

## Voluntariness and Intention

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I am very grateful to the editors of *Jurisprudence* for proposing this symposium, and to Maria Alvarez, Erasmus Mayr, Dennis Patterson and Assaf Sharon for taking the time and trouble to write about *Action, Knowledge, and Will*. I have not been able to address every argument they present, and every question they raise, because of the limitations of space, but I have replied to what seem to me their most challenging arguments and questions. I have organised my comments by topic rather than by critic.

### VOLUNTARINESS

#### An Ethical Concept

Empiricist philosophers from Locke to Mill maintained that a voluntary act is a movement of the body caused by an act of will. Locke called the act of will a ‘volition’, whereas Bentham and Mill preferred the term ‘intention’, but their conception of it was the same. The volition or intention was a kind of conscious choosing or deciding, not merely an appetite or aversion, but a *sui generis* act or operation of the will.

James, Russell, Wittgenstein and Ryle all rejected this theory, but they disagreed about what should take its place. James and Russell argued that the only mental antecedents of voluntary action we generally need to postulate, apart from the agent’s motives, are kinaesthetic images of the movements to be performed. For their part, Wittgenstein and Ryle dispensed with both acts of will and kinaesthetic images.

Ryle argued that the ‘doctrine of volitions’ is a myth: ‘a causal hypothesis, adopted because it was wrongly supposed that the question, “What makes a bodily movement voluntary?” was a causal question.’ The terms ‘voluntary’ and ‘involuntary’, he maintained, are applied, ‘with a few minor elasticities’, to acts that

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‘ought not to be done’, and such acts are voluntary if, and only if, the agent could have avoided doing them.<sup>1</sup>

In *Action, Knowledge, and Will* (henceforth *AKW*), I argue that Ryle is partly right and partly wrong. He is right to reject the ‘doctrine of volitions’, and right to suggest that voluntariness is an ethical concept. But his account of voluntariness contains three significant mistakes.

First, the ‘minor elasticities’ remark cannot be right, because we commonly ask whether an act was voluntary without suggesting that it ought not to have been done, when it involves a substantial risk or sacrifice on the part of the agent. Second, conduct can be both voluntary and unavoidable, as in Locke’s example of a man who remains in a room, conversing with a friend, unaware that he is ‘locked fast in’, and ‘has not the freedom to be gone’.<sup>2</sup> He cannot avoid staying, but he stays voluntarily. Third, as Aristotle points out, a voluntary act is one that is *not* due to ignorance or compulsion, so the question of whether an act is voluntary is a causal question, although what makes it voluntary is *not* having certain causes, so one could describe it as a causal question in a negative sense.

Why then was Ryle right in thinking that voluntariness is at root an ethical concept?

To see why, ask what the connection is between ignorance and compulsion. Why are these very different conditions—one cognitive, the other causal—bound together in the idea of voluntariness? Aquinas’s answer is that two powers are jointly exercised in voluntary action, cognition and appetite, and while ignorance prevents the cognitive contribution to voluntary action from occurring, as when Oedipus unwittingly kills his father, compulsion prevents the appetitive contribution from occurring, as when a man is sent into exile against his will. So when an act is involuntary, either the cognitive power or the appetitive power is ‘excluded’.<sup>3</sup>

But this is inconsistent with allowing (as Aristotle and Aquinas do) that there are cases of psychological compulsion, as when a man reveals secrets under torture.<sup>4</sup> For in this kind of situation compulsion works *through* the appetitive power, rather than bypassing or excluding it. Aquinas is clearly right in thinking that ignorance and compulsion involve the cognitive and appetitive contributions to action respectively. But if we accept that there are cases of psychological compulsion, then even if the involuntariness of an act is sometimes explained by the ‘exclusion’ of cognition and appetite, this cannot be the whole story, and exclusion cannot be the key.

1 G Ryle, *The Concept of Mind* (Penguin 2000) 66-68. Wittgenstein agreed that the act of volition is a myth. ‘Voluntary movements’, he claimed, ‘are certain movements with their normal *surroundings* of intention, learning, trying, acting.’ L Wittgenstein, *Remarks on the Philosophy of Psychology I* (GEM Anscombe trans, Blackwell 1980) §776.

2 John Locke, *An Essay Concerning Human Understanding* (R Woolhouse ed, Penguin 1997) 2.21.10.

3 *Sententia Libri Ethicorum* 3.1.

4 *EE* 1225a19-27, *NE* 1110a26.

In *AKW*, I argue that the key is exculpation. The reason why ignorance and compulsion negate the voluntariness of an act is that they are normally exculpations. To be precise, they are exculpations unless they are themselves culpable, or result from culpable conduct by the agent. Hence, when we describe an act as ‘voluntary’ we imply that it was *not* due to factors that exculpate, factors that exclude guilt or free someone from blame. Aquinas states that the involuntary is a privation of the voluntary (*involuntarium est privatio voluntariū*).<sup>5</sup> My view is the opposite: voluntariness is defined by negation. In Austin’s terminology, ‘involuntary’ wears the trousers.<sup>6</sup>

We can now see why Aquinas’s idea about exclusion fails to explain why ignorance and compulsion negate the voluntariness of an act. For knowledge and desire can *either* be excluded *or* they can be manipulated or controlled by another, in ways that exculpate the agent. This is more obvious if we distinguish between unwittingness and deception (two forms of ignorance) and between physical force and coercion (two forms of compulsion). Aquinas thinks of unwittingness and force as excluding cognition and appetite respectively, but deception manipulates or controls cognition and coercion does the same to appetite.

So the foundation on which the concept of voluntariness rests is the immemorial principle that ignorance and compulsion are exculpating factors.<sup>7</sup> That is why I say that voluntariness is an ethical rather than a purely psychological concept. Its basic function, I maintain, is to inform the appraisal of individual conduct, and in particular the assessment of innocence and guilt. Furthermore, it will sometimes be a matter of judgement whether, in a particular case, a threat is sufficiently grave to qualify as coercion, bearing in mind the value that is sacrificed by giving way.<sup>8</sup> So the concept of voluntariness does not merely have an ethical function, its application is sometimes guided by a value judgement.

