BARGAINING, DURESS, AND ECONOMIC LIBERTY*

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We live in what is known as a free economy. We did, at least, before it was subjected to the controls necessitated by the war, or, as some would say, before the advent of the New Deal. Government and law did not tell us what part each of us must play in the process of production, or assign to each of us our respective rations of coffee, gasoline or other materials. What work we should do and how much we might consume were determined by a process known as freedom of contract. Yet in that process there was more coercion, and government and law played a more significant part, than is generally realized.

That men may live, they must either be in a position each to produce the material necessities of life for his own use, or there must be some adequate incentive for production of the goods and services which people other than the producers may enjoy, and some means by which individual consumers can acquire some portion of them. In thinly settled lands it may be possible for each family to produce most of the things needed to satisfy its own wants. The law has only to recognize each family's property right in its farm and its products, and protect that property from interference. But in a land as thickly settled as ours, such individualistic methods of providing for wants would be wholly inadequate. We have to resort to the more efficient process of machine production, with its widespread division of labor. Almost every article or service that is produced is the fruit of the combined efforts of countless people, each working on a fractional part of the product. But the product is consumed only in small part, if at all, by its producers. Other people consume it, and the producers of this product consume the products of other people's labor. Goods are turned out collectively and consumed individually. Individuals could conceivably be conscripted to contribute their respective efforts to the collective process of production, and the products could be rationed out to each for his individual consumption. These are not the methods of our free economy. We rely instead, for the most part, on bargaining.

There are few, if any, who own enough of the collective output of goods ready for consumption to satisfy their needs for more than a brief period in the future. Some persons own more than enough of certain

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types of goods, but they must perforce acquire the use of other types as well. The owner of a shoe factory is in no danger of going ill-shod—he may wear his own shoes. But he cannot live on shoes alone. Like everyone else, he must *buy* food or starve. Even the producer and owner of food must as a rule buy other forms of food than those in which he has specialized. Any person, in order to live, must induce some of the owners of things which he needs, to permit him to use them. The owner has no legal obligation to grant the permission. But if offered enough money he will probably do so; for he, too, must obtain the permission of other owners to make use of *their* goods, and for this purpose he too needs money—more than he has at the outset. He needs it more than he needs his surplus of shoes. Indeed he values his right of ownership in the shoes solely for the power it gives him to obtain money with which to buy other things which he does not yet own.

The owner of the shoes or the food or any other product can insist on other people keeping their hands off his products. Should he so insist, the government will back him up with force. The owner of the money can likewise insist on other people keeping their hands off his money, and the government will likewise back *him* up with force. By *threatening* to maintain the legal barrier against the use of his shoes, their owner may be able to obtain a certain amount of money as the price of not carrying out his threat. And by threatening to maintain the legal barrier against the use of his money, the purchaser may be able to obtain a certain amount of shoes as the price of not withholding the money. A bargain is finally struck, each party consenting to its terms in order to avert the consequences with which the other threatens him.

This does not mean, of course, that in each purchase of a commodity, there is unfriendliness, or deliberation and haggling over terms. Market conditions may have standardized prices, so that each party knows that any haggling would be futile. Nevertheless the transaction is based on the bargaining power of the two parties. The seller would not part with the shoes, or produce them in the first place, if the law enabled him to get the buyer's money without doing so, nor would the buyer part with his money if the law enabled him to obtain the shoes without payment.

Of course the process of getting some part of the collective product of the community into the consumer's hands is more complex than our illustration indicates. There are usually intermediaries between the factory and the consumer—jobbers, wholesalers and retailers. But the illustration reveals the essentials of the process. It does not explain, however, how the shoes came into the ownership of the factory owner, or how, indeed, they came to be produced at all. Nor does it explain

how the money came into the possession of the purchaser. It merely makes clear that, without money, an individual has little chance of gaining access to any part of the goods produced. The law bars such access without the consent of some of those to whom it assigns the ownership of those goods.

How, then, does any purchaser obtain the money that will enable him to consume? We have already seen that the owner of products obtains it, by selling his products to buyers. But how did he come to be the owner of the products? The answer which first suggests itself is that he produced them. To the extent that this is true, it indicates that he made his contribution to the productive process, not by first making a bargain with consumers, but because he anticipated that his efforts would put him in a favorable position to make future bargains. But the answer is not wholly true. The owner did not produce the shoes by his own efforts alone. Other people have taken part in the production too—not only his employees, but those who have advanced the necessary capital, or taken any part in the production of the raw materials and fuel which he uses, or in transporting them to his factory.

Yet of all these innumerable producers of the shoes, only the owner of the factory acquires title to them. The others have all, at one time or another, waived their claims to any share in the ownership of the shoes. They have done so in a series of bargaining transactions, in which they received money, or promises to pay money. Through this series of bargains, the owner of the plant has acquired the full right of ownership in the shoes. This right enables him, if he is successful, to obtain from his customers more than enough to repay all the outlays he has made to the other participants—enough more to compensate him for his risk and labor in organizing and managing the plant, and perhaps even more than this.

As a result of these innumerable bargains, the owner and the other participants in the production obtain their respective money incomes, and these money incomes determine the share that each may obtain of the total goods and services turned out by the collective efforts of all the other members of society. And it is as a result of these bargains, or in anticipation of them, that each participant in these collective productive efforts makes his contribution. We rely on the bargaining process to serve the conflicting interests of individuals in securing a share of the collective output of society, and also to serve their common interest in the creation of that collective output.

Though these bargains lead to vast differences in the economic positions of different persons, whether as producers or as consumers, these differences have all resulted from transactions into which each has

entered without any explicit requirement of law that he do so. But while there is no explicit legal requirement that one enter into any particular transaction, one's freedom to decline to do so is nevertheless circumscribed. One chooses to enter into any given transaction in order to avoid the threat of something worse—threats which impinge with unequal weight on different members of society. The fact that he exercised a choice does not indicate lack of compulsion. Even a slave makes a choice. The compulsion which drives him to work operates through his own will power. He makes the "voluntary" muscular movements which the work calls for, in order to escape some threat; and though he exercises will power and makes a choice, still, since he is making it under threat, his servitude is called "involuntary." And one who obeys some compulsory requirement of the law in order to avoid a penalty is likewise making a choice. If he has the physical power to disobey, his obedience is not a matter of physical necessity, but of choice. Yet no one would deny that the requirement of the law is a compulsory one. It restricts his liberty to act out of conformity to it.

Government has power to compel one to choose obedience, since it can threaten disobedience with death, imprisonment, or seizure of property. Private individuals are not permitted to make such threats to other individuals, save in exceptional circumstances such as self-defense. But there are other threats which may lawfully be made to induce a party to enter into a transaction. In the complex bargains made in the course of production, some parties who deal with the manufacturer surrender a portion of their property, others their liberty not to work for him, in order to avert his threat to withhold his money, while he, in turn, surrenders some part of the money he now owns, or some part of his right to keep from them money he may obtain in the future, to avert their threats of withholding from him their raw materials or their labor. And he may have surrendered property in the past, and the freedom to abstain from labor, in order to attain his position as owner of the plant and its products, and so to obtain the money with which to avert the threats of owners of the things he wishes to consume, to withhold those things from him. In consenting to enter into any bargain, each party yields to the threats of the other. In the absence of corrective legislation, each party, in order to induce the other to enter into a transaction, may generally threaten to exercise any of his legal rights and privileges, no matter how disadvantageous that exercise may be to the other party. As Justice Holmes said in 1896 in a well known dissenting opinion in *Vegelahn v. Guntner*,[1]

1. 167 Mass. 92, 107 (1896).

