

DURESS: A PHILOSOPHICAL ACCOUNT OF THE DEFENSE IN LAW

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I. INTRODUCTION

J.L. Austin expresses the common understanding of the distinction between justifications and excuses, respectively, when he says: "In the one defense...we accept responsibility but deny that it was bad: in the other, we admit that it was bad but don't accept full, or even any, responsibility."¹ This way of dividing up the terrain leaves out a possibility: we accept responsibility for the deed, admit that it was bad, but argue that our behavior was understandable under the circumstances and that we should therefore not be punished. This Article will argue that the criminal law's defense of *duress per minas* belongs in this third category, and that the category marks out a species of *excuse*. Duress is most often, however, understood in terms of one or the other of the surrounding categories, thus being thought to be either a justification or a denial of the voluntariness of the agent's conduct.

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1. JOHN L. AUSTIN, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 175, 176 (3d ed. 1979).

The idea that justification and lack of voluntariness exhaust the philosophical basis for legal defenses is the product of a mistaken idea about responsibility: the assumption that an individual is fully *morally responsible* for the bad things she does, provided that she does them intentionally.² Against the background of this assumption, the two standard approaches to duress fall out naturally as the only two possible grounds for withholding blame in such cases. Blame can only be withheld from an actor for something she did intentionally when the thing done causes more good than harm. If the thing done turns out to be unintentional, either because it was the consequence of an action that was not itself intentional, or because it was an unintended consequence of an intentional action, the question of moral responsibility, in the typical duress case, does not arise. Against the background of the above idea about responsibility, then, there are two theories of defense potentially available to defendants in such situations: justification and excuse, where excuse is taken to mean lack of responsibility. This Article will argue that the foregoing conception of responsibility is confused, and it will attempt to show that a third conception of duress becomes available on an alternative theory of responsibility.

The conception of duress for which the Article will argue is that actions performed under duress flow from states of character we endorse, such as loyalty and prudence. While traditional commentary maintains that character is irrelevant to the criminal law,³ this Article will argue that the modern bias against character makes a mystery of why we should ever exonerate agents for harm they bring about intentionally when the infliction of harm does not raise the aggregate level of social welfare. Although this Article will focus entirely on the duress defense, other defenses of the criminal law may share the conceptual structure of duress and thus should lend themselves to similar analysis.⁴ For a defense of this sort, there is a gap between the legal use of the defense and the theoretical rationales commentators are able to offer for it. The Article attempts to bridge this gap for the duress defense by holding fixed the current use of the defense and attempting to develop a rationale for it which is consistent with this use. Existing rationales would all require significant reform of the law in order to close the gap between theory and practice.

Before continuing, it is important to articulate an assumption which underlies the present discussion. It is a premise of this Article that a single legal doctrine, especially one in the criminal arena, should be justified in terms of a single philosophical rationale. Some may object to this assumption, claiming that certain elements of the defense can be explained under one rationale, while others seem to lend themselves to explanation under another. But there is a natural conceptual unity to doctrines in the criminal law, presumably because the criminal law tends to echo moral theory, and there is a conceptual unity to the various elements of common sense morality. In addition, the single rationale assumption is justified by the difficulty that would otherwise exist of resolving

2. The Article will assume the view of intentional action most familiar to philosophers, that articulated by Donald Davidson. See generally DONALD DAVIDSON, *Actions, Reasons and Causes*, in *ESSAYS ON ACTIONS AND EVENTS* 3 (1980); DONALD DAVIDSON, *Agency*, in *ESSAYS ON ACTIONS AND EVENTS*, *supra*, at 43.

3. See HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 321-28 (1979); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character and Responsibility*, 67 *IND. L.J.* 719, 727 (1992).

4. See *infra* text accompanying notes 109-112.

cases at the margins: it is possible to determine whether duress should be allowed as a defense to murder, for example, only if we can articulate why we allow a duress defense generally. It is the premise of this Article, then, that the demand for a unified treatment of a legal defense is not an excessive one to make of legal theory.

The next Part presents and explains the most commonly accepted elements of the duress defense. Parts III and IV then turn to two prevalent rationales for the defense, referring to them as the "welfarist" and the "voluntarist" conceptions respectively. These Parts attempt to motivate the search for an alternative conception by showing that neither rationale can form the basis for a complete theory of duress, since both fail to account for its core elements. Part V indicates the intellectual territory an alternative to the standard theories should occupy. It considers, among other things, Sections 34 and 35 of the German Criminal Code, which, it argues, point in the direction of a sensible alternative to the approaches presently available in Anglo-American law. Part VI attempts to flesh out the suggested approach to duress by focusing on the role of dispositions in ethical assessment. It draws support from Aristotle's discussion of ethical judgment, and in particular, from his distinction between judgment of action and judgment of character. It also explores Aristotle's own discussion of duress, and it argues for an interpretation of his brief treatment of the subject. The proposed theory of duress thus provides a way of understanding a passage in Aristotle that commentators have often found obscure. The Conclusion elaborates the Article's diagnosis of why the two standard rationales for duress have long seemed to legal scholars to exhaust the possible store of explanations for the defense in Anglo-American jurisprudence.

II. THE ELEMENTS OF THE DURESS DEFENSE

The duress defense has prevailed in the following sorts of cases. An individual robs a liquor store because an aggressor credibly threatens to shoot him and to harm his family if he does not.⁵ A man smuggles drugs from Colombia to the United States by swallowing cocaine balloons after he is threatened with his own death and the death of his family.⁶ A traveler participates in a robbery, which turns murderous, upon orders of the principal assailant and threats by the same to his life.⁷ A person drives a getaway car for the I.R.A. upon threats to his life by a notorious terrorist.⁸ A taxicab driver, threatened by a passenger armed with a gun, drives the passenger to a bank the latter intends to rob.⁹

It is important to distinguish between the possible rationales for duress and the legal requirements that are generally taken to constitute the defense.¹⁰

5. *State v. Tanner*, 301 S.E.2d 160 (W. Va. 1982) (defendant found guilty nonetheless because duress defense disbelieved).

6. *United States v. Contento-Pachon*, 723 F.2d 691 (9th Cir. 1984).

7. *State v. Hunter*, 740 P.2d 559 (Kan. 1987) (duress is defense to felony-murder where defendant not principal).

8. *Lynch v. Director of Pub. Prosecutions*, 1 All E.R. 913 (H.L. 1975) (duress held acceptable excuse to second degree murder).

9. *People v. Merhige*, 180 N.W. 418 (Mich. 1920).

10. Sometimes courts or commentators will attempt to offer one of the elements of the defense as a rationale, such as the fact that the defendant had no reasonable opportunity to escape from the situation, or that the threat was of death or serious bodily injury. See *infra* text accompanying notes 11-17. But it should be clear that when we speak of the theoretical ground

As will become clear in the next two Parts, there is little consensus on the former, while the case law, legislation and commentary are fairly consistent in their acceptance of the latter. Substantive debate focuses mostly on the more marginal requirements.

The core requirements for claiming the defense are generally accepted as the following:

- (1) The defendant must have no reasonable opportunity to escape from the coercive situation.¹¹
- (2) The defendant must be threatened with significant harm—death or serious bodily injury.¹²
- (3) The threatened harm must be illegal.¹³
- (4) The threat must be of imminent harm.¹⁴
- (5) The defendant must not have placed herself voluntarily in a situation in which she could expect to be subject to coercion, as is the case when a person joins a violent criminal organization.¹⁵

The two requirements which appear to have marginal status are as follows:

- (6) Duress must not be pleaded as a defense to murder.¹⁶
- (7) The defendant must have been acting on a specific command from the coercer.¹⁷

Let us briefly review each requirement in turn.

The first requirement, that the defendant have no reasonable opportunity to escape, bears on whether the defendant was in fact confronted with the stark

of a legal doctrine, we are looking for something on a different level altogether.

11. See, e.g., *Pancoast v. Commonwealth*, 340 S.E.2d 833 (Va. App. 1986) (doctor who failed to take advantage of reasonable opportunity to escape barred from claiming she wrote false prescriptions under duress).

12. See *United States v. Shapiro*, 669 F.2d 593, 596 (9th Cir. 1982); *State v. Scott*, 827 P.2d 733, 739–40 (Kan. 1992); *People v. Luther*, 232 N.W.2d 184, 187 (Mich. 1975). Although this condition is generally adhered to in the cases, debate about it appears in the commentary. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 438 (2d. ed. 1986) ("It is not proper, on principle, to limit the defense of duress to situations where the instrument of coercion is a threat of death or serious bodily injury. A threat to do bodily harm less than serious bodily harm, or a threat to destroy property or reputation, ought to do..."); see also 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 177(c)(2) (1984) (arguing that the relevant consideration is "the nature of the actor's state of coercion and his ability to resist it").

13. See *Regina v. Hurley*, 1967 V.R. 526, 543.

14. See, e.g., *Shapiro*, 669 F.2d at 596; *Scott*, 827 P.2d 739.

15. *Scott* (defendant who joined drug-selling organization voluntarily barred from claiming duress when coerced into torturing fellow member).

16. This condition is debated in the commentary, see 2 ROBINSON, *supra* note 12, §177(g)(1), but the prohibition seems to hold firm in the case law, see *State v. Hunter*, 740 P.2d 559 (Kan. 1987); *State v. Strickland*, 298 S.E.2d 645 (N.C. 1983); *Cawthon v. State*, 382 So.2d 796, 797 (Fla. Dist. Ct. App. 1980); *State v. Little*, 312 S.E.2d 695, 697 (N.C. Ct. App. 1984). Courts have sometimes allowed the defense to a charge of accomplice murder, see *Lynch v. Director of Pub. Prosecutions*, 1 All E.R. 913 (H.L. 1975) (accepting defendant's plea of duress to charge of aiding and abetting murder of police officer), or to felony-murder, see *Hunter* (accepting plea to charge of felony-murder where defendant claimed he was not triggerman).

17. See Martin R. 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, 128–130 (1975).

choice between suffering the threatened harm and performing the illegal act. If another course of conduct was open to the defendant, such as reporting the threat to the authorities, the defendant is obligated to pursue that option. While this requirement bears some relation to the imminence requirement,¹⁸ it is conceptually separate from it, since it is possible for threatened harm to be imminent yet for the defendant to have a way of avoiding the illegal act other than suffering the harm.

The requirement that the threat be of significant harm actually incorporates two separate requirements: the condition that the defendant have received an actual threat, and the condition that the threatened harm be of sufficient gravity. First, requiring an actual threat rules out coercion by unusually attractive offers, such as the offer of a high-paying job to an indigent if he carries out some illegal act.¹⁹ It also rules out threats that are merely inherent in a situation, such as a menacing dog or the risk of an avalanche.²⁰ Threatening conditions are believed to be more appropriately raised under the category of necessity.²¹ Nevertheless, an actual threat has been found to exist when the threat was only implied by the coercer's general behavior.²² It need not be an articulated threat. Second, courts are fairly consistent in requiring that the threatened harm be of death or grievous bodily injury.²³ Although the definition of "grievous bodily injury" is vague, it appears to mean roughly injury that is life-threatening or which "seriously interfere[s] with [the victim's] health and comfort."²⁴ The requirement is generally taken to exclude non-physical harm, such as loss of reputation or psychological distress.²⁵

The requirement that the threatened act be illegal rules out use of the defense when, for example, the coercer is acting under a claim of right. But this requirement hardly requires articulation, since threats to perform legal acts will not result in illegal conduct.²⁶ A person who threatens another with injury will not be able to claim his actions are justified if he demands the performance of an illegal act. As discussed below,²⁷ if one allows that the defense can be claimed for responses to threats that are not themselves commanded by the coercer, it becomes possible for a person to commit an unlawful act in response to a lawful threat. Thus a defendant could trespass on private property to escape from a threat of bodily injury when the threat was issued in defense of a third party. Duress should presumably not be available as a defense to trespass in such a case.²⁸

18. See *infra* text accompanying notes 29-31.

19. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1336 (1989) ("Duress implicates threats, not offers.").