### Coercion

Alvarez disagrees. She maintains that ‘the sort of compulsion that negates [voluntariness] depends, not on evaluation, but on literal choice: on whether the act was within the agent’s control’. The concept of voluntariness, she concludes, can

<sup>5</sup> *Sententia Libri Ethicorum* 3.1.

<sup>6</sup> ‘It is usually thought, and I dare say usually rightly thought, that what one might call the affirmative use of a term is basic—that, to understand “*x*” we need to know what it is to be *x* or to be an *x*, and that knowing this apprises us of what it is not to be *x* or not to be an *x*. But with “real” it is the negative use which wears the trousers.’ JL Austin, *Sense and Sensibilia* (GJ Warnock ed, OUP 1962) 70.

<sup>7</sup> Sharon doubts whether the principle that ignorance is an exculpation was as securely established in antiquity as I claim. He writes: ‘Oedipus was ignorant of his familial relationship to Jocasta, and yet he bore the guilt of mating with his mother.’ But this remark confuses guilt and pollution. As Dodds points out, Oedipus’s incest certainly amounted to what Aristotle calls μεγάλη ἀμαρτία, but he acted without πονηρία and so (in Aristotle’s terminology) it was a ἀμαρτία, not an ἀδικημα. Dodds also mentions that if Oedipus had been tried for parricide by an Athenian court, he would have been acquitted (ER Dodds, ‘On Misunderstanding the *Oedipus Rex*’ in *The Ancient Concept of Progress* [OUP 1973] 67 & 71.) Sharon’s comments about the Old Testament concept of guilt seem to me mistaken for the same reason. See D Daube, *The Deed and the Doer in the Bible* (Templeton 2008) ch 3, esp 71–72, where the material in *Leviticus* Sharon mentions is discussed.

<sup>8</sup> Aristotle acknowledges this in the Eudemian Ethics: *EE* 1225a15–19.

be relevant to ethical judgements, 'but it is doubtful that it is an ethical, as opposed to a psychological concept'. So she agrees with Ryle where I disagree with him, about the definition of voluntariness; and she disagrees with Ryle where I agree with him, about the ethical character of the concept. However, in her comments on *AKW* she does not defend the claim that 'literal choice' is necessary for voluntariness.<sup>9</sup> She focuses on whether it is sufficient.

In *AKW* I argue that 'literal choice' is not sufficient for voluntariness, on the grounds that a sufficiently grave threat—such as a threat of death or serious personal injury—can negate the voluntariness of an act, even if the agent was capable of choosing not to submit.<sup>10</sup> If that is right, there are forms of compulsion that fall short of main force, and are not so debilitating that the victim loses the ability to resist. This is exactly what we should expect, if the point of describing an act as 'voluntary' is to say that it was *not* due to factors that exculpate, since duress is such a factor.

However, according to Alvarez, an act that is done under duress *is* done voluntarily, as long as the person threatened is capable of choosing to resist, so that she has a 'literal choice', and the act is 'within her control'. Alvarez argues that duress 'qualifies' the voluntariness of an act, but does not negate it. Quoting Aristotle, she writes as follows:

some acts are 'mixed, but are more like voluntary actions'; they are mixed because in the abstract, that is, independently of the circumstances in which they are done, 'no one would choose such an act in itself'.

Duress, she claims 'exculpates because it qualifies voluntariness (it makes the act "mixed voluntary")'. But with this qualification, the act *is* voluntary, since the agent can choose to face down the threat, however difficult or costly this might be, and an act is voluntary if the agent is 'literally able to choose' to do it or not do it. She calls this the 'literal choice view', because of a remark by Hart and Honoré: 'The person threatened is literally able to choose whether to act as instructed or suffer the threatened harm, so that a choice exists.'<sup>11</sup>

Although Alvarez says that she is following Aristotle, her view is not in fact the same as his. Aristotle does not explain voluntariness in terms of choice. Remember, Aristotle maintains that we can describe the behaviour of animals and small children as voluntary, but he denies that we can talk about choice here, on the grounds that animals and small children lack the ability to reason. His position is actually that an

<sup>9</sup> She discusses this elsewhere: see M Alvarez, 'Actions, Thought-Experiments and the "Principle of Alternate Possibilities"' (2009) 87 *Australasian Journal of Philosophy* 61.

<sup>10</sup> I did not propose a test to determine whether a threat is grave enough to negate the voluntariness of an act in *AKW*, because it was sufficient, for my purposes, to prove that there are forms of compulsion that fall short of main force, and do not render a person incapable of resisting. But Sharon points out, quite rightly, that the idea of a 'sufficiently grave threat' is 'terribly vague', adding 'We may ask of a philosophical theory to at least provide us with some criteria'. The difficulty in devising a fair test is that in order to be fair, it must take the individual's powers of resistance into consideration, but in order to be a test, it must supply a standard with which his conduct in the particular situation can be compared. The idea of a threat that would prevent resistance by a person of reasonable resolution may be a good starting point, but if we adopt it, it will remain a delicate task to decide how far to relativize a test of this kind, to an individual's age, mental capacity etc.

<sup>11</sup> HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, OUP 1985) 157.

act is involuntary if the agent ‘contributes nothing’ to it, but as long as the origin of the motion of his body is in the agent himself, it is up to the agent whether to do the act or not, and so it is voluntary.<sup>12</sup> In effect, Aristotle applies the distinction he draws in the *Physics* between ‘natural’ and ‘violent’ motion to behaviour, voluntary action being ‘natural’, and involuntary action being ‘violent’ or ‘forced’.

