Legal Theory, 8 (2002), 45–89. Printed in the United States of America
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THE NORMATIVE FUNCTIONS OF COERCION CLAIMS

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INTRODUCTION

A says to B: "Unless you *x*, I will *y*." Or, equivalently, "I will –y if and only if you *x*." Is this proposal *coercive*? If B performs *x* has he been *coerced*? Is this an instance of *coercion*? Moral and political philosophers, as well as legal theorists, have struggled with these questions at least since Aristotle but have been tackling them with renewed vigor since Robert Nozick's seminal 1969 article.[1] And, happily, scholarly efforts over the past few decades have substantially advanced our understanding.[2] Most significantly, in my view, they have made increasingly clear (despite a few remaining dissenters) that answers to these coercion questions are thoroughly moralized in the sense that the questions cannot be resolved by reference solely to nonmoral facts. But if the answers themselves are moralized, so too, of course, are the questions. That is, coercion claims arise, and stake a claim to our attention, in order to serve some sort—or sorts—of normative needs.

This article is animated by the belief that existing moralized conceptions of coercion remain unsatisfactory because theorists have not attended closely enough to the precise normative questions to which verdicts of coercion purport to respond. Most previous efforts to understand coercion are shaped, explicitly or implicitly, by the assumption that there exists a single unified concept of coercion. Once we define this concept with adequate precision, the thinking goes, we will be able to employ it to answer whatever descriptive and normative coercion questions we might have. I

*I am grateful to Russell Christopher, Jeremy Horder, Doug Laycock, Brian Leiter, Daniel Markovits, Bill Powers, John Robertson, and two anonymous referees for this journal for very helpful comments on an earlier draft of this article, and to the Butler & Binion Centennial Research Professorship in Law for generous financial support.

1. Robert Nozick, *Coercion, in* PHILOSOPHY, SCIENCE AND METHOD 440 (Sidney Morgenbesser et al., ed. 1969).

2. The most comprehensive account, which explores coercion from both legal and philosophical perspectives, is Alan Wertheimer, COERCION (1987). Other particularly valuable contributions to a substantial literature include Joel Feinberg, HARM TO SELF 189–268 (1986); Harry G. Frankfurt, *Coercion and Moral Responsibility, in* ESSAYS ON FREEDOM OF ACTION 63 (Ted Honderich ed. 1973); Vinit Haksar, *Coercive Proposals*, 4 POL. THEORY 65 (1976); Daniel Lyons, *Welcome Threats and Coercive Offers*, 50 PHIL. 425 (1975); Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541; and David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFFAIRS 121 (1981).

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

will approach the problem the other way around. Starting by identifying the particular normative functions that coercion claims serve—and eschewing any interest in trying to explicate all meanings that might attach to the word "coercion" (and to its associated linguistic forms) abstracted from those concrete normative needs—I will attempt to explain how these claims are best analyzed. Some ingredients of the particular analyses will be familiar; others are new. The details, in any event, are (for the most part) less important than is the need to focus on the discrete types of normative claims that give rise to the question of whether there has been coercion. The conditions that sustain an affirmative answer for one type of claim are quite different from those that constitute "coercion" for purposes of the other. And vice versa. The single unified conception of coercion that theorists seek, I will argue, is of little, if any, normative significance. Moreover, careful attention to the distinct normative functions that coercion claims serve will, I believe, permit substantial advances in understanding the various sorts of coercion questions that arise in a wide variety of legal contexts.[3]

The article is divided into six parts. Section I identifies the two functions that claims of coercion serve in normative discourse. These two types of claims—what I inelegantly call "coercion$_W$" and "coercion$_E$"—are then examined in detail in the following three parts. Section II unpacks coercion$_W$, the type of claim that is used "offensively" to charge someone with having engaged in coercion. Section III relates claims of coercion$_W$ to the threat-offer problem by investigating whether offers as well as threats can be coercive. Section IV turns attention to coercion$_E$—the sort of coercion claim that is used "defensively" to deflect or mitigate blame—and shows why the two types of claims are logically distinct. This theme is further developed in Section V, which demonstrates the futility of unified theories of coercion that assume a single concept of coercion designed to satisfy both of the normative needs animating coercion talk. Finally, Section VI puts the analysis to work, showing how attending to the distinction between these two discrete types of coercion enables us to resolve coercion questions with which legal theorists and philosophers have long struggled.

I. TWO NORMATIVE FUNCTIONS

Why do we care about coercion? As is widely appreciated, coercion claims are part of our ethical and legal discourse. But precisely what normative

3. Although this is not a study of legal doctrine, it is worth noting a sample of the diverse arenas in which courts have struggled over efforts to operationalize the notion of coercion. For illustration, the issue arises in the criminal law rules governing sexual assault and blackmail; throughout constitutional law, especially in unconstitutional conditions cases, Establishment Clause jurisprudence, and when assessing the admissibility of confessions; when determining the validity of contracts, surrogacy and adoption agreements, and wills; and for purposes of ascertaining informed consent in tort.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

functions do such claims serve? Alan Wertheimer puts it this way in his expansive study. Coercion claims arise when we wish to ask: "Is B *responsible* for the normal moral or legal effects of his action? Does A's proposal constitute the sort of coercion that nullifies or mitigates B's responsibility for his action?"[4] Virginia Held locates our interest in coercion "at the moral level" in the fact that "we have a prima facie obligation not to employ" it.[5] Note that these are two different answers, each partial. As a first cut, then, let us say with Michael Bayles that coercion claims serve two distinct normative functions: first, "if a person has been coerced to perform an action he is thought to be blameless or less blameworthy. Second, the use of coercion is generally thought to be morally bad."[6]

Although it should be uncontroversial that coercion claims do serve these normative functions, it might be thought that they serve other normative functions as well. Coercion, after all, is often viewed as a partial antonym for freedom or liberty.[7] Some are tempted, therefore, to raise coercion questions in order to ascertain whether specific persons or classes of persons enjoy adequate freedom (and, derivatively perhaps, to adjudge whether a particular social or political system is just), even apart from the propriety of blaming or excusing particular individuals. David Zimmerman's well-known exploration of "coercive wage offers"[8] might be viewed in this vein. From what I've said thus far, whether wage proposals are "coercive" or whether wage laborers are "coerced" are questions well asked insofar as we mean to inquire, respectively, into whether the employer acts wrongfully in extending her proposal or whether the wage laborer should be (morally or legally) excused for breaking his contract. But I suspect that this is not the sole, or even principal, purpose for raising the question.[9] I suspect, rather, that such inquiries are ordinarily prompted, and read, to assess the relative justness of different political-economic regimes or (relatedly) the relative freedom of their subjects. And for these purposes, I think, casting the inquiry in coercion terms is simply not helpful. This is not just a definitional stop. It is a claim that coercion does not supply the linguistic or conceptual apparatus that can assist us in answering these questions, and therefore that conclusions that particular social or economic classes are (or are not) coerced in a given regime are the product of substantive normative judgments about the proper ways to secure human freedom, and not the other way around. Of course, to state this point is not yet to demonstrate it. That task has

4. Wertheimer, *supra* note 2, at 6.
5. Virginia Held, *Coercion and Coercive Offers*, *in* NOMOS XIV: COERCION 49, 62 (1972).
6. Michael D. Bayles, *A Concept of Coercion*, *in* NOMOS XIV: COERCION 16, 16 (1972); *see also* Haksar, *supra* note 2, at 74.
7. For one exploration of this theme, *see* J. Roland Pennock, *Coercion: An Overview*, *in* NOMOS XIV: COERCION 1 (1972).
8. Zimmerman, *supra* note 2.
9. I do not mean here to speculate as to what Zimmerman's own purpose are. It seems to me that his article contains some ambiguity on that score.

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been ably performed by others.[10] I will simply assume it at present, with the hope that if my accounts of the normative functions that I believe coercion claims *do* serve are persuasive, those accounts will themselves provide reason for disbelieving that employing the language of coercion will furnish any insight into questions of freedom or justice.

In short, then, I am assuming that coercion claims serve two normative functions: (1) to determine whether A's conduct is at least prima facially wrongful or whether A is blameworthy;[11] and (2) to determine whether B is excused for conduct that would otherwise warrant blame; that these are the only normative functions such claims serve; and that these functions are, in principle, quite distinct. I surely do not deny that coercion claims can and do serve other descriptive functions. But, because I am interested here in clarifying the meanings of coercion insofar as they are thought to do real normative work, and am not concerned to undertake an exercise in ordinary language analysis (despite what value there might be to such a project),[12] I will by and large disregard them. My goal in this article, therefore, will be to explore how "coercion talk" can help us answer these particular normative questions.

Philosophers customarily perform this task by expounding a set of necessary and sufficient conditions for there being "coercion." Yet this is a risky strategy. We have just seen that coercion claims serve two distinct normative functions. Any explication of a single concept of coercion will satisfy both of these needs only if the necessary and sufficient conditions for each are coextensive. But there is no reason to believe this will be so. Indeed, there is strong reason to doubt it. After all, to coerce somebody generally connotes success.[13] But if it is true (and this is not uncontroversial, of course)

10. *See generally* Lawrence A. Alexander, *Zimmerman on Coercive Wage Offers*, 12 PHIL. & PUB. AFFAIRS 160 (1983); *see also* Wertheimer, *supra* note 2, at 253–55. In his response to Alexander, Zimmerman seems to have partially conceded this point, though he proceeds to defend his inquiry as potentially serving important *political* purposes. *See* David Zimmerman, *More on Coercive Wage Offers: A Reply to Alexander*, 12 PHIL. & PUB. AFFAIRS 165, 170–71 (1983). I do not deny this is so; the rhetorical function of coercion claims is not my subject here.

11. This equation of wrongfulness and blameworthiness might seem imprecise for a number of reasons. For one thing, a focus on wrongfulness might be more appropriate insofar as we wish to ask this first type of coercion question *ex ante* to advise that particular conduct should not be engaged in. Second, even insofar as we undertake the inquiry *ex post*, a determination that conduct was coercive, and thus (presumptively) bad, need not entail that A was blameworthy for engaging in it. That latter conclusion depends as well upon certain assumptions of moral agency. *See, e.g.*, Peter Aranella, *Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992); Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 319 (1996). For present purposes, though, these qualifications need not distract us. Accordingly, I will generally speak interchangeably of the wrongfulness of A's conduct, and of A's blameworthiness for that conduct. In either case, such a judgment is only presumptive. *See infra* note 14.

12. For similar observations *see, e.g.*, Joseph Raz, THE MORALITY OF FREEDOM 151 (1986); Wertheimer, *supra* note 2, at 180–81.

13. Or such is the prevailing view. *See, e.g.*, Nozick, *supra* note 1, at 443–44; Bayles, *supra* note 6, at 19; Lyons, *supra* note 2, at 425 n.1; Bernard Gert, *Coercion and Freedom, in* NOMOS XIV: COERCION 30, 47 (1972); Martin Gunderson, *Threats and Coercion*, 9 CAN. J. PHIL. 247, 256 (1979);

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that the fortuitous realization (or nonrealization) of particular consequences cannot affect the rightness or wrongness of our actions or of our corresponding moral desert, then it cannot be the case that A's blameworthiness for engaging in coercion depends upon whether A actually coerced somebody. Furthermore, if "coercion" is taken to designate the conjunction of the separate normative claims——that is, if there is coercion only when A is blameworthy *and* B is excused—then its normative significance is opaque. Or, if this conception of coercion does have normative significance, it would not be in response to either of the individual normative functions we've identified.

In order to make clear that we are seeking to resolve two separate coercion claims whose truth conditions might be different, it will be useful to employ different linguistic placeholders. Therefore, let coercion_W (for coercion-wrongful) stand for the normative conclusion that an individual (A) has *engaged* in coercion; let coercion_E (for coercion-excused) represent the normative conclusion that an individual (B) has *acted under* coercion. Put otherwise, A has acted wrongfully (on grounds of coercion) in undertaking action *z* if and only if *z* is $\textit{coercive}_W$;[14] and B is morally excused (on grounds of coercion) for her action *x* if and only if B was $\textit{coerced}_E$ to perform *x*.[15] Thus, to say that "B was coerced_E" denotes that B was "coerced" in the particular sense that she was not blameworthy (or less blameworthy) for her action because she acted under coercion (what-

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Held, *supra* note 5, at 51. It is not, however, universal. Peter Westen, for example, urges that "to coerce a person is to subject him to coercive constraint," and that only "coerce *into*" implies success. Westen, *supra* note 2, at 562–63. We can afford to be agnostic on this question, however. So long as one can intend to subject another to "coercive constraint" and yet fail to do so, then it remains true, even on Westen's view, that A's blameworthiness should not depend upon his actually coercing some B. Consequently, the instant dispute serves principally to reinforce the plasticity and arbitrariness of coercion *language* and thus the importance of attending directly to the underlying normative questions.

14. That is, A's conduct is presumptively wrongful. As many commentators have recognized, coercive_W action can be justified. For one such discussion, *see* Robert Paul Wolff, *Is Coercion "Ethically Neutral"?* NOMOS XIV: COERCION 144 (1972). *See also* Cheyney C. Ryan, *The Normative Concept of Coercion*, 89 MIND 481, 493–95 (1980). My purpose here is to explicate coercion_W. How coercion_W can be justified is a wholly separate question that I will not address. *See* Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 889 (1997) (expressing a similar view).

15. Though I will often cast coercion_W questions specifically in terms of whether a proposal was coercive_W, and coercion_E questions in terms of whether an individual was coerced_E, I hasten to emphasize that I am not claiming either that, as a matter of ordinary language, it is improper to characterize something as "coercive" except to signify an instance of coercion_W, or that speaking of a person being "coerced" always or "really" means that she was coerced_E. On the other hand, I do not believe that assimilating the adjective "coercive" to coercion_W and the passive verb form "coerced" to coercion_E is wholly arbitrary. Daniel Lyons has commented on the "odd fact that outside of philosophy and law journals, we rarely use 'coerce' as an active verb at all." Daniel Lyons, *The Last Word on Coercive Offers . . . (?)*, 1983 PHIL. RES. ARCHIVES 393, 398. This is true, I think, but not so odd. This feature of our linguistic practice at least partially reflects that, in contrast to questions of "coerciveness" and "coercedness," whether A actually "coerces B" is of little normative significance.

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ever that may mean).[16] When written without subscripts, "coercion" and its linguistic variants will signify some generic, comprehensive, or indeterminate sense, as the context requires.

II. COERCION$_W$

We have divided "the coercion question"[17] into two separate questions: the coercion$_W$ question and the coercion$_E$ question. The first can be put this way: Under what conditions is A's conduct, *z*, coercive$_W$? A complete answer will cover at least two bases. First, it will identify the types of conduct that *can* be coercive$_W$. Second, it will articulate the respect in which coercive$_W$ behavior is *wrongful*.

