be made in fear or terror, but the behavior is not sheer mindless panic. No doubt it is the awareness of these unacceptable factual implications, if “broken will” is taken in a literalistic way, that often leads the courts to qualify the idiom and to speak of the loss of “free will”²⁴ in coercion, rather than of the loss of “will” *simpliciter*.²⁵

23. Thus we exclude such recognized forms of involuntariness as, for example, the flailing of an epileptic, the fall of one who trips and stumbles, or the bodily movements of one who suddenly and totally loses consciousness. These are the kinds of behavior that are factually quite untypical of coercion, and are forms of involuntariness that are paradigmatic of literally unwilled behavior, and hence of absence of the *actus reus*.

24. See *infra* notes 38-41 and accompanying text.

25. Interestingly enough, if one were to accept the translation of the broken will into an absence of will and consequent absence of *actus reus*, the coercion defense would be *too* strong. Logically, it would seem to imply that coercion should then be a defense to an allegation of murder. LaFave and Scott, make much the same point. See W. LAFAVE & A. SCOTT, *supra* note 1, at 374 n.3. But this of course is not the law. It is true that the rule excluding coercion as a defense to murder has been criticized as bad law. To some it has seemed unacceptably unrealistic. Hobbes’ epigram—“If I doe it not, I die presently, if I doe it, I die afterwards; therefore by doing it there is time of life gained”—expresses the purported irrationality of expecting the threat of future punishment to have any effect where the alternative to killing an innocent person is one’s own immediate death. LEVIATHAN, 1651, pt. 2, ch. 27. Lord Wilberforce, in *D.P.P. for Northern Ireland v. Lynch*, seems to reject as unjustified that the law should expect self-sacrifice in order to save another. [1975] A.C. 653, 681. In this connection, the South African case of *S. v. Goliath* (1972), (3) S.A. 1 (A.D.), is often cited in English law. In general, the movement in English law has been to narrow the murder exception to the coercion defense rather than to abandon it altogether. See *supra* note 18. Dennis argues against the exception, but not on the ground that the victim behaves without “will.” See Dennis, *supra* note 12, at 236. Some state statutes on the defense of duress have not incorporated the common law exception as to murder. See, e.g., DEL. CODE ANN. tit. 11, § 431 (1979); HAWAII REV. STAT., § 702-231 (1976 & Supp. 1983); TEX. PENAL CODE ANN., § 8.05 (Vernon 1974). Hall’s discussion stresses the reluctance of courts to convict squarely on the basis of this exception to the coercion defense. See J. HALL, *supra* note 1, at 439-40. The Model Penal Code, § 2.09, omits the murder exception. But the rule has long been law and an adequate account of coercion ought at least to show why the rule has plausibility. See *supra* note 9(g). If judges really did conceive of the coerced act as literally willless, without intent or self-control, it would become implausible to suppose that they would have stayed with the rule because of public policy concern that to allow coercion as an excuse for murder might encourage acquiescence in murderous enterprises, or because of moral concern that one ought to sacrifice one’s own life rather than take an innocent person’s life. Such considerations would be beside the point in this article since they presuppose self-control, intent, and will.

There are other possible interpretations, however, of the language of the "broken," "overborne," "destroyed" or "neutralized" will, interpretations that avoid so literalistic a tack, and that nevertheless aim at translating the idiomatic language into some kind of legal involuntariness. An obvious range of alternatives is based on viewing the issue as a matter of absence of *mens rea* rather than absence of the *actus reus*. Thus the claim of a broken will may be interpreted as the claim that even though an act is in the legal sense willed, the act in some respect lacks the requisite *mens rea* because of some form of "volitional defect."²⁶ Such an approach poses the question as to the specific form of volitional defect that we are to presume results in involuntariness and absence of *mens rea*.

The defense of ignorance or mistake of fact does plainly pertain to *mens rea* and has also been characterized in terms of "involuntariness."²⁷ If I do not know my act will have a certain consequence material to the criminality of the act, then perforce I do not intend, in doing the act, to cause that consequence; and so, finally, it can be said that in that sense I did not voluntarily bring it about. But to say I did not voluntarily bring it about remains, in substance, no more than a roundabout way of referring to the original substantive point that I was mistaken about what I was doing. That one can eventually render the point verbally in terms of "involuntariness" should not obscure the truth that none of this has anything in fact to do with any psychological defect of "volitional capacity," the kind of thing plainly suggested by the idiom of the broken will.

Sometimes the courts will say of irrational persons—the insane, mentally defective, or otherwise gravely mentally disabled—that they do not act voluntarily; and this has been characterized as a form of lack of *mens rea*.²⁸

26. *D'Aquino v. United States*, 192 F.2d 338, 362 (9th Cir. 1951) (voluntariness, when not negated by coercion, requires act be done "purposefully, freely,...intended and unconstrained"); *Gillars v. United States*, 182 F.2d 962, 976 n.14 (D.C. Cir. 1950) ("a voluntary mind" negated by coercion); *R. v. Hudson*, [1971] 2 All E.R. 244, 246 ("no longer the voluntary act of the accused"); *R. v. Bourne*, 36 Crim. App. 125, 128 (1952) ("[a] plea of duress...as showing that she had no *mens rea* because her will was overborne by threats...."). In the Canadian case of *R. v. Paquette*, 70 D.L.R. 3d 129, 135 (1977), the Canadian Supreme Court held that duress negatives the "common intention [general intent] to carry out an unlawful purpose." Furthermore, the absence of general intent was held to be relevant to coercion in *United States v. Hearst*. See *United States v. Hearst*, 412 F. Supp. 889, 891 (N.D. Cal. 1976). See also *infra* note 27 (quotation from Blackstone concerning defect of will).

27. The defense of action in ignorance of a material fact is a form of absence of voluntariness, a position formulated as early as Aristotle. See *Nicomachean Ethics*, Bk. V, Ch. 8. It is a view central to Spinoza's views on freedom and bondage. It is expressed early in English law in 1 HALE, *PLEAS OF THE CROWN* 42 (1678). Blackstone said: "[I]gnorance or mistake is another defect of will;...[f]or here the deed and the will acting separately there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law...." 4 W. BLACKSTONE, *COMMENTARIES* *27. Among modern commentators, Hall adopts this formulation. See J. HALL, *supra* note 1, at 370-71; see also RUSSELL ON CRIME 71-72 (J.W.C. Turner, ed. 1963) (discussing this formulation in historical terms).

28. "Insanity, which robs one of the power to make intelligent choice between good and evil,...." Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004 (1932). Goldstein discusses one such

The involuntariness referred to is constituted in substance by either or both of two conditions of mind as traditionally construed by the court, either serious loss of the ability to reason, or serious loss of self-control from causes other than the loss of reasoning ability.²⁹

Where there is loss of reasoning capacity, the behavior can be characterized as "involuntary" on the basis of argument analogous to that used in connection with mistake and ignorance.³⁰ For analogous reasons, this kind of "involuntariness," therefore, is not pertinent to any involuntariness one might find in coercion. Coercion victims, who comply rationally with the orders of the coercer, are not in fact persons whose reasoning capacity is "destroyed" or "broken."

Analysis of the precise nature of loss of self-control is often evaded by use of the legal catch-all term "involuntary." As has already been noted,

point of view generally under the rubric of the "liberal" position, a position from which deviant behavior is viewed as "the product of forces beyond the individual's control...." A. GOLDSTEIN, *THE INSANITY DEFENSE* 14 (1967). One common psychiatric view, based on belief in psychological determinism, implies that in the only sense in which "free" makes sense as applied to actions, a neurotic or psychotic act would not be free. See Knight, *Determinism, 'Freedom', and Psychotherapy*, 9 *PSYCHIATRY* 251 (1946). Another modern view, from the very different point of view of a legal scholar, expresses the significance of the excuse of insanity as demarcating the loss or absence of that "autonomy" which is characteristic of the sane. See G. FLETCHER, *supra* note 9(f), at 846. Morse formulates the legal import of "craziness" in terms of "harder and easier choices," which seems to suggest the issue of voluntariness, although Morse says he uses the phrase in its "commonsense" meaning. See Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 *S. CAL. L. REV.* 527, 563 (1978). Morse summarizes generally: "[I]f an actor's behavior is apparently and inexplicably irrational and crazy, the law and also persons in general assume that because of mental disorder the actor was not in control of his behavior—that it was not chosen." *Id.* at 563-64. That mental affliction bears ultimately on legal responsibility by reason of absence of *mens rea*, *i.e.*, that the act is not "a product of choice," seems to be the gravamen of Professor Herbert Wechsler's opening remarks in the Panel Discussion on Insanity as a Defense. See *Second Judicial Circuit, Annual Judicial Conference, Insanity as a Defense*, 37 *F.R.D.* 365, 381 (1964). See also *State v. White*, 60 *Wash. 2d* 551, —, 374 *P.2d* 942, 965, *cert. denied*, 375 *U.S.* 883 (1962); *State v. Maish*, 29 *Wash. 2d* 52, —, 185 *P.2d* 486, 490-94 (1947); *State v. Harrison*, 36 *W. Va.* 729, 740-44, 15 *S.E.* 982, 990-91 (1892). Kadish proposes the concept of absence of general *mens rea* to cover excuses such as insanity. See Kadish, *The Decline of Innocence*, 26 *CAMBRIDGE L.J.* 273 (1968). See generally H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 44-65 (1979) (full discussion of this theme).

29. One or both of these two criteria appear in the insanity context in *M'Naghten's Case*. See *Daniel M'Naghten's Case*, 10 *Clark & Fennelly* 200, 210, 8 *Eng. Rep.* 718, 722 (1843) (defendant labored under "defect of reason," so he "did not know the nature and quality of the act..., or...[that it] was wrong"). They also appear in so-called "irresistible impulse" cases. See, *e.g.*, *Davis v. United States*, 165 *U.S.* 373, 378 (1897) ("his will...completely destroyed"); *Parsons v. State*, 81 *Ala.* 577, —, 2 *So.* 854, 866-67 (1887) ("lost the power to choose between the right and wrong...his free agency was at the time destroyed"). Furthermore, the criteria appear in various versions of the now widely adopted Model Penal Code test. *MODEL PENAL CODE* § 4.01 (Official Draft 1962) ("lacks substantial capacity either to appreciate the criminality [or wrongfulness] of his conduct or to conform his conduct to the requirements of law").

30. See *supra* text accompanying note 27.

this could not be taken to amount to unwilling behavior. On the other hand, loss of self-control behavior has been characterized not as unwilling but as "irresistibly" willed.³¹ "Irresistibility" then becomes a candidate for expressing the kind of involuntariness in coercion that is the basis of the defense. The "irresistibility" approach to the matter has had support not only in legal literature but also in philosophical literature.³²

The practical difficulties that such an approach poses for the law are familiar to those acquainted with the literature on criminal responsibility. Lady Wootton summarily stated the issue some time ago, echoing the remarks of the Lord Chief Justice of England: The step between "he did not resist his impulse" and "he could not resist his impulse" is one that is "incapable of scientific proof."³³ Certainly, the courts have found no rational formula, no criteria or paradigmatic patterns of evidence that unambiguously lead to a reasoned conclusion on the question. The problem is not that expert witnesses disagree on this issue because of a dispute about the facts; they may indeed agree on the facts, but they disagree on what conclusion to draw.³⁴ The revealing feature of the disagreement is that there is no agreement as to what facts would even in principle settle it. In short, the question is not a factual one; it is differences in professional ideology or theory that seem to be at issue.³⁵

The point of the preceding remarks is not merely to comment on the practical difficulties that emphasis on "irresistibility" can create for the coercion defense; the main point is to establish that the analysis of the coercion defense as a form of "irresistibility" defense is an incorrect analysis. That it is incorrect follows from the fact that when coercion is the defense, these familiar and ubiquitous difficulties over irresistibility typically do *not* emerge. In court cases where coercion is at issue, it is quite uncharacteristic to present experts' testimony delving in depth into the psychology of the defendant, whereas such testimony is commonly the centerpiece in cases where "irresistible impulse" or "loss of self-control" are the bases of defense. Now if the irresistibility of desires, motives, or impulses were indeed the essence of the "involuntariness" in coercion, there is no good reason why such elaborate expert testimony, and the usual difficulties associated with proof of "irresistibility," should be absent when the existence of coercion is placed in question.

31. See generally A. GOLDSTEIN, *supra* note 28, at 67-79; Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956 (1952). For a use of this language in the context of coercion, see *Gallaher Drug Co. v. Robinson*, 13 Ohio Misc. 216, ____, 232 N.E.2d 668, 670 (1965) ("irresistibly driven toward...irrational action").

32. Frankfurt, for example, has argued that we can explain the excusatory force of coercion only if we assume as an essential condition of coercion that the victim's desires or motives are "beyond his ability to control." Frankfurt, *Coercion and Moral Responsibility*, in *ESSAYS IN FREEDOM OF ACTION* 65-86, 72 (T. Honderich ed. 1973).

33. B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 73 (1963).

34. H. FINGARETTE & A. HASSE, *supra* note 28, at 52.

35. *Id.* at 62.

Turning to involuntariness as possibly being a "loss of self-control" in some other or broader sense than an "irresistible" desire or impulse, we can see that the very notion of loss of self-control seems to be at odds with the facts in the defense of coercion. On the contrary, the victim's life may depend on keeping self-control and on carefully obeying the coercer.³⁶ Panic or other loss of self-control may frustrate the coercer's aims, and may evoke fear or anger reactions, thus provoking the coercer into bringing about the very disaster the victim fears. Far from being non-responsible because irresistibly driven,³⁷ the victim of coercion may manifest great, even heroic responsibility and self-control. Coercion does not destroy the responsibility-status of the actor, but it excuses the actor from culpability.

There remains still another approach to understanding coercion as "involuntariness": The coerced choice may be characterized as "unfree,"³⁸ or as "unfair,"³⁹ or as being "no real choice."⁴⁰ It is initially plausible that these characterizations should imply "involuntariness," but analysis quickly reveals problems. The centrally relevant difficulty is that if these phrases are to be used precisely enough for legal purposes, then we need to know more specifically what mental state, if any, they designate. After all, there are many kinds of everyday situations in which one could say, with apt every day English language idiom, that "I had no real (or fair, or free) choice," and yet not at all have in mind conditions that would serve as a legal basis for the defense of coercion against a criminal charge. It may be, however, that a closer and more sympathetic examination of these idioms would suggest a more specific and legally usable meaning. We shall examine each

36. This important feature of coercion is fatally obscured by remarks in the English Law Commission Report to the effect that duress deprives the victims of "their proper judgment." See REPORT ON DEFENCES, *supra* note 9(a), at 14.

37. See Frankfurt, *supra* note 32.

38. State v. Gann, 244 N.W.2d 746, 752 (N.D. 1976) ("removes the free will of the actor"); Wise v. Midtown Motors Inc., 231 Minn. 46, _____, 42 N.W.2d 404, 407 (1950) ("destroys the victim's free will"); Parsons v. State, 81 Ala. 577, _____, 2 So. 854, 866 (1887) ("free agency...destroyed"). See Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313 (1957).

39. Wasik, *supra* note 21, at 454 ("whether the accused had a fair opportunity to make the choice"); see G. FLETCHER, *supra* note 9(f), at 833-34 (Fletcher supports the "unfair" doctrine, which he says is explicit in German law and French law, to the effect that the question in duress defense is what we can "fairly" expect of the person).

40. Gillars v. United States, 182 F.2d 962, 976 n.14 (D.C. Cir. 1950) ("leaves no choice of action"); Wise v. Midtown Motors Inc., 231 Minn. 46, _____, 42 N.W.2d 404, 407 (1950) ("whether or not the party really had a choice"); Frankfurt, *supra* note 32, at 77 (in effect arguing that the coerced person is quite literally unable to choose, *i.e.*, "He cannot effectively choose to do otherwise."). See Tallmadge v. Robinson, 158 Ohio St. 333, _____, 109 N.E.2d 496, 500 (1952) (economic coercion: "whether the party affected really had a choice"); Siström v. Anderson, 51 Cal. 2d 213, _____, 124 P.2d 372, 376 (1942) (economic coercion: "The test in any case is whether the complaining party was or was not in a position to exercise his own will"); see also Gardner, *supra* note 9(f), at 133 (proposing as one relevant interpretation of duress-necessity defense that "forces acting on him made 'choice' impossible").

idiom in turn, and in the process begin to make some substantive progress toward understanding the true content of the coercion concept.

Of the three characterizations, "unfree choice" is the least promising as an idiom that could lead us to an identifiable psychological condition which would fulfill the two conditions necessary, that is, correspond to "broken will" and have a clear and specific legal excusatory potential. In the first place, it does not necessarily follow that if I am not free to choose I am therefore coerced. For example, I am not free to choose to speak Swahili; nor am I free to loan you money (because I have promised to loan what I have to another person). But in neither case am I coerced. On the other hand, neither is it plainly entailed that a coerced choice is unfree. Nozick used this example of a choice that is coerced but nevertheless free: The coercer makes a threat which is credible and which frightens the victim into compliance, but in reality the coercer never had the power to carry out the threat. Here, says Nozick, the compliant victim was in fact free to refuse to comply, but the choice was made under coercion.⁴¹

Of course one may quibble about the meanings of the terms and these particular uses of "free" and "coerced." In each illustration the conclusion rests on acceptance of certain intelligible but still debatable uses of "free" and "coerced." What such illustrations definitely bring out is the fact that an explanation of coercion in terms of the concept "free," rather than reducing our difficulties only adds to them. Debates over the meaning of "freedom" and "free choice" fill many more volumes than do debates about the meaning of "coercion." Therefore, it is not a wise strategy to explain the problematic concept of "coercion" in terms of the far more problematic concept "free."