This means that according to Aristotle, an act that is done under duress, such as when a man complies with an order to do a shameful act because his family are being held hostage, or out of necessity, such as when a captain throws his cargo overboard during a storm in order to avoid capsizing, is voluntary. Indeed, he says this explicitly in the latter case. So why does he also say that acts of these kinds are involuntary ‘in the abstract’, and that they contain an admixture of involuntariness?<sup>13</sup>

Meyer suggests that this may be a ‘concession’, which Aristotle makes to ‘accommodate (or at any rate acknowledge)’ the fact that it was normal to describe the agent in these kinds of circumstances as acting *akōn*.<sup>14</sup> But whether or not that is the right answer, the fact that no one would do a shameful act—e.g. betray a friend—for its own sake cannot explain why duress is an exculpation. For if an act that is done under duress were free from blame *for this reason*, the same act would also be free from blame if it was done because of a large bribe, since in both cases it is *ex hypothesis* an act no one would choose ‘independently of the circumstances in which they are done’.<sup>15</sup>

Perhaps that is why Aristotle does not explain why duress can be an exculpation in this way. Instead, he says that it exculpates when it makes doing the act the right thing to do, in which case it is a justification rather than an excuse, or when resistance is beyond human nature, as in the example mentioned earlier where someone reveals secrets under torture. This position cannot be faulted on logical grounds, but it is hard-line. Our view today, at least the view that is implicit in the way duress is treated in the courts, is that a sufficiently dire threat can *either* justify doing an act, if giving way is a lesser evil than resisting, *or* excuse doing it *without its ceasing to be wrongdoing*, even if the agent was ‘literally able to choose’.

For example, when two young women perjured themselves in order to avoid being viciously assaulted, they were acquitted of perjury because the defence of duress was accepted by the court, but there was no suggestion that they did the right thing when they lied under oath (*R v Hudson and Taylor* [1971]). The defence was not required to establish that the defendants were right to perjure themselves, or that letting a dangerous man walk free (which happened as a result) was the lesser evil. Nor do we require this when we excuse wrongdoing in our daily lives. If we did require it, we would not be excusing wrongdoing, since doing the right thing, or choosing the lesser evil, is not wrong.

<sup>12</sup> NE 1110a4, 1110a15-18.

<sup>13</sup> NE 1110a18.

<sup>14</sup> Susan Suavé Meyer, ‘Aristotle on the Voluntary’ in R Kraut (ed), *The Blackwell Guide to Aristotle’s Nicomachean Ethics* (Blackwell 2006) 147; see also Meyer, *Aristotle on Moral Responsibility* (Blackwell 1993) ch 4.

<sup>15</sup> See Anthony Kenny, *Aristotle’s Theory of the Will* (Duckworth 1979) 32f.

Setting the defence of duress aside, is conduct voluntary as long as the agent is 'literally able to choose'? I argue that we can see that this is not a sufficient condition for voluntariness if we consider a case where the question is whether an act was voluntary on the part of the patient, rather than the agent. For example,

if a rapist threatens a woman with violence and she makes a conscious decision to submit ... the idea that she must therefore have consented to the act and submitted to it voluntarily is repugnant and absurd, regardless of whether she was 'literally able to choose' whether to submit or risk being killed. (AKW89)

The legal definition of rape varies across different jurisdictions, and has changed across time. But a comparative study by a UN Criminal Tribunal in 2002 found that 'the basic underlying principle' in the law of rape across the various legal systems it surveyed is that rape is sexual penetration that is 'not truly voluntary or consensual on the part of the victim'.<sup>16</sup> However, if this is accepted, the 'literal choice' theory of voluntariness implies that it would be a defence against a charge of rape that the victim was 'literally able to choose' whether to submit. I contend that this disproves the 'literal choice' theory of voluntariness.

Alvarez agrees that the 'literal choice' theory of voluntariness implies that the victim in this case submits voluntarily, but she is willing to accept this implication. The case still qualifies as rape, she says, 'because the act described is not "*truly* voluntary or consensual on the part of the victim"' (her emphasis): it is 'mixed voluntary', since 'submitting to a sex act with a man one doesn't want to have sex with' is something no woman would choose to do 'in the abstract'.

But this cannot be right. The UN tribunal was not contrasting 'truly voluntary' with 'mixed voluntary'. It was contrasting 'truly voluntary' with 'apparently voluntary', as for instance when the victim submits without protest or resistance, because of fear, the effects of torture, and so on. So Alvarez's position is not consistent with the tribunal's finding.

Besides, women submit to sex acts with men they do not want to have sex with in various circumstances, such as unhappy marriages and prostitution, and a sex act that occurs in one of *these* kinds of circumstances does not normally qualify as rape. So the claim that in the case described, where the victim submits because she has been threatened with death or serious injury, the act qualifies as rape *because it is 'mixed voluntary' on her part* cannot be right.

Alvarez also makes the following comment about this case: 'although the victim consented to submit ... her consent was invalid, since her decision to submit was coerced.' Now in fact according to English law, the victim of a rape who submits because she has been threatened with violence does *not* consent. So Alvarez's comment is not quite right, or at any rate it is not in line with the use of the term 'consent' in English law.<sup>17</sup>

<sup>16</sup> *Prosecutor v Kunarac* s 440, quoted in W Schomburg and I Peterson, 'Genuine Consent to Sexual Violence in International Law' (2007) 101 *American Journal of International Law* 134.

<sup>17</sup> S 73 The Sexual Offences Act 2003 states that 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'.

However, the term 'voluntary consent' does commonly occur in guidance about clinical care, with the implication that consent is not voluntary as such. So we can ask whether Alvarez's 'literal choice' theory of voluntariness is plausible in this situation, and the answer is surely that it is not. For when 'voluntary consent' is required, e.g. for surgery or medication, it would be perverse to maintain that consent obtained by coercion is voluntary or 'mixed voluntary', as long the subject is 'literally able to choose' whether to give it or withhold it. Consent is not voluntary if it is obtained by threats.