Let's attend to the first aspect. To what sorts of conduct do judgments of coerciveness$_W$ attach? Broadly, let us suppose, conduct can be coercive$_W$ only if it is designed to cause another person or persons to engage in some particular behavior, *x*.[18] This seems uncontroversial. Arguably, though, there are two fundamentally different ways to cause others to act, and these different ways might translate into two different senses of coercion$_W$. Michael Bayles, accordingly, has labeled coercion that proceeds by physically compelling B to perform *x* (such that *x* is not the product of B's will or volition in any plausible sense) "occurrent coercion," and coercion that

16. In recent works, William Edmundson and Grant Lamond distinguish coercion claims in a way that yields something akin to my distinction between coercion$_W$ and coercion$_E$. *See* William A. Edmundson, THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY 74 (1998) (contending that coercion claims arise in three distinct types of "contexts," labeled "justification supplying," "justification defeating," and "justification demanding"); Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEG. STUD. 39, 47–51 (2000) (identifying three "conceptions" of coercion, what he calls the "action-inducing use," the "liability-grounding use," and the "responsibility-affecting use"). It is not clear, though, how similar this aspect of our accounts is. For example, although my coercion$_W$ seems much like Edmundson's "justification demanding" context, the first example he gives of a "justification defeating" claim—involving a man who secures sexual intercourse with a woman by threat of physical harm—likewise seems a paradigmatic example of coercion$_W$. And whereas Lamond's "action-inducing use" seems the closest of his three conceptions to my coercion$_W$, Lamond says this requires "that someone was forced or made to act under pressure from another and thus did not act voluntarily," *id.* at 47, which is irrelevant for purposes of coercion$_W$. More notably, to whatever extent my distinction between coercion$_W$ and coercion$_E$ might prove similar to distinctions Edmundson or Lamond advance, the differences between my overall thesis and theirs are of greater significance. For one thing, Edmundson's and Lamond's distinctions are each tripartite, not, as mine, bipartite. I explain in Section IV.D *infra* why I think the third normative function that coercion claims might be thought to serve is not in fact distinct. Moreover, at least Edmundson explicitly affirms precisely what I deny—namely, "that a univocal account of the truth conditions of coercions claims is possible." Edmundson, *supra*, at 78.

I am grateful to an anonymous referee for drawing my attention to these valuable contributions to the coercion literature.

17. *See* Wertheimer, *supra* note 2, at 211.

18. This formulation, I believe, adequately accommodates Nozick's observation that conduct can be coercive$_W$ even if A does not actually want B to perform *x*. Nozick, *supra* note 1, at 442.

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proceeds by inducing B to perform *x* "dispositional coercion."[19] I'm skeptical of "occurrent" coercion. I think that common reference to "coercion" envisions conduct that somehow induces action by another without forcibly compelling it. (If A pushes B into the lake, for example, we would not naturally say that he "coerced" B to take a swim.) Furthermore, dispositional coercion is by far the more interesting and provocative sense. That is, we may disagree over when physical compulsion is wrong but we also know that any disagreements can be resolved only by straightforward recourse to substantive moral argument. Our puzzlements over the coercion questions I've identified, however, appear to be of a different order. For these reasons I think it appropriate to define coercion_W in terms of conduct designed to *induce* action by another. (Of course, readers who think this limitation inappropriate or inaccurate need not, for that reason, jump ship; if you think it useful to speak of occurrent coercion, you may read these remarks I intend about coercion_W *simpliciter* to be limited to *dispositional* coercion_W.)

I've now claimed that conduct can be coercive_W only if it is designed to induce somebody to do something, *x*, that she might not otherwise do (i.e., designed to give that person additional reason to do *x*). Can we further narrow the scope of its application? It is customary to suppose that coerciveness_W is a quality only of conditional proposals. However this limitation strikes me as too restrictive. This is not because of any worries presented by implied threats. While it is certainly true that implied threats can be coercive_W, there is no reason that "conditional proposals" must be express. So we need not resist a reduction to conditional proposals on that score. I am thinking, rather, of cases like the following.

Assume[20] that A wants to ensure that B is not in her office one afternoon between 2:00 and 3:00 P.M. (Why is unimportant.) To accomplish his goal, A concocts an unusual plan. On the morning of the day in question, A places at B's home a bomb set to detonate at 3:00 P.M. A then leaves town. At 2:00 P.M., A calls B at her workplace and tells her about the bomb. "If you don't rush home now to disarm it," A explains, "your house will be demolished." Because A no longer has control over whether the bomb detonates, this looks more like a "warning" than a "proposal";

19. Bayles, *supra* note 6, at 17. Grant Lamond and Alan Wertheimer both subdivide occurrent coercion—distinguishing, respectively, *physical* compulsion from *psychological* compulsion, *see* Grant Lamond, *Coercion, Threats, and the Puzzle of Blackmail*, *in* HARM AND CULPABILITY 215, 218–19 (A.P. Simester & A.T.H. Smith eds. 1996), and involuntary *movements* from involuntary *acts*, *see* Wertheimer, *supra* note 2, at 9–10. I agree that psychological compulsion is best treated like physical compulsion when our focus is on coercion_E. *See infra* note 50. For purposes of coercion_W, however, classification is less neat. Where A uses psychological pressure to destroy B's ability to act volitionally, he employs occurrent coercion. But if A tries to compel B with threats A believes B will be unable to resist, this is dispositional coercion.

20. This hypothetical is adapted from Leo Katz, ILL-GOTTEN GAINS 1–4 (1996).

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for this reason, Nozick would doubt that it is coercive$_W$.[21] But this strikes me as a rather arbitrary stipulation. A's course of conduct seems functionally and morally equivalent to calling B at 2:00 and threatening to bomb her house if she doesn't return home immediately (assuming that A's afternoon call to B was part of an initial plan, and not prompted by a late change of heart). And *that* would be an unambiguous case of a coercive$_W$ conditional proposal.

Absent a compelling reason to treat the paradigmatic case of conditional proposals as a formal requirement, then, it will be more propitious to continue to allow any conduct designed to induce action by another to constitute coercion$_W$ (so long, of course, as it satisfies whatever additional requirements we shortly identify). To be sure, almost all coercive$_W$ conduct will in fact take the form of proposals to produce, or allow to occur, particular consequences conditioned upon the addressee's conduct. Little understanding will be lost, therefore, if we allow ourselves the convenience of speaking of coercion$_W$ in terms of conditional proposals. So I will do so. But in so doing I assume that our further explications of coercive$_W$ proposals can be applied, *mutatis mutandis*, to more complicated forms of conduct designed to induce action.

What types of conditional proposals (or their functional equivalent) are coercive$_W$? By definition, coercion$_W$ claims are used to express a normative judgment. Broadly, then, a coercive$_W$ proposal is wrongful. But it is not merely the label for wrongful proposals. Imagine that A, a stranger to B, approaches B on a train and offers to knock off her husband for a fee. Some writers might deem this proposal "coercive" if the attraction to B of being rid of her husband were sufficiently great.[22] As I will make clear later, I think this is incorrect. But for now it's enough to observe that the proposal is wrongful even beyond those situations (if any obtain) that would make it coercive$_W$. In other words, coercive$_W$ proposals are not the *name* for wrongful proposals, but a *subset* of them.[23] And before we can make much progress in defining them, we should agree on the nature of this subset. Perhaps this will do as a first cut: coercive$_W$ proposals are those that are wrongful by dint of placing improper pressure on the recipient's choice.[24]

21. Nozick, *supra* note 1, at 444.

22. *See, e.g.*, Held, *supra* note 5.

23. Like recognition of this point is found in, e.g., Haksar, *supra* note 2, at 69; Lyons, *supra* note 2, at 427; Wertheimer, *supra* note 2, at 243.

24. To some, this supposition might have the air of *ipse dixit* about it, given that other writers appear to conceptualize coercive proposals as wrongful for tending to insult or degrade the offeree. *See, e.g.*, Lyons, *supra* note 2, at 436. I concede that I do not know how to resolve such a disagreement except, at this stage, by resort to mostly pretheoretical intuition. On that score, I think my more precise formulation has much to recommend it. Ultimately, though, the test of my proposed conceptualization of coercion$_W$, and of coercion$_E$ for that matter, is (as Lamond nicely puts it) "how convincing and illuminating an account they provide in each case—whether what they deliver is still recognizable as an account of the phenomenon in question, how well it succeeds in systematically linking the phenomenon to related aspects of our understanding, and whether it deepens our comprehension of the phenomenon."

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To summarize, I am at this point hoping for broad agreement regarding the nature of coercion$_W$ at some fairly abstract conceptual level—namely, conduct that is *designed* to induce some person or entity, B, to engage in action *x*, and that *operates* by exerting wrongful pressure on B's freedom to choose otherwise. I am suggesting, in short, that we already have a strong shared sense of the region of conceptual space in which coercion$_W$ resides. If so, our challenge now is to craft a definition that will allow us to identify concrete instances of coercion$_W$ without requiring in each case an ad hoc impressionistic judgment. Luckily, we need not start from scratch. Following the work of Vinit Haksar and others, we might suppose that a proposal is coercive$_W$ if it involves a threat to violate a moral duty.[25] (Note that this definition ensures that mere warnings cannot be coercive$_W$, without our having to stipulate that the property of being coercive$_W$ attaches only to proposals.)

This, I think, is about right. But it is not exactly right. Consider that ubiquitous puzzle of constitutional law known as the unconstitutional conditions problem. The problem arises whenever government offers a benefit it is not constitutionally obligated to provide, but conditioned on the recipient's waiver of a constitutional right. Famous instances range from restrictions imposed on the speech or political activities of government employees and other recipients of government funds, to the requirement that welfare recipients and probationers agree to warrantless searches, to the standard plea bargain in which a prosecutor offers the benefit of a reduced sentence

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Lamond, *supra* note 16, at 47. In these regards, note that locating the wrongfulness of coercion$_W$ in the exertion of wrongful pressure, rather than in the more general violation of a Kantian duty to treat others as persons not objects, *see* Wolff, *supra* note 14, at 146, will better enable us to distinguish the core concept of coercion from the core concept of exploitation. *See infra* Section VI.

25. *See* Haksar, *supra* note 2, at 68–70. Similar views are developed in Gunderson, *supra* note 13, and in Ryan, *supra* note 14. Wertheimer defines "coercive proposals" in a like fashion—as proposals to put an offeree worse off than his "moral baseline"—but for purposes of explicating coercion$_E$. Interestingly, though, Wertheimer criticizes Haksar's theory as "entirely unmotivated" because Haksar "do[es] not explain why the moral test seems to work." Wertheimer, *supra* note 2, at 215. I think this objection is mistaken. Here, in part, is Haksar's explanation:

> Since violation of moral duty is wrong, so is the readiness to violate our moral duty wrong. . . . Admittedly, on some occasions, the proposer is bluffing and does not really intend to carry out his declared unilateral plan, even if his proposal is turned down. . . . But in such cases also, since deception is immoral, the proposer is using immoral means in order to make the recipient more vulnerable to his wishes, so he is involved in moral wrongdoing. . . . The mere exertion of pressure, even of pressure that cannot be resisted, is not necessarily a violation of a moral duty. . . . What is wrong is to use immoral means in order to make one's proposals more eligible to a recipient.

Haksar, *supra* note 2, at 71–72. This strikes me as an adequately motivated account of coercion$_W$. (Indeed, Haksar's overall analysis—which anticipates several of the arguments I will develop in this article—strikes me as more than merely adequate. In my view, his short and insightful piece deserves more attention than it has enjoyed.) That Haksar's account looks unmotivated to Wertheimer reflects, I think, their two different points of departure. Wertheimer is animated to explain coercion$_E$, *see generally* Wertheimer, *supra* note 2, ch. 1, whereas Haksar is concerned to understand coercion$_W$. *See*, *e.g.*, Haksar, *supra* note 2, at 65–66.

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if the defendant waives her right to trial.[26] Are such conditional grants allowable on the theory that the greater power (to withhold the benefit) includes the lesser power (to award it conditionally)? Or are they unconstitutional on the rationale that the state may not be permitted to accomplish indirectly what it could not do directly? The Supreme Court has waffled over such problems for well over a century, and constitutional theorists have struggled with the puzzle for nearly as long.[27] Many have sought to fashion a solution that distinguishes coercive from noncoercive proposals.[28] But the consensus is that such efforts are doomed to failure. As Kathleen Sullivan, one of the most influential and insightful theorists of unconstitutional conditions, puts it, "accounts of interpersonal coercion in both private law and moral philosophy" demonstrate that "any useful conception of coercion is irreducibly normative. Without a theory of autonomy, utility, fairness, or desert, one cannot tell when choice has been wrongfully constrained." Such theories, however, "cannot be derived from the post-1937 Constitution itself." Therefore, "[t]o hold that conditions coerce recipients because they make them worse off with respect to a benefit than they *ought* to be runs against the ground rules of the negative Constitution on which the unconstitutional conditions problem rests."[29] In short, because a coercion-based approach requires a contestable moral theory of governmental obligations, it cannot operate internal to constitutional law.

But this objection rests on an overly narrow conception of the normative ground from which coercion claims may issue. We have observed that coercion is an inherently normative concept. That is, it is an element of normative discourse. However there are many normative discourses. In addition to the obvious "moral" discourse that involves ethical obligations operating upon individuals, we could recognize a discourse of political morality (concerning obligations operating upon states when acting in either domestic or international spheres), and normative discourses shaped by positive legal obliga-

26. In a federal system, the problem also often arises when the national government conditions benefits on a *state*'s waiver of constitutional protections, such as sovereign immunity from suit. Some aspects of this issue are explored in Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix"* Florida Prepaid *(And How* Not *To)*, 79 TEX. L. REV. 1037, 1130–1172 (2001).

27. Some of the more important recent contributions to the legal literature are Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Powers, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); and Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984). For appreciation of the problem in the standard philosophical literature on coercion, *see, e.g.*, Lyons, *supra* note 2, at 425; Held, *supra* note 5, at 56–62; Don Van DeVeer, *Coercion, Seduction, and Rights*, 58 PERSONALIST 374, 379–80 (1977).

28. Most notably Kreimer, *supra* note 27. *See also* Westen, *supra* note 2; Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289 (1989).

29. Sullivan, *supra* note 27, at 1428, 1450. Michael Bayles had reached a similar conclusion several years earlier: "If the government is not morally obligated to provide the benefits independent of the conditions, their addition does not deprive recipients of legitimately expectable benefits. Thus no harm or coercion is involved." Michael D. Bayles, *Coercive Offers and Public Benefits*, 55 PERSONALIST 139, 143–44 (1974).

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tions (running against individuals, or—as in constitutional law—against states). There being no reason to cabin the concept of coercion$_W$ to just one of these real and meaningful normative discourses, we should revise our definition to make this plain. Thus: A proposal is coercive$_W$ (within a particular normative discourse) if it involves a threat, conditioned upon specified action or inaction by a recipient of the proposal, to do what it would be impermissible (within that discourse) for the threatener to do.