20. *Id.* at 1339.

21. As discussed below, distinguishing defenses according to the source of the threat is ad hoc and should probably be abandoned. See *infra* text accompanying note 48.

22. See *People v. Pena*, 197 Cal. Rptr. 264, 272 (Cal. App. Dep't Super. Ct. 1983); *Regina v. Valderrama-Vega*, 1985 Crim. App. 220.

23. See *supra* note 12.

24. *Wellar v. People*, 30 Mich. 16, 20 (1874); *Commonwealth v. Dorazio*, 74 A.2d 125, 130 (Pa. 1950).

25. See LAFAYE & SCOTT, *supra* note 12, at 436.

26. See Dressler, *supra* note 19, at 1339-40.

27. See *infra* text accompanying notes 35-36.

28. See generally Herbert Fingarette, *Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape*, 42 WASH. & LEE L. REV. 65, 79

The imminence requirement, while strongly supported by the jurisprudence of duress,²⁹ is in fact a proxy for several other, distinct concerns. One might see it as an attempt to ensure that the defendant committed the illegal act because of the threat received. The defense would be open to abuse, for example, if a defendant were able to claim she performed an illegal act because of a threat that something terrible would befall her in several years. Such a threat might be too diffuse to make the defendant actually believe she was under serious pressure to comply.³⁰ The requirement is thus generally understood as ensuring that the threat is "operating upon the mind of the defendant at the time of the alleged act."³¹ In addition, the imminence requirement bolsters the "no escape" requirement. The longer the period of time between the threat and the threatened harm, the greater the chances that the defendant can find a way out of the situation.

The requirement that the defendant not have placed himself intentionally in a situation in which he knew he would be subject to coercion is on somewhat shakier ground than the other core requirements, since there is little case law on the question. It appears, however, to be generally accepted in codifications and commentary.³² The Model Penal Code ("MPC") disallows the defense in such a case, and even goes so far as to bar the defense when the defendant was reckless or negligent in entering a situation in which he could expect to be coerced, when recklessness or negligence respectively are sufficient *mens rea* for the offense.³³ The general point of the requirement is clear: individuals should be excused from bad acts only when they are in fact blameless with respect to those acts. A person who intentionally enters a coercive situation is not free from blame when he performs a criminal act under threat. In addition, the requirement serves an obvious deterrence function, since it may dissuade individuals from joining organizations they foresee will pressure them to commit illegal acts.

As we shall see, the requirement that duress not be pleaded as a defense to murder makes little sense under either of the prevalent rationales for the defense. Nevertheless, most courts have accepted the restriction.³⁴ Further discussion of this requirement will await the explanation of the rationales in the next two Parts.

Finally, requiring that the act be commanded by the coercer should make the defense inapplicable where the defendant undertakes a method of avoiding the threatened harm on his own initiative. The typical case is one in which the defendant escapes from prison following threats of death, imminent bodily harm, or sexual abuse and the prison guards are unreliable as a source of succor.³⁵ But the jurisdictions that do allow a defense in this situation are

n.42 (1985).

29. See Dressler, *supra* note 19, at 1340 & n.46 (describing the imminence requirement as "entrenched in American legal history").

30. The imminence requirement should probably be taken to apply to two different time periods if it is to satisfy these concerns: the period in between the moment of the threat and the time of the defendant's illegal act, and the period in between the moment of the threat and the time when the threat was to have been carried out.

31. *People v. Luther*, 232 N.W.2d 184, 187 (Mich. 1975).

32. See Dressler, *supra* note 19, at 1341.

33. MODEL PENAL CODE § 2.09(2) (1980).

34. See *supra* note 16.

35. Where courts have allowed the defense in such cases, the defendant must turn

divided over whether the correct defense is duress or necessity.³⁶

As the above discussion demonstrates, there has been a fairly consistent approach to actual cases involving the duress defense, and commentators generally agree that the core elements of the defense should be retained. Despite the clarity of application, however, there is little consensus on the reason for allowing a defense with these requirements. Courts ignore the question, and commentators either do the same or offer confused rationalizations. This has made principled debate about the more marginal cases difficult, and has left the basis for exoneration in cases in which the defense is accepted mysterious. The next two Parts will explore the two most prevalent rationales for the defense in the legal commentary. The theories discussed form opposite philosophical approaches to the problem of duress. As these Parts will show, both approaches fail to capture many of the core elements of the defense.

III. THE WELFARIST CONCEPTION

The utilitarian approach to duress rationalizes the defense on the grounds that violating the law in the typical case of duress raises the level of social welfare. The Article will accordingly refer to this view as the "welfarist" conception. The welfarist conception regards the duress defense as a justification: it denies that acts performed under duress are bad acts. This approach echoes the doctrine of necessity, according to which an agent can claim he was justified in breaking the law if the criminal act was a lesser evil than would have occurred had the defendant not acted. Thus, the actor who sets fire to a field to prevent the destruction of a town can claim the destruction of property is justified because it was the lesser evil.

The clearest proponents of the welfarist conception are Wayne LaFave and Austin Scott:

The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person.³⁷

Glanville Williams also appears to favor this approach. He says that the reason for allowing a claim of duress is "precisely the same as that for allowing the defense of necessity, and in this respect duress can be regarded as a type of necessity."³⁸ And Jeremy Bentham says that in the case of something done "in the way of precaution against instant calamity," the actor should not be punished where, "although a mischief was produced by that act, yet the same act was necessary to the production of a benefit which was of greater value than the mischief."³⁹ In addition, the criminal codes of four states explicitly treat duress

himself over to the authorities upon reaching a position of safety. *United States v. Bailey*, 444 U.S. 394 (1980); *see also* Gardner, *supra* note 17.

36. *Compare* *People v. Lovercamp*, 118 Cal. Rptr. 110 (Ct. App. 1974) (allowing the defense of necessity against prosecution for prison escape when defendant threatened with imminent homosexual attack) *with* *People v. Harmon*, 220 N.W.2d 212 (Mich. App. 1974) (accepting duress as a defense to prison escape).

37. LAFAVE & SCOTT, *supra* note 12, at 433.

38. GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 755-56 (2d ed. 1961).

39. *See* JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* at XIII.V.2. But Bentham also seems to think that at least some cases of coercion are more like

as a justification.⁴⁰

There are two ways one might interpret the emphasis on social welfare. First, one might suppose that a defendant can plead the defense only when his individual act increases the level of social welfare, where the baseline is the harm that would have occurred without the defendant's intervention. Alternatively, one might allow the defense insofar as the *rule allowing the defense* would enhance social welfare, where the baseline is the level of social welfare in a world without such a defense. The first approach would consider the welfare effects of submission to coercion act-by-act. The second would consider the welfare effects of a legal rule permitting the defense.⁴¹ The next two Sections will consider each version of the welfarist rationale respectively.

A. The Act-Utilitarian Version

While proponents of the welfarist position do not explicitly endorse act-utilitarianism, talk of lesser evils appears to focus on the social welfare effects of the individual act of submission to the threat. These discussions devote little or no attention to the secondary effects of allowing the defense. This emphasis is unfortunate, since the act-by-act approach is the less plausible of the two possible welfarist justifications for the defense. Let us consider how the approach fares in application to the elements of the defense set out above.⁴²

The act-utilitarian approach can arguably explain the first requirement, namely the condition that the defendant have had no reasonable opportunity to escape from the coercive situation, on evidentiary grounds. The availability of a legal means of escape implies that submitting to the threat is unlikely to maximize utility. If the requirement serves an evidentiary purpose, however, it ought merely to create a rebuttable presumption: a defendant ought in theory to be able to prove that it would be utility-maximizing for him to submit to the threat, despite the existence of a legal means of escape, if escape would be more costly than submission to the threat. One might nevertheless justify the "no escape" provision on act-utilitarian grounds by noting that epistemic problems are likely to make rebutting a presumption of disutility in this case infeasible.

Most of the remaining requirements are even less readily explained on an act-utilitarian view. The requirement that the threat be of death or serious bodily injury is highly arbitrary from an act-utilitarian standpoint, since an agent threatened with minor bodily injury or loss of property maximizes utility by giving in to the threat when the coercer demands that she bring about any lesser harm. A defendant threatened with a broken finger should have a valid defense against a parking violation, on this view. No matter how insignificant the threat, it is always possible for performance of the illegal act to constitute a

involuntary, than voluntary action. *Id.* at XIII.XI.5.

40. ARIZ. REV. STAT. ANN. § 13-412 (1978); IOWA CODE ANN. § 704.10 (West 1979); LA. REV. STAT. ANN. § 14.18(6) (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 103-A (West 1983).

41. There is another "rule-utilitarian" interpretation one might adopt. One can ask whether acts of submission to coercive threats are *generally* utility-maximizing. This approach would not consider the secondary welfare effects of incorporating the defense into a *legal* rule, but rather would limit its consideration to the welfare effects of a certain class of acts. The Article focuses on the more general rule-utilitarian approach, since it is more relevant to assessing the desirability of legal rules.

42. See *supra* text accompanying notes 11-17.

lesser evil. The restriction, moreover, does not normally apply to the necessity defense.⁴³ It is not surprising, then, that LaFave and Scott, as well as Williams, reject the requirement as applied to duress.⁴⁴ But, as discussed below in the context of the voluntarist approach, there may be good reasons for the restriction which the welfarist conception cannot represent.⁴⁵

The imminence requirement is equally inexplicable on a welfarist rationale. If the salient consideration is maximizing social utility, why should it matter whether the threatened harm is imminent, as long as it is sufficiently certain to happen as to make calculations of social utility reliable? Perhaps one will respond that imminence is a proxy for high likelihood of occurrence. But if so, it is far from a reliable one, and courts could simply evaluate the likelihood of occurrence, or at least the *apparent* likelihood of occurrence, directly.

The requirement that the defendant not have placed herself in a situation in which she could expect to be subject to coercion is also inexplicable on the act-utilitarian view. If performing the illegal act would be welfare maximizing under the circumstances, an act-utilitarian cannot support disallowing the defense. As we shall see, rule-based forms of utilitarianism may not have this difficulty, since the defense can be justified in terms of the apparent incentive effects that a rule allowing the defense under these circumstances would create. But act-utilitarianism cannot consider general incentive effects: it is limited to an *ex post* evaluation of the welfare effects of a single act.