Sharon also criticises my views about coercion, but on different grounds from Alvarez. He agrees with me that duress negates the voluntariness of an act, and that a woman who submits to a rapist because he has threatened her with violence does not submit voluntarily. But he is sceptical about my claim that whether an act is voluntary on the part of the patient depends on whether it is done with her consent. He writes as follows:

This seems to be the argument [in *AKW*]:

(1) an act is voluntary on the part of its patient only if she consents to it.

(2) a sufficiently grave threat vitiates consent.

therefore,

(3) an act performed under sufficiently grave threat is not voluntary.

The latter premise of this argument is, intuitively, hard to deny. But the first premise seems to me less decisive. I wonder whether consent is either necessary or sufficient for voluntariness.

Sharon first argues that consent is not necessary for an act to be voluntary on the part of the *agent*. He mentions several examples, but perhaps it is unnecessary to comment on them. Most voluntary activity does not involve consent, because one can only consent to do an act if one has been (explicitly or implicitly) invited, asked or told to do it. So, for instance, a child playing with a doll (Sharon's example) or sucking on a sweet (one of the examples in *AKW*) has not normally consented to do so. But it does not follow from the fact that consent is not necessary for voluntary *activity* that it is not necessary for voluntary *passivity* either, that is, for an act's being voluntary on the part of the patient, the person who receives it.

Sharon also doubts whether consent is *sufficient* for an act to be voluntary on the part of the patient. As noted above, he agrees that a woman who submits to a rapist because he has threatened her with violence does not submit voluntarily. But he adds:

It is less certain that this involuntariness should be explained as lack of consent. Consider the mother of a fatally sick child who consents to having sex with the wealthy man in return for the life-saving medicine for her child. There is consent, but I doubt whether it is proper to regard her choice as voluntary.

Again, it does not follow from the fact that consent is not *sufficient* for voluntary passivity that it is not *necessary*. So this argument does not affect premise (1) either, and Sharon does not seem to offer any reason to doubt whether the premise is true.

However, I do in fact maintain that consent *is* sufficient to make a sex act voluntary on the part of the person who receives it, so I should comment on whether the example of a mother exchanging sex for medicine shows that this is false. I do not think it does show this.

The question raised by the example is interesting and important, and has been extensively discussed. The question is this: what kinds of situations are coercive, despite the fact that they do not involve threats? But this debate has no bearing on the principle that the consent of a person who receives an act, such as a sex act or a medical or surgical intervention, makes it voluntary on her part. The rich man in Sharon's example does not commit rape. As the law stands, the woman *does* consent, and *does* have sex voluntarily, although she may do so reluctantly, perhaps even with revulsion. But we can acknowledge this while still agreeing that by a different standard, she does not make the bargain (what Sharon calls her 'choice') voluntarily. For having sex is one thing, and making a bargain is another, even if the bargain is to have sex, and different standards of compulsion apply.

The case of rape plays an important part in my argument, because it demonstrates that if an agent is 'literally able to choose' whether to submit or risk the threatened harm, and if she chooses to submit, it does not follow that she does so voluntarily. And if this is true where the voluntariness of an act on the part of the *patient* is concerned, it must also be true where the voluntariness of an act on the part of the *agent* is concerned. Two important conclusions follow. First, the idea that every intentional act is also voluntary must be mistaken.<sup>18</sup> For an act that is done under duress is done intentionally—i.e. with the intention of avoiding the threatened harm. Second, neither the empiricist theory of voluntary action nor the 'literal choice' theory can be right, because both theories imply that if a victim of rape chooses to submit, then she *does* submit voluntarily.

### Economic Duress

Patterson is more sympathetic to the theory of voluntariness I defend than either Alvarez or Sharon. But he raises a challenging question about my position regarding duress. As noted earlier, I defend the orthodox position that duress provides a defence against every criminal charge, except possibly treason or murder, because it negates the voluntariness of the alleged offence—regardless of whether the defendant was 'literally able to choose whether to act as instructed or suffer the threatened harm'. Patterson does not disagree. But he asks how we are to apply this principle to the case of economic duress.

The question of duress arises in contract law when a party enters into an agreement because of a threat. The contract is not void, but it is voidable if the threat

<sup>18</sup> The doctrine that every intentional act is also voluntary has been widely accepted since Anscombe stated it in *Intention*: GEM Anscombe, *Intention* (Blackwell 1957) 90. This is puzzling, since even if the person threatened is psychologically incapable of resisting, e.g. as a result of torture, he does the act demanded of him intentionally—he does it so that the torture will stop—but it is also widely accepted that torture can negate the voluntariness of the act.

qualifies as duress. The common law recognised threats of physical violence or unlawful imprisonment as grounds for voiding a contract, but during the last 30 or 40 years the courts have also allowed some forms of economic pressure to qualify as duress. Such threats must be ‘wrongful’, but they need not be unlawful, as Lord Justice Steyn noted in 1993:

The fact that the defendants have used lawful means does not by itself remove the case from the scope of the doctrine of economic duress ... Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which ‘lawful-act duress’ can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying ‘never’.<sup>19</sup>

But if it is not necessary for a threat to be unlawful, is it sufficient that the party who claims to have been subjected to duress had no real choice but to enter into the agreement, and did not do so voluntarily?

Patterson argues that this is not sufficient. He describes a hypothetical case in which Dave agrees to pay Pete \$200 per gallon for potable water because there is no other way in which he can avoid the risk of potentially fatal dehydration. He subsequently refuses to pay for the water he has received, and when Pete sues him for breach of contract, he argues that he made the agreement under duress. ‘The alleged wrongful threat by Pete’, Patterson writes, ‘was the threat not to contract with Dave unless Dave paid \$200 per gallon’.