An example might help. Assume that (under the particular circumstances) it would be morally and legally impermissible for A to kill B. It follows that A's threat to kill B unless B pays A $1,000 is both morally coercive$_W$ and legally coercive$_W$. Or assume that it would be legally impermissible for A to ϕ, where ϕ is a *malum prohibitum* (i.e., is not morally wrongful as a prelegal matter). If A threatens to ϕ unless B pays A $1,000, A's threat is legally coercive$_W$. Whether it is also morally coercive$_W$ depends upon whether the imposition of a legal duty upon A creates a moral duty as well. That is, whether it is morally coercive$_W$ depends upon one's (moral) theory of political obligation. Because my explication of coercion$_W$—like other "moralized" resolutions[30]—neither presupposes nor supplies any particular content to one's obligations (whether ethical, political, constitutional, or what-have-you), all we can conclude for certain is that the conditional threat is coercive$_W$ in a normative discourse in which the act threatened would be impermissible. And if one can speak intelligibly about an offer being constitutionally coercive$_W$ without thereby committing oneself to a claim that the offer is morally coercive$_W$, the unconstitutional conditions puzzle might prove itself amenable to resolution after all. Or so I argue elsewhere.[31]

III. THREATS AND OFFERS

We have so far defined coercive$_W$ proposals specifically in terms of the act threatened. By so doing, we have entered a rich debate in the literature

30. *See, e.g.*, Wertheimer, *supra* note 2, at 217–19; Haksar, *supra* note 2, at 69. Zimmerman observes that "it is one thing to say [a] proposal is coercive because [the maker] *violates a prior obligation*, which is itself grounded in either utilitarian or Kantian reasons, and quite another to say that [the act of coercion] is wrong because it has *those non-moral features* which figure in the utilitarian and Kantian principles." Zimmerman, *supra* note 2, at 130–31. He proceeds to argue that only the latter approach can be satisfactory. To be clear, I am adopting the former. But with two caveats. First, and most critically, I do not claim that a proposal is coercive (hence wrongful) because it violates a prior duty. Such a view is rightly criticized as empty unless it supplies content to those prior duties. *See, e.g.*, John Lawrence Hill, *Moralized Theories of Coercion: A Critical Analysis*, 74 DENV. U. L. REV. 907, 927 (1997). I contend that a proposal is coercive$_W$ (hence wrongful) if *the act threatened* would violate a duty. Because this claim entails a specific method of analyzing coercion claims, it is not vacuous. Second, the "prior obligation" at issue need not be traced solely to utilitarian or Kantian reasons. It could be grounded in whatever principles are thought to define obligations in the particular normative discourse.

31. *See* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

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concerning the meanings of the terms "threat" and "offer,"[32] and the relationship of each to coercion. Two positions have emerged.[33] Under the first approach, "threat" is simply the name for a coercive$_W$ proposal. A threat is a conditional proposal that would put B worse off than some appropriate baseline. Although these theorists often disagree about what the appropriate baseline is (or baselines are),[34] they agree that threat and coercive$_W$ are synonymous. The second position holds that, however a "threat" is best defined, a coercive$_W$ proposal can be a threat or an offer. I appear to reject both approaches. I define coercive$_W$ proposals in terms of *threats*, so I seem to deny that offers can be coercive$_W$. But because I define coercive$_W$ proposals as involving *types* of threats, I must deny that coercive$_W$ proposals just *are* "threats."[35] How can this be?

I have been willing, for ease of exposition, to discuss coercion$_W$ as though it were limited to conditional proposals of the form if *–x* then *y*. It is often observed, though, that coercive proposals are necessarily *bi*-conditionals in which particular consequences are promised if and only if the addressee of the proposal undertake (or refrain from) specified conduct: if *–x* then *y;* if *x* then *–y*.[36] For example, even if the gunman doesn't expressly say that he'll shoot you if, *but only if*, you don't hand over your money, the implication is generally clear. And where the implication is less clear than the addressee would wish (kidnappers' demands might be of this sort), the implication surely remains that the probability of *y* given *x* is less than its probability given *–x*. (If the proposal does not communicate at least this, it is not designed to induce action.) Or consider Nozick's well-known hypothetical: "if you go to the movies I'll give you $10,000. If you don't go, I'll kill you."[37] Such "throffers" (as Hillel Steiner has dubbed them)[38] are still biconditionals of the form: if *x* then *(–y* +

32. In speaking here of threats and offers, I am referring only to their *conditional* forms. *Un*conditional proposals—whether denominated "threats" or "offers"—are widely recognized not to be coercive.

33. *See* Westen, *supra* note 2, at 570–71 (making this point and citing partisans on each side of the debate). Westen himself adopts the view that offers can be coercive. *See id.*, at 587–89.

34. Wertheimer, for example, denies that there is any single appropriate baseline and argues instead that different baselines are correct for different purposes. He agrees, however, that threats are defined as proposals that would leave the recipient worse off than whichever baseline is properly designated for the given need. *See* Wertheimer, *supra* note 2, at 211–14.

35. To be sure, other commentators too have written that only threats can be coercive but that not all threats are coercive. *See, e.g.*, Raz, *supra* note 12, at 153 (asking "how serious need a threat be to be a coercive one?"); Gert, *supra* note 13, at 43. As far as I can tell, though, such authors are making a different point. Both Raz and Gert, for instance, are claiming that only some subsets of threats are "coercive" in the sense of sufficing to constitute coercion$_E$ if accepted. *See* Raz, *supra*, at 153–54; Gert, *supra*, at 31–33. As we will see (in Section IV), I agree with that claim. They are not arguing (as I do here) that only some subsets of threats are "coercive" in the sense of being presumptively wrongful (and thus subjecting A to blame)—that is, coercive$_W$.

36. *See, e.g.*, Frankfurt, *supra* note 2, at 66; Haksar, *supra* note 2, at 66.

37. Nozick, *supra* note 1, at 449.

38. *See* Hillel Steiner, *Individual Liberty*, 75 PROC. ARISTOTELIAN SOC'Y 33, 39 (1974–75).

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z); if *–x* then *–(–y + z)*. It is largely accurate, then, to identify coercive proposals as biconditionals.[39]

All conditional proposals (biconditional or otherwise) contain alternative proposed courses of action. And, in all conditional proposals designed to induce action, the alternative consequences proposed (*y* and *–y*, in the paradigmatic case) are not equally attractive to the recipient. Or, more precisely, the proposer, A, *believes* that the alternatives are not equally attractive.[40] I propose to call the consequent that A believes is less eligible to B the *act threatened*, and the consequent that A believes is more eligible the *act offered*. And the conditional that promises the less eligible alternative (as perceived by the proposer) the *threat*, and the conditional that promises the more eligible alternative the *offer*. Thus every proposal designed to induce action contains, by definition, both a threat ("if *–x* then *y*"), and an offer ("if *x* then *–y*").[41]

That all biconditional proposals contain both a threat and an offer is quite straightforward, I hope, and I am not the first to propose it.[42] Unfortunately, as the continued controversy over whether both "threats" and "offers" can be coercive$_W$ reveals, the import of this suggestion has not been appreciated. Luckily, the error that has impeded acceptance of this way of viewing matters can be readily identified and corrected. Harry Frankfurt provides a convenient illustration. After contemplating the possibility of "constru[ing] every biconditional that makes either a threat or an offer as necessarily making both," Frankfurt rejected it on the grounds that the average merchant offering goods for sale "is not ordinarily to be regarded as threatening his customers."[43] Indeed not. But so what?

39. It is not wholly accurate though. Consider, for example, this triconditional: "if you stay in this room, then I'll give you $100; if you leave through the door, then I'll kill you; if you leave through the window, then I'll hunt down your family and kill them." This is clearly a proposal designed to induce action, and it sure looks like coercion$_W$. It is incorrect, therefore, to define coercive$_W$ proposals in terms of biconditionals—or, at least in terms of "simple biconditionals" whose consequents are not themselves conditionals. Nonetheless, for simplicity's sake I assume away the complications produced by polyconditionals.

40. Imagine B, standing on the curb, leaning against a bright, spanking new sports car. A approaches with a baseball bat and announces: "give me your wallet, or I'll take this bat to the car." B shrugs: It's not her car. A is nonetheless guilty of coercion$_W$ (whether he carries out his threat or not).

41. It is not worth objecting that a biconditional proposal might contain alternatives that are equally eligible to B, and A knows this. Well, maybe. But it is hard to see how this would be designed to induce action. A separate and interesting question is what to call the alternatives in polyconditionals. *See supra* note 39. Presumably the least eligible alternative is a threat, and the most eligible one is an offer. But what about alternatives in between? I'm inclined to conclude that they are all threats. But perhaps they are all offers. Or maybe proper designation of "threat" or "offer" in these cases will depend upon further criteria yet to be elucidated, or upon a totality-of-the-circumstances impressionism.

42. Vinit Haksar and Kristjan Kristjansson make similar points. *See* Haksar, *supra* note 2, at 68 (calling the act threatened A's "declared unilateral plan"); Kristjan Kristjansson, *Freedom, Offers, and Obstacles*, 29 Am. Phil. Q. 63, 67–69 (1992) (terming *all* conditional proposals "throffers"—contrary to Steiner's usage which, as noted above, employs the term to refer to a small subset of proposals—to represent that they all contain both a threat and an offer).

43. Frankfurt, *supra* note 2, at 67.

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Frankfurt's mistake comes from conflating two distinct ways of assessing the biconditional—what might be called the holistic and constituent senses. The holistic perspective inquires into the nature or meaning of the proposal as a whole. The constituent sense analyzes its component parts. I have attempted to demonstrate that it is in fact useful to adopt the constituent perspective and to recognize that every biconditional necessarily contains both a threat and an offer. Frankfurt objects to this approach on the grounds that it is peculiar to conceive of some proposals as threats. But this is a non sequitur, rather like denying the claim that, for certain biochemical purposes, it is useful to view human beings as containing both water and solids, by observing that human beings are ordinarily regarded as being solids not liquids. Put another way, to say that every proposal can be profitably analyzed as containing both a threat and an offer (as I've just defined them) is not to say that every proposal "is" both a threat and an offer. Frankfurt's observation, therefore, does not have the force he thought. That we may have an interest—perhaps for descriptive purposes—in being able to characterize the proposal as a whole does not undermine the importance—for accomplishing our normative tasks—of distinguishing elements of the proposal.

Let us suppose that there is this much truth to Frankfurt's argument—that, in order to satisfy certain descriptive needs, there is value in being able to characterize the proposal as a whole as either a threat or an offer, but not as both at once. Granting that every biconditional *contains* both a threat and an offer, we might then ask, whether it, itself, *is* a threat or an offer. For expedience and clarity, let us use lowercase letters when referring to one or the other constituent of a biconditional proposal, and capitals when characterizing the biconditional itself. Thus, for example, we might say that every biconditional, whether a Threat *or* an Offer, necessarily consists of both a threat *and* an offer. My guess is that whether a proposal is better characterized as a Threat or an Offer is sociological and phenomenological. Most often, I suspect, it will turn largely on B's expectations, which in turn will be a product of, among other things perhaps, her own past experiences, her knowledge of A's past conduct, her beliefs about statistical ordinariness, her normative beliefs, and her beliefs about the relevant culture's normative commitments. For other descriptive purposes, the appropriate perspective from which to judge a Threat or an Offer will be that of A himself or of some (actual or hypothetical) third party observer. (Either way, Frankfurt is surely correct that we do not ordinarily regard a merchant as Threatening his customers.) Although I do not insist on the point, I am very skeptical that there exists *any* formula for consistently and accurately distinguishing Threats from Offers.

This is all fairly indeterminate to be sure. But that should not trouble us. The normative question prompting coercion_W claims depends upon whether a proposal is coercive_W, and *though there can be* coercive_W *Offers as well as* coercive_W *Threats, either is* coercive_W *only by virtue of its constituent threat, not by*

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virtue of its constituent offer. (So while there may be sound reasons of policy to prohibit certain types of "seductive Offers"—in areas ranging from prisoner experimentation to organ sales to surrogate motherhood—those reasons do not sound in the coerciveness$_W$ of the proposal unless we believe that the act threatened is wrongful.) In short, in rejecting in toto the construction that he considered (and that I adopt), Frankfurt's mistake—the mistake that still plagues coercion theorists—was to fail to recognize that our descriptive and normative needs might be separable. And for purposes of determining whether A is blameworthy for having engaged in coercion$_W$, the only question is whether it would be improper for A to perform the act he threatens; whether he is Threatening or Offering is irrelevant.

IV. COERCION$_E$

We've said enough to explain what makes A's action wrongful on coercion grounds: namely, if A conditionally threatens (*not* "conditionally Threatens") to act impermissibly. The task of this Section is to explain what makes B's action blameless (or less blameworthy) on a coercion rationale, which is to say, what constitutes coercion$_E$. The analysis proceeds in several steps. The first is to see if we can derive coercion$_E$ from coercion$_W$. After demonstrating that coercion$_W$ does not itself entail coercion$_E$, I next try to build coercion$_E$ from the ground up, that is without reference to coercion$_W$. Put simply (and not with novelty), coercion$_E$ is an excuse extended as a concession to the actor's severely constrained choice situation. I then explore whether coercion$_W$ is an *additional* condition necessary to constitute coercion$_E$. This step of the analysis itself requires several stages. I conclude that coercion$_E$ is logically independent of coercion$_W$. That conclusion is reinforced when, lastly, I turn to claims that arise in the special context of broken promises.

A. From Coercion$_W$ to Coercion$_E$?

That the coerciveness$_W$ of a proposal is not sufficient to constitute coercion$_E$ should be plain. If A threatens to egg B's mailbox unless B kills C (clearly an instance of coercion$_W$, if a trivial one), we would be hard pressed to say that B was "coerced" to do so—even if we believed that A were so bizarre as to anticipate that B could be driven to murder by such an inconsequential threat. This is not to attribute something unique to "coercion" language. Just as we recognize cases where A acted *deceptively*, even though his audience was not, in fact, *deceived* (and, consequently, there was no *deception*), there will be at least some values for *x* and *y* for which we'd want to say that the proposal is *coercive*, but for which we would not say that B is *coerced* nor that there has been an instance of *coercion*. But what we would or would not

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say as a matter of common parlance is not directly at issue. If B, acceding to A's demand, kills C, we would certainly not conclude that she was coerced$_E$.

B. Coercion$_E$: A First Pass

So coercion$_E$ is not reducible to or simply correlative of coercion$_W$. What, then, does it require? We can proceed here much as we did when examining coercion$_W$, by first trying to articulate a shared pretheoretical sense of the circumstances in which a claim that one should be excused for acting under coercion or because coerced might be appropriate.

Very roughly, the idea is this. Functionally, as we have said, a coercion$_E$ claim serves to excuse the actor for conduct that is ordinarily deemed wrongful. Put another way, it serves to release her from or reduce the demands of a normative obligation. Just as coercion$_W$ is not any sort of wrongful conduct, however, coercion$_E$ does not signal just any sort of excuse. One can be excused for a host of reasons—because of physical error (accident), cognitive error (mistake), cognitive defect (insanity or delusion), and perhaps moral or emotional defect (psychopathy or uncontrollable passion). To claim that one was coerced$_E$ is also to claim an excuse, but on none of these grounds.