We turn, then, from "unfree" choice to "unfair" choice. It deserves notice that in everyday English usage the notion of "coercion" need not necessarily imply unfairness. The policeman who points a gun at the criminal assailant's head, and orders the latter to drop his gun and surrender, is surely using coercion, but he is not acting unfairly. Of course this is not coercion in the legal sense at issue here—coercion as a defense to a criminal charge. It remains, then, to ask: Does the legal defense of coercion necessarily imply a claim that the choice was "unfair"? The answer, roughly speaking, is yes.

The coercer's threat must be unlawful,⁴² and in that legal sense the victim was not allowed a "fair" choice. If one speaks of coercion as implying

41. Nozick, *Coercion, in Philosophy, Science, and Method*, in *ESSAYS IN HONOR OF ERNEST NAGEL* 440 (1969).

42. W. LAFAVE & A. SCOTT, *supra* note 1, at 374 (duress defined as "unlawful threat...."); MODEL PENAL CODE § 2.09(1) (Official Draft 1962) (duress defined as "[u]se of, or a threat to use, unlawful force"). See R. PERKINS, *supra* note 1, at 956 (omitting to include this requirement in his explanation of duress, but immediately afterwards, in discussing Necessity (which he also labels "Duress of Circumstance"), distinguishing Necessity from Compulsion-duress by reference to absence of wrongful act in former); *State v. Toscano*, 74 N.J. 421, —, 378 A.2d 755, 764 (1977) (using Model Penal Code test). The Model Penal Code test or

unfair choice, it may also be plausible to say that the choice, therefore, was

close variants that also explicitly specify the "unlawful" character of the coercer's act of coercion, are being adopted increasingly widely in case law and statutes. See *supra* note 13 (Model Penal Code test). What is noteworthy, however, is that this element of the test is so typically accepted without comment, one feels that it makes explicit what is self-evident and needs no comment. Even the rather lengthy discussion in the Model Penal Code incorporates this element without commenting on it. See Comments, MODEL PENAL CODE 7-8 (Tent. Draft No. 10, 1960). A review of case reports will reveal that although a court may not and usually does not comment explicitly on the point, the facts and the comments thereon either plainly imply or explicitly establish that the coercive threat is unlawful. In the view of the present writer, this wrongfulness of the coercer's act is essential to understanding why duress is a legal basis for excuse or avoidance. See *infra* text at section IV. In contrast, emphasis on the subjective, psychological impact of coercion has led to an almost total lack of comment on the legal status of the coercer's act, and to a failure to appreciate clearly the rationale that justifies excuse/avoidance where duress has operated.

One might ask: Could a *lawful* demand or threat amount to legal coercion? Of course there is something odd and improbable about the idea of a situation in which a *lawful* threat is used to coerce someone to do an *illegal* act, and this is no doubt why the "unlawful threat" condition is generally taken for granted without further comment. But in fact such situations do occur. For example, in *O'Sullivan v. Fisher*, the police lawfully ordered a drunk to leave private premises where he was trespassing; then, when he had dutifully stepped out into the street, they arrested him for public drunkenness. See *O'Sullivan v. Fisher*, [1954] S.A.S.R. 33, as reported in G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 759 (2d ed. 1961). The court held that the defense of duress did not apply because the police order was lawful. *Id.* This result is logical insofar as the duress defense, specifically, is concerned, if one accepts the essential role of the wrongfulness of the alleged coercer's act. The other side of the coin is the argument that one who is given an authoritative order (for example, by a judge in proceedings where he has or plausibly claims jurisdiction or by a police officer in the performance of duty, etc.) should be excused on that ground (not on the ground of duress) if the act commanded turns out to be illegal. See, e.g., *Cox v. Louisiana*, 379 U.S. 559, 571 (1969) (not guilty because unlawful act was at direction of police officer); *United States v. Mancuso*, 139 F.2d 90, 91-92 (3d Cir. 1943) (defendant not convictable for failure to obey draft board because of reliance on judicial decree). It is true that in these latter cases the law-officer's order was in the end determined to have been based on the law-officer's error; but if an ultimately unwarranted order from such a source will excuse the unlawful act of the defendant, surely a legally warranted order would do so.

In reality, then, it seems that the courts tacitly do make the finer distinctions called for by the present article. That is, if the defendant was initially doing something wrong (in the sense explained *infra* text accompanying notes 80 & 172), and thus was not an "innocent victim" (in the sense explained *supra* note 9(a) and accompanying text and *infra* note 52 and accompanying text), then a lawful order to do what would ordinarily be a lawful act will not constitute coercion, or an excuse of any kind, if because of the defendant's initial wrongdoing it turns out that the act is unlawful. See *O'Sullivan v. Fisher*, [1954] S.A.S.R. 33, as reported in G. WILLIAMS, *supra*, at 759; see also *Frasher v. State*, 8 Md. App. 439, 260 A.2d 656 (having contraband drugs in his possession, defendant was lawfully ordered to cross state line into Maryland, then convicted for possession in Maryland; court uses rationale as, in essence, stated above), *cert. denied*, 400 U.S. 959 (1970); *State v. Miller*, 187 So.2d 461 (La. App. 1966) (sheriffs ordered disconnected private car radio to be connected and, contrary to law, tuned into sheriff's radio band; held, not guilty). But see *State v. Ragland*, 4 Conn. Cir. Ct. 424, 233 A.2d 698 (1967) (car improperly parked, driver ordered by police to drive to station, but, as it turned out, driver had suspended license; defendant then charged with driving with suspended license; dictum that in this respect there was no guilt, though defendant's conviction on other grounds affirmed).

not voluntary. There is no gross impropriety in so doing. On the other hand, there is in law no tight or necessary connection between the word "unfairness" and involuntariness. More pertinent yet to present purposes is that the use here of the term "involuntariness" has as its substantive reference the unlawfulness of another's conduct, *not* a psychological state of the victim. Thus if we are to treat the idiom of the "broken will" as referring to an unfair choice, we must in turn see it as a roundabout way of referring to the unlawfulness of a second party's act. This is linguistically odd or at least misleading; it is, more importantly, a tacit shift of the logical center of interest of the inquiry. The dramatic language of the breaking of the will, which had seemed to be expressive of a certain traumatic psychic event in the victim's mind, has here turned out to be an indirect way of referring to the *legal* status of the *coercer's act*. In any case, the essential reference to the legal wrongfulness of the coercer's act will remain as a cornerstone of the concept of coercion, and of Victimization, to be developed below.

We turn now to coercion as allowing "no real choice."⁴³ This characterization is obviously highly idiomatic. As has been seen, this cannot mean that there was literally no will, or no self-control, or even that there was no responsible choice. One plausible interpretation of what the "no real choice" idiom connotes is that there was an absence of any *reasonable* choice. That is to say, no reasonable alternative existed,⁴⁴ no alternative could reasonably be preferred. Hence what the individual does is under the circumstances reasonable. More than that, it is the only reasonable thing to do. But then the quest for "involuntariness," following the trail from the "broken will" to "no real choice" to "no reasonable choice," has once again led to a sense of "involuntariness" that refers to a *legal norm* rather than to inner

43. See *supra* note 40.

44. The requirement that there be no reasonable escape from the threat is in substance uniformly held to be a necessary element of the coercion defense. See *R.I. Recreation Center v. Aetna Casualty & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949) ("there must be no reasonable opportunity to escape the compulsion without committing the crime"); *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935). Having a similar logical force is the formulation that: "[T]he defendant could not reasonably have been expected to resist...." See REPORT ON DEFENCES, *supra* note 9(a), at 15 (advocating this formulation). Sometimes the point is made more colloquially: "The person claiming the defense of coercion and duress must be a person whose resistance has brought him to the last ditch." *D'Aquino v. United States*, 192 F.2d 338, 359 (9th Cir. 1951). See *W. LAFAVE & A. SCOTT, supra* note 1, at 378. Although the English case of *R. v. Hudson* is in the circumstances of that case generous in interpreting the principle, the same basic principle is invoked. See *R. v. Hudson*, [1971] 2 All E.R. 244.

Frankfurt explicitly rejects the idea that "no real choice" as applied to coercion could mean no reasonable alternative. See Frankfurt, *supra* note 32, at 77. His argument, however, is based on his assumption that the victim of coercion is excused because, due to "irresistible impulse," the victim is not a responsible actor. He then argues that reasonable conduct is incompatible with the assumption that the individual is not responsible, and he concludes, therefore, that coerced acts cannot be reasonable acts. See *id.* As previously noted, however, a coercion victim may indeed act responsibly and reasonably, and even be justly praised for heroism. See *supra* text accompanying note 37.

psychic trauma. The issue is now the reasonableness of the choice, as determined in law, rather than the psychic disablement of the victim.

In summing up to this point, then, we have found the coerced act to be plausibly characterized as involuntary only insofar as that term is taken to allude to objective legal norms, either to the unlawfulness of a threat, or to the unreasonableness of a choice. On the other hand, the language of the "overborne" or "broken" will leads us down a blind alley if we try to take its legal force as arising out of some subjective condition of inner psychic trauma or breakdown. It is now appropriate, therefore, to put aside the rhetoric of the "broken will" idiom used as a psychological rationale for the defense of coercion, and to turn instead to a systematic account of the operative legal test for criminal coercion.

2. A Positive Account of "Coercion" as Defense to a Criminal Charge

The preceding analysis ended with the suggestion that a crucial feature of coercion is the absence of any "real choice," that is, the absence of any reasonable alternative. This suggestion can now be taken up systematically.

The classical test of criminal coercion necessarily entails the "no real choice" idea. It is implied by the conjunction of several elements of the legal test: (1) For coercion as a defense to a criminal charge to succeed, the test requires that the coercer's unlawful threat should have created for the victim a well-grounded belief that death or grave injury would be imminent on failure to comply with the coercer's command; (2) such compliance must not amount to participation in the killing of an innocent person;⁴⁵ and (3) the victim must be "innocent," that is, it must not be that the victim's own conduct culpably rendered the victim vulnerable to the coercer's threat. From these three propositions it follows that the victim has two alternatives only. One alternative is for the victim, innocent up to the point of decision, to resist and thereby foreseeably to be quickly and unlawfully killed or seriously injured.⁴⁶ The other alternative is to cooperate in a criminal act where no innocent life would be at stake. Legal policy must surely hold it to be unreasonable to act so as to foreseeably induce an immediate mortal assault on an innocent person if a feasible alternative would avoid unlawful threat to life.⁴⁷ Thus, in the context of coercion as a defense to a criminal charge, the conditions of the classic coercion test, taken jointly, entail that in the eyes of the law the victim had no reasonable alternative⁴⁸ to compliance.

45. See *supra* text accompanying notes 9(g) & 11.

46. It is assumed that the law does not require the citizen to act heroically, and so heroic defiance is not, in law, to be considered a "reasonable alternative," *i.e.*, one that a citizen is required to entertain, and indeed to prefer, in this context.

47. See *supra* text accompanying note 9(e).

48. This principle is obviously a narrower version of the principle underlying the defense of Necessity. Because it is a special form of that general principle, and because the general principle of Necessity as a defense has long been accepted in the common law, the narrower

It may appear that the word "fear," so commonly used in the formulation of the test,⁴⁹ introduces an essential psychological component. The word in this usage, however, need connote no more than "apprehension,"⁵⁰ that is, expectation of undesired consequences. The legal issue here is not the presence of emotion⁵¹ but the foresight of legally relevant consequences. Plainly, a person whose conduct and circumstances meet the legal test for coercion would be entitled to the excuse even if, as a result of prior experience or of natural temperament, the defendant had not experienced fear. Such a person might comply coolly and calmly because, being the only way to avoid death, compliance was the only reasonable alternative.

Given the victim's innocence,⁵² the other side of the coin is that the coercer's threat must be unlawful. In the informal idiom examined in the

formulation is also valid. However this is by no means to say that, in general, coercion should be viewed as a species of Necessity. See *infra* note 54.

49. Thus in *R.I. Recreation Center v. Aetna Casualty & Surety Co.*, the court formulated the "well established" rule that coercion must produce a "well-founded fear." 177 F.2d 603, 605 (1st Cir. 1949). Similarly, in *Gillars v. United States*, the court referred to "the force and fear" essential to coercion. 182 F.2d 962, 976 n.14 (D.C. Cir. 1950). Also, quite typically of the courts in defining coercion, the same two courts use the word "apprehension" apparently interchangeably with the word "fear."

50. See *supra* note 49.

51. Obviously there is a connection: The taking of life is proscribed so stringently by law because it is so grave a harm; and because it is so grave a harm, it does typically arouse fearful emotion. To feel fearful emotion under such circumstances typically is reasonable. No doubt it is the painfulness of the emotion, and the reasonableness of this under the circumstances that are principal reasons inspiring the acceptance of the basic legal principle that the unlawful taking of innocent human life belongs to the gravest category of criminal offense. Nevertheless, that legal principle suffices, in the context of law, to ground the excuse, and the subjective experience of emotion becomes irrelevant or only indirectly relevant. It becomes a crime in law regardless of any subjective fear felt or not felt. Correspondingly, the element of emotion is *not* an essential element of the classic legal test of criminal coercion; it is the unlawful placing of life at risk that is legally crucial.

In a spirit that may appear contrary to this, the English Law Commission in its 1977 discussion of duress, said, "It is difficult to see how the proper test in regard to the defendant's belief as to the nature of the threat could be other than a subjective one." REPORT ON DEFENCES, *supra* note 9(a), at 3. The Report stresses at a later point that "[t]hreats directed against a weak, immature or disabled person may well be much more compelling than the same threats directed against a normal healthy person." *Id.* at 10. This all suggests that the subjective emotion of fear, contrary to the thesis of the text above, is of the essence in establishing the defense of coercion. But careful examination of the language of the Report reveals that it contains the same ambiguities found ubiquitously in the case law on coercion. Are we to suppose that coercion is a subjective, emotion-driven *incapacity to resist*, or is it that evidence showing that the defendant was "weak, immature or disabled" might go toward proof that the defendant did take at face value, as a "threat of death," what a "normal, healthy person" might have been able to confront and resist. See *infra* text accompanying notes 94-99 (discussion of subjective element that may be relevant to determining "apparent reasonableness").

52. It bears emphasis that the assumption in the preceding analysis of the victim's "innocence" is not to be taken in the sense that the defendant is presumed not guilty of the crime charged, for that would be to beg the very question posed by the defense. See *supra* note 9(a). The point is, rather, that the defendant did not culpably (*e.g.*, through prior criminal participation or through recklessness) get into the position of vulnerability to such threats.

preceding section, the choice before the victim must be "unfair." The wrongfulness of the coercer's act is obvious and taken for granted, and the legal test of coercion in the criminal defense context is thus silent on the issue. After all, use of the coercion defense entails the claim that the coercer demanded commission of the criminally prohibited act. Only in rare and esoteric borderline cases⁵³ would one find even the arguable possibility that a person could *lawfully* threaten a person and demand that the person commit a criminally prohibited act. Moreover, as we shall see, the requirement of wrongfulness on the part of the coercer is made more explicit in other legal contexts, perhaps simply because it is not always true in those contexts that threatening demands need be unlawful.⁵⁴

53. See *supra* note 42 (discussing *O'Sullivan v. Fisher* and related cases).

54. It has been proposed that the coercion defense is a species of Necessity defense, an assumption that would fundamentally de-emphasize the significance of the wrongfulness of the threat. See G. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* 755 (2d ed. 1961). But see G. WILLIAMS, *supra* note 1, at 578 (between 1961 and 1978, Professor Williams changed his view to where coercion seems to be treated as a kind of ad hoc variant of Necessity.) Not infrequently the terms "coercion" and "necessity" are conjoined and treated as if they were essentially the same. See, e.g., *Gillars v. United States*, 182 F.2d 962, 976 n.14 (D.C. Cir. 1950); *R.I. Recreation Center v. Aetna Casualty & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949). Perkins seems to assimilate the two defenses in their fundamentals: "[A]ny threatened harm, whether by man or by the elements, which would have induced a person of reasonable firmness to do what [he] did, should be recognized as an excuse." R. PERKINS, *supra* note 1, at 960. LaFave & Scott also say that "[i]t would doubtless be possible to treat [coercion] as a branch of the law of necessity." W. LAFAVE & A. SCOTT, *supra* note 1, at 383. See Cross, *supra* note 21. Gardner notes that "[t]he doctrine of necessity is poorly developed in Anglo-American jurisprudence." Gardner, *supra* note 9(f), at 114. He adds that the "paucity of common law decisions and legislative effort devoted to it has led courts that do discuss the doctrine to disfavor the widespread application." *Id.*

On such a view, wrongful threat would merely be a familiar and common feature of certain types of Necessity, those types that have been given the separate name of coercion. The aspect of wrongfulness would logically add nothing essential to the legally excusing force of the plea. The essence of the matter, on the view that coercion is a form of Necessity, is that the defendant's act reasonably appeared to risk less harm than any available alternative. Whether this be due to someone's wrongful conduct or not is irrelevant.