The unavailability of the defense to murder appears at first to fare better than the other requirements under an act-utilitarian approach. If lives are of equal worth, then social welfare is not enhanced when one person kills another to save himself. But upon further consideration, act-utilitarianism may have difficulty accounting for this condition as well. An act-utilitarian ought to endorse the defense to a charge of murder if the defendant is coerced into killing one person for the sake of saving a greater number. Murder under these circumstances creates a net benefit, again, assuming lives are of equal worth. More troubling still, however, a careful utilitarian should probably reject the premise that lives are of equal worth. The existence of a rich philanthropist may confer more social utility than the existence of an unemployed, unskilled welfare recipient. If consistently applied, the lesser evils approach should tie the availability of the defense in cases of murder to an evaluation of the relative worth of victim and defendant. And this, one might be justified in saying, constitutes a *reductio ad absurdum* of the lesser evils approach.

There are other, more general problems with the welfarist conception. First, it has difficulty explaining why necessity and duress remain separate defenses in most of Anglo-American law: the penal codes of the vast majority of American jurisdictions, as well as the MPC, distinguish them in separate

43. See LAFAVE & SCOTT, *supra* note 12, at 445.

44. LAFAVE & SCOTT, *supra* note 12, at 438 (arguing that threat of less than serious bodily harm or threat to destroy property should be sufficient if act done to avoid threat is relatively minor); WILLIAMS, *supra* note 38, at 756-57; see also sources cited *supra* note 12 and accompanying text.

45. See *infra* Part IV.

provisions,⁴⁶ as does British law.⁴⁷ But since duress and necessity are redundant, on the welfarist conception, one would expect the two defenses to be combined under a general lesser evils defense. The welfarist conception thus has some explaining to do if it is to present itself as an accurate *descriptive* account of the duress defense. It can, alternatively, be presented as a normative theory, one which seeks to abolish duress as a separate defense. But on this strategy, the welfarist conception is not so much an account of duress as an argument against the possibility of such an account. The problem is that the concept of coercion is absorbed into the more general principle of maximizing social welfare, and thus coercion disappears as an independent ground of exculpation.

This is no doubt the reason why the welfarist conception often turns to a distinction based on the source of the threat: duress results from man-made threats, and necessity pertains to threats from natural forces.⁴⁸ A person caught in a mountain storm struggling for survival can claim necessity in breaking into a mountain cabin she discovers. An actor threatened by another human being with death if she does not rob the bank would still be justified, on the welfarist account, but her defense is duress. The problem with this solution, however, is that the distinction seems *ad hoc*. Surely it is irrelevant from a normative perspective whether the source of the threat is man or nature. And if it is not normatively relevant, and if duress and necessity are alike in every respect save this, then the distinction between duress and necessity cannot be a relevant one either. But if the distinction is irrelevant, why should the law retain two separate defenses?

Second, it may be difficult for the welfarist conception to handle cases of mistake about the availability of a justification. There are two sorts of mistake that can occur: the defendant can think his behavior is justified when it is not, and he can think his behavior is not justified when it is. The welfarist conception, at least on the act-utilitarian interpretation, implies that the defendant should not be able to claim the defense in the former case but be allowed the defense in the latter.

If the basis for the defense is that the action does more good than harm, on a welfarist conception, the defense should be unavailable if the action in fact does more harm than good, even if the defendant reasonably believes it does more good than harm. The implication is that the welfarist conception must hold defendants strictly liable for their judgments about the availability of the defense. This would contradict the general approach to mistakes about the availability of a justification, since the law usually allows such actors to claim the benefit of the justification nonetheless.⁴⁹ Moreover, welfarists themselves

46. MODEL PENAL CODE §§ 2.09, 3.02; see Paul H. Robinson, *Criminal Law Defenses*, 82 COLUM. L. REV. 199, 235 n.135 (1981).

47. See WILLIAMS, *supra* note 38, §§ 231, 242.

48. See LAFAVE & SCOTT, *supra* note 12, at 441.

49. *Id.* at 436; see also Allison & Coleman v. City of Birmingham, 580 So. 2d 1377, 1380 (Ala. 1991) ("Most cases do not require that an actual peril exist; a well-founded and reasonable belief is sufficient. Therefore, if an actor is actually mistaken in his belief, he may still use the defense."); Nelson v. State, 597 P.2d 977 (Alaska 1979); City of Chicago v. Mayer, 308 N.E.2d 601 (Ill. 1974). But see State v. Jacobs, 371 So.2d 801 (La. 1979) (holding that actual necessity is required for a reasonable agent to claim defense of necessity). LaFave and Scott criticize this latter decision. LAFAVE & SCOTT, *supra* note 12, at 446 n.38. They also claim, however, that the defendant's view of the *gravity* of the evils does not govern: "It is for

appear to agree with this approach. LaFave and Scott, for example, say that the danger the defendant fears "need not be real," and that it is sufficient if the defendant "reasonably believes it to be real."⁵⁰ They cite a case for this proposition, however, in which the court offered largely a subjective or psychological rationale for the defense.⁵¹ As discussed in Part IV, it is natural for a subjective approach to ignore whether the threat is real. But the position cannot be adequately explained on an act-utilitarian rationale for the defense.⁵²

Of course this does not require the welfarist to maintain that reasonable mistakes will not exonerate. He can claim that even if an actor mistaken as to the availability of a justification is not in fact justified, he is excused under the doctrine of mistake.⁵³ On this approach, one would treat an actor mistaken about the availability of a *necessity* defense as excused rather than justified. But a view that treats *duress* as a justification cannot easily adopt this same structure, since the approach would entail some quite arbitrary distinctions. Compare the standard duress case in which a person is ordered at gun point to rob a bank with an identical case in which the gun is later discovered to have no bullets. The latter situation never was life-threatening, although the defendant's belief that his life was being threatened was reasonable. It seems arbitrary to say that the defendant threatened with a loaded gun has a justification but to say that the defendant threatened with the empty gun has a mere excuse. Our intuitions about the cases are identical, and the legal doctrines of exoneration ought to be as well.

Now consider the second sort of mistake case, that in which the defendant unknowingly creates more good than harm. If the act-utilitarian approach is strictly construed, the defendant ought to be able to claim the benefit of her luck, since she has performed an action which enhanced, rather than diminished, the level of social welfare. This is problematic, however, since defenses are normally available to defendants on the basis of their *ex ante* calculations. The person unaware of circumstances that could justify her behavior is as culpable as if those circumstances did not exist. This is at least in part because she would presumably be willing to repeat the act without the benefit of justification in the future. It is part of the notion of justification that it requires knowledge of the circumstances constituting the justification.⁵⁴ A

the court, not the defendant, to weigh the relative harmfulness of the two alternatives." *Id.* at 446-47. In other words, it is not the actor's value system that determines which of two evils is the lesser. The assessment of the relative gravity of the evils must be objective. The case law appears to support this position. *See* United States v. Moylan, 417 F.2d 1002, 1008 (4th Cir. 1969) ("[T]he exercise of a moral judgment based upon individual standards does not carry with it legal justification..."); *State v. Fee*, 489 A.2d 606 (N.H. 1985) (court rejects defendant's judgment as to which option is lesser of two evils).

50. LAFAVE & SCOTT, *supra* note 12, at 436.

51. *People v. Luther*, 232 N.W.2d 184 (Mich. 1975).

52. We return to this question in the discussion of the rule-utilitarian version of the welfarist position below. *See infra* Section B.

53. There is some support for this approach in the case law. *See* *People v. Scott*, 194 Cal. Rptr. 633 (Ct. App. 1983) (finding defendant who had ingested hallucinogens excused for car theft on grounds that he reasonably believed action was necessary to save life of himself and the president).

54. LaFave and Scott appear to agree, at least in the case of necessity. They say that actual necessity, without knowledge and intention to act on the necessitous circumstances, is never enough to exonerate an agent. LAFAVE & SCOTT, *supra* note 12, at 446. It seems, however, that one need not be aware that the circumstances constitute a legal justification; one need only be aware of the circumstances themselves and perform the act in question because of

justification is a type of motivating reason, and one cannot have such a reason of which one is unaware.⁵⁵ This underscores the inadequacy of welfarist theories of duress: if the basis for the defense is enhancement of social welfare, the mentalistic, or reason-related nature of the defense remains unexplained.⁵⁶

B. The Rule-Utilitarian Version

One might attempt to render the welfarist conception more plausible by turning from act to rule-utilitarianism. The latter would attempt to justify duress in terms of the utility of having a legal *rule* permitting defendants to plead duress. Rule-utilitarianism allows a certain leeway: an act performed under duress would not itself have to be welfare-enhancing to be permissible. The act would merely have to fall under a rule permitting the defense, and the rule would be justified by social welfare considerations.

The philosophical, as opposed to the legal, literature on duress appears to favor this approach. A number of philosophers, for example, have argued that the defense is justified by the simple fact that a rule forbidding such acts could not be welfare enhancing because it would not be obeyed. Jeremy Bentham thought it would be impossible to punish an act performed out of mortal fear sufficiently to induce an actor to refrain from performing the act: "the evil which he sets himself about to undergo, in the case of his *not* engaging in the act, is so great, that the evil denounced by the penal clause, in the case of his engaging in it, cannot appear greater."⁵⁷ Thomas Hobbes also adopted a deterrence rationale, saying that in a case in which a person is compelled to break the law by terror of present death, a person would reason thus: "If I do it not, I die presently; if I do it, I die afterwards; therefore by doing it, there is time of life gained."⁵⁸ Strangely enough, even the most avid anti-utilitarian,

these circumstances.

^{55.} A motivating reason is what philosophers sometimes call an "internal reason," i.e., a reason for acting which the agent takes himself to have and one which impels him toward action. An "external reason" is generally thought to be a consideration which points in favor of an action by which the agent is not motivated. On some versions, a reason which is *potentially* motivating, given an agent's psychological constitution, counts as an internal reason even if it is not actually motivating. See BERNARD WILLIAMS, *Internal and External Reasons*, in MORAL LUCK 101 (1981).

^{56.} One might wish to object that the approach to this sort of case is not consistent with other features of morality. Permitting defendants to take advantage of their luck is not, after all, unfamiliar in ethics, *see id.* at 20, nor is it foreign to the law. If two defendants aim at a human being and they both shoot, and if one hits and the other misses, the former can be charged with murder, while the latter cannot be. Yet the latter is not a better person, from a moral point of view. He just got lucky. Analogously, one might argue that the agent whose evil behavior saves a greater evil from occurring should benefit from his luck. Yet the intuition in this case is entirely different.

The difference might be explained by the fact that the unaware defendant is attempting to offer his "luck" as a defense to an imputation of culpability that arises from harm the agent has actually caused. In the case of the lucky gunman, however, the harm that would make his behavior culpable in the first place has not occurred. Thus in the latter situation, the elements of the *prima facie* case do not exist, and the question of culpability (at least culpability for murder) does not arise. The defendant who is unaware of circumstances justifying his act has successfully carried out a criminal act, and he has done the act *intentionally*. The question of culpability thus cannot be avoided. The individual who fires and misses, however, can usually be convicted for an attempt, but that is another matter altogether.

^{57.} BENTHAM, *supra* note 39, at XIII.XI.5.

^{58.} THOMAS HOBBS, *LEVIATHAN* ch. 27 (Richard Tuck ed., 1991) (emphasis omitted).

