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A CRITICAL ANALYSIS OF "COERCION" AND ITS APPLICATION TO CONTRACT LAW

The University of Arizona Ph.D. 1985

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A CRITICAL ANALYSIS OF "COERCION" AND ITS APPLICATION TO
CONTRACT LAW

by
Joan L. McGregor

A Dissertation Submitted to the Faculty of the
DEPARTMENT OF PHILOSOPHY
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For the Degree of
DOCTOR OF PHILOSOPHY
In the Graduate College
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THE UNIVERSITY OF ARIZONA
GRADUATE COLLEGE

As members of the Final Examination Committee, we certify that we have read the dissertation prepared by Joan L. McGregor entitled A Critical Analysis of "Coercion" and Its Application To Contract Law and recommend that it be accepted as fulfilling the dissertation requirement for the Degree of Doctor of Philosophy.

Joel Steinberg 3/29/85
Date

Date

Date

Date

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Final approval and acceptance of this dissertation is contingent upon the candidate's submission of the final copy of the dissertation to the Graduate College.

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Joel Steinberg 3/29/85
Dissertation Director Date
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ABSTRACT

The value of liberty is one of our most fundamental commitments. Given this commitment, judgments concerning coercion are of profound moral significance. The concept of liberty is usually defined as the absence of coercion; so defined, the very important moral and political value of liberty is safeguarded only when coercion is excluded. Presently, the concept of coercion is inadequately defined, and in drastic need of clear analysis. An important area in which individuals express their liberty is through voluntary agreements made under the law of contracts. The moral defense of the law of contracts rests on the belief that contracts facilitate individuals' opportunities for self-determination; liberty being a necessary condition for self-determination necessitates the exclusion of all forms of coercion in contracts.

Market interactions have a particular character and occur within a specific institutional framework. Using economic models, I argue that other accounts of coercion have failed to capture the unique character of coercion in market interactions. The "normalcy" criterion, which is the most prevalent approach to distinguishing coercive proposals from noncoercive ones, assumes that a person's status quo is an appropriate point from which to distinguish coercive proposals from noncoercive proposals. I argue that under
certain ideal conditions in the market, a perfectly competitive market, this assumption might be legitimate.

I utilize game-theoretic models to analyze the nature of coercive proposals in an imperfectly competitive market. The bargaining advantages that agents have, which are a function of certain background conditions, give them bargaining power over others with whom they negotiate. I argue that when the following conditions are present coercion can arise in the market: the status quo of an agent (or his "threat-advantage") is stronger in relation to the agent with whom he is dealing and he takes advantage of his stronger bargaining position, exploiting the deprivation that the weaker agent will face if he does not comply. I apply this analysis of coercion to the law of contracts, specifically, to the doctrines of duress and unconscionability.
CHAPTER 1

INTRODUCTION

"Though we willingly consented to his banishment, yet it was against our will" Coriolanus, Act IV, Scene vi.

The value of liberty is one of our most fundamental commitments. Given this commitment, judgments concerning coercion are of profound moral significance. The concept of liberty is usually defined as the absence of coercion, so defined, the very important moral and political value of liberty is safeguarded only when the necessary steps are taken to minimize the instances of coercion in the society.

Presently, there is confusion among writers on this subject over how "coercion" is best defined. Agreement on the nature of coercion is reached only in some core instances; for example, in the classic gunman case: "Your money or your life!". Beyond that, we arrive too quickly in the shadowy area of diverging intuitions.

An important area in which individuals express their liberty is through voluntary agreements made under the law of contracts. The moral defense of the law of contracts rests on the belief that contracts facilitate individuals' opportunities for self-determination. Since liberty is a necessary condition for self-determination we want to
protect against all forms of pressure which might result in coercion. Often, contracts are made where the terms of the agreement are unfair, and the parties to it are in grossly unequal bargaining positions. Whether the unfairness of these agreements and/or the inequality of the bargaining positions undermine the liberty of agents, in a way particular to coercion, is a central question for modern contract law. The purpose of this study is to analyze critically the concept of coercion, specifically in relation to modern contract law.

The motivation for this study rose out of the belief that coercion is more extensive than is commonly recognized. The contention here is that some persons, for example those in need of basic goods, are in poor bargaining positions, and are therefore open to subtle forms of pressures in the market which are just as clearly coercive as some more commonly recognized forms of coercion. This study will give an analysis of the concept of coercion which accounts for these subtler forms of pressure, and it will show that modern contract law is morally justified only if it accounts for the total range of coercive pressure.

The elucidation of the concept of coercion is not only of importance to the law of contracts but also is central concern to the following areas of philosophy. First, the issue of coercion underlies problems in political
philosophy. The very justification of the state, with its monopoly on coercion, depends upon what is taken to be the legitimate use of coercive power. For example, questions of political obligation, at least since Hume, have been couched in terms of the problem of coercion. And the importance of this question is reflected in the fact that the question crosses ideological boundaries: a concern of libertarians, liberals, and Marxists alike.

Second, the question of coercion is central to philosophy of law, which seeks the grounds for the validity of law itself as a coercive order, and the grounds and limits of the moral obligation to obey law. Other normative questions arise in law as to limits of the coercive or liberty-limiting rules. This work, insofar as it provides conditions for the moral justification of contract law, will have implications for these traditional questions. In addition, it will have direct implications for the criminal law, where questions of coercion are relevant on a number of levels.

Third, the practice of paternalism, in law and medicine, among other areas, comes under fire and is in need of justification precisely because of the coercion that is often employed. And on the opposite side, an account of coercion will determine when "weak" paternalistic practices are justified because coercion was involved in securing
consent. For example, should there be paternalistic constraints on "consent" by individuals who are involuntarily confined in what has been called "coercive settings"? This is a concern in medical ethics as illustrated by the problem of evaluating prisoners' consent to be subjects in experiments.

Fourth, economic structures which define the background conditions within which exchanges and transactions take place find their justification in the absence of coercive relationships that the background conditions permit. But without an adequate account of the nature of coercion these defenses of economic structures are difficult to assess. Further, the concepts of bargaining positions, advantage-taking, and the control over others have profound significance for moral questions of distributive justice, and for questions of the justice of economic systems. For example, the bargaining positions permitted by a system's institutions have direct consequences on the advantages that some have over others; this in turn affects the justification of the entire system. Finally, Marxist critiques of capitalist markets rest upon the notions of exploitation and coercion which they argue constitute the relationships among persons in those market structures.

My study of the concept of coercion and the particular moral issues raised in the law of contracts, will
proceed in two major sections. The first section provides a philosophical analysis of coercion. In the second section, the analysis of coercion is employed to evaluate critically the most basic assumptions of existing contract law.

The general outline is as follows. In the second chapter some preliminary issues are addressed: common conceptions of coercion, the situations that are often considered coercive, and coercion's connection with liberty. Since coercion is so intimately tied with liberty, I argue for an account of liberty, and consider ways other than coercion of undermining liberty. In addition, there is a discussion of the value of liberty, and the related notions of "harm", paternalism, and the legal maxim, *Volenti non fit injuria*.

In the third chapter I consider some influential theories which contributed to the conceptual development of "coercion". The discussion begins by examining the work of Aristotle. I argue that Aristotle considers coerced actions as "in themselves" involuntary, even though the agent does make a choice in the situation. I argue that Thomas Hobbes departs from Aristotle in that Hobbes maintains that even though a promise is extracted through threats the person acted freely or willingly. John Locke rejects Hobbes' idea that a promise extracted through fear expresses true consent: "Should a robber break into my house, and with a
dagger at my throat, make me seal deeds to convey my estate to him, would this give him title?" (Locke 1965, Sect. 176.). Certainly not, is Locke's response. Locke's approach has become the accepted one. Nevertheless, though it was accepted that fear could preclude voluntary action, there has not been wide agreement over the precise limits of the concept of coercion's application. Finally, I consider Robert Nozick's theory of coercion which represents the cornerstone of modern analyses. Nozick's account, however, encounters many problems which subsequent theories have attempted to resolve.

