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STUDENT ARTICLES

A COERCION DEFENSE FOR THE STREET GANG CRIMINAL: PLUGGING THE MORAL GAP IN EXISTING LAW

DAVID S. RUTKOWSKI*

> [L]aw is ineffective in the deepest sense, indeed . . . it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case . . . is divorced from any moral base and is unjust.[1]

I. INTRODUCTION

Crime in society is an unquestioned problem threatening social and moral communities where it occurs.[2] Recent perception of increase has lead to significant legislative measures to discourage and, when unsuccessful, to incapacitate criminals.[3] Unjust combat, however, weakens the society it purports to

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1. MODEL PENAL CODE AND COMMENTARIES § 2.09 cmt. 2, at 374-75 (1985) [hereinafter MPC].

2. *See* Alan C. Brantley & Andrew DiRosa, *Gangs: A National Perspective*, F.B.I. LAW ENFORCEMENT BULL., May 1994, at 1 ("Today, gangs represent a serious threat to the Nation's sense of security." *Id.* at 2).

3. *E.g.*, mandatory sentencing, "three-strikes-and-you're-out" legislation, and RICO. For a discussion of mandatory sentencing, see Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993). Federal "three-strikes-and-you're-out" legislation is found at 18 U.S.C. § 3559 (1994) (two convictions for "violent" felonies requires a mandatory life sentence without parole). For a discussion of existing state "three-strikes-and-you're-out" legislation, see Robert Heglin, Note, *A Flurry of Recidivist Legislation Means: "Three Strikes and You're Out,"* 20 J. LEGIS. 213, 215-16 (1994). RICO is found at 18 U.S.C. §§ 1961-68 (1994).

defend.[4] To maintain social and moral community, punishment for crime must accurately reflect the culpability of the actor. To help unite the measure of punishment with the degree of culpability, the criminal law recognizes a number of affirmative defenses that may justify or excuse otherwise criminal acts when the exigencies of the situation require.

In particular, gang crime[5] and membership[6] are on the increase and have met considerable response from legislatures and prosecutors alike — both in theories of prosecution and in unique criminal counts. Several state legislatures have enacted various anti-gang statutes to combat the proliferation of gangs and gang crime.[7] With the development of these measures, the goal of *just* punishment should not be forgotten. If punishment is inflicted independent of culpability, the practice of punishment suffers as does the authority of society to administer it.[8] Society must punish gang members only to the extent of their culpability. To facilitate this match, even gang members should not be overlooked as potential victims of crime whose victimization may mitigate or completely negate culpability for otherwise criminal acts.

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4. *See* David Bazelon, *The Morality of Criminal Law*, 49 S. CAL. L. REV. 385, 386 (1976) ("[L]aw's aims must be achieved by a moral process cognizant of the realities of social injustice.").

5. 140 CONG. REC. S15270 (daily ed. Nov. 30, 1994) (statement of Sen. Paul Simon); CATHERINE H. CONLY, STREET GANGS: CURRENT KNOWLEDGE AND STRATEGIES 1, 12-13, 27 (1993) (included in "crime" are both property crimes and crimes against people); C. Ronald Huff, *Youth Gangs and Public Policy*, 35 CRIME & DELINQ. 524, 524 (1989); David W. Thompson & Leonard A. Jason, *Street Gangs & Preventive Interventions*, 15 CRIM. JUST. & BEHAV. 323, 324 (1988).

6. Paul Cromwell et al., *Youth Gangs: A 1990's Perspective*, 43 JUV. & FAM. CT. J. 25, 25 (Sum. 1992).

7. ARIZ. REV. STAT. ANN. §§ 13-2308(F), 13-3102(A)(9) (Supp. 1995); Arkansas Criminal Gang, Organization, or Enterprise Act, ARK. CODE ANN. §§ 5-74-101 to -105 (Michie 1993); California Street Terrorism Enforcement and Prevention Act, CAL. PENAL CODE §§ 186.20-.28 (West Supp. 1995); Street Terrorism Enforcement and Prevention Act, FLA. STAT. ANN. §§ 874.01-.08 (West 1994); GA. CODE ANN. §§ 16-15-1 to -7 (1992 & Supp. 1995); ILL. ANN. STAT. ch. 740, paras. 147/1-35, ch. 705, para. 405/5-4(3.1)-(3.3), ch. 730, para. 5/5-5-3(c)(2)(J) (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 35-45-9-1 to -4 (Burns 1994 & Supp. 1995); IOWA CODE ANN. §§ 723A.1-.2 (West 1993); Louisiana Street Terrorism Enforcement and Prevention Act, LA. REV. STAT. ANN. §§ 15.1401-.1407 (West 1992 & Supp. 1995); MINN. STAT. ANN. § 609.229 (West Supp. 1995); MO. ANN. STAT. §§ 578.421-.437 (Vernon 1995); NEV. REV. STAT. ANN. § 193.168 (Michie 1992); OKLA. STAT. ANN. tit. 21, § 856 (West Supp. 1995); S.D. CODIFIED LAWS ANN. §§ 22-10-14 to -15 (Supp. 1995).

8. *See infra* notes 156-95 and accompanying text.

Gangs and gang crime pose an extraordinary threat to society at large;[9] in gang-controlled communities, they can exert almost ubiquitous authority.[10] In prosecuting gang members for their gang related crimes, the criminal justice system should not forget that these members, before they join, help compose the larger "terrorized" society and often reside in the most afflicted communities.[11] It is against the social backdrop and policy goals that influenced anti-gang legislation that we must evaluate the moral culpability of criminal gang acts and actors.

California's anti-gang legislation opens: "[I]t is the right of every person . . . to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals."[12] Since gang members pervade "innocent" society before they join, we cannot summarily discount the possibility that society's failure to secure their safety, suggested as a "right" in the California statute, precipitated such association. Specifically, that society may have failed its duty is relevant in determining whether a gang member lacked free choice in joining his[13] gang. Additionally, once within the gang, an individual member is not always free to choose to participate or not participate in various gang activities, nor is he always completely at liberty to leave.

The critical question that this Article will address is whether a person is morally accountable for joining a gang to help secure

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9. *See, e.g.*, Tracey Kaplan, *A Stray Bullet Kills Resident Who Stood Up to the Gangs*, L.A. TIMES, Oct. 17, 1992, at 3 (man shot while trying to expel a graffiti artist when rival gang members arrived and opened fire). *See also* C. Ronald Huff, *The New Youth Gangs: Social Policy and Malignant Neglect*, *in* JUVENILE JUSTICE & PUBLIC POLICY 20, 27-28 (Ira M. Schwartz ed., 1992) (there are nearly 500 gang-related homicides in Los Angeles each year, roughly one-half of the victims are not gang members).

10. *See* CONLY, *supra* note 5, at 7-9. Although Conly's compilation of research on gang neighborhoods suggests that some gangs maintain a positive relationship with their host community in order to retain a certain level of community tolerance, she also notes that other, more violent gangs, tend to play more controlling roles. *Id.*

11. *Id.*; Bazelon, *supra* note 4, at 402. *Cf.* G. David Curry & Irving A. Spergel, *Gang Homicide, Delinquency, and Community*, 26 CRIMINOLOGY 381, 385 (1988) (high crime areas do not significantly vary across Chicago neighborhoods).

12. CAL. PENAL CODE § 186.21 (West Supp. 1995).

13. Gang members will be referred to in the masculine throughout. This is primarily for writing convenience, however it also is representative of the gender composition of most gangs. Male gang members exist in far greater number than female gang members and the two almost never mix within any one gang. *See* CONLY, *supra* note 5, at 14; Cromwell et al., *supra* note 6, at 27; Huff, *supra* note 9, at 21; John W. Williams, Jr., *Understanding How Youth Gangs Operate*, CORRECTIONS TODAY, July 1992, at 86, 86.

his safety when society has failed its threshold responsibility to protect and, as a part of such gang association, is compelled to further the gang's activities or commit criminal acts. Insofar as a person lacked free choice in joining a gang, to that extent he should not be held morally responsible for involuntary acts within the gang and should not be punished; insofar as his capacity for free choice was diminished but not removed, his punishment should be reduced proportionately. Existing law is not equipped to address these contentions adequately. This Article will discuss various factors that can lead to gang participation and criminal activity within the gang and posit that a coercion-based defense should be available to excuse gang actors in appropriate situations.

The presentation will proceed as follows. Part II will present gang culture in an almost anthropological vein. Most people are unfamiliar with gang operations and structure and why gang membership is so popular. A thorough explanation is imperative for understanding why classic defenses do not adequately address the "insider" victims of this increasing problem. Although this discussion will not be exhaustive, as understanding of gangs is ever changing and increasing as gangs themselves change, it will suffice to expose the type of gang members relevant to the central issue in this Article.[14]

In particular, Part II will define gang, gang membership, and gang related crime. The viability of concretely defining these terms is the cause of considerable uncertainty in gang research[15] and has important implications for assessing and addressing gang problems. Part II will discuss various gang structures and leadership forms. This structure is particularly important in evaluating the activities of gang members and the capacity of the gang to threaten and coerce. Expanding on the various gang environments, coercive influences leading to gang involvement will also be examined. Finally, Part II will discuss the restrictions that certain gangs and gang controlled communities place on the activities of their members and the ability of their members to quit safely.

The Article, then, will briefly switch to a theoretical discussion of the basis for punishment. Part III will examine the propriety of criminal punishment in the abstract and as applied to

14. For more thorough discussions of street gangs, current as of this publication, see MALCOLM W. KLEIN, THE AMERICAN STREET GANG (1995); IRVING A. SPERGEL, THE YOUTH GANG PROBLEM (1995).

15. Cromwell et al., *supra* note 6, at 26 ("gang" labeling is usually self-serving, defined for a particular purpose by the police, media, or political bodies).

coercion defenses in general. The crux of this discussion is that a coerced gang member is like any other coerced person and is equally undeserving of punishment. Instead, it is the coercive force or person that is the proper subject of public censure.

Returning to specific application, Part IV probes the particulars of the classic defense of duress, while, at the same time, contemplating circumstances in which it is morally unjust to punish gang members for their criminal acts.[16] Recognizing potential compelling scenarios, Part IV also explores the void in existing law for addressing these situations.

Finally, recognizing the moral strength of certain exculpatory claims, Part V will develop a structured coercion defense framed primarily by the classic excuse of duress. Part V will examine the elements of this defense, their justifications and applications, and various difficulties this defense must survive. Specifically, this new defense faces obstacles in practical application as well as perception and acceptance problems from society. None, however, overwhelm the justice requirement that should be the goal of criminal law. Crime control has not yet reached the point where moral innocents should be punished to decrease the armament of coercive gangs.

II. STREET GANGS

A. *What is a Gang And Who Are Its Members?*

It is important to define a gang,[17] who its members are, and what are gang activities. More specifically, society must define what it is prepared to recognize as such. Clearly, there is no consensus.[18] Almost all academic studies about gangs and gang activity employ variant definitions for these terms.[19] To add to

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16. The skeletal scenario exists where a member lacked free choice in joining a gang and, once a member, lacked free choice in remaining a member and in acting or refusing to act according to the gang's directives. *See infra* notes 217-24 and accompanying text.

17. Youth "gangs" often use other names to define themselves, such as posse, tribe, or crew; this nomenclature is not important, the underlying characteristics that band these groups are the operative factors.

18. CONLY, *supra* note 5, at 5. *See also* Ruth Horowitz, *Sociological Perspectives on Gangs: Conflicting Definitions and Concepts, in* GANGS IN AMERICA 37, 43 (C. Ronald Huff ed., 1990) ("every group . . . has its own interests and taken-for-granted assumptions and will never agree on a definition.").

19. *See, e.g.*, CONLY, *supra* note 5, at 5-6 (presenting six different conceptions of "gang" that researchers use); Huff, *supra* note 9, at 25; James R. Lasley, *Age, Social Context, and Street Gang Membership: Are "Youth" Gangs Becoming "Adult" Gangs?*, 23 YOUTH & SOC'Y 434, 439 (1992); Leonard Savitz et al., *Delinquency and Gang Membership As Related to Victimization*, 5 VICTIMOLOGY 152, 154 (1982).

the mix, the popular media are likely to expand artificially the scope of gang activity to dramatize their stories.[20] Although no one definition is necessarily correct, some are better than others. The primary vice of these variant definitions is that they produce conflicting gang data sets.[21] Where one definition finds a gang another may not. When Cheryl L. Maxson and Malcolm W. Klein applied the relatively restrictive definition of "gang-related" used by the Chicago Police Department to "gang-related" Los Angeles homicide data, they found that the gang homicide rate in Los Angeles would be cut in half.[22] An important lesson, therefore, to remember throughout the following discussion of gangs, forms, and functions is that information about gangs cannot easily pass from one area or study to the next; systematic understanding is limited. This does not mean that individual conclusions or observations are suspect, but only that larger trends are difficult to confirm.

Nevertheless, gang definitions play important roles in the criminal and social treatment of "gang" members. First, the proliferation of anti-gang statutes[23] has necessitated that legislatures and/or courts determine exactly whom these terms describe. A suspect consequence is that these conclusions create greater penalties for "gang" members than for solo criminal actors. Second, labeling someone as a gang member may play an important role in solidifying that person as an actual gang member. Third, a workable definition will help to focus Part V's development of a gang-coercion defense, although a technical finding of "gang" presence is not morally imperative. The effects and opportunity for coercion that may play on an individual do not depend on whether we would like to term the coercing force a gang. However, the recognition that a jury or judge may wish to accord a particular claim may depend on such arbitrary titles.[24]

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20. Cromwell et al., *supra* note 6, at 26. *See also* Salvador A. Mendez, *Community Struggles to Prevent Youths From Joining Growing Numbers of Gangs*, CORRECTIONS TODAY, July 1992, at 72, 74 ("Because of the media's ignorance and overdramatization of gang problems, the Salt Lake County community is increasingly fearful and reactionary.").

21. Cromwell et al., *supra* note 6, at 27.

22. Cheryl L. Maxson & Malcolm W. Klein, *Street Gang Violence: Twice as Great, or Half as Great?*, *in* GANGS IN AMERICA, *supra* note 18, at 71, 73, 90.

23. *See supra* note 7.

24. *See infra* text paragraph following note 49.

1. Definitions

Although there is no unanimous definition for "gang," legislatures, courts, and researchers have applied certain components extensively. Recognizing prevalent factors from various definitions employed, in this Article a "gang" is "an ongoing, organized association of three[25] or more persons, whether formal or informal, who have a common name or common signs, colors, or symbols, *and* members or associates who individually or collectively engage in . . . criminal activity"[26] as a part of the ordinary business of the association.[27]

In a related matter, we need some way to determine or define gang membership. This topic has also been the subject of uncertainty. As a gang is a relative body, depending on the definition used, no universally accepted method for determining membership has been construed.[28] Macro-level uncertainty is caused by the difficulty researchers and others have had in defining gangs and the problems attendant to placing conclusive labels on private individuals with disincentives to reveal their true affiliations. At the micro-level, the selection of a particular definition of "gang" somewhat ameliorates this difficulty. Internal consistency is possible once a group or study adopts a particular

25. The anti-gang legislation in Arizona, Arkansas, California, Florida, Georgia, Illinois, Iowa, Louisiana, Missouri, and South Dakota all specifically require the presence of only three people to constitute a gang. The selection of this number was, perhaps, influenced by the common law on riots, which required the presence of at least three people for a potential riot to exist. *See* MPC, *supra* note 1, § 250.1; 4 WILLIAM BLACKSTONE, COMMENTARIES *146. *See also* 18 U.S.C. §§ 2101-02 (1994) (federal riot law). Curiously, in its anti-gang legislation, Indiana requires the association of at least five people before the presence of a "gang" may be found. IND. CODE ANN. § 35-45-9-1 (Burns Supp. 1995). This deviation from the norm may be due to the fact that Indiana requires the presence of five people for a riot as well. IND. CODE ANN. §§ 35-45-1-1 to -2 (Burns 1994). *But see* MO. ANN. STAT. § 574.050 (Vernon 1995) (requiring at least seven people for a riot despite the need for only three people to form a gang).

26. CONLY, *supra* note 5, at 6 (represented as a "statutory definition" and very similar to the definitions set forth in the anti-gang statutes of California, CAL. PENAL CODE § 186.22(f) (West Supp. 1995), and the anti-gang statutes of other states). This definition is very similar to that found in WEBSTER'S NEW WORLD DICTIONARY 555 (3d ed. 1988), which defines gangs as an organized group of criminals or juvenile delinquents and is representative of other, slightly variant, definitions. For similar definitions of "gang," see Lasley, *supra* note 19, at 436; Mendez, *supra* note 20, at 75.

27. This qualification, present in some definitions, would exclude benevolent organizations that contain criminal members. Under a literal reading of the statutory definition, these "positive" groups would be considered gangs subject to anti-gang legislation and to some bizarre applications of law.

28. Thompson & Jason, *supra* note 5, at 325.

definition. Toward this end, police officers have identified certain factors they consider important in identifying gang members.

Generally accepted criteria for identifying gang members include: if an individual admits gang membership; if a very reliable informant represents a person as a gang member; if a person wears gang type clothing, has gang tattoos, or uses gang symbols or would adorn a distinctive gang dress style to affect a certain neighborhood; if the person is arrested in the association of other gang members during the commission of a gang crime; if an unreliable or untested informant represents a person as a gang member and that identification is corroborated by other criteria.[29] At the margin of this definition, if a person is continually in the association or within the group of gang members but does not fit the other criteria, he may be considered an associate and not a gang member.[30] Although guidance from these factors is helpful, their efficacy has been doubted as seriously inaccurate and unprincipled and essentially dependent on police officers using their best judgment.[31]

With gang defined and various tools for determining membership, what, then, is "gang crime"? Demarcation of gang crime is difficult in large part because gangs are such amorphous groups. Given the previous definitions, it is plain that the definitions for gang, gang member, and gang crime must significantly work off one another. Obviously, to find gang crime, you first need a gang and a criminal act committed by a member. But, then again, the presence of a gang necessarily depends on criminal activity. And, unless there is a gang, there can be no gang member. Gang crimes, then, are those crimes or activities that would satisfy the respective crime requirements for the definitions of gang or gang membership or that would perpetuate the gang's interests once its existence has been confirmed.

G. David Curry and Irving A. Spergel have attempted to define gang crime in less cyclical terms as, "law violating behavior

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29. State v. Tran, 847 P.2d 680, 684 (Kan. 1993). The definition used by the Wichita Police gang unit in *Tran* was adopted from that developed by the Los Angeles police gang unit and is representative of the dominant factors used in most studies of gang membership. *See* Mendez, *supra* note 20, at 75. These factors have also been adopted in the anti-gang statutes of both Florida, FLA. STAT. ANN. § 874.03(2) (West 1994), and South Dakota, S.D. CODIFIED LAWS ANN. § 22-10-14(2) (Supp. 1995), and to a lessor extent in Arizona's anti-gang legislation, ARIZ. REV. STAT. ANN. § 13-105(8) (Supp. 1995).

30. *Tran*, 847 P.2d at 684. For an explanation of the difference between a gang member and an associate, see *infra* notes 55-59 and accompanying text.

31. Thompson & Jason, *supra* note 5, at 325.

committed . . . in or related to groups that are complexly organized although sometimes diffuse, sometimes cohesive with established leadership and membership roles."[32] Curry and Spergel's definition and the definition presented in the immediately preceding paragraph are not significantly different.

To some extent, the difficulty of determining what constitutes gang crime has been ameliorated in California, Louisiana, Minnesota, and Missouri by provisions in their respective anti-gang statutes. These states have simply enumerated which crimes are eligible to be branded gang crimes. When an enumerated crime is committed by a gang member it is automatically a gang crime, regardless of the involvement of any gang in the commission. This does seem to tidy up the definition of gang crime, however, its application is no less dependent on the definitions used for gang and gang membership and the uncertainties these create.

2. Definition Has Important Criminal and Psychological Implications

Although defining gangs, gang members, and gang crime may seem purely academic, it is not. Indeed, it is more dangerous in the criminal justice system to be a gang member than a solitary criminal. Besides its value in framing the eligible class of defendants for a new coercion defense that will be described in Part V, definition is paramount in determining who can be prosecuted under anti-gang statutes; in certain cases, this definition can even influence who, in fact, becomes a gang member.

Within most anti-gang legislation[33] are provisions that hinge culpability and enhanced punishment on definitions of gangs, gang membership, and gang crime. For example, California has enacted its California Street Terrorism Enforcement and Prevention Act (STEP Act) which makes it a crime knowingly to participate in a criminal street gang[34] and provides for sentence enhancements for gang related crimes.[35] There are also private

32. Curry & Spergel, *supra* note 11, at 382.

33. For a thorough analysis of anti-gang legislation from which the following discussion, *infra* notes 33-45 and accompanying text, has benefited greatly, see Michael D. Finley, Note, *Anti-Gang Legislation: How Much Will it Take?*, 14 J. JUVENILE L. 47 (1993). *See also* David R. Truman, Note, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683 (1995).

34. CAL. PENAL CODE § 186.22(a) (West Supp. 1995) (punishable by up to three years imprisonment).

35. *Id.* § 186.22(b) (additional consecutive term of one to three years on felonies not punishable by life or two to four years if the crime is committed

nuisance provisions providing for injunctions and for assessing personal liability to abate gang violence.[36] These provisions have passed various Constitutional challenges in California,[37] including claimed infringement on freedom of association.[38] California's STEP Act has served as a model for various other states enacting similar punitive measures.[39]

Illinois' "gang transfer" statute is an alternative approach to gang violence.[40] Essentially this statute allows the state to prosecute a juvenile offender in the adult system provided: he is over age fifteen; he has a prior record of what would amount to forcible felonies; the current charge would be a forcible felony; and, the offense furthered the criminal activities of an organized gang.[41] Illinois statute also provides that convictions for gang related forcible felonies require jail sentences.[42] Like its California counterpart, the Illinois statutes have passed Constitutional muster.[43] However, unlike California's STEP Act, the Illinois provisions have not yet inspired emulation.

In many states that have not enacted anti-gang provisions, gang crimes are being prosecuted more aggressively than non-gang related offenses.[44] Additionally, federal law has provided a mighty sword. Prosecutors have used the Federal Racketeer Influenced and Corrupt Organizations Act (RICO) to indict and to convict gang members for their gang related crimes.[45]

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within 1,000 feet of a school during school hours; in the case of life sentences this section requires that the offender complete at least fifteen years before being eligible for parole).

36. *Id.* § 186.22a.

37. In re Alberto R., 1 Cal. Rptr. 2d 348 (Cal. Ct. App. 1991) (due process and equal protection); People v. Green, 278 Cal. Rptr. 140 (Cal. Ct. App. 1991) (vague and overbroad terms).

38. *Alberto R.*, 1 Cal. Rptr. 2d at 357.

39. Finley, *supra* note 33, at 54-55 n.68 (Florida, Georgia, and Louisiana); Truman, *supra* note 33, at 688 n.28 (Missouri). Too a lesser extent, Arizona, Indiana, Iowa, Minnesota, Nevada, Oklahoma, and South Dakota have, at least, implemented enhanced penalty provisions similar to California's STEP Act. Finley, *supra* note 33, at 54-55 n.69.

40. ILL. ANN. STAT. ch. 705, paras. 405/5-4(3.1)-(3.3) (Smith-Hurd Supp. 1995).

41. Finley, *supra* note 33, at 49.

42. ILL. ANN. STAT. ch. 730, para. 5/5-5-3(c)(2)(J) (Smith-Hurd Supp. 1995).

43. *See* People v. P.H., 582 N.E.2d 700 (Ill. 1991) (separation of powers, double-jeopardy, equal protection, substantive due process, vagueness, and procedural due process challenges all rejected).