Normative demands operate upon presumedly free agents: Ought implies can. The gist of a coercion$_E$ claim is that one has acted under circumstances in which the consequences of doing otherwise were so grave that one's ability to choose otherwise was substantially constrained. The claim therefore has two basic components: first, an explanatory requirement that constraining circumstances existed that caused B to do as she did[44]—that, we might say, B "acted under duress"[45]—and second, an objective moral evaluation[46] of B's conduct in light of those constraints or in light of the psychological pressure B experienced.

The moral evaluation can yield three sorts judgments in B's favor: a justification, a full excuse, or a partial excuse.[47] The fact that one was coerced$_E$ makes out a justification where, although *x* is normally (or pre-

44. If the circumstances obtained but B would have performed *x* even had they not, the mere happenstance that she did so after being threatened with *y* is of no moral moment.

45. While I believe that this is a perfectly acceptable use of the phrase, the skeptical reader should keep in mind that this is merely a stipulation. For some thoughts about the "real" meaning of *duress* and its relation to *coercion see* Westen, *supra* note 2, at 544–45.

46. By speaking of an "objective" evaluation, I mean only to signify that the actor's own assessment of the moral character of her act is not determinative. Perhaps we might just as well think of it as an "external" moral evaluation.

47. Although this usage of the terms "justification" and "excuse" is fairly standard, I fully acknowledge that these are heavily contested terms in both philosophical and legal circles, so that no usage can claim universal allegiance. (I explore some of the contested issues in an unpublished manuscript tentatively entitled *Justification and Excuse in the Criminal Law: Toward the Irrelevance of Moral Wrongdoing.*) Readers who prefer meanings for these terms different from the ones I offer should treat my definitions, again, as stipulative. The argument that follows does not depend upon the particular way I slice the domain of justification and excuse.

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sumptively) wrongful, doing *x* under threat of *y* was actually the morally right thing to do. Where *x* was not the right thing to do even under the circumstances, B might nonetheless seek to be excused. Excuse, unlike justification, can be full or partial. Either way, the crux of an excuse is that one's blameworthiness for engaging in wrongful conduct—or the wrongfulness of the conduct—is reduced or eliminated. B's claim to have been $\text{coerced}_{\text{E}}$ succeeds, then, precisely insofar as it is thought too demanding to expect her to have refrained from *x* at the cost of enduring *y*.

Some readers might find this unsatisfying. Naturally we should prefer more guidance regarding which threats of *y* make performance of which acts of *x* permissible or excusable. Unfortunately, further conceptual analysis of $\text{coercion}_{\text{E}}$ cannot supply that guidance. As Wertheimer has argued at length, resolution of coercion claims ultimately depends upon substantive moral reasoning.[48] Put another way, the conceptual account of $\text{coercion}_{\text{E}}$ is inevitably metaethical. Specific answers will depend upon one's acceptance of a general substantive moral theory and on one's particularistic moral judgments.

Although $\text{coercion}_{\text{E}}$ claims are *inescapably* moralized in this sense, what I have said so far should be enough to suggest that they are not *radically* moralized in the sense that they operate independent of any psychological or phenomenological component.[49] At least insofar as B seeks an excuse (full or partial) for her action—rather than a justification—B must actually *feel* (substantial) pressure.[50] This requirement is not, however, a separate and independent condition. Instead, it is internal to the moral evaluation. Where our moral judgment is that B really should not have done *x* notwithstanding that refraining from *x* entailed *y*, then the excusability of

48. *See generally* Wertheimer, *supra* note 2, ch. 15. Although I agree with much of Wertheimer's penetrating analysis, I am not inclined to agree with his ruminations about the distinction between justification and excuse. *See id.*, at 269–72.

49. John Lawrence Hill defines "radically moralized theories" of coercion as those that "eschew any reference to the voluntariness or freedom of particular acts, at least where voluntariness is defined as an empirical state reflecting the author's psychological capacity to resist acting." Hill, *supra* note 30, at 910–11.

50. If we accept that whether B was $\text{coerced}_{\text{E}}$ turns on some psychological component, it remains open whether we should say that B was "coerced" just so long as she acts under the experience of pressure, in which event there would be situations in which B was coerced but not excused, even partially. This is Joel Feinberg's preference. *See* Feinberg, *supra* note 2, at 212. We could certainly adopt this nomenclature. It may even better reflect common parlance. Either way, it remains the case that whether B was $\text{coerced}_{\text{E}}$ requires a moral evaluation. And this is the important issue—as Feinberg appears to acknowledge. *See id.*

To be sure, if the prospect of *y* is so intensely terrifying or debilitating to B that she is (in whatever sense you'd be prepared to recognize) psychologically compelled to perform *x* to avoid it, we might conclude that B is excused for performing *x* even without undertaking the type of moral assessment I've outlined. Here, though, she's excused not because $\text{coerced}_{\text{E}}$ but because her conduct is involuntary. Put another way, following Wertheimer, we might say that the analysis in text applies to $\text{coercion}_{\text{E}}$ claims tailored to B's acts of "constrained volition" rather than to her "nonvolitional acts." *See* Wertheimer, *supra* note 2, at 9; *supra* note 19. *See also* Jeffrie G. Murphy, *Consent, Coercion and Hard Choices*, 67 VA. L. REV. 79 (1981) (dubbing the elements of a similar dichotomy "Duress_1" and "Duress_2").

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doing *x*, as a matter of moral evaluation, depends upon B being able to say that she felt (in some sense) that she couldn't have done otherwise. In other words, the moral evaluation itself takes into account not only whether *x* occurred because of the threat of *y* but whether it occurred as a matter of *succumbing* to that threat.[51] How much pressure is enough, or, better, how we can profitably analyze how much pressure is enough, I am content to leave open.[52] For my particular objective, it bears emphasis, is not to present a complete account of coercion$_E$ but rather to explicate the relationship between coercion$_E$ and coercion$_W$. For that purpose, this outline of what is entailed by a coercion$_E$ claim should suffice.

C. The Irrelevance of Coercion$_W$

I've proposed, then, that whenever the threat of *y* induced B to do *x*, a successful claim of coercion$_E$ hinges upon a moral evaluation of the extent to which it is fair to demand that B suffer *y* as the price of refraining from *x*, and that resolution of this difficult question is not aided by further conceptual analysis of coercion. If this is all there is to say about coercion$_E$, coercion$_W$ would be irrelevant. It could prove relevant in two ways, however. First, this account of coercion$_E$ might be incomplete. Even when B acts under duress, and is for this reason excused, the objection would run, B has not been coerced$_E$ unless the threat of *y* is coercive$_W$. Second, coercion$_W$ can be viewed, much like the psychological requirement that B feel compelled to do *x*, as an essential ingredient of the moral evaluation that I've represented as the core of the coercion$_E$ inquiry. That is, one simply can't be deemed excused on grounds related to her choice predicament unless she has been coerced$_W$. I suspect these two argumentative moves amount to the same thing. Even if distinct, though, the fundamental question remains

51. For one who thinks that this psychological component—the feeling of being compelled to do *x*—is conceptually central to a coercion$_E$ claim, it might follow that a successful claim to have been coerced$_E$ always serves as an excuse, not a justification. That is, insofar as B contends that the prospect of *y* if –*x* made *x* the right thing to do under the circumstances (as opposed to a wrongful choice for which she should not be blamed), then, strictly speaking, B might be said to be relying not on a claim to have been coerced$_E$ but rather on the conceptually distinct claim to have acted rightly under exceptional circumstances, *even though the facts exist sufficient to excuse B on grounds of coercion$_E$ were the justification to fail.* I am sympathetic to this perspective (which is partly why I didn't call this second type of claim coercion$_J$) but don't press it.

52. This discussion is therefore agnostic regarding Harry Frankfurt's claim that it is "a necessary condition of coercion that a person should have to be convinced that he has no choice but to submit." Frankfurt, *supra* note 2, at 80; *see also id.* at 75 ("A person who is coerced is *compelled* to do what he does. He has *no choice* but to do it."). For a thoughtful analysis of different ways to measure the amount of "coercive pressure" a choice situation exerts, as measured by *y*'s ineligibility (to B), rather than by *y*'s wrongfulness (if performed by A), *see* Feinberg, *supra* note 2, at 199–212.

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the same—namely, whether coercion_E requires coercion_W. The prevailing view is that it does.[53] I will argue that it does not.

Suppose that B is driving "along a narrow and precipitous mountain road, falling off sharply on both sides, under the command of A, an armed escaping felon. The headlights pick out two persons, apparently and actually drunk, lying across the road in such a position as to make passage impossible without running them over."[54] A threatens to shoot B dead if she stops the car to move the drunks aside. As a result, B continues driving, thereby killing C and D, the two drunks. Now imagine that B_1 is driving down the same road, but this time alone. When she espies the two bodies on the road and applies her brakes, she discovers that they are suddenly inoperative. Realizing that her only alternative is to turn the car off the road and thereby plummet to her certain death, B_1 continues straight ahead, again killing C and D.

Are B or B_1 morally blameworthy for the deaths of C and D? Maybe, maybe not. If, however, you believe that B is not blameworthy—that, in short, B is morally excused—it would seem to follow that B_1 isn't blameworthy either. Likewise, if you reject an excuse for B_1, you seem compelled to reject one for B as well. From a moral perspective, B and B_1 seem identically situated, in which case coercion_E is independent of coercion_W.[55]

But maybe this conclusion is premature. One might agree that B and B_1 are equally excused and yet insist that only B is coerced_E on the grounds that only actions by human beings can "coerce." This is a controversial view.[56] But whatever one's predilections here, either position is arbitrary from a normative perspective. If we choose to say that B is excused by reason of coercion_E, while B_1 is excused by reason of duress, nothing more is at

53. *See, e.g.*, Lamond, *supra* note 19, at 220 ("Clearly coercion is a necessary component of duress, but it only establishes duress where it justifies or excuses the victim's behavior."); Lamond, *supra* note 16 at 48. A softer contention would be that even if coercion_W is not a necessary condition of coercion_E, it is nonetheless normatively significant such that, holding constant the amount and quality of pressure that the prospect of *y* exerts on B, whether the threat of *y* emerges as part of a coercive_W proposal itself affects the coercion_E analysis. The argument to follow addresses this weaker position too.

54. These well-known hypotheticals were first introduced in Sanford Kadish & Monroe Paulsen, CRIMINAL LAW AND ITS PROCESSES 570–71 (3d ed. 1975). Here, and throughout this paper, I have altered letters designating parties, or standing for acts threatened and demanded, to conform to my usage. Such alterations effect no changes in meaning; for ease of readability, I do not signal the substitutions as they occur.

55. As Lawrence Becker has observed, this is true as well of coercion_E claims predicated on B's psychological inability to withstand the act threatened. *See* Lawrence C. Becker, *Hard Choices Are Enough*, 67 VA. L. REV. 97, 99–100 (1981) (doubting that there is "any practical difference . . . between what Murphy calls Duress_2 ('being unfairly placed in a situation of great psychological pressure') and 'simple pressure' (where the amount of pressure may be the same but there is no one applying it unfairly)").

56. *Compare, e.g.*, Frankfurt, *supra* note 2, at 83–84; Westen, *supra* note 2, at 560; Wertheimer, *supra* note 2, at 267 (only persons can "coerce"); *with, e.g.*, Feinberg, *supra* note 2, at 193 (situations can coerce too).

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stake than linguistic preference; our substantive moral conclusions will remain unaffected.

Nonetheless, let us take the position more challenging to my thesis by agreeing arguendo that natural conditions do not "coerce" and therefore that coercion$_E$ claims are properly limited to cases where an actor performs *x* in response to pressure exerted by another person. Now is it true that coercion$_E$ requires coercion$_W$? Is it true, in other words, that *if* B performs *x* in response to a conditional proposal issued by A, then whether B is morally excused for reasons associated with the constraining force of her choice situation depends not just on a holistic moral evaluation but also on whether A's proposal was coercive$_W$?

A hypothetical will suggest not. Suppose that B's terminally ill child, C, will die unless he receives an unusual medical treatment within 24 hours. A is the only physician to whom B and C could possibly have access in this short time frame who is capable of performing the requisite procedure. For reasons that I am about to make clear, B actually and reasonably believes that the only way to secure A's services—thus the only way to save C's life—is to steal a particular painting owned by D. Acting on this belief, B steals the painting. Is she blameworthy? Consider four variations:

(1) A has no moral or legal duty to operate on C. (Feel free to supply whatever facts you find necessary to reach this conclusion; perhaps, for instance, A would have to fly in from Calcutta.) Still, A offers to treat C if and only if B gives him D's painting. B protests (truthfully) that she is destitute and therefore could not possibly buy the painting from D. "Your poverty is irrelevant," A explains. "Even were you rich as Gates you couldn't buy the painting from D because (I happen to know) D would never willingly part with it. You'll have to take it. If you want me to operate on C, you'll have to steal the painting for me."
(2) Same as (1), except that this time A does have a moral and legal duty to try to save C. (A could perform the operation at negligible inconvenience, or A is C's father, or A caused C's injury in the first place, or whatever.)
(3) Here, as in (2), A is morally and legally obligated to try to save C. Unlike the first two cases, though, the stated price for A's services is not D's painting but rather $10,000—A's usual fee. B steals D's painting because she knows that it is valuable and poorly protected, and realizes (correctly) that she has absolutely no other way to raise $10,000 so quickly.
(4) Same as (3), except that A is not morally or legally obligated to save C.

The key variables in this iterated hypothetical, of course, concern the wrongfulness of the act A threatens (to let C die) and the wrongfulness of the act he solicits (for B to steal D's painting). If my analysis in Parts II and III is correct, A is guilty of coercion$_W$ in cases (2) and (3). Additionally, he is guilty of soliciting wrongful conduct in cases (1) and (2). A's conduct in case (4) is not morally wrongful. And yet, I would argue, these variables

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have no bearing on B's blameworthiness for stealing D's painting. B is at least excused, and perhaps justified, in all four cases.

If this is right, then my earlier claim that coercion_E is independent of coercion_W survives. Regardless of whether you would recognize the possibility of being coerced_E by nonhuman pressures, the critical point is that whether B is morally excused (or justified) for *x*—the normative question animating a coercion_E claim—has everything to do with a (phenomenologically informed) moral evaluation of B's choice situation and nothing to do with whether her action is in response to coercion_W—or, indeed, any type of wrongful action—by another person (except in the rather uninteresting empirical sense that B's being in a situation of duress will often be the result of A's coercive_W proposal).