It is notable that the Necessity defense, although long recognized in legal theory, has never succeeded in England. See REPORT ON DEFENCES, *supra* note 9(a), at 20. The Report expresses doubt whether any such common law general defense even exists in English law. See *id.* In the United States, its fate has not fared much better. See J. HALL, *supra* note 1, at 425-36 (discussion of "teleological necessity"). Hall says that while the doctrine in English law is in "an unsatisfactory condition," that is, not recognized by the courts but advocated by many commentators, it is "recognized in the substantive law of the United States." *Id.* at 433. On the other hand, he cites no United States cases where a defense of what he calls teleological necessity (*i.e.*, choice of lesser evil) was in his opinion unambiguously and rightly the basis of acquittal. Perkins cites the three cases viewed with suspicion by Hall, but definitely assigns them as successful uses of the necessity defense. See R. PERKINS, *supra* note 1, at 956. However Perkins, unlike Hall, seems to accept the principle that necessity should not be an excuse for killing an innocent and unoffending person. Perkins does cite cases, and defends the result, where necessity is not posed by mortal dangers but is posed by much less portentous choices among evils; the cases are few, however. As LaFave & Scott point out, where the legislature has itself, in its statutes, made determinations of value, the statutory determination has force.

Before proceeding to an analysis of coercion in other legal contexts, we may summarize the results of the discussion of the criminal defense by saying that coercion as a defense to a criminal charge requires at least that:

See W. LAFAVE & A. SCOTT, *supra* note 1, at 382. LaFave and Scott also note that the cases on point are not numerous. *Id.* at 383. The Model Penal Code provides for a defense of Necessity in § 3.02; and the pertinent comments to Tentative Draft No. 8 (1960) remark on the paucity of cases.

In recent years the necessity defense has been attempted unsuccessfully in cases of politically motivated offenses. See, e.g., *United States v. Simpson*, 460 F.2d 515, 517-18 (8th Cir. 1972); *United States v. Kroncke*, 459 F.2d 697, 700-01 (8th Cir. 1972). However, there has been occasional success at the trial court level in connection with prosecutions of "de-programmers" who forcibly kept religious converts under their control while "de-programming" them; yet the same defense, in regard to much the same circumstances, has been rejected in other such cases. See *United States v. Patrick*, No. Cr-74-320-S (W.D. Wash. Dec. 11, 1974) (defense allowed); *People v. Patrick*, No. N-320-778 (N.Y. Crim. Ct. Mar. 30, 1973) (defense allowed); *People v. Patrick*, 541 P.2d 320, 322 (Colo. App. 1975) (defense rejected); *People v. Florence*, No. 8699, *People v. Patrick*, No. 8688, *People v. Sacks*, No. 8686 (Fullerton, Cal. Mun. Ct. May 6, 1975) (defense rejected). In connection with de-programming and the necessity defense, see Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 83-85 (1977). It should be noted that in the defense of necessity to a forcible de-programming charge, the "greater evil" that the defendant was avoiding was not a natural event, but was an alleged wrongdoing by human beings.

The classical accounts of Necessity contrast it with duress by stressing that the choice of evils constituting Necessity arises out of natural events, whereas the choice in duress arises because of another human being's wrongful threat. Yet the de-programmer's defense is plainly not one of duress. This brings out that the true distinction between duress and Necessity is not based on the human or non-human origin of the dilemma, but instead is a distinction between Necessity as a choice-of-evils defense—where one of the evils might involve human conduct, and even human wrongdoing, but where the defendant was not being Victimized—and a Victimization defense (of which duress is a species). See *infra* text at section III. Plainly the de-programmer faces a dilemma caused by human conduct, which also happens to be alleged wrongdoing, but the de-programmer is equally plainly not the one who is wronged—not a Victim. See *infra* text accompanying notes 171-72. The meaning and rationale of these two types of defenses are very different. The defense of Necessity has also been used in recent years in connection with prison escapes. See *infra* text beginning just prior to note 159.

Duress and coercion, on the other hand, have been far more frequently invoked than Necessity, and what is more, often successfully so. In fact the courts have shown increasing sympathy for the duress defense in modern times, and have tended to enlarge rather than to restrict its scope. There is no good evidence that this disparity in use arises because situations of coercion are relatively common as compared to (noncoercion) situations of Necessity. Instead, the moral to be drawn seems to be that in the eyes of the law there has consistently been something systematically significant, and more forceful, about a plea of excuse for a criminal act motivated by a danger to the actor that was designedly created for that very purpose by a wrongful human threat, *i.e.*, Victimization, as contrasted with a defense based merely on the actor having faced a choice-of-evils dilemma. English commentators have been more explicit in affirming that there is a significant difference than have commentators in the United States. Thus, the English *Report on Defences* explicitly proposes keeping the duress defense, and even liberalizing its terms in some respects as compared to common law concepts. See REPORT ON DEFENCES, *supra* note 9(a), at 16. The Report, however, suggests that the Necessity defense has dubious authority, and ought to be explicitly excluded from the Criminal Code. See *id.* at 32. Williams argues that duress should not be viewed as simply a particular application of the doctrine of necessity. See G. WILLIAMS, *supra* note 1, at 579. While none of the arguments

- (a) There is an innocent victim—*i.e.*, one who innocently became vulnerable to
- (b) a coercer who wrongfully confronted the victim with a mortal threat and a demand, and
- (c) the victim, in response to the threat, complied with the threatener's demand because compliance was the only reasonable course.

B. *Economic Coercion*

“Economic coercion” is a legal rubric that covers many types of situations. In general, a party to a business transaction, if that party was coerced into the transaction, can avoid or be excused from ordinary legal consequences of such a transaction, for example, can have payments returned, or commitments voided.⁵⁵ We will consider a selected sampling of types of economic coercion.

above are those offered herein, they do support the general proposition in the text above to the effect that there has been and remains a persistent resistance to the necessity defense, and a consistent willingness to accept the duress defense, which taken jointly suggest a legally significant difference, practical as well as conceptual, between the two concepts. See Gardner, *supra* note 9(f), at 114 (speaking of courts as having “disfavored [the] widespread application” of the necessity defense). The conclusion that the wrongful threat intended as a motive for the act is central and essential rather than secondary in the context of the coercion defense is confirmed when one considers the tests of coercion in other legal contexts such as those discussed below in the remainder of this section.

55. Although the present study is not historical in its aim, it at least deserves note here that economic duress was not until modern times so broad in scope as stated in the text above. In both England and the United States, courts of equity had increasingly recognized over time what was called “duress of goods” as distinguished from “duress of the person.” But by the 20th century the scope of duress had expanded in United States law to cover many forms of business and property interests. See Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947) (excellent historical survey); see also *Sistrom v. Anderson*, 51 Cal. App. 2d 213, 124 P.2d 372 (1942); 13 WILLISTON ON CONTRACTS § 1602 (3d ed. 1957); Schwatka, *Economic Duress and Business Compulsion in California*, 40 CAL. L. REV. (1952); Annot. 77 A.L.R. 2d 803 (1959); Annot. 20 A.L.R. 2d 736 (1950); Annot. 75 A.L.R. 654 (1931). The development of analogous law in England seems to have been much slower. It was foreshadowed by *Astley v. Reynolds*, 93 Eng. Rep. 939 (1731), *Parker v. Great Western Railway Co.*, 135 Eng. Rep. 107 (1844), and *Maskell v. Horner*, [1915] 3 K.B. 106. These were not taken up vigorously until the past few decades, which have seen a strong movement toward a broad doctrine of economic duress akin to that of the United States. See *Rookes v. Bernard*, [1964] A.C. 1129 (H.L.); *D. & C. Builders Ltd. v. Rees*, [1966] 2 Q.B. 617 (C.A.); *North Ocean Shipping Co. v. Hyundai Constr. Co.*, [1979] 1 Q.B. 705; *Pao On v. Lau Yiu Long*, [1979] 3 All E.R. 65; *The Siboen & the Sibotre*, [1976] 1 Lloyd's Rep. 293 (Q.B.—Comm. Ct.). Dawson argues that the main function of duress doctrine has *always* been economic—“the prevention of unjust enrichment.” Dawson, *supra*, at 282. But this plainly seems to be an overgeneralization. While the prevention of unjust enrichment is often substantively central, it is in many cases not even relevant because money or valuables are not at issue even though duress is. For example, there is no question of unjust enrichment when coercing a person into doing a criminal act such as aiding in an assault or rape, or committing perjury, or treason. And in modern law, coercion may play a legal role, for example in adoption proceedings or confession to crime, where again unjust enrichment need have no role.

The first kind of economic coercion, and probably the one that most sharply contrasts with coercion as a criminal law defense, is coercion in which corporate or governmental entities rather than individual persons are the parties in litigation. In *Great Northern Railway Co. v. State*,⁵⁶ the Great Northern Railway Company (Company) paid a tax that it thought was unlawfully imposed.⁵⁷ The tax statute provided that failure to duly pay the tax would trigger automatically and immediately certain penalty provisions which would in fact have interrupted the Company's use of its property and the operations of the railroad itself.⁵⁸ Rather than refuse to pay the tax and suffer major economic loss that would for all practical purposes be irreparable, even if some appropriate subsequent legal action were successful, the Company paid the tax under protest.⁵⁹ The Company then sued for redress on the ground that payment had been coerced.⁶⁰ The court found that the Company had been correct in claiming that the tax had been unlawfully imposed.⁶¹ In consequence, said the court, an essential condition of coercion had been present: the State's demand for payment was wrongful.⁶² Moreover the court agreed that because of the irreparable large-scale economic impact that would result from the automatic penalty provision, no reasonable economic or legal alternative to paying the wrongfully imposed tax existed.⁶³ The court declared, therefore, that the claim of coercion was justified, and the Company was entitled to the return of the tax paid.⁶⁴

It should be noted at the outset that the legally relevant issues here are patently not psychological or "subjective." So far as the law was concerned, there were essentially two interrelated sets of issues, those centering on the legal wrong, and those centering on the *reasonableness* of the alternatives available to the Company. The issue of reasonableness raised objective questions of economics and of law, questions of corporate profit and loss, of the legality of the demand for tax payment, and of the availability of legal redress under a variety of different payment or no-payment conditions. This confirms our previous emphasis on the issues of wrongfulness and reasonableness as of the essence in coercion.

On the other hand, the court's opinion gives no clue as to the personal, psychological reactions or emotions of the corporate officers because, of

56. 200 Wash. 392, 93 P.2d 694 (1939).

57. 93 P.2d at 699-700.

58. *Id.* at 704.

59. *Id.*

60. *Id.* at 699.

61. *Id.* at 703.

62. *Id.* at 706 (quoting *Thompson v. Deal*, 92 F.2d 478, 484 (D.C. Cir. 1937)); *id.* at 707 (quoting *Cox v. Whelcher*, 68 Mich. 263, 36 N.W. 69 (1888)).

63. *Id.* at 706.

64. "[D]uress may sometimes be implied when a payment is made or an act performed to prevent great property loss or heavy penalties when there seems no adequate remedy except to submit to an unjust or illegal demand and then seek redress in the courts." *Id.* (quoting with approval the Supreme Court of Wisconsin).

course, such reactions were legally irrelevant. Thus our earlier rejection of the issue of psychic stress and trauma as not of the legal essence in coercion claims is thoroughly substantiated in this economic context. Nevertheless, it is not atypical that the court, even in a case of this kind, invokes the rhetoric of the "broken will." "The coercive purpose and effect," said the court, "was amply sufficient to break down the resistance....There was a yielding to compulsion...."⁶⁵ The language is "psychological"; the substantive issues are not.

The leading case of *Young v. Hoagland*⁶⁶ expresses a pertinent general rule in economic coercion:

[W]here, by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, he may recover it.⁶⁷

Here again the issues are defined in terms of reasonable business calculations and inequitable (wrongful) demands, no reference being necessary to inner psychic ordeals, stresses, or breakdown.

But not unexpectedly, the *Young v. Hoagland* court also discusses the issues in terms of a "threat to perform some unlawful act whereby plaintiff will suffer loss, [thereby inducing] the plaintiff, under circumstances sufficient to control the action of a reasonable man, to pay money which he would not otherwise have paid."⁶⁸ Here the phrase "control the action" suggests that the issue is one of psychological causation. But the sense of that phrase becomes ambiguous because it is "the action of a reasonable man" that is controlled, not the plaintiff's action. Presumably what "controls" reasonable men is by definition the reasonableness of the act, not inner breakdown or mere subjective emotion. So here, as in so many other similar instances,⁶⁹ what looks like a comment about psychological causality

65. *Id.*

66. 212 Cal. 426, 298 P. 996 (1931).

67. 212 Cal. at 431.

68. *Id.*

69. "Duress does not necessarily mean force or personal fear, but rather that pressure of circumstance which compels the will of man to yield to an exaction or payment to release his property from some illegal hold upon it." *Alcoa S.S. Co. v. Velez*, 285 F. Supp. 123, 125 (D.P.R. 1968). Again we see the rhetoric of the will "compelled to yield," and of psychological causality, and we sense the background imagery of the armed extortionist. At the same time other language in the formulation, as well as the facts in the case, reveal that in this case we are dealing with a highly impersonal business transaction between Alcoa Steamship Company and their Puerto Rican insurance company, a transaction in which, as in *Great Northern Railway*, 200 Wash. 392, 93 P.2d 694 (1939), the only relevant issues are economic calculation and legal analysis. The *Alcoa* opinion explicitly rejects necessity for "personal fear", whereas *Sistrom v. Anderson* casts the issue in such terms as: "Coerced by fear of a wrongful act by the other party." See *Sistrom v. Anderson*, 51 Cal. App.2d 213, 124 P.2d 372 (1942). In the economic context, it is easier to see that "fear," in its essential *relevant* meaning, connotes

becomes, when cashed in, a statement about the act's normative status under legal standards of wrongfulness and reasonableness.

The issues may become somewhat more complicated, although not changed in their essentials, when the victim of a wrongful threat is an individual rather than a corporate entity. This is especially so if that individual's legally cognizable interests in the transaction are not solely economic. Where individuals are economically coerced, personal or domestic interests may also be legally cognizable as interests at stake, and this is more likely to be so if the individual that is victimized is an individual who is not, as it were, "in business." It is for the court to define the bounds of the transaction and the nature of the interests at stake in the eyes of the law.

Thus, in *Leeper v. Beltrami*,⁷⁰ Leeper's personal home was threatened with foreclosure and sale if she did not make a payment wrongfully demanded. The court found coercion, holding that it was "not a reasonable alternative" for Leeper to assert her rights by rejecting the wrongful demand, if to do so she had to allow her home to be sold forthwith, and then subsequently had to sue for money redress.⁷¹ The court recognized as a legally relevant interest the unique personal value of one's own home, a value not reasonably translated into future money damages in the context of resisting wrongful demands.⁷² By contrast, there is in *London Homes Inc., v. Korn*⁷³ a very different legal definition of the interests legally relevant for purposes of assessing reasonableness. In *London Homes*, a large-scale shopping mall development company was faced with what seemed a wrongful demand by a lessee.⁷⁴ Compliance would have allowed normal progress toward completion of the project, and prompt financial returns on the large investment.⁷⁵ Litigation along with refusal to comply, however, would have entailed a delay of years, with continuing costs and no return on investment.⁷⁶ The developer gave into the demand, then sued for redress on grounds of coercion.⁷⁷ The court held that it is a normal risk in such business enterprise

merely a reasonable anticipation of an economically undesirable result. *See supra* notes 49 & 51. In economic coercion as in the criminal defense of coercion, the reasonableness of the victim's act presupposes the absence of any reasonable alternative: It "is undoubtedly the law" that "if the plaintiffs had a reasonable alternative [to compliance], the [compliance] was not made under duress." *Louisville Title Ins. Co. v. Surety & Guar. Co.*, 60 Cal. App. 3d 781, 801, 132 Cal. Rptr. 63, 77 (1976); *Leeper v. Beltrami*, 53 Cal. 2d 195, 204, 347 P.2d 12, 19, 1 Cal. Rptr. 12, 19 (1959). The implication is plain: Even if company A makes a wrongful demand on company B for payment, and even if this arouses intense emotions in company B's executive officer that leads him to comply, this is not legally coercion. It is of the legal essence to determine whether there existed a reasonable economic-legal alternative to a wrongful demand.

70. 53 Cal. 2d 195, 347 P.2d 12, 1 Cal. Rptr. 12 (1959).

71. 53 Cal.2d at 205.

72. *See id.*

73. 234 Cal. App. 2d 233, 44 Cal. Rptr. 262 (1965).

74. 44 Cal. Rptr. at 264.

75. *See id.*

76. *See id.*

77. *Id.* at 265-66.

that there may be difficult business dealings, and occasion for litigation and the accompanying costs.⁷⁸ Here we see that, in contrast to the risk to Leeper's personal home, the losses attendant on litigation were reasonable from the standpoint of the law as a cost of defending the corporation's economic rights.

Although the claim of coercion in *London Homes* was rejected, the court did acknowledge that "within the common or every-day meaning of the words" there was "a kind of necessity or compulsion to get things done immediately...."⁷⁹ Here we see clearly that "reasonableness" is a legal norm, in the sense that the court decides definitively what interests are legally relevant to assessing reasonableness, and definitively determines their weight. The court also determines what interests that may be legitimate from other perspectives are not to be considered as relevant for the legal purposes at hand. In doing so, the court may take into account the norms of common economic practice, or of domestic customs and values, or of moral aspects of the affair.⁸⁰

It deserves emphasis for our purposes that while economic, domestic, moral, or other extralegal norms may be substantively incorporated into the

78. *Id.* at 267.