Immanuel Kant, defended the duress defense on deterrence grounds, characterizing necessity as a situation in which "no punishment threatened by the law could be greater than losing [one's] life."⁵⁹

The foregoing approaches, however, are confused. First, the philosophers incorrectly limit their analyses to threats of death. But there is no theoretical justification for ruling out use of the defense in situations in which the threat involves harm of a lesser degree. As discussed above,⁶⁰ the duress defense is applicable to lesser threats. Second, pain and torture can always be added to death to make the punishment worse from the standpoint of expected utility than the death one would suffer at the hands of one's coercer. There are, of course, other arguments against increasing penalties in this way, but Bentham does not address them. Third, focusing on deterrence as the philosophers do is problematic because the difficulty of deterring such crimes can cut the other way: one can argue that the penalties for acts performed under duress should be more, rather than less, severe, since such acts are more difficult to deter.⁶¹ Assuming we wish to deter coerced acts, we will simply have to penalize them more harshly than we otherwise would. Of course the argument does not hold if these acts are literally *impossible* to deter. But the availability of ever more stringent penalties makes this assumption unreliable.⁶²

In addition, a deterrence analysis of the defense is not conclusive. In theory, nothing prevents the illegalization of a course of action which is impossible to deter. Granted, for a utilitarian such as Bentham, deterrence is the only justification for punishment, and thus disallowing the defense is unjustified if it is impossible to deter coerced behavior. But one would not expect a non-utilitarian to adopt this position, since for him there are other potential justifications for disallowing the defense. On a retributivist rationale for punishment, for example, the agent's culpability implies that he deserves to suffer in proportion to the suffering he has inflicted. Punishment for an offense must be inflicted, then, even if there is no hope of deterring the offender.

If acts performed under duress are not *impossible* to deter, there is no quick and easy rule-utilitarian analysis of whether a duress defense is justified on social welfare grounds. We can approach the question by returning to the various elements of the defense and asking whether each one is justified in rule-utilitarian terms.

There are two requirements which fare better under a rule-utilitarian than an act-utilitarian interpretation. First, that the defendant have had no reasonable opportunity to escape need not lead merely to a rebuttable presumption, as on the act-utilitarian interpretation. This follows directly from the fact that a rule can be justified on social utility grounds even if utility calculations occasionally weigh against allowing the defense. Second, the requirement that the defendant not have placed herself voluntarily in a situation in which she could expect to be coerced also fares better on a rule-utilitarian approach. This is because the requirement addresses itself to an act of the

59. IMMANUEL KANT, *Appendix to the Introduction to the Elements of Justice*, in *THE METAPHYSICAL ELEMENTS OF JUSTICE* 41 (1965).

60. See sources cited *supra* note 12 and accompanying text.

61. The argument is Anthony Kenny's. Anthony Kenny, *Duress Per Minas as a Defence to Crime: II*, 1 *LAW & PHIL.* 197, 203 (1982).

62. Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 229-30 (4th ed. 1992) (describing efforts to institute strictly increasing schedule of penalties in medieval England).

defendant's which occurs prior to the moment of coercion. Even if it would *increase* social utility for a defendant to succumb to coercion in a given instance in which the coercion could have been foreseen *ex ante*, a rule disallowing the defense in such situations is arguably efficient: it may deter individuals from entering into criminal organizations. This is not a result we could have reached on an act-utilitarian interpretation.

For the most part, however, a rule-utilitarian justification for the defense will share the defects of its act-utilitarian counterpart. For example, like act-utilitarianism, rule-utilitarianism has difficulty justifying the requirement that the threatened harm be of death or serious bodily injury. If, as we saw, the requirement fails as an act-utilitarian account because there are potentially many situations in which social utility would be enhanced by allowing the defense for lesser threats, then a *rule* which disallows the defense for lesser threats will not be utility enhancing either. Similarly, if it would increase social utility to allow the defense in situations in which the threatened harm is not imminent, then a *rule* requiring imminence could not be socially efficient. Nor does the rule-utilitarian version of welfarism help to distinguish duress from necessity. We will still be left with having to accept a single, lesser evils defense to cover the two defenses. Again, whether this is objectionable on its own merits depends on whether one thinks the defenses *should* be kept separate. But the welfarist, who appears committed to regarding duress and necessity as separate defenses, will have to regard this as a strike against his account.

The rule-utilitarian may fare somewhat better in the debate about the availability of the defense to murder, but the result is inconclusive. He can respond to the charge that a utilitarian basis for the defense requires an absurd evaluation of the worth of lives by saying that the epistemic difficulties associated with attempting to determine the worth of a human life are insurmountable. Even if the worth of a human life could be assessed, there is no reason to suppose that this assessment will be available to victims of coercion, who must make quick decisions with relatively little information. Social utility is thus perhaps best served by treating human lives as equal in worth. But if a defendant *knew* the respective worth of the lives involved, there would be no epistemic benefit to the assumption that lives are of equal worth. In this case, a welfare-maximizing rule would have to require that the availability of the defense turn on the worth of the lives involved. For this reason, we cannot straight-forwardly conclude that the welfarist approach endorses the unavailability of the defense to murder.

Finally, consider the applicability of rule-utilitarianism to the two forms of mistake discussed above. The rule-utilitarian can argue that a rule which allows reasonably mistaken actors to claim the benefit of a justification would be efficient. Since epistemic limitations make difficult a determination of whether a justification properly applies to a given situation, people will be discouraged from relying on their own judgment about the availability of a justification if they are held strictly liable for their mistakes. This argument, however, seems weak. Strict liability about the availability of the defense is unlikely to have much of a chilling effect on behavior. Someone acting under duress has more important considerations to weigh than the remote possibility that her perception of the situation will prove erroneous. Given the importance of the issues at stake, and, at least in the case of duress, the personal interests at

stake, the residual possibility of error is likely to seem of pale significance in the actor's deliberations about what to do.

The turn to rule-utilitarianism also does not appear to improve the answer that the welfarist can give to the second sort of mistake case, the actor unaware of justifying circumstances. For if a defendant is allowed to take advantage of his luck and claim the defense where what he has done is socially beneficial, regardless of whether he acted *in order to* raise the level of social welfare, he will, by definition, be permitted the defense only in cases in which he actually does some good. There cannot be any harm, then, in a rule that allows for exculpation under these conditions, since an actor will never be able to claim the defense in a situation in which his behavior is socially detrimental.

But perhaps the argument is that defendants will start to gamble, giving in to threats where, at least given what they know at the time, they should not. So, the argument might run, defendants will be encouraged to take foolish risks, hoping that they will get lucky and that their behavior will turn out to be justified. This is surely a weak argument, however, since the chances that one will be able to avail oneself of a justification that one does not now believe oneself to have are presumably too low to create an incentive for defendants to perform illegal acts they would not otherwise perform.

A welfarist approach to duress, then, fails to provide a justification for the defense as it presently exists in the law, since most of the elements of the defense make little sense if welfare-maximization is our only concern. This is true whether the units over which we attempt to maximize utility are individual acts or rules governing acts of a certain type. Duress is simply not a defense that can be captured by welfarist thinking.

V. THE VOLUNTARIST CONCEPTION

Both the academic literature on duress and the statutory codifications of the defense contain expressions of an entirely different rationale, one that is subjective or psychological: an individual who performs an action out of fear for his life may *lack the ability* to conform his behavior to the law. Paul Robinson, for example, says that "[t]he excusing condition in duress is the impairment of the actor's ability to control his conduct."⁶³ Proponents of the voluntarist conception regard the basis for exoneration as a loss of control resulting from an impaired psychological state. The typical formulation thus treats the defense as negating voluntariness. A British case, for example, says that duress is a defense when "the will of the accused has been overborne by threats of death or serious personal injury so that the commission of the alleged offense was no longer the voluntary act of the accused."⁶⁴ George Fletcher says that "[e]xcuses apply on behalf of morally involuntary responses to danger; they acknowledge that when individuals *merely react* rather than choose to do wrong, they cannot fairly be held accountable."⁶⁵ And the court in *People v. Luther* explained the grounds for duress as the fact that "compulsion or duress overcomes the defendant's free will and his actions lack the required mens

63. ROBINSON, *supra* note 12, at 351.

64. *Regina v. Hudson*, 2 All E.R. 244, 246 (C.A. 1971).

65. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 811 (1978) (emphasis added).

rea."⁶⁶

On this view, duress is an excuse rather than a justification. If an individual follows a certain course of conduct because he literally cannot bring himself to do otherwise, his exoneration does not depend on his having done the right thing. An actor overwhelmed by fear cannot be expected to deliberate about his options, and consequently he cannot be blamed if he acts badly. The relative gravity of the harms is irrelevant, on this view, since duress is understood as a claim that one was unable to deliberate about relative harms and benefits. It is true that a defendant who accedes to the demands of a coercer *may* bring about less harm than he would by resisting these demands, since in the typical case he is threatened with death and ordered to perform some criminal act that does not involve death. But the fact that the defendant brings about the lesser evil in some cases is an accidental benefit of the situation, from a moral point of view. An individual overcome with fear acts *because* he is overcome, and not because he sees that the act he is inclined to perform to save himself would minimize the evil in the world.⁶⁷

A. The Pure Voluntarist Position

This Section will argue that, although the voluntarist conception has greater intuitive appeal than the welfarist conception, it too faces insurmountable obstacles to providing a complete explanation of the defense. In particular, the voluntarist conception has difficulty explaining most of the core requirements. It must also reject the two marginal requirements, although this will appear to be a benefit if one seeks a basis for their rejection.

The imminence requirement can be explained as an evidentiary condition on the voluntarist account. The more time the coercer leaves between the moment of the threat and the projected moment for carrying out the threat, the higher the likelihood that the defendant will be in control of his actions when he performs the illegal act. The requirement that the threat be of death or serious bodily injury might be analyzed as an evidentiary condition as well: true loss of control is not a likely result of threats of property damage. The stakes must be extraordinarily high, and the actor must feel herself powerless to evade the stark alternatives with which she is confronted before her claims of loss of control will be credible. Arguably, threats of non-physical harm or of minor bodily injury do not rise to this level.

It speaks against the evidentiary explanation of these requirements, however, that they are irrefutable. If the requirements were evidentiary in nature, the law would allow one to prove that one was overwhelmed in other

66. *People v. Luther*, 232 N.W.2d 184, 187 (Mich. 1975). The court in this case outlined four requirements for the defense:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm.

Id. This formulation of the defense, however, contains a reasonable person standard. The test is thus not rigorously subjective.

67. The last two conditions of the *Luther* test together ensure that the act was committed *because* of the fear of death or serious bodily injury. *See id.*

sorts of circumstances. That is, on a thorough-going voluntarist conception, the defense should be available for an idiosyncratic defendant with a particularly low terror threshold. One might argue that rebuttable presumptions would be impossible to administer with respect to these requirements. What would count as sufficient evidence that a defendant had a particular sensitivity to the loss of a certain material possession, for example? But even if rebuttable presumptions are infeasible, it may not be desirable to tailor the use of the duress defense to individual peculiarities. Someone who robs a bank because he is out of his mind with fear over the threatened loss of his new sports car should probably not be able to claim the defense, no matter how great his attachment to his car.