In the fourth chapter I present theories of various contemporary philosophers who have attempted to define the limits of coercion and thereby resolve the problem of the nature of coercion. Two approaches are distinguished: moralistic analyses, and psychological analyses. Moralistic analyses include the theories of Vincit Haksar and J. G. Murphy. Psychological analyses include the theories of Robert Nozick, Michael Bayles, Joel Feinberg, and Michael Zimmerman. I argue that all these theories are deficient; they are conceptually inadequate and they fail to capture our moral intuitions about coercive situations. Through the exegesis of these theories, I discussed a number of topics and argue for certain positions. For example, regarding the distinction between threats and offers, it is often sug-
gested that threats are always coercive and offers never can be. The problem arises as to how we distinguish threats from offers, itself an issue not without controversy. Also how we distinguish coercive threats from non-coercive ones, for certainly not all threats are coercive. The thread that runs through most of the theories I consider is that a proposal is a threat if it makes the person "worse off" in relation to some baseline. But these baselines themselves are not normatively neutral and I question whether any baseline is justifiable to do the work that is required by these accounts.

I argue for an analysis of coercion in the fifth and final chapter of this section. The overarching question that I address concerns the relationship between coercion and bargaining positions. I argue that most other accounts of coercion have missed what is central to market coercion and possibly begged some important questions about coercion in assuming the legitimacy of the status quo as the focal point for the determination of coercion. I argue as well that the better off/worse off distinction ignores the power relationships that occur when there are radically disparate bargaining strengths. Those who miss the relevance of relative bargaining positions to coercion seem committed to the position that those who are worse off in society are the ones most difficult to coerce. I argue that coercion
involves exercising power over another; in the market, it involves exercising superior bargaining power. Superior bargaining power is a function of the bargaining advantages that one has over another. I examine the notions of bargaining advantages, exploiting advantages, bargaining power and control over others, and their relationship to freedom, voluntary behavior, and especially voluntary exchanges, to develop an account of coercion that not only satisfies our moral intuitions about coercive situations but also is conceptually consistent and strong to capture all coercion that occurs in market interactions.

In the second section and the final chapter I apply the conceptual apparatus that has been developed to the law of contracts. I analyze the doctrines of duress and unconscionability and defend an interpretation of those doctrines using the theoretical framework of my analysis of coercion. I argue that the courts must employ different standards when making an assessment of duress in commercial settings from consumer settings. The doctrine of unconscionability, I argue, finds its justification in that it constrains advantages which are likely to vitiate consent on the grounds of duress, fraud, undue influence, or incompetence.
CHAPTER 2

COERCION AND FREEDOM

Often the best way to begin an analysis of any concept is to focus upon our pre-theoretical intuitions about that concept. I will start by doing this with the concept of coercion, this will not only lay the foundation for my study but will define and limit the scope of the study. I will begin by focusing on common understandings and conceptions of coercion with a view toward sharpening our focus on the concept of "coercion". I will take up in a general way some of the normative questions that arise about the practice of coercion and explore the foundations of the moral wrongness associated with that practice. On the other side, I will examine the extent of a person's moral and legal responsibility when acting under coercion. And I will ask why the excusing conditions which are normally associated with coercion are not present in some arenas; for example, with institutional occurrences of such "pressures".

The connection between coercion and liberty is obviously a close one, but the question whether the absence of coercion is sufficient for liberty needs further analysis. In light of this, I shall develop, a general account of liberty. I will argue that coercion is one among many ways
of constraining another's freedom and consequently its absence is not sufficient for unfreedom. The presence of coercion may not even be necessary for unfreedom once certain distinctions among "kinds" of freedom are made. Along with the normative questions regarding the *prima facie* wrongness of the practice of coercion, I will discuss the value of liberty itself. The presumption against the practice of coercion rests upon the value of liberty consequently it is the strength of the case that can be made for liberty which is the ultimate cornerstone for an attack on the practice of coercion and a barrier for its extensive use. Finally, I will raise some related issues to the argument in favor of liberty: the harm principle as a rebuttal to the presumption in favor of liberty, the *volenti non fit injuria* maxim as qualifying the harm principle, and the problem of paternalism.

I. General Conceptions of Coercion

Coercion is an active term referring to the act or power of coercing. To 'coerce' according to Webster's means "to restrain or dominate by nullifying individual will; to compel to an act or choice; to enforce or bring about by threats or by force." This definition brings out a cluster of characteristics or constitutive elements of the act of coercing. The definition implies that coercion is the use
of power (to restrain or dominate is to have power over another and to exercise it) by one person over another, and that the power is exercised on the will of the person coerced. The coercer's power is used to apply "pressure", via the victim's will, to force that person to act or make a choice in the way the coercer wants. The power manifests itself through threats of what the coercer's power can do to the agent if he does not comply. If not with explicit threats, then with a show of force exemplifying what his power can do. Coercion is usually associated with a threat of sanction or punishment or some evil by an agent with the power to make the threat credible. The common form of a coercive proposal is: "If you don't do x, then I will do y". The coercer uses a threat to make the choice of noncompliance less "eligible" than before the threat was made. Generally, we can say that coercion is the use of power through the vehicle of threats to force a person to do some action or make some choice.

The power relationship is exemplified in the paradigmatic case of coercion that of the gunman who proposes to his victim: "Your money or your life." The gunman has power over his victim, that is, the power to cause his victim to suffer harm if he does not comply with the demand. The language of power finds itself comfortable in discussions of coercion for the following reasons. First,
power is a relational concept, that is, some person A has power over B in regard to a particular action or range of actions. Second, power is a dispositional concept, defined in terms of capacity, i.e., the power A has over B allows A to control the behavior of B to a greater or lesser extent.

There is, however, a vast spectrum of cases where power is exercised. For example, the leader of the party has power over the members of that party to influence their voting in concert with him; employers have power over their employees within a range of activities; and teachers have power over students with regard to their school work. None of these power relationships necessarily involves the coercive use of power. In these cases, because of the position the person holds, he is able to influence the persons dependent upon him. He can do this by, for example, providing that person with reasons for acting in a particular way. When A (the power holder) exercises his power of persuasion over B, B is still free to act otherwise. B has been given reasons for acting in the way A wants him to, but whichever way B acts will be on the basis of how the reasons that were supplied by A coincide with other preferences that B has that would motivate B to act. On the other hand, when A exercises coercive power over B, A's power precludes B from acting otherwise. When A coerces B, A prevents B's from acting other than A wants. With coercive power, then, one
has the ability to cause his victim to act in a way other than his victim wanted, and he does this not by physically necessitating, but through the use of threats.

One of the unique characteristics associated with coercion, distinguishing it from other forms of constraints on liberty, is that the victim seems to have a choice in the situation. The use of coercive constraints does not make it impossible for the victim to do otherwise, as when, for example, an agent through brute force pushes another down the gangplank or holds another down and physically takes that person's money. Theoretically, the gunman's victim could "choose" not to comply with the demand. Though the victim has a choice, the choice is between "evils" or alternatives that the victim would rather not have to face. We could say then that a salient characteristic of coercive proposals is that the victim must make a choice between evils. The coercer, by exercising his power, has manipulated his victim's options to ensure the undesirability of noncompliance. The paradoxical nature of coercion is just that the victim does appear to make a choice in the situation and yet it is claimed that he does not act freely.

This fact, no doubt, led Hobbes to deny that the person's free will was overridden. Most subsequent theorists have been lead to the opposite conclusion, that even though the person in some sense had a "choice" in the situation the
overall assessment is that the individual's freedom was undermined, that the person did not freely consent or agree to the treatment or exchange and consequently should not be held accountable.

How is it that we can circumvent the Hobbesian approach (Hobbes, 1964, XXI); that is, how can we retain the thesis that the coerced person did not act freely while admitting that it was not literally impossible for him to do otherwise? It is important to notice that if the coerced act is in fact a deliberate "action" of the agent's, as opposed to a mere physical movement, then the agent must have a motive. This is purely definitional. Given this definition of an action, how are we to understand the claim that the coercer "caused" his victim to act? The coercer must cause his victim to have a motive for acting which he did not have before by arousing a desire that his victim already has. Is causing a person to have a motive which he did not have before what constitutes coercion, and thus the restraint on freedom? Surely this is not sufficient. Not all cases of causing a person to have a new motive would be cases of interference with that person's freedom. If this were true we would be committed to counting as constraints on freedom all enticing promises of rewards or goods that cause people to have new motives. Bribery is a good case to consider: B is offered a large sum of money to give away
company secrets. A has enticed him to act in a way that he had not intended to act. In other words, A caused B to have a new motive for acting. What differentiates this example from the cases of coercion?