79. *Id.*

80. See *White v. State*, 44 Ohio App. 331, 185 N.E. 64 (1933) (abandoning wife without just cause is not per se legally punishable, but is wrongful enough to constitute general *mens rea* for crime of abandoning pregnant wife, even though defendant did not know of pregnancy). The classic cases here are the statutory rape and analogous offenses. Even in the non-negligent absence of knowledge of the female's age or status, the general *mens rea* required for violation of statutes prohibiting sexual intercourse with such females has been widely held to be present by reason of the wrongfulness, even where not in itself unlawful, of non-marital sexual intercourse. See *R. v. Prince*, (1875) 13 Cox C.C. 138, [1874-80] All E.R. Rep. 881; see also Annot., 8 A.L.R. 3d 110 (1966). The law bearing on unconscionability in economic matters is notably replete with cases in which what the court declares to be wrong is conduct incompatible with contemporary norms of fair business dealing rather than a specific illegal act. See *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111 (D.C. App. 1971); *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971); UNIFORM COMMERCIAL CODE § 2-302 (1962) (Purposes). "The act or threat upon which a claim of [economic] coercion is predicated must only be wrongful in a moral sense, not necessarily a legal one." *Gerber v. First Nat'l Bank*, 30 Ill. App. 3d 776, 779, 332 N.E. 2d 615, 618 (1975). "[W]e think [the contract] is too hard a bargain and too one-sided an agreement to entitle plaintiff to relief in a court of conscience.... We are not suggesting that the contract is illegal...." *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

Recent successful defenses in prison escape cases also furnish patent examples of the tacit importation of moral norms into legal reasoning. The defense requires that there have been no reasonable alternative to escape. See *infra* section III (discussion of prison escape). If acquiescing to homosexual demands were not so freighted with negative moral value in the mind of the court as well as that of the defendant, surely the defense would be implausible. Imagine, for example, that the threats of the other prisoners were to brutalize or kill the defendant unless the defendant submitted to having his hand held for an hour. Obviously, although this too is a demand for bodily submission, it does not have the moral connotations of bodily submission to homosexual intercourse, even if the latter were accompanied by no physical injury or pain at all. But while the demand for handholding would surely not establish an excuse for prison-escape, it is the moral import of unwillingly submitting to the sexual embrace that makes this option unreasonable and, thus, escape from prison is accepted as the only reasonable alternative by the court.

law on the case, they acquire their legally normative force by reason of a legally authoritative decision, and only insofar as that decision does ascribe legal force to them. Presumably, the *reasons* for this legal decision are rooted in legal principle and in legal policy. Thus, in characterizing as “legalist” the present approach to coercion (and ultimately to Victimization), it is not claimed that all considerations of psychology, morality, custom, or other extra-legal norms are totally excluded. Rather, the point is that such extra-legal considerations become relevant only occasionally, and always have their normative force derivatively from law. Analogous distinctions can be made in many other areas. For example, a *medical* view of diet is significantly different from a *culinary* view of diet, although the former may on occasion take culinary facts and norms of taste into account. The medical authority decides on medical grounds, however, which culinary considerations will be given medical support for medical purposes, and which culinary considerations will be ignored or even overridden. It is not merely a “verbal” matter, then, that in occasionally recognizing certain economic or moral norms in regard to coercion, a court does so from a “legalist” standpoint.

Now we are in a position to appreciate how it is true in some types of cases that individual psychological processes and traits may be legally relevant to determining whether there is economic coercion. For example, in *Wise v. Midtown Motors*,⁸¹ the plaintiff had been asked to sign a release of an action against a former employer, and was threatened with dismissal from his current job and with heavy litigation expenses if he refused to sign the release.⁸² Unable to contact his lawyer, the plaintiff signed the waiver, and later asked the court to invalidate the release on the ground that it was given under coercion.⁸³

The *Wise* court emphasized that the former employer’s threats were wrongful.⁸⁴ The court noted that while it is true that a mere threat to bring a legal action, if made in good faith, is not wrongful and, therefore, “does not constitute duress,” it is wrongful to threaten another with demands and litigation “where the purpose is not to enforce the demand, but rather by exceeding the needs for enforcement thereof to so use legal process as to oppress his adversary....”⁸⁵ On the other hand, and with at least apparent inconsistency, the court stated that “the test” [of coercion] is not the “nature of the threats,” nor is it whether some hypothetical “person of ordinary courage and firmness” would have complied.⁸⁶ The test, the court indicated, is the plaintiff’s “state of mind”;⁸⁷ it is a subjective test. What, specifically, was the crucial “mental state” that in the court’s mind established coercion?

81. 231 Minn. 46, 42 N.W.2d 404 (1950).

82. 42 N.W.2d at 406.

83. *Id.*

84. *Id.* at 408.

85. *Id.*

86. *Id.* at 407.

87. *Id.*

—It was that as a result of the corporation's having acted "oppressively," the plaintiff's free will had been overcome.⁸⁸

Turning from the ambiguous language of the court to the circumstances of *Wise*, however, one sees that whereas the victim's "state of mind" was declared to be of the essence, and the question of a victim's mental weakness was in turn declared pertinent to his "state of mind,"⁸⁹ the court's reasoning about the specific facts did not dwell on the plaintiff's mental functions or malfunctions, or on the strength or weakness of the plaintiff's will. Instead, the court focused its attention primarily on the "oppressiveness" of the defendants' actions, given this individual plaintiff's employment status (fired from one company, threatened with loss of his current job), and his finances (in "financial distress" and threatened with expensive law suits).⁹⁰ The court also noted that although the plaintiff tried to get in touch with his own lawyer, he could not; thus informed legal advice was not available during the interview when he was directed to sign the waiver immediately.⁹¹ The sum of the court's truly psychological comment amounted to saying the plaintiff was "worried and under stress."⁹²

What does all this add up to? The reference to plaintiff's mental condition—"worried and under stress"—certainly does accord with the model of coercion as a kind of psychic breakdown, but it hardly suffices to establish it. Moreover, consideration of this fact would be unnecessary to legally establish coercion *if* it were to be determined that from an objective standpoint plaintiff had no reasonable alternative under the circumstances but to sign. That is, the force of the plaintiff's argument would be unchanged if we were to imagine him in the same situation but as being a person who by temperament is not a worrier but typically unflappable in the face of stress. Given his naivete, the lack of legal advice, and his domestic and economic situation, the threats left him no reasonable course but to comply.⁹³

How is the stress on the importance of the plaintiff's "subjective" state of mind by some of the courts to be explained? It is not sheer error; there

88. *Id.* at 408. See *Pao On v. Lau Yiu*, 3 W.L.R. 435, 456 (1979) ("coercion of his will so as to vitiate his consent"); *id.* at 451 (the victim's consent was "not a voluntary act").

89. *Wise v. Midtown Motors*, 231 Minn. 46, _____, 42 N.W.2d 404, 407 (1950).

90. 42 N.W.2d at 408.

91. See *id.* at 406. The plaintiff did manage to talk to another attorney on the phone, one he apparently had never consulted before, who told him it would be "legal" to sign the waiver. *Id.* See *Mitchell v. C.C. Sanitation Co.*, 430 S.W.2d 933 (Tex. Civ. App. 1968) (threat to fire employee is unlawful where designed to force employee to surrender valid claim and good cause of action).

92. See *Wise v. Midtown Motors*, 231 Minn. 46, _____, 42 N.W.2d 404, 406 (1950).

93. "Duress does not necessarily mean force or personal fear, but rather that pressure of circumstance which compels the will of man to yield to an exaction...." *Alcoa S.S. Co. v. Velez*, 285 F. Supp. 123, 125 (D.P.R. 1968) (corporation's refusal to make unjustified payment would have made it non-insured employer).

is indeed reason for it, although that reason is much more indirect and non-essential than the language suggests. In considering the plaintiff's decision to sign the waiver, the court is concerned to a significant extent with the reasonableness of things from the perspective of the plaintiff, that is, with what will hereafter be called the "*apparent* reasonableness" of compliance. Here "subjective" factors *may* play a legally relevant role. Some course of conduct may understandably appear reasonable to a person who, although without fault in the matter, has little business or legal experience and is without access to professional help. The same course of action might, on the other hand, appear plainly unreasonable to one who has had legal or business advice or who is personally knowledgeable about the relevant matters. Such "subjective" considerations are legally relevant to coercion.

The concept "appears reasonable" is, to use Justice Frankfurter's word in a related context, an "amphibian."⁹⁴ It is by no means purely subjective in reference. Not everything that subjectively seems reasonable to (the individual) "appears reasonable" in law, because there is also an "objective" dimension to the concept. The courts do set limits, "objective" constraints, on the form and content of any assessment of reasonableness. One such constraint, in the case of both economic and criminal coercion, is that the coerced act may in law "appear reasonable" only if no available alternative could reasonably be preferred. This is a strong and effectively restrictive constraint.

There are other constraints as well. Thus, under the circumstances of *Wise*—Mr. Wise being unsophisticated in such affairs, and in a subjective state of mind that rendered him easily influenceable—it appeared reasonable, within the meaning of the law, that Mr. Wise should sign rather than refuse, lose his job, and be driven into bankruptcy. However, had he been a person whose subjective knowledge and sophistication in such matters were greater, a person fairly well aware of his legal rights and privileges, it might not have appeared reasonable, in the legally relevant sense, to sign even if he were subjectively fearsome and easily persuadable. Moreover, if his attorney had been present and had flatly advised him that he need have no fear, and that other, adequate recourse was available, then regardless of Mr. Wise's subjective state of mind, only assuming he was mentally competent, it could not have appeared reasonable, within the meaning of the law, to sign away his valid claim and cause of action.⁹⁵

Likewise, if Mr. Wise had been persuaded to knowingly cooperate in defrauding some third party, in order to realize substantial profits, no evidence about the subjectively apparent reasonableness of this *to him* would

94. See *infra* text accompanying notes 132-35.

95. This would seem to be the implication of the universal coercion requirement that there have been no reasonable alternative to the dilemma posed by the coercer. If plaintiff's attorney had pointed out a reasonable alternative that actually existed, then in spite of fears and willingness to comply, the plaintiff would not be able to meet the "no reasonable alternative" test.

make this, within the meaning of the law, an "apparently reasonable" choice. Here the objective constraint on "apparent reasonableness," that a violation of law cannot appear reasonable,⁹⁶ is decisive.

One cannot say beforehand all that will be pertinent to a judgment of reasonableness. The concept has a distinctively legal role of a complex kind, and the court must in the last analysis make that decision in the perspective of the principles and aims of law, and of the facts of the case. In any case, even where individuals rather than corporate entities are concerned, the ultimate issue is the reasonableness of acts, not whether some psychological power of the victim's mind was destroyed or crippled.

The preceding analysis of "appears reasonable" brings out in the economic context something that is also true and important, although previously undiscussed, in connection with coercion as a criminal defense. The test of coercion as a defense requires that the threat be "well-grounded."⁹⁷ This notion is akin to the concept "appears reasonable." The victim must subjectively believe the threat to be well-grounded, that is, authentic, credible, capable of implementation and intended to be implemented. Not any belief, however, even if only based on fantasy-fear, will do. There is both a subjective and objective dimension. What is well-grounded for a person of very low intelligence may not be so for a person of very high intelligence.⁹⁸ The exact interplay of the "subjective" and "objective" here, as in the case of "apparent reasonableness," is complex; the possibilities are many and are nowhere completely elucidated. This much may be said: The court will take into account individual mental powers or weaknesses, particularly those not culpably self-induced, that bear upon assessment of the threat. On the other hand, the victim, given those powers, will be expected to use them, and will also be held to some objective standards of judgment, even if those standards are adapted to a person with such a mind. We must recall in this connection that we are dealing, after all, with legally competent persons, since mental incompetence would immediately shift the legal context and issues away from coercion.⁹⁹

Finally, turning again to economic coercion, it must be emphasized that the courts are quite explicit that the coercer must have acted wrongfully.¹⁰⁰

96. To say that the violation of the law "cannot" appear reasonable does, of course, oversimplify. As was noted earlier, for example, it is reasonable in the eyes of the law to violate a law under the conditions of criminal coercion. *See supra* text accompanying notes 46-48. Furthermore, at least according to legal theory, it is reasonable to violate a law in a case of Necessity. *See supra* note 54.

97. *See supra* note 9(b).

98. *See id.* (discussion in regard to English law).

99. *See infra* note 186 (discussion of this in relation to undue influence).

100. *See LaBeach v. Beatrice Foods, Co.*, 461 F. Supp. 152, 156, 157 (S.D.N.Y. 1978) (use of power, no matter how great the disparity, is not per se duress; there must be wrongful use of power); *Louisville Title Ins. Co. v. Surety Title & Guar. Co.*, 60 Cal. App. 3d 781, 805, 132 Cal. Rptr. 63, 80 (1976) ("wrongful act or bad faith which is a predicate to a right to assert economic compulsion"); *Sistrom v. Anderson*, 51 Cal. App. 2d 213, 220-21, 124 P.2d 372, 376

Absent wrongfulness, it is no matter if the defendant used methods such that "within the every-day meaning of the words" the plaintiff suffered "a kind of necessity or compulsion,"¹⁰¹ or that the defendant had made "threats" that "might have induced a reasonable man to succumb,"¹⁰² or that a party "has been deprived of the exercise of his free will and constrained by the other to act contrary to his inclination and best interest."¹⁰³ None of this is duress if the "pressure" be not "wrongful."¹⁰⁴

Thus, in summary, we see that in economic coercion the *general concept* is the same as in criminal coercion, although the *criteria* of application of those concepts differ in the differing contexts. The shared general concept, as so far developed, is *not* in essentials a psychological concept directed to inner stresses or breakdowns. The shared concept is, instead, defined in terms of first, the *wrongfulness* in the eyes of the law of a person's conduct designed to induce certain conduct on the part of the victim, and second, the (apparent) *reasonableness* of the victim's act in the circumstances.

Turning to the criteria of application of this general concept, we see that one *criterion* of "reasonableness" shared by both the economic and criminal forms of coercion is that, for purposes of establishing coercion, a victim's act is reasonable only if no available alternative could reasonably be preferred. On the other hand, the criteria for assessing reasonableness diverge in economic and criminal contexts when it is a question of the nature of the harms relevant to the assessment. Specifically, the criterion of reasonableness in the context of the victim's commission of a criminal act is that alternative conduct would have led to a far graver criminally prohibited harm, that is, grave injury or death of an innocent person. On the other hand, the context of economic affairs calls for more complex and more indefinite criteria with respect to the types of harm relevant in assessing reasonableness. Thus, it must be found that alternative conduct on the part of the victim would have led to economic loss that was more than a prudent person engaged in such

(1942) ("coerced by fear of a wrongful act"); *Young v. Hoagland*, 212 Cal. 426, 431, 298 P. 996, 998 (1931) (demand unjustified in equity and good conscience); *Hyde v. Lewis*, 25 Ill. App. 3d 495, 501, 323 N.E. 2d 533, 537 (1975) (duress has been defined as a condition where one is induced by a wrongful act or threat); *Rubenstein v. Rubenstein*, 20 N.J. 359, —, 120 A.2d 11, 15 (1956) ("But the pressure must be wrongful, and not all pressure is wrongful."); Annot., 79 A.L.R. 3d 598 (1975) (three basic elements in economic duress, of which one is wrongful act of coercer). See also *North Ocean Shipping Co. v. Hyundai Const. Co.*, [1979] Q.B. 705, 3 W.L.R. 419, 428 ("wrongful threatened action").

101. *London Homes, Inc. v. Korn*, 234 Cal. App. 2d 233, —, 44 Cal. Rptr. 262, 267 (1965).

102. *Louisville Title Ins. Co. v. Surety Title & Guar. Co.*, 60 Cal. App. 3d 781, 806, 132 Cal. Rptr. 63, 80-81 (1976).

103. *Wolf v. Marlton Corp.*, 57 N.J. Super. 278, 154 A.2d 625 (1959).

104. *Rubenstein v. Rubenstein*, 20 N.J. 359, —, 120 A.2d 11, 15 (1956); *Louisville Title Ins. Co. v. Surety Title & Guar. Co.*, 60 Cal. 3d 781, 805, 132 Cal. Rptr. 63, 80 (1976) ("wrongful act" or act of "bad faith" is "predicate to right to assert economic compulsion"). See 13 WILLISTON ON CONTRACTS § 1602, at 651 (3d ed. 1957) ("result of some imminent and morally or legally wrongful or unlawful act or threat").

affairs would normally be expected to accept. And the threat, in addition to being wrongful, must have credibly portended economic loss of a kind that, in the light of legally cognizable norms and interests, the victim should not fairly be called upon to risk. Thus, the criteria of wrong and of reasonableness significantly diverge from the economic to the criminal defense context, but the underlying general concept consistently focuses on the reasonableness of a response to a wrongful threat and demand.

C. Coerced Confessions

Having explored the concept of coercion as used in both the defense to crime and also in the claim of economic coercion, we turn now to a third major area of its use, the claim that a confession to crime was coerced. Immediately striking when making such comparisons from the perspective of this inquiry are the radical differences in the criteria used when it is a case of being coerced into *doing* a crime as contrasted with a case of being coerced into *confessing* a crime. In both instances, it remains true that the coercion serves as a basis of avoidance or excuse from the ordinary legal consequences, either excuse from condemnation for the crime, or avoidance of use of the confession as evidence of one's guilt.

Opinions that have dealt with the issue of coerced confession are pervaded by the language of the overpowered, broken, or otherwise tyrannized and traumatized will.¹⁰⁵ This, as in other contexts of law, is declared to be the essence of the matter.¹⁰⁶ Such language seems to work against a tacit or background paradigm of torture-coerced confessions: One imagines the excruciating pain and horror associated with the all too real and long history of bodily torture and "third degree" methods of inquisition. The "broken will" is the psychic reflection of the literally broken body. However, along with this language, recent coerced confession cases are also, and paradoxically, replete with disclaimers recognizing the obvious absence of physical torture in the case at hand. As if too obvious to warrant discussion, it is said that of course "beatings" and other such "gross abuses" need not be present.¹⁰⁷ We are assured that "coercion can be mental as well as physical,"¹⁰⁸ that coercive results can be achieved by "subtler devices" than

105. A classic compendium of such language is found in Justice Frankfurter's lengthy opinion in *Culombe v. Connecticut*. See *Culombe v. Connecticut*, 367 U.S. 568, 576 (1961) ("overborne will"); *id.* at 576 ("drained capacity for free choice"); *id.* at 584 ("mind of an accused...twisted until he breaks"); *id.* at 634 ("will was broken"). The same, and analogous idiom, is found in cases discussed and cited *infra* in connection with coerced confession. See *infra* notes 106-56 and accompanying text.