Let us consider one final objection. I've argued so far that B's moral blameworthiness for *x* has nothing to do with coercion_W. (To repeat: the particular provenance of the circumstances that constrain B—whether from a coercive_W proposal by A or anything else—is irrelevant.) But perhaps that conclusion rests on too partial a view of what we mean in examining whether someone was coerced_E. In Wertheimer's formulation, recall, coercion claims arise when we wish to ask: "Is B responsible for the normal moral or legal effects of his action?"[57] Our present conclusion that coercion_E is logically independent of coercion_W cannot be secure until we understand just what this construction means. For even if (as I've argued thus far) the presence of coercion_W is not strictly relevant to a claim of coercion_E in the sense of eliminating or mitigating B's blameworthiness for *x*, perhaps it is relevant to a claim of coercion_E in the different normative sense that Wertheimer has in mind.

One problem is that what Wertheimer's formulation does mean is far from clear. Consider first the question of whether one is "responsible for the normal *moral* effects" of one's action. This is difficult to understand, I think, because the notion of "normal moral effects" is opaque, while "responsibility" is famously ambiguous.[58] My best guess, though, is that at least two different ideas are at work here. First is the notion that moral blame normally attaches to morally wrongful conduct.[59] To contend that one is not "responsible" for such blame would seem to mean that one does not deserve it because one is justified or excused. This is to raise a straightforward claim of coercion_E, which is precisely the claim we have already examined: Coercion_w is logically irrelevant to a claim that one should not

57. *See supra* note 4 and accompanying text. This formulation is neither casual nor careless. It's how Wertheimer articulates the issue throughout his book. *See* Wertheimer, *supra* note 2, at 172–75, 267–70, 281–86, 307.

58. For the classic examination *see* H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 210–30 (1968) (distinguishing four basic concepts of responsibility in legal and moral contexts—what he calls role-responsibility, causal-responsibility, liability-responsibility, and capacity-responsibility).

59. Also, praise attaches to supererogatory conduct. *See infra* text accompanying note 107.

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be held morally responsible for conduct that ordinarily warrants some sort of moral censure.

But there is at least one other notion lurking here. Where one's conduct is not a wrongful act but the making of a promise, the normal moral effect might be thought to be the creation of a moral obligation to fulfill that promise. One who was "coerced" into making the promise might claim not to be "responsible" for the moral obligation that normally arises. That is to say, one might be excused for coercion-related reasons. A claim of coercion$_E$ might seem inapplicable, however, as I have defined coercion$_E$ claims to arise for the purpose of justifying or excusing a presumptively wrongful act. Because the making of a promise is not a wrongful act, if one is to be excused from the promise, or from the obligation that arises therefrom, on grounds of coercion, this will be a third normative function that coercion claims serve. Indeed, suggestions that there exist three types of coercion claims seem to rest on something very much like this view.[60]

Though this possibility should not be rejected out of hand, nor should it be embraced too quickly. First, the difficulty might lie not with the contention that coercion claims serve two discrete normative functions (as opposed to three), but with my definition of coercion$_E$. Instead of focusing narrowly on whether B is excused for wrongful conduct, it might be better to identify coercion$_E$ claims more capaciously (following Wertheimer) as serving to release one from the normal consequences of one's action. An alternative would be to reject as premature the concession that insofar as one seeks to avoid responsibility for making the promise on grounds of coercion, one cannot be relying on coercion$_E$ because there is as yet no presumptive wrongdoing to excuse. After all, a claim that one ought to be released from a promise or that the promise be viewed as nonbinding seems readily assimilable, if not identical, to a claim either that one's breaking of a promise be excused or justified or that one be found excused or justified for making a promise one intended from the beginning not to honor. In short, even if one does not seek excuse for making a promise[61] or from the normal moral effects of making the promise, one does seek to be excused either for breaking a promise that was bona fide when made or for making a fraudulent promise.

To summarize: in order to retain the two-function account, we have two approaches potentially available to us: We could expand my working definition of coercion$_E$ so as to embrace claims to be relieved of the obligation to fulfill a promise as well as claims to be excused for wrongdoing, or we could preserve the definition of coercion$_E$ and assimilate a claim to be relieved of

60. *See* authorities cited *supra* note 16.

61. At least not ordinarily. If C, referring to A, instructs B: "Don't promise that man anything!" and B makes a promise to A nonetheless, B might seek to excuse the making of the promise on the grounds that she was coerced. But the excuse is sought not *qua* the making of the promise to A, but *qua* the defying of C's instruction (or, where B had promised C not to make a promise to A, the excuse is sought *qua* the *breaking* of the first promise, not *qua* the *making* of the second).

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a promise to a claim to be excused for wrongdoing. Of course, the question remains whether we *should* do either of these things. Not, I think, if the conditions that make out a claim of coercion_E in the promise context differ from those that make out coercion_E elsewhere. Most particularly, if the claim to be excused from a promise requires coercion_W, even if (as I have argued) coercion_E does not require coercion_W when it is being appealed to for the purpose of excusing some other form of wrongdoing, then it might prove more perspicuous to identify three discrete normative functions that coercion claims serve. If not, then the bipartite taxonomy of coercion_W and coercion_E would seem to have parsimony on its side.

D. Coercion_E, Coercion_W, and the Problem of Promises

The intuition that one is not excused for breaking a promise, even if one acts under duress, unless subjected to coercion_W emerges most clearly when contrasting cases like the following pair of variations on the hypothetical of the terminally ill child:

(5) A is morally obligated to operate on C for free but offers to do so only if paid $10,000, A's usual fee. B accepts and gives A her promissory note. After C recuperates, however, B refuses to pay A.
(6) Same as (5), except that A has no duty to operate on C.

If we assume (here and in the hypotheticals that will follow) that B has the $10,000 or could get it through legal means,[62] is she excused (or justified) for the fraudulent promise on grounds of coercion? Intuition suggests she is in case (5) but not in case (6).[63] Because these variants differ only in the presence of coercion_W (present in (5), absent in (6)), the conclusion might seem to follow that coercion_E = duress + coercion_W.[64]

That this conclusion is not sound, however, is illustrated by the following case:

(7) Same as (5), except that the fee A demands for the operation is not $10,000 but D's painting. B offers D $10,000 for the painting and D accepts. After B gives the painting to A, A successfully operates on C. B refuses to pay D.

62. If, as in the first series of hypotheticals, B is destitute, these variations do not involve broken or fraudulent promises so much as misrepresentations regarding B's present economic means. In that event, these variations present no new issues. In cases (1)–(4), B engages in theft by stealth; here she engages in theft by false pretenses. I see no interesting conceptual difference.

63. If you have doubts about case (5), compare (5′), where A comes upon B and C in a dark alley and threatens to shoot C unless B pays him $10,000. If A is willing to take a check, surely B is justified in stopping payment on that check when she returns home. If (as I've asked you to assume) A is morally obligated to try to save C in (5), then (5) and (5') seem morally equivalent.

64. This, I think, is the conclusion Wertheimer would draw. *See generally* Wertheimer, *supra* note 2, at 23–46.

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As in case (5), B faces the choices of promising to pay $10,000 or allowing C to die. And as in (5), this choice is a result of A's coercive_W proposal. Yet surely B has no greater excuse in case (7) than she does in case (6). Therefore, duress and coercion_W do not necessarily excuse B from her promise.

To be sure, there is a ready response: Duress and coercion_W might be independently necessary but not jointly sufficient conditions for B's promise to be excused on grounds of coercion_E. That the breach works no harm to an innocent promisee (or, perhaps, to any innocent third-party beneficiary) could be an *additional* necessary condition.

Maybe. But there's another possibility. When invoked to excuse wrongdoing, coercion_E claims, I have said, contain two basic components: first, an explanatory requirement that the wrongdoing (x) was performed in the face of an unusually constraining choice predicament that I call "duress"; and second, that, as a matter of substantive moral evaluation, the claimant's doing of x given the alternatives was excusable or justifiable. Transplanted to the promise context, the explanatory prong would require that the promise was made under duress and the evaluative prong would require that, once the promise has been made, it is morally preferable (or at least permissible) that the promisor shift the costs of that promise upon the promisee. Under this view, the contrast between cases (5) and (6) is not due to the presence of coercion_W per se, but to the more general fact that A's having wronged B in case (5) tips the balance of equities so as to make it preferable that the cost of B's "involuntary" promise fall on A rather than B.

Yet another variation suggests that this is in fact the better explanation:

> (8) A, without any duty to do so, has offered by phone to operate on C for $10,000, A's usual fee. B agrees and withdraws the cash from her bank account. En route to A's office, however, B's pocket is picked and the $10,000 lifted. When she reaches A's office, B is shocked to recognize A as the thief. Nonetheless, B promises to pay A for the operation. After the successful procedure, B reneges on her promise.

An informal survey of my colleagues reveals a consensus that B is excused, a conclusion that strikes me as powerful. First, B's promise is extracted under duress: B cannot reasonably refuse. Second, once B has made the promise, it seems a prissy, perhaps otiose, morality that would demand that she honor it by paying another $10,000 to the thief. And yet A's wrongdoing consists in something other than coercion_W. If all this is right, coercion_W has no independent significance in making one excused for breaking a promise on grounds of coercion_E. That the disappointed promisee induced B's promise by coercion_W is one feature that can make the breach excusable, but so could others.

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Even assuming that B is excused from her promise in case (8)[65] (as she was in case (5)), the conclusion that coercion_W is not independently relevant (i.e., relevant in any way beyond the fact that coercion_W is a type of wrongdoing) in determining coercion_E could still be resisted were one to suppose that only in case (5) does B's excuse sound in coercion_E and that in case (8) some other consideration is at work. That is, B is excused in both cases but for conceptually distinct reasons.

If this judgment is to reflect something other than the mere *ipse dixit* that coercion_E requires coercion_W, however, some explanation is needed. Start with the premise that one cannot be excused from a promise "because coerced into it" unless the promise was the product of some sort of defect of voluntariness. (Without at least this much agreement, it is not clear that you and I are examining the same normative phenomenon.) If this is correct as a rough demarcation of what makes a coercion excuse different from other excuses, then B's excuse in case (8) could fairly be described as something other than coercion_E only if it operates independent of duress—that is, if the making of a fraudulent promise is a morally justifiable or excusable response to a prior theft, regardless of the extent to which adverse consequences would flow from refraining from the promise. At the same time, of course, duress must be deemed essential to the excuse in case (5), else B is not coerced_E in that situation either, in which event there still appears no support for the view that coercion_W is a necessary component of coercion_E.

We can test this argument—that B is coerced_E in case (5) but excused for reasons other than coercion_E in case (8)—with a final pair of hypotheticals:

(9) B takes a couple of blouses in for dry cleaning. A, the dry cleaner, quotes B a price of $10. B pays in advance. When B returns to pick up her clothes, A demands another $10. B explains that she has already paid but is shocked to discover that A was under no misapprehension of fact. "I know you've paid," says A. "But I'm just not going to release your clothing unless you give me another $10." B is tempted to walk out; after all, she has plenty of other blouses. Instead, she writes A a check for $10 and receives her dry cleaning. Once home, B stops payment on the check.[66]

(10) As in (9), B takes two blouses in for cleaning. She is quoted a price of $10 but does not pay in advance. Days later, when on her way to pick up the dry cleaning, B's pocket is picked and $10 taken. When she reaches the dry cleaner she recognizes A, the owner, as the pickpocket. She writes out a check for $10, returns home with the clean clothes, and stops payment.

65. Even if you reject this proposition, I would still hope to convince you that one's being excused from a promise on grounds of coercion_E does not depend upon coercion_W. *See infra* note 67.

66. This example is adapted from Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 296 (1975).

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I take it that in neither case does B give A her promise under duress. I take it, too, that in both cases A acts wrongfully vis-à-vis B: he commits coercion_W in case (9) and garden-variety theft in case (10). Cases (9) and (10) thus differ from cases (5) and (8), respectively, only in the absence of duress.

What, then, should we make of these two cases? If you believe that B is not excused from her promise in either case, then the presence of duress seems essential to the viability of B's excuse in case (8), in which event the hypothesis that B's excuse in case (8) is not one of coercion_E remains without support. If, at the other extreme, you conclude that breach of B's promise is excusable in cases (9) and (10) alike, then it *does* become plausible that B's excuse in case (8) sounds in something other than coercion_E. (Perhaps B is excused in case (8) simply because, contrary to conventional elementary school wisdom, two wrongs *do* make a right.) But this does not get us very far, for the very same reasoning would suggest that B's excuse in case (5) isn't coercion_E either. And if that's the case, then there is as yet no support for the contested claim that coercion_W is necessary for coercion_E.

Some readers, however, might have the intuition that cases (9) and (10) are in some meaningful respect different. In case (9), after all, A tries to sell B something to which B already has a claim of right—namely, B's blouses. This might make B's agreement void *ab initio*. In case (10), in contrast, A does have a right to demand $10 for the dry cleaning. It just so happens that A is also in possession of a "different" $10 to which A has no right and B is fully entitled. As a descriptive matter, there is a linkage between B's promise and A's wrongdoing in (9) that is absent in (10): Only in case (9), and not in case (10), is B's promise procured by A's wrongful conduct.

Whether this descriptive difference is normatively meaningful is a separate matter. Suppose that it is. (If you think otherwise, you're not likely to conclude that B is excused in one of these cases but not the other.) But note how it cuts. It would seem to suggest that B is excused in case (9), but not in case (10). And that suggests, in turn, that if B is excused in (8), the fact that her promise in that case is made under duress really *is* critical to the normative judgment. If there is a conceptual difference between cases (5) and (8), then, it's that B is coerced_E only in (8), whereas in (5), her more fundamental claim is that she simply has no obligation, even prima facie, to honor a promise made in response to coercion_W. I think this is not a convincing position.[67] The important point, though, is that the most likely way to rationalize the intuition that the excuses in cases (5) and (8) are

67. *See infra* Section V.C. But if it is sound, it provides a sufficient basis for the conclusion that B is excused in case (5) and not in case (8) without having to consider any matters of "duress" or "involuntariness." This means that one who holds these joint intuitions about the excusability of B's conduct in cases (5) and (8) still need not conclude that coercion_E—the excuse that *does* sound in constrained choice—requires coercion_W.

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conceptually different makes duress essential in case (8) but not in case (5), and hence makes case (8) look like the clearer instance of coercion_E.

The upshot appears to be that it is not the case that the viability of coercion_E as a justification or excuse in cases of broken and fraudulent promises depends upon coercion_W *in addition* to the judgments that B's promise was made under duress and that it's morally acceptable for B to shift the costs of that promise onto the promisee. The contrast between cases (5) and (7) reveals that the fact that B is responding to coercion_W is morally immaterial if the consequence of her presumptively wrongful action is to shift a loss onto an innocent party. Meanwhile, the similarity between cases (5) and (8) reveals that various sorts of wrongs by the promisee—coercion_W and others—can make it justifiable or excusable to lie to him (or to break a promise made him). To be sure, figuring out which wrongs should suffice is likely to be a very elaborate task. For one thing, it will depend upon one's account of why promises are morally binding in the first place, a matter on which there is no universal agreement. But the need for contestable moral judgment is already incorporated into coercion_E. The presence *vel non* of coercion_W is, once again, inessential. When one seeks moral excuse or justification for breaking a promise on the grounds that it was "coerced," the question is whether it was made under conditions that make it insufficiently voluntary and whether breach is excusable—the twin factors that underlie a claim of coercion_E in nonpromise contexts as well.