The most striking difference between coerced acts and enticed acts is that in cases of enticement the agent seeks a good or reward; but in cases of coercion the agent is attempting to avoid an evil. The general contention must be that there is no "good" that would provide a rational agent with a motive which would preclude considering other reasons for acting. On the other hand, there are evils which provide motives which override consideration of any other reasons for acting. We can, however, move too quickly and think that it is always obvious whether an agent is seeking a good or avoiding an evil. Problematic cases abound where it is difficult to decide whether the agent is seeking a good or avoiding an evil. The often cited drowning swimmer example is debated on these grounds. The example is of a swimmer who is drowning in an isolated and deserted lake. Along comes a boat the occupant of which says to the swimmer: "If you promise to pay me $10,000, then I will rescue you." Is the swimmer motivated by his desire to gain a good, i.e., being rescued, or is he motivated by his desire to avoid an evil, i.e., drowning? I find the example quite unproblematic, (the swimmer is clearly motivated by his fear
of drowning) but it has stirred quite a bit of controversy, making shared intuitions unlikely on the subject.

We think of the coercer as an agent who actively intervenes and uses "force" or "pressure" on the victim's will, causing a change in the victim's network of options. The change is to a situation where the victim has only one eligible choice. The question has been raised (Gert 1972, pp.34-37) whether coercion involves certain sanctions and not others. Presumably, then we could develop a list of evils which are sufficient to force compliance. Certainly having such a litmus test for the evils sufficient for coercion would make the search for conditions for coercion a simpler task. There are some contemporary philosophers who maintain that there are some evils, the threats of which are sufficient for coercion (Gert 1972, pp.34-37). However, this is a controversial matter. Traditional legal scholars, e.g., Pufendorf, and philosophers such as Locke thought that it was enough to show that the individual's will was "overborne" by overwhelming pressure. On the other hand, the courts have often applied standards which delimited the threats which were sufficient for coercion. For example, in Skeate v Beale ((1841) 11 Ad. & E. 983, 113 E.R. 688.) the courts refused to countenance the idea of economic duress or duress of goods, and they required that an act of coercion not only take away the 'free agency' of any person, but a
person who 'possesses that ordinary degree of firmness which the law requires all to exert'. Legal scholars distinguish between internal ('subjective') standards tailored to a given individual and external ('objective') standards like 'the person of ordinary firmness'. Nevertheless, we need to question whether from a moral point of view these qualifications are justifiable, and what if any their limits are. We are primarily interested in morally justifiable conditions for coercion and that may mean taking the "weak" individuals along with the strong.

Up to this point we have focused on the victim's fear of certain consequences, but the content of the demand has been neglected. Demands, as threats, can be ordinally ranked. In other words, given some particular demand the threatened consequence was not sufficient to coerce this person. And this could be true even though the person fears the consequence or at least views it as undesirable. Or given the mild unpleasantness of the demand and the greater unpleasantness of the threatened action, the proposal was sufficient for coercion. Consider the following: a bully says to B: "If you don't give me a quarter, I'll punch you in the nose". Before this proposal was put to B he had no desire to give up his quarter. But, after the proposal he desires to avoid having the bully punch him in the nose and thus has a motive to hand over his quarter. Now suppose the
bully ups the demand. The bully demands that B hand over all his money, yet the threatened sanction remains unchanged. While he may fear the consequences of not acting in the demanded way he views the demand the greater of the two evils. In this case we would say the bully applied coercive pressure but that it was not sufficient to coerce. Coercive proposals have this relative nature, their success is dependent not only on how much the individual desires to avoid the threatened consequences but also how high the price is to do that.

The above examples illustrate an interesting point about the position of philosophers who argue that there are some evils sufficient for coercion. Being punched in the nose is probably sufficient for coercing an agent to hand over his quarter, but it is unlikely that it is sufficient to coerce an agent to do much more undesirable actions. Either we admit that being punched in the nose is sufficient to coerce people to do some things and consequently include "being punched in the nose" on the list of evils, or we admit that "being punched in the nose" is not sufficient to coerce people, and thus not include it on our list. If we opt for the latter we are committed to saying that B acted freely when he hands over his quarter. This is an absurd position since clearly B only hands over his quarter to prevent himself from being punched in the nose. This
criticism illustrates the problems plagued with "objective standards".

Coercion is usually thought to be a relationship between persons. The source of the pressure or force is assumed to be the result of the power of some deliberate human action. What is not so common is to think of states of nature, such as storms, high seas, and avalanches as coercive. Yet, cannot such natural occurrences pose threats to agents' desired courses of conduct and just as effectively prevent those individuals from acting in ways which they otherwise would not? Aristotle thought that a storm might force one to do what one would not do otherwise, e.g., throw one's valuable cargo overboard to save his life. In this situation, given the agent's preferences, jettisoning his cargo was the lesser of two evils and the most rational choice. The effect on the person's will seems as coercive as if another agent deliberately threatened him. The storm "put" pressure was on his will to choose between the two undesirable alternatives. Some have argued that these are not cases of coercion since they do not have the element of deliberate human intervention. Indeed, they may not be part of the core cases of coercion, yet one could not deny that such events pose threats, and thus put constraints on one's action. I would suggest that these cases have not been focused upon because of the connection with justification that
we demand from deliberate human action when that action con-
strains the freedom of another. Of acts of nature we cannot
make such demands. But when deciding whether a person acted
under coercion, when assessing the limits of his moral
and/or legal responsibility, the coercive effects of "acts"
of nature seem to be as relevant to that evaluation as
intentional acts of others.

The above discussion raises another question, the
question whether actions of others which are not
intentional, but which seem to "force" another agent to act
in ways in which he would not otherwise have acted, are to
be included under coercion. A case that has been cited in
this regard is that of price slashing which forces the
competition to do the same or face bankruptcy (Pennock 1972,
p.3). The original price slasher had no intention of forcing
his competitors to cut their prices, in fact, he did not
even want them to. Yet the competitors "feel" as if their
freedom was constrained, that they were forced to do what
they did not want to do. Another case is that brought up by
John Stuart Mill wherein, through the "tyranny of the
majority", dissenters feel pressured into complying with the
norms and customs of the society. We need to ask if these
pressures are sufficient to call them coercive. It is diffi-
cult to imagine that the disapproval of society would be
sufficient for coercion, although it might be in a given
exceptional case. Only when the sanctions are great can we say that the person was coerced by society. And yet when the pressures become that great, it is hard to imagine them as not deliberate or intentional on the part of those applying the force.

We have mentioned "pressures" from other individuals both intentional and unintentional and pressure from states of nature. We now need to question whether all "pressures" upon agents should be characterized alike. Commercial or business life is full of "pressures" which are often assumed to be legitimate, as in the case of the price slugher and his unwilling "victims". And society may put pressure on nonconformists, but it is not clear that these are cases of coercion. It seems evident that some pressures are more legitimate than others, especially those which are not intentional acts of pressure. In fact, there seem to be certain institutional practices which justify the use of such pressures. This includes not only unintentional acts of pressure, but intentional "pressures" which are sanctioned by the state, e.g., undertaking of various kinds given to judges. P.S. Atiyah views these legally sanctioned "pressures" as problematic for accounts of coercion which maintain that the use of coercive pressure nullifies obligations. He states: "Clearly, if promises of this nature [undertakings or promises entered into under threat of im-
prisonment] are to be treated as creating binding obliga-
tions, the conventional will-theory explanation of the
effect of unlawful coercion or duress will not do" (Atiyah
1981, p. 23). On the one hand, the courts maintain that the
person's will was 'overborne' by overwhelming pressure, and
consequently the contract or promise is not binding; on the
other hand, the judiciary uses such "pressures" to ensure
compliance. An account of coercion must answer these ques-
tions concerning the legitimate use of "pressure", both
unintentional and intentional.

Up to this point we have focused on cases involving
individuals coercing other individuals. Another form of
coercion involves the state coercing its citizens. The
state, through the coercive arm of the law, demands com-
pliance. The state has the power to make demands and backs
them up with sanctions, e.g., punishment. The law demands
that individuals not harm or offend others, and requires
positive action in the way of paying taxes, serving in the
armed forces, and so on, all backed by sanctions for noncom-
pliance. State coercion differs from other forms of coercion
in that it employs standing threats and normally with only a
probability of carrying out the threatened action. But
states find themselves in need of justification precisely
because of their coercive use of power (Kant 1965, pp. 35-
37). Discussions of state coercion normally revolve around
the question whether the state is justified in having this coercive power. And, then if so, the question arises as to the acceptable limits of the state's use of coercion. Coercion undermines liberty, thus it is not uncontroversially true that states or any authority or person should wield this power.