> . . . The word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do, that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences.

As Holmes indicated in this passage, however, the law makes some exceptions to this general rule, even apart from legislation aimed at economic reforms. Many courts, for instance, follow what is known as the *prima facie* tort doctrine. As formulated in the classic statement of Lord Bowen in *Mogul Steamship Co. v. McGregor, Gow & Co.*,[2] "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse." When the damaging act is done for the purpose of bringing the other party to terms, courts which follow this doctrine will hold the act unlawful, even though in ordinary circumstances it would not be, if they think the terms insisted on do not justify the infliction of the damage. As Holmes said long ago,[3] the ground of decision "really comes down to a proposition of policy." If the damage is inflicted, for instance, by a labor union in the form of a strike to induce an employer to boycott another employer with whom he has no quarrel, many courts will hold that it lacks justification, even though the demands made on the employer against whom the boycott is directed would be held to justify the direct infliction of damage on *him*, by means of a strike.[4]

The employer against whom a strike is called suffers from the failure of his employees to work. Failure to work is not an "act," but is what the law calls non-feasance. Calling a strike, however, is an act. When the workers *combine* to quit work, it is the affirmative act of combining, not the failure to work, which the law pronounces illegal when the strike is not deemed to be justified. If an injunction is granted the employer, it does not direct the men to go back to work, but directs them, or their leaders, to cease from the affirmative acts of instigating and supporting the strike. Though the employer's loss is from lawful cessation of work, it is the antecedent and accompanying affirmative acts

2. L. R. 23 Q. B. D. 598, 613 (1889).

3. *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1, 8. Reprinted in HOLMES, COLLECTED LEGAL PAPERS (1921), 117, 128.

4. As, for instance, in Auburn Draying Co. v. Wardell, 227 N. Y. 1 (1919), where the threat to strike against plaintiff's customers was said to be an illegal *means* of inflicting damage on plaintiff himself, regardless of what was demanded of *him*.

which the law stigmatizes as wrongful.[5] A worker may suffer as much harm or more when an employer fails to continue to employ him as does the employer when the worker ceases to remain employed. The purpose of a discharge may be as unjustifiable as the purpose of a strike. But if the discharge is not accompanied or preceded by affirmative acts, such as the acts of combining, many courts will hold the *prima facie* tort doctrine inapplicable. Thus Judge Swan, in *Green v. Victor Talking Machine Co.*,[6] said, "Even the most ardent advocates of the principle that the intentional infliction of temporal harm requires a justification have stopped short of asserting that it applies to harm resulting from nonaction, in the absence of facts creating a duty to act." He doubtless meant harm resulting from nonaction when not preceded or accompanied by affirmative acts. In that case it was the discontinuance of the act of selling, not employing, that was in question, but the principle is the same. It was nonaction, and the court held it required no justification. The defendant corporation had ceased selling its products to the plaintiff's retailing corporation, in pursuance of a threat to bring pressure on the plaintiff. The nonaction of the Victor Company had undoubtedly been preceded by combined affirmative action on the part of some of its officers. Likewise when any corporate employer threatens to discharge unless its terms are accepted, there has always been combined action. Some other officer must have instructed the man in charge of employment whom to keep at work and whom to drop. But since the law treats the corporation as a single person, it disregards the acts of the natural persons who are its agents. Hence when a court requires a justification for harmful affirmative acts, but not for nonaction, a corporation's officers may combine to bring pressure on the men by threatening to discharge them, without having to justify the purpose of the pressure to a court, whereas if the men seek to bring comparable pressure on the employer, their acts of combining, unshielded by any corporate fiction, subject them to judicial scrutiny of their purposes.

The National Labor Relations Act sets certain limits to the power of an employer to threaten nonaction for the purpose of controlling the activities of its employees. It penalizes failure to employ, whether by discharging or by refusing to employ in the first place, when motivated by the purpose of interfering with union membership or activities. The wrong under the statute does not consist in any affirmative act of com-

5. The affirmative nature of the act of combining, to be followed by harmful nonfeasance, was pointed out by Holmes, J., in Aikens v. Wisconsin, 195 U. S. 194, 205-206 (1904).

6. 24 F.(2d) 378, 382 (C. C. A. 2d, 1928). See also Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor* (1905) 18 HARV. L. REV. 411, 416 footnote.

bining, but in the discharge itself. In sustaining an order of the Board which, among other things, required a corporation to reinstate certain discharged employees, Chief Justice Hughes said in *NLRB v. Jones & Laughlin Steel Corp.*,[7] that the Act "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. . . ." Since threats of not acting (not buying or selling, not employing or remaining employed) are among the most effective weapons of coercion, there would seem to be no insuperable reason why courts which require a justification for affirmative acts should not require it likewise for nonfeasance, even in the absence of legislation, when resorted to for reasons other than the "normal exercise of the right." In fact, Justice Frankfurter, speaking for the majority in *Rochester Telephone Corp. v. United States*,[8] spoke of the "line between 'nonfeasance' and 'misfeasance' " as "outmoded," and intimated that it was "unilluminating and mischief-making."

Not only will courts sometimes forbid the commission of harmful acts which are otherwise lawful when motivated by a purpose which fails to justify the harm; they will sometimes refuse to aid a party to enforce a duty which someone else owes him when he desires enforcement for an unjustified end; or, for the same reason, they may refuse to permit him to employ those private means of enforcement which are normally open to him—as when the owner of land removes another's property from it, which is there without permission.[9] Ordinarily the law not only permits the holder of a check to present it for collection to the bank on which it is drawn at any time the holder may choose, but also stands ready to enforce the bank's legal duty to pay it when presented. But in *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*,[10] it was held unlawful for the Federal Reserve Bank to accumulate checks on country banks, as they alleged it was doing, and present them in a body for the purpose of forcing the country banks to keep so much cash in their vaults as to be driven out of business, as the alternative to sub-

7. 301 U. S. 1, 45-46 (1937).
8. 307 U. S. 125, 142 (1939).
9. For a contrary view see Ames, *op. cit. supra* note 6, at 412-413.
10. 256 U. S. 350 (1921). On the pleadings at this stage of the proceedings, the allegations of the plaintiff were assumed to be true. At a later stage it was held, on the basis of findings by the lower court to which the case had been remanded, that they had not been proved. American Bank & Trust Co. v. Federal Reserve Bank, 262 U. S. 643 (1923).

mitting to the Reserve Bank's alleged insistence that they join the reserve system. If the allegations could be proved, it was held, the Reserve Bank should be enjoined from collecting checks except in the usual way. To determine whether the Reserve Bank was authorized to follow the course alleged, said Justice Holmes, "it is not enough to refer to the general right of a holder of checks to present them but it is necessary to consider whether the collection of checks and presenting them in a body for the purpose of breaking down the plaintiffs' business as now conducted is justified by the ulterior purpose in view."