44. Finley, *supra* note 33, at 55.

45. *See, e.g.*, United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991), *cert. denied sub nom.* Kelly v. United States, 503 U.S. 941 (1992); United States v. Boyd, 792 F. Supp. 1083 (N.D. Ill. 1992). *See also* Matthew Purdy, *Using the*

In addition, it cannot be ignored that for some "gang" members on the periphery of gang involvement, labeling or overlabeling them as gang members may help solidify their involvement in the gang.[46] C. Ronald Huff explained this phenomenon with reference to the protective function of gangs.[47] An individual gang provides some measure of protection against rival gangs for its members[48] — a service often unavailable from other, legitimate resources. If a youth is labeled as a gang member or is associated with a particular gang, he may need this protection, but it will be available only if he actually becomes a member. In such a position, the youth would *need* to join the gang with which he has been associated, if only for protection from rival gangs.[49]

Finally, a gang member must contend with both perception and reception by both judge and jury. To argue the new coercion defense presented in this Article, the defendant will necessarily need to convince either a judge or jury or both that the coercive forces acting were sufficient to exculpate an otherwise criminal act. That it was a "gang" that coerced the defendant could lend weight to the seriousness and pervasiveness of the threats the defendant faced. On the other hand, society's apprehension of gangs and the general trend toward crime control through stiffer penalties representative of the "war on crime" could increase the fear factor involved. The jury may wish to err on the side of false positives — better to convict all gang members, even those acting under coercive force, than to acquit a dangerous gang member or allow gang violence to pass with impunity. This negative sentiment that is directed toward gang defendants is different from that associated with other coerced defendants. Whereas the typical coerced defendant is exposed to an unreasonable threat that compels an otherwise "normal" citizen to commit a crime, the gang member is (at least nominally) a part of the criminal group; gang crime is not an isolated incident and the gang member defendant is, to a certain degree, a part of the coercive force itself.

Racketeering Law to Bring Down Street Gangs, N.Y. TIMES, Oct. 19, 1994, at A1; Michael York, *Five Convicted in R Street Drug Trial: Racketeering Law Used to Prosecute D.C. Gang Leaders*, WASH. POST, Feb. 17, 1993, at A1. For a broad discussion of the efficacy and propriety of RICO's application to street gangs, *see generally* Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579 (1993).

46. CONLY, *supra* note 5, at 49-50; Huff, *supra* note 9, at 27.

47. For a discussion of the protective function of gangs, see *infra* notes 68-85, 150-55 and accompanying text.

48. Huff, *supra* note 9, at 22; Savitz et al., *supra* note 19, at 153.

49. Huff, *supra* note 9, at 27.

Given the various statutory provisions, theories of prosecution, and psychological "gang" factors, it is important to label correctly particular actors and acts as gang involved. These statutory provisions, their effectiveness, and anti-crime/anti-gang perceptions are not, however, determinative of the moral culpability of individual gang actors.

B. *Structure And Leadership: How Gangs Operate*

Defining gangs and gang members gives little substance to these categories. Discussion of the operations of gangs and motivations of gang members is necessary to an informed evaluation of the activities of individual gang members. Clearly, gangs maintains some level of control over the activities of their members. The level of this control will depend, in part, on the organizational and leadership structure adopted by the gang.

Gangs can take almost any form. So long as they fit into the prescribed definition, form is variable. The dominant thought in gang structure study is that gangs are rather disorganized, composed of various numbers of groups loosely associated into diffuse organizations.[50] This view, however, is not universal. Indeed, it reveals only that a majority of gangs may organize in this manner, not that this is the only form. Other studies find more elaborate structure and cohesive decision making bodies. Since the study of the structure of loose associations is difficult and the likely coercive power minimal in such cases, we will consider primarily those gangs exhibiting significant structure.

Within the larger species of organized gangs, there is no one correct structure that a gang must take. According to Martín Sánchez Jankowski's study of New York, Boston, and Los Angeles gangs, three organizational structures predominate.[51] First, the vertical or hierarchical form recognizes leadership divided into various offices in a traditional pyramid of descending power. Second, is the horizontal or commission form in which all leaders share equal power over lower members. These two forms carry the greatest potential for coercive force. The final form is termed the influential form in which two to four members are informally recognized as leaders of the gang and exert lesser influence over common members. Many gangs change between these and other less popular leadership structures frequently

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50. Martín Sánchez Jankowski, Islands in the Street: Gangs and American Urban Society 63 (1991); Leslie W. Kennedy & Stephen W. Baron, *Routine Activities and a Subculture of Violence: A Study of Violence on the Street*, 30 J. Res. in Crime & Delinq. 88, 91 (1993).

51. Jankowski, *supra* note 50, at 64-67.

depending on their composition and needs at any one time.[52] Although this structure may routinely change, the gang must select some form in order to exist as a coherent group.

Size may help select which of these structures a gang will adopt. Toward this end, traditional organization theory offers some advice. Specifically, the larger the organization, the greater the need for structure of some sort.[53] To reiterate, the larger the gang the more formal the structure and the more power gang leadership must possess. This structure restricts the decision making authority of low level actors and leaves these low level "workers" limited ability to change the directives or goals of the organization.

On an intermediate scale, within any one gang there are often many "cliques" composed of a portion of the members who consistently act in concert.[54] These cliques are semiautonomous and coordinate to various degrees with the other cliques from the same gang. The presence of cliques is more frequent in larger gangs that maintain bases of power in several cities or several areas within a particular city, regardless of the chosen or current leadership structure.

At the personal level, individual gang members separate into several power units. Although these units merely comprise the various groups described above, the terminology will facilitate later reference. Prevalent understanding consolidates gang members into three groups: *leaders* (a.k.a. hard-core gang members, O.G. (original gangsters), core members, or homeboys), *peripheral members* (a.k.a. associates), and *recruits*.[55] Leaders are typically violent criminals, very active and committed to the gang, and compose roughly fifty percent of most gangs.[56] Peripheral members know people in the gang but are not deeply associated with the people or the activities.[57] These members, however, are called on to participate in the activities of the gang and are considered a part of the group. Recruits are new or potential members whose roles are yet uncertain.[58] An additional group,

52. In an appendix to Jankowski's book, he summarizes the leadership structure of 37 different gangs of which over two-thirds had changed leadership structures during the period of his study. *Id.* app. at 323-324.

53. *See* W. RICHARD SCOTT, ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS 245 (2d ed. 1987) (size of administrative component increases with organization size).

54. CONLY, *supra* note 5, at 9-10.

55. *Id.* at 9; Williams, *supra* note 13, at 86.

56. CONLY, *supra* note 5, at 9 (citing Malcolm W. Klein's studies of gangs in California).

57. *Id.*

58. *Id.* at 19 (research on recruiting is limited).

although not technically within the gang, are *wannabees* (a.k.a. peewees or juniors). Wannabees are typically young and infatuated with the gang and, although they may act the role and talk the talk, they are not gang members.[59]

Delimitation of gang members into neat categories helps one to evaluate the extent of and, perhaps, motivation for actions within the gang. This discussion, however, does not help determine why someone joins a gang in the first place or maintains any level of involvement. These latter determinations are more germane to the development of a coercion defense, but a prior understanding of gang structure provides a valuable perspective into gang activity that will be useful in assessing the validity of coercive scenarios.

C. *Why Individuals Join Gangs*

Certainly no discussion of individual motivations can hope to encompass all existing influences that may lead to involvement in a gang. The discussion of factors that follows recognizes two main categories that stimulate gang membership: personal incentives and gang recruitment. These factors are not meant to be exclusive; rather, they have been selected for their bearing on the coercion discussion that will proceed in Parts IV and V, below.

1. Personal Incentives

Researchers have recognized numerous stimulants to gang membership. Underlying more specific motivations, many studies find poverty and alienation of urban groups as crucial factors leading to gang involvement.[60] Along these lines, Irving A. Spergel, director of the National Youth Gang Suppression and Intervention Research and Development Program at the University of Chicago, cites social disorganization (specifically disorganization in the school, family, politics, and neighborhood) and insufficient access to legitimate resources as primary factors contributing to and reinforcing gang involvement.[61] In a Chicago study, Spergel notes:

> The violent gang is a natural, lower-class interstitial institution, resulting mainly from the weakness of secondary institutions, such as schools, local communities, and ethnic

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59. *Id.* at 9; Williams, *supra* note 13, at 86.

60. Cromwell et al., *supra* note 6, at 28.

61. IRVING A. SPERGEL ET AL., NATIONAL YOUTH GANG SUPPRESSION AND INTERVENTION RESEARCH AND DEVELOPMENT PROGRAM, YOUTH GANGS: PROBLEMS AND RESPONSES 8 (1990) (Executive Summary).

> organizations, and to some extent from the weakness of primary institutions such as the family, to provide adequate mechanisms of opportunity and social control, particularly in the transition of males from youth to adulthood.[62]

Further, Curry and Spergel concluded, in their study of gang membership and delinquency, that, "[s]ocial disorganization and poverty rather than criminal organization and conspiracy may better explain the recent growth and spread of youth gangs to many parts of the country."[63]

An alternative line of study (perhaps encompassed by Spergel's broader scheme) suggests that many decisions to join gangs derive from rational decision making; a member can accomplish or access more within a gang than on his own.[64] More specifically, the following individual factors have been consistently cited as motivating gang involvement: money, economic opportunities, previous involvement in crime, excitement, power, status, sex, structure, belonging, recognition, dropout or school failure, respect, understanding, growing up with values contrary to the mainstream, discipline, self-esteem, hopelessness of urban life, dysfunctional families, nurturing, love, shelter, food, clothing, violence in gang youths' lives, and protection needs.[65] Although the beginning of this laundry list stokes the prosecutorial fire raging against gang members, the final five offerings cannot be overlooked: shelter, food, clothing, violence in their lives, and protection needs.[66] The first three of these unfortunate factors are necessities of life. In some cases these

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62. Irving A. Spergel, *Violent Gangs in Chicago: In Search of Social Policy*, 58 SOC. SERVICE REV. 199, 201-02 (1984).

63. Curry & Spergel, *supra* note 11, at 401.

64. JANKOWSKI, *supra* note 50, at 40-42.

65. Brantley & DiRosa, *supra* note 2, at 3; CONLY, *supra* note 5, at 18-19. Conly collected these factors in interviews with Sgt. Joseph Rimondi, Malcolm Klein, Lonnie Jackson, and Barbara Wade. Conly selected these people to interview, among others, because of their respective reputations among gang researchers as experts in the field of gang research. *Id.* at 1.

66. An interesting method of separating these influences is into offers and threats or fears and desires. *See* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1336-37 (1989) ("Intuitively, society believes that conduct is freer when individuals respond to temptations than when they act out of fear. Individuals want what is offered, but not what is threatened." *Id.* at 1337). A study by Arie W. Kruglanski and Yoel Yinon has shown that a person who commits an immoral act in order to gain a benefit is considered more immoral than one who commits the same act to avoid a loss or harm. Arie W. Kruglanski & Yoel Yinon, *Evaluating an Immoral Act Under Threat Versus Temptation: An Illustration of the Achievement Principle in Moral Judgment*, 3 J. MORAL EDUC. 167, 168, 172-73 (1974).

factors may be coupled with other more contemptible motives. The last two unfortunate stimulants will provide an interesting case for reduced moral culpability: violence in youths' lives and protection needs.[67]

These two factors may overlap; the desired protection could be needed to combat perceived or threatened violence. This violence could come from any of several sources, including within the family, non-gang delinquents, rival gangs, or gang recruiters.[68] The forum could be the home, in school, or simply on the streets. Regardless of its origin, the reality of many inner city neighborhoods precludes or discourages residents from seeking traditional forms of protection (*i.e.*, police).[69] If there is a local gang that can ease this violence and offer the needed protection the motivation to join is obvious and unfortunate. David Fattah, co-director of the House of Umoja,[70] in Philadelphia, has recognized this unfortunate reliance; he laments, "[i]f [the police] were more approachable, 'kids would go to them instead of some other group, like a gang.' "[71]

The basic instinct for self-preservation should not be overlooked as a legitimate and powerful stimulant to gang membership.[72] The basic instinct for self-preservation is assured in the greater society by a police force designed to investigate and redress wrongs and, when possible, to intervene before the harm. This is not the case in many gang neighborhoods. The need to preserve exists nonetheless. To expect members of society, who are especially at risk, not to fulfill this need is inhumane. Indeed, criminal law recognizes this need in cases of self-defense, where an individual is justified in defending himself in the face of immediate danger (*i.e.*, when ordinary police protection is unavailable). The gang member who joins a gang for self-preservation reasons is doing no more. His action is simply more remote.

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67. *See infra* notes 218-21 and accompanying text.

68. *See* People v. Cruz, 518 N.E.2d 320 (Ill. App. Ct. 1987) (*prosecution* argued that Cruz's gang would shoot the people that they were recruiting; purportedly, the activity would recur periodically until the person joined), *cert. denied*, 526 N.E.2d 834 (Ill. 1988).

69. *See infra* notes 285-87, 297-99, 317-20 and accompanying text.

70. David Fattah and his wife, Sister Falaka, opened the House of Umoja in the late 1960s to provide a place for gang members to go to get off the street, to promote community service activities and educational and job skills development, and, ultimately, to increase employment. Conly, *supra* note 5, at 95.

71. *Id.* at 48 (quoting telephone interview with David Fattah, House of Umoja, March 22, 1991).

72. *See* Mendez, *supra* note 20, at 76.

This thinking engenders an "if you can't beat 'em join 'em" philosophy. However, the negative property and safety externalities[73] prevalent in gang controlled communities are a major source of financial burdens, trauma, and feelings of powerlessness that need to be eased in some way.[74] Although gang affiliation has negative implications for self and family, it can help to divert other harmful gang activities. The comments of Cory, a sixteen-year-old gang member from Los Angeles, explaining his *choice* to join a gang is indicative: "I joined the Fultons because there are a lot of people out there who are trying to get you and if you don't got protection you in trouble sometimes. . . . [Now] I don't always have to be looking over my shoulder."[75]

Gang membership may ease the fears associated with life in violence ridden communities. Indeed, in a study of Philadelphia youths, Leonard Savitz, Lawrence Rosen, and Michael Lalli tested the hypothesis that gangs help protect their members and therefore that gang members have lower fears of violence and victimization than non-members in the same community.[76] Although their study offered few statistically significant results, the results that were significant are telling. First, black gang members were, "far more likely to rate their immediate neighborhood as not dangerous (or [not] very dangerous) during the day time"[77] than non-gang members. Second, white gang members were significantly less afraid of going to and returning from school than white non-members.[78] In general, the fear of being victimized was lower for gang members than for non-members, although at a statistically insignificant level.[79] Nonetheless, the hypothesis

73. A "negative externality" is an indiscriminately imposed cost or secondary result that occurs from an activity. For example, the noise created by a jackhammer is not the intended function of this tool, but it does place a cost or harm on those in the immediate vicinity. In gang controlled neighborhoods, negative property and safety externalities may include persistent fears felt by residents, unintended bystander victims of violence, and decreased property values, among others.

74. *See* Mendez, *supra* note 20, at 74.

75. JANKOWSKI, *supra* note 50, at 45. *See also* Dave Wielenga, *Snoop Doggy Dogg Faces Trial*, ROCKY MTN. NEWS, Jan. 29, 1995, at 26A ("[I]n some southern California neighborhoods . . . it [is] sometimes difficult to distinguish between real criminals and those merely . . . tiptoeing the tightrope of survival. Simply growing up in certain areas confers some allegiance to the local gang.").

76. Savitz et al., *supra* note 19, at 152.

77. *Id.* at 158. Although not statistically significant, at night, black gang members felt relatively safe 53% of the time compared to 46% for all non-gang members. *Id.*

78. *Id.*

79. *Id.* Although the difference from non-gang members was not significant and may be counter to the actual incidents of victimization, this

tested, which is valuable in the coercion context, yields modest support in favor of a gang-as-protector theory and lends some credibility to the protection claims of gang members.[80]

The tentative answers in this Philadelphia study are supported by the unfortunate story of a seventeen-year-old Chicago boy, Anthony Burgos.[81] Anthony was not in a gang. However, two sixteen-year-old boys who confronted him on November 29, 1994, were. They asked Anthony what his gang affiliation was. Anthony responded truthfully that he was not in a gang. The two boys, then, drew a pistol and shot Anthony in the temple. Anthony died in a hospital room the next day. The loss was especially lamented by Roberto Caldero, who has done extensive gang intervention work in Chicago and organized community groups against gang violence: "Here are kids who reject that lifestyle, and they can't even walk around."[82]

The tendency or necessity for youths to seek the protection of one gang from the threats and actions of another gang is not new. Around 1969, in south Los Angeles, the Crips developed as a local street gang.[83] Soon on its heals, the Bloods organized to protect its members against the Crips.[84] These two gangs are now, perhaps, the most notorious in the nation with franchises in numerous cities from coast to coast. Moreover, the danger they pose extends far into the community. These two gangs have been known to kill children simply because they were wearing the wrong color clothing (blue for Crips, red for Bloods) and were mistaken for the enemy.[85]

Catherine H. Conly has noted in her research that the strength of various gangs may compel enlistment, that, "some

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difference results in large part from the definition of gang member used, which required the individual to have fought with the gang to be considered a member. *Id.* at 158-60.

80. *See infra* notes 81-87, 148-55, 343-44 and accompanying text.

81. Larry Hartstein, *Turning Back on Gangs Didn't Save Teen's Life; He Was in Wrong Place at Wrong Time, Cops Say*, CHI. TRIB., Dec. 1, 1994, at N3.

82. *Id.*

83. Huff, *supra* note 9, at 26.

84. *Id.*

85. *Id.* at 27. In recent years, the distinct rivalry between the Bloods and the Crips in the Los Angeles area has subsided with the signing of various truces by the respective leaders of these two gangs. *See* Efrain Hernandez, Jr. & David Ferrell, *March a Tribute to Fragile Truce*, L.A. TIMES, Apr. 29, 1995, at B1. These agreements were the culmination of years of negotiation, beginning as far back as 1986, and have since served as a model for similar cease-fire efforts by various gangs in other areas, including other Bloods and Crips factions. *See* Todd Copilevitz, *Call for Gang Truce Repeated*, DALL. MORNING NEWS, Mar. 8, 1994, at 26A; Jesse Katz, *Crips and Bloods Factions Prepare Ground for Widespread Gang Truce*, L.A. TIMES, May 19, 1994, at B1.

[gangs] may be so intimidating that for non-members to fail to claim membership is perceived as dangerous."[86] These fears are natural and do not depend on direct or voluntary association with criminals or gang members. As Albert Reiss' research points out: "[O]ur sense of personal safety and potential victimization by crime is shaped less by knowledge of specific criminals than it is by knowledge of dangerous and safe places and communities."[87] The dangerousness of gang-infested communities should not be ignored as a significant and pernicious factor leading to gang membership.

2. Gang Recruitment

In addition to individual incentives, it is important to recognize that, to some extent, gangs actively choose whom they want to have join their ranks. The selection of gang recruits is often a utilitarian decision that depends, in large part, on the gang's needs and the prospects' attributes.[88] The prevalence and power of such recruiting efforts is difficult to assess and has not been systematically studied;[89] however, initial attempts have been made to increase understanding of this phenomenon which researchers invariably recognize as existing to some degree.[90]

Researchers have found that gangs use various strategies to attract or, sometimes, to conscript members. Jankowski has divided these efforts into three categories: fraternity type recruitment;[91] obligation type recruitment;[92] and coercive type recruit-

86. CONLY, *supra* note 5, at 19 (citing a 1991 interview with Jose Morales, Director of the Chicago Commons Association, where Morales indicated that, "in the Henry Horner housing development in Chicago, where gang youth control high-rise buildings in the same way that gangs in other areas control neighborhoods, youths are afraid to say they are not a part of a gang." *Id.* at 25 n.98).

87. Albert J. Reiss, Jr., *Why are Communities Important in Understanding Crime?*, *in* 8 COMMUNITIES AND CRIME. CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 1 (Albert J. Reiss, Jr. & Michael Tonry eds., 1986).

88. CONLY, *supra* note 5, at 19 (relating conclusions drawn in JANKOWSKI, *supra* note 50, at 100).

89. CONLY, *supra* note 5, at 19 (researchers admit gaps in their knowledge and understanding).

90. *Id.* at 19-20.

91. JANKOWSKI, *supra* note 50, at 48-51 (gangs attempt to attract members by highlighting the perks and exploits of the gang, showcasing it as a "cool" or "hip" thing to do).

92. *Id.* at 51-55 (gang members try to convince prospective members that the gang performs an important function in protecting and supporting the community and that it is every man's duty [who has the ability to fight] to give something back and protect the honor of the community through service in the gang).

ment.[93] The type of recruitment that is important for this Article is the coercive type.

The method of coercion used to recruit can be either mental or physical. Mental coercion typically involves threatening the recruit or placing the recruit or his family in an unreasonably dangerous situation.[94] Physical coercion involves the infliction of pain on the recruit or members of his family and may also involve the destruction of the recruit's property.[95] Unfortunately, incidents of both types of coercive activity are not isolated or infrequent and necessarily enlist gang members who do not want to join and have no real choice in doing so. The story of an ex-gang member from Los Angeles is illustrative:

> I really didn't want to be in any gang, but one day there was this big blowout [fight] a few blocks from here. A couple of O Streeters who were from another barrio came and shot up a number of the Dukes [local gang's name]. Then it was said that the O Streeters wanted to take over the area as theirs, so a group of the Dukes went around asking people to join for awhile till everything got secure. They asked me, but I still didn't want to get involved because I really didn't want to get killed over something that I had no interest in. But they said they wanted me and if I didn't join and help they were going to mess me up. Then the next day a couple of them pushed me around pretty bad, and they did it much harder the following day. So I thought about it and then *decided* I'd join.[96]

Although the pervasiveness of coercive recruitment is not known, there is some indication that as the number of gangs increases the use of such measures has as well.[97]

Appellate courts have considered specific recruitment scenarios that are illustrative of the type of threats often involved.[98] In

93. *Id.* at 55-59 (used primarily when the gang needs to increase membership quickly).

94. *Id.* at 58.

95. *Id.* at 59.

96. *Id.* at 56 (emphasis added).

97. *See* Huff, *supra* note 9, at 29 (In Chinese gangs in the last fifteen years there has been a "large increase in the use of intimidation and coercion, including assault, to recruit new members.").

98. In addition to the scenarios presented in the appellate cases that will subsequently be discussed, the phenomenon of coercive gang recruitment surfaces frequently in cases brought by prisoners against the institutions in which they are housed. The substance of these claims is, generally, that the prison officials knew of the threats and beatings that were being inflicted to compel gang membership, but ignored them and failed to protect the afflicted inmates. *See, e.g.*, Williams v. Sternes, No. 91 C 20074, 1992 WL 74998, at *1-2

People v. Cruz,[99] the defendant, Victor Cruz, was convicted of the attempted murder of Javier Garcia. At trial, Garcia testified that he was walking to school from his parents' home and had gotten about a block and a half away, when Cruz started to walk toward him. As Cruz came near he called out Garcia's name and then shot him in the mouth.[100] In its closing argument, the *prosecution* argued that the incident was gang-related. Specifically, Cruz was a member of the Ambros street gang and one of the recruitment techniques used by this group was to shoot its intended member.[101] Garcia was the recruit and Cruz was carrying out gang business by shooting him. Whether this is in fact what was happening it reveals the reasonableness that such a state of affairs could exist.

A similar recruitment scenario is presented in *People v. Gardeley*.[102] Defendant Rochelle Gardeley was convicted of attempted murder, assault with a deadly weapon, possession of cocaine, and the commission of a crime in furtherance of a criminal street gang under California's STEP Act.[103] These crimes stemmed from the gang beating of Edward Bruno,[104] however, of interest here is the testimony by the prosecution's gang expert, Officer Boyd, offered to show a pattern of criminal gang activity by Gardeley. In particular, Boyd related an incident for which Gardeley had been convicted for being an accessory to a terrorist attack.[105] Gardeley and three other members of the Family Crip Gang wanted to recruit an independent drug dealer, Michael Halliburton, to sell drugs for their organization. When Halliburton refused, the gang members followed him to his house. They knocked on his door and when Halliburton's mother answered they told her to send her son outside so that they could kill him.

(Apr. 3, 1992, N.D. Ill.) (plaintiff was struck in the face with a baseball bat to *encourage* his involvement in a gang).

99. 518 N.E.2d 320 (Ill. Ct. App. 1987), *cert. denied*, 526 N.E.2d 834 (Ill. 1988).

100. *Id.* at 322.

