LEGAL AND NON-LEGAL VOLUNTARINESS: A REJOINDER TO WERTHEIMER

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I argued in the paper that has given rise to this exchange (1982) that Wertheimer failed to distinguish between two questions: (A) Are negotiated pleas involuntary in a sense that renders them legally invalid? and (B) Are negotiated pleas entered involuntarily in a sense that justifies the abolition of plea bargaining as a matter of social policy? In his reply, Wertheimer agrees that he failed to make this distinction but disputes its importance. He offers two reasons for minimizing its significance: (1) That to decide (A) judges must decide "questions of social and political morality"; and (2) that the structure of the concept of voluntariness is the same in both (A) and (B). I will argue that (1) is false and that (2) is not true in any interesting sense.

Apparently Wertheimer believes either that (1) follows from the second prong of his "two-pronged test" or that it is simply a restatement of it. In either case its truth depends on the claim that "empirical involuntariness" is never a sufficient condition of legal involuntariness (at least in relation to contracts). But this is false. In many cases findings of involuntariness are based entirely on claims that the will of a party has been overborne or that the party has otherwise been deprived of the capacity to make a free and rational choice. Moreover, this is so even where the misconduct of public officials (e.g., an illegal threat) is a factor. Though they have had ample opportunity to do so, the courts do not base findings of involuntariness on the presence of wrongful threats in such cases. On the contrary, where such threats are grounds for a finding of involuntariness, the reason given is that they diminish the capacity for free choice. Thus, in *Garrity* v. *New Jersey*, the case of which Wertheimer makes so much, the court holds:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-

LAW & SOCIETY REVIEW, Volume 17, Number 4 (1983)

> incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda v. Arizona*, 384 U.S. 436, 464-465, is "likely to exert such pressure on an individual as to disable him from making a free and rational choice" (385 U.S. at 497).

And in *Haynes* v. *Washington*:

> The petitioner's written confession was obtained in an atmosphere of substantial coercion and inducement created by statements and actions of state authorities. We have only recently held again that a confession obtained by police through the use of threats is violative of due process and that "the question in each case is whether the defendant's will was overborne at the time he confessed," *Lynum v. Illinois* 372 U.S. 528, 534 (373 U.S. at 513).

The courts do not need to address issues of social and political morality to determine that pressure exerted on a defendant is sufficient either to overbear his will or otherwise to deprive him of the capacity to make a free and rational choice.[1]

Wertheimer might reply that the Court is mistaken to employ this standard; the actual legal standard is the one he, Wertheimer, posits. I have already noted that we do not find evidence for this standard in the case law, but the standard does appear in the *Restatement of Contracts*, and it does enable us to render consistent the Supreme Court's apparently inconsistent rulings in the few cases Wertheimer mentions.

Nevertheless, we cannot accept this position for all such cases. To do so would be to deny that threats which in fact render someone incompetent do not also render his agreements involuntary. But let us set this aside and grant that the standard Wertheimer quotes from *Restatement of Contracts* is valid for a significant range of cases. Does it follow that to decide whether agreements are involuntary in these cases judges must answer major questions of social and political morality?

Wertheimer originally believed that it does follow because he believed that the wrongfulness referred to in the

[1] I argue in a paper that is as yet unpublished that the courts' reasoning on the question of voluntariness is inconsistent, and sometimes very unconvincing ("Are Coerced Agreements Involuntary?"). One wonders whether official misconduct typically deprives a defendant of the capacity to make a free and rational choice. Certainly, police threats, etc., do not necessarily "overbear the will" (i.e., deprive us of the capacity to choose the alternative dictated by our values). Most of us are strong enough to withstand at least the milder forms of illegal pressure to confess to crimes we did not commit. One wonders why the courts are not content to rule simply that such threats violate due process or impose an intolerable burden on the exercise of a Constitutional right.

Restatement of Contracts is moral wrongfulness. If I understand him correctly, he is now willing to admit that the wrongfulness is legal, but he continues to insist that judges must answer questions of social and political morality in order to determine whether a threat is legally wrong. However, he offers neither examples of this nor arguments that support his position. Rather, he attempts to show that one example I use to illustrate the difference between immoral and illegal threats does not do the job. I shall show later that this attempt is flawed.