Although a patentee has a right not to have others make or use his patented article without license from him, "it will not do," said Justice Douglas in *United States v. Masonite Corp.*,[11] "to say that since the patentee has the power to refuse a license, he has the lesser power to license on his own conditions. There are strict limitations on the power of the patentee to attach conditions to the use of the patented article." He was referring to limitations imposed by the anti-trust laws. But even when a patentee is not violating these laws, it has been held that a court of equity should deny him relief in an infringement suit, so long as he is using his patent as a means of enforcing a monopoly in an unpatented adjunct of his patented machine. Such a use of his patent, declared Chief Justice Stone in *Morton Salt Co. v. G. S. Suppiger Co.*,[12] thwarts "the public policy underlying the grant of the patent"—a policy which "includes inventions within the granted monopoly," but "excludes from it all that is not embraced in the invention."

In some of the cases in which courts refuse to grant specific enforcement of a duty, or to permit the injured party to put an end to its breach, they nevertheless award him damages. But these are frequently measured by some other criterion than what the plaintiff might have obtained in a bargain from the defendant, under threat of stopping the breach of the duty outright. In *Vincent v. Lake Erie Transportation Co.*,[13] the Minnesota Supreme Court sustained an award of $500 for damage to a dock caused by a vessel whose owners kept it moored to the dock during a sudden and unusual storm which would otherwise probably have destroyed the vessel. In sustaining the award, the court evidently regarded the act of keeping the vessel moored a technical invasion of the dock owner's property rights; yet it went out of its way to justify the invasion, and remarked that "the situation was one in which the ordinary rules regulating property rights were suspended by forces

11. 316 U. S. 265, 277 (1942). See also United States v. Univis Lens Co., 316 U. S. 241, decided the same day in an opinion by Stone, C. J.
12. 314 U. S. 488 (1942).
13. 109 Minn. 456 (1910).

beyond human control." It intimated that the dockowner could not lawfully have done what, under ordinary circumstances, would have been permissible—that is, unmoor the vessel and cast her adrift; for its citation of the Vermont case of *Ploof v. Putnam,*[14] in which a dockowner's unmooring under similar circumstances was held unlawful, was apparently with approval. In short, the dockowner seems to have had a "right" not to have the vessel moored to the dock, even during the storm, but would not have been permitted to exercise that right, but only to be paid for not exercising it. And what he was paid was for the physical damage to the dock, not for the loss of the bargaining power which he might have exerted against the owners of the vessel, had he been able to threaten to exercise his property right.

In *Smith v. Staso Milling Co.,*[15] the Circuit Court of Appeals modified an injunction granted by the District Court against a slate crushing mill, which restrained it from continuing an admitted invasion of the property rights of the owner of a nearby summer residence, by polluting the air with dust. Damages were awarded, but they were measured by the loss which the plaintiff suffered by being prevented from leasing his house as a residence. As in the *Vincent* case, they were not measured by what he might have exacted from the mill by threatening to cause it to cease operations by enforcing his right to have the pollution stopped. In fact the court intimated that one reason for refusing to put an end to the admitted invasion of the plaintiff's property right was that such action might put the plaintiff in a position to exact too much money from the defendant, as the price of letting him continue to operate the mill. "The very right on which the injured party stands," said Learned Hand, Cir. J., "is a quantitative compromise between two conflicting interests. What may be an entirely tolerable adjustment, when the result is only to award damages for the injury done, may become no better than a means of extortion if the result is absolutely to curtail the defendant's enjoyment of his land. Even though the defendant has no power to condemn, at times it may be proper to require of him no more than to make good the whole injury once and for all."[16]

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14. 81 Vt. 471 (1908).
15. 18 F.(2d) 736 (C. C. A. 2d, 1927).
16. When property is appropriated under the power of eminent domain, the compensation awarded is not necessarily commensurate with the bargaining advantage which the owner might have taken of the appropriator's necessities. "The question is what has the owner lost, not what has the taker gained." Holmes, J., in Boston Chamber of Commerce v. City of Boston, 217 U. S. 189, 195 (1910). What he has lost takes account of what he might have obtained in a bargain with other potential purchasers, but not with the actual taker on the supposition that he could refuse to sell. "It is just this advantage that a taking by eminent domain excludes." Holmes, J., in McGovern v. New York, 229 U. S. 363, 372 (1913).

There are statutes making extortion of money a crime. And there are doctrines that in a civil action, one may recover money paid under duress, or avoid a contract made under duress. But all money is paid, and all contracts are made, to avert some kinds of threats. What are

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For a more detailed discussion, see Hale, *Value to the Taker in Condemnation Cases,* (1931) 31 COLUMBIA LAW REV. 1.

The option to pay damages instead of performing a duty is a matter of constitutional right when the duty is to render personal services which the party has contracted to render. Though there is a contractual duty to perform, the party "can elect at any time to break" the contract, and destruction of this power to elect has been held to constitute involuntary servitude contrary to the Thirteenth Amendment, whether the destruction is effected by the private force of the employer [Brewer, J., in Clyatt v. United States, 197 U. S. 207, 215 (1905)], or by legislation making breach of the contract punishable by imprisonment [Hughes, J., in Bailey v. Alabama, 219 U. S. 219 (1911)]. Note also the refusal of English courts to enjoin negative covenants to desist from every sort of work except for the employer to whom services are promised, when the effect of such enforcement would be to compel performance of the stipulated service through fear of starvation, but their willingness to enforce negative covenants to refrain from the particular type of highly skilled service otherwise than for the employer. Enforcement of the latter type of negative covenant will confront a defendant with pecuniary loss, but not starvation, if he will not perform his affirmative covenant to serve. The difference, like the difference between an award of damages and imprisonment, lies in the degree of pressure to induce performance. As stated by Branson, J., in enforcing a negative covenant made by Bette Davis (Mrs. Nelson) to refrain from performing theatrical or motion picture service for anyone but Warner Brothers, "She will not be driven, although she may be tempted, to perform the contract, and the fact that she may be so tempted is no objection to the grant of an injunction." Warner Brothers Pictures, Inc. v. Nelson, L. R. [1937] 1 K. B. D. 209, 219-220.

A counterpart of the law's refusal in some cases to deprive a party of the option to act in a way which is nominally "wrongful" by subjecting himself to a liability for damages, is the law's *requirement* in some cases that a "rightful" act may only be performed on condition that money be paid for harm caused thereby. *Cf.* payments under workmen's compensation acts, and payments made under the doctrine of *respondeat superior* by one who has been guilty of no wrong himself. See Y. B. Smith, *Frolic and Detour* (1923) 23 COLUMBIA LAW REV. 444, 716; W. O. Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 YALE L. J. 584, 720. *Cf.* also the payments required of a railroad for the innocent act of condemning property, or of a debtor for the innocent act of having made a contract. When payment must be made for a "wrongful" act, the liability to pay acts as a deterrent, and in many cases that fact alone may justify the tranferrence to the defendant of the plaintiff's losses. See Clarence Morris, *Punitive Damages in Tort Cases* (1931) 44 HARV. L. REV. 1173, 1174. But the liability will only deter the "wrong" if the probable amount of damages exceeds the probable benefit from committing it. But the obligation to pay for "rightful" acts will deter them to that extent too, and the policy of the law may well be to deter them that far. It may be thought well to discourage such business activities as are not expected to pay their way economically, and to deter people from incurring debts which they will not be willing to pay. The distinction disappears between those "rightful" and "wrongful" acts to which the law attaches a condition to pay damages and no other consequences. *Cf.* Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 461-462, reprinted in HOLMES, COLLECTED LEGAL PAPERS (1921) 167, 173-175. See further discussion in Hale, *Force and the State* (1935) 35 COLUMBIA LAW REV. 149, 151-163. For a distinction between "remedial" and "punitive" sanctions for a wrong, with reference to the constitutional guaranty against double jeopardy, see Brandeis, J., in Helvering v. Mitchell, 303 U. S. 391 (1938), and Black, J., for the majority, in United States v. Hess, 63 S. Ct. 379 (1943), and the concurring opinion of Frankfurter, J., in the same case.

the peculiar earmarks which characterize some types of threat as "extortion" or "duress," in contradistinction to other types which the law regards as innocent?