101. *Id.* at 321, 328. In the alternative, the prosecution also argued that the incident was a pay back for Garcia's involvement in a rival gang, the Bishops. *Id.* at 328. Garcia testified, however, that he had quit that gang several months before the shooting, *id.* at 322, which would not necessarily discount this alternative theory, but would involve the prosecution adopting another contention, to be made later in this Article, that quitting a gang may not relieve the dangers previously posed by rival groups. *See infra* notes 148-55 and accompanying text.

102. 36 Cal. Rptr. 2d 136 (Cal. Ct. App. 1994), *cert. granted*, 890 P.2d 1115 (Cal. 1995).

103. *Id.* at 137-38.

104. *Id.* at 138.

105. *Id.* at 140.

Halliburton's mother called the police and when the police arrived they found that one of the gang members was carrying a sawed-off shotgun.[106]

In a non-adversarial context, less subject to self-serving motivation, Jack Hynes, from the Cook County State's Attorney's Office, estimated that, "[i]ntimidation probably plays a role in *only* 20 percent of gang recruitment."[107] Twenty percent is no small number when one considers that gang membership in the Chicago area alone is estimated at between 30,000 to 50,000 hard-core gang members and as many as 100,000 peripheral gang members and wannabees.[108]

David W. Thompson and Leonard A. Jason have made some preliminary inquiries into the recruitment environment in Chicago. According to their study, at least 110 gangs in Chicago actively recruit new members, with public schools (even elementary schools) serving as fertile recruiting grounds.[109] This connection to schools has been recognized in other studies as well. In a 1981 survey of Chicago public schools, roughly 40,000 school children claimed they had been attacked or threatened by gang members and many were afraid to go to school for fear of gang recruiters.[110] Araceli Corona, 1994 valedictorian at Bowen High in Chicago's southeast side, recognized this relationship: "This is where the gangs conduct all of their business, their transactions. They'll get their customers. This is the place where they'll eat. This is . . . their recruit station."[111] Discussing gang activity at Bowen, Susan DeGrane recounts the most horrifying comment that a student can make to his teacher: "They're after me."[112] Experience has shown that a brutal beating or even death is frequently forthcoming.

The destruction of the public school system through gang domination is particularly troublesome. In effect, it has created a continuous supply of children with increased potential and incentive to join gangs. As the classroom becomes dangerous or

106. *Id.* Gardeley's convictions under the street gang offenses were overturned in this decision, because Boyd's testimony was inadmissible hearsay and no other evidence established the necessary gang connection. *Id.* at 143-44.

107. CONLY, *supra* note 5, at 19 (emphasis added).

108. Andrew Martin & George Papajohn, *Suburbs Touched by Gangs: Commission Details Activity Outside City*, CHI. TRIB., Feb. 2, 1995, at 1.

109. Thompson & Jason, *supra* note 5, at 324.

110. *Id.* (citing J. H. CLARK, CHICAGO BOARD OF EDUCATION, A REPORT OF THE GANG ACTIVITIES TASK FORCE (1981)).

111. Susan DeGrane, *Danger: School Zone*, NOTRE DAME MAG., Winter 1994-95, at 38, 43.

112. *Id.* at 42.

unattainable and education deteriorates, due to gang control, so too will the ability of students to find and maintain employment.[113] The demise of the schools, therefore, serves to perpetuate the cycle of poverty and depression that has allowed gangs to attain and exert their authority.

Clearly, coercive recruitment exists. That is exists at all is sufficient for this discussion. Its extent and severity adds to the weight and believability of an individual gang member's claim that he did not want to join his gang but was faced with an unreasonable threat of force.

D. Restrictions on Actions and the Ability to Leave Once Within a Gang

The three typical structures that large gangs take each posit a group of leaders that direct the activities of associates and recruits.[114] Unfortunately, in some gangs these orders carry commanding force. In such cases, if a member does not do what he is supposed to do the repercussions may be serious.[115]

The primary situation in which a gang member may fear retaliatory punishment is when the leaders direct some particular activity or goal and the gang member refuses. An alternative scenario exists when the gang itself is threatened from a rival or other source. If a gang member does not respond with appropriate force — if he did not react in a similar manner as other members — he may be punished for his idle reaction and failure to defend the gang.[116]

Helton v. State[117] offers a poignant example of the institutionalized use of violence to control of the activity of gang members. James Helton was convicted for participating in a criminal gang, the Imperial Gangster Disciples. Specifically, Helton's offense derived from the initiation, or beating, of Travis Hammons.[118] The initiation involved what the gang called a "46," where the

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113. *See* Barry Glick, *Governor's Task Force Tackles Growing Juvenile Gang Problem*, CORRECTIONS TODAY, July 1992, at 92, 94 ("A youth's positive development is directly correlated with his or her level of involvement in school.").

114. *See supra* notes 51-53 and accompanying text.

115. *See, e.g.*, Gutierrez v. State, 395 N.E.2d 218, 221 (Ind. 1979) (defendants feared that Robert Taggart, the leader of their gang, would kill them or their families or would have them killed if they did not obey his orders or if they attempted to get out of the gang).

116. *See* JANKOWSKI, *supra* note 50, at 144 (gang members attacked other members who did not fight with the requisite tenacity in a battle with a rival gang); Kennedy & Baron, *supra* note 50, at 103.

117. 624 N.E.2d 499 (Ind. Ct. App. 1993).

118. *Id.* at 504.

current members would encircle the new member and strike him in the head forty times and in the chest six times.[119] In addition, the Imperial Gangster Disciples used various forms of physical violence to discipline members for *infractions* against the gang. Any member who missed a meeting would "get violated" — receives six blows to the chest — and any member who defied or hurt the gang or tried to leave the gang would be "eight-balled" — circled by eight members and beaten until the offending member changed his mind or mended his ways.[120] Due to the gang policy of internal threats and attacks, it is fair to assume that genuine fears would accompany any attempt by an Imperial Gangster Disciple to break from the gang or to refuse, or even question, a gang directive.[121]

A similar policy of enforcing gang directives is presented in *People v. Ganus.*[122] The defendant, Victor Ganus, was a member of the Latin Kings street gang, although at the time he committed the crime involved in this case he was incarcerated in a state prison in Illinois. Supposedly under orders from Latin Kings leadership, Ganus killed a fellow inmate, Lucas Gonzalez, when it was discovered that Gonzalez had raped a friend of the Latin Kings before he entered the prison system. In his defense at trial and as a mitigating factor against the imposition of the death penalty at sentencing, Ganus argued that the order, by Latin Kings leadership to kill Gonzalez, had coerced his actions.[123] According to Ganus, failure to follow a gang order could result in death;[124] he killed Gonzalez because, if he did not, he feared that he would be killed himself. Although, due to the circumstances, the veracity of this particular coercion claim may be questioned, it is nonetheless another piece of evidence that helps support the similar claims of others.[125]

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119. *Id.*

120. *Id.* The Indiana Court of Appeals recognized the use of strikingly similar disciplinary actions by a gang called the "G's," in Jackson v. State, 634 N.E.2d 532, 533 (Ind. Ct. App. 1994).

121. The activities of the Imperial Gangster Disciples were not in dispute in this case. *Helton*, 624 N.E.2d at 504. Rather, the chief inquiry of the court was the constitutionality of Indiana's anti-gang statute, which, after considering various challenges at length, the court determined that the statute was not unconstitutionally vague, *id.* at 506-07, did not unconstitutionally interfere with the right to freedom of association, *id.* at 511, and did not deprive Helton of equal protection of the laws. *Id.* at 512.

122. 594 N.E.2d 211 (Ill. 1992), *cert. denied*, 113 S. Ct. 1055 (1993).

123. *Id.* at 214.

124. *Id.*

125. *See* Philip P. Pan, *Girl Apparently was Killed for Warning Friend, Source Says*, WASH. POST, Dec. 5, 1995, at B1 ("[G]irl found slain in the woods last

In *United States v. Campbell*,[126] defendants, John Campbell and Riley Fultz, were inmates in a federal prison where they joined a prison gang called the Wolverines. At their trial for bank robbery, Campbell and Fultz asserted that Wolverines leadership (also in prison) ordered them, under penalty of death, to escape and rob banks for the gang.[127] Indeed, the two defendants felt that the Wolverines' threats followed them with equal force outside the prison walls as they had within the prison system. In their defense, neither Campbell nor Fultz denied their participation in the bank robberies. Rather, each based his case on the presence of gang coercion.[128] Undoubtedly, the defendants believed that the threats they faced were sufficient and concrete enough to hinge their freedom on the hope that a judge and jury would listen to and believe their story. The trial judge, however, did not believe their story, or at least did not believe it was relevant to their guilt, and refused to subpoena witnesses requested by the defense to support their coercion claims.[129] Similarly, the trial judge refused to instruct the jury on a duress defense because evidence supporting the necessary elements had not been presented.[130] The Sixth Circuit affirmed both of these conclusions.[131]

Although complete comparisons cannot be drawn between prison and street gangs, prison gangs are bountiful sources of gang knowledge. In particular, the difference in mobility should always be kept in mind when comparing these two groups. At least in theory, a street gang member can escape the reaches of the gang by moving to another location.[132] A prison inmate's movement and susceptibility to prison gangs depends solely on

week, apparently was killed because she warned a friend that her gang was planning to beat him up . . . .").

126. 675 F.2d 815 (6th Cir.), *cert. denied*, 459 U.S. 850 (1982).

127. *Id.* at 817.

128. *Id.*

129. *Id.* at 818. The reason for this denial is, perhaps, best explained by the Eighth Circuit ruling on the same issue and the same facts regarding the same defendants. In particular, the judge refused to subpoena the requested witnesses because Campbell and Fultz had not presented evidence establishing the immediacy of the threats against them (as required for a duress defense) and the proposed witnesses could not remedy this deficiency. United States v. Campbell, 609 F.2d 922, 924 (8th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980). For a discussion of the immediacy requirement of classic duress, see *infra* notes 267-77 and accompanying text.

130. *Campbell*, 675 F.2d at 821.

131. *Id.*

132. This is not a realistic possibility for most street gang members, however, because the poverty that necessarily subjects them to the gang environment often precludes them from the means to change residence.

his placement by prison officials. This confinement can cut the other way as well. Prison authorities can insulate individuals to a degree that is unattainable on the street. In sum, playing on the increased confinement and decreased mobility, the coercive power in prison gangs may be greater than on the streets. This is not to say, however, that a prison gang's power is confined inside the prison walls.

Recently, the distinction between prison and street gangs has blurred.[133] The Wolverines are a prime example,[134] but they are not alone. For example, the Nuestro Carnales, a Texas prison gang, have endeavored to expand their power into the community outside the walls.[135] Indeed, according to a Federal Bureau of Prisons study, "gang members released from prison are often expected under the penalty of death to continue working for their fellow members inside."[136]

Expansion has moved in the other way as well. Highly franchised street gangs such as the Bloods and the Crips have increased their power and presence in prisons.[137] As members of these gangs are incarcerated, they maintain their gang affiliation.[138] Once enough members reside in the same facility they can begin normal operations there, including recruitment of new members. The distinction, therefore, between prison and street gangs is ever decreasing[139] and knowledge about one group is helpful to understanding the activities of the other.

With this reciprocity in mind, a profile of seven major gangs in the Texas prison system may shed some light on the pervasiveness of internal gang violence. The unifying characteristic of these gangs is that once a convict commits to one of these organizations the only way out is death.[140] One particular Texas prison gang, the Texas Syndicate, is especially known for its violence and has adopted a paramilitary structure with strictly enforced rules to pursue its agenda. A violation of these rules may result in death.[141] In fact, it is understood by the gang's members that

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133. Craig H. Trout, *Taking a New Look at an Old Problem*, CORRECTIONS TODAY, July 1992, at 62, 64.

134. *See supra* notes 126-31 and accompanying text.

135. Salvador Buentello, *Profiles of the Seven Major Gangs*, CORRECTIONS TODAY, July 1992, at 59, 59.

136. Trout, *supra* note 133, at 64. *See also* CONLY, *supra* note 5, at 56.

137. Trout, *supra* note 133, at 64.

138. *Id.*

139. *See id. See also* CONLY, *supra* note 5, at 56.

140. Buentello, *supra* note 135, at 59.

141. *Id.*

they must obey the commands of the leaders, even if this means committing acts of violence.[142]

Perhaps the most violent prison gang, the Aryan Brotherhood has been involved in about 18 percent of all homicides in the federal prison system in the last ten years.[143] Although this gang was established to promote white supremacy, its most recent and prevalent activities have been directed toward the internal discipline of its members.[144] It is plain, that within this gang, notorious throughout the federal prison system for its use of deadly force even toward its own members, the ability to resist a gang directive is minimal and life threatening.

Of course, not all gangs coercively direct the activities of their members or compel that they retain their membership. In some gangs, failing to satisfy the gang's requirements will lead to a loss of honor and status as a member.[145] In other gangs, one need only resign or dissociate quietly from the group.[146] This does not mean, however, that coercive forces are necessarily absent for members of such organizations. In any of these situations, the practical ability to separate from a gang should not be overestimated.

The consensus of a panel of five gang members from Cabrini Green Housing Project in Chicago was that the ability to leave the gang was effectually none: rival gang members do not know whether you have left your gang and they certainly will not take your word for it.[147] In this respect, gang affiliation is usually

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142. *See* Salvador Buentello, *Combatting* [sic] *Gangs in Texas*, CORRECTIONS TODAY, July 1992, at 58, 60. Buentello argues that prison gangs who require their members to break the law can help to increase the number of prison gang members willing to provide information about their gangs to prison authorities. *Id.* Although this relationship may exist in the context of prison gangs, any parallel to street gangs should be minimal at best. A prison inmate does not risk as much as an unincarcerated gang member in going to the authorities — he is already in prison and the victims of his gang activities are likely prisoners as well. Prison informants also may be offered incentives that are not applicable in the street (*e.g.*, recreation time, "good time"). Furthermore, access to the authorities without fear of reprisal is increased in prison. In the prison system the ability to protect a particular informant is much greater (although not perfect). *See also* William Riley, *Taking a Two-pronged Approach to Managing Washington's Gangs*, CORRECTIONS TODAY, July 1992, at 68, 70.

143. Trout, *supra* note 133, at 62.

144. *Id.*

145. Kennedy & Baron, *supra* note 50, at 89-90.

146. JANKOWSKI, *supra* note 50, at 61-62, 314.

147. Panel of 5 Cabrini Green gang members, discussion at Notre Dame University (Jan. 21, 1995) [hereinafter Panel Discussion] (conducted by Brother Bill Tomes from The Brothers and Sisters of Love).

for life.[148] Researchers have had difficulty identifying the peripheries of gangs and their members,[149] especially in loosely organized gangs with *unrestricted* exit opportunities; rival gangs rarely have better information and they may not even care that the ex-member has ended his gang affiliation. Therefore, the increase in personal safety achieved by leaving the gang is often quite small, especially when one considers that the deserting member will no longer have the support of other gang members to protect him and discourage attack.

Gang protection, whether it is the prime motivation for joining a gang, is certainly an important consideration regarding continued involvement. Leslie Kennedy and Stephen Baron's study of the instigation of violence by gang members indicates that the selection of gang victims is often a rational process of risk minimization where solitary figures are the prime targets.[150] Even if an individual can defend himself in confrontations with solitary gang members, he will not be able to defend himself against an entire gang. Gang protection may be necessary to assert one's own rights, to stand up and protect oneself. Says Officer David Stallard, who is stationed at an in-school police unit at Bowen High in Chicago, Illinois:

> Before, there'd be a lot of fighting one on one, and that would be the end of it. Now it doesn't stop there. I've never seen such a need for revenge. They'll get the whole gang after the kid who beat them one on one. And they won't stop till he's dead, or at least until they've carried out some death attempt.[151]

The ability to separate is even smaller still if one embraces the results in Savitz', Rosen's, and Lalli's Philadelphia study.[152] Along these lines, research has suggested that a delinquent person is a more attractive target for gang and other crime, since such a person can be attacked with some measure of impunity.[153] This impunity results from a decreased likelihood that gang member or ex-gang member victims will report crimes to the police for fear of implicating themselves and, even if they do, a decreased likelihood that the police will believe or even care

148. *See also* Howard Dukes, *Gang Vows are for Life*, S. BEND TRIB., Nov. 19, 1995, at A1.

149. *See supra* notes 17-22 and accompanying text.

150. Kennedy & Baron, *supra* note 50, at 101-02.

151. DeGrane, *supra* note 111, at 42.

152. *See supra* notes 76-80 and accompanying text (fear of being victimized is lower for gang members than for non-gang members).

153. Kennedy & Baron, *supra* note 50, at 93.

about the claims of such offensive victims.[154] Not so remarkable, but worth spelling out specifically, one is more likely to be a victim of crime if one participates in crime and hangs out in risky areas.[155] This increased susceptibility is not completely diminished merely by ending gang membership.

The question, then, is whether society can punish a gang member who has been coerced into joining his gang, either by threats of violence or protection needs, and has been compelled to remain in the gang and participate in gang activities by similar forces. The answer depends on the degree to which the coercive forces existed and how this compulsion relates to a moral theory of punishment. This is the topic we will next address.

III. THE NECESSARY LINK BETWEEN CULPABILITY AND PUNISHMENT

Despite state legislatures' attempts to tighten their grips on gang violence and the general public's fear of gangs typified by its support for the "war on crime," prosecution cannot proceed at the indiscriminate expense of all gang members. Combating gangs is not necessarily inconsistent with helping and excusing a certain class of gang members (the coerced ones). Despite laws that make membership and activity in gangs criminal *per se*, not all such "criminals" are morally culpable and worthy of punishment. This general statement applies not only to the association offenses typical of anti-gang statutes, but also to specific criminal acts in furtherance of gangs.

A. *Theoretical Basis for Punishment*

From Plato to Hart, philosophers have debated whether we should punish and, if so, why we should punish. Of those who think that punishment is a proper institution, some endorse it for its reformative or rehabilitative potential; some endorse it for its retributive value; and some endorse it for its deterrent effects.[156] These functions need not be mutually exclusive, although, depending on the circumstances of the crime, each may suggest a different degree of punishment.

Punishment for crime may be morally justified as it tends to maintain order in society.[157] That punishment may be justified,

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154. *Id.*

155. *Id.* at 98.

156. ANDREW VON HIRSCH, DOING JUSTICE 45 (1976). *See also* OLIVER WENDELL HOLMES, THE COMMON LAW 42 (Boston, Little, Brown & Co. 1881); NIGEL WALKER, WHY PUNISH? 6-9 (1991).

157. Bazelon, *supra* note 4, at 386.

if not required, in certain situations, does not help define who should be punished and to what extent that person should be punished. The answers to these questions depend on one's justification or rationale for punishing or the purpose punishment is to serve (i.e. reformation, rehabilitation, deterrence, or retribution). It is necessary to examine the rationales behind these various functions in order to understand the implications each has for the appropriate limits of just punishment.

1. Reformation, Rehabilitation, Deterrence, and Consequentialist Theory

In appropriate situations, reformation, rehabilitation,[158] and deterrence theories recommend punishment to consequentialist thinkers. According to consequentialist theory, punishment is warranted if its overall consequences produce "good" in a utilitarian sense,[159] that is, the total good produced exceeds the total evil.[160] The unifying characteristic of consequentialist theory is the belief that a specific individual may be punished not because of a prior bad act, but because of the effect that the punishment will have on the criminal disposition of that person or the future criminal plans or tendencies of that person and others. Thus, the punishment is not an end in itself but is used as a means for shaping behavior to maximize the good of society. The punishment itself is not the good, but, rather, the good is found in the consequences that the punishment produces.

Different people envision differently the good that society realizes through punishment. Conceptions of the relevant good include the assured liberty of citizens living under rule of law, crime control, public welfare,[161] reputation, and privacy.[162] The promotion of one of these notions is not necessary here. Instead, it is the entire conglomeration of these ideas, as well as all others, that is important since, for consequentialists, it is the *total* good of society that should be elevated. Significant, and

158. Reformation and rehabilitation, although similar, refer to distinct objectives whose difference should not be forgotten or ignored. Specifically, reformation means the improvement one's character while rehabilitation refers to acquiring job or other legitimate skills to aid the legal functioning of the individual in society. The two objectives are similar in that each is concerned with the betterment or alteration of the individual being punished.

159. Antony Duff & David Garland, *Introduction: Thinking about Punishment*, *in* A READER ON PUNISHMENT 1, 6 (Antony Duff & David Garland eds., 1994).

160. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (Oxford, Clarendon Press 1823).

161. Duff & Garland, *supra* note 159, at 6.

162. ALAN GEWIRTH, REASON AND MORALITY 294 (1978).

worthy of note in this balance, are the rights of the individual criminal. This person has a definite interest in not being punished.[163] Accordingly, as the benefits from punishment diminish or if the crime was minimal to begin with, the harm that may be felt by the criminal through further penalty is likely to outweigh the minimal benefits.

Given this skeletal framework of consequentialist theory, it is important to understand how this theory influences or should influence punishment aimed at reformation, rehabilitation, and deterrence. Specifically, when, why, and to what extent is punishment appropriate for consequentialist thinkers?

First, consider a consequentialist theory of punishment in which the primary goal is to reform or rehabilitate the criminal.[164] With these goals in mind, the individual criminal propensities of the person to be punished would determine the extent of punishment warranted. Punishment would last only as long as the good produced or capable of being produced by the further extinction of criminal tendencies outweighs the evil caused by the restraint on the individual freedom of the person being punished — only as long as the good outweighs the evil. However, no matter what the crime, if punishment were appropriate solely to reform or rehabilitate, then it necessarily must end when it appeared that the individual criminal would not repeat the crime or when it appeared that a particular person was incorrigible.[165] If the criminal act was merely a one-time transgression or if the criminal were, in fact, incorrigible, then punishment would not be warranted at all. Something is amiss in the latter case because the incorrigible criminal surely deserves some punishment. The former case may or may not represent an appropriate penalty depending on the particular circumstances of the crime. Regardless, in both cases, punishment has definite limits if we have only reformation or rehabilitation in view. From a consequentialist perspective, the punishment *must* end when the harm

163. This interest in avoiding punishment is not unlimited. There may be situations where punishment would be beneficial to the individual criminal. For example, if X's avoiding punishment for rape contributes causally to X raping again, then it would perhaps have been in X's interest to have been punished. In such a case, the interest in avoiding punishment would be offset by the good furthered in the particular criminal if a repeat offense could be avoided.

164. It is somewhat artificial to separate consequentialist thought into its various components, since consequentialists are concerned with rehabilitation, reformation, *and* deterrence at once. This separation, however, facilitates an understanding of the implications that each of these components has on the measurement of punishment.

165. HOLMES, *supra* note 156, at 42.

occasioned by the punishment outweighs the good that could be achieved through further penalty.

The necessity of the utilitarian constraints placed on reformation or rehabilitation based punishment can be illustrated well by the limitless and unprincipled punishment that is possible if such constraints are ignored. If reformation or rehabilitation were removed from the utilitarian cloak of consequentialist theory or if the rights of the criminal were ignored in the balancing of goods, punishment could proceed indefinitely. Without the limitations that consequentialist utilitarianism brings, so long as progress is capable of being made, even if it is at a particularly slow rate, punishment may continue. This seems to be a problem and underscores the need to retain the utilitarian constraints on consequentialist theories of punishment.

Deterrence based punishment has different goals in mind. Specifically, deterrence is designed to promote two ends. It can either be general (*i.e.*, punishing one person will influence the actions of others because they will see what the consequences will be) or it can be specific (*i.e.*, the individual being punished will realize the harm to himself that his actions have caused and will not want to repeat them). As with reformation and rehabilitation, the use of deterrence to justify punishment can also be problematic.

In particular, it may be immoral to use deterrence as a justification for punishment because deterrence does not establish a principled means for scaling penalties and treats the individual as a means only and not also as an end in himself.[166] With respect to the first of these shortcomings, it is rational to assume that the threat of punishment will often influence the decision to commit a crime. Thus, if society wants to discourage crime, extremely long sentences might help achieve the maximum effect.[167] As a specific deterrent, life imprisonment or capital punishment for all crimes would prevent those malefactors who were convicted from committing other crimes against the general populace; it may help as a general deterrent as well. This is manifestly improper. In this regard, the primary vice of deterrence based punishment is the severity of sentences that may result. With respect to the second, moral criticism, although as a specific deterrent such punishment would use the individual

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166. *Id.* at 42-43.