In this section we have considered some general characteristics of coercion. We have noted that coercion is the use of power through the vehicle of threats to force a person to do some action or make some choice. I argued that the language of power is appropriate since "power" is a relational and dispositional concept. The statement that 'A coerces B' can be analyzed in terms of A's exercising enough power over B such that it precludes B from acting other than that A desires. A's exercise of power over B does not make it impossible for B to do otherwise but rather that the alternative to complying has been made so undesirable that B must comply. Part of A's power is that he controls the occurrence of some evil state of affairs that B fears and strongly desires to avoid. The coercer must cause his victim to have a motive for complying and the motive is based on the victim's desire to avoid the evil that is in the coercer's power to affect. The next question we will address is: What wrong with getting a person to act in this way?
II. The Moral Wrongness of Coercion

Coercion can only be discussed by addressing the issue of freedom. The analysis of coercion rests on the conception of its use as a constraint on freedom. When it is asked what is wrong with the practice of coercion the answer is obvious: Coercion is *prima facie* morally wrong because it undermines freedom.

As has been argued, coercion involves forcing a person to do what he does not want to do or preventing him from doing what he intended to do. What is central is that the agent is no longer free to act as he desires, consequently this kind of unfreedom is produced by a desire frustration. Coercion frustrates an agent's desires, yet it does this in a paradoxical way. The agent chooses what he most prefers in the situation but what the victim does not want is to have the motive to act in the circumstances. There are two kinds of unfreedom, the first directs itself to the actual desires that an agent has that are frustrated. "[A]n agent is unfree to perform (to refrain from performing) an act only if his actual desire to perform (to refrain from performing) the act is frustrated" (Zimmerman 1981, p.129). The second has to do not with actual desires that the person has at the time, but with possible desires that if he had would be frustrated. "[A]n agent is unfree to perform (to refrain from performing) an act only if he would
not perform it (would perform it) even if he wanted to do so (wanted to refrain from doing so)" (Zimmerman 1981, p.126).
The second kind of unfreedom is exemplified by the classic example of John Locke's; in the example, a man is locked in room but he does not notice because he is enjoying himself. But if he wanted to leave the room he would be unfree to do so. Both kinds of unfreedom can be analyzed in terms of want frustration (actual and hypothetical).

What is wrong with making an agent unfree in this way? The question of the justification of the value of liberty will be addressed latter in this chapter. But, briefly, there are at least two moral accounts given for the prima facie wrongness of coercion or causing an agent to have frustrated desires. The Utilitarian argument is simple: frustrating an agent's desires produces unhappiness and doing so violates the principle of utility. The Kantian analysis, of course, rejects the notion of utility as the criterion of wrongness. Rather, the Kantian approach focuses upon treating agents as full rational agents worthy of respect. The "dignity" of man comes from his freedom and his capacity to be autonomous. One cannot be autonomous or act autonomously if the ends are set for one. The coercer disregards the agent's chosen ends and sets immediate ends that the victim cannot disregard. The coercer uses his victim's
preferences as a means to the coercer's own ends, forcing the victim to choose the coercer's ends.

III. The Connection Between Coercion and Liberty

The connection between coercion and liberty has been lurking behind our discussion. As was said earlier, liberty is often defined as the absence of coercion. This conception of freedom has been central in the tradition of individualism and liberalism that has flourished in the last few centuries. The conception of freedom, according to this tradition, is characterized by the condition of the absence of coercion or constraint imposed by another person or the state. Thus freedom has this relational characteristic: A person is free to the extent that no other person interferes with him. This needs to be expanded: A person is free to the extent that he is not compelled to act as he would not himself choose to act, or prevented from acting as he would otherwise choose to act, by another, or the state, (and possibly even the impersonal forces of nature). And a person is free to the extent that he can choose his own actions, choose his own goals and plans, and choose between alternatives available to him. Freedom from constraint is often called "negative freedom" and "negative liberty". Many theorists maintain that the absence of coercion is necessary and sufficient for freedom, in other words, so long as no one coerced him, he was free.
Isaiah Berlin defines "negative liberty" as the absence of obstacles to the realization of desires. The characterization "freedom from", has been attached to negative liberty. Yet, according to Berlin's own definition, it is freedom from something to realize desires. It is not enough to say that some person is free from some constraint without mentioning what he is now free to do or be or have. In mentioning the constraints the possibilities that he was formerly unable to do become clear, the frustrated desires that are no longer constrained. Even with these qualifications this is only the framework of a definition; the range of obstacles and the range of desires have yet to be specified.

For at least two reasons, the range of desires must include possible as well as actual desires. First, as Berlin himself pointed out, if liberty were simply the absence of obstacles to the realization of actual desires, a person could dramatically increase his liberty by the simple device of dramatically reducing his desires. As an account of liberty, this is totally misleading. Second, we should not restrict the scope of the definition to actual desires, because we want to allow for the fact that people can be free to do things they have no desire to do. Liberty, consequently, must be understood to be the absence of obstacles to the realization of both actual and possible desires.
We are interested in the kind of liberty which is made possible by the structure of our social institutions and practices, a type of liberty that cannot be changed except by a change in those institutions and practices. And although freedom does not include the ability or power to achieve one's goals or desires, if the structure of the social institutions and the practices directly or indirectly results in some deprivation of ability and power, then this would be productive of unfreedom.

There are good reasons for not limiting the range of obstacles to freedom to coercion proper, i.e., getting people to act in a certain way by making them fearful of not acting in that way. Much of the power wielded by the government which limits freedom does come in the form of coercion, most notably, that which is prohibited by criminal law, torts, contractual obligations, as well as any conduct the state may enjoin or prevent by its regulatory processes. This is not, however, the only way the state can affect our liberty. In addition to these prohibitions, the state regulates our conduct by imposing positive requirements of specific performances upon us, e.g., to pay taxes, to pay for retirement annuities. These requirements impose additional kinds of governmental obstacles on our conduct. We are not free to do that which is itself neither prohibited nor
required, if the doing of that act would conflict with something else we are required to do.

But it would be shortsighted not to recognize the other ways in which states or individuals can diminish the freedom of individuals. There are sound theoretical reasons for not considering these other ways of restricting freedom as instances of coercion. Let us consider a number of these other ways of restraining individuals' freedom. Another obstacle to freedom that must be distinguished from coercion proper is that of compulsion. This is one form of constraint that is often considered a form of coercion. Even Black's Law Dictionary's definition of 'coercion' includes compulsion. It states: "compelling by force or acts of constraint under coercion: 'It may be actual, direct, or positive, as where physical force is used to compel acts against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to others to do what his free will would refuse.'" On the other hand, The Model Penal Code limits coercion as follows:

A person is guilty of criminal coercion if, with purpose to unlawfully restrict another's freedom of action to his detriment, he threatens to: (a) commit any criminal offense; or (b) accuse anyone of a criminal offense; or (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (d) take or withhold action as official, or case of an official to take or withhold action (MPC sec 212.5).
Like coercion, compulsion involves external power which is inflicted upon the person. But unlike coercion, compulsion does not force the person through the person's will but directly forces the person physically. Some theorists, for example Neil MacCormick, take issue with this distinction between forcing someone to do something via threats and forcing someone to do something with the application of brute force. He thinks that both are instances of coercion. One MacCormick calls "coercion by direct threats" and the other by "coercion by indirect threats". He cites the following cases: mounted policemen charging upon a mob rioting in a city square and forcing them despite all resistance to leave the square; cases of rape where a man makes it clear to a woman that if she does not forthwith submit to intercourse he will force her do so anyway; and a prisoner who does not go quietly to jail, but is dragged there despite resistance. He says that in "every case of using force to make someone do or submit to x against his will and without real choice is a case of 'direct physical coercion'" (MacCormick 1982, p.233).