Blackmail includes attempts to exact money from a victim by threatening the illegal act of publishing a libel, or by offering illegally to withhold knowledge of a crime from the authorities, thus compounding a felony. But blackmail covers a wider field than threats or offers to act unlawfully. The matter was discussed by three English courts with reference to attempts by the Motor Trade Association to collect fines from its members. The Association had a Stop List. If any member's name was placed on it, other members would not deal with him. One of the Association's rules provided that, if any member deviated from list prices, his name should be placed on the Stop List, unless, within 21 days, he pay a "reasonable" fine. The question was whether collection of this fine, under threat of being placed on the Stop List, was a violation of the Larceny Act of 1916, S. 29, Sub-s. I (i.), which reads: "Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without reasonable or probable cause, any property or valuable thing . . . shall be guilty of felony . . ."

The question came before the Court of Criminal Appeal in 1926, in *Rex v. Denyer*,[17] which held the attempted collection of the fine to be a felony. "A person has no right," said the court, "to demand money . . . as a price of abstaining from inflicting unpleasant consequences upon a man." Such a rule, of course, would make any sale of property, or any acceptance of a salary or wage, a felony. It is demanded as a price of abstaining from inflicting the unpleasant consequences of doing without the property or services. Perhaps the court had in mind only inflicting by an affirmative act, rather than by failing to act or to relax one's property rights. Even so, the statement is far too broad.

In 1928 the same question came before a civil court (the Court of Appeal) in *Hardie & Lane v. Chilton*,[18] where the attempt to collect the fine was held lawful, despite the Larceny Act, on the ground that, though the demand was made "with menaces," it was not "without reasonable cause." Scrutton, L. J., intimated that a demand is always with reasonable cause when "the threatener has a legal right to do what he threatens." This statement is also too broad.

The same attempt to collect the fine came finally before the House of Lords in the civil case of *Thorne v. Motor Trade Association*,[19]

17. [1926] 2 K. B. 258.
18. [1928] 2 K. B. 306.
19. [1937] A. C. 797.

where it was held lawful. Lord Wright, delivering one of the five opinions, took a middle ground between the extremes taken by the two lower courts. As to the lawfulness of demanding money as the price of abstaining from inflicting unpleasant consequences, he cited the instances of a landowner being paid not to build a house which would be an eyesore to his neighbor, a valued servant threatening to go to other employment unless paid a bonus or increased wages,[20] and "the owner of multiple stores offering not to open a shop in a particular locality if a tradesman or tradesmen in the locality will compensate him for so doing."[21] On the other hand, he asserted that it is not always lawful to demand money by a threat merely because "the threatener has a legal right to do what he threatens." Referring to Scrutton's intimation, Lord Wright said:[22]

> . . . But there are many cases where a man who has a "right," in the sense of a liberty or capacity of doing an act which is not unlawful, but which is calculated seriously to injure another, will be liable to a charge of blackmail if he demands money from that other as the price of abstaining. . . . Thus a man may be possessed of knowledge of discreditable incidents in the victim's life and may seek to extort money by threatening, if he is not paid, to disclose the knowledge to a wife or husband or employer, though the disclosure may not be libellous. Such is a common type of blackmail. Cases where the non-disclosure to the proper authority is illegal as amounting to compounding a felony or a misdemeanour of public import, or where the publication would constitute a criminal libel, are a fortiori. . . .

The same position has been taken in this country. A federal statute provides punishment for any person who, with intent to extort money, transmits in interstate commerce a communication containing a "threat to injure the property or reputation of the addressee." In *Keys v. United States*,[23] a conviction under this statute was sustained, of one who sought money from the Aluminum Association by threatening (in an interstate communication) to distribute a pamphlet which alleged that aluminum cooking utensils were dangerous to health. In sustaining the conviction, the court dismissed the defendant's contention "that a threat to do something which a person has a right to do is not a threat in a legal sense," and held that it was not "an essential element of the offense" that the threat should be one to violate a legal right of the addressee.

Yet surely not every interstate communication asking money for abstaining from injuring the addressee's property would violate the fed-

20. *Id.* at 820.
21. *Id.* at 822.
22. *Id.* at 822.
23. 126 F.(2d) 181 (C. C. A. 8th, 1942).

eral statute. If a writer should offer to abstain from putting up a contemplated building, which would have the effect of cutting off his neighbor's light, on condition that the neighbor (to whom the letter was addressed) pay a certain sum for an easement of light and air, it could hardly be said that there was an illegal attempt to extort money. Such a letter contains, nevertheless, what to the addressee amounts to a threat to injure his property, and a demand for money for not putting the threat into execution. What is the distinction between a lawful and an unlawful demand for money when each demand is accompanied by "a threat to do something which a person has a right to do"? Do we get any clue from the civil cases dealing with "duress"?

Most frequently when duress is alleged, it is based on a threat to do an unlawful act. Since there was assumed to be a legal remedy for unlawful acts, it may have been supposed that nobody would have to yield to threats to commit them, unless his will was so overcome that he had no volition in the matter.[24] At any rate, many courts have taken the position that there can be no duress save where the party has been deprived of volition. And, since a person acting under duress is supposed to have no volition, his signing of a contract or his transfer of a chose in action is regarded by courts which take this position as no act at

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24. In Board of Trustees of National Training School for Boys v. O. D. Wilson Co., 133 F.(2d) 399 (App. D. C. 1943), appellee, making a bid for a construction job, inadvertently omitted an item of $1,600 for a floor. The bid, being the lowest by $2,010, was accepted. On discovering its mistake, it asked leave to withdraw the bid, but appellant replied that the bid bond of $1,500 would be forfeited if it refused to perform. Thereupon appellee, under protest, executed a contract in accordance with the bid, performed it, and collected the contract price, which was $994 less than the cost of performance. In its suit for $1,600 as the reasonable value of the floor, it contended that it had made the contract under duress, because of appellant's threat to forfeit the bid bond. Without deciding whether appellee had a right to rescind its bid because of the mistake, the court held that appellant's threat to challenge that right did not amount to duress, and denied recovery. Said Justice Edgerton:

> . . . But if appellee had, as it insists, a right to rescind, appellant had no power to make good its threat. Its denial of the right to rescind did not conclude the question. Appellee could litigate it. Appellant was equally entitled to litigate it or, as it did in effect, threaten to litigate it. It follows that there was no duress [Citations]. Appellee simply chose to contract and perform rather than have its right to rescind judicially determined. . . .

The threat to litigate would seem to amount to coercion, whether or not it was illegal duress.