The fundamental point that a successful claim of coercion_E does not depend upon coercion_W is perhaps even more clear when we turn attention from the "normal *moral* effects" of one's conduct to the "normal *legal* effects." I'll be brief. Consider two actual cases Wertheimer discusses: Caivano v. Brill Contracting Corporation[68] and Shasta Water Company v. Croke.[69] In *Caivano*, subcontractor A hired plumber B conditioned on B's payment of $25 per week in kickbacks. When B's work ended, he sued A to recover the payments he had made. Reasoning that, given the economic depression, B accepted A's proposal under duress, the court ruled for B. In *Shasta*, employer A accused employee B of theft. B promised to repay the money he was accused of stealing in exchange for A's promise not to prosecute. When B breached and A sued to require B's performance, the court again ruled for B on the grounds that "the use of criminal prosecution as a means of collecting a debt is against public policy; such threats . . . constitute a menace destructive of free consent."[70] Wertheimer appears to endorse the conclusions in both cases.[71] In neither case, though, has A engaged in coercion_W. Instead, the conditions that appear sufficient to excuse B from the normal legal effects of his promise are that he made the promise under duress and that the frustrated promisee engaged in wrong-

68. 11 N.Y.S.2d 498 (1939).
69. 276 P.2d 88 (1954).
70. *Id.* at 91.
71. Wertheimer, *supra* note 2, at 28, 40–42.

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fulness (not amounting to coercion$_W$)[72] sufficient to make the equities tip (in the courts' eyes) in B's favor at A's expense.

Caivano and *Shasta* thus illustrate that there exists a variety of paths leading from acting under duress to being legally excused in contract that do not pass through coercion$_W$. But we can put the point more generally. Wertheimer is surely correct that, in order to be successful, B's claim to be excused from a variety of normal legal consequences for *x* will often require more than a demonstration that she performed *x* under duress. But any implication that it inevitably requires the presence of coercion$_W$ is mistaken. The reason is obvious. Unlike physical effects and (arguably) moral effects, legal effects don't just *happen*, they're *imposed*. And they're imposed for reasons. Consequently, to decide whether B should be excused from a particular legal consequence cannot be detached from the reasons that underlie the sanction's usual imposition. It therefore follows that there is no single answer to the question of whether B should be excused from the ordinary legal consequences. Rather, the answers will be as intricate, multivalent, and particular to specific legal contexts as are the reasons for the application of legal consequences in the first place. The not-surprising upshot is that, in addition to the cases where duress and coercion$_W$ do confer legal excuse, B's duress will sometimes generate an excuse even absent coercion$_W$ (as where B's adversary is guilty of any wrong that falls within the equitable catchall category of "unclean hands"), while other times B will not be excused despite the conjunction of duress and coercion$_W$ (as when D, the rightful owner of the stolen painting, sues B for damages). Perhaps most tellingly, just as B can be excused from the normal legal consequences of her act by reason of duress, even absent coercion$_W$, she can be excused for reason of coercion$_W$ absent duress (and thus necessarily absent coercion$_E$)![73]

72. That should be clear in *Caivano*. That A's wrongful behavior in *Shasta* likewise did not constitute coercion$_W$ emerges from my discussion of crime-exposure blackmail *infra*, Section VI.

73. For a revealing example of this situation, consider Wertheimer's own gloss on Harry Frankfurt's remarks about "coerced confessions." Frankfurt had observed that "[t]he courts may refuse to admit in evidence, on the grounds that it was coerced, a confession which the police have obtained from a prisoner by threatening to beat him. But the prisoner's accomplices, who are compromised by the confession, are less likely to agree that he was genuinely coerced into confession." Frankfurt, *supra* note 2, at 65. After quoting this passage, Wertheimer claims that it reflects the fallacy of equivocation because "[t]here is no reason to think that there must be a single acceptable answer" to the question of whether the prisoner's confession was coerced. "We may think that the sort of pressure to which the prisoner was subject may be sufficient to deprive his confession of legal validity. At the same time, and if there is anything like honor among thieves, the very same pressures may not be sufficient to excuse his betrayal of his accomplices." Wertheimer, *supra* note 14, at 894.

Perhaps. But not directly to the point, I think. The more important point here is not that a single confession might be "coerced" (i.e., coerced$_E$) for one purpose and not another, but rather that B might be freed of the normal legal consequences of her acts because of coercion$_W$ just as from coercion$_E$. The best sense to be made out of Frankfurt's story is that the beating threatened might not exert sufficient pressure to justify or excuse the prisoner's disloyalty to his comrades, and yet was impermissible as a matter of political morality (because the action

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Where, finally, does this leave us? Back with the view that one's being coerced_E (in the sense of being blameless or less blameworthy for one's action) *just is* the two-part judgment that one has "acted under duress" (as earlier defined) in circumstances that make one's action (including the breaking of a promise) excusable. Whether the duress and thus the action are products of a coercive_W proposal has no independent moral significance.[74]

V. UNIFIED THEORIES OF COERCION AND THEIR PITFALLS

Let us recap our conclusions to this point. First, an individual is (prima facie) morally blameworthy on grounds of "coercion_W" if he conditionally threatens to engage in conduct that would violate a normative obligation. Second, an individual is morally excused on grounds of "coercion_E" to the extent that conduct that is prima facie wrongful—including causing injury to another, lying, or promise-breaking—does not warrant censure in light of the phenomenological and moral characteristics of her choice situation. Third, the wrongfulness of the proposer's threatened conduct (coercion_W) and the moral acceptability of the offeree's conduct in light of her alternatives (coercion_E) are jointly necessary conditions for resolution of *neither* basic normative question.[75]

I supposed early on that existing theories of "coercion" have proven unsatisfactory because theorists have assumed that "coercion" has a single

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threatened was impermissible, and the making of the threat was not justified). There was therefore coercion_W without coercion_E, and if we choose to exclude the confession, we do so on the basis of some dictate of our political theory (or constitutional law), not on the basis that the confession was not adequately voluntary. Sure enough, the Supreme Court made clear some years after Frankfurt's writing that the inadmissibility of certain confessions is a function of coercion_W, not coercion_E. *See* Colorado v. Connelly, 479 U.S. 157, 170 (1986) (holding defendant's confession made as an involuntary manifestation of a mental disease admissible on the grounds that "voluntariness" under the Fifth Amendment means "the absence of police overreaching rather than 'free choice' in any broader sense of the word").

74. It is noteworthy that Wertheimer begins his study of coercion in law and philosophy by examining contract law. He explains this priority on the grounds that it "provides the most fully developed account of coercion in the law." Wertheimer, *supra* note 2, at 15. So it does—where "coercion" represents the intersection of the distinct circumstances that B acted under duress and that A engaged in coercion_W. I am suggesting that this sense of coercion is most fully developed in the law of contracts, because contract disputes are, far and away, where this conjunction is most relevant.

75. Haksar captures these points nicely:

> According to some philosophers, for a recipient of a proposal to be coerced the important thing is not whether there was unfair pressure, but whether the pressure could (or could reasonably) be resisted by the recipient. Now some such sense of coercion is the relevant one when the problem is whether to excuse the recipient of the proposal from blame for doing what he was asked to do by the proposer, but it is not relevant to deciding whether the proposer (not the recipient) is involved in moral wrongdoing—nor . . . does the existence of such pressure necessarily invalidate the contract between the proposer and the recipient.

Haksar, *supra* note 2, at 74 (citation omitted).

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

unified meaning. Let us call any such unified conception of coercion, "coercion$_U$." If the principal elements of coercion talk are the wrongfulness of A's proposal and some aspect of B's choice situation (whether moralized or put in terms of "voluntariness" or positive "baselines"), we might expect theories of coercion$_U$ to come in three different forms permitting of at least rough adumbration. In the first variety, coercion$_U$ would require both that A's proposal was wrongful and that B faced morally mitigating choice constraints. In the second, the existence of coercion$_U$ turns solely on an evaluation of B's choice situation. And in the third, coercion$_U$ depends only on the wrongfulness of A's threatened conduct. Furthermore, if the general arguments of this article have been correct, we should expect that insofar as instances of each of these three conceptions of coercion$_U$ exist and are in fact deployed in response to both of the normative coercion claims we've identified, four different types of erroneous conclusions would result. The first conception of coercion$_U$ should sometimes produce false negatives to the separate questions of whether A is blameworthy and whether B is excused; the second conception should produce false positives to the question of A's blameworthiness; and the third conception should produce false positives to the question of B's being excused. To detect such patterns is to muster additional support for the view that continued search for a unified conception of coercion is folly.

A. Two-Pronged Conceptions of Coercion$_U$

The foregoing analysis allows us to predict that a theory of coercion$_U$ that depends upon both the wrongfulness of A's proposal and the pressure experienced by B risks mistakenly exonerating A and mistakenly failing to excuse B.

For a good example of the first error, consider this hypothetical from Joel Feinberg:

> B is an extremely neurotic person who cannot bear to be patted on the back. A, who is larger and stronger than B, knowing of his peculiar sensitivity, demands that B sign over to him most of his worldly goods or else A will pat him on the back. Filled with genuine horror by A's threat, B complies with the demand. . . . Given the account of voluntariness developed in these chapters, it would be an entirely intelligible result if the courts were to acquit A of the criminal charge, but find for the plaintiff in his subsequent civil suit for full restitution.[76]

To be sure, it would be "intelligible" for legislators to conclude that drafting a criminal ban to reach A's conduct would, for a variety of practical reasons, not be worth the candle. But this does not appear to be Feinberg's point.

76. Feinberg, *supra* note 2, at 211–12.

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Rather, he argues, "B's consent was voluntary enough to provide A with a defense to a criminal charge, since the coercive pressure was not coercive enough (by objective standards) for criminal liability."[77] This strikes me as wrong. If A knows that B "cannot bear to be patted on the back," then it would be morally wrongful for A to pat him on the back. If this is so, then A's conditional threat to pat B on the back is likewise wrongful, as an instance of coercion$_W$. If it would be permissible *in principle* to make A subject to criminal punishment for unconditionally patting B in these circumstances—and Feinberg suggests that it would[78]—it would seem likewise permissible to criminally punish A for conditionally threatening to pat B. That Feinberg is so quick to conclude otherwise arises from the mistaken belief that the "voluntariness" of B's acceptance bears upon the wrongfulness of A's threat.

As a practical matter, however, this error is less troubling than the (nearly) converse error that the existence or nonexistence of a wrongful threat bears upon B's entitlement to an excuse. Recall our earlier hypothetical of the two drivers who run over the sleeping drunks—the first in response to the demand of an armed felon, the second to avoid driving off the mountainside. I concluded that the two drivers are equally culpable and that both should be deemed coerced$_E$. (The more important claim is the former.) This is, I believe, the majority view among academics. But it is rarely reflected in positive criminal law. The Model Penal Code, for example, recognizes an affirmative defense of "duress" when "the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist."[79] Where the same offense is committed in response to nonhuman exigencies, however, that a person of reasonable firmness would have been unable to resist is not enough. Instead, the agent is permitted a defense—this time denominated a "justification"—only if "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."[80]

Again, good second-order reasons[81]—driven principally by evidentiary concerns—might support this discrimination in the extension of a duress defense. But this is not the Model Penal Code's rationale. Instead, after expressly considering the twin hypotheticals we've discussed, the Commentary proceeds to reject the intended inference. It reasons that:

77. *Id.*, at 212.
78. *See* Joel Feinberg, HARM TO OTHERS 192 (1984).
79. MPC §2.09.
80. MPC §3.02(1)(a).
81. In Nozick's terms, institutional limitations might render this the best choice among suboptimal alternatives. *See* Nozick, *supra* note 1, at 456–57.

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> there is a significant difference between the situations in which an actor makes the choice of an equal or greater evil under the threat of unlawful human force and when he does so because of a natural event. In the former situation, the basic interests of the law may be satisfied by prosecution of the agent of unlawful force; in the latter circumstance, if the actor is excused, no one is subject to the law's application.[82]

This is a peculiar passage. It is peculiar, most conspicuously, because it leaves entirely unexplained *why* there is even a prima facie need to ensure that somebody can be subjected to the law's application. Let's assume, arguendo, that such an interest does exist, that, in other words, something of value would be lost if nobody were punished in either of the two hypotheticals. The principal argument for nonetheless extending a defense to persons who act under duress (regardless of the cause) is that such actors are not deserving of moral condemnation and, therefore, that their punishment would be unjust. The Code's blithe refusal to extend a duress defense to the driver who runs over the drunks to avoid plummeting to his own death would thus seem to rest on one of two additional premises—either that excusing from punishment those who are not morally blameworthy is not an interest that the law ought to consider, or that those who accede to human threats and those who act in the face of other sorts of exigencies stand in meaningfully different moral postures. But the Commentary does not appear to adopt the former position.[83] It would seem, therefore, to accept the latter. If this is right, then the Code's questionable rule and the Commentary's palpably unsatisfactory reasoning both spring from the unstated (and mistaken) assumption that coercion$_E$ is a function of the existence of a wrongful threat.

B. Demoralized Conceptions of Coercion$_U$

Several theorists have offered "demoralized" theories of coercion under which the presence or absence of coercion can be determined without inquiring into either party's rights or duties. If my account is correct, such theories will result in false (or at least premature) charges of coercion$_W$.

David Zimmerman provides an illustration. "Suppose," he says:

> that A is planning to divest himself of a factory he himself built, but changes his mind upon learning that the prospective buyer B represents a group of

82. MPC Commentary to §2.09, at 379.

83. Scant pages earlier, the Commentary pronounces that the law is "ineffective" and "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.

MPC Commentary to §2.09, at 375.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

> workers . . . who have hitherto sold their labor power, but now wish to run their own factory as a workers' cooperative. (A refuses to sell to this group because he wants to discourage the emergence of a cooperative movement which might provide workers with a route of escape from the vulnerability of capitalist relations of production.)

Because "A refuses to make an exchange which would enable B to try to obtain his strongly preferred preproposal situation *and which A would have made in the normal course of events*," Zimmerman concludes, "A's offer is coercive."[84]

Note that, on a strict reading of this hypothetical, A does not condition the offer to sell his business on any action or inaction by B. Instead, A flatly refuses to sell to B because of who B is (or because of who B's real parties in interest are). Consequently, if my early claim that coercion_W is a quality of "conduct designed to induce action by another" is right, A's conduct is not even potentially "coercive_W." The straightforward normative question in this scenario is this: Does A have a moral duty, all things being equal, not to impede the development of workers' cooperatives? If so, then it would be coercive_W for A to condition the sale of his business on the would-be buyer's commitment not to give workers equity in its operation. If not, then it wouldn't be. My account can, of course, accommodate either position. What it can't accommodate is the precise move that Zimmerman appears here to make—viz., to use the charge of coercion as a normatively freighted *substitute* for the conclusion that A's conduct would violate a moral duty.