If a person is literally dragged or pushed by brute force to do or submit to something against his will, then no doubt his freedom is undermined. But there is no choice, in any sense of the word, on the part of that person. Neither is there any sense in which the victim "acted"; being
dragged through the street is not an action of the victim. Under coercion, on the other hand, the person fears a greater evil of not submitting and acts to avoid the evil. In cases of compulsion there is no greater evil that is threatened. In the rape case, whether the victim submits or resists, according to MacCormick, she has no fear of a greater evil than the evil of the rape. If this were an accurate characterization of such cases there would seem to be no reason not to resist. MacCormick mischaracterizes the rape situation. Normally the woman does fear that through resistance she will receive even greater harm (rape and grievous bodily injury and possibly death). With such cases, it is a coercive threat which forces her choice between evils. Another example is that in which one is pushed along the road with bayonets in one's back, one chooses to walk on one's own for fear of another jab.

Clear cases of compulsion, which MacCormick fails to focus upon, are those in which the person has no choice in the matter, where one does not choose or act at all. When someone pushes another down the gangplank, he moves his victim's body as one would a physical object disregarding the person's desires, wishes, or free will. The victim not only has his freedom undermined but he does not "act" at all. Consider another example: Q is locked into a room, Q is not coerced into remaining in the room, but Q's agency is en-
tirely circumvented; Q has no choice, not a choice between evils. Compulsion involves physically requiring a person to do something (or preventing a person from something), and it is characteristic of compulsion that there is no purposeful human action on the part of the victim. The causal network is between the physical force or physical barrier erected by some agent, and the victim’s body.

Coercion, on the other hand, requires an action or sometimes an omission on the part of the victim, but nevertheless purposeful human behavior is required on the part of the victim. The coercer is attempting to force the person to do x by threatening that he will do y if the person does not do x. The coercer makes y sufficiently evil that the person has no choice but to do x. This is not to say that there are not borderline cases where it is difficult to decide whether the person was physically compelled or whether the person was coerced. There are cases in which it is difficult to determine whether the person decided he could no longer "resist", e.g., the pain, and chooses to act as the coercer wants, and cases in which he psychologically "cracks" because of the pain and his body does what the other wants.

There are good theoretical and practical reasons for distinguishing compulsion from coercion. On the theoretical side, compulsion does not include an action on the part of the victim, whereas with coercion it does. With coerced acts
critical assessment of the person's preferences which "forced" him to act as he did can be made, whereas these judgments cannot be made of compelled "acts". And practically, compulsion is easier to determine: One need only ask whether one's body was, through brute force of another, moved, or whether because of some physical barrier erected by another the person was unable to act. In other words, was it impossible for the person to do otherwise?

There are other methods of constraining individuals' freedom which may be subtler than coercion and compulsion but no less insidious in their results. We can imagine, for example, a society in which the government has controlled and manipulated the sources of information (the educational system, the media, and so on) to the extent that the populus has only a narrow perception of the range of alternatives. Yet because of the skillful and covert work of the state the people do not realize their myopic vision. The persons in the society desire and set goals according to the state's manipulated plan. The citizens, unaware of the potential alternatives or not even able to conceive that there might be alternatives, do not feel that their freedom has been diminished in any way. There is no frustration of actual desires because they do not have the desire for anything but the delineated class of desires. And we can imagine in this extreme case that the state is so successful in its
manipulation that there is no need for "coercive laws" since the citizens naturally desire to do only legally permitted and required action. In such a society coercion proper would not exist and yet one would not hesitate to say that the citizens do not have much freedom. Indeed, this kind of deprivation of freedom may be the most insidious, for it denies even the awareness of any creative realization of self or autonomy.

Another form of constraint that is closely tied to manipulation is that of providing the individual or individuals with false information. This differs from manipulation generally in that with occurrences of manipulation the information does not need to be false but only one-sided, or narrowly tailored. Whereas if the information is misrepresented or distorted as with propaganda, for example, then individuals are not able to choose among alternatives in an intelligent and rational way. One can control another's choices by leading him to believe that the result is different from what it is. Aristotle notes that a person does not act in a voluntary way when he is ignorant of the alternatives, or at least the important factors in a decision (Aristotle 1980, p.57). In these cases as in cases of manipulation the person's evaluation of the results are affected, whereas this is not true of coercion. Normally, the person who is coerced does not desire or view the result
of his choice as a good thing. And with coercion the person knows or is aware that his alternatives have been narrowed. Misrepresentation and manipulation change the person's evaluation of the result.

If liberty is the right, or includes the right, to choose among alternatives, then the alternatives can not be rigged by manipulation or misrepresentation so that one's evaluation of the result is based on either little known alternatives or false alternatives. This implies that at least some knowledge of the range of alternatives is constitutive of free choice. Where the baseline is drawn, below which free choice is impossible, is difficult to determine, but we can say that the more information and thus knowledge of the alternatives the person has in a society the greater, on balance, is that person's freedom.

There is one final distinction that should be made in regard to constraints on freedom. This is the distinction between being free to act and acting freely (Feinberg 1973, pp.17-18; Gert 1972, pp.37-41; Oppenhiem 1961). When there are coercive rules or coercive pressure is applied (e.g., rules backed by sanctions) but a person performs the forbidden action anyway, how are we to characterize the person's behavior? In the face of a coercive rule or coercive pressure he apparently acts freely. We can say that he was unfree to act in the prohibited way (officially he was) that
is that his freedom was diminished by the presence of a price on his behavior, but he still acted freely. On the other hand, one can comply with a rule, i.e., do what one is required to do but not because of the threatened sanction. Most laws have this character. They are freely obeyed not because of the threatened sanction but because that is the way individuals want to act. The difference is that it is not the fear of punishment that prevents agents from acting in those prohibited ways or gives agents a motive for not acting in the prohibited way. Rather the agents have other motives for not acting in the prohibited ways. This is what we would expect from the rules of a society that values liberty. Democratic forms of government are thought to be most respective of liberty since individuals have an opportunity to participate in the legislative process and tend to have people do freely what is legally required and to freely refrain from action that citizens are legally unfree to perform. In this way the laws are not viewed as a burden.

When coercive pressure is applied to a captive dissident and he is told that he must reveal the whereabouts of the underground or he will be tortured, then if he does not reveal the secret we must conclude that he was not motivated by the fear of torture, and thus he acted freely. Submitting to torture is not the same action as keeping the secret, and in fact submitting to torture is not even an
action of his at all. The coercive pressure failed to coerce, and he was compelled to endure the torture. On the other hand, when a citizen pays his taxes, not because he fears the punishment of not paying, he acts freely even though he was officially unfree to act otherwise.

Coercive pressure does not always prevent a person from acting freely although its presence does deprive the person of freedom. But if coercive rules never prevented actors from acting in, say, socially undesirable ways then we would hesitate to call it coercive pressure. Different sanctions represent different degrees of deprivation of liberty. The aim of the law is to determine what degree of deprivation most citizens will experience with a particular sanction, or in other words, finding that sanction which will deter most from performing the prohibited action if they have a desire to perform it.

What we are primarily interested in when we give an account of coercion are the conditions under which an agent does not act freely, a way of determining whether he was actually prevented from acting as he wished. When coercive pressure is applied and an agent succumbs then the action was unfree. But whether coercive pressure was enough to "force" compliance will turn out to be a function of an individual's preferences at the time. It will depend on the degree of deprivation and hence unfreedom that is associated
with a punishable action, i.e., it depends on the negative utility of the punishment or sanction and how much the person desires to perform the action. The dissident may see the torture as having great negative utility but his desire to perform the action of keeping the secret outweighs the negative utility when he decides to keep the secret. We can imagine that if his captors increased the price by attaching a higher penalty (they will torture his family), this would tip the scales making the negative utility so great that he succumbs to the pressures and tells the secret. Thus the action would be unfree.

Even though our central concern is to state the conditions under which an agent acts unfreely, we must not lose sight of the important consideration that all coercive rules deprive someone of freedom. Though we may not desire to act in those ways, and thus do not feel the burden of such restrictions, we must be wary that some day these restrictions will undermine our freedom or we will be prevented from acting in a way we desire. This is the reason advocates of liberty such as John Stuart Mill thought that strong constraints on even a democratic government's power to legislate should be imposed because the "tyranny of the majority" could be just as effective a coercive force as the tyrannical despot.
IV. The Value of Liberty

Freedom is often characterized as a good thing or as a basic value and, by Kant (Kant 1978, pp.49-59), as a value not in need of justification; a good in itself. Mill argued differently (Mill 1947, pp.56-74; Mill 1975, pp.12-14), attempting to give an account of the justification of the value of liberty. Mill argues that everyone has a right to the essential ingredients of happiness. What is most important for this discussion is his construal of happiness, with which, whether one subscribes to utilitarianism or not, one could still embrace. His construal of happiness is conceptually tied with the notion of individual autonomy--i.e., self-determination and self-realization.