These two requirements are thus perhaps better understood in normative terms, that is, as standards for loss of control that weaker defendants are expected to meet. They communicate that an agent who *does* lose the exercise of her deliberative faculties for less does not have values that the law will protect. The law need not accommodate exaggerated responses to threats of remote harm or perverse attachments to material possessions.

The first and fifth requirements also seem more plausibly construed in normative terms. That the defendant had no reasonable opportunity to escape from the coercive situation admits of a possible evidentiary interpretation: it is perhaps implausible to think that the defendant would be out of control with fear if the defendant could simply have walked away from the situation. The requirement is more sensibly construed as bearing on the reasonableness of a defendant's behavior in performing the illegal act. Whether the defendant voluntarily placed herself in a situation in which she could expect to be coerced is a particularly difficult requirement to construe as evidentiary. A defendant's level of fear is presumably unrelated to the way in which she came to be subject to coercion in the first place.

Voluntarists should reject the rule that duress is unavailable as a defense to murder.⁶⁸ If a person overcome by threats to his life submits to orders that he take the life of another, although he cannot be praised, the loss of control under the circumstances is exonerating, on this theory. The restriction, moreover, is arguably incoherent on a psychological theory of the defense, since a person is not more in control when he murders than when he commits a lesser crime.⁶⁹ Voluntarists should also reject the classic distinction between natural and man-made threats, focusing instead entirely on state of mind. This distinction is both illogical and unnecessary from a subjective point of view: illogical because the core of the defense is a psychological state, rather than an external circumstance, and unnecessary because duress and necessity are distinguished from one another by the fact that one is an excuse and the other a justification. In addition, voluntarists should reject the other marginal requirement for the defense, namely that the defendant's behavior constitute obedience to a direct order from a coercer. Fear-induced behavior should be excused regardless of the specific relation between the threat and the action performed. Not surprisingly, then, we find that proponents of the voluntarist conception allow duress as a defense to prison escape under appropriate

68. Some voluntarists seem indeed to reject the restriction. See FLETCHER, *supra* note 65, at 831-33.

69. See LAFAVE & SCOTT, *supra* note 12, at 433 n.4.

circumstances.⁷⁰

B. Hybrid Approaches

While a purely voluntarist rationale for the defense appears problematic, tempering it with some objective elements greatly improves its plausibility. The MPC provides a clear statutory example of a modified, or "hybrid," subjective approach. It solves the problem of idiosyncratic agents by adopting a "reasonable person" standard on the question of ability to resist. Section 2.09 defines duress as follows:

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*.⁷¹

As discussed in the Explanatory Note to this Code Section, the requirement that the "person of reasonable firmness" have been unable to resist is an objective element. The psychological nature of the approach, however, remains in the fact that the exonerating element is the agent's *inability* to resist. Whether the agent does the right thing in not resisting is irrelevant, as is shown by the fact that Section 3.02, which sets out the basic lesser evils defense, is not limited to situations in which nature is the source of the choice. If Section 2.09 were a lesser evils provision, Section 3.02 would be redundant. Assuming it is not redundant, Section 2.09 must cover situations in which the actor cannot justify his conduct on lesser evils grounds, but in which his behavior must still be excused. As the Commentary to Section 2.09 says,

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

The reasonableness standard is a familiar way to cope with variations in individual fortitude when a provision's basic approach is psychological. But its importance underscores the inability of the psychological theory to provide a *complete* rationale for the defense. The voluntarist theory combined with a reasonableness condition makes a unified rationale for the defense impossible. It will be recalled that the possibility of accounting for the defense in terms of multiple rationales has already been rejected.⁷² The approach is therefore theoretically unsatisfying. The sought-for unity of explanation would be maintained if the reasonableness standard were an evidentiary rule. But first, as discussed above, such a rule would have to be rebuttable to be consistent with the voluntarist rationale. Second, the defense probably should not be extended to idiosyncratic agents. There is thus a normative aspect to the reasonableness standard which the evidentiary rationale fails to capture.

A further problem with the MPC approach, however, is that there is a risk that duress will collapse into the conditions which negate the basic elements of the crime.⁷³ Many of the conditions which undermine the act requirement of

70. See *People v. Luther*, 232 N.W.2d 184 (Mich. 1975); see also *supra* notes 35-36.

71. MODEL PENAL CODE §2.09(1) (1980) (emphasis added).

72. See *supra* Part I.

73. This is also a problem with "pure" voluntarist theories.

the criminal law proceed by negating the voluntariness of the actor's behavior, and negation of voluntariness is also the core of the voluntarist approach to duress. On the voluntarist conception, duress exonerates because it eliminates the actor's power of choice, much in the same way that having one's hand closed around the handle of a knife by another eliminates choice. But as the Commentary to MPC Section 2.09 says:

If [the actor] is so far overwhelmed by force that his behavior is involuntary, as when his arm is physically moved by someone else, Section 2.01(1) stands as a barrier to liability, following in this respect the long tradition of the penal law. The case of concern here is that in which the actor makes a choice, but claims in his defense that he was so intimidated that he was unable to choose otherwise. Should such psychological incapacity be given the same exculpatory force as the physical incapacity that may afford a defense under Section 2.01?

As the above passage makes clear, the problem is that the *actus reus* requirement found in MPC Section 2.01 covers the condition of an agent who acts, but who acts involuntarily, and Section 2.01 gives no indication that it is meant to cover the case of coercion. The forms of involuntary behavior listed in that section are limited to reflex movements or convulsions, bodily movements made while unconscious or during sleep, behavior under hypnosis, or bodily movements that are "not a product of the effort or determination of the actor, either conscious or habitual."⁷⁴ Arguably the kind of involuntariness duress creates is somewhat different, and although Section 2.01 can perhaps provide an analogy, it is not itself meant to cover such cases. The Commentary supports this interpretation. The problem, however, is that it is not clear what other sort of involuntariness there can be, that is, what non-physical involuntariness might mean.

Fletcher's answer to this question invokes the notion of normative involuntariness.⁷⁵ His approach is a hybrid voluntarist conception, since it combines the basic voluntarist rationale for the defense with a normative element. According to Fletcher, the movements of a person whose hand is forcibly closed around the handle of a knife are involuntary in a physical sense. The ordinary cases of duress we have been considering, however, are examples of normative or moral involuntariness. Fletcher does not explore how one might determine when conduct is involuntary in a moral, as opposed to a physical sense, except that unlike physical involuntariness, normative involuntariness "depends in a curious way on the competing interests as in cases of justification."⁷⁶ He concludes that when "the gap between the harm done and the benefit accrued becomes too great, the act is more likely to appear voluntary and therefore inexcusable."⁷⁷ A person cannot claim that he is coerced by threats that his finger will be broken into destroying the rest of the world.⁷⁸ On the other hand, Fletcher says, "conduct may be perceived as morally involuntary even though the cost is substantially greater than the

74. MODEL PENAL CODE § 2.01(2)(d) (1980).

75. FLETCHER, *supra* note 65, at 803.

76. *Id.*; see also George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1276 (1974). ("Whether conduct appears to be involuntary depends, in part, on the competing interests at stake.")

77. FLETCHER, *supra* note 65, at 804.

78. *Id.*

benefit gained.”⁷⁹ The example he gives is of a person who kills another in order to avoid mutilation of his own body. He points out correctly that we are often excused in the latter sort of case according to common notions of morality. This is clearly a result the welfarist conception cannot support.

While Fletcher’s classification of the cases is supported by the ethical judgments we make about them, the fact that we regard a defendant threatened with a broken finger as fully culpable and a defendant threatened with mutilation as blameless does not imply that the cases should be distinguished from one another by the concept of “voluntariness.” That we blame in the former case *does* entail that we regard the act as voluntary, but that we exonerate in the latter case *does not* entail lack of voluntariness. The involuntariness of killing to avoid mutilation would have to be established on independent grounds, and “dependence on competing interests” is unlikely to supply those grounds.

It is the contention of this Article that duress does not involve involuntariness of any sort. The clear examples of physical involuntariness—reflex motions, epileptic seizures, having one’s limbs moved by someone else—are irrelevant for understanding coerced behavior. Individuals whose physical movements are controlled by forces outside themselves, or outside their conscious minds, cannot conceivably choose to behave otherwise. Although a person acting because she fears for her life may feel as though she has no control over whether to do the act, she surely controls the act in precisely the way that she controls non-coerced movements. This is what is entailed by saying she performs the act *intentionally* in both cases. Furthermore, there is little doubt that responses to coercion can be affected by training. Soldiers may learn to increase their resistance to torture, and they may even learn to accept death rather than to betray the values for which they are fighting. Reflex movements and epileptic seizures, on the other hand, are unlikely to be affected by training.

It appears, then, that the voluntarist rationale cannot explain the basic elements of the defense, since that theory cannot be sensibly maintained without interjecting certain normative elements. A mixed account of this sort, among its other drawbacks, does not satisfy the condition of theoretical unity which has been this Article’s objective. What is required is a *single* conceptual framework that can accommodate both normative and psychological elements.

V. DURESS AND THE NATURE OF RESPONSIBILITY

The welfarist and the voluntarist conceptions depend on the same basic account of responsibility. Both assume that what a person does intentionally is necessarily an appropriate object of moral assessment. Exoneration is only possible, therefore, if the thing done intentionally turns out to be good, meaning that it brings about an improvement in the social welfare.

To spell out the common assumption of the two conceptions, we might say they are committed to the following Principle of Responsibility (call it “PR”): *An agent is morally responsible for everything she does intentionally.* In other words, agents are morally responsible for all the intended consequences of their intentional actions. PR has no bearing on situations in which an agent is

79. *Id.* at 803.

held morally responsible for things she did not do intentionally. That is, neither of the standard views assumes that agents are responsible for *all and only* their intentional doings. What *PR* does do is severely restrict the grounds for exonerating an agent for the bad consequences she intends: the only basis for exonerating intentional conduct is justification. It follows that one can only avoid blame for a socially inefficient act if the thing done was not done intentionally. It is in virtue of their commitment to *PR*, then, that the standard theories limit the withholding of blame for the violation of a prohibitory norm to situations in which the behavior is either justified or involuntary.

The term "responsibility" is a nebulous one. In the context of *PR*, the expression has moral connotations. That is, it incorporates the upshot of a moral inquiry into the characterization of the relation between the agent and the thing she does. The moral usage is a common one. We often say someone is not "responsible" for an occurrence, when what we mean is that, although she brought it about on purpose, she is not to *blame*. What often goes unrecognized, however, is that we sometimes use the term to characterize a non-moral relation between an agent and one of her doings. This should be clear from the fact that we can say an agent is responsible for something she did in a case in which the thing done is morally neutral, that is, when the action or consequence is neither good nor bad. When we say, for example, that someone went for a walk, or brushed her teeth, or pulled up her socks, we understand the agent as responsible for what she does, but we do not, in the usual case, regard her as subject to praise or blame for it. The question of moral evaluation simply does not arise. The expression "responsibility" should be taken to signify the non-moral agency relation that holds prior to moral judgment between an agent and certain of her actions, whereas the expression "moral responsibility" should be understood as referring to the upshot of moral evaluation. The thesis of this Article might therefore be put as the claim that the gap between *responsibility* and *moral responsibility* allows for an extension of the concept of excuse: excused conduct should include cases in which the agent is responsible for what she does in the non-moral sense and leave to one side cases in which the agent is responsible in the moral sense.