Any of the "two-baseline" theories in which coercion_U exists if a proposal would put B worse off as measured by *either* a positive or a normative baseline yields similar problems. Daniel Lyons has proposed one such theory. According to Lyons, a proposal is "coercive" if:

> 1. A knows that B is rationally reluctant to give *x* to A for *y*; and
> 2. Either B knows that he has a right to *y* from A on easier terms, or B knows that A would have given *y* to B, on easier terms, if the chance had not arisen to trade *y* for *x*.[85]

Applying this formula, Lyons asks us to consider this threat from A to B: "If you do not speed up delivery, you will lose my business." Now suppose:

> that A would in fact find it profitable to trade with B even with slow deliveries; however, A gambles that B will speed up deliveries if A proposes to cut off buying unless B complies. B knows that if he calls A's bluff, A will in fact cut off trade, at a slight loss to A and a serious loss to B; and yet B knows that A would find it profitable to trade even with slow delivery. It seems clear that A is threatening to quit buying, trying to force B to speed up deliveries.[86]

84. Zimmerman, *supra* note 10, at 169.
85. Lyons, *supra* note 2, at 436.
86. *Id.*, at 431–32.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

Yes, that does seem clear. But it does not follow that A's "refraining from giving easier terms just so he can get B to give *x* on these terms" makes the proposal "coercive"—at least not if Lyons means (as he apparently does[87]) coercive_W. If, as Lyons and I agree, A "is not morally obliged to give *y* to B on easier terms,"[88] then there is no coercion_W.[89]

C. Coercion_U as Depending Exclusively on the Wrongfulness of A's Proposal

It is rare to find a conception of coercion_U that purports to address the responsibility of an offeree and yet turns entirely on the wrongfulness of the proposal. This should not surprise, given how palpably inappropriate it would be to excuse B for committing a criminal act in the face of trivial pressure. Nonetheless, such conceptions do exist in the context of addressing whether B should be excused from a promise made in response to a coercive_W threat. Consider, for instance, Jeffrie Murphy's claim that "[w]hen a person B consents to a proposal from A, and when his only or paramount reason for consenting to the proposal is his suffering wrongful treatment from A, then in such a case B has no moral obligation (even prima facie) generated from the act of consent."[90]

There is, of course, much truth to this point. But it is overstated. Imagine that A asks B, his neighbor and erstwhile friend, to pick up A's child, C, after school one day. When B demurs, A recalls that he is still in possession of B's lawn mower which he had borrowed some time ago: "Pick up C, please, or I won't return your lawn mower." "Okay," says B, "I'll get C." Later, though, B decides that she doesn't care about her lawn mower and consequently decides not to honor her promise to pick up C. It seems obvious that the mere fact that A threatened B with wrongful treatment would not morally excuse her for leaving C in the lurch. But nor is C's reliance on B doing all the moral work here: surely B's obligation vis-à-vis C would be different had she steadfastly refused to agree to pick C up notwithstanding A's threat to keep the lawn mower, and even if A had told B that if she doesn't get C, "the poor child will just sit on the school's steps waiting." *Pace* Murphy, then, B's act of consent did in fact generate a moral obligation. And that's because the fact that her agreement was extracted in the face of coercion_W does not itself entail that it was made under coercion_E. In short, a conception of coercion_U that would focus only on the wrongfulness of A's conduct cannot promise satisfactory answers to all questions of B's responsibility.

87. *See id.*, at 428.
88. *Id.* at 431.
89. Peter Westen proposes a similar (but not identical) two-baseline theory, *see* Westen, *supra* note 2, at 586–87, and likewise appears too quick to find A blameworthy. *See id*, at 579–82.
90. Murphy, *supra* note 50, at 81.

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VI. CHESTNUTS

It's simple enough for any account of coercion to accommodate the easy cases. Under my account, like any, a kidnapper's proposal to kill your daughter unless you promise to pay $1 million is a Threat, it's coercive_W (making the kidnapper legally and morally blameworthy), and you're permitted to break your consequent promise on grounds that you were coerced_E. Contrariwise, if you agree to leave your present post for an appointment at another law school, you've accepted an Offer, you weren't coerced_E (so don't expect to be excused if you back out), and the faculty at your new institution are not guilty of coercion_W. The harder cases are, well, harder. Over the past few decades, theorists have built up quite a stable of them. This final section endeavors to make sense of some of the most perplexing or illuminating. In so doing, I hope both to deepen our understanding of the requisite coercion analyses and to highlight respects in which further examination is still needed.

> *The Slave*. Suppose that usually a slave owner beats his slave each morning, for no reason connected with the slave's behavior. Today he says to his slave, "Tomorrow I will not beat you if and only if you now do *x*."[91]

Commentators have pondered whether this is a threat or an offer ever since Nozick first proposed it.[92] But per my definition, of course, it contains both a threat ("if –*x*, then I'll beat you") *and* an offer ("if *x*, then I won't beat you"), and whether it amounts to a Threat or an Offer is a question of phenomenology and cultural anthropology about which we need not care. The threatened action (beating the slave) would be morally wrongful. Therefore, the proposal is coercive_W.

Is the slave coerced_E? Well, why do you ask? Outside of philosophy journals, this question simply doesn't arise unless the slave performs *x* and we want to know whether such performance is morally or legally excused (or, relatedly, where *x* is a promise, whether nonperformance is excused).[93] And to ask that question assumes that performance of *x* is ordinarily bad. Yet thoughtful writers persist in pondering such questions as whether the

91. Nozick, *supra* note 1, at 450.

92. Nozick concluded it was a threat after proposing "that when the normal and morally expected courses of events diverge, the one of these which is to be used in deciding whether a conditional announcement of an action constitutes a threat or an offer is the course of events that the recipient of the action prefers." *Id.* at 451. But he did admit to some doubt. *See id.*, at 469 n. 30. Theorists who agree that the slave owner's proposal is a threat include Westen, *supra* note 2, at 583; and Wertheimer, *supra* note 2, at 213. Those viewing the proposal as an offer include Feinberg, *supra* note 2, at 221–22; and Zimmerman, *supra* note 2, at 127–28.

93. Doug Laycock has pointed out to me that coercion_E claims can also arise under the law of restitution when B seeks payment from A for a service he had rendered without having first negotiated a fee. In such cases B could be understood to be seeking permission to renege on an implicit promise to provide a service for free.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

slave might have been coerced to wear a hat.[94] I question whether we speak like this in common parlance. In any event, such questions are plainly ill posed if we mean to raise the more precise normative question of whether the slave was coerced$_E$. Let us suppose then, that the conduct demanded, *x*, was for the slave to steal an apple from C's orchard. If the slave does so and is caught, his coercion$_E$ claim will be good if we believe that it is morally preferable that B take C's apple than suffer a beating.

But what if the slave owner demands that the slave set fire to C's orchard as the price for escaping a beating? Now we'll want more information. How severe would the threatened beating have been? How valuable was the orchard? Did the fire endanger any persons? Perhaps we'd conclude that the slave's action was not "justified" (in the sense, suggested earlier, of being the morally right thing to do). The question would still remain whether the slave should be "excused" (fully or partially) on the grounds that he was coerced$_E$. And this would, at the least, be a closer call. At this stage of our analysis, the slave's perception of the proposal as a Threat or an Offer might indeed become relevant. We might be appropriately reluctant to excuse B for doing the wrong thing (what, objectively, he ought not to have done) unless he actually *felt* threatened (as opposed to having felt "offered"). In any event, the question of the slave's moral responsibility for his action can never be resolved by conceptual analysis of coercion claims that does not include substantive moral evaluation.[95]

> *The Drug Dealer*. A is B's usual supplier of drugs, and today when he comes to B he says that he will not sell to B, as he normally does, for $20, but rather will give them to B if and only if B beats up a certain person.[96]

Is the drug dealer guilty of coercion$_W$? Yes, if you believe that he has a moral duty—born, perhaps, of their prior relationship—to provide B with drugs.[97] Otherwise, no. Even if not, the proposal might nonetheless be wrongfully *exploitative* (a concept about which I'll have a little more to say shortly). What if B beats up A's target? Does she have a coercion$_E$ excuse? Not on grounds of constrained volition. But what if her psychological need for the drug was so great that she was "compelled" (in whatever sense we might recognize) to accede to A's demand? In that event (what Wertheimer calls "nonvolitional conduct" and Murphy terms "Duress$_2$") a *moral* evaluation of B's choice, given threat of *y*, is not called for. To buy B's factual claim is ipso facto to consider her excused (at least so long as we adopt an act-based rather than character-based notion of blameworthiness).

94. Westen, *supra* note 2, at 560.

95. This point is not limited to coercion$_E$ claims. If you did not already believe (and were not amenable to being convinced) that beating the slave is morally wrongful, I could not demonstrate that the slave owner's proposal to do so was coercive$_W$ either.

96. Nozick, *supra* note 1, at 447.

97. *See, e.g.*, Wertheimer, *supra* note 2, at 209 n.27; Haksar, *supra* note 2, at 72.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

Garden-Variety Blackmail. A threatens to reveal B's infidelity to B's husband, C, unless B pays A $10,000.

Blackmail fairly reeks of coercion$_W$. And yet it has long puzzled theorists of the criminal law because the act threatened—in this (paradigmatic) example, to reveal B's adultery—is lawful. How then can this be "coercive"? Why should it be criminal?[98]

To resolve this puzzle requires that we advert back to our earlier observation that conduct can be coercive$_W$ in a variety of normative discourses. The example of A's conditional threat to ϕ illustrated that conduct can be criminally coercive$_W$ without thereby being morally coercive$_W$. (That is, the conditional threat was criminally wrongful because the act threatened would be a criminal wrong, while the presumed fact that the act threatened would not be a moral wrong established that the conditional threat was not morally wrongful.) Blackmail merely illustrates the converse proposition. I'll explain. There are two significant features of the act-*types* with which a blackmailer threatens his victim. First, they cause cognizable legal harm. (The disclosure of one's infidelities, for example, can result in both reputational injury and emotional distress.) Second, they are morally indeterminate in the particular sense that they are often undertaken with bad motives, but other times with good. (Very possibly, a third party's revelation of one spouse's infidelity to the other spouse might be motivated by the beliefs (a) that such disclosure will encourage the "innocent" spouse to divorce the adulterous scoundrel; (b) that such spouse will be happier after the divorce; and (c) that any adverse effect on the adulterer counts for less in the moral balance because of his wrongdoing.) This latter feature is critical. The supposition that, as a matter of empirical fact, persons who perform such actions frequently have good motives in doing so makes it difficult or impossible to generalize that such act-types are morally bad. This moral indeterminacy provides a sufficient (if not necessary) reason not to criminalize the types of acts that are generally leveraged into blackmail proposals (here, truthfully unmasking an adulterer).

A conditional threat to perform such act, however, changes the epistemic nature of the act threatened. For it suggests (not conclusively, of course) that the threatener would lack the good motives that would be required to justify his undertaking the action he threatens. The threat tends to reveal, in other words, that in his case the act-*token* would be morally wrongful. And *if* performance of the act would be morally wrongful, so too is the threat. That is, the threat is morally coercive$_W$. Furthermore, because most theories of punishment (retributivist and consequentialist alike) permit criminaliza-

98. The so-called "paradox of blackmail" has spawned a substantial literature of its own. For representative contributions, *see Symposium: Blackmail*, 141 U. PENN. L. REV. 1565–1989 (1993). For my views on the subject, *see* Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998), where the remarks I offer in the text about "garden-variety" and "crime-exposure" blackmail are further developed.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

tion of morally blameworthy, harm-threatening conduct, blackmail's criminalization is justifiable as well as explicable. We might put it this way. Insofar as blackmail is defined as a threat to perform a legal act, it necessarily follows that it is not criminally coercive_W. However, because the blackmailer would (most likely) be acting in a morally wrongful manner were he to carry out his threat, the threat itself is morally coercive_W. The threat is criminal, finally, not because it is coercive_W as a criminal matter, but because it is coercive_W as a moral matter and because moral wrongfulness is a sufficient basis for criminalization.

> *Crime-Exposure Blackmail.* Suppose that A knows that B has committed a murder which the police are investigating, and knows of evidence sufficient to convict B of this murder. A says to B, "If you give me $10,000 I will not turn over the information I have to the police."[99]

Nozick puzzles over this one. "It would seem that A is *offering* not to turn the information over to the police, rather than *threatening* to turn it over. Yet," he concludes, "one is strongly tempted to say, when B pays A $10,000 because he accepts the offer, that B was coerced by A into paying the $10,000."[100]

To my mind, this passage well illustrates the signal error of so much philosophical scholarship on coercion in that it seeks to resolve questions of "coercion" in the abstract, untethered to any particular purpose. Suppose that C and D are chatting. C says to D: "Did you hear the news? That old tightwad B seems to be changing his ways. He just gave $10,000 to A!" If D knows the underlying circumstances, he might indeed be tempted to respond, "Oh no, C, you don't understand. B was coerced into paying that money." On the other hand, D might just as well say, "B was pressured into paying" or "B was forced to pay" or "B had to pay." If Nozick means that, among these alternatives, the first formulation exerts a particular pull, I'm far from certain that I agree. But I'm also not sure that I should care. Normatively, this question would seem to have no more significance than the question whether the proposal is an Offer (as Nozick suggests) or a Threat. (With regard to that latter question, incidentally, I'd suppose that the authorities would almost certainly view it as an Offer, whereas, in B's eyes, it might well be a Threat.)

Imagine instead that Nozick means to inquire into whether B was coerced_E into paying the $10,000. This seems unlikely at first glance. Although B might charge A with coercion_W, it does not appear that he has reason to raise a "coercion claim" on his own behalf. But perhaps he does. Assume, say, that B's wife were to reprove him for withdrawing the $10,000 from their children's college fund. Can he reasonably claim that he was coerced_E to do so? Not, I presume, if you believe that B's moral obligation is to turn himself

99. Nozick, *supra* note 1, at 452.
100. *Id.*

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

in. The usual situation that sustains a claim of coercion$_E$ confronts the offeree with the need to choose between two evils—one to his own interests, one to the interests of others. Here, B would seek to excuse his wrongful use of the $10,000 by appeal to an interest—escaping retributive justice—that, by hypothesis, is itself wrongful. In short, B is not here *exchanging* evils but *compounding* them. And that will not prove to B's moral advantage. But perhaps you believe that, all things considered, B does not have a moral obligation to suffer the consequences of the act A threatens. Perhaps you are an anarchist. Or perhaps, under the circumstances, you perceive that B has an overriding obligation to his wife or children to avoid incarceration. In such event, I'd venture, whether B's claim of having been coerced$_E$ is tenable will prove rather more intricate than first appears. Still, it will boil down to whether it was morally excusable to choose *x* over *y*, a matter over which conceptual analysis of coercion can provide no assistance.