In order to justify Wertheimer's conflation of (A) and (B), his claim that to find a threat legally wrong judges must decide issues of social and political morality must mean that the same sort of issues that arise in determining whether a threat is illegal are also involved in determining whether that kind of threat ought to be permitted in our society. The latter determination raises questions about the sorts of institutions we ought to have. As I argued in my paper, it requires us to address deep issues in political philosophy. The former determination may be made in the context of the institutions we now have. Answering it may require us to address certain limited moral questions—e.g., what fairness entails in some specific legally relevant context—but it does not involve addressing *fundamental* questions of moral or political philosophy.

Wertheimer writes as if a judge may properly find that a threat is legally wrong only by: (a) adequately defending some moral theory or principle (e.g., rule utilitarianism); and (b) showing that the threat is immoral according to that principle (e.g., by showing that threats of this sort do not produce the greatest happiness for the greatest number). But clearly it is possible to make the relevant legal finding without having to decide between, for example, Rawls and Mill.

To illustrate the difference between (A) and (B), consider the question of whether a landlord's threat to evict a tenant violates the law. The law in question may describe permissible threats in moral terms like "fair" or quasi-moral terms like "reasonable," and the meanings of these terms may not be precisely specified by existing legal standards. To the extent this is so, a judge, as I acknowledged, will be required to do some limited moral reasoning, but although this reasoning is not determined by existing legal standards, it must be narrowly circumscribed by them. A judge is never free to decide the

legality of a threat by asking: "What is fair *really*?" in the way a moral philosopher might ask this question.

Now let us contrast (A), the legal question, with (B), the social question. The latter asks: "Should landlords be allowed to threaten tenants with eviction under the conditions the law now permits?" To answer this we must focus on deeper issues of social and political morality. As utilitarians, we will ask what maximizes utility; Rawlsians will consult the maximin principle, and some socialists may argue that private property claims of the sort implicit in a threat to evict ought not be honored. To decide the social question will require us to decide between these competing positions in political philosophy. This is not required by the legal questions. Thus, Wertheimer's claim that questions (A) and (B) "have the same structure" cannot be true in any interesting sense.

Toward the end of his reply Wertheimer claims that I "borrow" the main idea of his articles, namely, the two-pronged test. In fact, I reject it. I believe that in some cases findings of legal involuntariness are based on the inability to make a free and rational choice, and I argue that in other cases courts invite confusion by speaking of voluntariness.

Finally, let me consider what Wertheimer says about my Gallery example. His complaint is that to hold A's agreement involuntary a judge must find that the *empirical* part of the two-pronged test is satisfied and that "that is by no means clear" in the case I describe. Quoting *Kaplan* v. *Kaplan*, he maintains that the threat I describe was not "such as to control the will of the plaintiff or to render him bereft of the quality of mind essential to making a contract." But the empirical prong of the two-pronged test does not require this. It may be satisfied by virtue of "the relative unattractiveness of the alternatives available." Clearly, the alternatives imposed are quite unattractive in the case I describe. Wertheimer does not dispute this. On the contrary, by citing *Kaplan* he implies that unattractive alternatives are not enough, i.e., that psychological involuntariness is a necessary condition of legal involuntariness. But this is to undermine the entire point of the two-pronged test. For, once we determine that the plaintiff is "bereft of the quality of mind essential to making a contract," this should be enough to invalidate the contract. If psychological involuntariness is a necessary condition of legal involuntariness, it is difficult to see why it is not also sufficient.

This critical rejoinder is not intended to deny the value in Wertheimer's work. Wertheimer is correct when he tells us

that legal involuntariness is never *simply* a matter of the relative unattractiveness of imposed alternatives. And although he is wrong to insist that psychological facts are never sufficient for this finding, he properly calls our attention to the fact that legal voluntariness is not always a psychological matter. In this way—and by calling our attention to the courts' rulings in certain cases—he has helped us see why the courts' appeal to the voluntariness standard is often confusing. This is a significant contribution.

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