Patterson denies that the case qualifies as economic duress. He comments:

Dave had no choice but to pay the usurious sum demanded by Pete for the water. But I think that is not a sufficient reason to allow Dave to assert the defence of duress when Pete sues him for breach of contract.

The defence of duress should not be available in this kind of case, he suggests, for policy reasons:

If Dave is allowed to avoid the contract with the defence of duress, then the Petes of the world will have no incentive to stockpile water, thereby making the Daves of the world worse off.

He concludes that the analysis of voluntariness may be ‘insufficient to decide whether the defence of duress is available to a party seeking relief from enforcement of a contractual promise’.

I agree with this conclusion. Indeed, as Patterson acknowledges, I say as much in *AKW*:

Cases of economic duress are customarily decided on the basis of what sorts of threat are permissible, without involving the concepts of voluntariness or choice, since the

<sup>19</sup> *CTN Cash and Carry Ltd v Gallaher Ltd* [1993] EWCA Civ 19.

legitimacy of commercial pressure does not depend on how painful it would be to resist. (AKW89)

However, I do not find Patterson's argument convincing. First, the reason why the defence of economic duress is not available to Dave is that the alleged threat 'not to contract with Dave unless Dave [pays] \$200 per gallon' is not a threat in the relevant sense at all. Second, the idea that laws prohibiting usury are undesirable because they deter beneficial commercial activity is debatable, but whatever the right view about this may be, it has no bearing on the doctrine of economic duress. I shall comment on these two points in turn.

First, a threat is the statement of an intention to cause some kind of hurt or harm unless the recipient of the threat complies with a demand. In cases of economic duress, the threat is commonly not to honour an existing agreement unless an unwarranted demand is met—such as to accept an onerous variation in the terms of the contract, or to pay an additional sum—although this will only amount to duress if no alternative means of enforcing the contract is available, e.g. because of the time steps of this kind would take. A refusal to enter into an agreement is not *per se* a threat. That is not to say that inequality of bargaining power is never a reason why a court will set aside a contract. It is only to say that in such a case, the ground will not be economic duress. In fact this is stated explicitly in the judgement by Lord Justice Steyn quoted above:

The common law does not recognise the doctrine of inequality of bargaining power in commercial dealings... The fact that the defendants were in a monopoly position cannot therefore by itself convert what is not otherwise duress into duress.<sup>18</sup>

(In Patterson's hypothetical case it is the plaintiff who is in a monopoly position, but the same point applies.)

The second point concerns Patterson's suggestion that laws prohibiting usury are undesirable for policy reasons. As a matter of fact, such laws do still exist, despite the general tendency to deregulate commercial activity during the last few decades. For example, the Consumer Credit Act 1974 empowers the courts to rewrite the terms of a credit agreement that is judged to be 'grossly exorbitant', although they have hardly ever exercised this power. But whether or not Patterson is right to oppose legislation of this kind, it has no bearing on the common law doctrine of duress.

Having said that, Patterson is quite right to point out that the introduction and development of the idea of economic duress has cut the concept of duress loose from its moorings. This, I believe, rather than any inherent confusion in the idea of voluntariness itself, is why some legal theorists interested in contract law, such as Atiyah, have been dismissive or disparaging about the traditional concept of duress.<sup>20</sup>

<sup>20</sup> PS Atiyah, 'Economic Duress and the "Overborne Will"' (1982) 98 *Law Quarterly Review* 197; 'Duress and the Overborne Will Again' (1983) 99 *Law Quarterly Review* 353.

### Obligations and Prohibitions

Turning now to obligations and prohibitions, I argue in *AKW* that both threats and obligations can be obliging factors, in other words, factors that compel someone to adopt a course of conduct without making it impossible for him not to do so.

If we accept that an agent does an act because he is obliged to do it, we thereby accept that he did not choose to do it in preference to an alternative, because the alternative was excluded by the obliging factor ... A threat constrains a person's freedom of choice by making an option—in other words, a possible course of conduct—too costly to pursue, whereas an obligation does so by excluding it from the range of options that are permitted. (95)

Hence, 'if one does in fact have an obligation to do something, and this is one's whole reason for doing it, then one does not do it voluntarily' (96). For instance, if a religious Jew refuses a dish of pork because eating pork is prohibited by Jewish law, he does not do so voluntarily, out of choice. So here too we have an example of compulsion that falls short of main force. However, I also argue that it is possible to fulfil an obligation voluntarily, and mention the case of parents caring for their children as an example. For if the parents' motive is love rather than duty, then the existence of the obligation is *not* their reason for fulfilling it.

Alvarez argues that my position regarding this kind of case is inconsistent. For I also claim that 'to acknowledge that one has an obligation to do something is precisely to think of it as compulsory, non-optional, so that whether one does it is *not* a matter of choice' (96). Alvarez suggests that it follows from *this* claim that parents who acknowledge they have an obligation to care for their children do not after all care for them voluntarily, regardless of their motive.

But this seems to me mistaken. I see no inconsistency in maintaining (a) that most parents acknowledge that caring for their children is compulsory, non-optional and not a matter of choice; and (b) the existence of the obligation is not generally their reason, or their whole reason, for doing so. But on my view, an obligation only compels a person who does an act because of it, just as a threat only compels a person who gives way. So although most parents acknowledge the obligation, they fulfil it voluntarily. The same would be true of someone who was threatened with violence if they did not do a certain act, and did the act, thereby complying with the demand, but for their own reasons, rather than to escape the threat.

Alvarez also mentions the case of someone who promises to help a friend move house, feels reluctant to make the effort when the time comes but does provide the help, purely because of the promise. Does he do so voluntarily? Alvarez comments: 'It seems more plausible to say that [he helps] voluntarily though perhaps out of a sense of duty rather than anything else.'