Human beings, Mill thought, have two sorts of natural tendencies and predilections, which must be developed and exercised for humans to be happy. First, we have the peculiarly human capacities and predilections such as the intellectual capacities, the desire for liberty and independence, and what goes to make up "the sense of dignity". Second, we all have in addition our own unique capacities, needs, wants, and goals. Individuals will not achieve the greatest happiness that is possible for them without the simultaneous development of the human capacities shared by all and the uniquely individual ones that are dominant in them. Mill argues that a person is autonomous
when he is left to live his life on the basis of his own rationally developed plan, which is an expression of the development of the human capacities. Being autonomous requires that one has certain developed faculties, such as the ability to conceive goals, formulate plans in order to attain desired ends, and make choices. By acting autonomously, moreover, one exercises and further develops these capacities. It is impossible for one to know what one's own unique capacities and propensities are in order to set goals and make plans in order to be fully autonomous unless one's abilities and potentialities have been allowed to be carried out and thus developed to some extent. An autonomous life essentially involves the active use of the person's "higher faculties". For this reason, almost by definition an autonomous life-style cannot be forced upon one.

The connection of liberty with both happiness and autonomy is obvious: Liberty is a necessary condition for both. The presumption in favor of liberty is, therefore, based on the fact that it maximizes happiness. Consequently, given that it is a necessary condition for acting autonomously, Mill is committed to liberty as a fundamental moral value. This account lays the foundation of his "utilitarian" argument. Yet it also grounds another argument which seems to run through his work, that of the absolute right of personal autonomy—regardless of the good served.
The latter argument is that the right of self-determination is as morally basic as one's own self-realization (one's good). And when the two conflict, the right of self-determination takes precedence. At times, Mill seems to argue this way, but he stops short at crucial points. This argument can more readily justify absolute non-interference in self-regarding acts, given that one's own choices are not always in accord with one's interest or good. But if the right to self-realization is absolute, and given that it most often is in accord with an individual's good, there is never a good reason for interfering with that right when only the agent is involved.

Following from this account of autonomy is Mill's famous "harm principle", which supplies what Mill thought was one of the two only good and relevant reasons for limiting an individual's liberty. The principle is:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection..., the protection of harm to others. (Mill 1947, p.9)

Only actions which directly cause harm may be interfered with by the infliction of penalties, and then only if certain further conditions are met, namely, that the harm to be prevented is greater than the harm caused by the interference. What precisely constitutes "harm" is itself an interesting and perplexing question. I will follow
Feinberg's definition, which is: Harm is to be understood as something that adversely affects someone's interest---physical, psychological, economic, etc. Mill characterizes a person's interest to include being a recipient of positive acts by others, such that individuals have positive duties to others. By combining these notions, it appears that one can harm another by not carrying out an assignable duty. Where there are duties to others, the others have an interest in the performance of those duties. Failure to fulfill a duty, then, is detrimental to those interests, and this constitutes a harm.

Another good and relevant reason for legal coercion is offense:

There are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly are violations of good manners, and coming thus within the category of offenses against others, may rightfully be prohibited. (Mill 1947, p.99)

The reasoning behind these constraints on freedom is easy to see: In harming or seriously offending someone else, one necessarily interferes with or impinges upon his liberty. Actions which harm or offend another can destroy the possibility of that individual's autonomous action. Liberty is not the freedom to destroy another's liberty, but rather the protection of liberty is to ensure like liberty for all.
The avoidance or prevention of harm and offense to others being the only good and relevant reasons for legal constraints, Mill is committed to an absolute prohibition of paternalism. He argues that:

His own good, either physical or moral is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so because it will make him happier, because, in the opinion of others, to do so would be wiser, or even right.... In the part which merely concerns himself, his independence is, of right, absolute. (Mill 1947, pp.9-10)

Mill adamantly (though not consistently) maintained that legal obstacles to an individual’s self-regarding acts can never be justified. Yet, many ask, if it is society’s duty to prevent harm, why is it not, then, justified in preventing self-inflicted harms? One may answer that the harm principle is mediated by the legal maxim, Volenti non fit injuria, which translates: "To one who consents, no harm is done". Interpreting this maxim is tricky business, given that no one could deny that an individual could consent to an act that literally harmed him. Nor did Mill deny this. The interpretation that is most defensible is that, indeed, a person can harm himself, but cannot wrong or do injustice to himself. The difference between a wrong and a harm is also exemplified in situations of other-regarding acts. For example, if an individual dies while having surgery done—the patient was fully informed, and consented to an operation of which he knew he had only a 50/50 chance of sur-
viving--no one would deny that the individual was harmed by the surgeon, but he was not wronged. If he was fully informed of his chances and the other possibilities, and he still opted for the operation, then no wrong was done to him.

Problems have arisen, however, over the use of the *volenti* maxim as a means of mediating the harm principle. The fact that a person consented to some agreement does not delineate the extent, say of the risk he should be held accountable for consenting to. In workman compensation cases in the 19th century, for example, it was maintained that workers were entitled to no compensation for injury on the job. The reasoning was that the workers were consenting to the risk of injury as part of their consent to employment at a certain wage. It was the *volenti* maxim that was invoked in these cases (Atiyah 1979, p. 704). It is not difficult to see that an adult should bear the risks that he in fact consents to, but it is not such an easy leap to argue that one knows or is aware of all such risk when one consents to some agreement or treatment. This is a problem that permeates many cases in contract law, especially those that have emerged under that doctrine of unconscionability.

In this section I have considered the traditional arguments advanced for the value of liberty. Particular attention was given to Mill's elegant defense of liberty.
Further we consider the only relevant reasons that Mill thought would justify state interference into an individual's liberty.

V. Freedom of Contract

It is generally thought that society has progressed to the point where society includes less coercion and more freedom for individuals. Freedom of contract is one of the ways in which individuals have more control over what affects them and are able to dictate the conditions under which they will live. Before passing judgments too quickly, however, we need to examine these contentions in light of what actually is meant by freedom of contract and other freedoms. "Freedom of contract" is formal in the sense that it permits everyone to enter contracts or agreements that suit them and it requires that the government and private individuals have no place in determining the content of the agreement. Mill's belief (Mill 1947, pps.19, 84) that no one is a better judge of a person's good than that person himself is embodied in the idea that the law will not test the adequacy of "consideration" in agreements. The institution of contracts allows persons the opportunities to determine for themselves the agreements that they wish to live by, without the interference of the state or other individuals. But as with other freedoms, freedom of contract
does not guarantee that everyone has the power to enter into the contracts of their own choice. Nor does it exclude those with greater market power from exercising that power over those with whom they negotiate.

Does this formal freedom actually create a milieu in which freedom is, if not maximized, at least increased on balance, by bestowing on individuals a framework that expands their choices to decide how they might live and generally shape their own lives? The ramifications of freedom of contract would be more self-determination and autonomy. But if this is open to only a few, or if the freedom can be used by the few with superior market power to dictate and possibly coerce others into agreements, then its justification needs to be reconsidered. Supposedly everyone is free to enter into contracts which he prefers. But in actuality those with superior bargaining power often present agreements in a "take it or leave it" fashion with the weaker agent having no choice but to take it, because there are no substitutes for the agreement. The opportunity to structure one's world the way one wants may not be open to all but only to those with the power to affect the agreements they want. Bars and shackles do not prevent individuals with little bargaining power from utilizing this freedom. But rather, those in superior bargaining positions can use their power to secure the deals that they prefer and leave those
without the market power with no choice but to agree. Of those without much market power we can say that they are free to decide the terms of contracts that they will enter but this may amount to no real expansion of freedom.