167. Absolute deterrence of crime is not always desirable, because there are situations where the value obtained from committing the crime is more beneficial for society than the harm that it causes. On this topic, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 75-86 (2d ed. 1989).

toward his own end,[168] the punishment, in itself, would be a mere means. As a general deterrent, punishment again "uses" the one being punished, even though the end sought is the betterment of others; the punishment, itself, remains a mere means. That is, the individual criminal would be used for society in general and other would-be criminals in particular.

Addressing the alleged immorality of treating a person as a means only and not also as an end in himself, Oliver Wendell Holmes agreed that by showcasing the individual as a warning to others or punishing that person to discourage recidivism, punishment does not treat the one being punished as an end in himself; it uses him as a means employed to repulse future acts.[169] Holmes, however, discounts this moral difficulty, noticing that community life requires some surrender of individuality for the good of the group.

To be sure, criminal law has censored acts and actors when the particularities, taken alone, do not seem to warrant punishment (*i.e.*, strict liability crimes).[170] In such cases, the aim of criminal law is to shape actions — it is active, not reactive — and the temptation is to subordinate individual culpability to the demands of public welfare.[171] Declaring that crime is what, in the name of public welfare, society says it is, Holmes wrote: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[172] In support, Holmes holds community standards above the individuality of the actor:

> [W]hen we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of liability are external and independent

168. Whatever the "end" of the particular individual being punished, the focus of specific deterrence on this particular individual necessitates that the punishment be directed toward *some* end of this person.

169. HOLMES, *supra* note 156, at 43 (attributing this discussion to Immanuel Kant without citation).

170. A "crime" is usually marked by the "concurrence of an evil-meaning mind with an evil-doing hand." Morissette v. United States, 342 U.S. 246, 251 (1952). However, advances in technology and the increased congestion and mobility of society have facilitated the acceptance of what have been termed "public welfare offenses" — where criminal liability is not dependent on intent or even action in some cases, but on a statutory duty imposed to encourage the active prevention of proscribed events. *Id.* at 255-56. For excellent discussions of the bases for such offenses, see United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277 (1943).

171. HOLMES, *supra* note 156, at 49.

172. *Id.* at 41.

> of the degree of evil in the particular person's motives or intentions.[173]

This reasoning surely would explain the acceptance of strict liability in criminal law, but it does not justify a failure to inspect individual culpability for more infamous offenses.[174] The moral difficulty remains.

Aside from the moral implications, the theoretical (utilitarian) base of deterrence must not be forgotten. The good sought is a future decrease in crime, however, the crime control good attained from excessive sentences is not without its countervailing evil. Cautioning from a utilitarian perspective against the punishment of innocents, H.L.A. Hart wrote: "[A] system which openly empowered authorities to [punish the innocent], even if it succeeded in averting specific evils . . ., would awaken such apprehension and insecurity that any gain from the exercise of these powers would by any utilitarian calculation be offset by the misery caused by their existence."[175] This argument can be taken beyond the mere punishment of the innocent to those cases in which persons are punished beyond their culpability. Surely, if innocent people are punished without having committed a crime, ordinary people would fear the safety of their own liberty. Similarly, if punishment extends beyond culpability, people would rightly fear that a minor transgression would engender an exorbitant response. In either case, the benefit to society is surely outweighed by the evil produced by the injustice and arbitrariness of the punishment.

Although difficulties exist with using reformation, rehabilitation, or deterrence as universally applicable bases for punishment, the purpose of this discussion is not to poke holes. Rather, these shortcomings are important to recognize in order to understand why these justifications for punishment must be constrained by their consequentialist foundations. So long as this underlying theory is maintained, all three rationales should arrive at appropriate levels of punishment in coercion cases.[176]

2. Non-consequentialist, Retribution Theory

In his exploration of the proper basis for punishment, Andrew von Hirsch argues:

> While deterrence explains why most people benefit from the existence of punishment, the benefit to the many is not

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173. *Id.* at 50.

174. *E.g.*, theft, assault, and rape.

175. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 12 (1968).

176. *See infra* notes 202-09 and accompanying text.

> by itself a just basis for depriving the offender of his liberty and reputation. Some other reason, then, is needed to explain the suffering inflicted on the offender: that reason is desert.[177]

Von Hirsch's desert rationale is similar to the notion of retribution and is non-consequentialist in nature. Any punishment must be for a prior bad act; the effect this may have on the future actions of anyone is insufficient in itself as a justification for the punishment, even if it may be necessary to it.

Retribution can be thought of in many ways. Essentially, it is punishment in response to previous evil-doing. Referring to the reasoning of Hegel, Holmes styled retribution in rather abstract terms: "[W]rong being the negation of right, punishment is the negation of that negation, or retribution."[178] In their writings, John Finnis and Alan Gewirth have characterized retribution as the equalization of an unfair advantage.[179] Society operates on the basic premise that members should refrain from criminal conduct. Everyone benefits from this state of affairs. When a crime is committed, however, the criminal not only benefits from the self-restraint of others, but he also benefits from the spoils of his crime and, thereby, gains an unfair advantage. The purpose of punishment is to offset this advantage and equalize society by applying a burden to the criminal. Additionally, as previously noted, von Hirsch labels the retributive notion as "desert"; people are punished because they deserve to be punished due to prior wrongdoing.[180] These various conceptions differ in their formulation of retribution, but they all rest on the same premise and should achieve the same punishment result.

Once it is determined that someone deserves to be punished, how much punishment is deserved still must be decided. According to non-consequentialist, retributivist theory, only the guilty may be punished and then only to the extent of their guilt or blameworthiness for the crime for which they are being pun-

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177. VON HIRSCH, *supra* note 156, at 51.

178. HOLMES, *supra* note 156, at 42.

179. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 263-64 (1980); GEWIRTH, *supra* note 162, at 294-99. Von Hirsch also discusses the concept of unfair advantage, in Andrew von Hirsch, *Censure and Proportionality, in* A READER ON PUNISHMENT, *supra* note 159, at 115, 116, however, he chooses, instead, to define retribution in terms of desert. *See infra* notes 180, 183-85 and accompanying text.

180. VON HIRSCH, *supra* note 156, at 46. Von Hirsch selected the word "desert," because he believed that the traditional use and meaning of "retribution" was misleading. The idea behind von Hirsch's word, nonetheless, is the same. *Id.* at 45-46.

ished.[181] Elaborating on the retributive position on punishment, Herbert Packer argues, "that punishment must be proportioned to the offense. The graver the offense (on some kind of scale of moral outrage), the more severe the punishment."[182] This is unsurprising, given that the very notion of retribution is to negate a wrong, to equalize unfair advantage, or to give someone what they deserve.

The principle that punishment should be constrained by culpability is perhaps most easily understood with reference to von Hirsch's notion of desert. In the measure of punishment, von Hirsch discards abstract notions about the negation of wrong, in favor of the clarity attainable through common sense understandings of equity; most people would perceive disproportionate punishments as unfair.[183] He explains: "Severity of punishment should be commensurate with the seriousness of the wrong. Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishments. Disproportionate penalties are undeserved . . . ."[184] Similarly, von Hirsch also argues that individuals who are punished are often perceived as deserving as large or as small a penalty as they receive — that they are as morally reprehensible as their sentence indicates.[185] Conviction and punishment carry with them a certain degree of reprobation from society which increases as the penalty increases. If an individual is punished beyond his culpability, he is being fitted with a larger degree of public reprobation than deserved; this reprobation will continue beyond the termination of the imposed sentence which makes the justice of the fit all the more important.

Indeed, it is generally accepted that, in criminal law, there should be a "bond between wrong and punishment."[186] This conclusion is a cornerstone of *just* punishment and is widely recognized as such, independent of retributive notions. The reasoning of John Locke and Herbert Morris[187] is illustrative.

181. Duff & Garland, *supra* note 159, at 7.

182. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 14 (1968).

183. VON HIRSCH, *supra* note 156, at 69.

184. *Id.* at 66 (emphasis omitted).

185. *Id.* at 71-72.

186. HOLMES, *supra* note 156, at 42.

187. H.L.A. Hart should be included in this list as well, however, since he drew the connection between culpability and punishment on utilitarian grounds, it was more appropriate to present his reasoning within the discussion of consequentialist theory. *See supra* note 175 and accompanying text.

Locke explained the necessary relationship between wrong and punishment as social contract. Exploring the extent of the legislative power, Locke wrote:

> It cannot be supposed that [society] should intend, had [it] a power so to do, to give any one or more an absolute arbitrary power over their persons and estates, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon [it]; this [would] put [society] into a worse condition than the state of Nature, wherein they had a liberty to defend their right against the injuries of others, and were upon equal terms of force to maintain it, whether invaded by a single man or many in combination.[188]

Since, in Locke's theory, the authority to govern derives from the assent of the people, it cannot legitimately act beyond the power given. Surely, society would not consent to be judged and punished arbitrarily nor punished beyond their own blameworthiness in acting.[189] Thus, the state does not and should not possess the power to punish beyond individual culpability.

Morris reaches basically the same conclusion through what he terms a paternalistic theory of punishment.[190] This theory posits that punishment is proper when it increases the good and promotes the growth of the person punished,[191] much in the same way that parents' interferences into the activities of their children are designed to teach and improve.[192] However, if punishment is inflicted beyond the blameworthiness or wrongfulness of the act, then that punishment would frustrate this rationale.[193] Indeed, if non-blameworthy activity is punished, then the good of the individual will not be furthered; instead, the punishment will confuse him. Morris summarizes this position: "[L]aw plays an indispensable role in our knowing what for society is good and

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188. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, BOOK II para. 137, at 191 (Thomas I. Cook ed. 1947).

189. *See* WALKER, *supra* note 156, at 92-94.

190. Herbert Morris, *A Paternalistic Theory of Punishment, in* A READER ON PUNISHMENT, *supra* note 159, at 95.

191. The good being promoted is essentially the identity of the individual as a morally autonomous person. *Id.* at 98. Morris describes this good as composed of many parts, including: the appreciation of the evil involved in doing wrong; the feeling of guilt as this encourages the restoration of harm caused or making amends; the commitment to benevolent activity in the future; and, the conception of oneself as a responsible person, responsible for having done wrong, and worthy of respect as an individual. *Id.* at 98-99.

192. *Id.* at 95-96, 97, 104. A similar notion has also be termed the communicative function of punishment, where the punishment imposed expresses to the wrongdoer that his action was wrong.

193. *Id.* at 104.

evil. Failure to punish serious wrongdoing, [or] punishment of wrongdoing in circumstances where fault is absent, would serve only to baffle our moral understanding and threaten what is so often already precarious."[194]

If we punish individuals beyond their culpability, we not only do not restore order to society, but we further upset it. If punishment were inflicted beyond culpability, then that punishment would create more of the evil that it was designed to remove. Holmes wrote: "Thus the punishment must be equal, in the sense of proportionate to the crime, because its only function is to destroy it."[195] Retributive theories of punishment, although not providing a talismanic formula for determining a precise penalty, treat punishment as a morally defensible response to a crime, and, furthermore, facilitate the process of reasoning to an appropriate level of punishment. Where the culpability of the person punished is not out of proportion to the punishment inflicted, the punishment is just. Where punishment is justified it is not a wrong. Just punishment is a rightful response to the wrong occasioned by crime and is the moral way to maintain the order of society.

B. *Application to Coercion Defenses and the Gang Situation*

1. Basis for Coercion as an Exculpatory Factor

The criminal law has recognized that sufficiently coerced acts do not warrant punishment; various coercion defenses have evolved to harness these cases. It is important to determine who and what acts these defenses should cover. To decide this, it is necessary to understand exactly what coercion is and how it would be analyzed under the theories of punishment discussed above.[196]

An act is coerced when the will or impetus for acting is the product of an unreasonable force or threat of force, that is, when the person would have done otherwise had the force not been present. What constitutes a sufficient coercive "force" is more complex. When William Blackstone wrote his commentaries on the common law, he limited the scope of relevant forces to those that threaten life or other bodily harm; a mere battery was sufficient.[197] Modern law has followed suit and recognizes a sufficient "force" when a there is a risk of death or serious bodily

194. *Id.*
195. HOLMES, *supra* note 156, at 42.
196. *See supra* notes 156-95 and accompanying text.
197. 4 BLACKSTONE, *supra* note 25, at *30.

injury.[198] The presence of this force alone, however, is not enough.

A force is only coercive when *it* causes the person to act in a certain way. For example, when a gang approaches a youth and beats him until he joins the gang, that youth's decision to join the gang may be coerced. Similarly, when gang leaders instruct another gang member to steal and threaten to kill him if he refuses, that theft may be coerced. Few would doubt that the severity of these threats is sufficient. However, whether the above two acts are, in fact, coerced ultimately depends on the individual. In both cases, the act is only coerced if the youth would not have acted *but for* the forces present.

The strength of the threat and the predisposition of the person threatened are necessary factors. Some people are more resistant to threats than others. No matter how serious the threat, if the individual did not feel threatened, then coercion is lacking. Similarly, some people do not need the prodding of a threat for them to act. No matter how great the threat, if the person would have committed the act regardless of the accompanying threat, then the act was not coerced. It follows, therefore, that an act can be more or less coerced depending on the nature of the threat, the fortitude of the individual to resist the threat, and the individual's predisposition to comply absent the threat.[199]

Coerced acts need not be involuntary acts.[200] Beyond reflex and unconscious acts, everything we do is voluntary in the sense that we are consciously performing. Coercion defenses do not deny the conscious performance of a crime, but, rather, they seek to exculpate due to the mental state of the actor. The core of such defenses is a defect of volition.[201] The significance of this defect is in its relation to the underlying rationales of criminal law — reformation, rehabilitation, deterrence, and retribution.[202] Examining how a coerced act should be punished according to these various rationales should help expose the proper scope of these defenses.

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198. *See infra* notes 278-79 and accompanying text.

199. This gradation is valuable for deciding how much someone deserves to be punished for committing a coerced crime.

200. ALAN WERTHEIMER, COERCION 8 (1987). The MPC defines involuntary acts to include: reflexes or convulsions; bodily movements during unconsciousness or sleep; conduct during hypnosis or resulting from hypnotic suggestion; and other bodily movement not the product of the effort or determination of the actor. MPC, *supra* note 1, § 2.01(2).

201. WERTHEIMER, *supra* note 200, at 9.

202. *Id.* at 145.

Under a reformation or rehabilitation theory of punishment, the coerced actor may not warrant penalty; he is not a good candidate to be either reformed or rehabilitated. Since the criminal act is necessarily the product of force or threatened force the likelihood that the individual would again commit such a crime is small. Furthermore, the future commission of a similar crime is not under this individual's control. Since the initial crime was the result of force, detaining or otherwise punishing the person who committed the crime could not effect the extinction of his or her tendencies or disposition to commit a similar criminal act. A coerced act is a type of one-time transgression that justifiably would receive no punishment.

Similarly, the coerced actor does not warrant punishment to deter future acts or actors. Granted, punishing a coerced actor could deter to the extent it forewarns the actor and others that no defense will lie. Such knowledge has some consequence in both the actor's fortitude in resisting and in his refusal to position himself in the line of likely coercive force. However, since a coercion defense requires that the actor truly had no reasonable choice but to commit the criminal act,[203] any such warning, even the threat of death,[204] may not suffice to discourage it. Thomas Hobbes reasoned:

> [N]o Law can oblige a man to abandon his own preservation. And supposing such a Law were obligatory; yet a man would reason thus, If I [do] it not, I die presently; if I [do] it, I die afterwards; therefore by doing it, there is time of life gained; Nature therefore compels him to the fact.[205]

Encouraging resistance has no value in the context of legitimate coercion claims since the threat that would need to be overcome is a threat that a reasonable person could not resist. Punishment could not effect his or her resolve to avoid a repeat offense.

Aside from reformation, rehabilitation, or deterrence specific analysis, consequentialist theory in general would argue against the punishment of the coerced actor; this would not promote the overall good of society. From a utilitarian perspective, the proper function of law is to augment the total happiness of society — promote good and discourage evil.[206] Believing that

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203. *See infra* notes 280-305, 356-64 and accompanying text.

204. IMMANUEL KANT, THE PHILOSOPHY OF LAW 52-53 (W. Hastie trans., Edinburgh, T. & T. Clark 1887).

205. THOMAS HOBBES, LEVIATHAN 345-46 (C.B. Macpherson ed., 1968) (emphasis omitted).

206. BENTHAM, *supra* note 160, at 170.

all punishment is evil,[207] Jeremy Bentham reasoned that punishment should not be inflicted when it would be inefficacious or unprofitable because overall good would not be promoted.[208] In the coercion context, punishment is both inefficacious and unprofitable; it cannot prevent future similar acts and the evil necessarily flowing from this punishment would exceed that of the crime. If the coerced actor has no legitimate opportunity to avoid the act, then he has, effectively, no choice in avoiding the punishment and, therefore, the resulting harm. The threat of punishment would be ineffective to prevent the act. If the criminal act cannot be discouraged, then punishment as a means for deterrence is valueless and punishment is not warranted.

Furthermore, if criminal law imposed penalties in cases where the criminal had no choice but to commit the crime, then the meager good society may realize by punishing is more than offset by the associated evil. In such cases, the normal good that society would receive is minimized by the implication that any random member of society may be similarly coerced and punished despite their lack of criminal tendencies or desires. Society should not convict when it cannot condemn.[209] Society should blame the wrongful act, but, in cases of coercion, it should not blame the actor beyond his blameworthiness. If punishment exceeds blameworthiness it does not promote overall happiness and is, therefore, inappropriate.

According to retribution theory, the function of punishment is to repudiate the rejection of moral community implicit in a particular criminal act. Although an authentic coerced actor cannot reasonably refuse the criminal act,[210] he or she has committed a crime that wrongs its victim and society. The question is whether punishing the coerced actor can negate this wrong. Alternatively, does the coerced actor deserve to be punished? The answer to both is no.

Since the coerced actor has no choice but to commit the crime, casting blame upon him or her through punishment would not revitalize society. Although society requires retribution for crime, such retribution is legitimate only to the extent that it does not exceed culpability. Within the coercion context,

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207. *Id.* Punishment, in itself, must be evil because it forces a restraint on a person that is not freely chosen and a restriction of free choice and liberty is something one naturally wants to avoid. This characterization is Benthamite; however, the notion that punishment is something one naturally wants to avoid is more general. *See, e.g.*, Morris, *supra* note 190, at 98.

208. BENTHAM, *supra* note 160, at 171.

209. Bazelon, *supra* note 4, at 388.

210. *See infra* notes 280-305, 356-64 and accompanying text.

the coerced actor has no legitimate choice in committing the criminal act, he or she is a mere conduit for sapping social value and is not blameworthy.

The coercive force or actor is the proper object of retribution;[211] anything contrary would, so to speak, punish the gun instead of the shooter for a killing. A gun stands in a similar relation to the crime as does a coerced criminal; each is used toward the criminal end of another being. The wrong caused by crime may not be negated by punishing a criminal tool.

The above analogy is inexact. Unlike a gun, a coerced criminal can select the threat instead of the crime. This choice, however, is unreasonable. The role of the hero should never be demanded. A true hero is so named because that person has done something *beyond* the call of the ordinary. To place the requisite standard of conduct at this level would demand from the ordinary that which society must recognize as exceptional.[212] Such heroism is not demanded elsewhere in criminal law[213] and it should not be expected in the face of legitimate coercive force. Sentiment to expect heroism may rest on the rarity with which such events occur and the reasonable belief that the average member of society will not face such a difficult choice; it is morally incorrect nonetheless.

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211. *See infra* notes 225-26 and accompanying text.

212. *See* MPC, *supra* note 1, § 2.09 cmt. 2, at 375 ("The proper treatment of the hero is not merely to withhold a social censure; it is to give him praise and just reward."). *Cf.* Regina v. Howe, 1 All E.R. 771, 779-80 (1987) ("I have known in my own lifetime of too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either 'just or humane' which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection on the coward and the poltroon in the name of a 'concession to human frailty.' ") (Hailsham, L.J.).

213. In general, criminal sanctions are not imposed absent an overt act (*actus reus*) except in specific situations where the law has placed an affirmative duty to do something. *See, e.g.*, Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962) (failure to act may be criminal only: where a certain status relationship exists between those involved; where statute imposes a duty to care for another; where one has assumed a contractual duty to care for another; and where one has voluntarily assumed the care of another and secluded that person from the aid of others); People v. Beardsley, 113 N.W. 1128, 1129 (Mich. 1907) (for culpability to result from a failure to act, "the duty neglected must be a legal duty, and not a mere moral obligation."). For more general discussions of the duty to rescue and the legal demands for heroism, see John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867; Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 74 WASH. U. L.Q. 1 (1993).

Holmes recognized that, "criminal liability . . . is founded on blameworthiness."[214] He also recognized that, "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."[215] This conclusion and rationale is supported in Holmes' reasoning on criminal law. He writes:

> The degree of civilization which a people has reached, no doubt, is marked by their anxiety to do as they would be done by. It may be the destiny of man that the social instincts shall grow to control his actions absolutely, even in anti-social situations. But they have not yet done so, and as the rules of law are or should be based upon a morality which is generally accepted, no rule founded on a theory of absolute unselfishness can be laid down without a breach between law and working beliefs.[216]

Today, one-hundred and fifteen years after Holmes' observation, the social instincts of man still do not completely control in anti-social situations, nor should they be expected to. A hero is still a hero; heroism is not the act of the ordinary.

The necessary fit between culpability and punishment compels the conclusion that, regardless of any minimal ability to negate wrong, a coerced person should not be punished for a coerced crime. Under reformation, rehabilitation, deterrence, or retribution theories, the presence of coercion demands that no punishment follow. The difficulty remains, however, to apply this principle in appropriate circumstances — distinguishing those deserving of protection from the ranks of the blameworthy.

2. The Coerced Gang Member Scenario

In cases of coercion, the quest for conviction or acquittal "on the merits" is valueless when the act is uncontested and the circumstances are the only true point of inquiry. Society has a genuine interest in combating gang violence, but it cannot legitimately do so oblivious to or at the expense of the moral justification for criminal punishment — moral culpability. Just as a non-gang member may be coerced, so too may a gang member. Just as a coerced non-gang member should not be punished, neither should a coerced gang member. Indeed, a coerced gang member may be the same as any other coerced actor in all respects relevant to punishment. In the gang context, however, existing

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214. HOLMES, *supra* note 156, at 50.

215. *Id.*

216. *Id.* at 44.

law does not sufficiently recognize defects in volition that may lead to criminal acts, particularly when coercion is involved.[217]

There is nothing unique about a gang member or gang crime that would except him from the requirement that culpability not be exceeded by punishment. So long as the volition to join the gang is driven by a sufficient force or threat of force, then the choice to join a gang may be coerced. So long as the gang member's continued involvement in the gang is compelled in a similar manner, then his continued involvement may be coerced. And, finally, so long as the impetus for criminal activity in the gang is the product of force or the threat of force, then these crimes can be coerced.

The potential sources of these forces or threats of force warrant particular discussion. Few would deny the coercive potential of a direct and concrete threat tied to a particular activity or inactivity. For instance, if the gang member did not want to join the gang, but was beaten or otherwise forced into submission,[218] if any effort to leave the gang would be met with violence,[219] or if the refusal to commit a particular act would result in an attack,[220] then the strength of the coercive force should not be doubted. Less direct threats, however, should also be sufficient.

Coercion is dependent on the presence of an external force compelling an action. From a theoretical standpoint, the source of this threat should not alone defeat the strength of coercion perceived. Particularly, there is nothing that would require the threat to come from within the gang; a threat exterior to the gang can compel gang affiliation as well. It should matter only that the threatened harm is real and is sufficiently certain to result.