In a recent Massachusetts case, refusing to hold that a payment to a union of a claim for back wages, made to terminate a strike, was tainted by duress, Justice Ronan said, "If the union was engaged in an illegal strike the plaintiff had a legal remedy." Because plaintiff's manager, instead of pursuing that remedy, settled the strike, it was concluded that plaintiff had not sustained the burden of proving that, as a question of fact, it "was forced to pay the money through the coercive effect of the strike," even though it be assumed that a strike to secure payment of wages due is illegal. Cappy's, Inc. v. Dorgan, 46 N. E.(2d) 538 (Feb. 1, 1943).

all of the party, and utterly void, even against a bona fide purchaser for value—unlike the case where a party is induced by fraud to sign a contract or transfer property, which is not void, but only voidable as against a party to the fraud. Making this distinction in 1875 in *Barry v. Equitable Life Assurance Society*,[25] Judge Folger, speaking for the New York Court of Appeals, said that in case of fraud "there is a voluntary parting with possession of the property and there is an uncontrolled volition to pass the title. But where there exist coercion, threats, compulsion and undue influence, there is no volition. There is no intention nor purpose, but to yield to moral pressure, for relief from it. A case is presented more analogous to a parting with property by robbery."

The notion lingers on that coercion necessarily implies that the party to whom it is applied has no volition, as does the converse notion that where he has volition, or the ability to make a choice, there is no coercion or duress. As recently as 1942, in *United States v. Bethlehem Steel Corp.*,[26] the Supreme Court denied the government's contention that certain shipbuilding contracts made during the first World War were made under duress. One of the two "basic propositions" underlying the government's contention, said Justice Black, was that "the government's representatives involuntarily accepted the Bethlehem's terms," whereas "there is no evidence of that state of overcome will which is the major premise of the petitioner's argument of duress."[27]

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25. 59 N. Y. 587, 591 (1875).

26. 315 U. S. 289, 301 (1942).

27. Courts which regard the overcoming of the will as essential to a finding of duress face a psychological problem in determining what constitutes an overcoming of the will. In Gill v. Reveley, 132 F.(2d) 975 (C. C. A. 10th, 1943), plaintiff sought damages for being compelled to sell corporate stock at less than its fair value while under duress. At the close of his evidence, the trial court directed a verdict for defendant, which was affirmed. The stock was sold in Kansas. Gill, while married, had been living with another woman as man and wife, travelling with her across state lines. After his associates in an oil company (the defendants), feeling that his manner of life was detrimental to the company, had sought vainly to get him to straighten out his marital difficulties, one of them (Reveley) told him in a hotel lobby that he wanted him to resign from the company and sell his stock in it; otherwise he would see that the federal authorities were informed of his violation of the Mann Act and he would be put in the penitentiary. Gill then resigned, and some two weeks later sold his stock to Reveley after some discussion (apparently not unfriendly) as to whether it would not be possible to obtain more for it. Bratton, Cir. J., cited state decisions in support of the proposition that, "Under the law of Kansas, a threat of criminal prosecution does not constitute duress and will not defeat a contract unless the person to whom the threat was made became so frightened or was placed in such fear as to overcome his judgment and make it impossible for him to exercise his own free will." Then, in pointing out what Gill did and did not testify to, Bratton indicated some of the elements that might serve as evidence of an overcome judgment. He said:

> Here Gill testified that the threat of Reveley made in the lobby of the hotel frightened him and made him mad; that except for such threat he would not

As long ago as 1887 Justice Holmes exposed the fallacy of this reasoning in the Massachusetts case of *Fairbanks v. Snow*.[28] In holding that a note signed under duress was voidable only as against parties to the duress, not void against a bona fide holder, as it would be if the signer had not exercised volition, he said:

> No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; and if the signature and delivery had not been her acts, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. There sometimes still is shown an inclination to put all cases of duress upon this ground. *Barry v. Equitable Life Assurance Society*, 59 N. Y. 587, 591.

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have resigned; and that he did not want to sell his stock and would not have done so had it not been for such threat. But he did not testify that he became deeply moved or upset in mind; that he could not sleep; that his nerves were strained; that he could not think clearly; that he could not control himself; or that he could not exercise his own free will. He did not give any testimony of that nature. And there was no other direct evidence indicating such a condition of mind. Moreover, the testimony that the threat frightened him and made him mad had reference to the time of the conversation in the lobby of the hotel, and the stock was not sold then. The contracts for the sale of the stock were executed more than two weeks later, and the record is utterly bare of any direct evidence with respect to his being frightened or otherwise disturbed in mind at that time. . . .

In Omansky v. Shain, 46 N. E.(2d) 524 (Mass., Jan. 27, 1943), the evidence was held to justify the finding below that plaintiff obtained the note on which he was suing "by threats that were in fact sufficient to overcome the will of the defendant, in the condition in which he was, whether or not they would have been sufficient to overcome the will of a person of ordinary courage and firmness." The evidence was to the effect that the note was signed while defendant was confined in a house of correction under sentence for an offence not specified in the report of the case. Plaintiff's and defendant's wives were sisters. As the court summarized the evidence:

> . . . The plaintiff wished the defendant to pay $500 for a fur coat that the defendant's wife had bought. The plaintiff told the defendant that if he did not pay the money he would be in jail for the rest of his life. The plaintiff shouted that the defendant must do what he was told to do, that 'they' had power and influence, and that the defendant should ask no questions but should give 'them' the money; that another brother-in-law was an editor of a magazine, and that one word from him would cause the newspapers to print anything he wished. The defendant pleaded with the plaintiff not to bother him any more, but the plaintiff said, 'We will keep you here for life. * * * We can frame you again.' At the time the defendant was mentally ill, helpless and confused, and vomiting frequently, and he was afraid that the plaintiff would make good his threats. Accordingly he gave the note to induce the plaintiff to pay for the fur coat.

Other evidence which was held admissible was that plaintiff had written letters to defendant's estranged wife which contained "extravagant language of affection." The note was dated December 1, 1930. Defendant testified "that beginning early in 1928 he did not eat at home, because he feared being poisoned by his wife and the plaintiff. This was admissible to show his state of mind and his fear of the plaintiff, and thus to show his susceptibility to duress."

28. 145 Mass. 153, 154 (1887).

> But duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable. [Citations.]
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> This rule necessarily excludes from the common law the often recurring notion just referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. *Tamen coactus volui. . . .*[29]

More than thirty years later, in *Union Pacific Ry. Co. v. Public Service Commission,*[30] Holmes again insisted that the existence of choice did not disprove the existence of duress. "It always is for the interest of a party under duress," he said, "to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." As is the case with blackmail, then, unlawful duress may be found even when the victim has made a reasonable and deliberate choice to avoid a threat. And, as in blackmail, it is not essential that the threat be to do some act which would be unlawful if performed for some other purpose.

One instance of duress based on a threat to do what may have been lawful is brought out in another Massachusetts case in which Holmes again spoke for the court—*Silsbee v. Webber.*[31] Plaintiff testified that she had executed an assignment to avert defendant's threat to reveal to her husband a theft committed by their son, when the revelation, as she informed the defendant, would be likely to drive her husband insane, on account of his nervous condition. It was held that she should have been given an opportunity to convince the jury of the truth of her allegations, for, if true, there was illegal duress, even if the imparting of the knowledge to the husband would not have been illegal.