I agree that we might say this, if the contrast we had in mind was between helping because one has promised to, and helping because one has been ordered to, or because one is being paid. But notice that one helps voluntarily in these cases too, according to Alvarez, as long as one is 'literally able to choose' not to

help. So our willingness to be guided in our use of 'voluntary' by this kind of contrast does not support her case.

The fact is that we distinguish between voluntary work and paid work, between making a voluntary donation and paying a mandatory charge, between doing an act voluntarily and doing an act under duress, between joining an army as a volunteer and joining as a conscript, between the voluntary and compulsory parts of an exam and so on. It is true, of course, that we can draw these distinctions by means of the term 'choice': voluntary work, a voluntary donation, a voluntary part of an exam etc., are a matter of choice. But 'choice' here cannot mean 'literal choice', since in each of the cases with which these are contrasted (paid work, paying a mandatory charge, the compulsory part of an exam etc.) a 'literal choice' exists. A choice that is available to a person is not merely one she has the physical and psychological capacity to pursue. It must also meet an appropriate standard of eligibility, because it does not conflict with a binding obligation and it is not too high a price to pay.

Sharon also doubts whether I am right to claim that if someone has a binding obligation to do something, and this is her whole reason for doing it, then she does not do it voluntarily. He mentions two kinds of examples. First, a person who acts 'under moral obligation ... is worthy of moral praise precisely because her actions are voluntary'. Second, 'Pace some versions of natural law theory, many war criminals act under legal obligation. This strips their actions neither of voluntariness nor of moral culpability.' But neither of these examples proves its point.

Regarding the first, it does not seem right to say that *every* act that is done to fulfil a moral obligation is worthy of praise: it may not be sufficiently demanding. The moot question is whether an act can be eligible for praise despite not being done voluntarily. Perhaps Sharon means to suggest that it cannot, so that his 'precisely because' should be read as 'only if'. If so, the argument would be as follows: some acts that are done to fulfil a moral obligation are deserving of praise; but only voluntary acts are deserving of praise; hence, some acts that are done to fulfil a moral obligation are voluntary. I accept the first premise, of course. But although the second premise has been widely accepted, I can see no good reason to believe that it is true.

On the contrary, in some cases a person who behaves with exceptional courage cannot help doing so, is not 'literally able to choose' not to do so, and does not do so voluntarily. Here, for example, is an excerpt from the citation for the award of the Victoria Cross to Private Ernest Alvia 'Smoky' Smith of the Seaforth Highlanders of Canada, in 1944:

Under heavy fire from the approaching enemy tanks, Private Smith, showing great initiative and inspiring leadership, led his Piat Group of two men across an open field to a position from which the Piat [an anti-tank weapon] could best be employed. Leaving one man on the weapon, Private Smith crossed the road with a companion, and obtained another Piat. Almost immediately an enemy tank came down the road firing its machine guns along the line of the ditches. Private Smith's comrade was wounded. At a range of thirty feet and having to expose himself to the full view of the enemy, Private Smith fired the Piat and hit the tank, putting it out of action. Ten German infantry immediately jumped off the back of the tank and charged

him with Schmeissers and grenades. Without hesitation Private Smith moved out onto the road and with his Tommy gun at point blank range, killed four Germans and drove the remainder back.<sup>21</sup>

Smith's local newspaper reported:

Smoky, dubbed a 'one-man army' by his pals, was reticent about the Oct 21–22 episode at the Savio river bridgehead in Italy that won for him the Victoria Cross. 'I couldn't help doing what I did after seeing my buddy (Pte. Jimmy Tennant) after he was wounded,' Smith said. He saw 'red' at that point and 'didn't give a hoot' what happened so long as he avenged his pal.<sup>22</sup>

I see no reason not to accept that this account is accurate, that Smith's remark 'I couldn't help doing what I did' is true and that his heroic behaviour at the Savio river bridgehead was not voluntary. But if that is right, it does not follow that Smith did not deserve praise.<sup>23</sup> Hence behaviour can be praiseworthy without being voluntary. As I point out in AKW, behaviour can also be blameworthy without being voluntary, in cases of negligence or foreseeable duress (77).

Sharon's second example is also unconvincing. As we have seen, he writes:

*Pace* some versions of natural law theory, many war criminals act under legal obligation. This strips their actions neither of voluntariness nor of moral culpability.

There are legal complexities relating to the defence of superior orders, which I shall ignore here.<sup>24</sup> The simple point is this. If a soldier is ordered do an act that constitutes a war crime, the order is unlawful, and a soldier is not under an obligation to obey an unlawful order. On the contrary, he is under an obligation to disobey it, at least if it is obvious that it cannot have a legitimate basis (e.g. an order to torture or rape civilians). Hence, the example does not disprove the principle that if someone *does* have a binding obligation to do an act, and this is her whole reason for doing it, then she does not do it voluntarily.

But if it is as simple as that, why does Sharon refer to natural law theory? He seems to have a traditional division of opinion in mind, over whether there is a legal obligation to obey an unjust law. Traditionally, positivists said yes, there is a legal obligation to obey any law that has been validly enacted, even one that is unjust; whereas natural law theorists said no, an unjust law is invalid, so there cannot be an obligation to obey it. Sharon's thought appears to be that if we accept the positivist view, as he believes we should, then we are bound to admit that someone who does an act 'under legal obligation' may do it voluntarily, since otherwise a soldier who committed a war crime in obedience to an unjust law

<sup>21</sup> *The London Gazette*, (19 December 1944).

<sup>22</sup> *The Evening Citizen* (Ottawa, 26 December 1944).

<sup>23</sup> On this topic see Susan Wolf, 'Asymmetrical Freedom' (1980) 77 *The Journal of Philosophy* 151.

<sup>24</sup> See for example Geoffrey Best, *War and Law Since 1945* (OUP 1994), 188–92. (This book was published before the creation of the ICC. The provision in the Rome Statute relating to superior orders introduces further complexities.)

would not be culpable. He would be able to say that he did not do the act voluntarily. In effect, the defence of superior orders would be allowed.