Another way to understand the suggestion of this Article is that we ought to drive a wedge between the notions of intentional action and moral responsibility. That is, *doing something intentionally* should not be thought to entail *moral responsibility* for the thing done. Once this is understood, a space opens up in which a revised conception of excuse can operate: someone can have an excuse for fully intentional conduct, despite the fact that the thing she did is not something she was justified in doing. Duress, then, is indeed an *excuse*, but, it will be suggested, the concept of excuse should not be restricted to lack of responsibility. Instead, blame can be withheld from a *responsible* agent without that agent having adopted the best course of action under the circumstances. An individual can perform a bad act and yet not be culpable, even though his behavior was fully intentional.

This middle road incorporates some of the benefits of each of the surrounding alternatives. On the one hand, it recognizes the relevance of psychological features. On the other hand, it provides the central advantage of the welfarist conception in recognizing that agents acting under duress exercise choice. The bank robbery performed on pain of death, for example, may

require an extended period of planning and a significant exercise of deliberative rationality. Indeed, what the coercer does is to appeal to the deliberative faculties of the defendant: the coercer provides the defendant with particularly strong reasons for acting, and when the defendant complies, he acts *for those reasons*. The resulting action performed under duress is thus fully intentional, since it is action done for a reason.⁸⁰

The proposed approach also makes sense of a number of the requirements of the defense. On this view, it is coherent to restrict the plea to actions performed in protection of particularly strong interests, such as one's interest in one's own life and bodily security and those of loved ones. It may be excusable that people protect loved ones in situations in which the same actions would not be excusable if undertaken on behalf of strangers. The asymmetry between loved ones and strangers can be maintained because actions that are permissible, on this view, need only be understandable. They need not be morally commendable. In addition, unreasonable preferences—such as a preference for expending a human life to save a material possession—need not be accommodated, even if the same sense of urgency affects the actor in that case as it does another, less peculiar actor threatened with death or serious bodily injury. This is because the approach is normative, albeit normative in a weak sense, based on a descriptive theory of psychological normality.

Other requirements—that the defendant have had no opportunity to escape from the situation, that the threat was imminent, and that the defendant not have placed herself voluntarily in a situation in which she could expect to be coerced—can be explained as features of the situation that bear on whether the actor's behavior was understandable under the circumstances. The last of these requirements in particular affects whether the defendant appears deserving of our sympathy: agents who join criminal organizations in some sense "assume the risk" of their activities. We are disinclined to believe that performing a criminal act is anathema to them. In this case, the act seems consistent with a negative view of the agent, since there is no basis for regarding it as an exceptional event in the life of an otherwise moral person.

Consider now how the proposed approach would apply to cases of mistake. Where a defendant reasonably but mistakenly believes she has a valid duress defense, her conduct is excused. The same character considerations that exonerate agents in duress cases where no mistake is made apply to the mistaken actor. And since duress is already an excuse, on this view, rather than a justification, there is no reason to analyze cases of this sort under the heading of "mistake" rather than "duress," as there is on the welfarist conception.

The second sort of mistake case is also unproblematic on the proposed view. Where a defendant is unaware of the existence of an excuse, there can be no exoneration in this case: no pressure operates on the mind of the defendant, and therefore character considerations have no opportunity to arise.

The jurisprudential obstacle to expressing the character view of duress in a legal standard is that Anglo-American law lacks a conceptual niche for a defense conceived in the suggested way. The traditional excuses—insanity, mistake, etc.—impugn the defendant's agency. In other words, excuses in our system tend to negative culpability by denying voluntariness. It is because

80. See DAVIDSON, *Actions, Reasons and Causes*, *supra* note 2.

justification is the only current theory of exoneration that Anglo-American law takes refuge in welfarist rationales for a legal rule such as duress. It is not surprising, then, that the welfarist conception of duress is the more prevalent of the two standard theories in the legal literature.

Consider, by way of contrast, the defense of "excusing necessity" found in Section 35 of the German Criminal Code. This Section provides:

Whoever commits an unlawful act in order to prevent a present danger to the life, limb or liberty of himself, a relative or a close person acts without guilt. However this does not apply if under the circumstances, and in particular if he has brought about the danger or has a special legal obligation, the perpetrator should be expected to cope with the danger.⁸¹

The provision clearly does not advance a justification: it exonerates agents under the specified conditions without regard to social welfare. Under the terms of the provision, an individual could take a life to save himself from death or serious bodily injury. The defense is nevertheless not predicated on involuntariness. That the approach is not concerned with voluntariness emerges clearly in the last sentence of the quoted passage: where the perpetrator cannot fairly be expected to cope, his behavior need not be involuntary, and conversely, where the perpetrator can fairly be expected to cope, his behavior need not be voluntary. A person might decide in a cool moment, for example, that he simply would not be able to cope with seeing a loved one killed. He realizes that it would induce madness, or that it would simply be unbearable. He takes rational measures to avoid the eventuality; these need not be involuntary simply because he acts in fear. While the possibility of voluntary behavior presumably provides a necessary but not sufficient condition for the fairness of requiring a person to stand firm in the face of a threat, the two concepts are analytically distinct.

What it is reasonable to expect of a person depends on various non-psychological, or social factors, such as the role the defendant plays in society. A fireman, for example, may rightfully be regarded as having assumed special duties that require her to refrain from acting on highly personal preferences in certain circumstances.⁸² A state actor may be required to act with an eye towards the social welfare alone. But the private actor will not usually be condemned for preferring his own welfare and the welfare of those with whom he has special bonds over the welfare of strangers. Although the German approach is at least partially psychological, it differs from the highly subjective approaches to duress encountered sometimes in American jurisprudence in that it does not require the agent to have lost control or to lack the *capacity* to conform her behavior to the law.

The German approach also obviates the need to distinguish situations caused by natural forces from those caused by human forces, since there is a non-artificial way to distinguish duress from necessity. The German Code, for example, includes all necessity and duress defenses where the conduct is exonerating, but not commendable, under the personal necessity provision of Section 35. It reserves another section, number 34, for similar situations where

81. STRAFGESETZBUCH [StGB] § 35 (F.R.G.) (translation in Albin Eser, *Justification and Excuse*, 24 AM. J. COMP. L. 621, 636-37 n.81 (1976)).

82. See Eser, *supra* note 81, at 636-37.

the defense is a justification, rather than an excuse. Section 34 is a proper lesser evils defense. It reads:

Whoever in a present and otherwise not preventable danger to life, limb, liberty, honor, property or any other legal interest acts to prevent the damage to be inflicted on himself or another person, does not act unlawfully if the balance of the conflicting interests, in particular the legal interest involved and the intensity of the imminent danger, shows that the defended interest is entitled to prevail over the one which is infringed. This is admissible, however, only in so far as the act is an adequate means for preventing the damage.⁸³

Unlike Section 35, this section allows a defendant to claim the defense for actions performed to protect *any* legal interest. It is thus a consistent application of the lesser evils defense. Its operation in conjunction with Section 35 is coherent, moreover, since behavior undertaken under the defense provided by Section 34, which turns out to be mistaken, may be excusable under Section 35.⁸⁴ The lesser evils defense only justifies behavior which is in fact socially beneficial. Since behavior excused under Section 35 might also be welfare-maximizing, some cases would presumably be covered by both provisions. The natural division among cases, however, is for criminal acts performed for the sake of compelling personal interests to be defended under Section 35, and for those performed by actors with no personal stake to fall under Section 34.

In an article on excuse, George Fletcher compares our legal system unfavorably to the German system.⁸⁵ He criticizes Anglo-American law for failing to make a place for "individualized" excusing conditions, that is, conditions that do not stem from the application of a legal rule, and which take seriously "differences among persons and situations."⁸⁶ Common law courts, in his opinion, "have been loath to recognize necessity, duress, insanity and mistake of law as defenses relating to the character of the doer rather than to the quality of the deed," with the result that "[n]ecessity and duress sometimes emerge as justificatory defenses..., as claims that the act is right and commendable, rather than that the actor should be disassociated from wrongful conduct."⁸⁷ He argues that German law is quite different on questions of culpability:

[T]he contemporary German style of thought stresses the centrality of codification and legislative supremacy in defining prohibited conduct. Yet at the level of assessing individual culpability, the German courts cultivate a system of individualized excusing conditions. The indispensable inquiry in every case is whether the defendant, as a concrete individual, can be fairly blamed for having violated the law.⁸⁸

At least where duress is concerned, Fletcher's argument that courts should focus on the individual seems correct. Focusing on the individual, however, does not imply that the excusing condition must itself be "individualized," namely not subject to application by a rule. The notion of

83. StGB § 34 (translation in Eser, *supra* note 81, at 634 n.65).

84. Recall, however, that there is a difference in scope between the two provisions. Behavior which the actor mistakenly believed to be covered by § 34 would not be covered by § 35 if it were undertaken to guard against an evil less serious than death or serious bodily injury.

85. See generally Fletcher, *supra* note 76.

86. *Id.* at 1300.

87. *Id.* at 1272.

88. *Id.* at 1300-01.

governance by legal principle, rather than by ad hoc commands of a ruler, requires that courts or legislatures fashion and publicize rules, and proceed to apply them as fairly as possible. The difficult question is what *kind* of rule we should have to govern exoneration, not whether or not to have rules. A rule-governed theory need not be impersonal or ignore character traits: personal or psychological features can be incorporated into rules as easily as objective or normative conditions. The only limits to tying legal rules to mentalistic elements are evidentiary, but there is no *a priori* reason for excluding such features from rules.

It is also important to realize that one need not equate the personalized with the subjective. A defense can be personal to the actor without being strongly psychological. For example, good character is personal to the actor, but a rule that turned on it would not depend on the presence or absence of occurrent psychological states. One might, therefore, attempt to push Anglo-American jurisprudence further than Fletcher does and reject the idea that the only way to focus on the doer, rather than on the deed, is to discover psychological peculiarities of an agent that negate culpability. It is possible for a personalized defense focusing on doers rather than on deeds to warrant exoneration on normative grounds.

VI. THE ROLE OF DISPOSITIONS

The previous Part pointed in the direction of a different approach to duress. It did not, however, explore *why* an actor who acts under duress should be excused. This Part argues that we excuse actors who perform criminal acts under duress because the decision to bring about harm in such cases stems from accepted dispositions, dispositions that are constitutive of human nature, at least for virtuous agents.

People who have good dispositions, and who attach value to the things they should value, may encounter situations in which continuing to act according to their dispositions will lead them to harmful acts. Suppose they form attachments to family and friends. These attachments are generally applauded. Indeed, something more can be said about such dispositions, which is that they seem to lie at the heart of what it is to be a person. This fundamental disposition, or set of dispositions, creates an asymmetry in the obligations to which we hold one another. That we form attachments, for example, makes strangers seem less deserving of our time and energy than those with whom we hold special bonds. A similar story can be told about self-preservation. People generally prefer their own preservation to that of others, at least others with whom they do not have special bonds. This is not a disposition we seek to eliminate. Having nurtured and protected the development of these strong asymmetric commitments, we will be unable to abandon them in rare, unexpected situations in which it might be better from the standpoint of the general social welfare to act contrary to the disposition. Because we recognize and identify with these dispositions, we excuse agents in cases in which their otherwise wrongful actions follow directly from dispositions of this sort.