> The strongest objection, [said Holmes] to holding the defendant's alleged action illegal duress is, that, if he had done what he threatened, it would not have been an actionable wrong. In general, duress going to motives consists in the threat of illegal acts. Ordinarily, what you may do without liability you may threaten to do without liability. See *Vegelahn v. Guntner,* 167 Mass. 92, 107; *Allen v. Flood,* [1898] A.C. 1, 129, 165. But this is not a question of liability for threats as a cause of action, and we may leave undecided the question whether, apart from special justification deliberately and with foresight of the consequences, to tell a man what you believe will drive him mad is actionable if it has the expected effect. [Citations]. If it should be held not to be, . . . it would be only on the ground that a different rule was unsafe in

29. See also Holmes's later insistence on the distinction between "duress by threats" and "overmastering physical force applied to a man's body," with citation of the same Latin maxim, in The Eliza Lines, 199 U. S. 119, 130-131 (1905). Failure to make the distinction, he said, "is one of the oldest fallacies of the law."

30. 248 U. S. 67, 70 (1918).

31. 171 Mass. 378 (1898).

> the practical administration of justice. If the law were an ideally perfect instrument, it would give damages for such a case as readily as for a battery. When it comes to the collateral question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat. In the case of the threat there are no difficulties of proof, and the relation of cause and effect is as easily shown as when the threat is of an assault. If a contract is extorted by brutal and wicked means, and a means which owes its immunity, if it have immunity, solely to the law's distrust of its own powers of investigation, in our opinion the contract may be avoided by the party to whom the undue influence has been applied. . . .[32]

In this case the act which was threatened was one which the law at best tolerated because of the difficulty of indentifying and preventing it. It was not tolerated because it was the policy of the law to permit it. There are other acts, however, which the policy of the law permits when done for their own sake, but not as threats. To the passage above quoted, Holmes added: "Some of the cases go further, and allow to be avoided contracts obtained by the threat of unquestionably lawful acts." He cited three cases in which the threat was to have the party imprisoned. In one of them, *Morse v. Woodworth*,[33] Justice Knowlton had said:

> It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way. . . .

Apart from the fallacious reference to overcoming the mind and will, this passage explains some of the cases in which a threat to do a lawful act is held to be illegal duress. An individual's privilege of taking steps which will lead to the imprisonment of a guilty person is a privilege which the law permits him to exercise, not for his own benefit, but for the protection of the public. The same may perhaps be said of the privilege to publish truthful but damaging statements about another. A threat to exercise either privilege for private gain subverts the purpose for which the privilege is accorded.

32. *Id.* at 380-381.
33. 155 Mass. 233, 251 (1892).

Even privileges and rights, however, which are accorded for the private benefit of their possessor may sometimes be denied when a threat is made to exercise them in order to obtain some abnormal private advantage. We have already referred to such cases, where parties were not allowed to institute a boycott by means otherwise innocent, or to accumulate checks on a bank for the purpose of forcing it to change its business methods, or to enforce their patent rights for the purpose of securing a monopoly in an unpatented article, or to enforce their property rights in such a way as to serve as a means of "extortion." Courts will not always permit a person to realize on the full nuisance value of his rights and privileges, even those rights and privileges which it accords to him for his private benefit. On the other hand, they do not always thwart the realization of a nuisance value.

In *Mayor of Bradford v. Pickles*,[34] Lord Macnaghten, rendering one of the opinions in the House of Lords, suggested that the doing of an otherwise lawful act for the sole purpose of being bought off was quite lawful. The Town sought damages from Pickles for having sunk a shaft in his own land for the malicious purpose of intercepting the flow of underground water to the Town's reservoir. It was held that he had an "absolute right" to do so, whatever his motive. But Lord Macnaghten went further, and, while regarding the existence of malice as irrelevant, denied its existence, saying, in what he termed "palliation" of Pickles's conduct, that

> it may be taken that his real object was to show that he was master of the situation, and to force the corporation [the Town] to buy him out at a price satisfactory to himself. Well, he has something to sell, or, at any rate, he has something which he can prevent other people enjoying unless he is paid for it. . . . His conduct may seem shocking to a moral philosopher. But where is the malice?[35]

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34. [1895] A. C. 587.

35. *Id.* at 600-601.

Apart from cases of blackmail, acts otherwise lawful do not seem to be held unlawful in England because motivated by a desire to exact money in some out-of-the-ordinary way. In fact proof of a motive to make money by the act would seem to refute the only ground on which the courts would hold unlawful an otherwise lawful act—namely that it was actuated by vindictiveness and by nothing else. In Sorrell v. Smith, [1925] A. C. 700, Lord Dunedin and Lord Buckmaster intimated that in the case of combined action to hurt another by otherwise lawful acts, the action became a "conspiracy," and illegal, if motivated by "malice," meaning a desire to hurt the person against whom it was directed, as distinguished from "a set of acts dictated by business interests." *Id.* at 730. They denied that even a "malicious" motive would make uncombined action unlawful. Viscount Cave, L. C., agreed with the test for combined action, but was not prepared to express an opinion on the act of a single person. *Id.* at 712. Lord Sumner denied the validity of a distinction "between acts, whose real purpose is to advance the defendants' interests, and acts, whose real purpose is to injure the plaintiff in his trade." *Id.* at 742. He thought that the former necessarily implied the latter, and

It is difficult to see why an act should be permitted when done for the sole purpose of exacting money from another in return for no service rendered, and no sacrifice incurred. And courts have, on occasion, ordered the restoration of what they regard as "exorbitant" payments, even though they were only exacted by threats to exercise rights and privileges which are accorded for private advantages. The test seems to be a quantitative one, the decision turning not so much on the nature of the threat, as on the amount exacted. Where the sum is "reasonable," the transaction is not characterized as "duress," even though it is exacted by precisely the same pressure as that used to exact an "exorbitant" sum. In *United States v. Bethlehem Steel Corp.*,[36] Justice Black, speaking of the government's abandonment of one of its demands in the course of preliminary negotiations during the first World War, in deference to what he regarded as a reasonable insistence by Bethlehem, said: "And if the government's abandonment of its position is to be regarded as evidence of compulsion, we should have to find compulsion in every contract in which one of the parties makes a concession to a demand, however reasonable, of the other side." We should indeed, for every concession is made to avert a threat. The reasonableness or unreasonableness of a demand has nothing to do with its compulsory or non-compulsory character. Obedience to law is compulsory, however reasonable the law. But the fact that a contract is made under compulsion is not sufficient ground to invalidate for duress. The test of validity is not compulsion (which is always present), but the quantitative reasonableness of the terms.

Courts will sometimes annul or modify contracts, because the person who enters into them is thought to be too inexperienced or ignorant to bargain effectively with such rights as he has. Thus an infant can avoid a contract, and the courts will give jealous scrutiny to contracts made by seamen, who are regarded as "wards in admiralty."[37] Even

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that the purpose of injuring the plaintiff did not render the acts illegal, unless they were so for another reason. But the other judges seemed to agree that, as long as the motive of benefitting themselves was present, that justified the acts even if ill-will also accompanied them.

A later case in the Court of King's Bench, Hollywood Silver Fox Farm, Ltd. v. Emmett, [1936] 2 K. B. D. 468, distinguished *Mayor of Bradford v. Pickles*, and held that an otherwise lawful act which fell short of such an "absolute right" as that of sinking a shaft in one's land, became unlawful when the sole motive was malice. The act of defendant consisted of the shooting of guns on his own land for the purpose of frightening plaintiff's vixen during the breeding season, and so injuring his business.

36. 315 U. S. 289, 302 (1942).