But this argument is surely quite unconvincing. For no positivist has ever claimed that the obligation to obey a validly enacted law is indefeasible, and binding in every case. Hart, for example, writes as follows about Nazi law, in explicit opposition to the position taken by West German courts after the Second World War, that Nazi law lacked legal validity:

What is surely most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.<sup>25</sup>

I am not claiming that Hart's approach is right, although I happen to agree with it. My point is only that the debate between natural law theorists and positivists has no bearing on whether a binding obligation can negate the voluntariness of an act. On one view an obligation to obey an unjust law is overridden, on another view it does not exist. This is not a trivial or merely terminological difference, but either way, the theory of voluntariness I defend does not provide any support whatever for the defence of superior orders, though it does provide a rationale for the defence of duress.

## INTENTION

In *AKW*, I propose a new solution to the dispute about whether explanations of intentional action are causal explanations. I argue that the dispute seemed to be intractable because of a lack of percipience about dispositions on both sides, that is, both on the part of Davidson and his followers, who claim that explanations of intentional action *are* causal explanations, and on the part of Wittgenstein and Anscombe and their followers, who claim that they are not.

The most serious difficulty faced by the claim that explanations of intentional action are causal explanations arises from the existence of so-called deviant causal chains. The best-known example is due to Davidson himself:

A climber might want to rid himself of the weight and danger of holding another man on a rope, and he might know that by loosening his hold on the rope he could rid himself of the weight and danger. This belief and want might so unnerve him as to cause him to loosen his hold, and yet it might be the case that he never chose to loosen his hold, nor did he do it intentionally.<sup>26</sup>

This kind of example proves that if an agent wants to achieve something, and if this desire causes her to do an act she knows or believes is conducive to achieving it, it

<sup>25</sup> HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 210.

<sup>26</sup> D Davidson, *Essays on Actions and Events* (OUP 1980) 79.

does not follow that she does the act with the intention of satisfying the desire. Davidson and Anscombe agree that the deviant causal chains from a desire to an act cannot be eliminated. In other words, we cannot define the 'right' kind of sequence of events, the kind of sequence that connects a desire to an act when the act is done in order to satisfy the desire. But they disagree about why this is the case.

Davidson argues that the reason why the deviant causal chains cannot be eliminated is that there are no laws relating specific desires to specific kinds of acts. For if there were such laws, they would define the 'right' kinds of sequences of events. And he argues that there are no such laws because of 'the normative character of mental concepts'.<sup>27</sup> So Davidson's position is that desires *do* cause intentional acts, and explanations of intentional action *are* causal explanations, and he insists that there is no causation without laws. But the laws that underwrite the status of desires as causes of intentional acts do not mention desires or acts *as such*. This solution depends on a physicalist theory of desires. Desires must be physical states, so that the laws can be physical laws.

By contrast, Anscombe claims that the problem of deviant causal chains confirms that explanations of intentional action are not causal explanations:

[Davidson] speaks of the possibility of 'wrong' or 'freak' causal connexions. I say that any recognisable causal connexions would be 'wrong', and that he can do no more than postulate a 'right' causal connexion in the happy security that none such can be found. If a causal connexion were found we could always still ask 'But was the act done for the sake of the end and in view of the thing believed?'<sup>28</sup>

So, how do desires explain intentional acts, if they are not causes? Anscombe's answer is signalled by the phrase 'for the sake of the end'. She claims that explanations of intentional action are irreducibly and exclusively teleological. They refer to final causes, not efficient causes. She also says that they 'interpret' the act, by identifying the value the agent aimed to realise, the good, or apparent good, he intended to achieve:

Motives may explain actions to us; but that is not to say that they 'determine', in the sense of causing, actions. We do say: 'His love of truth caused him to ...' and similar things, and no doubt such expressions help us to think that a motive must be what produces or brings about a choice. But this means rather 'He did this in that he loved the truth'; it interprets his action.<sup>29</sup>

But the claim that goals are perceived goods—the so-called 'guise of the good' thesis—is a separable feature of Anscombe's view, and I shall not discuss it here.

In *AKW*, I argue that both Davidson and Anscombe misdiagnose the problem of deviant causal chains. It is not really a problem about intentional action in

<sup>27</sup> D Davidson, *Problems of Rationality* (OUP 2004) 114.

<sup>28</sup> GEM Anscombe, 'Von Wright on Practical Inference' in PA Schilpp and LE Hahn (eds), *The Philosophy of Georg Henrik von Wright* (Open Court 1989) 378.

<sup>29</sup> GEM Anscombe, *Intention* (Blackwell 1957) 24.

particular, and it is not explained by ‘the normative character of mental concepts’, nor by the difference between final and efficient causes. The problem arises because a desire is a disposition, and *every* disposition can be connected to the kind of act or event that manifests it by a deviant causal chain. I make use of Molière’s famous example of a disposition, the *virtus dormitiva*, to illustrate this point:

A man might take a soporific drug before driving, and the drowsiness induced by the drug might make him crash the car and knock himself unconscious. If this happened, he would lose consciousness because he took the drug, but the exercise of its *virtus dormitiva* would be pre-empted by the crash. (AKW 116)

Hence, if Anscombe and Davidson are right in thinking that the deviant causal chains from a desire to an act cannot be eliminated, this is a corollary of the more general fact that powers or dispositions cannot be reduced to regularities or laws—*contra* Armstrong, they are not ‘congealed hypothetical states of affairs’—and the exercise of a disposition cannot be defined as a specific kind of sequence of events.