Consider finally the question (not directly invited by the wording of Nozick's observations) of whether A's proposal was coercive$_W$—that is, whether A is guilty of coercion$_W$. This is easy. Unlike garden-variety blackmail, crime-exposure blackmail is not (morally or legally) coercive$_W$ under my analysis because the act threatened (either as act-type, or as act-token) is neither wrongful nor criminal. That doesn't mean A is off the hook though. Clearly, the act A offers is wrongful. The offer itself, therefore, is an aggravated form of obstruction of justice and should be (morally) condemned and (criminally) punished accordingly. (And it might be exploitative too.)

> *Rescue at Sea*. B is struggling alone in the water when A happens by in his boat. A proposes to rescue B if and only if B promises to pay A $10,000 after reaching shore. Both A and B know that A is B's only hope to avoid drowning.[101]

This is straightforward. Whether A is guilty of coercion$_W$ depends entirely on whether he has a duty to rescue B. Because, as I've already remarked, no moralized theory of coercion can answer *that* question, whether the proposal is coercive$_W$ is inescapably contingent upon one's substantive moral beliefs. (The background rule under the common law, incidentally, is that there is no duty to rescue; the rule of the sea, in contrast, does impose such a duty.)

Does it matter if A had demanded $10 rather than $10,000? Surely not if you think even the initial proposal isn't wrongful. But if you found the initial proposal coercive$_W$, that's because (I contend) you believe that A has a duty to rescue B and therefore acts wrongfully in threatening to violate that duty. And if that's all true, then the threat to let B drown unless he promises to pay (a mere) $10 seems likewise coercive$_W$. Yet I suspect that

101. *Id.* at 449.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

even if you believe that the first proposal is coercive$_W$, you may have difficulty shaking the feeling that the second isn't, or, if you agree that both proposals are coercive$_W$, you're likely to believe that the former is morally worse. It will be helpful, then, briefly to explore three questions. Assuming arguendo that the first proposal ("I'll save you if and only if you promise to pay me $10,000") is coercive$_W$, is it possible that the second proposal is not coercive$_W$? If both proposals are coercive$_W$, is the second less wrongful than the first? If so, is that because it's less coercive$_W$ or for other reasons?

To some extent, a disinclination to view the second proposal as coercive$_W$ may arise from a supposition that when A demands of B a mere $10, he isn't *really* threatening B with non-rescue. That is, we might be tempted to imagine A's proposal as an unconditional offer of rescue conjoined to something like a request for payment rather than as a stark biconditional offer to rescue B if *but only if* B promises this nominal sum. Relatedly, we might believe that, even if in both cases A does in fact threaten not to rescue B unless promised payment, the threat is more likely to be a bluff (or even a joke) in the second case. But in order to focus attention on the difference in the amount of money each would-be rescuer demands, it's important to control for these other possible variables. Let us stipulate, then, that in both cases A conveys unambiguously that he does intend to leave B to drown unless B accedes to A's demand. Assume too that in the two cases A is equally committed (however committed that might be) to carry out his threat if B chooses not to accept the offer.

With the rather limited nature of the difference between the two cases thus highlighted, it still remains to wonder whether the second proposal might not be coercive$_W$ even if (as I've asked you to assume) the first proposal is. To answer this question requires that we say a little more about why it would be wrong in the first case for A to do as he threatens—namely, to let B drown. More particularly, it might matter whether the ground of such wrongfulness is utilitarian or deontological. If our conclusion that allowing B to drown is wrong rests on utilitarian grounds, then it is at least open to argue that the second proposal isn't coercive$_W$ even if the first proposal is. Perhaps a consequentialist interest in encouraging entrepreneurs to scour dangerous waters in search of Bs in need of rescue could justify A in making a coercive$_W$ proposal to save B only on condition that he pay whatever (minimum?) amount is necessary to make feasible the formation of such "private coast guards." And if the threat is coercive$_W$ but justifiable, it is conceivably even morally right to carry it out as a means to bolster the threatener's credibility (again, insofar as such bolstering is necessary to make the venture profitable). But in that case, the threat is not even coercive$_W$. (Actually, if this argument is sound, then even if the demand for $10,000 is too high to be justifiable, the demand for $10 is almost surely too *low*. But this is a quibble.)

The larger point is that coercion$_W$ claims (like all moral judgments)

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

require that we evaluate the morality of A's threatened act, *y*, not in the abstract but under the totality of circumstances. And one potentially relevant circumstance is that, before undertaking *y*, A extended the offer of *–y*, if *x*. Most often, I suspect, this won't make a difference. But sometimes it might. And this produces a surprising but important conclusion. It might be true that a conditional proposal "if *–x* then *y*" is coercive$_W$, while the similar proposal "if $–x_1$ then *y*" is not, *even though* coercion$_W$ is constituted by the wrongfulness of the act threatened, *y*. At least so it appears on utilitarian reasoning. Whether the same is true on deontological principles is less clear. Perhaps the most we can say on deontological grounds is that a conditional proposal "if *–x* then *y*" may be coercive$_W$ and wrongful, while a kindred proposal "if $–x_1$ then *y*" is coercive$_W$ yet justifiable. That is certainly true. But it is not very interesting.

We have seen that there exists a logically valid argument pursuant to which the threat to let B drown unless he pays A $10 is not coercive$_W$ even if the threat to let him drown unless he pays $10,000 is coercive$_W$. That this argument would prove sound, however, must be deemed extraordinarily unlikely. So let us proceed on the assumption that A is guilty of coercion$_W$ in both cases, and that he is justified in neither. What then accounts for our intuition that the more demanding A is more blameworthy? The obvious possibility is that he is guilty of *exploitation* in addition to coercion$_W$, whereas the more accommodating A is guilty only of coercion$_W$.[102] What (it is finally time to ask) is the difference?

In order to distinguish instances of exploitation and coercion$_W$ at the retail level, it will be profitable to first think in broad, conceptual terms. David Zimmerman proposes that "[t]he intuitive idea underlying coercion is that *the person who does the coercing undermines, or limits the freedom* of the person who is coerced."[103] This strikes me as correct as far as it goes, but we can get more precise. As I put it earlier, coercion$_W$ is a way of inducing a person to do (or forego) some act, *x*; and it is a wrongful means to achieve that end because it proceeds by placing improper pressure on that person's freedom to do otherwise. (The pressure may be great or small in *magnitude* ; by definition, though, it is wrongful in *character*.) Exploitation, in contrast, connotes taking unfair advantage of a person's vulnerability.

I hope that sounds right, even trite. The game, it might seem, is to operationalize the notion of "taking unfair advantage." So, ultimately, it may be. But that is not my game. At this point, I wish only to reinforce that exploitation and coercion$_W$ do indeed have distinct normative content and are not just different ways of putting essentially the same point. We can see

102. Here's another possibility. If each A is equally—indeed, fully—committed to carrying out his threat if his offer is refused, the less-demanding A is taking a smaller risk that B will refuse and therefore a smaller risk that he will "have to" commit the wrong he threatens. Does this make the less-demanding A less guilty of the wrong of coercion$_W$, or is each A equally guilty of the wrong of coercion$_W$ but *un*equally guilty of risking the wrong of "causing" B's death?

103. Zimmerman, *supra* note 2, at 134.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

that is so by describing the two concepts formally. We have already (albeit with some caveats) formalized coercion$_W$ as a type of biconditional proposal containing an offer (if *x* then –*y*) and a threat (if –*x* then *y*). The same, it would seem, can be said of exploitation. The difference is this. Whereas the wrongfulness of coercion$_W$ is a function of the wrongfulness of the act threatened (*y*), the evil of exploitation is a function of the meanness (in two senses) of the act demanded (*x*). The victim of coercion$_W$ complains that the offeror threatens to wrong him; the victim of exploitation complains that the offeror demands too much of him.

This, to be sure, says nothing about how to assess intelligibly what makes a demand too great. But it provides enough to justify confidence that coercion$_W$ and exploitation are distinct normative categories. It seems reasonable to suppose, then, that the threat to let B drown unless paid $10,000 is both coercive$_W$ and exploitative, and that the more moderate demand of $10 may be coercive$_W$ but not exploitative. And a different proposal—say, to rescue B's pet ferret for an additional $10,000—might be exploitative but not coercive$_W$.

> *The Lecherous Employer.* B applies for a job with a private firm. A, the employer, offers to hire B if and only if B agrees to engage in sexual relations.[104]

Daniel Lyons suggests that whether A is guilty of coercion$_W$ depends upon whether B is qualified for the job and, if not, whether A would have hired B anyway to satisfy legitimate goals extrinsic to job performance (narrowly construed). In my view, of course, whether the proposal is coercive$_W$ depends exclusively on whether A has a duty to hire B. If B is not qualified, then A has no duty and the proposal cannot be coercive$_W$. But even if B is qualified—let's say the most qualified—A ordinarily has no duty to hire her. Or so I suppose.

But perhaps A does have such a duty. A duty might arise, for example, if A is a personnel officer who has specifically promised the boss to hire the most qualified applicant. Or A might have a fiduciary duty to the shareholders to do so. In such cases, A is threatening B to violate his moral duty. Under my analysis, that makes his proposal coercive$_W$. Here's the wrinkle. In the paradigmatic case of coercion$_W$, A threatens to violate a moral duty owed B. Here, A's duty is owed third persons other than B. Should it matter?

I confess to some uncertainty. It does seem that calling this threat "coercive" lacks the right intuitive feel. I am tempted, therefore, to revise our definition. Perhaps we should say that a proposal (or its functional equivalent) is coercive$_W$ if it involves a conditional threat (conditioned, that is, on specific action or inaction by the addressee) to violate a duty owed the addressee. Or—what I take to be equivalent—a proposal is coercive$_W$ if it involves a conditional threat to *wrong* the addressee. On the other hand, my

104. Adapted from Lyons, *supra* note 15, at 406.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

intuition is strong that it *would* be coercive$_W$ for A to threaten to kill any person, C, unless B sleeps with A. And in that case A's duty (not to kill) is directly owed C, not B. So this revision is not unproblematic. And while a revision along these lines might nonetheless succeed if combined with a theory of what it means to "wrong" somebody that would, under these circumstances, make A's murder of C a wrong to B (as well as to C), it might be that the impulse to perfect such a redefinition should be resisted. After all, any reluctance we might feel to label the personnel officer's threat coercive$_W$ might be due not to the fact that it isn't coercive$_W$ but to the fact that its coerciveness$_W$ (vis-à-vis B) is a less salient feature of its overall wrongfulness than is its breach of duty owed the employer. I leave this an open question.

Of course, even if the proposal is not coercive$_W$, that does not dispose of all coercion questions. If, for instance, B's romantic partner C were to reproach B for giving in to A's "demand," B might plausibly plead that she was coerced$_E$. The ultimate success of the claim would then depend on such considerations as the nature of B's and C's commitment, the urgency of B's need for employment, and the likelihood of other prospects.

> *The Egalitarian Benefactor*. B, the dean of an all-male college, expects a generous bequest from A. A informs B that he will support the school only if it starts admitting women.[105]

Lyons concludes that this is a coercive threat, albeit a morally acceptable one. On our analysis, it might be a Threat, but it's not coercive$_W$ unless A is actually obligated (by reason, perhaps, of a prior promise) to make the hoped-for bequest. The more interesting question is whether, if the dean agrees to admit women, he was coerced$_E$ to do so. Wertheimer insists that "B is not coerced at all."[106] And he is correct if the claim is (as Wertheimer takes it to be) that B should be bound by his promise. But there's another use to be made of coercion$_E$ claims here. As Frankfurt reminds us, coercion$_E$ claims can be employed to relieve or mitigate B's moral responsibility for praise as well as for blame.[107] So if it turns out that alumni are thrilled that the college will admit women, Lyons seems quite right to conclude that the dean does not deserve credit because he was coerced$_E$. In reaching this conclusion, though, it is not at all clear that the test of coercion$_E$ that we developed in Part IV with an eye specifically to the mitigation of blame can be profitably applied, *mutatis mutandis*, to determine whether an actor should be relieved of praise. For there is an asymmetry in the attitudes toward good and bad that we require of an actor to make him, respectively, praiseworthy and blameworthy. I have in mind here the notion that it is (prima facie) blameworthy willingly to suffer oneself to do bad, but it is not

105. Adapted from Lyons, *supra* note 2, at 427.
106. Wertheimer, *supra* note 2, at 214.
107. Frankfurt, *supra* note 2, at 75.

https://doi.org/10.1017/S1352325202081028 Published online by Cambridge University Press

(prima facie) praiseworthy (merely) willingly to suffer oneself to do good. If this is right, then it remains to explicate precisely what our test should look like when assessing whether to "excuse" an agent for doing good on the grounds that he was coerced$_E$.

CONCLUSION

Coercion claims are not free-floating. They arise in response to particular moral and legal needs. First, we often wish to know whether given conduct is wrongful, rendering the actor worthy of blame. I have called this the "coercion$_W$ question." Functionally, the issue is whether he threatens to violate a normative obligation for the purpose of inducing another to engage in (or abstain from) a specific action. This is (prima facie) wrongful because it puts wrongful pressure on that other person's freedom to do otherwise.

Second, we may seek to determine whether one is entitled to be relieved of moral responsibility (i.e., blame or praise) for particular conduct because of the constraining conditions under which one acted. I have termed this the "coercion$_E$ question." Again, the analysis is straightforward (though not necessarily simple to resolve). It requires us to assess the moral character of the claimant's conduct in light both of the consequences she would have suffered had she not acted as she did, and of the phenomenology of her choice predicament.

I have argued that these two normative coercion claims are essentially distinct: Coercion$_w$ depends upon the *wrongfulness* of the act the proposal-maker threatens, whereas coercion$_E$ depends upon the psychological *forcefulness* of the consequence a (presumptive) wrongdoer averts. And yet there is no denying that they are deeply and tightly linked in most theoretical studies of the terrain. This is, I think, for two principal reasons. First, to suffer wrongdoing tends to be disagreeable. (This is not, of course, coincidental.) And since threatened wrongdoing defines coercion$_W$, a coercive$_W$ proposal contains within it the basic ingredients of a coercion$_E$ claim. Consequently, when A's effort to coerce$_W$ B succeeds (not infrequently, I'd venture), B is likely to have at least a colorable coercion$_E$ claim (insofar as she would need it). Second, our lives are overwhelmingly characterized by the ability to choose among a large number of options. It is exceedingly rare for unthinking nature or even inadvertent human action to confront us with an essentially binary decision. Binary choice or something close to it, though, is essential for a successful claim of coercion$_E$. Therefore, if one has been coerced$_E$, it is likely the result of a do-it-or-else command from another person. And that raises the prospect of there being coercion$_W$.

All of this is to say that, as an empirical matter, coercion$_W$ is likely to entail coercion$_E$ and, conversely, that coercion$_E$ is likely to entail coercion$_W$. But the contingency of these relationships is critical. That coercion$_W$ and coer-

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cion$_E$ tend to coexist in nature (as it were) is not integral to either of the basic normative questions that brought us here. If "coercion" is conceived as the union of A's wrongful threat and B's experience of duress, it is a bit player in our normative dramas. It doesn't warrant the generous philosophical attention lavished upon it.

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