One problem is that contracts tend to preserve advantages once they are secured. The disadvantages which one agent brings to the bargaining table will express themselves in contract. Thus as contracts tend to preserve advantages once secured, so contracts preserves disadvantages. Bargaining power patterns are determined, at least partly, through legally sanctioned property rights. Yet it may be determined that the background conditions of negotiations permit some too much power at the expense of others. That is, they can coerce those in a weaker position into one-sided unfair deals. Freedom of contract under this scheme works to the benefit of those with the market power. This reinforces and supports the power that the strong already have, and of course, enhances their liberty and autonomy. Some of these issues are more appropriately addressed in a theory of justice, but when questions arise as to whether superior bargaining power permits those with the power to coerce weaker individuals, then it is a question about freedom and the proper subject of our study.

In this chapter I have considered a number of issues
related to the subject of coercion. First I attempted to capture some of our pre-theoretical intuitions about the nature of coercion. Second, I addressed the question of the basis of the moral judgment that the practice of coercion is prima facie wrong. Third I provided an account of liberty and the value of liberty. Fourth, we distinguished coercion from other ways that freedom can be undermined, e.g., compulsion, manipulation, etc., and thus established that coercion is not necessary for unfreedom. And finally we briefly considered the topic of freedom contract which sets up the arena in which we will later consider the issue of coercion. Before developing an account of coercion which will account for some of the pressures which occur in the market I will present some influential theories of coercion.
CHAPTER 3

SOME INFLUENTIAL THEORIES OF COERCION

In this chapter I will consider what I take to be the most important theories in the history of coercion. This will lead to a fuller understanding of the historical underpinning of later accounts. In many areas of philosophy the exhaustive work of Aristotle has provided the foundation and set the stage for subsequent work in the area. This is also true of the subject of human action, where his work on the conditions for voluntary and involuntary action and the ascriptions of responsibility that those characterizations carry laid the foundation for subsequent work. Beginning with Aristotle's work should lead towards an understanding of the presuppositions of all later work on the subject of coercion.

I. Aristotle

Ironically, and perhaps prophetically for the problems associated with the nature of coercion, Aristotle's arguments have been interpreted in such a way that they lead to diametrically opposed conclusions. This confusion in interpretation of Aristotle's illustrates the complexity of the subject and the inherent problems associated with it.
For example, Atiyah states: "Aristotle had said that a man on board a vessel who throws his goods overboard in a storm does so perfectly willingly, given the circumstances, and his arguments were reproduced by Hobbes" (Atiyah 1981, p. 22). On the other hand, Bernard Gert states:

Aristotle recognized that when a man was faced with possibility of death, he would do things that he would not otherwise have done. Actions done in these circumstances Aristotle called non-voluntary....For both Aristotle and I agree that a person may some times be in a situation such that it would be unreasonable to expect any rational man not to act so as to avoid certain circumstances, for instance, in a storm a ship captain will always throw his cargo overboard if he believes it necessary in order to keep his ship from sinking. Both Aristotle and I agree that this kind of situation, in some sense, forces the person to act in a certain way, that he does not act freely." (Gert 1972, p. 35)

And Gert footnotes that "Hobbes explicitly disagrees with this view."

Without consensus on the correct interpretation of Aristotle's work, I will attempt to interpret his arguments in the Nicomachean Ethics where he discusses this subject. In Book III, Aristotle was interested in delineating the spectrum of human action for the purpose of establishing criteria for ascriptions of virtue or excellence. For Aristotle, virtue or excellence is concerned with the emotions and actions. Aristotle was concerned with human actions since when they are "voluntary we receive praise and blame; when involuntary, we are pardoned, sometimes even
pityed" (Aristotle, 1980, p.52). Thus, for any student of virtue, or a lawmaker who doles out reward and punishment, it is of utmost importance to differentiate between voluntary and involuntary actions.

As with many thinkers, Aristotle found the best way to begin his analysis was with a negative one, that is, by defining what conditions must be present in order for an action to be involuntary. There are two generally accepted categories of involuntary actions: actions done under constraint, and actions done due to ignorance. Of the first category, actions done under constraint, he states that they are ones in which the "initiative or source of motion comes from without and to which the person compelled contributes nothing" (Aristotle 1980, p.54, underlining added). The second category of involuntary actions encompasses those actions in which one is ignorant of the important factors. With these two categories as exhaustive of involuntary actions, Aristotle's definition of voluntary action is: "[A] voluntary action would seem to be one in which the initiative lies with the agent who knows the particular circumstances in which the action is performed" (Aristotle 1980, p.57).

If actions done under coercion are to be considered involuntary then they must be included under the genus of "constraint". Hence it must be true that the initiative or
source of motion is external to the person acting. Aristotle's examples of actions due to "pure" constraint are the following: "a wind might carry a person somewhere (he did not want to go), or men may do so who have him in their power" (Aristotle 1980, p. 52). In the first example it is clear that the agent contributes nothing, i.e., the source of motion is external to the person. The second example is ambiguous. "Being in one's power" could mean, as was stated in the previous chapter, having overwhelming physical power over another or having power to control another through other means, such as fear. But Aristotle does not explain his meaning, it seems, however, as though he is referring to compulsion.

Aristotle does recognizes the problem of actions done with external "pressures" on the actor, "pressures" other than physical pressures. He does not, however, focus exclusively upon acts done under a "fear of greater evil" but considers them in conjunction with acts done for some nobler purpose (courageous or heroic acts). Both are actions done with external pressures on the agent. In the one case (acts done under fear of a greater evil) the motive is to avoid an evil and in the other case (for a nobler purpose) the motive is to attain a good. He gives the following examples of actions done with external pressures present. Both his examples, however, are ones in which the
actor is motivated by fear of a greater evil: One is a case of a tyrant who uses a man's parents or children as hostages in ordering him to commit a base deed, making their survival or death depend on his compliance or refusal. And the other is a case where a storm threatened a greater evil forcing the captain of a ship to jettison his cargo in order to survive. Aristotle says of the action in the second example: "Considering the action itself, nobody would voluntarily throw away property; but when it is a matter of saving one's own life and that of his fellow passengers, any sensible man would do so" (Aristotle 1980, pp.52-53). Because of their peculiar character the actions in both examples, and all actions in this category, are neither purely voluntary nor purely involuntary. They are of a "mixed nature", as opposed to actions of pure constraint where, e.g., one's body is blown willy-nilly in the wind.

Aristotle provides the following qualification to actions of a "mixed nature". Such actions are closer to voluntary action, since at the moment performed the course of action is the most desired. And, he states, the term voluntary and involuntary are to be used with reference to the moment of action. It is important to note that Aristotle continues to refer both to actions which are done through a fear of a greater evil and those with a nobler purpose.
The conditions for voluntariness are: (1) that the choice is most desired at the moment of action and (2) that the source of motion rests with the agent himself (and "where the source of motion is within oneself, it is in one's power to act or not to act" (Aristotle 1980, p.53)). Aristotle again provides a qualification, he says: "Such actions, then, are voluntary, although in themselves they are perhaps involuntary, since nobody would choose to do any one of them for its own sake." These statements illustrate the source of confusion in the interpretation of Aristotle's position on the nature of coercion. The problem is that at the time the person acts, he seems to have a "choice", and chooses the most desired course. But, on the other hand, no one would choose that act for its own sake.

A major source of confusion in the interpretation of Aristotle's position is that Aristotle does not distinguish acts which are done with a fear of a greater evil and those done for a nobler purpose. Not distinguishing the two creates problems since Aristotle wants noble acts, done with external pressure present, to be voluntary. Aristotle's contention that actions done with external pressure are voluntary at the time at which they are done, yet they are in themselves involuntary, needs further explaining. In support of his argument that some actions done with external pressure are voluntary, Aristotle argues that people are
often praised or blamed for them. He gives the following examples: "sometimes people are even praised for doing them,... if they endure shameful or painful treatment in return for great and noble objectives" and "if the opposite is the case, reproach is heaped upon them, for only the worthless man would endure disgrace for no good or reasonable purpose" (Aristotle 1980, p.53). In making the choice with external pressure upon one, it is hard to decide when one must look forward to painful treatment and "what we are forced to do is base" (Aristotle 1980, p.54). So it is because of this "difficulty that praise and blame depends on whether or not a man successfully resists compulsion." What Aristotle must mean by "compulsion" is the external force putting pressure upon one to act in a particular way rather than irresistible physical force.