However, while the problem of deviant causal chains is not specifically about teleology, we cannot explain the nature of desire without employing the idea of an end or goal. For desires are dispositions, dispositions are defined by specifying how they are manifested, and desires are manifested in purposive or goal-directed behaviour. In fact, a desire is manifested in two main ways: first, by behaviour aimed at satisfying it, i.e. at doing what it is a desire to do, or getting what it is a desire to get; and second, by feeling glad, pleased or relieved if the desire is satisfied, and sorry, displeased or disappointed if it is frustrated. When I explain this in AKW, I add the following observation about the manifestation of desire, which is germane to Mayr’s argument, as we shall see:

Pleasure at a desire’s satisfaction and displeasure at its frustration can in turn be manifested in behaviour that is not purposive, as when a child claps her hands with delight or stamps her foot with annoyance, so these kinds of behaviour are also indirect manifestations of the desire that is satisfied or frustrated. (AKW 107f)

In sum, I maintain that a desire *is* a causal factor, like any disposition, but it is a disposition of a special kind, because it is manifested in goal-directed behaviour, and in the direct and indirect hedonic reactions I have just described. If this is on the right lines, we are not forced to choose between Davidson’s view that explanations of intentional action refer to efficient causes and Anscombe’s view that they refer to final causes, since they do both.

Mayr agrees with some parts of this argument. He agrees that desires are dispositions, and that every disposition can be connected to the kind of act or event that normally manifests it by a deviant causal chain. But he does not accept that the existence of deviant causal chains between desires and intentional acts is *completely* explained by these two facts. He presents an example of a professor named Jane who informs the candidate she favours that he has been selected for a scholarship:

Very enthusiastically and in a very friendly tone of voice, Jane immediately tells him: 'Jim, you have got the scholarship.'

Since Jane is not the kind of person who allows her personal wishes to influence her choice, it is the tone in which she says this, rather than her act of saying it itself, that is due to her desire that Jim should get the scholarship. However, the act of informing Jim that he has got the scholarship does have the effect that her desire for this outcome is satisfied, because the scholarship is within her gift. Mayr says—rightly, in my view—that this is a case where 'a desire is manifested in a goal-directed action which contributes to fulfilling the desire, even though [the agent] does not act in order to satisfy this desire'.

Now remember Anscombe's remark: 'If a causal connexion were found we could always still ask "But was the act done for the sake of the end and in view of the thing believed?"' Mayr's example shows that we can still ask this question, even if the act is not only caused by the desire, like the climber loosening his hold on the rope, but also expresses it—or at least its manner of performance does so—and is intentional, and conducive to satisfying the desire. Mayr concludes that the problem of deviant causal chains between desires and acts 'is not just an instance of a more general phenomenon concerning the relation between dispositions and their manifestations'. So it is a mistake to imagine that if desires are dispositions, this fact alone 'fully resolves the problem of deviant causal chains, thereby allowing the causalist to win the debate by vindicating his claim at least in letter (if not in its original spirit)'.

I agree with Mayr, right up to the last step: 'thereby allowing the causalist to win the debate ...' In particular, I agree that an act which manifests a desire need not be done in order to satisfy it.<sup>30</sup> In fact, I make this point explicitly in *AKW*, when I point out that non-purposeive behaviour expressing pleasure at a desire's satisfaction or displeasure at its frustration, such as the child's behaviour described above, is an indirect manifestation of the desire. I also agree that Mayr's example shows that an act whose manner of performance manifests a desire need not be done in order to satisfy it, even if the act is intentional and conducive to satisfying the desire. And I agree that the mere fact that desires are dispositions does not by itself 'fully resolve the problem of deviant causal chains', in other words, it does not fully explain the difference between an act's being caused by a desire and an act's being done in order to satisfy a desire. The full explanation involves a substantial account of the kind of disposition a desire is. I stand by the account I propose in *AKW*—which is sketched very briefly above—although I agree with Mayr that there is scope to clarify and elaborate it.

But as far as I can see, none of this casts any doubt on my contention that the problem of deviant causal chains is not a problem about desires and intentional acts in particular, since *every* disposition can be connected to the kind of act or

<sup>30</sup> Mayr seems to attribute the opposite opinion to me when he says that according my view, 'the cases in which an agent acts on a desire he has are precisely those cases in which the desire is manifested (and, perhaps, some uncontroversial further conditions are fulfilled)'. But it is hard to be sure, because he does not explain what 'uncontroversial further conditions' he has in mind.

event that manifests it by a deviant causal chain; or my claim that if the deviant causal chains from a desire to an act cannot be eliminated, this is a corollary—an immediate consequence—of the more general fact that powers or dispositions cannot be reduced to regularities or laws. Nor does Mayr's example show that the causalist's claim cannot be vindicated 'at least in letter (if not in its original spirit)'. In fact, it wasn't my intention to side with either party in the debate. As I have said, I think both sides are partly right and partly wrong. But if the question is simply whether an explanation of an intentional act that identifies the desire it was meant to satisfy is a causal explanation, then Davidson was right. For a desire is a disposition, and a disposition is a causal factor. So the explanation that identifies the desire must be a causal explanation.

According to Anscombe, the problem of deviant causal chains shows that explanations of intentional action are irreducibly teleological, and not causal. Mayr's principal aim is to support the first half of this claim, the first conjunct, with a new kind of example. I believe he succeeds, or at least presents a fresh challenge to the reductionist about final causes. But the second half of Anscombe's claim, the second conjunct, is simply a mistake, which is ultimately due to a lack of perception about dispositions, and a failure to be sufficiently critical of Humean orthodoxies about causation. But it would be unfair to end without adding that the same failure led Davidson to conclude that the existence of deviant causal chains between desires and acts is explained by the normative character of mental concepts. Loosening the grip on our imagination of Hume's conception of causation is one of the main achievements in philosophy since their day. As it happens, Anscombe made a significant contribution to this process, but that was many years after she wrote *Intention*, and she does not appear to have reassessed the relationship between desire and action as a result.<sup>31</sup>

<sup>31</sup> GEM Anscombe, 'Causality and Determination: An Inaugural Lecture' in E Sosa (ed), *Causation and Conditionals* (OUP 1975).