37. For an interesting explanation of the law's solicitude for seamen at a time when other workers were left to the mercies of "freedom of contract," see the opinion of Circuit Judge Jerome Frank in Hume v. Moore-McCormack Lines, 121 F.(2d) 336 (C. C. A. 2d, 1941). For an attempt by the same judge to construe

when the party is not inexperienced or ignorant, courts will sometimes annul what they regard as unconscionable contracts when advantage has been taken of a party's necessities. As Justice Frankfurter said, in his dissenting opinion in the *Bethlehem* case:[38]

> . . . Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of the other. "And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." Vernon v. Bethell, 2 Eden 110, 113. So wrote Lord Chancellor Northington in 1761.

After citing numerous other cases, Frankfurter added:[39]

> Strikingly analogous to the case at bar are the decisions that a salvor who takes advantage of the helplessness of the ship in distress to drive an unconscionable bargain will not be aided by the courts in his attempt to enforce the bargain. Post v. Jones, 19 How. 150, 160; The Tornado, 109 U. S. 110, 117; The Elfrida, 172 U. S. 186, 193. In Post v. Jones, *supra,* it was said that the courts "will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit." These cases are not unlike the familiar example of the drowning man who agrees to pay an exorbitant sum to a rescuer who would otherwise permit him to drown. No court would enforce a contract made under such circumstances.

The helplessness of the government, of which Frankfurter thought the Bethlehem had taken advantage here, consisted of the risk of losing the war if Bethlehem's terms were not accepted. Black thought the government not so helpless as did Frankfurter, partly on the dubious general principle that a government is too powerful to be subjected to duress by private individuals,[40] partly on the more specific ground that

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the Copyright Act so as to extend the same solicitude to the author of a song, who assigned to a publisher his renewal rights twenty-two years before the copyright expired, for a sum much less than they turned out subsequently to be worth, see dissenting opinion in M. Witmark & Sons v. Fred Fisher Music Co., 125 F.(2d) 949, 954 (C. C. A. 2d, 1942). On April 5, 1943, the Supreme Court, rejecting the contentions advanced by Frank, affirmed, in an opinion by Justice Frankfurter, while Justices Black, Douglas and Murphy dissented on the basis of Frank's opinion. Fred Fisher Music Co. v. M. Witmark & Sons, 63 S. Ct. 773.

38. 315 U. S. at 326 (1942).

39. 315 U. S. at 330.

40. "Although there are many cases in which an individual has claimed to be a victim of duress in dealings with government, . . . this, so far as we know, is

the government could in this case have requisitioned the plant and conscripted the personnel.[41]

Assuming with Frankfurter, however, that the government was in the position of a "necessitous person," it would not, of course, follow that every bargain that it made out of necessity was oppressive to it. All would agree that Bethlehem should receive *some* compensation for building the ships, just as a salvor should receive some reward for going to the rescue of a ship in distress. Black insisted that, "if there was a 'traffic of profit' here, it was not the unanticipated result of an accident as in the salvage cases."[42] Elsewhere he said that, "high as Bethlehem's 22% profit seems to us, we are compelled to admit that so far as the record or any other source of which we can take notice discloses, it is not grossly in excess of the standard established by common practice in the field in which Congress authorized the making of these contracts."[43] And again: "The profits made in these and other contracts entered into under the same system may justly arouse indignation. But indignation based on the notions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress."[44]

These remarks suggest that, in determining whether a contract is

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the first instance in which government has claimed to be a victim of duress in dealings with an individual." 315 U. S. at p. 300.

For Frankfurter's effective answer to the implication of this statement, see 315 U. S. at 331: "The contracts here were not made by an abstraction known as the United States or by millions of its citizens. For all practical purposes, the arrangement was entered into by two persons, Bowles and Radford [of the Emergency Fleet Corporation]. And it was entered into by them against their better judgment because they had only Hobson's choice—which is no choice. They had no choice in view of the circumstances which subordinated them and by which they were governed, namely, that ships were needed, and needed quickly, and Bethlehem was needed to construct them quickly. The legal alternative—that the Government take over Bethlehem—was not an actual alternative, and Bethlehem knew this as well as the representatives of the Government."

41. To the objection that if the plant had been commandeered, the personnel of the Bethlehem organization would have been unwilling to serve in it, Black replied that there was no evidence to support this assumption, and moreover that the Government could have drafted the personnel.

The specific feature of the contract which the Government challenged was the "half-saving" clause, under which the company was to get, in addition to the "actual cost" estimated by a generous formula, and profit, one-half the difference between the company's advance estimate of "actual cost" (included in the contract), and the "actual cost" as it turned out to be. Justice Douglas, while agreeing with Black on the absence of duress, thought this clause separable and not supported by consideration. Justices Reed, Byrnes and Murphy subscribed to Black's opinion, Murphy adding an opinion of his own in which he expressed moral disapproval of the contract. Stone, C. J., and Jackson, J., "who as former Attorneys General actively participated in the prosecution of these cases," and Roberts, J., took no part in the decision.

42. 315 U. S. at 304.

43. 315 U. S. at 305.

44. 315 U. S. at 308-309.

so oppressive that it should be annulled or modified on the ground of duress, when the party accused of duress has only threatened to exercise some right or privilege whose use for bargaining purposes is not wholly banned, a court will only inquire whether there is a discrepancy between the amount exacted and the *anticipated* result of the other party's needs, or the *standard* established by common practice. That a payment was agreed to under the pressure of necessities does not suffice to make it exorbitant. The services of a wrecking truck or of a salvaging vessel or, for that matter, of a physician, are required only because of necessities; but not every contract to pay for such service will be annulled. No court would be likely to annul a contract to pay for the services of a wrecking truck, unless the proprietor of the service station had taken advantage of some "unanticipated" necessity of the driver in distress, beyond the ordinary necessities of such drivers, and forced him to agree to pay appreciably more than the "standard" rate established by common practice. Where there is a market for the services, the standard rate, based on anticipated necessities, would correspond to the market rate. In several of the cases cited by Frankfurter where a contract was annulled, one party, under the stress of necessity, had either sold property for less than its market value, or bought property for more.

"Market value" is a somewhat ambiguous term. In one sense, the price at which any sale takes place *is* its market value—the value for which the property or service is exchanged on the actual market in which the buyer and seller participate. But when a sale is said to take place at a price above or below the market value, reference is made to what the property *would* sell for in a hypothetical "normal" market, in which other parties might have made bids, had not the buyer or seller been prevented by ignorance or pressing necessity from seeking them out. A driver in distress may be forced to pay his rescuer far more than he would have to if aware of the charges made by other service stations, or if circumstances permitted him to resort to them. If courts refuse to enforce the contract to pay more than the "normal" market value, they do not allow the rescuer to profit from the driver's distress, *except* to the extent that the "anticipated" distress of drivers in general affects the normal market value of the service. They will not inquire, apparently, into whether the normal market value itself, resulting from the mutual coercion of buyers and sellers of the service, is so high or so low as to give an undue advantage to one side or the other. Nor are they the appropriate organs to make such an inquiry.