This idea may be at the core of Aristotle's account of duress, although his remarks on the subject are all too brief. In the *Nicomachean Ethics*, Aristotle says that actions performed under duress are ones in which a person performs a

forbidden action "under pressure which overstrains human nature and which no one could withstand."⁸⁹ By "human nature" he means the dispositions of choice and patterns of behavior that are distinctively characteristic of human beings. If we know anything about Aristotle's views of human life, we know two things: first, that all human action aims at "happiness,"⁹⁰ and second, that human beings are characteristically "political," meaning that they realize their good in association with others.⁹¹ It follows that the end of human action is one's own well-being and the well-being of one's family and friends. It thus "overstrains human nature" to require human beings to refrain from acts on which the most essential human ends depend.

One might wish to object that Aristotle's point must be about involuntary behavior, since failure to "withstand" pressure might simply mean giving in to irresistible impulses. What else could it mean for a person to respond to pressure which "overstrains human nature," other than that the person cannot control her response to the threat? But just as the German rule presupposes a distinction between involuntary action and inability to cope, the notion of overstraining human nature need not be cashed out in terms of involuntariness either. Aristotle's more general ethical philosophy offers us a conception of responsibility which explains why this is so.

For Aristotle, the category of voluntary action is a broad one. It includes acts of animals and children as well as adult action.⁹² There are two types of voluntary action: action which follows deliberation, which stems from choice,⁹³ and action which is not preceded by deliberation. Aristotle draws the distinction by saying: "Choice, then, seems to be voluntary, but not the same thing as the voluntary; the latter extends more widely. For both children and the other animals share in voluntary action, but not in choice...."⁹⁴ The actions of children and animals are voluntary, but they do not stem from choice.

Aristotle also says that voluntary actions are subject to praise and blame, and that involuntary actions are not. Those actions are voluntary which are not rendered involuntary by either compulsion or ignorance.⁹⁵ Compulsion obtains when "the moving principle is outside" the agent.⁹⁶ Aristotle explains this as "a principle in which nothing is contributed by the person who is acting or is feeling the passion, e.g. if he were to be carried somewhere by a wind, or by

89. ARISTOTLE, *Nicomachean Ethics*, in THE COLLECTED WORKS OF ARISTOTLE § 1110(a)(25) (Jonathan Barnes ed., 1984) [hereinafter NE].

90. *Id.* § 1097(b)(20). "Happiness" is the standard translation of "eudaimonia."

91. Aristotle says "man is by nature a political animal." ARISTOTLE, *Politics*, in THE COLLECTED WORKS OF ARISTOTLE § 1110(a)(25) (Jonathan Barnes ed., 1984).

92. NE, *supra* note 89, § 1111(b) (7-9).

93. Voluntary action that is not the product of choice is the product of appetite or passion. It is considerations such as these that lead Aristotle to the conclusion that "...the voluntary [is] not...defined either by desire or by choice." ARISTOTLE, *Eudemian Ethics*, in THE COLLECTED WORKS OF ARISTOTLE § 1225(b)(1) (Jonathan Barnes ed., 1984). Neither appetite nor deliberation is part of the definition of voluntariness, implying that neither acting on an appetite nor failing to deliberate prior to performing an action renders an act involuntary.

94. NE, *supra* note 89, § 1111(b) (7-10).

95. In the *Magna Moralia*, however, Aristotle treats compulsion as the only condition that renders an act involuntary: "Roughly speaking, that is voluntary which we do when not under compulsion." ARISTOTLE, *Magna Moralia*, in THE COLLECTED WORKS OF ARISTOTLE § 1187(b)(35) (Jonathan Barnes ed., 1984).

96. NE, *supra* note 89, § 1110(a)(1-2).

men who had him in their power.”⁹⁷ Ignorance, sometimes translated as “error,” falls into several different categories, not all of which exempt an action from praise and blame. The kind of ignorance that makes an action involuntary is ignorance of particulars, which is ignorance of the “circumstances of the action and the objects with which it is concerned.”⁹⁸ It follows that the actions of animals and children are subject to praise and blame, as long as they are not caused by something outside the agent and there is no ignorance of the particulars surrounding the act.

It also seems to follow that actions performed under duress are voluntary, and that they are therefore subject to praise and blame. The actors in such cases make no perceptual mistake, and the movements they make are initiated by them, i.e., the acts are not caused by an external force. The few remarks Aristotle makes on duress confirm this reading. He says that although actions of this sort are “mixed,” the person who performs them acts voluntarily, “for the principle that moves the instrumental parts of the body in such actions is in [the man,] and the things of which the moving principle is in a man himself are in his power to do or not to do.”⁹⁹

Although Aristotle makes his position reasonably clear, some commentators do not believe that Aristotle could have meant what he said. Terry Irwin, for example, concedes that Aristotle treats the voluntary as sufficient for responsibility, but he nevertheless thinks it obvious that responsibility is more closely tied to rational agency than this equation of responsibility with the voluntary suggests, and equally obvious that Aristotle agrees.¹⁰⁰ Aristotle, according to Irwin, is confused by his own lights, thinking “he has found a criterion for responsible action when he seems to have found only a criterion for voluntary action.”¹⁰¹ Assuming that Aristotle meant to “connect[] responsibility more closely with rational agency,”¹⁰² Irwin attempts to show that Aristotle actually “takes responsible action to require something more than these minimal conditions.”¹⁰³ But nothing more is in fact required, and it is a mistake to try to rewrite Aristotle on this point.

Aristotle’s understanding of the voluntary is not inadequate to ground the non-moral notion of responsibility presented above.¹⁰⁴ His account of the voluntary is only too minimal if it is treated as a foundation for the moral sense of the term. But, as discussed in Part V, to say that an action is voluntary, or to say that an agent is responsible for a certain occurrence, is not to make a moral judgment. It is instead to make a judgment that the agent satisfies a threshold condition for moral judgment, that is, she has caused something to happen which she must own. This is to say no more than that she has done something *for a reason*, where the reason is explanatory of her behavior. As discussed

97. *Id.* § 1110(a) (2–4).

98. *Id.* § 1110(b) (33–34).

99. *Id.* § 1110(a) (11–17). While it is clear that Aristotle rejects a voluntarist account of duress, it is slightly more difficult to show that he rejects a lesser evils rationale. The strongest direct evidence for this stems from the fact that the lesser evils rationale does not cover all cases in which agents should be exonerated, according to Aristotle. He says that “[o]n some actions praise indeed is not bestowed, but forgiveness is...” *Id.* § 1110(a) (23–24).

100. TERENCE H. IRWIN, *ARISTOTLE’S FIRST PRINCIPLES* § 182 (1988).

101. *Id.*

102. *Id.*

103. *Id.*

104. See *supra* Part V.

above,¹⁰⁵ to say that an agent does something for a reason is to say that she does the thing *intentionally*. It is the mere fact that an agent acts for a reason that determines whether the thing done is done intentionally. The content of the reason is irrelevant. It is only once it is clear that a person has acted intentionally that we can call her to account for what she has done. Whether we regard her as culpable will depend on the content of the reason she gives. Responsibility, then, in the non-moral sense turns only on the *form* of the action: the action must be something the agent did for a reason in order for the agent to be responsible for it. *Moral responsibility*, by contrast, requires more. It requires that we regard the *content* of the agent's reason for acting as inadequate to excuse or to justify her conduct.

The distinction between moral and non-moral forms of responsibility also sheds brighter light on Aristotle's comments about praise and blame. When he says that all voluntary action is subject to praise and blame, he does not mean praise and blame to be understood as varieties of moral responsibility. Moral assessment, unlike praise and blame, pertains to human character. It is not applicable to individual acts, even acts which reflect choice. There are thus two kinds of judgment at issue: judgment of action and judgment of character, or to be more precise, judgment of agents in light of their actions and judgment of agents in light of their characters.

Judgment of agents in light of their actions is strictly speaking non-moral in form. It is the means by which the moral capacities are developed, since at least in human beings, praising and blaming actions will issue in states of character. Character, as Aristotle says, is acquired "from the exercise of activities on particular objects,"¹⁰⁶ that is, through the performance of actions of a certain kind. Human beings will presumably perform actions more often when they are rewarded for them, and will cease to perform those for which they are punished. The repeated performance of virtuous action thus leads to the development of a virtuous character, and likewise with vice. In short, the ethical capacities of persons are acquired through habituation, and praise and blame are devices for encouraging the performance of good actions and discouraging the performance of bad actions. Praise and blame are thus not themselves varieties of moral assessment.

Moral assessment, by contrast, is a judgment about the state of a person's character, taken as a whole. This applies only to beings capable of choice, and thus animals and children below a certain age cannot be judged as agents. Character-judgment is ethical in nature, since agents with developed characters are moral agents. They can be judged as good or bad persons *in toto*. Derivative from this second sort of evaluation is a notion of moral judgment of agents *for their actions*: actions acquire their ethical quality from the way in which they depend on and reveal the ethical constitution of agents. But this type of evaluation is only appropriate if (1) the being in question is a being with a character, and (2) the action in virtue of which the agent is being judged is itself reflective of choice. The most important element of this conception for our purposes has to do with this last point: that an action is reflective of choice means that the action is particularly revelatory of the agent's character. As Aristotle says, choice is "thought to be most closely bound up with virtue and to

105. See *supra* text accompanying note 80.

106. *NE*, *supra* note 89, § 1114(a) (5-6).

discriminate characters better than actions do."¹⁰⁷ We examine chosen action, then, in order to learn something about the chooser's character.

On an Aristotelian conception, we can understand duress in the following way. A person acting under duress performs an action which, *prima facie*, merits a negative judgment. This judgment indicates the appropriateness of punishment. But the *prima facie* judgment is inaccurate in the case of an action performed under duress, because a judgment of character supersedes the act-based judgment. There is thus a failure of implication from bad act to bad character. Although the action performed under duress is of a type to result in poor character formation and thus would normally require discouragement through punishment, the dispositions in the service of which the action is performed make a different sort of judgment applicable. Dispositions of the agent, such as love of family and friends or a strong commitment to self-preservation, transfer to the action in the derivative sense explained above, and the action can thus be judged as a reflection of character, rather than as an isolated act. Because the person who acts under duress is revealed as acting in harmony with his good dispositions in a case of duress, the badness of the act does not require the normal pedagogic response.

The usual danger of inculcating bad dispositions by allowing or failing to punish bad acts can fail to apply, then, because human beings with developed characters, and a clear conception of the good, will not have their characters influenced by acts which already stem from a firmly developed disposition. The bad act is excused, because it follows from the good disposition. Animals and children, by contrast, could not be excused in this fashion, since they develop dispositions of a very different sort. Bad acts will always contribute to bad dispositions for them, since acts turn rigidly into dispositions solely in virtue of repeated performance. The absence of character formation, and with it, the absence of the faculty of choice, means that there is nothing to stand between the act and the development of a disposition to act in the way dictated by the disposition. One is left with praise and blame, reward and punishment. Ethical assessment, therefore, applies only to human conduct.