A threat does not become less threatening when the source is outside of the gang. For instance, when a neighborhood is host to extensive gang violence, experience has shown that non-gang members are often the victims. Gangs can help to ease this threat because a gang member will have the support and protection of others; support and protection that is often unavailable from more legitimate sources. Habitat is not always controllable and taking steps to protect oneself (*i.e.*, joining a gang) deserves special consideration when courts and society judge the culpability of appropriate gang members. In the gang context, absence

217. *See infra* Part IV.
218. *See supra* notes 96-106 and accompanying text.
219. *See supra* notes 117-21, 135-36, 140 and accompanying text.
220. *See supra* notes 116-31, 141-42 and accompanying text.

of free will may include a lack of reasonable alternatives to initial and continued association in the gang.

In theory, the origination of the harm compelling gang association should not effect the viability of the threat; its only implication should be in the measurement of the force present. The question, then, is whether we want this to make a difference. The answer to this question, however, cannot be completely divorced from the various justifications for punishment. In particular, if such external forces are not recognized then punishment may be inflicted in situations where reformation, rehabilitation, or deterrence theory would find that good is not furthered and where retributivist theory may find that culpability has been exceeded and punishment is not deserved. External threats *must* be considered because they significantly affect the decisions of youths to join gangs. The same analysis is appropriate to the evaluation of threats compelling continued gang involvement and criminal gang activity. Such neighborhood factors must be considered because they can coerce an action in the sense that *they* are the cause of the otherwise criminal activity.

The crimes committed by gang members are not usually the type included under the heading of strict-liability. Although the association offenses of most anti-gang statutes may fall within this category, other offenses such as theft or assault traditionally require a guilty mind.[221] Regardless, in theory, even for strict-liability crimes, a coercion defense should apply. The purpose behind strict-liability's imposition of criminal duty is to encourage compliance with some prescribed norm in order to promote a particular social goal.[222] This purpose is denied if one is coerced into violating the law; encouragement to act in a certain manner cannot hope to overcome a present, unreasonable force or threat of force. Thus, failure to recognize the coercive forces that may affect the culpability of gang members cannot be excused as a sacrifice necessary for the growth and preservation of society or by a blanket desire to suppress street gangs.

Society does need to stop gang activity, but punishing the coerced gang member would not further this goal. The very fact that he was coerced connotes that the situation, not the inclinations of the individual, caused the crime. Punishing the individual will not suppress the environmental factors exterior to him. The differences that the gang situation entails cannot make a difference in determining just punishment.

221. Morissette v. United States, 342 U.S. 246, 260-61 (1952).

222. *Id.* at 255-56.

Recognizing that sufficiently coerced street gang members are not proper subjects for punishment, however, does not help to divine those gang members deserving such classification. The sufficiently coerced street gang criminal has not yet been packaged as such. It is difficult to point to an existing case or model because the incentive to come forward with the requisite qualities has been lacking. Instead of viewing street gang criminals as potentially deserving of compassion, criminal law has sought stiffer penalties to be applied without regard for the individual exigencies of the gang member involved.[223] Not surprising, when gang members have advanced coercion claims, they have been largely unsuccessful.[224] The coerced gang member, however, does exist.

When a gang member joins his gang under a reasonable fear of bodily harm, from the gang itself or from the dangerous nature of his environment, he should not be punished for his mere membership. Further, so long as free choice in refraining from criminal activity or from leaving the gang entirely is severely limited, society cannot legitimately impose the full force of its criminal sanctions. Although this contention may not attract strong social support at first glance, it is, nonetheless, required in a just society. This call for compassion should not be troublesome. So long as the appropriate individuals can be selected, society must recognize the situation.

3. Coerced Gang Crime Will Be Punished

Excusing the actions of sufficiently coerced gang members does not negate the wrong that these crimes inflict, however, the wrong will not often go entirely unchecked. Most coerced gang crimes will be punished, but it is the person or persons who caused the crime, those responsible for coercing, who will receive the penalty, not the person who is coerced. This is a straightforward proposition which, in the gang situation, may not be so simple.

In certain situations, the leadership or particular individuals within a gang will coercively recruit the gang member and will retain his allegiance through force or threat of force. This is the easy case. The gang leadership or the individuals involved should be punished for both the act of coercion and the crime committed. Indeed, the anti-gang statutes of California and Indi-

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223. *See supra* notes 33-45 and accompanying text.

224. *See supra* notes 122-25 (People v. Ganus), 126-31 (United States v. Campbell) and accompany text; *infra* notes 291-98 (United States v. Smith), 306-08 (Regina v. Sharp) and accompanying text.

ana specifically recognize that a gang member can coerce another to join a gang and to remain in the gang.[225] If a gang member can coerce it necessarily implies that another can be coerced. It should also follow that a crime can be coerced although these statutes do not address this situation.

Alternatively, when the youth joins a gang so as to provide himself a measure of protection against an unreasonably dangerous community or when a gang member cannot leave the gang because of a legitimate fear of retaliation or attack by a rival gang, the selection of a person to punish is more difficult. It is unclear exactly who should be punished in this situation. This uncertainty and perhaps the conclusion that no one can be punished under such circumstances should be ameliorated by the fact that these claims will likely be the most difficult to prove to the necessary degree. These cases should also highlight to society that such unreasonable situations do exist and that maybe it is society and these situations that warrant the attention as well as the coerced gang member involved.

Judge David Bazelon, addressing the necessity to punish only to the extent of moral culpability, wrote:

> I strongly suspect that those who fear that my emphasis on moral culpability would jeopardize our safety are not realistic. . . . [I]f community morality cannot condemn certain dangerous actors — then those facts, and the values they reflect, should be confronted. The real question it seems to me, is how we can afford *not* to live up to our moral pretenses and *not* to excuse unfree choices or non-blameworthy acts.[226]

Judge Bazelon's beliefs are quite appropriate to sum up the circumstances in which gang crime would and should not be punished.

IV. Classic Coercion Defenses Offer No Relief

Society rightly mourns and consoles the innocent victims of gang violence. However, it must make sure to capture the entire band of victims in this empathy. Polite society may not want to recognize the gang member victim, but he is a victim nonetheless. A gang member can be coerced just the same as an "ordinary" citizen can be coerced. However, most legitimate gang coercion claims simply cannot survive in the rigid climate of

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225. Cal. Penal Code § 186.26 (West Supp. 1995); Ind. Code Ann. § 35-45-9-4 (Burns 1994).

226. Bazelon, *supra* note 4, at 398.

existing coercion based defenses. So long as the criminal justice system fails to take his peculiar circumstances into account, the coerced gang member is victimized yet again.

There are two traditional coercion based defenses at common law: duress and necessity. Assuming that certain coerced gang members deserve an affirmative defense to tailor their punishment more closely to their culpability, neither common law defense is appropriate. Necessity will not be considered here because it is not meant to cover the gang situation.[227] Duress, on the other hand, is designed to exculpate on certain occasions when one is forced by another to commit a criminal act in fear of one's personal safety. Duress, however, is not responsive to the realities of the gang situation.

Discussing duress in general terms, Professor Joshua Dressler pointed out the moral gap in existing law: "If . . . legal doctrine ought to be, whenever possible, consistent with a coherent moral theory, society's moral intuitions, and the emotions that shape society's reactions to dilemmatic circumstances, current duress law may fail this criteria."[228] This may be even more true in the context of coerced gang members. To its credit, however, classic duress does not miss by much. The purpose is well formed, but the scope of its reach is inadequate. Exploring the current confines of this defense will help illustrate its deficiencies in the gang context and which of its facets need to be addressed and improved to match culpability more accurately with punishment.

A. *Classic Duress*

Unfortunately complicating this analysis, duress is subject to jurisdictional differences. The core of the defense, however, does not vary all that significantly in jurisdictions that have retained relatively close ties to the common law of duress. Although actual enunciations of duress standards or elements may vary, the following discussion of elements underlies most

227. Essentially, "necessity" justifies an otherwise criminal act when the actor is faced with two unreasonable alternatives and chooses the one that produces the lesser harm. *See* MPC, *supra* note 1, § 3.02; WERTHEIMER, *supra* note 200, at 150. Typically, the greater harm needs to be of natural cause (*e.g.*, "a lightning storm forces [someone] to trespass on [another's] land in order to seek safety"). Dressler, *supra* note 66, at 1348.

228. Dressler, *supra* note 66, at 1333.

classic duress defenses.[229] Where appropriate, significant jurisdictional differences will be noted.[230]

Traditionally, duress is an excuse as opposed to a justification.[231] This characterization, however, is not universally accepted; some state criminal codes[232] and scholars[233] treat duress as a justification instead. In the end, the difference between "justification" and "excuse" relates primarily to the manner in which society perceives the otherwise criminal act; both exculpate the actor. An act is justified, "[w]hen the law tolerates, permits, or actively encourages otherwise wrongful, socially harmful conduct."[234] An excuse, on the other hand, admits that an act was wrong, but argues that the actor should not be punished.[235] Duress rightly falls into the latter category.[236] Gang crime, committed by coerced gang members, is not justified; it is not tolerated, permitted, or encouraged. Gang crime is wrong and its commission by a coerced actor does not change this evaluation. A coercion defense for the coerced gang member, as with classic duress, seeks to excuse the actor not justify the act.

As it has been applied, a successful duress defense requires that the defendant prove, by a preponderance of the evidence,[237] that: (1) he was subjected to actual or threatened force at the time of his illegal conduct; (2) this force or threat of force was of such a nature to induce a well-founded fear of impending death or serious bodily harm; (3) he had no reasonable opportunity to

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229. The following analysis of classic duress primarily utilizes federal decisions on the topic. Contrary to the vast majority of state legislatures, which have codified the duress excuse, federal duress law remains entirely judge made. For a state by state breakdown of duress requirements, see Laurie Kratky Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665 app. (1995).

230. In particular, the most significant divergence is in states that have adopted duress standards similar to that of the MPC. MPC, *supra* note 1, § 2.09. Due to the significance of these changes, it would be unreasonably disruptive, at this point, to give MPC duress the attention that it deserves. For this discussion, see *infra* notes 324-34 and accompanying text.

231. WERTHEIMER, *supra* note 200, at 146.

232. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-412 (1989); IOWA CODE ANN. § 704.10 (West 1993); LA. REV. STAT. ANN. § 14.18(6) (West 1986).

233. *See, e.g.*, WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 433 (2d ed. 1986).

234. Dressler, *supra* note 66, at 1349 n.124.

235. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 759 (1978).

236. For a thorough discussion of the distinctions between justification and excuse and the proper placement of duress, see Dressler, *supra* note 66, at 1349-67.

237. United States v. Santos, 932 F.2d 244, 248 (3d Cir.), *cert. denied*, 502 U.S. 985 (1991); United States v. Christian, 843 F. Supp. 1000, 1004 (D. Md.), *aff'd*, 37 F.3d 1496 (4th Cir. 1994).

escape the force or threat of force other than by engaging in the unlawful activity;[238] (4) he did not intentionally or recklessly or, sometimes, negligently put himself in a position where he would likely be compelled to commit criminal acts;[239] and, in some cases, (5) he turn himself in as soon as a safe opportunity arises[240] or does not maintain the illegal activity any longer than absolutely necessary.[241]

Courts have strictly applied these elements and successful duress defenses are rare.[242] This is certainly due to many factors, including: the all or nothing nature of classic duress,[243] the severity of the threat required,[244] and the fact that duress excuses a

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238. United States v. Villegas, 899 F.2d 1324, 1344 (2d Cir.) (first three elements), *cert. denied*, 498 U.S. 991 (1990). Most jurisdictions that follows classic duress holds these first three elements in common. *See* Doré, *supra* note 229, at 697-98.

239. Most jurisdictions hold that intentionally placing oneself in the position where one would likely be the subject of coercion will defeat a duress defense. There is definite disagreement, however, as to whether reckless activity will suffice as well. *See, e.g.*, Doré, *supra* note 229, app. (Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Indiana, Kansas, Kentucky, Maine, Missouri, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, Utah, and Washington statutorily declare that recklessness will bar a duress defense). Mere negligence will create a barrier in only a minority of jurisdictions. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 103-A(3)(C) (West 1983); United States v. Singleton, 902 F.2d 471, 472 (6th Cir.), *cert. denied*, 498 U.S. 872 (1990); United States v. Gant, 691 F.2d 1159, 1162-63 (5th Cir. 1982); United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979).

240. United States v. Bailey, 444 U.S. 394, 412-13 (1980) (usually applied in prison escape cases).

241. United States v. Riffe, 28 F.3d 565, 569 (6th Cir. 1994).

242. *See* Doré, *supra* note 229, at 747 & n.339; Dressler, *supra* note 66, at 1331-32; MPC, *supra* note 1, § 2.09 cmt. 3, at 379.

243. At the guilt phase there is no middle ground; lower levels of duress than that required to acquit can never mitigate the offense to a lesser charge. *But see* MINN. STAT. ANN. § 609.20(3) (West Supp. 1995) (permitting a murder charge to be reduced to manslaughter when the homicide is the product of coercion); WIS. STAT. ANN. § 939.46 (West Supp. 1995) (permitting coercion defense to reduce first degree murder to second degree murder). Imperfect duress claims (actual duress insufficient to acquit) have been successful and readily allowed in sentencing. *See* Doré, *supra* note 229, at 732-34. Such use could achieve roughly the same result (in terms of sentence received) as would mitigation at the guilt phase. However, the two are not identical. The nature of convictions (*e.g.*, murder or manslaughter, rape or sexual assault) surely cast different stigmas independent of the sentence received and with affects reaching well beyond release from prison.

244. Regardless whether the criminal act compelled is minor (*i.e.*, a misdemeanor), classic duress requires a threat the produces a well founded fear of death or serious bodily harm in order to excuse. It seems rational, however, that a lesser threat would be sufficient to coerce a lesser crime. Nonetheless,

person who has "rationally and intentionally chosen to commit an unlawful act."[245] Whatever the reason, the duress defendant faces a distinctly hostile environment in which to assert his claim.

United States v. Bailey[246] exemplifies the strict, rigid, and, often, distrustful environment that has developed around the defense of duress and with which a coerced defendant must cope. A thorough discussion of this decision will provide a helpful context to the remainder of this analysis.

In 1976, Clifford Bailey, James Cogdell, Ronald Cooley, and Ralph Walker were all serving sentences for different and unrelated federal crimes at the New Detention Center of the District of Columbia Jail.[247] On August 26, 1976, these men removed a bar from a window in the jail, climbed through the opening, and escaped down a knotted bed sheet. Outside the facility, the four parted company and remained at large for extended time periods ranging from one month to three-and-one-half months.[248]

Once apprehended, all four men were tried for escape and all four were convicted. At trial, each offered or attempted to offer a defense of duress or necessity. These defenses were based on alleged threatening conditions that existed at the jail — from guard started fires in the cell block to guard inflicted beatings and death threats.[249] The trial court, however, refused to instruct the jury on duress as a matter of law, because the defendants had not satisfied *all* of the required elements for such a defense.[250] The Court of Appeals reversed and remanded, holding that the jury should have been allowed to consider evidence regarding jail conditions. The Court of Appeals reasoned that such evidence was relevant for determining whether the requisite intent to escape was present to sustain a conviction or whether the defendants were merely extricating themselves from unreasonable conditions unrelated to confinement.[251]

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classic duress does not make this distinction; "any proportionality or 'sliding scale' analysis based on the severity of the threat compared to that of the offense committed," Doré, *supra* note 229, at 700, is not permitted. *But see* IND. CODE ANN. § 35-41-3-8 (Burns 1994) (requiring only "force" or "threat of force" for a duress defense to a non-felony); TEX. PENAL CODE ANN. § 8.05 (West 1994) (same).

245. Doré, *supra* note 229, at 747. *See also* Dressler, *supra* note 66, at 1359-60.

246. 444 U.S. 394 (1980).

247. United States v. Bailey, 585 F.2d 1087, 1090 (D.C. Cir. 1978).

248. *Bailey*, 444 U.S. at 396.

249. *Id.* at 398.

250. *Id.* at 399-400 (according to the district court, the defendants had not turned themselves in after they had escaped their coercive conditions).

251. *Id.* at 401-02.

The Supreme Court granted certiorari and Justice Rehnquist, writing for the majority, reinstated the trial court's decision.[252] He disagreed with the Court of Appeals' "heightened standard of culpability" and "narrow definition of confinement,"[253] and quickly rejected its reasons for reversing the trial court as a matter of statutory interpretation. Justice Rehnquist then examined the sufficiency of the defendants' evidence as related to the defense of duress so as to determine whether a jury instruction on duress should have been given. In particular, and more important for this discussion, he applied the defendants' claims and evidence presented to the classic elements of duress. The majority found that the defendants had not satisfied the required elements and, thus, had significantly fallen short of a duress defense. Specifically, they had not turned themselves in to the authorities once they had removed themselves from the alleged harm.[254] Since the defendants failed to offer evidence that would satisfy *all* the required elements of duress, the trial court had properly refused to instruct the jury on such a defense.[255]

Curiously, the defendants had presented evidence that should have remedied this flaw. Each contended that he feared being returned to the same jail as before and subjected to the same conditions and threats and, furthermore, to retaliation for his escape.[256] Essentially, each had claimed that the threats had not yet ceased. The majority, however, discounted this information, stating that, "[v]ague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense."[257] Surprisingly, Justice Rehnquist prefaced this statement by reaffirming that,

> [t]he Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, and not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story.[258]

This function of the jury is essential to its role in the judicial process. Indeed, the jury's primary role is fact finder. Although

252. *Id.* at 417.
253. *Id.* at 408.
254. *Id.* at 415.
255. *Id.*
256. *Id.* at 429-30 nn.7-9 (Blackmun, J., dissenting).
257. *Id.* at 415.
258. *Id.* at 414-15.

the majority accents the primacy of the jury's discretion in this regard, it seems to have limited the scope of evidence relevant for the jury's consideration. If nothing more, the majority surely expressed its distrust of the duress claims of these particular defendants.

Justice Blackmun dissented at length and was joined by Justice Brennan. The main point of Justice Blackmun's dissent was that he would have allowed the jury to consider the duress defense; he recognized that the fears the defendants expressed about returning to custody could be legitimate and that in some cases they surely were.[259] Justice Blackmun believed that, "[i]t is society's responsibility to protect the life and health of its prisoners."[260] Perhaps most important and relevant to the topic of this Article, he observed:

> The real question presented in this case is whether the prisoner should be punished for helping to extricate himself from a situation where society has abdicated completely its basic responsibility for providing an environment free of life-threatening conditions such as beatings, fires, lack of essential medical care, and sexual attacks.[261]

The jury, having considered *all* the evidence, not an appellate court having merely read the record, is surely in a better position to determine the legitimacy of the defendants' claims — to determine whether society has abdicated its protection responsibilities. "This is routine grist for the jury mill and the jury usually is able to sort out the fabricated and the incredible."[262] The jury, not the judge, is the conscience of society.[263]

Gang members urging duress as a defense to their crimes, perhaps even more so than the defendants in *Bailey*, face the distrust and rigidity of the judicial system. Prosecutors frequently target gang members for vigorous prosecution[264] and judges often look to gang affiliation as an aggravating factor at sentencing.[265] If a jury, after hearing all the evidence relating to coercion, also determines that the gang member deserves to be

259. *Id.* at 421-22, 427 (Blackmun, J., dissenting).

260. *Id.* at 422 (Blackmun, J., dissenting).

261. *Id.* at 424-25 (Blackmun, J., dissenting).

262. *Id.* at 432 (Blackmun, J., dissenting).

263. *Id.* (Blackmun, J., dissenting).

264. CONLY, *supra* note 5, at 53-54; Finley, *supra* note 33, at 55.

265. *See, e.g.*, CAL. PENAL CODE § 186.22 (West Supp. 1995); ILL. ANN. STAT. ch. 705, paras. 405/5-4(3.1)-(3.3), ch. 730, para. 5/5-5-3(c)(2)(J) (Smith-Hurd Supp. 1995); State v. Johnson, 873 P.2d 514 (Wash. 1994). *See also supra* notes 33-45 and accompanying text.

punished then he can expect no more. The jury should be the "conscience of society" and should decide which claims are in fact legitimate.

Unfortunately, although the sufficiently coerced gang member defendant deserves to be excused, he will not likely be able to present his coercion claim to a jury. In gang situations, excepting very rare and unreasonably narrow circumstances, the classic defense of duress simply will not work. This is a legal conclusion recognizing that one or more of the elements will probably be lacking. If only one element is missing, the trial judge should not burden the jury with evidence regarding *any* of the elements and need not instruct the jury on the defense.[266] Consequently, classic duress is not a viable plea for the coerced gang member; he will not likely reach the jury. A perusal of the five required elements of classic duress should make this point abundantly clear.

1. Actual or Threatened Force at the Time of the Crime

This element of the duress defense is often termed immediacy, imminency, or impendency and has been strictly applied by the courts. Holding steadfast to the rationale behind this element — denying relief for elusive threats "in the air" and assuring "the existence of a causal connection between the threat and the wrongful act"[267] — courts have held that this element is satisfied only in cases where the threatened harm accompanied the defendant to the crime scene and was ready or threatened to proceed should the defendant renounce the criminal design.[268]

In gang prosecutions, especially under anti-gang statutes that provide special criminal counts for crimes in furtherance of the gang, this element could prove a difficult hurdle to clear. At its most extreme, satisfying this element would require the coerced member to prove that a gun or other harmful threat stood ever-ready to strike him should he ever renounce the criminal plan. Since most gang statute violations are products of membership, to end such a crime the member must leave the gang. Further, immediacy would require the coerced gang member to renounce his allegiance as soon as the forces inducing

266. *Bailey*, 444 U.S. at 415-16; United States v. Villegas, 899 F.2d 1324, 1343-44 (2d Cir.), *cert. denied*, 498 U.S. 991 (1990); United States v. Karr, 742 F.2d 493, 497 (9th Cir. 1984); United States v. Campbell, 609 F.2d 922, 924 (8th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980).

267. Dressler, *supra* note 66, at 1340.

268. *See* United States v. Brooks, No. 92-50296, 1993 WL 455170, at *2 (9th Cir. Nov. 5, 1993); United States v. Campbell, 675 F.2d 815, 821 (6th Cir.), *cert. denied*, 459 U.S. 850 (1982).

membership subside. Any delay would be unjustified because the threat would no longer be immediate. The gang member could be responsible under these statutes for any crime he committed in the interim between the removal of the compelling threat and his departure from the gang. If the threat ever subsided, then there would no longer be a reason to be in the gang. Unfortunately, what classic duress views as an immediate threat does not jibe with the subtleties of gang coercion. If the gang's policy is to reprimand reactively, as is the Imperial Gangster Disciples',[269] the requisite immediacy is lacking. To an even greater extent, if protection needs mandate gang participation, classic duress immediacy is not implicated at all.

The foregoing analysis applies to individual criminal events as well. Analysis of gang culture reveals that gangs rarely coerce proactively, but, more often, reactively.[270] The threat does not usually accompany the actor, but looms to respond to errors and fouls against the gang and its directives. These threats are less than immediate and, consequently, fail the first element of classic duress even though a reasonable person would be likely to experience legitimate apprehension when confronted with such legitimate pressures.

Not surprisingly, the immediacy requirement is not satisfied by generalized fears of retaliation.[271] Instead, a *specific* threat inducing a particular act is necessary.[272] Although not representative of the coerced gang member scenario central to this Article, *United States v. Brooks*[273] is illustrative of the types of gang fears that are insufficient to satisfy the immediacy requirement of classic duress. Ronnie Brooks was convicted for being a felon in possession of a firearm. At trial, Brooks presented evidence about the dangers posed by gang related violence in his neighborhood and his fears of unidentified threats to his life.[274] The trial court, however, refused to instruct the jury on duress or necessity because such fears and threats were not *immediate* threats as required by the defense. The Ninth Circuit affirmed.[275]

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269. *See supra* notes 117-21 and accompanying text.

270. *See generally supra* notes 114-44 and accompanying text.

271. *See* Doré, *supra* note 229, at 701-02; United States v. Villegas, 899 F.2d 1324, 1344 (2d Cir.), *cert. denied*, 498 U.S. 991 (1990).

272. *See* United States v. Stevens, 985 F.2d 1175, 1182 (2d Cir. 1993); United States v. Jennell, 749 F.2d 1302, 1305 (9th Cir. 1984), *cert. denied*, 474 U.S. 837 (1985); United States v. Agard, 605 F.2d 665, 668 (2d Cir. 1979); State v. Toscano, 378 A.2d 755, 761 (N.J. 1977).