In pre-Nazi Germany the courts dealt with a somewhat similar problem. In the Civil Code of 1900 was a provision which declared a transaction void whereby a person, "through exploitation of the neces-

sity, thoughtlessness, or inexperience of another," obtains economic advantages which "exceed the value of the counterperformance to such an extent as to be, under the circumstances, strikingly disproportionate." Professor J. P. Dawson, discussing this provision,[45] observed that the appellate courts limited their inquiries to deviations from current market prices. "A rule of law," he said, "whose implications were revolutionary was thus deprived of all subversive effects and brought into harmony with basic assumptions of a competitive economy." Attempts to revise the more basic unequal distribution of coercive power among individuals which is registered in normal market prices themselves, would require remedies which courts alone would be incapable of furnishing, and inquiries for which they are not fitted.[46] As Justice Stone said for our own Supreme Court in *United States v. Trenton Potteries Co.*,[47] in so construing the Sherman Anti-Trust Act as not to exempt price-fixing combinations from its scope merely because particular prices fixed might be thought reasonable, "we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

But because courts can do nothing to revise the underlying pattern of market relationships, it does not follow that other organs of government should make no attempt to accord greater freedom to the economically weak from the restrictions which stronger individuals place upon them by means of the coercive bargaining power which the law now permits or enables them to exert. Nor does it follow that courts should, in the name of liberty and equality, thwart such attempts to increase and to equalize the economic liberty of the weak. The fact that transactions do not deviate from normal market values does not necessarily indicate that there is a fair relation between the respective bargaining powers of the parties. The market value of a property or a service is merely a measure of the strength of the bargaining power of the person who owns the one or renders the other, under the particular legal rights with which the law endows him, and the legal restrictions which it places on others. To hold unequal bargaining power econom-

45. *Economic Duress and Fair Exchange in French and German Law* (1927) 11 TULANE L. REV. 345, 12 *id.* 42, at 57.

46. For the inadequacy of courts alone as instruments to shape the law for the realization of democratic values, see Harold D. Lasswell and Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest* (1943) 52 YALE L. J. 203, *passim.*

47. 273 U. S. 372 (1927).

ically justified, merely because each party obtains the market value of what he sells, no more and no less, is to beg the question.

As a result of governmental and private coercion under what is mistakenly called *laissez faire,* the economic liberty of some is curtailed to the advantage of others, while the economic liberty of all is curtailed to some degree. Absolute freedom in economic matters is of course out of the question. The most we can attain is a relative degree of freedom, with the restrictions on each person's liberty as tolerable as we can make them. It would be impossible for everyone to have unrestricted freedom to make use of any material goods of which there are not enough to go round. If some exercised a freedom to take all the goods they desired, the freedom of others to consume those goods would be gone. There can be no freedom to consume what does not exist, or what other consumers have already appropriated. To protect a consumer's liberty from annihilation at the hands of other consumers, the law curtails it in a more methodical and less drastic way, by forbidding the use of goods without the consent of the owner. In practice this means that the liberty to consume is conditioned on the payment of the market price. When, as in time of war, a price high enough to keep the demand down to the amount available is deemed to place too great a limitation on the freedom of the less well-to-do consumer, the price is kept down by law. We then add a supplementary restriction on the freedom to consume, in order to protect it from being destroyed by the activities of hoarders. Freedom to consume is then conditioned, not only on the possession of money, but also on the possession of rationing coupons.

Liberty to consume would be restricted far more drastically than it is were there no restrictions on that other aspect of economic liberty, freedom to abstain from producing. We do not have slave labor, but there are nevertheless compulsions which force people to work. These compulsions affect different people in varying degree, and are usually far more tolerable than slavery, or than the famine which would doubtless ensue were there no compulsions to work at all. In our industrial society, an employee works in order to make a bargain with his employer and thus obtain the money with which to free himself from some of the restrictions which other people's property rights place on his freedom to consume. He induces the employer to pay him his wage by *threatening* not to work for him, and then not carrying out his threat. Not carrying it out involves temporary surrender of his liberty to be idle. He *must* surrender that liberty, under penalty of not having freedom to consume more than his present means would enable him to.

But the degree to which men surrender liberty in the sphere of production, in order to increase their freedom to consume, varies. One

who is endowed by nature or by superior educational opportunities with the ability to render services which are relatively scarce and for which there is great demand, may be able to insist on a high salary as the price of not withholding that ability from the employer, and thus may attain a large measure of freedom to consume. Or he may organize a business of his own and with the profits buy his freedom to consume. At the same time the surrender of his liberty to be idle may involve little if any sacrifice, for the work is apt to be agreeable, or at least more so than idleness. And he may have a large measure of discretion (or liberty) in deciding just *how* he is to perform his work, whereas those who have to take inferior jobs may have to do just what they are told by superiors throughout the working day. The liberty of these people as producers is more closely restricted than is that of those who can bargain for supervisory positions, or who can become entrepreneurs, and for this greater sacrifice of liberty in the process of production, they generally gain less freedom as consumers, being able to bargain only for low wages. The market value of their labor may be low, reflecting the low degree of compulsion they can bring to the bargaining process, as compared to the compulsion brought to bear by the employer.

The employer's power to induce people to work for him depends largely on the fact that the law previously restricts the liberty of these people to consume, while he has the power, through the payment of wages, to release them to some extent from these restrictions. He has little power over those whose freedom to consume is relatively unrestricted, because they have large independent means, or who can secure freedom to consume from other employers, because of their ability to render services of a sort that is scarce and in great demand. Those who own enough property have sufficient liberty to consume, without yielding any of their liberty to be idle. Their property rights enable them to exert pressure of great effectiveness to induce people to enter into bargains to pay them money. The law endows them with the power to call on the governmental authorities to keep others from using what they own. For merely not exercising this power, they can obtain large money rewards, by leasing or selling it to someone who will utilize it. These rewards may in many instances amount only to postponed payments for services which the owners have rendered in the past in the process of production, but frequently they greatly exceed any such amount. In fact the owner may have rendered no services whatever himself, but may have acquired his property by government grant or by virtue of the fact that the law assigns property rights to those named in the will of the previous owner, or, if he makes no will, according to the intestacy laws. Bargaining power would be different were it not

that the law endows some with rights that are more advantageous than those with which it endows others.

It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining. There may be sound reasons of economic policy to justify all the economic inequalities that flow from unequal rights. If so, these reasons must be more specific than a broad policy of private property and freedom of contract. With different rules as to the assignment of property rights, particularly by way of inheritance or government grant, we could have just as strict a protection of each person's property rights, and just as little governmental interference with freedom of contract, but a very different pattern of economic relationships. Moreover, by judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have—freedom to resist more effectively the bargaining power of the strong, and to obtain better terms.

If more ambitious governmental activities, in the way of public works, government enterprises and deficit financing at appropriate times, would result in full employment in periods when there would otherwise be business stagnation, then these government activities, far from reducing the economic liberty of individuals, might greatly enlarge it. People who cannot find jobs have no freedom to bargain for wages, and without wages they have very little freedom to consume. In so far as a certain amount of government enterprise would eliminate unemployment, it would increase the demand for the products of private industry. The freedom of private enterprise is at present restricted during periods of business stagnation by its inability to bargain with non-existent customers among the unemployed. Full employment would strike down these restrictions. Whether government activities of the type indicated would in fact increase the total output of society, and with it not only the security and well-being, but the economic liberty as well, of most people, is a question that can be answered only in economic terms. There is no *a priori* reason for regarding planned governmental intervention in the economic sphere as inimical to economic liberty, or even to that special form of it known as free enterprise. We shall have governmental intervention anyway, even if unplanned, in the form of the enforcement of property rights assigned to different individuals according to legal rules laid down by the government. It is this unplanned governmental intervention which restricts economic liberty so drastically and so unequally at present.