106. "The question in each case is whether a defendant's will was overborne at the time he confessed." *Reck v. Pate*, 367 U.S. 433, 440 (1961); see *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) ("The ultimate test remains...the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?").

107. *Mincey v. Arizona*, 437 U.S. 385, 401 (1978).

108. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (citing *Chambers v. Florida*, 309 U.S. 227 (1940)).

the use of "ropes and a rubber hose," subtler even than "relay questioning persistently, insistently" that ends in "subjugating a tired mind."¹⁰⁹

This is a rhetorical move not infrequently seen in the literature of jurisprudence, philosophy, and theology. The conditions that originally gave rise to the idiom and imagery (here the confession obtained by literally breaking the body) are with bland reasonableness acknowledged to be absent, but the language is retained. Now it is held to refer to an invisible, intangible, and subtle counterpart (the "broken will" in an intact body). (Let those who cannot see the emperor's new clothes admit it at their peril!) The postulation of the invisible counterpart serves as the ground for taking the present case, factually very unlike the originals, and assimilating it doctrinally to the originals. The doctrine is important because it can then be applied to trigger certain desired logical or legal consequences—excuse or avoidance. The cost of this move is that while one may end up with the result one intuitively wants, one also ends up with verbal incantations providing no real insight and having no determinable application to the facts.¹¹⁰

Anyone who would take seriously the language in the Supreme Court opinions that emphasizes the broken will in coerced confession should be profoundly puzzled by the language of *Bram v. United States*,¹¹¹ the 1897

109. *Culombe v. Connecticut*, 367 U.S. 568, 574 (1961).

110. From this perspective it is interesting to take note of the tendency since *Haynes v. Washington*, 373 U.S. 503 (1963), for the Supreme Court to abandon faith in making specific factual determination of coercion in confession cases, and to move to procedural rules in the manner of *Escobedo v. Illinois*, 378 U.S. 478 (1964), *overruled*, *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

On the other hand, the latest move of the English courts, possibly because of a lack of the elaborate exclusionary rules available as an alternative to the United States courts, has been to acknowledge the inadequacy of the specific formulae hitherto used, and to return candidly, for lack of better, to vague generalities. See *R. v. Rennie*, [1982] 1 All E.R. 385. *Rennie* holds that the determination of voluntariness is "above all" a matter of "common sense" and of applying the "spirit of the principle." *Id.* at 389. On the one hand, Lord Chief Justice Lane remarks that if a confession were inadmissible because the interrogation engenders stress, or leads the accused to hope for some advantage by confessing, "nearly every confession would be rendered inadmissible." *Id.* "Very few confessions are inspired solely by remorse," remarks Lord Lane. *Id.* at 388. Having thus in effect abandoned the rule turning on "fear of prejudice or hope of advantage" in *Ibrahim v. R.*, [1914-15] All E.R. Rep. 874, 877, reaffirmed in *D.P.P. v. Ping Lin*, [1975] 3 All E.R. 175, Lord Lane offers no doctrinally specific substitute. He does say that "'voluntary' means in ordinary parlance 'of one's own free will,'" but this is merely to invoke once again the classic phrase which, as we have seen, provides of itself no specific guidance. See [1982] 1 All E.R. 385, 389. And he refuses to "complicate" matters by use of such notions as "improper" or "inducement." See *id.* However the facts of *Rennie*, as recounted by Lord Lane, are consistent with, indeed quite suggestive of, the theses of this study. The interrogators told Rennie of evidence that they had, and that in fact would have implicated his mother had he not confessed; but in the view of the trial judge and Lord Lane, this was not done in a way designed to threaten or induce confession, but simply as part of a factual narrative of the available evidence in the case. See *id.* at 387-88. In short, the substance of the matter was that nothing was done that was improper in the context of English law, and hence the unquestioned influence of the interrogation on Rennie, and the fears and hopes it engendered, were not held to be coercive. See *id.*

111. 168 U.S. 532 (1897); see *Wilson v. United States*, 162 U.S. 613, 621 (1896) ("inadmissible if made under any threat, promise, or encouragement of any hope or favor").

case so frequently cited as authority and quoted in argument. *Bram* says that the statement of confession “must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, *however slight*, nor by the exertion of *any* improper influence....” (emphasis added).¹¹² *Bram* rationalizes the transition from the dramatic psychological language of the “broken will” to the legal prohibition against *any improper influence, however slight*, by arguing that “[t]he law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the [confession] if any degree of influence has been exerted.”¹¹³

Such language shows that the Court was carrying out an elaborate verbal manipulation. First, the Court re-interprets “coercion” so that it ultimately rests on an invisible counterpart to the torture-broken limb, the counterpart being an invisible and unnameable psychic process in which “the will” broke as a result of external threats or violence. Then the Court can rationalize avoiding the use of psychological tests in the legal context by declaring that the phenomenon is so esoteric and inaccessible that relevant psychological tests cannot as a practical matter be directly applied. Plainly, however, the Court is intuitively persuaded that *something* is wrong; something is improper and unacceptable about the confession; and it seems somehow akin to what is wrong in the classical gun-at-the-head or torture-inquisition cases. But wherein lies the similarity? The true answer is seen in *Bram* as if it were merely an objective “substitute” test. We find this by combining the idea of an “improper” influence with what is suggested in yet another phrasing in *Bram*: “The rule is that...the proof... must be sufficient to establish that [the accused] was involuntarily impelled [to confess] from causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged....”¹¹⁴

In sum, then, the actual test (as distinguished from the verbal “test”), is that there is coercion if “legally sufficient causes” for a decision to confess are in any degree *improperly employed*. Thus, *Bram* ends up, in this devious way, with a test that in substance expresses the legalist concept already formulated here: There is coercion if the confession was elicited because the interrogator acted wrongfully with the intent to make confession appear reasonable (in some “legally sufficient” sense of that phrase).

Bram does expressly remark on the essential causal role of the wrongful conduct by means of the clause: “[W]hen but for the improper influence he would have remained silent.”¹¹⁵ This does raise a question of psychological

112. *Bram v. United States*, 168 U.S. 532, 542 (1897) (emphasis added). In modern Supreme Court cases this test was rephrased as requiring that the confession be made “freely, voluntarily and *without compulsion or inducement* [i.e., wrongful compulsion or inducement] *of any sort*.” *Haynes v. Washington*, 373 U.S. 503, 513 (1963) (emphasis added).

113. *Bram v. United States*, 168 U.S. 532, 543 (1897).

114. *Id.* at 549.

115. *Id.*

causation, a factual question rather than one of law. On the other hand, the psychological question as so framed does not ask whether the accused's will was broken, destroyed, or even "overborne" in some less dramatic way. Rather, putting all the conditions together, what is required is the legally improper use of a legally sufficient cause, no matter how minimal that cause, to induce confession or a decision to remain silent. Thus the person coerced need not be "twisted until he breaks"; it is enough merely to tip an otherwise balanced weighing of the pros and cons by the person being interrogated.

Examination of the fact situation in modern confession cases confirms that it is indeed this substance of the *Bram* test which governs in practice, and with a high degree of consistency, in the reasoning of courts, although the rhetoric of the "broken will" is also likely to be indulged. Haynes' confession, for example, was declared inadmissible, even though "secured by so mild a whip as the refusal, under certain circumstances, to allow [the] suspect to call his wife until he confessed."¹¹⁶ (Notice the physical imagery of the whip, with the disclaimer phrase, "so mild," that makes what used to be a physical reality into an obscure metaphor.)

Some courts have emphasized that certain particular mental qualities, for example, being "weak of will or mind," are relevant,¹¹⁷ recalling similar comments discussed in the context of economic coercion. But again, as in the economic context, examination of the particulars reveals a different picture. Thus Haynes, who had a substantial criminal record, was apparently a "mature adult...of a least average intelligence...neither a stranger to police techniques and custodial procedures nor unaware of his rights on arrest."¹¹⁸ One must assume that it was police impropriety that was crucial here, rather than Haynes' dependency on his wife.¹¹⁹

Culombe, in the classic portrait painted by Justice Frankfurter in *Culombe v. Connecticut*,¹²⁰ appears as one whose capacity for free choice had been "drained" by a "suction process,"¹²¹ and whose will had in fact been "broken" twice in one day.¹²² The totality of the facts reported in the opinions in *Culombe* does reveal him as a person of low intelligence who for a period of days was subject to improper police restraints and inducements to confess.¹²³ For days he consistently refused to confess.¹²⁴ At last he acquiesced.¹²⁵

116. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (referring to *Haynes v. Washington*).

117. *Fikes v. Alabama*, 352 U.S. 191, 251 (1957) (quoting with approval *Stein v. New York*, 346 U.S. 156, 185 (1953), *overruled*, *Jackson v. Denno*, 378 U.S. 368 (1964)); see *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (more general statement to this effect).

118. *Haynes v. Washington*, 373 U.S. 503, 522 (1963) (Clark, J., dissenting).

119. *See id.*

120. 367 U.S. 568 (1961).

121. *Id.* at 576; see *Watts v. Indiana*, 338 U.S. 49, 53 (1949) ("the suction process of interrogation").

122. *Culombe v. Connecticut*, 367 U.S. 568, 634 (1961).

123. *See id.* at 606-21.

124. *Id.* at 607-15.

125. *Id.* at 614-15.

To say, however, that Culombe's will was "broken" or his capacity "drained" seems quite the wrong language in which to characterize his conduct. If we cast aside our stereotypes about persons of relatively low I.Q., we see that the record tells us that in spite of improper police tactics, Culombe was from the outset consistent and firm in his attitude, for days acting on the view that he would do best not to talk.¹²⁶ Then, after pleas by his family, he decided that the reasonable thing to do was to confess.¹²⁷ He then clearly stated that he wanted to make a clean breast of it all, and followed through consistently thereafter on this decision.¹²⁸ This was plainly a conscious, reasoned, and resolute new commitment. That there was police impropriety designed to give him reason to confess is also plain, and that the police thus did finally manage, by indirection, to make it appear reasonable to him to change his mind, is all beyond doubt.¹²⁹ It is not the improprieties that are in question here but the claim that Culombe was a man who had been "drained" of some crucial mental capacity, or deprived of its use. His decision was instead "the product of a deliberate choice on his part."¹³⁰ It is characteristic of the coerced confession literature, however, that Justice Frankfurter should have used the traditional mentalistic idiom of the "voluntariness" test,¹³¹ translating into a kind of mental incapacity language these legally crucial facts.

Justice Frankfurter also was aware, of course, of the objective, factual content of "involuntariness" in this context, and that it was not merely a psychological or subjective notion. In the attempt to find some resolution or synthesis, he presents an analysis of the concept of "voluntariness" as an "amphibian" that straddles the subjective and the objective.¹³² He asserts that the term "voluntariness" here has reference to the external circumstances under which the confession was given, and also has reference to the "imaginative" and "largely inferential recreation...of 'psychological' fact," an inferential process that is "inextricably interwoven" with *legal* standards.¹³³ This formulation remains obscure, and must remain so when taken to refer to external forces actually causing some hypothetical inner mental breakdown. However, it takes on greater intelligibility when "involuntariness" in regard to confessions is viewed as a legally conclusory term, analogous here to "coerced," and thus as representing a legal finding that the wrongful external conduct had played a crucial role in making it appear reasonable to confess. The tacitly included notion of "appearing reasonable" does straddle, as we saw earlier,¹³⁴ the subjective and the objective, in that it may in some

126. *See id.* at 607-15.

127. *Id.* at 613-15.

128. *See id.* at 616.

129. *See id.* at 631-35.

130. *Id.* at 642 (Harlan, J., dissenting, joined by Justices Clark and Wittaker).

131. *Id.* at 603.

132. *Id.*

133. *Id.*

134. *See supra* text accompanying notes 94-96.

cases call for imaginative inference to “psychological facts” about what appeared reasonable, but the “psychological facts” concern the deliberations of a rational person, as we saw earlier,¹³⁵ and not the mental incapacitating of that person.

It now becomes evident that the *criteria* for applying the concept “reasonable” once again differ significantly in the coerced confession context from the criteria used in the economic and criminal coercion contexts. Most importantly, the “no reasonable alternative” requirement is not applicable here. Culombe, for example, could hardly claim that no reasonably preferable alternative existed. It was, *prima facie*, at least equally reasonable for him to prefer silence.

One can see the reason for the difference in criteria in this way. In the matter of confession to a crime, a citizen’s basic liberty interests are at risk. The “no reasonable alternative” criterion of the reasonableness of an act, so plainly suitable where the coerced act is criminally prohibited, is too demanding in this context where the coerced act is, after all, perfectly lawful, and where the private citizen is pitted against improper state oppression designed to induce the act.¹³⁶

Not only does the confession context reveal how the criteria of coercion can vary, it reveals that the operative general concept is itself wider than the word “coercion” readily suggests. *Bram*, for example, speaks not merely of threats but also of improper “promises.”¹³⁷ Furthermore, the extension of “coercion” to include deception is also implicit in *Bram* when it speaks of “promises” and “influence.”¹³⁸ Other confession cases speak of “induce-

135. See *supra* text accompanying notes 93-99.

136. In the case of coerced confessions a major complicating factor is the fact that the wrongdoer is an officer of the criminal justice system. As reflected in “exclusionary rules,” the official status of the wrongdoer introduces an independent element that itself can warrant relieving the coerced person from the burden of having the confession admissible as evidence of guilt. Thus, it is arguable that the shift from confession produced by torture to confession induced by “any improper influence” “no matter how slight,” should be viewed as in substance a shift from the inadmissibility of coerced confession to the inadmissibility of the fruits of official wrongdoing. Viewed this way, the *Bram* test requirement that the person would not have confessed but for the improper influence serves merely to establish the materiality of the wrongdoing to the act of confession. See *Mapp v. Ohio*, 367 U.S. 643 (1961), *overruled*, *United States v. Leon*, ___ U.S. ___, 104 S. Ct. 3425 (1984); *Weeks v. United States*, 232 U.S. 383 (1914), *overruled*, *Elkins v. United States*, 364 U.S. 206 (1960); *Boyd v. United States*, 116 U.S. 616 (1886), *overruled*, *Warden v. Hayden*, 387 U.S. 294 (1967). It bears noting that the transition from a subjective to an objective view of the coerced confession concept is reflected in section IV of the *Mapp* opinion, in which the application of the exclusionary rule is explicitly connected with the precedents on coerced confessions beginning with *Bram*. See *Mapp v. Ohio*, 367 U.S. 643 (1961). Once this shift of emphasis explicitly takes place, it presages such flat rules as to an arrestee’s rights in regard to police interrogation as are embodied in the *Escobedo* and *Miranda* decisions. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964), *overruled*, *Miranda v. Arizona*, 384 U.S. 436 (1966).

137. *Bram v. United States*, 168 U.S. 532, 542 (1897).

138. See *supra* note 112 and accompanying text.

ment.”¹³⁹ Moreover, it is plain that in coerced confession, promises of benefits, deception and trickery are among the common improper influences.

If promises of benefits, or deception, can be the basis of a “coerced” confession, why cannot deceptive argument or a promise of benefits that induces a person to commit a criminal act serve as the basis of a coercion *defense*? Why is it that the legal test of coercion as a defense should require, as it does, a threat? Is this limitation justifiable?

Using the general theses that have by now been formulated here, we can logically justify the legal limitation of the coercion defense to threats, while dispensing with that limitation in the context of confessions. Axiomatic to such a justification is the principle that in the eyes of the law criminal acts in general are unreasonable.¹⁴⁰ The only thing that can make a criminal act reasonable in a particular case is the threat that if the victim should refuse to comply a graver crime would be committed. Thus, it follows that promises or inducements (*i.e.*, proffered benefits) could not make commission of a crime reasonable under the law.¹⁴¹

Turning from the question of proffered benefits to that of deception, we see that in this connection, too, the actual legal content of the concept of *Bram*’s “improper influence” goes beyond what the word “coercion” naturally suggests. *Mincey v. Arizona*¹⁴² seems to be a case where it was not threats but misleading tactics that produced confession, although other than this it is not clear how the Court meant to categorize the wrongful influence. In *Mincey*, Justice Stewart, writing for the majority, declared that Mincey’s “will was simply overborne.”¹⁴³ Justice Rehnquist, dissenting, declared on the contrary that Mincey’s “will was ‘simply [not] overborne’ by ‘mental coercion.’”¹⁴⁴ The facts were that Mincey had been seriously wounded and was in the hospital intensive-care unit, attached to life-support equipment

139. *Haynes v. Washington*, 373 U.S. 503, 513 (1963) (“coercion or improper inducement”); *Wilson v. United States*, 162 U.S. 613, 621 (1895) (“or encouragement of any hope or favor”).