273. No. 92-50296, 1993 WL 455170, at *1 (9th Cir. Nov. 5, 1993).

274. *Id.* at *2.

275. *Id.*

The immediacy element of classic duress does not encompass appropriate cases in the gang context where the threat, although very real, is less than *immediate.* A threat is no less compelling, or coercive, when set up to act in an hour or a day or a week. Under the classic application of duress, the fear of being "eight-balled," present in *Helton v. State,*[276] would not satisfy the immediacy requirement, yet there is a real threat to members who want to leave this gang or want to abstain from particular gang activities.

The narrow manner in which the immediacy requirement has been interpreted has prevented classic duress from exculpating in cases of genuine threat; it is especially problematic in gang situations. If "eight-balling" is not an "immediate" threat, surely, the gang member who joins to protect himself in his community does not face an immediate threat. This is troubling; the genuine nature of the threatened harm should satisfy in either of these cases. With regards to "eight-balling," whether the harm occurs *immediately* upon refusing some gang requisite or later that day or week does not alter or lessen the force or reality of the beating. The same is true when one joins a gang to protect himself in the community. So long as the contemplated harm is reasonably likely to occur, a mere postponement should not effect the quality of its compulsion.[277]

The immediacy requirement is founded upon a pragmatic need to discourage defenses based on nebulous threats in the air. In the gang context, however, this threat is often not nebulous and, although sometimes in the air, it can be readily verified by reference to those who previously played the role of the "hero." Provided adequate proof is made regarding the operation and certainty of a threat, then "threats in the air" concerns should not pose a legitimate bar to the protection of a coercion defense. When gang leaders threaten the recruit or his family with physical violence or experience has shown the danger in refusing gang membership, then that recruit's subsequent membership is as coerced as when the gang leaders come over with a gun and physically seize him. If a gang member waits for a threat in the air to become immediate, as contemplated by classic duress, this will usually mean that he is about to be beaten or killed, *immediately.*

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276. 624 N.E.2d 499 (Ind. Ct. App. 1993). *See supra* notes 117-21 and accompanying text.

277. The American Law Institute corrected this seeming impropriety by abolishing the immediacy requirement when it drafted the MPC section on duress. The MPC refers atemporally to force and threatened force. *See* MPC, *supra* note 1, § 2.09. *See also infra* notes 324-28 and accompanying text.

Failing this element alone will preclude a duress acquittal. Thus, although he may have satisfied the purpose behind this element, the street gang defendant will likely have already lost. If the threat is real, the law should recognize it. Current duress law does not.

2. Well Founded Fear of Death or Serious Bodily Harm

The seriousness of an alleged coercive threat is measured by an objective standard — would a reasonable person fear impending death or serious bodily harm? This is a standard that would not seem to cause problems for gang member defendants, at least in the nature of the harm threatened.

Much gang violence (*i.e.*, drive by shootings, armed robbery, murder, group violence in general) lends empirical seriousness and objective reasonableness to the fears associated with gang threats. This is true whether or not the threats induced membership or activity or both. This, of course, assumes certain characteristics of recruitment related threats: one, that they are similar in magnitude to the outward violent manifestations of the gang; two, that the gang has carried out threatened violence on its potential members in the past. Looking at *People v. Cruz*[278] and *Helton*,[279] these assumptions surely are not baseless. Further, with the fear and threat society generally perceives in gangs, it would be hypocritical to conclude that gang members could not fear this violence as well.

Cruz and *Helton* dealt with particularly directed threats, however, coercive forces may be more general as well. In some cases, a gang member may be driven to gang activity by the dangerousness of his environment (in the neighborhood or the school) and the absence of police and other protection. Even here, the nature of the threatened harm, again gang violence, would not likely pose significant difficulties. In this respect, it is the same danger, the same violence, that is relevant, the focus is simply on the entire community instead of on an individual coercive actor.

In general, the nature of gang violence is amenable to this element. That is to say, this component of duress does not effectively preclude the street gang defendant. It is only one of five elements, however, and does not of itself establish a defense.

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278. 518 N.E.2d 320 (Ill. Ct. App. 1987) (recruiting by shooting), *cert. denied*, 526 N.E.2d 834 (Ill. 1988). *See also supra* notes 99-101 and accompanying text.

279. 624 N.E.2d 499 (Ind. Ct. App. 1993) ("eight-balling"). *See supra* notes 117-21 and accompanying text.

3. No Reasonable Means to Escape the Threatened Harm and Not Break the Law

According to the United States Supreme Court, in *Bailey*,[280] if there is any way to avoid the criminal act and also avoid the threatened harm, then the defense of duress will fail. The purpose behind this element is to distinguish cases in which there is no choice but to commit the crime and cases in which an alternative choice, albeit difficult, can be made. This philosophy is clearly expressed by the Tenth Circuit, in *United States v. Lewis*[281] where the court said:

> The [duress defense] does not arise from a 'choice' of several sources of action; it is instead based on a real emergency. It may be asserted only by a defendant who was confronted with a crisis as a personal danger, a crisis that did not permit a selection from among several solutions, some of which would not have involved criminal acts.[282]

Obviously, if it is not reasonable to fear the threatened harm (*e.g.*, the threat is not likely to be carried out or escape is available), then the reasonable choice is simply to ignore the threat. Deciding which threats are reasonably feared and which are not, however, is a difficult and precarious task for one facing the threat. If a real threat is mistakenly perceived as uncompelling, then the threatened person will likely receive a devastating harm. However, if the threatened person acts criminally in response to an unreasonable threat, then the duress defense will not be available. Perhaps easing the burden of selection,[283] if the circumstances surrounding the threat allow, case law on duress often requires the defendant to contact the police before engaging in the criminal act.[284]

Although police involvement is theoretically available in most gang crime situations, this alternative may not be reasonable for the coerced gang member. To the credit of the duress defense, there are two generally recognized exceptions to calling

280. 444 U.S. 394, 410 (1980) (considered this third element the keystone of the analysis).

281. 628 F.2d 1276 (10th Cir. 1980), *cert. denied*, 450 U.S. 924 (1981).

282. *Id.* at 1279.

283. It is uncertain whether the requirement to contact the police complicates the choice of the threatened person, by placing another obstacle in the path of a successful duress defense, or relieves the burden of deciding which threat is or is not reasonable to fear.

284. United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995); R.I. Recreation Center v. Aetna Casualty & Surety Co., 177 F.2d 603, 605 (1st Cir. 1949); United States v. Christian, 843 F. Supp. 1000, 1006 (D. Md.), *aff'd*, 37 F.3d 1496 (4th Cir. 1994).

the police; a course of action that has proven futile need not be pursued nor must an alternative that is unreasonable under the circumstances. Both exceptions are applicable in the gang situation.

First, if experience has shown that it is futile to pursue a particular course of action (*e.g.*, calling the police) to avoid a threat then it need not be attempted.[285] In heavily gang controlled neighborhoods the police do not actively and, certainly, do not zealously patrol the area.[286] In a panel discussion of a group of five gang members living in the Cabrini Green Housing Project in Chicago, the gang members said that the police did not attempt to control the violence. Paraphrasing their response: you know who the police are (whether in uniform or not) because when gun shots sound, they are the first ones running in the opposite direction.[287] If previous calls for help or complaints about unruliness or violence have received no serious response, one threatened need not call the police to relate the present threat. Unfortunately, courts have limited the value of this exception through narrow application.

For example, in *United States v. Gant*,[288] the Fifth Circuit found a lack of futility as a matter of law in rather disconcerting circumstances. In this case, Edgar Gant was confronted in his store by two men he had reason to suspect were going to rob him. Gant retreated to a supply room and emerged with a gun to defend himself. He was immediately arrested by the two men — who happened to be police officers — for being a felon in possession of a firearm.[289] Despite Gant's claim that the police had been slow to respond to a previous robbery at his store, the Fifth Circuit held that this neglect did not establish the necessary pattern of futility.[290]

In the gang context, the Tenth Circuit, in *United States v. Smith*,[291] reaffirmed this tight grip on the futility exception. At his trial for various drug trafficking charges, Brandon Smith

285. United States v. Gant, 691 F.2d 1159, 1164 (5th Cir. 1982).

286. *See generally* CONLY, *supra* note 5, at 8 ("In a gang community, residents are isolated from traditional institutions such as schools and law enforcement . . . .").

287. Panel Discussion, *supra* note 147.

288. 691 F.2d 1159 (5th Cir. 1982).

289. *Id.* at 1162.

290. *Id.* at 1164. *See also* United States v. Scott, 901 F.2d 871, 873-74 (10th Cir. 1990) (alleged failure of the police to respond to unrelated matters did not excuse defendant from contacting the police regarding coercive threats), *cert. denied*, 115 S. Ct. 419 (1994).

291. 63 F.3d 956 (10th Cir. 1995), *petition for cert. filed*, Nov. 14, 1995 (No. 95-6751).

offered a duress defense. Specifically, he claimed that a gang called the VLBs had been threatening his life, had delivered drugs to his home, and, since he was living in their territory, had demanded that he sell the drugs for the gang.[292] The trial judge, however, refused to instruct the jury on this defense[293] and Smith was convicted.[294] The Tenth Circuit affirmed this decision since it believed that Smith could have phoned the police before the drugs had been delivered to his home.[295] Furthermore, even if Smith believed, as he contended at trial, that the police would not have responded to his problem, such amorphous beliefs would be insufficient to satisfy the futility exception.[296]

Second, even if there is no experience of futility, if an alternative is simply unreasonable under the circumstances there is no need to attempt it.[297] Akin to the previous exception, it may not be reasonable for a threatened recruit to call the police if he has had no prior, positive dealings with the police. This conclusion is buttressed by a fair analysis of the perilous position in which a gang recruit may find himself. Police receptivity to a gang member seeking protection is doubtful. The police are not likely to take the complaint seriously, especially in light of recent legislation that, essentially, makes gang membership illegal. It is not reasonable for a recruit to gamble his safety on the questionable response of the police and, in the process, subject himself to potential criminal prosecution. Furthermore, even if the police took the claim seriously, their ability to sufficiently protect the recruit is suspect. To protect the recruit, the police would, essentially, have to fight the gang. Since gangs are organized in various structures, focusing on a few leaders or even all the leaders of any one clique may not subdue the entire gang.[298] It is not reasonable to risk being "eight-balled," as was the case in *Helton*,[299] or worse, in hopes that the police will believe you and then fight the gang for you.

Unlike the first exception, however, recent case law on unreasonable alternatives gives some hope to the coerced gang member. In *United States v. Riffe*,[300] Leonard Riffe was convicted

292. *Id.* at 960, 966.

293. *Id.* at 965.

294. *Id.* at 959.

295. *Id.* at 966.

296. *See id.* at 967 n.5.

297. United States v. Riffe, 28 F.3d 565, 570 (6th Cir. 1994).

298. CONLY, *supra* note 5, at 10.

299. 624 N.E.2d 499 (Ind. Ct. App. 1993). *See supra* notes 117-21 and accompanying text.

300. 28 F.3d 565 (6th Cir. 1994).

for conspiracy to distribute marijuana while in prison and for aiding and abetting the use of the mail to facilitate the distribution of marijuana.[301] At his trial, Riffe pursued a duress defense and offered evidence showing that he was under the threat of immediate harm — a threat of death — should he ever cease helping in the sale of these drugs.[302] The district court refused to present this defense to the jury; since Riffe had not first sought the protection of prison officials the defense of duress was *per se* unavailable.[303] The Sixth Circuit, however, agreed with Riffe that disclosure to the prison authorities would not have been reasonable because Riffe had a well founded fear that the prison would not have been able to protect him from the threatened harm.[304] In applying this exception to duress' strict requirements, the Sixth Circuit recognized that in such lawless situations, seeking help from the prison guards would likely have subjected Riffe to even greater risk and should not be required as a *per se* threshold to a duress defense.[305]

Provided the coerced gang member can satisfy one of these exceptions, the police need not be contacted. The gang situation seems to argue that the police are not a reasonable alternative, however, it is questionable whether courts will hold this to be the case. The decision is necessarily factually intensive.

The purpose of this element is valid. A defendant should be required to show that he had no reasonable alternative but to commit the crime. However, in the gang context, although the ability to avoid the crime may often be limited and unreasonable, case law (*Riffe* excluded) and the tendency of courts to apply this element strictly make it unlikely that the typical coerced street gang defendant will satisfy this element. Furthermore, even if a particular situation affords the street gang criminal the opportunity to contact the police, the value in avoiding the harm is minimal. Unlike more traditional duress scenarios, the coercive force of a gang is not fleeting. The gang is not likely to disappear and even if the police are summoned they will rarely, if ever, be able to permanently relieve the pressure.

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301. *Id.* at 566.
302. *Id.* at 568.
303. *Id.* at 568-69.
304. *Id.* at 570.
305. *Id.*

4. Did Not Intentionally, Recklessly, or Negligently Place Oneself in a Position Where One Would be the Likely Subject of Coercion

Coming to the coercive force or intentionally placing oneself in the path of coercion will, by itself, defeat a duress claim. The criminal law has developed this element to prevent criminals from voluntarily joining conspiracies or associating with known criminals and then claiming that their subsequent criminal activity was coerced. It places the initial responsibility to avoid such dangerous environments on the individual who wants to assert duress as a defense.

In the gang context, a gang member would fail this requirement if he voluntarily joined the gang in the true sense of "voluntarily." In *Regina v. Sharp*,[306] the English courts addressed this very situation. In this case, David Sharp, a gang member, urged duress as a defense to charges of murder and robbery. The trial judge refused to hear evidence on this matter, however, ruling, "that because he had voluntarily joined the gang in the first place, the defense of duress was not available to him."[307] On appeal, Lord Chief Justice Lane summed up the rationale for this decision:

> [W]here a person has voluntarily, and with knowledge of its nature, joined a criminal organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such pressure, he cannot avail himself of the defence of duress.[308]

The appellate court agreed with the trial court and affirmed its decision to exclude any evidence relating to a duress defense.

Recognizing this limitation in the law of duress is appropriate; the relevant consideration for the present discussion, however, is the situation where the gang member did not freely choose to join the gang. Lord Chief Justice Lane recognized this distinction as well, commenting that if the member were coerced (under the typical standards of duress) into joining the gang, then duress may apply.[309] He expressed, however, his hesitance

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306. 1 Q.B. 853 (1987). For an excellent discussion of this case, see Conor Gearty, *Duress — Members of Criminal Organisations and Gangs*, 46 CAMBRIDGE L. J. 379 (1987).

307. Gearty, *supra* note 306, at 380. *See also* Fry v. State, 440 N.E.2d 1133, 1135 (Ind. Ct. App. 1982) (duress defense not available to gang member because he recklessly exposed himself to threats by joining a gang).

308. Gearty, *supra* note 306, at 380.

309. *Id.*

in believing that such a member would lack the ability to escape the control of such a gang.[310]

Lord Chief Justice Lane is surely correct in saying that coerced gang membership would satisfy the requirement that the proponent of the duress defense did not intentionally, recklessly, or negligently subject himself to the coercive force of the gang. If the gang member did not voluntarily join the gang, he should not have difficulty with this element. This, however, is not so broad a concession as to encompass those cases in which the coercive force is not specifically directed at a particular recruit. It leaves open the question whether membership is sufficiently coerced when a gang member did not have a real choice in joining in the sense that he would be subject to a greater and unbearable threat of harm by living in his community or attending school without any gang affiliation.

It is uncertain how classic duress would address such less direct threats. Most likely, the same five element analysis that is required of a duress defense generally would be required to determine whether such associations are sufficiently coerced. For the same reasons that duress will not work for most gang crimes, the defense also will not likely sanction such membership. This may not, however, be an appropriate response. If gang membership is, in fact, caused by such forces, then gang membership is not really voluntary and the gang member is not "intentionally" placing himself in the path of coercive force; the appropriate gang member is not placing himself in the coercive environment. Likewise, these less direct threats should not approach a level of recklessness or negligence. The context in which a gang member faces coercive forces is often his neighborhood or his school. Certainly, his placement in the line of such difficulties should not reach the level of recklessness or negligence since these factors are, as in the case of specifically directed threats, out of his control. Certainly, being unfortunate enough to live in gang controlled territory or going to a school that is more a war zone than a learning institute is completely innocuous. Blame should not be placed on, or more correctly defense denied to, someone based on his address and school district.

In a related matter, possessing qualities that a gang might value would not likely be considered negligent or reckless in so far as attracting the attention of gang recruiters. Being a tough guy or a good fighter should not matter. So much is obvious. Basic freedom, surely does not place a duty on gang prospects to

310. *Id.* at 381.

maintain passive or benevolent personalities. It certainly does not mandate a fragile physique.

An interesting and more borderline case regarding this element of classic duress may lie with gang recruits who have previous criminal, perhaps violent, histories. A recruit has some control over his previous criminal record and criminal activity and an argument could be made that the propensity of these activities to attract the attention of street gangs could be considered negligent or reckless. Drawing this conclusion would require some common knowledge that gangs recruit primarily criminal actors or, at least, a substantial number of criminal actors because of their past activity.[311] This information, however, is not available and the premise is doubtful.

According to a recent study, gang members, before they enter gangs, do not have significantly higher delinquency rates than non-gang members, although it is true that gang members are more criminally disposed than non-gang members once they are within the gang.[312] This study supports the conclusion that it is the gang context and not the criminal tendencies of the individual member that promotes delinquency.[313] This relationship seems to hold at the culmination of gang affiliation as well. Malcolm W. Klein, studying age in its relationship to gang involvement, found no correlation between adolescent gang involvement and criminal activity as an adult.[314] Furthermore, so long as the criminal system recognizes a duress defense for prison escape under the conditions of *Bailey*,[315] where the prisoner had to commit a conscious criminal act to be incarcerated,

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311. If gangs do select recruits based on previous criminal activity and a reasonable person would know that this is the case, then such previous criminal activity could be regarded as negligent in so far as attracting the attention of gang recruiters. Alternatively, if the individual knows that gangs recruit based on past criminal activity and he consciously disregards this fact, then he could be considered reckless.

312. Terence P. Thornberry et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, 30 J. RES. IN CRIME & DELINQ. 55, 68-69 (1993). *Cf.* Williams, *supra* note 13, at 88 ("Most gang-involved youths come from violent backgrounds and find a certain attraction to gang violence.").

313. Thornberry et al., *supra* note 312, at 69 (this study does not attempt to examine the reasons for the increased delinquency of gang members).

314. *See* MALCOLM W. KLEIN, STREET GANGS AND STREET WORKERS 103-39 (1971). Although Klein conducted his research nearly a quarter-century ago, his conclusions were noted and his major premises were re-analyzed and undisturbed in Lasley, *supra* note 19, at 436.

315. *See generally* United States v. Bailey, 444 U.S. 394 (1980) (duress defense available in cases of prison escape provided *all* classic elements are satisfied).

the unconvicted or, even, convicted criminal acts of a gang recruit cannot of themselves preclude an excuse defense.

Although individual characteristics will not likely reach a level of recklessness or negligence necessary to defeat a duress defense, presumably the gang member will need to show specific membership inducing threats. The influence of this element in the gang context, therefore, would be to exclude from the duress defense all but those members who were specifically compelled to join the gang.

5. Surrender as Soon as a Safe Opportunity Arises

This element was discussed extensively in *Bailey*,[316] and will not be rehashed here, except to say that the requirement to surrender is applicable in all cases of duress, not merely prison escape. To satisfy this element, the coerced actor must surrender to the police after the commission of the crime and the removal of the threatened force or must cease the criminal activity as soon as a safe opportunity arises. This element rests quite securely on the premise that if the coerced actor would not have committed the crime but for the presence of threats, then he should naturally cease such activity as soon as the threats subside.

If a gang member has committed a criminal act, not only does he face that offense, but he also may face another individual offense or aggravating factor based on his gang affiliation. Thus, the coerced gang member's duty with respect to this element may be two-fold. The gang member would not only need to turn himself in to the police as soon as the *immediate* threat subsided, but renounce gang membership as well. In the context of gang crime, this element of duress coincides well with the immediacy element described above.[317] These affirmative requirements, however, could have dire consequences for coerced gang members.

First, these requirements assume that the police would be receptive to the gang member's claims. Although there does not seem to be any study on the matter, common sense suggests legitimate pessimism that a gang member would receive a favorable police response to his turning himself in, admitting gang membership and a particular crime, and soliciting compassion because he claims he was coerced. The most likely result of such action, with the current state of the law, is an arrest, a confession, and a not too distant conviction.

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316. *Id.* at 415. *See also supra* notes 247-63 and accompanying text.
317. *See supra* notes 267-77 and accompanying text.

Second, there is no safety incentive in surrender. In the typical coercion case, surrender has some valuable consequence for the coerced actor. In many situations, it allows the actor to escape or seek protection from those forcing his hand. Even in the context of prison escape, surrender highlights the prisoner's unconscionable plight. In the gang context, with the existing state of the law, surrender has no attractive consequence for the unwilling actor. If he tries to avail himself of a duress defense and turns himself in, the coerced gang member faces a substantial risk of gang reprisal. The neighborhood would be even more hostile to a traitor gang member than the environment that precipitated membership in the first place. Furthermore, gangs are different from other coercive actors. The police, simply, cannot protect the complaining gang member from his gang as they would be able to protect most other non-gang coerced actors from their respective threats. Specifically, the police cannot stop or subdue the threat by arresting one or a few people.[318] Police custody, aside from some form of witness protection program, would be less than ideal as well. Since street and prison gangs are significant power centers on both sides of the prison walls,[319] the security gained from incarceration may be no greater than the security in the neighborhood.[320] These difficulties are present regardless of whether the police are receptive to the recruit's claim.

The typical duress victim, although facing a significant hurdle in proving his claim, has incentive to turn himself in because the import of his claim will not be summarily dismissed. Each gang member, on the other hand, is the titular focus of public fear, condemnation, and attack. So long as their is no defense to aid the coerced gang member in his legal battles and no social program to relocate the recruit to a safe environment, the police, society, and the gang renders the affirmative requirement of this element unrealistic in the gang context. As the law of duress currently exists, the surrender element may require nothing short of martyrdom for coerced gang recruits.

One final hurdle, perhaps related to this requirement of martyrdom, deserves mention here. That is, most classic duress jurisdictions refuse the defense, as a matter of law, when homi-

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318. CONLY, *supra* note 5, at 10, 46 (targeting a few key members or leaders does not result in the reduction or destruction of gang activity). *See also* JANKOWSKI, *supra* note 50, at 265.

319. *See supra* notes 133-39 and accompanying text.

320. *See, e.g.*, People v. Ganus, 594 N.E.2d 211, 214 (Ill. 1992) (victim killed inside prison in retaliation for raping a friend of the Latin Kings prior to conviction), *cert. denied*, 113 S. Ct. 1055 (1993).

cide is involved. No matter what the alternative, if any, murder is *never* excused. The inequity of this *per se* rule is perhaps best illustrated by *Regina v. Dudley and Stephens.*[321] Although this was technically a justification case the principle is equally applicable to cases of duress.

In *Dudley and Stephens,* four sailors, Tom Dudley, Edwin Stephens, Ned Brooks, and Richard Parker, were adrift on the open sea about 1600 miles from the Cape of Good Hope after a storm had destroyed their main vessel. They consumed their meager supplies after only three days, then drifted at sea for seventeen more eating only a small turtle and drinking no water. The youngest, Parker, lay sick and close to death on the floor of the boat; he had been drinking sea water and was in worse condition than the others. Approaching starvation and dehydration himself, Dudley told the others that he believed none would survive to rescue unless one was sacrificed and the others feasted on his body. Dudley and Stephens believed that Parker would not survive regardless and selected him for slaughter. The fourth sailor, Brooks, did not consent to this scheme although he did partake of Parker's body once Dudley had killed him. Four days later, having already consumed much of Parker's flesh and blood, the remaining three men were rescued.[322]

Despite the circumstances, Dudley and Stephens were sentenced to death.[323] Even with such egregious facts, Chief Judge Coleridge was not prepared to recognize imminent starvation as a worthy coercive force to exculpate homicide. Indeed, no level of force could ever justify or excuse a homicide. It is questionable, however, whether Chief Judge Coleridge would have been able to satisfy the self-sacrifice he required of Dudley and Stephens had he been the one floating at sea. Would a reasonable person have been able die of starvation? The role of hero or martyr is not a viable standard. It is not accessible to the ordinary person. Indeed, it is an *extraordinary* act. Nonetheless, it is required since a classic duress defense will never excuse when the crime compelled is murder.