It is sometimes said that actions performed under duress should be excused because the usual inference from conduct to character cannot be made. Fletcher, for example, puts the point thus:

The distinguishing feature of excusing conditions is that they preclude an inference from the act to the actor's character. Typically, if a bank teller opens a safe and turns money over to a stranger, we can infer that he is dishonest. But if he does all this at gunpoint, we cannot infer anything one way or the other about his honesty.¹⁰⁸

The account presented in this Article reverses Fletcher's analysis. In the normal case of punishment, there is little or no attention paid to character. We do not punish an act because we think the actor evil. We punish the act because the act is wrong, even if the actor is a good person. Duress appears as an

107. *Id.* § 1111(b) (5-6). For a general discussion of the distinction between judgment of character and judgment of actions, see Claire Finkelstein, *Tort Law as a Comparative Institution: Reply to Perry*, 15 HARV. J. LAW & PUB. POL'Y 939, 950 (1992).

108. FLETCHER, *supra* note 65, at 799-800. He goes on to say that "the same breakdown in the reasoning from conduct to character occurs in cases of insanity...." *Id.* He thus believes that this is a feature that characterizes excuses generally. But with at least some sorts of insanity, it seems difficult to speak of an underlying character which is preserved.

exception, a case in which we put the act-judgment to one side because of a countervailing character-judgment. What follows is a suspension of punishment, or an *exoneration* of the agent, which the agent receives as a special dispensation for acting on good motives. Allowing character judgment to enter into the practice of punishment is the exception, rather than the rule. Most of the other excuses do pertain to voluntariness, and the conventional wisdom about the irrelevance of character should continue to apply to those cases.

At least two other defenses, however, appear to lend themselves to a character-based analysis: provocation suggests that the defendant's violent reaction is at least partially understandable, although not commendable, in light of the extraordinary situation in which he found himself. A relatively virtuous person might react badly when confronted with pressures of an unusual nature. Like duress, provocation has often been treated as a defense based on involuntariness.¹⁰⁹ Entrapment is now explicitly treated as a character-related defense, since, under the prevailing "subjective standard," the government must prove the defendant was "predisposed" to perform the criminal act it induced him to perform.¹¹⁰ In addition, the defenses of battered women's syndrome¹¹¹ and black rage¹¹² might also derive more support from character considerations than from the idea that the agent's conduct is involuntary.

The foregoing analysis suggests certain conclusions about the distinction between excuse and justification generally. Instead of distinguishing excuse from justification by the difference between involuntary and commendable conduct, the distinction lies in the stance society takes to the offender: where the basis for the defense is that the actor behaved understandably, given her personal stake in the situation, we excuse, even though the behavior is not commendable. Where the actor's own interests are not implicated, by contrast, we exonerate only where the behavior is *justified*, since the act enhances social utility. Although an actor can increase the general level of utility even where personal interests are at stake, in such cases the actor's reason for violating the prohibitory norm is the act's effects on the actor's own interests. The actor does not violate the prohibitory norm *in order* to improve social welfare. In short, where the reason for violating the prohibitory norm is *agent-relative*,¹¹³ that is, identified by its connection to the interests of the person whose reason it is, we demand only acceptance and understanding as a basis for exoneration. By contrast, where the reason is *agent-neutral*,¹¹⁴ that is, formulated for agents

109. See Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1149 (1985). But see Joshua Dressler, *Retrinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. 421, 462 (1982).

110. Mathews v. United States, 485 U.S. 58 (1988). Commentators, however, insist on regarding entrapped behavior as involuntary. See George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1280 (1985).

111. See State v. Pascal, 736 P.2d 1064, 1071-72 (Wash. 1987) (treating battered women's syndrome as operating in mitigation of punishment based on diminished capacity); see generally Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994) (criticizing diminished capacity approaches to the battered woman syndrome defense).

112. See State v. Lamar, 698 P.2d 735, 741 (Ariz. Ct. App. 1984) (rejecting the defense of "black rage").

113. Agent-relative reasons make essential reference to the person whose reason it is, whereas agent-neutral reasons do not. See DEREK PARFIT, REASONS AND PERSONS 143 (1984); see also THOMAS NAGEL, THE VIEW FROM NOWHERE 152-53 (1986); Finkelstein, *supra* note 107, at 944-45.

114. See *supra* note 113.

generally, we demand that the act be done for the sake of the greater good.

This way of distinguishing excuse from justification, however, does have a somewhat counterintuitive result. The case of the person threatened with death unless he robs the bank must be grouped with the case of the person who breaks into a cabin in the woods to keep himself from freezing to death, and both are placed under the heading of "duress." But unless we can find a way of justifying the apparently spurious distinction between manmade and natural threats, there is no reason for treating these cases differently. The disinterested bystander who sets fire to a field to prevent a forest fire from engulfing a town acts for the sake of the greater good, rather than for interests of his own. It does not seem unreasonable to hold the disinterested agent to a higher standard of evaluation, since he does not require our understanding and sympathy.

In light of the suggested basis for distinguishing excuse from justification, certain general secondary characteristics of each become easier to understand. If justifications are characterized by the fact that they rest on agent-neutral reasons for acting, it makes sense that third parties can assist in the performance of justified acts.¹¹⁵ Where the reason for exoneration is personal to the actor, that is, where the reason for acting is agent-relative, third parties are appropriately barred from assisting, unless they share the excuse as well.

Excuse and justification are also sometimes distinguished in terms of reliance. As Fletcher interestingly argues, one should not have a right to rely on the availability of an excuse *ex ante*, but one should have the right to rely on a justification.¹¹⁶ Distinguishing excuses from justifications in this way is plausible in most cases. A defendant who argues she was insane or mistaken as to a factual matter at the time of the act could not also claim to have relied on rules governing insanity or mistake, on pain of contradiction. Justifications, by contrast, set out rules of conduct that individuals can use to guide their behavior, since the availability of a justification does not generally turn on the personal characteristics of the actor.¹¹⁷ Although the argument that excuses fail to generate a right of reliance may appear to depend on a conception of excuses as involving involuntary conduct, character-based excuses should resist reliance as well. A character rationale for a certain act, such as loyalty, implies practical deliberation that takes place largely outside the ambit of legal incentives. That an agent relied on the availability of a defense seems more appropriate where the act was undertaken for objective reasons. A change in law could dramatically affect the actor's incentives in the latter sort of case, but is unlikely to do so in the former.

Against the background of an Aristotelian conception of responsibility, then, we can afford to reject the bifurcation of defenses into lack of voluntariness, on the one hand, and justification on the other. This is because an agent can fail to be *morally* responsible for a chosen act. All chosen acts are voluntary, since, as Aristotle says, the voluntary extends more widely than the chosen. To say that an act is chosen is therefore to say at a minimum that the agent is responsible for it, in the non-moral sense, and that she can be called to account. The judgment we make of the agent in light of her action will then

115. George Fletcher, *Rights and Excuses*, CRIM. JUST. ETHICS, Summer/Fall 1984, at 17.

116. *Id.* at 24.

117. *Id.* at 17.

depend on the substance of the reason the agent offers in her explanation of why she did it. When the action stems from a settled disposition, the reason the agent gives for having pursued the course she did will reveal something about her character. If the reason for the action, for example, was love for a friend or a member of one's family, we will usually take a benevolent view of the agent. We do not find the action blameworthy, then, because it is a product of the very dispositions we would hope to inculcate by administering punishment or blame. The agent is responsible for the action in virtue of the voluntariness of the action, but she is not *morally* responsible, in the sense of culpable, since the action is not a reflection of a vicious character.

One might suppose that the above discussion misses the point, since what we want to know is whether our attitudes of sympathy and identification towards victims of duress are *justified*. The welfarist, for example, would maintain that the fact that we tend to understand and accept action performed for reasons of this sort does not do the normative work that must be done if we are to provide a rationale for the defense. If it does not enhance social welfare to exonerate agents acting under duress, perhaps we cannot justify a rule permitting the duress defense.

But the welfarist response demands too much of moral theory. The ever so human dispositions tapped into by the coercer do not themselves stand in need of justification, at least not at the level of analysis at which the question of exemption from punishment applies. Preferring our own preservation to that of others, or wanting to save loved ones at the expense of strangers, are dispositions which form background conditions for normative analysis. Legal and moral rules are at least substantially reflective of the ethical fabric of our actual mode of existence. Although they push and encourage ethical change at the margins, they do not create that fabric for the most part, and one should not expect to be able to justify them on the basis of first principles alone.

VII. CONCLUSION

Our jurisprudence inherits from moral philosophy the mistaken view that human beings are morally accountable for all the intended consequences of their behavior. The claim of this Article has been that it is to this mistaken conception that we owe the bifurcation of theories of duress into the welfarist and voluntarist positions. But the conception itself only came to look sensible once a certain philosophical transformation had taken place, namely the notion of choice had replaced the Aristotelian focus on dispositions.

On a certain view, choice operates independently each time it is exercised. Its consequences, intentional actions, must therefore be assessed individually. No previous exercise of choice is relevant for present or future choices. And this constitutes a rejection of the relevance of character to moral judgment, which links the choices and actions of a person over time. With the move from character to choice, there was a corresponding move from disposition to act. The single act became the centerpiece of modern ethics, and moral judgment became a way of evaluating individual acts, a turning away from the notion of ethical evaluation of *persons*. Behavior is taken piecemeal on the modern view: each act is assessed for the amount of good or bad it brings into the world. Agents are thus morally accountable for all the actions they perform intentionally, since each intentional action represents an individual

choice.

What is missing from the modern view is a principle of moral evaluation of actors, and this absence in the background conception requires a psychological theory of exoneration like excuse to turn instead to the underlying voluntariness of the act. The natural focus on the actor is thus either eliminated, and excuses are transformed into justifications, or it is misconceived in a way that turns the voluntary into the involuntary in order to undermine the applicability of ethical assessment. Fletcher is in a sense correct when he says that Anglo-American jurisprudence resists the concept of excuse.¹¹⁸ We resist it *as a grounds of moral judgment*, even though we accept it *as a grounds for denying the applicability of moral judgment*.

We have lost the ability to make sense of a defense like duress, then, because we have lost the concept of character judgment, and we have put in its place the less coherent notion of *moral* evaluation of an action, stemming from the idea that each action is the product of an independent exercise of choice. The concept of an excuse, however, fits into the space between judgment of persons and judgment of actions. Since modern moral philosophy collapses this space, the possible bases for exoneration that remain are either increase in social welfare or bodily movement which is not intentional.

This Article has presented the two standard rationales for duress and has attempted to show that neither rationale proves adequate to explain the defense in its present form. What the Article presents is not a complete theory of duress, but a way of conceptualizing the defense and a philosophical rationale for a concept with its general characteristics. It argues that the two standard theories emerge as the sole alternatives only against the background of the modern conception of responsibility. On a different conception of responsibility, an older conception, a third possibility emerges: a notion of excuse which is not based on loss of control or impaired voluntariness. Anglo-American jurisprudence has been particularly resistant to the idea that excuse can itself function as a normative principle, and since the only normative principle available seems to be justification, it resorts to the nonmoral principle of defective action in order to exempt an actor from punishment when justification is unavailable. But the supposition that the only ethical principle we have in our arsenal is the principle of welfare-maximization is an overly narrow one. It is a restriction one must accept only on a theory of moral responsibility that leaves dispositions and character out of the picture.

118. See generally Fletcher, *supra* note 76.