140. See *supra* note 96 and accompanying text.

141. Where economic coercion is at issue, the matter is less clear. Although the reported cases generally allow one to avoid the question, because the alleged coercion can usually be interpreted as a threat, nevertheless it is at least arguable that it would be coercive to make a wrongful offer of a benefit to a businessman who had no reasonable alternative but to accept (perhaps *everything* would be lost if the offer were refused). Probably other remedies in equity, perhaps unconscionability, would be argued rather than coercion, and there also arise more philosophical disputes as to whether such a proffered “benefit” amounts to a threat. See, *e.g.*, Nozick, *supra* note 41, at 447-53. Of course in the economic context we also find deception, as distinguished from direct offer of benefits or threats of losses. But, as will be seen when deception in the case of coerced confession has been analyzed, the claim of deception in economic matters does indeed fall under the general concept of Victimization as developed in section II below. It is legal tradition rather than logic that treats economic deception as a quite different legal category from economic coercion.

142. 437 U.S. 385 (1978).

143. *Id.* at 401.

144. *Id.* at 409 (Rehnquist, J., dissenting).

that included breathing apparatus hindering his speech.¹⁴⁵ He was weak, depressed, in pain, and periodically either confused, in a coma, or falling asleep.¹⁴⁶ Whenever Mincey was conscious, a police officer who remained at his bedside put questions to him.¹⁴⁷ Mincey said that he did not want to be interrogated, and asked for a lawyer, but to no effect.¹⁴⁸ The officer simply persisted in asking questions when Mincey was alert enough.¹⁴⁹ After a time, Mincey responded to some of the questions.¹⁵⁰

The trial court held the confession to have been voluntary.¹⁵¹ The Arizona Supreme Court affirmed.¹⁵² The United States Supreme Court reversed.¹⁵³ Given the majority opinion's statement of the facts, one might have expected the opinions to focus on Mincey's unsatisfied request to be allowed to remain silent and to have an attorney; but this is not the issue on which debate centered. Instead, the majority, and Justice Rehnquist in dissent, debated whether Mincey's will had been "overborne."¹⁵⁴ Justice Stewart, for the majority, also posed a crucial variant of the test question: Was Mincey's confession the "product of a rational intellect and a free will?"¹⁵⁵ We do not know whether Justice Stewart thought Mincey was less than rational, or was rational but so debilitated that his will was weak and unfree, or some complex combination of these. Without specifying further, the majority opinion declares that it would be "hard to imagine a situation less conducive to the exercise of a 'rational intellect and a free will' than Mincey's."¹⁵⁶ Nevertheless, it does not seem that Mincey was either threatened or promised benefits. In his weakened condition he was simply asked questions, and his statements of unwillingness to answer were ignored.

One thing is clear about *Mincey*: It tells us that if the official by any improper means makes it appear reasonable to confess, then even if remaining silent also appeared reasonable, as it did, both subjectively to Mincey and objectively, then the confession induced by the official's conduct was legally coerced. In short, there is no implication that (coerced) confession has to appear the *only* reasonable course, or that the wrongful conduct need be a threat.

The general principle that seems to be at work here is that in cases where deceptive or misleading tactics are used, and where the victim's act is in itself lawful, the victim may have no apparent decisive reason to seek

145. *Id.* at 396.

146. *Id.* at 396, 399, 401.

147. *Id.* at 401.

148. *Id.* at 399.

149. *Id.* at 401.

150. *Id.*

151. *Id.* at 388.

152. *Id.*

153. *Id.* at 402.

154. *Id.* at 401-02, 409.

155. *Id.* at 398 (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960)).

156. *Id.*

alternatives to the victimizer's proposal. After all, the deceptive proposal or invitation or request is made to appear not only reasonable but also lawful, and the person innocently does nothing unlawful in complying. This contrasts sharply with the coerced criminal act, where the compliant act is unlawful and, therefore, requires per se that alternatives be sought and, if at all reasonable, preferred. It also contrasts with what is seen in the economic coercion context. For where a demand is accompanied by a wrongful threat, such as the prospect of wrongfully imposed significant economic loss, this normally will be a decisive ground for seeking reasonable alternatives, seeking to avoid compliance. The axiom here is the corollary of the axiom that if there is any reasonable alternative it is generally unreasonable to *do* wrong: It is generally unreasonable to *submit* to wrong if there is a reasonable alternative. Therefore, one who claims to have been confronted with a demand accompanied by a perceptibly wrongful threat must show that *no* reasonable alternative appeared—for if it had appeared that a reasonable alternative existed, and if the actor had nevertheless complied, then it could be inferred that the actor preferred compliance regardless of the wrong. In short, the “no reasonable alternative” test of coercion properly applies to the criminal defense and to those economic coercion cases where wrongful threats are used, but it does not apply in confession cases or in economic cases where there are deceptive tactics that conceal the wrong.

Having now made it explicit that the general concept requires the victim's act to be a reasonable response to a wrongful influence, but that the criteria change significantly in different contexts, we should recognize that the general excuse-avoidance concept in question, when looked at for the way it works rather than in the light of its derivation from legal doctrine on “coercion,” embraces not only legal coercion of all kinds,¹⁵⁷ but also would seem logically to embrace to varying degrees what is taken up in law under such rubrics as “unconscionability,” “undue influence,” “deception,” and “extortion.” With a modification to be introduced below, it will also embrace the doctrinally confused defense currently widely used in prison-escape cases,¹⁵⁸ that is, those cases where the escape is motivated by the wrongful threats

157. It should be re-emphasized at this point that the legal concept of coercion is narrower than (and in some other respects different from) the loose, everyday English notion of coercion. See *supra* text accompanying note 41. Any use of threat, whether or not it is wrongful, may count as coercion or as “coercive” in ordinary speech. The courts have recognized this difference. See, e.g., *Louisville Title Ins. Co. v. Surety Title & Guar. Co.*, 60 Cal. App. 3d 781, 806, 132 Cal. Rptr. 63, 80-81 (1976) (threat to exercise legal right may cause person to “succumb” but is not coercion in law); *London Homes Inc. v. Korn*, 234 Cal. App. 2d 233, —, 44 Cal. Rptr. 262, 267 (1965) (recognizing that “business ‘compulsion’ within the common or every-day meaning of the words” may exist even though there is not “‘duress’ within the meaning of the law”). And the failure to appreciate this distinction undermines the main argument of Hale, who treats any transaction in which the prospect of a deprivation or loss is a factor as coercive, and as substantially equivalent to coercion in law. See Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

158. See *infra* text accompanying notes 159-71.

and demands of other inmates. All amount to wrongful conduct designed to make a certain course of conduct appear reasonable and thereby to induce it, thus victimizing the actor. And as one reviews the road thus far travelled, it seems more evident than ever that the drama and physical-mental trauma associated traditionally with the notion of "coercion" have in fact misguided legal attention and obscured the true unity in a concept of very wide scope.

To pursue this train of thought directly and expeditiously, we turn now from critical analysis, type by type, of specific legal uses of the notion of "coercion," and proceed on a more theoretical level to a straightforward, precise formulation of a general and legal concept of *Victimization*, along with brief remarks on those elements or aspects of it that call for explanatory comment or justification.

III. VICTIMIZATION

The word "Victimization" is here given a restricted, technical use. In ordinary use, Jones could be spoken of as a victim, or as victimized, if he was knocked down by a robber who forcibly grabbed his money. In what is here called Victimization, however, the Victim is induced to *do* something by the Victimizer. It is of the essence that the Victimizer aims to work his will not merely *on* the Victim but, specifically, *through the will* of the Victim. And the Victim-act will constitute a legally defined act that ordinarily entails certain burdens (obligations, losses, penalties, punishments, etc.). Thus the Victim may have consummated a contract, or signed over title to property, or signed a legal waiver or consent form, or unlawfully damaged another's property or injured another person. Where one of the Victimization claims is made, the Victim, therefore, will acknowledge doing the act, that is, the Victim will acknowledge that all the legal elements of the act were present; but, because of having been Victimized into doing the act, the Victim asks to be legally excused from legal burdens ordinarily entailed. To this end the Victim will invoke such specific legal excuse or avoidance concepts as "coercion," "deceit," or "undue influence," and will request, for example, "restitution," "invalidation," "voiding," "rescission," or a "Not Guilty" verdict.

The concept of Victimization is not proposed as a replacement for traditional legal concepts such as those just mentioned. The latter can be viewed as reasonable or at least the accepted traditional variant forms of the generic Victimization concept; and they provide specific criteria for application of the general concept.

The formal statement of the concept of Victimization will introduce nuances that the analysis up to this point has not developed. The gist of the concept, however, is that if someone innocent is led to do something because it appears the reasonable thing to do, and if it appeared that way because someone else wrongfully and intentionally manipulated the situation with the design of influencing the innocent person's choice precisely by making it appear that way, then the innocent person has been Victimized and deserves

to be excused or relieved from legal burdens that the act would normally entail. A more formal statement of these ideas is the following:

- (1) A *Victimizer* is one who intends to elicit certain conduct from another person (the intended Victim), and who, with this design, sets about, by means that wrong the intended Victim, to do what will make it appear reasonable for the intended Victim to engage in that conduct.
- (2) An intended Victim becomes an actual Victim (*i.e.*, is Victimized) if, having non-culpably gotten into the situation, the intended Victim does what has been made to appear reasonable in that situation as designedly arranged by the Victimizer, and does so because of that apparent reasonableness.
- (3) Insofar as a person has been Victimized into doing an act, the Victim may be legally relieved of legal burdens normally entailed by that act.

A. *The Victimizer's Intent—and Excusable Prison Escape*

The definition of Victimization has been formulated so as to leave it open whether the Victim-conduct is in fact the conduct intended by the Victimizer. The Victimizer may wrongfully create a certain reason for action with the intent that it be the Victim's reason for acting in one way, whereas the Victim, for that very same reason, acts in another way. This is what can happen when prisoners Victimize a weaker prisoner.

A typical defense against the charge of escape from prison by a Victimized prisoner may be conceived in the following way. One or more other prisoners demand sexual submission and conjoin credible threats of dire bodily injury for refusal to comply. The intent, of course, is that the combination demand and threat will serve as sufficient reason for the Victim to choose to comply. Those same conditions make it appear to the Victim¹⁵⁹ that "the only viable and reasonable choice available"¹⁶⁰ is the choice to make an escape from prison.

159. The "amphibian" character of the apparent reasonableness of the act has been stressed in this context. See *supra* text accompanying notes 94 & 132. Speaking of the defendant's belief as to the nature of the threats, the court in *People v. Condley* emphasized that the belief must be an "actual belief" and also that there must be "a reasonable cause for such belief." *People v. Condley*, 69 Cal. App. 3d 1008, 1011, 138 Cal. Rptr. 515, 522, *cert. denied*, 434 U.S. 988 (1977).

160. *People v. Lovercamp*, 43 Cal. App. 3d 823, 827, 118 Cal. Rptr. 110, 112 (1974). In *People v. Condley*, the court emphasizes that this phrase plainly implies an "objective" test. See *People v. Condley*, 69 Cal. App. 3d 1008, 1010, 138 Cal. Rptr. 515, 521, *cert. denied*, 434 U.S. 988 (1977). But unless they enter into new "reasonable man" flights of fancy, the courts will have to abjure an objective standard based on what would be viable for the "reasonable-man-as-prisoner," and will in some circumstances also have to take into account the personal traits of the prisoner in estimating what was a "viable and reasonable choice."

In such a case, and conformably to the formal definition as well as to our intuition, it is correct to speak of the escapee as having been Victimized.¹⁶¹ It also is formally and intuitively correct, and (with certain regulative constraints as discussed below) legally correct, to say that the Victim, as such, deserves to be excused from punishment for escaping prison for this reason.¹⁶²

Puzzles have arisen as to how to characterize this situation in terms of the usual legal terminology, puzzles on which "oceans of ink have been spilled by the legal logicians."¹⁶³ Some courts, with an eye on the threats of brutality and assault, have viewed this defense as, in law, the excuse of coercion.¹⁶⁴ But of course it significantly deviates from coercion as classically understood, since the defendant was not obeying the commands of others. Other courts, with an eye on this latter fact, hold that this cannot be coercion, and instead these courts have viewed the defense as a species of justification by Necessity.¹⁶⁵ Still other courts have taken a compromise view, that the defense is "somewhere between" coercion and Necessity.¹⁶⁶ The latter view provides no principled solution, but seems to be language that licenses ad hoc formulation of a special defense for this special kind of situation, as the courts have been doing in effect.¹⁶⁷

161. "The unlawful acts of the person under duress are attributed to the coercing party who supplies the requisite *mens rea* and is liable for the crime." *People v. Condley*, 69 Cal. App. 3d 1008, 1012, 138 Cal. Rptr. 515, 522, *cert. denied*, 434 U.S. 988 (1977). See *People v. Unger*, 66 Ill. 2d 333, ____, 5 Ill. Dec. 848, ____, 362 N.E.2d 319, 322 (1977).

162. The development of American law and the proliferating commentary in connection with excuses for escape from prison because of unbearable conditions has been rapid and significant in recent years. See Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355 (1979); Note, *Prison Escape and Defenses Based on Conditions*, 67 CALIF. L. REV. 1183 (1979) [hereinafter cited as *Prison Escape*]; Note, *Intolerable Conditions as a Defense to Prison Escapes*, 26 UCLA L. REV. 1126 (1979) [hereinafter cited as *Intolerable Conditions*]; Note, *Duress and the Prison Escape: A New Use For an Old Defense*, 45 S. CAL. L. REV. 1062 (1972) [hereinafter cited as *Duress and the Prison Escape*]; Annot., 69 A.L.R.3d 678 (1976); see generally *United States v. Bailey*, 585 F.2d 1087 (D.C. Cir. 1978) (lengthy review of literature), *rev'd*, 444 U.S. 394 (1980).

163. *State v. Baker*, 598 S.W.2d 540, 543 (Mo. App. 1980).

164. See, e.g., *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977); *People v. Harmon*, 394 Mich. 625, 232 N.W.2d 187 (1975); *People v. Luther*, 394 Mich. 619, 232 N.W.2d 184 (1975).

165. See, e.g., *People v. Lovercamp*, 43 Cal. App. 3d 823, 831, 118 Cal. Rptr. 110, 115 (1974); *People v. Unger*, 66 Ill. 2d 333, 5 Ill. Dec. 848, 362 N.E.2d 319 (1977); *State v. Baker*, 598 S.W.2d 540 (Mo. App. 1980). See also *People v. Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969) (defense of duress rejected because defendant's escape was not act complying with demands of coercers).

166. *United States v. Bailey*, 444 U.S. 394, 412 (1980); *id.* at 410 ("Modern cases have tended to blur the distinction between duress and necessity"); see *State v. Baker*, 598 S.W.2d 540, 543 (Mo. App. 1980); see also, *Intolerable Conditions*, *supra* note 162, at 114, 128, 132-33.

167. In *United States v. Bailey*, the Supreme Court staying with the duress-necessity excuse as the rationale of the defense, rejected a third possible defense rationale—that there was absence of an element of *mens rea*, i.e., the specific intent to escape confinement that was

Viewed in terms of the concept of Victimization, no puzzles arise. Moreover, the concept of Victimization and the assumptions associated with it plausibly and systematically generate the very types of constraints, for example, those laid out in *People v. Lovercamp*,¹⁶⁸ that have in fact been placed on this plea, ad hoc, by courts.¹⁶⁹ The reasonableness of a criminal act, as previously noted, rests on the fact that it avoids much graver harm, grave or mortal injury to an innocent person; from this it follows that escape from prison cannot be reasonable if it entails injury or death to prison guards or police.¹⁷⁰ Moreover, the wrong done the Victim must be the reason

explicitly included in the statutory definition of the offense. See 444 U.S. 394, 408 (1980). The Court overruled the District of Columbia's Circuit's holding that Bailey's intent was not necessarily to escape but could have been to avoid injury or sexual attack. See *id.* at 408. Viewing this as "quite unsupportable," the Court held in effect that all the elements of the alleged act are acknowledged to be present where duress-necessity is the issue, and that essential to that defense is evidence of further conditions, over and above the act, that excuse or justify the act. See *id.* at 408. In the context of the main theses of the present article, this is a noteworthy holding by the Court. For in the Victimization concept, as herein defined, a Victim is one who acknowledgedly committed the act as legally defined, but did so in a context where there were further reasons, over and above commission of the act per se, that warrant excuse. This thesis, in turn, is pertinent to the specific account of the justification for legally excusing those who have been Victimized. See *infra* text at section IV.

Fletcher argues that "the important preliminary question...is not which doctrinal label we should use, but whether the principle requiring consideration of the evidence is one of justification or excuse." Fletcher, *supra* note 162, at 1355. While this is not the place to enter into an extended discussion of his analytical approach and the theory that develops out of it, it is pertinent that Fletcher ends with proposals that conflict in several substantial respects with the content and thrust of the *Lovercamp* and *Bailey* holdings. See *id.* at 1366-68. In contrast, the Victimization concept developed herein leads essentially to the same results in prison escape cases that *Lovercamp* and *Bailey* do. Moreover the Victimization approach is more conceptually economical than Fletcher's approach in that a distinct third defense need not be established.

168. *Lovercamp* set out a test consisting of five criteria:

- (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
- (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
- (3) There is no time or opportunity to resort to the courts;
- (4) There is no evidence of force or violence used towards prison personnel or other 'innocent' persons in the escape; and
- (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

See *People v. Lovercamp*, 43 Cal. App. 3d 823, 831-32, 118 Cal. Rptr. 110, 115 (1974).