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321. 14 Q.B.D. 273 (1884). For an in depth discussion of the social and legal climates in which this case was tried and from which the following factual discussion was taken, see A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW (1984).

322. *See* SIMPSON, *supra* note 321, app. A.

323. Dudley's and Stephens' sentences were later commuted to six months, but by extra-judicial means. *Id.* at 248 (Queen's pardon).

B. *Model Penal Code Duress*

From the foregoing analysis of classic duress and its application to the gang situation, it follows that the coerced recruit cannot rely on its venerable shield. Within classic duress, gang and gang membership crimes find almost insurmountable difficulty with the immediacy, escape, and surrender elements. Additionally, the duty to avoid placing oneself in the path of a coercive force may also pose a problem. Although doubtfully with gang members in mind, but, perhaps, cognizant of the cracks in these elements, the American Law Institute crafted a much more lenient version of duress. The Model Penal Code (MPC) provides a slightly different standard of duress that mops up some of the spillage from the more troubling classic elements.

The MPC section on duress provides that:

> It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.[324]

Although this framework seems quite similar to that of the classic defense, comment to the section indicates that the only real requirement is that the threat be objectively reasonable. That is, the threat must be such that a reasonable person, in the actor's situation, would have committed the commanded crime (*i.e.*, the coerced person acted no different than anyone else).[325] Indeed,

> [b]eyond this limitation to coercive force or threats against the person, no valid reason [is] perceived for demanding that the threat be one of death or even of great bodily harm, that the imperiled victim be the actor rather than another or that the injury portended be immediate in point of time.[326]

Thus, the MPC approach to duress has explicitly eliminated the immediacy and deadly force requirements of classic duress. In addition, the MPC defense is available for all crimes; it is not

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324. MPC, *supra* note 1, § 2.09(1). Subsection (2) denies the defense if the actor is reckless in placing himself in a likely coercive situation and provides that negligence can destroy the defense as well, when negligence suffices to establish culpability for the offense charged. *Id.* § 2.09(2). Subsection (3) eliminates the defense for a woman acting on her husband's command. *Id.* § 2.09(3).

325. *Id.* § 2.09, explanatory note; Dressler, *supra* note 66, at 1344, 1362-63.

326. MPC, *supra* note 1, § 2.09 cmt. 3, at 377.

summarily denied in cases of homicide.[327] The success of the defense depends on the nature of the threat in comparison to the crime committed,[328] not on the satisfaction of several elements.

Within this framework, duress is much more malleable and capable of dividing the culpable from the coerced. By broadening the scope of those amenable to the defense and framing a more realistic question for the trier of fact to decide, MPC duress may more accurately reflect the culpability of the individuals involved. In the gang context, in place of a rash condemnation of all gang crime and gang members, at least the issue would be presented to a fact finder that has had the opportunity to hear all relevant evidence and make an informed, individual decision.[329]

Unfortunately, MPC duress has not been particularly influential. Only six states have adopted duress standards substantially similar to the MPC.[330] A few additional states have enacted individual "reforms." Specifically, eight other states have abandoned the requirement that the harm threatened be death or serious bodily injury.[331] Six other states allow a duress defense in cases of homicide.[332] And, three other states have relaxed the immediacy requirement.[333] Except for Arkansas, Missouri, and South Dakota, none of the states that have enacted anti-gang legislation have also adopted any portion of the MPC defense.

Moreover, although jury instruction on the MPC standard leaves room for individual tailoring, the language of the MPC defense does not adequately address the environmental issues involved in some gang coercion situations. Specifically, the language of the MPC defense contemplates a particular person bringing the coercive threat. MPC duress would not excuse crime committed under the coercive forces of poor socioeco-

327. *Id.* ("It is obvious that even homicide may sometimes be the product of coercion that is truly irresistible . . . .").

328. *See id.*

329. *See* Dressler, *supra* note 66, at 1345 ("[T]he MPC involves the jury (assuming it is not waived) more deeply in the determination of the excuse than is the case at common law.").

330. *See* Doré, *supra* note 229, at 719 & n.216, 720 & n.219, 721-22 & n.227, app. (Alaska, Arkansas, Delaware, Hawaii, New Jersey, and Pennsylvania). For a generalized survey of what standards of duress different states employ, see Dressler, *supra* note 66, at 1343-47.

331. *See* Doré, *supra* note 229, at 719 & n.216, app. (Colorado, Connecticut, Kentucky, Missouri, New York, Oregon, South Dakota, and Utah).

332. *See id.* at 720 & n.219, app. (Connecticut, New York, North Dakota, Tennessee, Texas, and Utah).

333. *See id.* at 721-22 & n.227, app. (Idaho, Kentucky, and South Dakota).

nomic conditions or unreasonably dangerous communities.[334] Nevertheless, in the gang context, a valid coercive force may result from the danger of the neighborhood or, once within a gang, the danger of a rival gang. These situations, although legitimately coercive, might not find protection under MPC duress.

V. Coerced-Gang-Member Defense

The law becomes illegitimate when gaps exist between culpability and punishment.[335] With the current, rigid application of duress, this gap is more than apparent in certain circumstances. Very real coercive threats exist in the gang context that are not addressed by current law. These shortcomings in the application of duress, however, are not shortcomings in the moral force behind the excuse.

MPC duress may cope with some of the deficiencies of classic duress, but even the MPC standard leaves many issues in the gang context unresolved. Specifically, the MPC does not recognize the coercive environmental factors (*i.e.*, unreasonably dangerous neighborhoods) that may play on the recruit's resolve, nor does it attempt to safeguard the martyrial nature of a gang member's coercion plea. Although MPC duress casts a larger net, in its crucial attempts to relax the immediacy and deadly force prongs of classic duress it has not been very influential.

In defense of the duress excuse, the criminal street gang and the communities that breed and perpetuate its growth could never have been anticipated when duress began its venerable career. Nevertheless, new situations and societies require new law that more accurately and adequately redresses the problems of the times. Although the law of duress is inadequate in the gang context and, if it is to protect the coerced gang member, must be reconsidered and remodeled, this Article does not propose to do that. The possibility of changing such an ancient defense is slight. Furthermore, in its place, duress is effective.[336] Unfortunately, its place is not broad enough.

C. Ronald Huff aptly recognized the problem in failing to recognize the situation in which some gang members find themselves: "If we, as a society, do not provide better social support

334. *See* Dressler, *supra* note 66, at 1367-68.

335. *See generally supra* Part III.

336. If a defendant can satisfy the necessary elements according to the strict nature in which they have been applied, then punishment will be withheld and, surely, will be unwarranted. Unfortunately, there are no reported cases of successful duress defenses to highlight; the state cannot appeal from an acquittal.

and better access to the legal routes to success, we are ultimately guilty of 'blaming the victims' when some of these young people turn to gangs and crime to fulfill their needs."[337] This Article will exploit the unique situation of the coerced gang member to fashion a new coercion-based defense that will more precisely match his culpability with his punishment. This new defense will allow the level of punishment to more accurately reflect the moral culpability of those who, as things now stand, are doubly victimized — first, by coercive gangs and/or neighborhoods and, second, by the criminal justice system.

Not every gang member or every act of violence by an otherwise eligible member should or will benefit from this defense. The moral force necessitating the excuse requires a limitation on the eligible class. Although classic duress is inadequate, perhaps outdated, its elements provide an excellent model from which to craft a more equitable coercion defense. In an effort to match culpability with punishment or, in context, to avoid punishing non-culpable gang members, a member's otherwise criminal acts should not be punished when the following three elements are met. First, the gang member did not join the gang by free choice. Second, within the gang either force, credible threat of force, or neighborhood exigencies precluded safe exit from the gang's ranks. Third, the gang member had no reasonable opportunity to avoid the criminal act. And where these three elements are not met sufficiently to exculpate, their partial satisfaction should serve at least to mitigate a gang member's guilt. Although these elements are similar to classic duress, their proper application in the gang context will reveal significant differences.

A. *Required Elements*

1. The Gang Member Did Not Join the Gang by Free Choice

Similar to the requirement of classic duress requiring that the defendant not intentionally, recklessly, or negligently place himself in the path of a likely coercive force, this first element of the coerced-gang-member defense ensures that the coerced gang member is a true victim of the gang and not a willing member compelled to act against his wishes. Specifically, to satisfy this element, the actor must have joined the gang either under legitimate force or threat of force from within the gang or under reasonably perceived needs for safety or protection.

337. Huff, *supra* note 9, at 34.

The first class of relevant threats — from within the gang — is likely the smaller, yet more compelling, category of this element. The study of gang recruitment tactics is rudimentary,[338] however, and documented cases of this type of recruitment are few. Nevertheless, existing evidence argues that this category does exist. The Cook County State's Attorney's Office estimated that intimidation played a role in recruiting about twenty percent of new gang members.[339] Although this intimidation may include the second recognized class of threats in this element,[340] there is reason to believe that part of this twenty percent is filled by this first class of forced membership. For instance, in *People v. Cruz*,[341] the Ambros street gang would shoot its recruits to *encourage* membership. The prosecution did not deny this tactic, but, rather, adopted and argued it themselves. The Ambros' tactic would support a defendant in proving this element; the situation, however, need not be so compelling.

With regards to the necessary force, any moderate level of force would suffice. Although "moderate" is not particularly descriptive, it is meant merely to signify that the force need not be life threatening, but must be more than a minor inconvenience (*e.g.*, a strong pinch on the back of the arm is not enough). A force that a reasonable person would go to lengths to avoid is perhaps the best description.

To suffice as a threat from the gang itself, the threat needs to be legitimate and reasonably feared. Although particular cases will flesh this out, the threat need, at least, be one that a reasonable person would fear and one that is legitimately believed will be carried out should the recruit not join. This test is primarily objective and partially subjective. It is objective in that the threat must be one that a reasonable person would fear. It is subjective in that the particular defendant must personally fear the threat. In this regard there is no threshold level of severity that the threat must reach. Since membership in the gang, not criminal activity, is the object, the threat is measured only by the reasonableness by which it is feared. The test is also objective in that the legitimacy of the threat (the likelihood that it will be carried out) needs to be reasonably likely. And, it is again subjective in that the particular proponent of the coercion defense needs to personally have believed in its legitimacy. A threat that no one besides the defendant would have taken seriously or one

338. CONLY, *supra* note 5, at 19.

339. *Id.*

340. Reasonably perceived needs for safety and protection.

341. 518 N.E.2d 320, 321 (Ill. Ct. App. 1987), *cert. denied*, 526 N.E.2d 834 (Ill. 1988).

that, although reasonable to fear and likely to occur, the defendant did not take seriously simply will not suffice. Commentary to MPC duress provides some useful insight into the selection of these criteria. Specifically, legal standards of conduct cannot depend on an individual's capacity to conform to the requirements of the law; the fact that the individual actor lacked the fortitude to avoid the threatened harm without joining the gang is important only to the extent that a reasonable person would also be unable to do so.[342] In sum, this element is satisfied when the pressures of the circumstances, not merely the frailties of the individual cause the defect.

The second class of "threats" that will satisfy this element are reasonably[343] perceived *needs* for safety and protection. Stress on the word "need" is significant. An increase in safety that can be achieved by joining a gang will not suffice if other, more conventional, means are available. The youth must have joined the gang to avoid a serious and unreasonable danger that would otherwise remain unaddressed. Within this class are those gang members who reasonably fear their community and the prospects of coping essentially alone in this hostile environment. Within this class are those gang recruits who see their neighborhood or their school as a dangerous place to be. Similarly within this class are those recruits who see gang membership as a necessary evil to getting to and surviving at school.[344] In such cases, the gang member is not a member because he placed himself in a dangerous situation, rather, he is a member because he was otherwise unable to extricate himself from an unreasonably dangerous environment.

Incorporated into this class is the further requirement that joining the gang must subdue the incipient threats. No matter how valid the actor's fears and protection needs, if the gang does not quell these anxieties, then gang membership is not necessary or effective to avoid the threat and will not satisfy this element.

A jury may have some difficulty applying the objective component of the test for this class of threats (*i.e.*, deciding whether a reasonable person would have felt a need to join the gang). The gang environment is foreign to most potential jurors. Presentation of evidence regarding the pervasiveness of violence in the community, however, should allow for a reasoned decision. Such

342. *See* MPC, *supra* note 1, § 2.09 cmt. 2.

343. Throughout the remainder of this Article, the words "reasonable" and "legitimate," when used as standards to judge conduct, threats, or beliefs, should be read to invoke the objective/subjective analysis described *supra* in the text paragraph preceding this note.

344. *See supra* notes 75-80, 109-12 and accompanying text.

evidence should be able to explain why gang membership may provide greater protection from everyday threats than would living outside the gang and relying on ordinary police protection.

Although gang membership also raises the specter of intergang warfare and, thus, the potential for greater harm, the casualties of these battles are not limited merely to gang members. Often non-gang members and innocent bystanders are caught in the violence. Thus, abstaining from gang membership is not certain to limit such threats. Furthermore, non members are on their own in the battle. At least the gang member has the support of his gang. So long as a reasonable person sees the protective function of the gang (for this reason or another) and also determines that this benefit is not sufficiently available from more conventional means, this test is satisfied.

The purpose behind this second class of threats leading to gang membership is to recognize situations where the gang member has taken upon himself the responsibility for securing his basic safety — safety that society should assure. This class supplies a viable context for answering the essential question posed by Justice Blackmun's dissent in *United States v. Bailey*: "whether the prisoner should be punished for helping to extricate himself from a situation where society has abdicated completely its basic responsibility for providing an environment free of life-threatening conditions . . . ."[345] The answer for purposes of this first element is no. Although Justice Blackmun wrote in the context of prison escape, the reasoning and the policy behind his argument applies equally well to the gang controlled neighborhood. Specifically, some gang members, through gang membership, are helping to extricate themselves from the dangers of the neighborhood and are affording themselves a level of protection that most assume without thought but which society is not providing in all locales. This inequality makes recognition of such threats all the more compelling. Justice Blackmun may agree: "The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions."[346]

An evaluation of threats will be required for all three elements to this defense. It is important to recognize, here and throughout, that the gang member need not challenge the threat so long as he has reason to believe it will be carried out. Likewise, the threat need not be immediate in the sense of classic

345. United States v. Bailey, 444 U.S. 394, 424 (1980) (Blackmun, J., dissenting).

346. *Id.* at 435 (Blackmun, J., dissenting).

duress; there is no temporal limitation. So long as the threatened harm will proceed or is reasonably believed will proceed as a direct consequence of the member's action or inaction, this element is satisfied. There is no sense in refusing to recognize the coercive value of threats simply because they do not hover over the unfortunate victim ever-ready to strike. If the threat effectively deters or compels certain activities and is generally known to exist against a community or group, it may be coercive. The Imperial Gangster Disciples are no less intimidating by threatening the "eight-ball"[347] than they would be if they stood over a gang member poised to inflict the beating. In the gang context, where the coercion claim is legitimate, the gang member has no escape. Therefore, whether the threatened harm will result immediately or later that evening or week does not govern the force of the threat. Time is an appropriate consideration only in determining whether a result is reasonably certain to occur. The greater the temporal gap the more difficult it will be to prove the necessary consequence; establishing an inability to avoid the harm may a pose higher hurdle.

Where legitimate cases of intimidating gang recruitment exists the argument is strongest that the recruit lacks moral culpability for joining or, at least, that his gang affiliation should not destroy an otherwise valid defense. Coercive-neighborhood arguments are valid as well. In these situations, the legitimacy of the criminal justice system requires some means for taking coercive factors into account in adjudicating anti-gang statute violations, RICO prosecutions, and common law criminal violations. Because there is a definite stigma and fear associated with gang related crime, mere prosecutorial discretion is not enough. Some state prosecutors are elected officials and the public, without knowing all the facts surrounding individual defendants, would likely be quite hostile to a prosecutor who dismissed cases against admitted gang members. The very sentiment that fuels the war on crime elects and reviews the prosecutor's office. Even where this defense legitimately applies, a prosecutor is not in the best place to terminate prosecution and should not be put in the position of risking social censure for attempting to reach a just result. Furthermore, the current trends in the prosecution of gang cases indicates a desire to punish to the maximum extent.[348] The legitimacy of the coercion at play needs greater

347. *See supra* notes 117-21 and accompanying text.

348. Typically, experienced gang prosecutors and senior attorneys prosecute gang cases, plea bargaining is rare, and the general policy is to seek maximum penalties. CONLY, *supra* note 5, at 53-54.

recognition to afford the appropriate protection. A jury that hears all of the surrounding evidence would be much better placed to apply even-handed justice to such a difficult situation.

2. Within the Gang Either Force, Credible Threat of Force, or Neighborhood Exigencies Precluded Safe Exit from the Gang's Ranks

Since the goal of this coerced-gang-member defense is to protect the non-culpable gang member from punishment for his gang membership and the involuntary crimes he commits while a member of a gang, it follows that he must not have been able to leave the gang at will. If the gang member is able to leave the gang whenever he so desires, then, when confronted with a gang directive to commit a crime or when the threat that caused his initial membership subsides, his simple choice would be to quit. If he cannot freely quit, if coercive forces restrict his exit, then his continued gang involvement is understandable and it will satisfy this element.

Force, threat of force, or neighborhood exigencies can all supply the necessary pressure. With respect to the "force" or "threat of force" classes of this element, the danger must emanate from the gang itself. In terms of seriousness, the "eight-balled" or "get violated" reprimands used by the Imperial Gangster Disciples, in *Helton v. State*,[349] provide formidable examples of possible activities that would satisfy the lower end of this element. It is doubtful that these devices were life threatening, but so much is not required. These threats surely were an objectively reasonable deterrent to safe exit for Imperial Gangster Disciple members. So long as an actual (moderate)[350] force was present or the threats were legitimate and reasonably feared[351] this element is satisfied.

A second (or third) class of threats precluding safe exit recognizes the exigencies of community life as a possible coercive force. This category is designed to recognize the difficult situation that a gang member faces when he leaves his gang. According to the real life testimony of five gang members from the Cabrini Green Housing Project, there is very little opportunity to

349. 624 N.E.2d 499 (Ind. Ct. App. 1993). *See supra* notes 117-21 and accompanying text.

350. For an explanation of the severity required of a "moderate" force, see *supra* text paragraph following note 341.

351. For a discussion of the objective/subjective standard implicated here, see *supra* note 342 and accompanying text.

make a clean break from a gang.[352] The threat from rival gang members may never disappear. Rival gangs are often oblivious to or unwilling to recognize a gang member's exit. Furthermore, if the gang member originally joined due to reasonably perceived needs for safety and protection, such threatening conditions may take time to remedy.

If there were some way to escape the danger zone, perhaps this class would lose its legitimacy. However, such means for escape must be dealt with on an individual basis. For the typical gang member the economics that left no alternative to joining the gang (*i.e.*, unable to move to less gang afflicted area) will not likely subside while in the gang.[353] This class of neighborhood threats, like much of this defense, relieves the gang member from the demands of self-sacrifice in the name of society. So long as a reasonable person, cognizant of the threat posed by rival gangs, would not feel safe outside the gang this element is satisfied.

In some cases, gang members may naturally age out of their gangs. Certainly, all members do not maintain their gang affiliation and activity until death. Studies have suggested that gang involvement tends to diminish as members reach adulthood.[354] The average or natural point of this break is uncertain, however, and it has been suggested that gang members are continuing their gang involvement to a later age than has previously been the case.[355] Regardless of the validity of this assertion, those at the margins of this natural separation remain equally endangered, by rival gangs, as do members who separate in the "prime" of their gang careers. Furthermore, recognizing that a member may eventually age out of his gang involvement does not diminish his potential necessity for current safety and protection.

352. Panel Discussion, *supra* note 147. *See also supra* notes 147-49 and accompanying text.

353. This is not always the case. Economic welfare can improve where distributions from drug sales economically empowers the individual gang members.

354. Lasley, *supra* note 19, at 434 (citing Horowitz, *supra* note 18; Huff, *supra* note 5; Maxson & Klein, *supra* note 22; James F. Short, *New Wine in Old Bottles? Change and Continuity in American Gangs*, *in* GANGS IN AMERICA, *supra* note 18, at 223).

355. Lasley, *supra* note 19, at 434 (citing RUTH HOROWITZ, HONOR AND THE AMERICAN DREAM (1982); JOAN W. MOORE, HOMEBOYS (1978); Jeffrey Fagan, *Social Processes of Delinquency and Drug Use Among Urban Gangs*, *in* GANGS IN AMERICA, *supra* note 18, at 183; James Diego Vigil, *Cholos and Gangs: Culture Change and Street Youth in Los Angeles*, *in* GANGS IN AMERICA, *supra* note 18, at 116). Lasley's analysis of the aging of gangs failed to prove this aging phenomenon statistically, however, it also did not disprove or dispute its existence. Lasley, *supra* note 19, at 447.

This element does not require that quitting the gang is categorically impossible. Rather, a gang member satisfies this element when he has no objectively reasonable choice other than to continue membership. The law should not require heroism; it should be responsive to reality.

3. The Gang Member Had No Reasonable Opportunity to Avoid the Criminal Act

The ultimate standard for this final element is well phrased by Justice Rehnquist's majority opinion in *Bailey*: the defense will fail if the gang member has a reasonable, legal opportunity to avoid the criminal act and the harm.[356] The moral import of this element is obvious. If the youth could avoid gang membership or criminal activity once within the gang and could also avoid the penalty "compelling" such acts, then there is no overwhelming coercive force and no coercion defense. On the other hand, if refusing the criminal act would necessarily result in serious harm, then the gang member is put to a choice for which he should not be held criminally responsible. The volitional defect required in the coerced-gang-member defense is similar to that in classic duress; they are not identical, however.

When gang leadership orders an act done under penalty of death or great bodily harm,[357] the gang member faces an unreasonable choice. With this defense, however, unlike classic duress, a well founded fear of death or serious bodily injury is not required to excuse for all crimes. Instead, whether a particular threat makes the choice to commit a specific crime unreasonable depends on the nature of both the threat and the crime. For the coerced-gang-member defendant, the necessary degree of harm threatened depends on the severity of the crime committed. Specifically, a lesser threat is sufficient to coerce and excuse a lesser crime.[358] For serious crimes, such as murder or rape, perhaps a threat of death would be required. However, for offenses such as robbery or simple assault, a lesser harm would suffice. So long as the defendant presents some evidence of a coercive threat, it will be the jury's duty, as the conscience of society, to decide its sufficiency in light of the crime committed.

356. United States v. Bailey, 444 U.S. 394, 410 (1980).

357. *See, e.g.*, United States v. Campbell, 675 F.2d 815, 817 (6th Cir.) (defendant gang members were required to rob a bank under penalty of death), *cert. denied*, 459 U.S. 850 (1982); People v. Ganus, 594 N.E.2d 211, 214 (Ill. 1992) (defendant gang member was required to kill a fellow inmate under penalty of death), *cert. denied*, 113 S. Ct. 1055 (1993). *See also supra* notes 122-31 and accompanying text.

358. *See also supra* note 244.

There is genuine debate as to whether classic duress should ever excuse in cases of homicide.[359] There is a definite moral imperative against killing another. Indeed, disabling the duress defense for such a crime, Blackstone wrote: "[the coerced actor] ought rather to die himself, than escape by the murder of an innocent."[360] It may, in fact, be more honorable to sacrifice one's own life, however, the law should not require it.[361] So long as the threat is sufficient, there is no reason to conclude that homicide cannot be legitimately coerced. For example, the imminent starvation present in *Dudley and Stephens* surely was sufficient.[362] If the alternative is, indeed, certain death, it is unduly harsh for the law to demand self-sacrifice. Thus, no such limitation shall accompany this new coercion defense.