169. There have been differences among the courts as to the exact status of the five conditions that *Lovercamp* requires. Some courts have accepted the substance of these conditions as requirements. See, e.g., *United States v. Bryan*, 591 F.2d 1161 (5th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); *United States v. Boomer*, 571 F.2d 543, 545 (10th Cir.), *cert. denied*, 436 U.S. 911 (1978). *United States v. Bailey* stresses that return to custody as soon as the coercion has lost its force is an indispensable element of the defense. See *United States v. Bailey*, 444 U.S. 394, 412, 415 (1980). Other cases have viewed these conditions as relevant for assessing the evidence as to necessity, but not as conditions specifically required as a matter of law. See, e.g., *People v. Unger*, 66 Ill. 2d 333, 5 Ill. Dec. 848, 362 N.E.2d 319 (1977); *State v. Baker*, 598 S.W.2d 540 (Mo. App. 1980).

170. As required by condition No. 4., *People v. Lovercamp*, 43 Cal. App. 3d 823, 832, 118 Cal. Rptr. 110, 115 (1974). See *supra* note 168 (*Lovercamp* criteria).

that made the difference, that tipped the scale in favor of the criminally prohibited act.

Therefore, the escapee must establish that the threats, and not, for example, the mere desire to escape custody, were the crucial motive for escape. This, in turn, can most readily be established if the escapee returns to official custody promptly after escaping the physical proximity of the Victimizers.¹⁷¹ Thus, the newly-emerging defense conforms with the Victimization concept and, it seems fair to say, reflects the tacit, intuitive use of the concept to modify legal doctrine when the standard legal categories did not fit the facts well.

B. To "Wrong" the Victim

Victimization requires that the Victimizer shall wrong the Victim. This is a more narrowly specified version of the requirement than has yet been mentioned; until this point the requirement has been formulated more broadly, in terms of the Victimizer's acting wrongfully. Mere wrongful conduct, however, might be no more than a wrongful act incidental to influencing choice. Thus, if Jones overparks in the course of taking Smith to lunch for some hard business bargaining, Jones has incidentally done what is wrongful but has not wronged Smith. This obviously is not a form of Victimization. Moreover, even if Jones' wrongful conduct is more than merely incidental to making the bargain, that still may not be enough to establish Victimization. The Victimizer must wrong the Victim. The fact that Jones had to act wrongfully toward a third party, as a necessary step in being able to make a persuasive proposal to Smith, does not make Smith a Victim. Most specifically, the wrong to Smith must be at least part of what makes the act in question appear reasonable: The relation between the wrong and the reason for action is "internal." For example, in order to present information to Smith that will make a certain act appear reasonable, it may be essential for Jones to unlawfully invade a reluctant Smith's privacy. But even if Smith is then persuaded to do as Jones says, Smith may be persuaded for reasons given by Jones that are perfectly valid. In that case Smith is not Victimized, even though he was wronged. The wrong done to him was not itself, at least, a part of his reason for the act, that is, the wrong was "external," not "internal," to what made the act appear reasonable. On the other hand, when the wrongful threat is itself the threatened person's reason for the act, the wrong to the actor is at least part of, is internal to, the

171. This requirement is emphatically imposed by the Supreme Court in *United States v. Bailey*. See *Bailey*, 444 U.S. at 412 n.9 ("We decline to hold that...failure to return is 'just one factor' for the jury to weigh.... [O]ur holding is a substantive one: [bona fide effort to surrender or return is] an essential element of the defense...."). See also *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977) (stressing that to excuse initial departure from custody is not to excuse continued absence and thus in effect allow commutation of sentence); *People v. Lovercamp*, 43 Cal. App. 3d 823, 832, 118 Cal. Rptr. 110, 115 (1974) (condition 5).

reason for the act; indeed the wrongful threat is itself *the* reason for doing the act.¹⁷²

C. *The Reason for the Victim's Act*

The definition of "Victim" requires that the Victim act "because of the apparent reasonableness" that the act has as the result of the Victimizer's conduct. This is intended to reflect the "but for" provision in *Bram*,¹⁷³ the idea that indeed it was the Victimizer's conduct that "made the difference." Some such link seems necessary in the formula if we are to capture the sense of the concept.

172. It should be recalled that in this context "wrongful" includes not only what is illegal in a well-defined sense, but also includes abuse of legal process or even can include conduct that is morally reprehensible or that violates other public norms. See *supra* note 80 and accompanying text. "Under the modern view, acts or threats cannot constitute duress unless they are wrongful; but a threat may be wrongful [in a "moral or equitable sense"] even though the act threatened is lawful." *Wolf v. Marlton Corp.*, 57 N.J. Super 278, 287, 154 A.2d 625, 630 (1959). "The act or threat upon which a claim of coercion is predicated must only be wrongful in a moral sense, not necessarily a legal one." *Gerber v. First Nat'l Bank*, 30 Ill. App. 3d 776, 332 N.E.2d 615 (1975). "It is clear that such act need not be criminal, tortious, or in breach of contract in order to be wrongful...." 25 AM. JUR. 2D *Duress and Undue Influence* § 7 (1966); see *Norris v. Stewart*, 350 So.2d 31, 31 (D. Ct. App. 1977) ("The act...is unlawful or wrongful"); *Louisville Title Ins. Co. v. Surety Title & Guar. Co.*, 60 Cal. App. 3d 781, 805, 132 Cal. Rptr. 63, 80 (1976) ("wrongful act or of bad faith"); *Bridges v. Howell*, 122 S.W.2d 665, 668 (Tex. Civ. App. 1938) ("to amount to undue influence it must be equivalent to moral coercion"). Not infrequently the term "improper" is used in connection with the coercive threat. See, e.g., *Bram v. United States*, 168 U.S. 532, 543, 549 (1897); *Head v. Gadsden Civil Service Bd.*, 389 So.2d 516, 519 (Ala. Civ. App. 1977); *Miles v. Caples*, 362 Mass. 107, —, 284 N.E.2d 231, 235 (1972) ("deception or improper influence"); see also, e.g., *Yinger v. Secord*, 369 Mich. 364, —, 119 N.W.2d 577, 580 (1963) (judge reminding jury of duty to stick by their personal convictions at late hour when fatigue had set in made verdict a coerced one). Moreover the wrong may be an inducement rather than a threat. See *Bram v. United States*, 168 U.S. 532 (1897) (reference to "promises"); *Wilson v. United States*, 162 U.S. 613, 622 (1896) (references to "encouragement" of "favor"). In labor relations, a favor to employees may be coercive. See, e.g., *Adams v. Federal Express Corp.*, 470 F. Supp. 1356 (W.D. Tenn. 1979) (holding that coercion, within the meaning of Railway Labor Act, exists where conduct favorable to employees is expressly designed to infringe on their freedom of choice for or against unionization, and is reasonably calculated to have that effect), *aff'd*, 664 F.2d 452 (6th Cir. 1981). For examples of "wrong" in terms of violation of accepted business practices, see *Young v. Hoagland*, 212 Cal. 426, 431, 298 P. 996, 998 (1931) (test is whether reasonably prudent person would pay under threat what is not owed in course of business transactions); *Mitchell v. C. C. Sanitation Co.*, 430 S.W.2d 933, 938 (Tex. Civ. App. 1968). In connection with undue influence in the making of wills, questions of the amount and kind of persuasiveness used, in relation to the relationship of trust or confidence that exists, can be crucial. Such issues are determinable by reference to a variety of domestic and legal norms as applicable to the particular circumstances. See *infra* text accompanying notes 176-86. In cases of adoption, the threat necessary to establish coercion is "determined in the context of public policy favoring finality in the adoption process." *Regenold v. Baby Fold, Inc.*, 42 Ill. App. 3d 39, 43, 355 N.E.2d 361, 365 (1976), *aff'd*, 68 Ill. 2d 419, 12 Ill. Dec. 151, 369 N.E.2d 858, *appeal dismissed*, 435 U.S. 963 (1978).

173. See *supra* note 115.

However the word "because" cannot signify merely a causal link of any kind. Plainly its causal significance here is more specific than that. The cause that makes the difference must be the wrong that serves as and is intended to serve as the Victim's reason for the act. Thus, in Victimization there is a certain "meeting of minds."¹⁷⁴ By intentionally providing the Victim with a crucial reason for action, the Victimizer may be said to cause the Victim-act but to do so specifically by acting upon and *through* the Victim's will.¹⁷⁵ In most cases the Victim then does act as intended. Thus the essence of Victimization may be expressed idiomatically: It is not merely working one's will upon another, but wrongfully working one's will through the will of the other.

We have no neat and objective test for determining a person's crucial reason for doing an act. However, there is nothing perniciously subjective here. It is no more (or less) subjective than determining a person's intent or knowledge. We infer these from objective circumstances and evidence, and we are more or less confident about our inference depending on the character of that evidence. It is at bottom no different in law from the procedure by which we gather another person's intent in everyday life. We rely on such determinations in the most trivial as well as the most portentous of our decisions.

D. Some Extensions of the Victimization Excuse: "Undue Influence"

The claim of undue influence has close affinities to coercion or duress: It has been said that "at least the two would seem to run together,"¹⁷⁶ or even that undue influence is simply a species of duress.¹⁷⁷ Certainly the definitions and explanations of undue influence do reflect the familiar idiom and imagery of the classic coercion tests, most especially in the assertions to the effect that undue influence "must subvert and overthrow the will," and that it entails the "destruction of free agency and will power."¹⁷⁸

174. See *supra* text following note 171 (definition under heading "To Wrong the Victim").

175. The Victim's act is "in truth the act of the one who procures the result..."—*i.e.*, the Victimizer. *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674 (1974); see W. LAFAVE & A. SCOTT, *supra* note 1, at 380 (suggesting something of the same sort). By contrast, rather than seeing the Victimizer as acting *through* the will and reason of the Victim, Fletcher argues that an excuse such as duress must be understood in terms of "mere react[ion]" and "pressure." See G. FLETCHER, *supra* note 9(f), at 804, 811. In a later essay, Fletcher speaks in terms of "an unreflecting reaction, a will that is overborne." See Fletcher, *supra* note 162, at 136-37.

176. 25 AM. JUR. 2D *Duress and Undue Influence* § 35, at 395 (1966).

177. *Id.*; see *In re Estate of Loftin*, 205 N.C. 717, 722, 208 S.E.2d 670, 674 (1974) ("Duress...may be described as the extreme of undue influence"); *Commercial Nat'l Bank v. Wheelock*, 52 Ohio St. 534, —, 40 N.E. 636, 638 (1895) ("Duress is but the extreme of undue influence").

178. *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963); see, *e.g.*, *Atlantic First Nat'l Bank v. Cripe*, 389 So.2d 224, 226 (Fla. App. 1980) (undue influence amounts to overpersuasion, duress, force, coercion, or artful or fraudulent contrivances to such degree that there is destruction of free agency and will power), *modified*, 422 So.2d 820 (1982); *De Grassi v. De*

What is required if undue influence is to be subsumable under Victimization is that it is established, under appropriate criteria that the victim, in deciding to do the act rather than not, decided so because the act was intentionally made to appear reasonable by the Victimizer's wrongful conduct. These conditions are implicit in the concept of undue influence. One sees this when one looks for the practical benchmarks of a "destroyed free agency."

One finds immediately, as in the case of coercion, that although much verbal reference is made to the "state of mind" of the victim,¹⁷⁹ the specific analyses of facts and law in the cases resolve substantively into two basic questions: Was there "overpersuasion," "excessive" argument, *unfair* tactics, or coercion?¹⁸⁰ It seems reasonable to subsume these questions under the generic Victimization questions. First, was there some conduct *wrongful* in the context, designed to influence the victim?¹⁸¹ In this context, such an influence may be wrongful of its own nature, or by reason of some context-specific relationship of trust or responsibility in which the influencer stands to the victim. Second, did the wrongful conduct make the act appear

Grassi, 533 S.W.2d 81, 85 (Tex. Civ. App. 1976) ("persuasion, entreaty, importunity, argument, intercession, and solicitation must subvert and overthrow the will..."); see also *In re Estate of Bailey*, 122 So.2d 243, 246 (Fla. App. 1960); *Klussman v. Day*, 107 Or. 109, 111, 213 P. 787, 789 (1923); *In re Estate of Gold*, 408 Pa. 41, —, 182 A.2d 707, 713 (1962); *Long v. Long*, 98 S.W.2d 236, 239 (Tex. Civ. App. 1936), *rev'd*, 133 Tex. 96, 125 S.W.2d 1034 (1939).

179. See, e.g., *In re Weeks Estate*, 29 N.J. Super 533, 542, 103 A.2d 43, 48 (1954) ("The clarifying test of the matter...is whether the testator's mind, when he made the will, was such that..."); *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963) (inquiry necessarily turns to state of mind); *Long v. Long*, 98 S.W.2d 236, 239 (Tex. Civ. App. 1936) (must act directly on her mind), *rev'd*, 133 Tex. 96, 125 S.W.2d 1034 (1939).

180. See *Stetzel v. Dickenson*, 174 N.W.2d 438, 443 (Iowa 1970) (improper or wrongful constraint, machination, or urgency of persuasion); *Cockrum v. Cockrum*, 550 S.W.2d 202, 207 (Mo. App. 1977) (force, coercion, or overpersuasion). See also *supra* note 178 (cases cited).

181. Not only does much of the language already quoted make this plain, but the wrongfulness of the influence as essential to undue influence is also explicitly mentioned as such in several cases. See, e.g., *Boland v. Aycock*, 191 Ga. 327, 329, 12 S.E.2d 319, 321 (1940) ("honest persuasion and argument, even to the point of importunity, is not undue influence..."; tears, persuasion, strong language, with testatrix weak in mind, feeble in health, who yields in order to escape mental distress and achieve peace and quiet is not undue influence where there is no falsehood or fraudulent misrepresentations, or deceiving or misleading); *Hyde v. Lewis*, 25 Ill. App. 3d 495, 501, 323 N.E.2d 533, 537 (1975); *Eslick v. Montgomery*, 3 Ill. App. 3d 447, —, 278 N.E.2d 412, 416 (1972); *Jones v. Jones*, 276 Or. 1125, —, 557 P.2d 239, 241 (1976); *Long v. Long*, 98 S.W.2d 236, 239 (Tex. Civ. App. 1936) ("it must amount to moral coercion"), *rev'd*, 133 Tex. 96, 125 S.W.2d 1034 (1939). Many times explicit reference to the wrongfulness of the influence is absent, but on the other hand reference to the overpowering or subverting of "free will" or "free agency" is included as essential and distinctive. We have seen in previous discussions that this idiom is not, so far as its legal force goes, essentially a reference to some traumatic mental breakdown, but is an indirect way of alluding to the wrongfulness of the externally created condition that made the decision appear reasonable.

reasonable,¹⁸² thereby eliciting the Victim's act?¹⁸³ In answering the latter question the court will of course take into account old-age, weakness or other "mental" factors, if they might relevantly bear on the victim's assessment of *reasonableness*.¹⁸⁴

That the central issue, even where "weakness of mind" is relevant, is the act of wrongfully making something appear reasonable, and not the

182. See *supra* note 175 (question is implicit in the language quoted). On one hand, we have to recognize that the concept of undue influence, as distinguished from incompetency, implies an influence exerted on someone who is mentally competent for the purpose at hand. See *infra* note 186. The victim must be rational with regard to the material facts and issues, and able to reason about them at least at some minimally satisfactory level. On the other hand, we see that the undue influence takes advantage of this very capacity, creating what appears to be reasons for acting in a certain way, and doing so by means of some form of wrongful persuasion, argument, threat, or plea, or else in the form of some deceit, trickery, fraud, or "machination." Of course undue influence may include conduct that, for example, wears down (by importuning, tears, persistent discussion) a person already physically and mentally vulnerable. This may affect what will then appear reasonable to that person. For example, acquiescence to certain improper advice or argument may appear reasonable to one who is exhausted, but not to one who is strong enough to withstand improper importuning.

As has been said in many undue influence cases, the importuning tactics do not of themselves suffice to constitute undue influence; to make them "undue," there must be some element of threat, fraud, deceit, misleading, misrepresentation—in short, presentation in a *wrongful* way of a *reason* for the weak and beset victim to make the decision the influencer desires. Here again the pseudo-psychological language of "pressures" on the will, "controlling" the will, "subverting" or "overcoming" the will, often does duty, misleadingly, for the concept of providing a rational person with what appears to be reason for doing what the influencer desires. See *In re Estate of Weir*, 475 F.2d 988, 992 (D.C. Cir. 1973) (influence gained by kindness and affection not undue unless imposition or fraud practiced, e.g., nurse, by false representations refusing relatives admission to see well patient; threats of physical abuse while under sedation to compel executing will); *Boland v. Aycock*, 191 Ga. 327, 329, 12 S.E.2d 319, 321 (1940); *Adoption of Jones*, 558 P.2d 422, 424 (Okla. App. 1976) (influence of affection, confidence, gratitude not undue, but is so if it confuses judgment or is coercive or controlling); *Methodist Mission Home of Texas v. N-A-B-*, 451 S.W.2d 539, 543 (Tex. Civ. App. 1970) (persuasion and offering reasons not undue influence, but is so if it includes misleading victim).

183. See *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963) (undue influence requires proof of: "(1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; (3) the execution of a testament which the maker thereof would not have executed but for such evidence").

184. We have here the same issue of the intertwining of subjective and objective considerations in determining what was made to appear reasonable. See *supra* text accompanying note 76; see also *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963) (the issue necessarily turns the inquiry to the victim's state of mind, mental or physical incapacity to resist or susceptibility). But see *In re Estate of Dunson*, 141 So.2d 601, 604 (Fla. App. 1962) (mere old age, frailty; sickness, failing memory, or vacillating judgment not inconsistent with testamentary capacity and absence of undue influence in spite of affection, kindness, attachment as influences); *Boland v. Aycock*, 191 Ga. 327, 12 S.E.2d 319 (1940) (elaborate hypothetical and real importunities of family directed to person of weak mind and feeble health not undue influence if testatrix not misled); *Miles v. Caples*, 362 Mass. 107, —, 284 N.E.2d 231, 235 (1972) (donor of gift disoriented before transfer, which in itself only shows susceptibility but not submission).