As with the previous two elements, not only can the gang affect the free will of individual members, but so can the community. A gang member who refuses to act criminally may lose his honor. Losing honor within the gang can lead to expulsion.[363] If it is unreasonably dangerous to leave the gang it should be equally unreasonably dangerous to be ousted. If the dangers of community life preclude exit from the gang in the first place and if refusing criminal gang enterprises would lead to exile from the gang, then the gang member cannot reasonably refuse the act. So long as the threat is legitimate and unreasonable, the moral push behind the defense must protect these transgressions as well. The jury will be able to decide what level of crime such coercive forces may excuse.

Although the coerced-gang-member defense could apply to smaller gangs, the stronger moral argument accompanies larger organizations. The reason is pragmatic. For cases relying on active gang influence, in order for the defense to apply, the gang actor must prove that he was "controlled" by the gang, both in joining and in acting according to the gang's wishes. The larger and more powerful (and organized) the group, the greater control it should be able to exert over its domain and the less power

359. For a discussion of this topic, see generally Dressler, *supra* note 66, at 1367-74; Gerald A. Williams, Comment, Tully v. State of Oklahoma: *Oklahoma Recognizes Duress as a Defense for Felony-Murder*, 41 OKLA. L. REV. 515 (1988). *See also* Doré, *supra* note 229, app. (listing crimes for which individual state codes declare the duress defense to be unavailable).

360. 4 BLACKSTONE, *supra* note 25, at *30.

361. *See* MPC, *supra* note 1, § 2.09 cmt. 2, at 375 ("The proper treatment of the hero is not merely to withhold a social censure; it is to give him praise and just reward.").

362. *See supra* notes 321-22 and accompanying text (defendants floating at sea for seventeen days without food or water).

363. Kennedy & Baron, *supra* note 50, at 89-90.

to change or resist will lie with mere members. Conversely, the smaller the group, the less its manpower, and, arguably, the less its controlling force in the greater community. This relationship is true as well for coercive-neighborhood arguments, in which the gang member must argue that the dangers attendant to living in the community require some measure of gang protection. As gang size and strength grows, so will ability to protect members from neighborhood dangers. Likewise, size will be positively correlated with a particular gang's contribution to this sense of danger.

Analyzing the merits of this defense from both moral and policy perspectives, one cannot lose sight of the previous discussion of gangs and influences to gang membership. Gang members are not always, or even often, hardened criminals or callous delinquents. Studies have shown that gang members are not necessarily delinquent before they enter the gang, nor highly delinquent upon exit.[364] Some gang members are merely scared or disillusioned kids who live in highly dangerous communities. For these gang members, friends (*i.e.*, gangs) are the only viable source of protection. The police department and the criminal justice system do not operate to help these individuals. In fact, with legislation that makes gang membership illegal, they operate to contain and convict all gang members. So when considering what is a reasonable fear or threat and what conduct is unreasonably dangerous, it must not be forgotten that ordinary means of protection and socialization are largely unavailable in gang-infested neighborhoods. It must be remembered that in this harsh environment rash words and ill-feelings often result in action. Death threats and threats of serious injury are always troublesome; they are even more troublesome when experience has shown their legitimacy.

The satisfaction of the above three elements of this new coerced-gang-member defense will help match the punishment that a gang member receives for his gang related crimes with his individual culpability for such acts. So long as all three elements are satisfied, morality and justice argue for compassion; the gang member should be excused.

B. *Abandoning the All or Nothing Defense*

Since we have shaken the constraints of classic duress, we are not limited to its all-or-nothing exculpatory consequences. This is enormously beneficial. It is possible that the limited success of

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364. Thornberry et al., *supra* note 312, at 68-69. *See also supra* notes 312-14 and accompanying text.

classic duress defenses is partly attributable to this stark dichotomy.[365]

Certainly, judges and juries have been wary of acquitting confessed "criminals" simply because of the circumstances of their crimes. This does not mean, however, that the judge or jury believed that compassion was undeserved. Experience has shown that, when the opportunity presents itself in difficult cases, juries tend to reach compromise verdicts.[366] For example, in borderline murder cases, a jury would rather find the defendant guilty of manslaughter than convict for murder or acquit entirely. The problem is that with most coercion defenses, the opportunity to compromise is lacking.

The line between guilt and innocence in coercion cases is not always concrete. The law should allow the judge or jury to express this uncertainty in their verdict. As a mitigator, the coerced-gang-member defense would allow the judge or jury to recognize the forces at play on the defendant's free will, even if they deemed the coercion insufficient to excuse.

Discussing classic duress in his opinion in *Lynch v. Director of Public Prosecutions for Northern Ireland*,[367] Lord Edmund-Davies considered the viability of duress as a mitigating factor. He argued that allowing duress to function other than as a total excuse would unduly restrict the number of defendants willing to assert it as a defense. This concern was echoed by Ian Dennis in his commentary on duress; applying duress as a mitigating factor will reduce the number of defendants willing to assert it, because they will necessarily have to admit to the crime without any real possibility of acquittal.[368] This fear is, perhaps, best illustrated by the dangers associated with inconsistent pleadings in coercion cases.

Although inconsistent pleadings are permitted in criminal law, when one such pleading is classic duress, this strategy is not a realistic alternative. For a coerced actor, an inconsistent pleading would require that he claim he was not guilty or, in the alternative, that he was coerced into committing the act. The problem is in the presentation to the jury. Typically, a defendant need not present any defense to the criminal charges against

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365. *But see* MINN. STAT. ANN. § 609.20(3) (West Supp. 1995) (permitting a murder charge to be reduced to manslaughter when the homicide is the product of coercion); WIS. STAT. ANN. § 939.46 (West Supp. 1995) (permitting coercion defense to reduce first degree murder to second degree murder).

366. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 230, 263, 280, 405, 477 (1966).

367. 1975 A.C. 707.

368. Ian Dennis, *Developments in Duress*, 51 J. CRIM. L. 463, 472 (1987).

him. Duress and the new coerced-gang-member defense are both affirmative defenses,[369] however, and, as such, the defendant would need to present evidence to support the required elements. During this presentation he would necessarily have to admit that he committed the crime. The alternative nature of the pleading would be impossible for the jury to maintain. So long as the prosecution addresses every element of the charged crime, the burden of persuasion is likely a foregone conclusion.

Removing the all-or-nothing gamble might, in fact, be detrimental to one who is partially responsible and, in such cases, may discourage coercion pleas. Although duress or the coerced-gang-member defense may be used less frequently if capable of mitigating as well as excusing, this is no argument against such application.

The clean slate that accompanies the coerced-gang-member defense affords the opportunity to incorporate a jury compromise provision. In particular, gang membership, to the extent coerced, should be a mitigating or exculpating factor depending on its degree and pervasiveness. Allowing coercion to mitigate as well as to exculpate is morally correct. If one objective of criminal law is to limit punishment by the degree of culpability present, then the potential use of coercion as a mitigating factor can only serve to facilitate this match. If one who commits a crime absent any coercive force is more responsible than one who has been threatened with harm should he refuse, then the two should not be punished the same. However, if mitigation is not permitted with a coercion defense and if a jury decides that the threat was not sufficient to exculpate entirely, then the two criminal actors would be punished the same. Providing a sliding scale of excuse would permit the appropriate distinction.

The freedom to use coercion as a mitigator is especially prudent in the gang context, where public sentiment will surely limit the jury's desire to acquit outright. Furthermore, allowing coercion to mitigate as well as to exculpate will encourage defendants whose coercion claims would doubtfully serve as a total excuse to expose the underlying nature of their criminal activity. These benefits outweigh the uncompelling fears articulated by Lord Edmund-Davies and Dennis.

The sharp line between conviction and excuse that is drawn by classic duress is unreasonable. Necessarily, there must exist some point at which a threat insufficient to excuse becomes sufficient. On one side of this line no punishment would be given.

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369. For a further discussion of the evidentiary implications of affirmative defenses, see *infra* notes 372-75 and accompanying text.

On the other side, notions of deterrence would warrant full punishment with all the moral difficulties this entails.[370] Also on this side, the problems associated with reformation and rehabilitation are left unchecked.[371] A retributive theory of punishment and a defense which allowed the jury to determine, on a sliding scale, exactly what conviction or sentence a defendant deserved would help erase this line.

C. *Logistical Considerations*

1. Limiting the Influx of Coerced-Gang-Member Pleadings

Opening the door for the coerced-gang-member defense also opens the door for satellite hearings on the poverty and dangers of gang controlled neighborhoods and the tyranny of gang leadership. Admittedly, allowing such a defense could divert focus from the specific criminal act on trial and, on occasion, would expend scarce judicial resources pursuing meritless tangents. This is a necessary evil, however, whose effects will likely be limited by the evidentiary requirements of affirmative defenses in general and the sheer danger in implicating a gang.

As with other affirmative defenses, the burden of proof is initially on the defendant to present evidence from which a reasonable juror, who believed those facts, could find in his favor.[372] With classic duress, so long as the defendant makes a prima facie case in support of the requisite elements, even if the evidence is weak or of doubtful credibility, it should be given to the jury.[373] Indeed, "[a] trial court commits reversible error in a criminal case when it fails to give an adequate presentation of a theory of defense."[374] The converse of this rule is also true. If the defendant fails to allege appropriate facts the judge may preclude presentation of *any* evidence on the subject and may refuse to give a jury instruction on the matter.[375] Furthermore, even if evidence

370. *See supra* notes 164-65 and accompanying text.

371. *See supra* notes 166-74 and accompanying text.

372. United States v. Bailey, 444 U.S. 394, 415 (1980); Mathews v. United States, 485 U.S. 58, 63 (1988).

373. *See* United States v. Newcomb, 6 F.3d 1129, 1138 (6th Cir. 1993).

374. United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986).

375. *Bailey*, 444 U.S. at 416 ("If . . . an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense."); United States v. Campbell, 675 F.2d 815, 821 (6th Cir.) ("If evidence is introduced, but it is apparent that all of the requirements of the coercion defense are not addressed, the trial court is not obligated to allow the evidence to remain for consideration by the jury."), *cert. denied*, 459 U.S. 850 (1982).

is presented to the jury, the jury is well equipped to weed out legitimate claims from mere self-serving stories. Dennis argues: "Commonsense suggest[s] that where there are in fact no reasonable grounds for holding a particular belief it will only be in exceptional cases that a jury will conclude that such a belief was or might have been held."[376]

As with classic duress, raising the coerced-gang-member defense would be risky. In doing so, the defendant admits the criminal act, hoping to disprove his responsibility. The inherent danger in urging this defense is manifest and is increased in the gang context by the fact that the proponent must necessarily implicate his gang and its leadership. As the distinctions between street and prison gangs blur, pleading this defense will raise definite safety issues for the defendant. If his fears are not deemed reasonable or sufficient enough to excuse the crime at trial, the basis for these fears will likely be much stronger afterwards. Whether the defendant is sentenced to prison or allowed on the street, the gang will have access to him.

Gangs pose a much greater retaliatory threat than smaller, less organized criminals and conspiracies. In this respect, the retaliatory implications of this defense should help it to police itself. Due to the strength of the typical gang, this defense is more self-policing than classic duress and there has been no flood of classic duress defenses going to trial. It is reasonable to conclude that the frivolous or doubtful coerced-gang-member defense will rarely be offered.

Finally, so long as the moral basis for the coerced-gang-member defense is valid, an increase in gang defendants seeking its protection is not necessarily harmful. Although uncertainty will necessarily accompany initial application of this defense, such uncertainty is a natural consequence of any new rule of law or the extension or contraction of existing law. As more cases are tried and issues appealed, the defense will assume more definite limits. Any additional work this evolution may demand of appellate courts is a positive and necessary consequence. Discussing a similar argument against the extension of duress to cases of murder, Dennis observed, "If considerations of rationality and fairness suggest the extension of a recognised defence to one restricted class of cases to which it has not hitherto applied, it surely cannot be an answer to these claims that we must expect the defence to be used and tested."[377] Indeed, Dennis captures this argument quite well; if the defense is valid, society, in the

376. Dennis, *supra* note 368, at 478.
377. *Id.* at 468 (emphasis omitted).

interest of justice, should encourage its employment and further definition.

2. Protection: Creating an Incentive to Plead Coercion in Legitimate Cases

The crux of the preceding self-policing argument is that pleading the coerced-gang-member defense will pose definite dangers to the gang member proponent. This is beneficial in that it will discourage frivolous claims. The justification behind the defense, however, requires that it be available in appropriate circumstances and provide adequate relief when successful. These legitimate users require some measure of protection, some incentive to plead the defense. It is not enough to place them at their own risk in offending and attacking the gang and its leaders. Some protective program is necessary to remove the successful coerced-gang-member defendant from the oppressive environment that led him to gang membership and criminal prosecution.

If no provisions are made for the successful defendant, he will return to the hostile environment that gave rise to the defense in the first place. The difference, now, is that his "friends" may well have turned to enemies — a highly organized, highly dangerous group of enemies.[378] There is no other escape for the successful coerced-gang-member defendant. The fact that he is economically unable to remove himself from the community is a given; without this lack of mobility the defense must fail.[379] In this regard, the mobility sufficient to destroy this defense is not established by access to cars or public transporta-

378. Gang retaliation against witnesses in gang prosecutions and even against gang prosecutors has become commonplace and certainly is an important consideration for anyone who would challenge or implicate the gang in court. *See Crime Control Priorities, Hearings Before the Senate Judiciary Comm.*, Feb. 14, 1995, *available in* LEXIS, Legis Library, Congressional Testimony File (statement of Thomas A. Constantine, Administrator Drug Enforcement Administration) (in prosecution of violent crack cocaine gang eleven witnesses were *fatally* shot and the home of another was set on fire); John Gillie, *Threats Against Witnesses Lead to Mistrial in Gang Slaying*, NEWS TRIB., Dec. 8, 1995, at B1 ("[Defendant] told his attorney they were sure to win because the prosecution's main witnesses would not be testifying because they had been threatened."); Kevin Cullen & Shelley Murphy, *Account of Killing Hints Prosecutor was Targeted*, BOSTON GLOBE, Sept. 27, 1995, at 1 (investigators found no evidence to explain the murder of a gang prosecutor except for his recent appointment to prosecute cases involving some of Boston's most violent gangs).

379. If the coerced-gang-member defendant had the means to leave the coercive community or group then he would not be able to satisfy the requirement that some force or threat of force prevented his safe exit from the gang. *See supra* notes 349-55 and accompanying text.

tion. Although these vehicles allow a gang member to travel to different areas, this reprieve is only short term. Long term escape is not obtainable without the ability to change residence. The successful defendant may avoid conviction and incarceration, but without some post-acquittal protection he will not likely avoid punishment. The incentive to plead this defense is lacking.

Society must assure some level of safety to the successful coerced-gang-member defendant, especially since a successful defense acknowledges that society has previously failed its duty to protect. Due to the community nature of the gang problem, relocation may be the only effective solution.[380] In theory, diffusing the danger posed by the gang is another possibility. In practice, however, this is not a viable alternative. The inability of the police to contain the gang is obvious from the presence of coercive gang control in the first place. A third alternative is to proactively dismantle and destroy the gang.[381] This is a long term remedy, however, which, although badly needed, will not help currently oppressed and coerced gang members.

If gang membership is coerced and if criminal activity within this gang is not freely chosen, then society does not profit either by incarcerating the defendant or by returning him to his previous community. Both non-relocation alternatives are morally unsound; we are either punishing beyond culpability or returning coerced defendants to the coercive, or worse, forces that compelled the crime. Since both relocation and incarceration require resources, it seems much wiser to apply these resources toward future development than toward illegitimate attempts at reformation, rehabilitation, deterrence, and retribution. Relocating successful coerced-gang-member defendants will be expensive, but so is incarcerating legitimately coerced defendants who are afraid to implicate the gang.

Relocating successful coerced-gang-member defendants also limits the potential for gang leaders to abuse this defense. If a coerced gang member is acquitted and returned to his neighborhood unpunished, this would send a message to the gang that this member could operate with impunity.[382] An alternative to

380. A similar strategy of relocation is already used for some witnesses who testify against gangs in gang prosecutions. *See* CONLY, *supra* note 5, at 54 (gang victims who are to testify against the gang are frequently relocated for their protection). Relocation may also include the defendant's family, since the strength of family bonds may provide an object for gang retaliation.

381. *See infra* notes 385-95 and accompanying text.

382. This was the worry of Lord Simon of Glaisdale in his opinion in *Lynch v. Director of Public Prosecutions for Northern Ireland*, 1 All E.R. 913 (1975), where he wondered, "Would it not enable a gang leader of notorious violence

revenge against the "turn-coat" gang member, the gang could snatch him back into its folds and compel him to commit further crime. The success of this member's coercion defense depended on his inability to avoid the gang and the crime; it is foolish to assume that if acquitted and returned to the community, the same overwhelming threats would not exist. In fact, sending the successful defendant back into his community may encourage gangs to commit crime mainly through coerced members.[383] Gangs already similarly exploit the differences between the juvenile and adult court systems and have extensively used underage members to take advantage of more lenient penalties in the juvenile system.[384]

Gang members need an incentive to plead the coerced-gang-member defense. From both moral and policy perspectives, society should enable the successful defendant to "escape" to a more hospitable neighborhood. Indeed, by hypothesis, society's own failure to provide basic human protections may have caused the problem to begin with. Although it may seem overly generous to provide gang members with a defense to admitted crime and a tax payer sponsored ticket to a new community, society will benefit, in the long run, by providing such assistance. The money is spent either way. In the long run, development is a wiser investment than incarceration.

VI. How To Combat Gangs: Proactively Eliminating The Problem

The coerced-gang-member defense is a band-aid. The root of the problem, the reasons why teens join gangs, must be addressed and eliminated. Cities have been slow to react and to implement effective programs to combat gangs. Significant to this tardiness is a political desire not to recognize a gang problem.[385] So long as a city or region does not recognize that it has a gang problem it cannot begin to address it. Indeed, this denial has facilitated gang operations and has allowed gangs to gain strong holds in many, many communities and schools.[386]

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to confer on his organisation by terrorism immunity from the criminal law? . . . A sane system of criminal justice does not permit a subject to set up a countervailing system of sanctions or terrorism to confer criminal immunity on his gang." *Id.*

383. A limitation on this technique, or course, is the potential for criminal liability that would accompany the coercion of another.

384. Jankowski, *supra* note 50, at 266.

385. *See* Huff, *supra* note 5, at 530.

386. *Id.*

C. Ronald Huff, in his study on gangs, implicated public schools as primary gang power bases.[387] This conclusion has not been directly contested nor dissected. Although most researchers cite decreased educational achievement as a significant impetus to gang involvement, few question the cause-effect relationship involved. The typical analysis is that a poor student or truant will be led to the gang because he has no other legitimate opportunities. If, however, the gangs "control" the schools and make education difficult to attain and the school even difficult to reach in many instances, is the gang merely collecting the educational system's refuse or is the gang creating it? The answer probably falls both ways, however, most efforts to limit gang membership, at least, unconsciously acknowledge the former response.

It is important to rebuke gangs. They should not be allowed to operate with impunity, but from a systemic perspective, gangs are operating with impunity today; indeed, membership steadily rises as does associated crime. Currently, much emphasis is being placed on reversing this trend.

Anti-gang legislation seeks to reverse this trend by incarcerating the gang. This sort of legislation is reactive and, in certain applications, illegitimate. Moreover, current anti-gang laws are not even effective in their own limited scope. Prisons have not been effective institutions for dismantling gangs. In fact, quite the opposite is true. Furthermore, anti-gang statutes cut too broadly and may further punish gang members that, simply, are not culpable. This is morally unsound. Gangs need to be eliminated, but anti-gang legislation is not the answer. According to G. David Curry and Irving A. Spergel, both community development and increased social opportunity, together with appropriate sanctions, will more effectively combat the gang problem than will mere blanket incapacitation.[388]

In general, quick fix measures aimed at criminalizing and detaining all gang members have been criticized, by those studying the formation and activities of gangs, as shortsighted, uninformed, and often fueled by political reelection goals.[389] Huff explains this position:

> Youth gangs are not "the problem." Rather, they are one symptom of more fundamental, underlying socioeconomic

387. *Id.* at 532, 535. *See also* Thompson & Jason, *supra* note 5, at 324.

388. Curry & Spergel, *supra* note 11, at 401.

389. Huff, *supra* note 9, at 32. *See generally* CONLY, *supra* note 5, at 27-60 (discussing the various community and educational programs that have been successful in helping to reduce the influence and destruction of gangs).

> problems — problems with both macrolevel components (e.g., structural unemployment and children living in poverty) and microlevel components (e.g., racism and its daily social/psychological effects). The opinion that youth gangs and their members are the problem and that the answer lies in simply arresting gang members, convicting them, and locking them up is a view that is futile and that has now been rejected even by most law enforcement leaders.[390]

At the local level, many communities have made great strides toward curbing gang violence and gang membership. Most of these programs are school- and community-based and attempt to even the balance of power between gangs and more legitimate forms of association.[391] These programs attempt to create alternative, positive environments where gangs previously controlled and may be effective diversions for those not yet in the gangs.[392] This still leaves the entrenched, yet coerced, gang member.

Although in the infancy of evaluation, there are numerous programs focusing on communities, schools, job training and placement, and families that have achieved considerable success. These programs focus primarily on younger or peripheral gang members or youths at risk of joining gangs.[393] These programs need to be expanded to include older and more entrenched gang members. Those who have already joined gangs fall outside most existing programs and do not benefit from them at all.[394] In place of community and governmental encouragement, older gang members are frequently subjected to harsher punishment at the hands of the law.[395] The coerced-gang-member defense addresses the problems some of these individuals face and fills the moral gap in existing law that otherwise leaves them victims.

390. Huff, *supra* note 9, at 32. *See also* CONLY, *supra* note 5, at 46 ("[W]hen [punishment] efforts have been implemented without community support or initiatives that improve opportunities for gang youth and prospective gang members to participate in non-criminal ventures, they have largely fallen short of their goals.").

391. Examples of such programs include: midnight basketball leagues and youth outreach programs which provide positive channels for after school activities. For more examples, see generally Glick, *supra* note 113, at 97; Mendez, *supra* note 20, at 76-77; Milton S. Eisenhower Foundation, *Youth Investment and Community Reconstruction: Street Lessons on Drugs and Crime*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 504 (1991).

392. *See* Huff, *supra* note 5, at 534.

393. *See* CONLY, *supra* note 5, at 27-45.

394. *See id.* at 45.

395. *Id.* at 58. *See also supra* note 348.

VII. CONCLUSION

Some street gangs instill danger and terror in their host communities. Some street gangs acquire members under threat of physical retaliation. Some street gangs simply feed off of the insecurity and fear they help create. Some youths join these gangs and obey the gang leadership because they fear for their lives; they are afraid of both the gang and the community that they live in. Indeed, some youths may have the same legitimate fears about gangs that influenced the anti-gang legislation found in many states. For some youths, however, social circumstances have required an alternative response to the gang problem.

Accountability plays an important role in criminal law. Morality plays an equally important role. If moral culpability is lacking, the actor should not be punished; notions of accountability cannot override this premise. This holds true no matter how repulsive the act or the actor. It is the responsibility and function of criminal law to fashion punishment so as not to exceed an individual's criminal culpability. Toward this end, as social and environmental conditions change, we must be willing and able to explore the margins of moral responsibility and existing law.

Justice demands that juries be allowed to examine the moral culpability of individual gang members in light of the exigencies of gang life and gang controlled communities. Current duress law does not allow for this. Duress has functioned adequately as an excuse for quite some time, now it needs some help. The coerced-gang-member defense proposed here would allow a judge and a jury to investigate and assess the individual culpability of the gang actor and to take into account the strength and leadership policy of the coercive gang, the gang member's possibilities for escape, and the safety of the surrounding community. The coerced-gang-member defense is not an open door through which criminals can run out. Rather, it provides a reasonable hurdle that can strengthen the moral community by more accurately relating punishment to culpability.

Certainly gang members are not poster children for criminal excuse. They often are children, though, and they often have grown up in environments that deserve special attention and consideration. Society surely benefits by giving an involuntary gang member a legitimate chance at independence in a non-coercive environment. We must not forget that in the war against crime, excepting a few RICO prosecutions, sanctions are applied against individual gang members, not against the gang.