“overcoming” or “destruction” of some part of the mind, can be readily seen.¹⁸⁵ Imagine a case in which an argument or piece of advice that was in every respect true, wise, and lawful, and that was persuasively presented; imagine this “overcame” the weak-minded advisee’s prior false opinions and unwise resolutions. Would this “overcoming” of the will be a “destruction of free agency” or a “subversion of free will”? Plainly not. It would be legally unobjectionable. Thus, it is not a matter of mental power, forcefulness, or weakness that is at issue, or of mere forcefulness versus weakness of mind. It is the use of wrongful means to persuade in a situation where, absent such means, there would have been no such decision that is at issue. The point becomes even more clearly evident when one is careful to distinguish the case of wrongful persuasion of a mentally competent person (undue influence) from the case of tactics that truly overcome a person by rendering that person mentally incompetent. In the latter case, there is no longer undue influence but legal non-competence, raising very different legal questions.¹⁸⁶

185. Undue influence has been classified by some courts as a species of fraud. *See Noel v. Noel*, 229 Ala. 20, _____, 155 So. 362, 363 (1934) (undue influence is species of constructive fraud but not fraud proper); *In re Shell’s Estate*, 28 Colo. 167, _____, 63 P. 413, 413 (1900) (“strictly speaking, ‘fraud’ and ‘undue influence’ are not synonymous expressions. Undue influence is, in one sense, a species of fraud...[but] may exist without any positive fraud being shown”); *In re Estate of Loftin*, 285 N.C. 317, 722, 208 S.E.2d 670, 674 (1974) (“undue influence is a fraudulent influence over the mind”). *But see Alexander v. Gibson*, 176 Ala. 258, _____, 57 So. 760, 871 (1912) (to show undue influence complainant must show both undue influence over mind and that execution of will was procured by fraud or result of fraud); *Matter of Adoption of Male Minor Child*, 1 Hawaii App. 364, _____, 619 P.2d 1092, 1097 (1980) (undue influence is distinct from fraud).

As noted earlier, duress has been thought of as a species of undue influence. *See supra* note 177. *See also Regenold v. Baby Fold, Inc.*, 42 Ill. App. 3d 39, 43, 355 N.E.2d 361, 364 (1976) (“duress or undue influence”—apparently being used without concern to differentiate sharply), *aff’d*, 68 Ill. 2d 419, 12 Ill. Dec. 151, 369 N.E.2d 858, *appeal dismissed*, 435 U.S. 963 (1978). Furthermore, duress itself is occasionally characterized as a species of fraud. *See Leeper v. Beltrami*, 53 Cal.2d 195, 204, 347 P.2d 12, 19, 1 Cal. Rptr. 12, 19 (1959) (“Duress is a species of fraud”) (quoting *Tanforan v. Tanforan*, 173 Cal. 270, 275, 159 P. 709, 712 (1916)); *Williams v. Rentz Banking Co.*, 112 Ga. App. 384, 385, 145 S.E.2d 256, 258 (1965) (“Duress is considered as a species of fraud...”) (quoting *King v. Lewis*, 188 Ga. 594, 597, 4 S.E.2d 464, 467 (1939)). Contrariwise, and from a purely logical standpoint, a plausible case can be made for viewing fraud as a species of undue influence rather than vice versa; and on the same logical basis coercion would appear to be a species of undue influence. *See In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674 (1974) (duress may be described as the extreme of undue influence); *Commercial Nat’l Bank v. Wheelock*, 52 Ohio St. 534, _____, 40 N.E. 636, 638 (1895) (same).

The conceptual interrelations among “fraud,” “duress,” and “undue influence” are, to put it mildly, obscure. “It is sometimes said that ‘undue influence’ is a subtle something that defies definition.” *Boland v. Aycok*, 191 Ga. 327, 329, 12 S.E.2d 319, 321 (1940). “The term ‘undue influence’ is not very clearly defined by the courts.” 25 AM. JUR. 2D *Duress and Undue Influence* § 35, at 395 (1966). Nevertheless, the essential element of wrongfulness in each is clearly brought out in the concept of Victimization, which, as can be readily seen, can have application in types of fraud as well as duress and undue influence. *See infra* note 191 (fuller comment on the possible broader applications of Victimization concept).

186. “Undue influence in the procurement of a testament is a ground...separate and distinct from the ground of testamentary incapacity; [u]ndue influence implies the *existence* of a

IV. WHY SHOULD VICTIMIZATION BE A GROUND OF EXCUSE OR AVOIDANCE?

The literature that bears on the justification for Victimization claims has been often formulated in the context of coercion as an excuse for criminal acts.¹⁸⁷ This, as the preceding analyses imply, is a limited and, therefore, misleading perspective.¹⁸⁸

testamentary capacity...." *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963) (emphasis added); see *McFadin v. Catron*, 120 Mo. 252, —, 25 S.W. 506, 509 (1894) ("want of testamentary capacity, or...fear or undue influence"); *Commercial Nat'l Bank v. Wheelock*, 52 Ohio St. 534, —, 40 N.E. 636, 637 (1895) (if undue influence exists, then capacity exists). See also *Alexander v. Gibson*, 176 Ala. 258, —, 57 So. 760, 761 (1912) (treating testamentary incapacity and undue influence as distinct grounds for contesting will); *In re Estate of Bailey*, 122 So.2d 243, 245, 246 (Fla. App. 1960) (court defines undue influence and lack of capacity in different ways); *Long v. Long*, 98 S.W.2d 236, 239 (Tex. Civ. App. 1936) (distinguishing explicitly between issues of testamentary capacity and undue influence), *rev'd*, 133 Tex. 96, 125 S.W.2d 1034 (1939).

187. See, e.g., *Fletcher*, *supra* note 162; *Intolerable Conditions*, *supra* note 162; *Prison Escape*, *supra* note 162; *Duress and the Prison Escape*, *supra* note 162; Annot., 69 A.L.R.3d 678 (1976). See also, e.g., *Cross*, *supra* note 21 (coercion as a criminal law defense); *Dennis*, *supra* note 19 (same); *Edwards* (1951), *supra* note 1 (same); *Edwards* (1953), *supra* note 1 (same); *Fletcher*, *supra* note 9(f) (same); *Hall*, *supra* note 1 (same); *O'Regan*, *supra* note 12 (same); *Smith*, *supra* note 12 (same); *Wasik*, *supra* note 21 (same). See generally *United States v. Bailey*, 585 F.2d 1087 (D.C. Cir. 1978) (lengthy review of literature).

188. The justifications offered by legal scholars and jurists have been quite various. All differ from the justification offered in the text following this note. The following very brief, representative review will suffice to suggest the range of proposals.

It has been argued that compassion is the basis for the excuse—the Victim did what I would have done too (or what any of us would have done). See G. FLETCHER, *supra* note 9(f), at § 10.3.3; REPORT ON DEFENCES, *supra* note 9(a), at 10 ("the defence of duress is essentially a concession to human weakness"). Whether what is intended here is a sentiment or a moral principle is not entirely clear. See *Fingarette*, *supra* note 20, at 1009-10 (discussion of Fletcher's view). It has been held that the law should excuse the victim of coercion because it is pragmatically unrealistic to expect more than what a person of ordinary courage and firmness would do. G. WILLIAMS, *supra* note 1, at 580; see REPORT ON DEFENCES, *supra* note 9(a), at 7. Or such an expectation has been called unfair or unjust. See *D.P.P. for Northern Ireland v. Lynch*, [1975] A.C. 653; G. FLETCHER, *supra* note 9(f), at 804 ("cannot fairly be punished"); *Cross*, *supra* note 21 at 372; REPORT ON DEFENCES, *supra* note 9(a), at 7. A moral justification in terms of unfairness has also been proposed on the basis of supposing that the victim's power of choice is gone, and that refusal to excuse the victim would amount to the obviously unfair demand that a person make a certain choice even though that person has no power to make it. The Model Penal Code, § 2.09(1), seems to imply this when it defines the defense of duress in terms of a threat that "a person of reasonable firmness in his situation would have been unable to resist." Fletcher takes a position that, at least verbally, casts his theory of excuse in such terms as: "circumstances that overwhelm...capacity for choice," "distort the actor's capacity for choice" or that "the actor's freedom of choice is constricted." See G. FLETCHER, *supra* note 9(f), at 801-02. But then Fletcher translates this into what he calls "moral involuntariness," which in turn becomes "a matter of moral judgment about what we expect people to resist...." See *id.* at 803-04. But the ambiguity in all this lies in the question as to whether the "moral involuntariness" is determined on the basis of a prior moral judgment about the fairness and justice of punishing, or whether that moral judgment is itself grounded on a prior judgment as to whether choice is "constricted" or "distorted." This ambiguity is left unresolved when he subsequently proposes that we "rest the entire theory of excuses on the injustice of punishing

The present approach differs from those to be found in the literature in its more comprehensive approach, and in the substantive analyses that result in bringing out a justification purely on the basis of legal principle. In offering such a "legalist" analysis and justification there is no intent to deny what is obviously true, that excuse or avoidance grounded on Victimization may often *also* be justifiable on the basis of morality, or public policy, or other extra-legal considerations. The point, rather, is that one finds strictly within the context of law considerations adequate to explain and justify treating Victimization as an excuse or avoidance claim, and so one does not *need* to rely on controversial public policy, moral, or other extra-legal assumptions in order to proceed rationally with such excuse or avoidance claims. It is arguable that the enduring appeal of the various Victimization excuses, in spite of changing moral, political, and psychological views over the centuries, may arise from an intuitive awareness of the always present solid foundation for such claims in the very idea of law itself.

Basic to the simple justification to be presented now is the conception of Victimization as implying confession of the act as legally defined, and as embodying a plea to be excused from, or to avoid, certain ordinary legal consequences of that act on the ground of further, special conditions.¹⁸⁹ Thus

unavoidable violations of the law." *Id.* at 805-06. Frankfurt's position plainly embodies, as being central to coercion, the incapacity to exercise choice. See *supra* text accompanying note 32; *supra* note 25; see also *Gallaher Drug Co. v. Robinson*, 13 Ohio Misc. 216, 232 N.E.2d 668 (1965) ("irresistibly driven"); Gardner, *supra* note 9(f), at 133 (choice impossible). This doctrine seems to be related to the conception of the Victim-act as being "in truth the act of the one who procures the result," *i.e.*, the Victimizer. See *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674 (1974); *Gorringer v. Reed*, 23 Utah 120, _____, 63 P. 902, 905 (1901); see also *W. LAFAYETTE & A. SCOTT*, *supra* note 1, at 380 (suggesting similar notion).

The power of choice has also played a central role in justifications based on certain theories of what a good system of law would be. It has been held, for example, that in a good system of law, if the law acts to punish or constrain me in some way, this should be the predictable result of the course I have chosen, not the result of factors I do not control by my choices, as is purportedly the case in duress. See H.L.A. HART, *Legal Responsibility and Excuses, and Negligence, Mens Rea and Criminal Responsibility*, in *PUNISHMENT AND RESPONSIBILITY*, 41-53, 143-44 (1968); H. MORRIS, *Persons and Punishment*, in *ON GUILT AND INNOCENCE* 46-49 (1976). Utilitarian argument in terms of the relative evils of the alternatives have been used to justify duress excuses as forms of Necessity. The utilitarian argument itself is based, of course, on Bentham's work, although Bentham does not seem to have taken up the topic of duress and the justification of its excusing role. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS & LEGISLATION* (1970). See also Cross, *supra* note 21, at 374 (giving a utilitarian-Necessity account).

All these proposals are based in some essential respect on considerations external to the system of the law itself. That is, they are justifications based on human sentiment, moral principle, social policy, psychological assumptions, or evaluative theories about the worth of different possible systems of law.

189. See Fingarette, *supra* note 20. The author, in that essay, argued for the position adopted herein in regard to the matters specifically mentioned in the text immediately above. On the other hand, that essay concluded with the hypothesis that the "further conditions" warranting excuse would always be appropriately characterizable in terms of impaired capacity for self-government—a hypothesis inconsistent with the position argued for in the present essay. It is now my view that it was a mistake to take mental disability—*i.e.*, impaired psychological

Victimization is in the nature of an affirmative defense.¹⁹⁰ And its range of applicability is very wide.

We are now prepared to ask and answer the question: Given that all the constitutive elements of the act as legally defined are present, why should a Victim be relieved of the burdens legally normally entailed? The legalist answer is quite simple and direct: It is true by definition that where there is Victimization there is, in the eyes of the law, on one side a wronged party who is acting reasonably under the circumstance. It is of the very essence of law—it is the *raison d'être* of the law—to protect and defend those who are innocent and who act reasonably and to oppose and discourage those who do wrong. But then to burden the Victim with punishment, obligations, or losses normally incident on the Victim's act would be to act directly contrary to what the law ultimately stands for. It would be to burden the innocent victim, and often would amount to aiding or at least standing neutral before the wrongdoer.

Thus, even where a legally defined act has been committed, it makes sense, as a basic policy of law, that the imposition of legal burdens normally consequent on the act should be modified, if there is Victimization, so that the law will not in effect knowingly be an accomplice to wrong and knowingly be unconcerned to protect the vulnerable and reasonable innocent. This essentially simple and intuitively apt rationale emerges out of the Victimization concept as defined in essentially legal terms, and its force applies very generally to the traditional forms of legal claims under rubrics such as duress and undue influence.¹⁹¹

capacity—as providing the paradigm of excuses generally. The argument herein in regard to Victimization does have a place for a “flaw” in the deliberative process. The emphasis, however, is on the fact that the flaw, far from being a psychological one, is a flaw constituted by the wrongfulness of a second party's act. Psychologically speaking, the emphasis here is on the Victim's psychological *capacity* for rational choice. The two positions are not strictly contradictory, but the former one was substantively misleading with its suggestion that the flawed choice situation should be read psychologically. The present one (it is to be hoped) stresses the perspective that is substantively fundamental.

190. It can of course be argued that the concept of coercion could, logically speaking, be incorporated into the definition of the criminal act by making “absence of coercion” definitionally an element of each crime, thus making a defense of coercion amount to a denial of the act. Aside from any procedural consequences that might tend to follow, *e.g.*, with regard to burden of proof matters, such verbal manipulations would obscure the substance of the matter. There is good reason—more than verbal economy—why the law has not in general defined legal acts in this way. Pleas of avoidance or excuse based on coercion (or, for example, insanity, or official misconduct) have a distinctive generality of applicability; they apply more or less wholesale to wide ranges of legal acts, even to all acts. In this generality, these pleas differ significantly from defenses based on absence of some element traditionally playing a specific constitutive role in distinguishing one specific act from other closely related ones, as elements of intent or knowledge quite typically do. Thus, intent to retain possession distinguishes the category “theft” from the category “trespass.” On the other hand, “coercion” does not distinguish one category of crime from another, but rather distinguishes one *instance* of a specific category of crime, for example, theft, from typical instances of that same category.

191. No attempt is made in this paper to develop the ways in which the concept of Victimization also operates in areas of law where such notions as fraud, misrepresentation, and unconscionability are central. The reasons are several: (1) Each concept covers a wide and

complex range of circumstances, and many variant definitions; discussion, therefore, would demand more space than can appropriately be afforded here, and would also demand more thoroughgoing analysis than this author has yet been able to complete; and (2) specifically, it is plausible that, unlike undue influence, not all forms of unconscionableness, fraud, and misrepresentation amount to Victimization. To settle this question, and to determine whether in the end all versions of these types of excuse/avoidance concepts do imply Victimization, would take extensive analysis which, as has been said, is beyond the scope of this paper. On the other hand, since it is relatively plain that undue influence is a form of Victimization, it has been possible to treat that topic here with comparative brevity. Moreover the treatment of deception in the text, as developed in connection with the material on coerced confessions, shows that some deception, at least, does amount to Victimization. That discussion exhibits a pattern of Victimizing-deception that can easily be generalized to include forms of deception and other Victimizing wrongdoing in contexts where the notion of coercion does not at all come into play.

The Victimization concept also plays a role in certain types of antitrust cases because in that area the concept of "unreasonable restraint," when used in connection with an unwilling victim, is so to speak a cousin of duress. Such cases both embody an improper use of power, are contrary to legal policy, elicit conduct by innocent parties that would otherwise not appear reasonable, and, therefore, negate what would otherwise be valid legal relationships. More specifically, "unreasonable restraint" in antitrust law is said to connote the improper use of "market power," the impropriety being rooted in an anti-competitive role played by the market power in question. *See, e.g.,* P. AREEDA, *ANTITRUST ANALYSIS* (1974). However, the rationales for the concept of duress and unreasonable restraint differ significantly: Duress is in its very essence a Victimization concept, that is a concept essentially directed to protection of a wronged victim, whereas unreasonable restraint of trade is most fundamentally a concept directed to promoting economic competition, a public economic policy goal assumed to be beneficial on the whole for society. The "unreasonable restraint" prohibition is only secondarily and, in some but not all instances, directed to protection or redress for a particular wronged private party. Thus, characteristic elements of duress, the victim's initial innocence, continuing unwillingness, and lack of available escape or legal recourse, are not always present, and in any case are not necessary in the antitrust context for there to be unreasonable restraint of trade.

WASHINGTON AND LEE LAW REVIEW

Volume 42

Winter 1985

Number 1

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