The above examples are interesting for the following reasons. In the first example the agent successfully resists the coercive pressure for a "noble" purpose. Consequently, he is not "compelled" to act as his coercer wants. Praise is heaped upon the agent for enduring the painful treatment, that is, choosing some act that no one would choose for its own sake. The difficulty of the choosing, and the fact that the agent chose the nobler purpose rather than giving in to the pressure, warrants praise. He was not coerced to act, in other words, he was not motivated by
fear. His motive was the "great and noble", thus the initiative came from the agent even though there was "external" pressure to do otherwise. No one, Aristotle says, would choose to endure the painful treatment for its own sake, thus we can understand the sense in which these actions are "involuntary" in themselves. For example, one might endure torture in order to keep a military secret out of the hands of the enemy, but no one would endure torture for its own sake. With the noble purpose to motivate one, one does not choose to endure the pain but chooses so as to achieve the nobler purpose. And this is the sense in which the action is voluntary. One would choose an action for the sake of some good end.

Aristotle's example of blame could be interpreted in one of two ways. The first is that one is being threatened with some consequence that one should be able to resist, given the demand. For example, consider the following threat: "If you do not hand over the military secrets, I will step on your foot". One should not endure the disgrace of complying when the penalty attached to noncompliance is so light. In this situation we would think the person a coward for fearing the penalty. In other words, for weighing the advantages and disadvantages in such a way that he viewed the light sanction as the greater disadvantage. The second interpretation is that a person should not resist a
demand with a stiff penalty attached unless there is a good or reasonable purpose. Imagine we change Aristotle's own example of the captain of the ship in a storm: now he refuses to jettison his cargo. In such a situation we might blame the person for making such a foolish decision (as being reckless). Under either interpretation the actor was not coerced.

Aristotle questions whether actions done under constraint should be limited to those actions in which the cause is external and in which the agent contributes nothing. His problem is that there are actions which are in themselves involuntary as in the praise example above, yet "chosen under given circumstance in return for certain benefits and performed on the initiative of the agent" (Aristotle 1980, p.54). Since there are benefits expected by doing the action they are voluntary, but since the actor would not choose to do the action without these particular circumstances, in this sense they are involuntary. Aristotle is concerned about the objection that noble acts are said to be performed under constraint "because the pleasant and the noble are external to us and have a compelling power". This would imply that all actions are done under constraint, since every person is motivated by what is pleasant and noble in everything he does. Aristotle's reply to this objection is that "it is painful to act under constraint and
involuntarily, but the performance of pleasant and noble acts brings pleasure" (Aristotle 1980, p.54). When one is seeking the pleasurable one does not act under constraint. Aristotle wants to avoid the conclusion that all actions done under external "pressure" are involuntary. When one is courageous, for example, one acts on one's own initiative, motivated by the noble end.

Most of Aristotle's discussion is focused upon those actions done under external pressure where the agent avoids the compulsion since he is motivated by a pleasurable end. Are we to infer from this that whenever an agent does not resist the compelling power he is to be blamed for being a coward and the action accordingly is voluntary? I think not. Aristotle argues that there are actions where the external pressures are sufficient to constitute a constraint: "There are some instances in which such actions elicit forgiveness rather than praise, for example, when a man acts improperly under a strain greater than human nature can bear and which no one could endure" (Aristotle 1980, p.53). His examples of such instances are those cited at the beginning of this chapter (actions done due to a greater evil), that is, the tyrant using a person's family as hostages, making their survival a condition of his compliance and Aristotle's example of the ship captain who jettisons his cargo in a storm.
In Aristotle's section on courage he states: "The same things are not fearful to all people, and there are some things of which we say that they surpass human endurance. The latter are fearful at least to every sensible person" (Aristotle 1980, p.70). The implication is that it is not the courageous man who fears nothing, that there are some things it is sensible to fear and one would be motivated to avoid unless there is some noble purpose to be attained by not avoiding them. There are some actions done from a reasonable fear to avoid some evil. When one is caused to fear a greater evil and chooses to avoid that evil that external pressure constitutes a constraint on his actions. The initiative for that action is external to the agent and causes him to act as he does.

In support of this interpretation of Aristotle's theory of actions done under constraint, I refer to the section on self-indulgence. Aristotle discusses the difference between self-indulgence and cowardice. Aristotle states:

Self-indulgence resembles voluntary (action) more than cowardice does. For it is motivated by pleasure, while cowardice is motivated by pain, and pleasure is something we choose, and pain something we avoid. Moreover, pain upsets and destroys the nature of the man who experiences it, but pleasure does nothing of the kind....It would seem, however, that cowardice is more voluntary than particular cowardly acts. For while cowardice itself is free from pain, cowardly acts, through the pain they entail, so upset a man that he throws away his arms and disgraces himself in other ways. Hence such acts
The cowardly man fears too much, but when he acts he does so from his desire to avoid pain.

Aristotle's theory of actions done under constraint has led some to draw the hasty conclusion that these are exhaustive of actions where brute force is applied. Aristotle contributes to the confusion by stating that a voluntary action is one in which the "initiative lies with the agent who knows the particular circumstances in which the action is performed". And actions done under constraint are those where the initiative is external. Yet he does not fully explain his meaning of initiative in Book III. But in Book V (On Justice) Aristotle's arguments support the thesis that coerced acts are a species of actions under constraint. Aristotle discusses cases in which the action may be unjust, but the person is not unjust or wicked. Of these actions he states that though the action was done with full knowledge, it was without previous deliberation, and they are due to an unavoidable or natural emotion. Aristotle uses anger as an example, but after what he has said about fear as a reasonable and unavoidable emotion in certain circumstances, fear of a greater evil could easily be substituted in the following analysis of initiative. He states: "the initiative rests not with the man who acts in anger but with him who provokes it". The person does not act from "choice", 

are actually considered as done under constraint. (Aristotle 1980, pp.81-82)
in Aristotle's sense, consequently he is not an unjust
person. Thus 'initiative' does not have the restrictive
meaning that it is often interpreted to have.

Aristotle thinks that actions that have not been
deliberated upon beforehand cannot be acts of choice. One
deliberates about means towards ends, the kinds of ends
that one deliberates about are ends that seem good to one.
The courageous man deliberates about the means to the noble,
and the means are often painful, but he is motivated by the
pleasant.

Aristotle's account is confusing since he discusses
actions that are motivated by a pleasant or good end along
with those that are motivated by a reasonable fear of an
evil. The two categories share a number of characteristics
but diverge at crucial points. The characteristics they
share are: that there is external pressure present, that the
agent chooses what is most preferred in the circumstances,
and that no one would choose that action for its own sake.
They differ in that for actions done for a nobler purpose
the initiative is internal to the actor and thus the moti-
vation is not caused by the external pressure. He is
motivated by his desire to attain the good end and choose so
as to reach that end. With actions done from a fear of a
greater evil the initiative is external to the agent.
Someone causes the agent to fear some greater evil. The
choice to avoid the evil is his own, but what causes him to choose as he does is external to him. And that choice is not only one which he would not choose for its own sake but also the and is one he would not choose. These differences lead to the conclusion that noble acts are voluntary and should be praised, and coerced act are involuntary and thus should neither be praised or blamed but forgiven. Aristotle's overall assessment of coerced acts is that they are involuntary. Nevertheless, Aristotle leaves it an open question whether any evil could constitute a constraint on an agent's action or whether it is only those evils which it would be objectively reasonable to fear.

II. Thomas Hobbes

Thomas Hobbes' view of actions done from fear of a greater evil is a radical departure from Aristotle's. For Hobbes the presence of fear does not undermine the liberty of the agent or constitute a constraint upon his action. He states:

so a man sometimes pays his debts, only for fear of Imprisonment, which because no body hindered him from detaining, was the action of a man at liberty. And generally all actions which men doe in Commonwealths, for fear of the law, or actions, which the doers had liberty to omit. (Hobbes 1969, p. 148)

The presence of fear in the state with its threatened sanctions of punishment is not sufficient to undermine the actor's liberty. It would seem that the state need not
justify its system of laws with penalties attached since this system does not undermine the liberty of the citizens.

This is a departure from our common understanding of the nature of law and the requirement of justification which we normally put upon the state's use of coercive power. Given this departure we need to inquire as to what Hobbes's deeper theory is, that is, is there some reason why in commonwealths fear and liberty are consistent? Indeed Hobbes goes further, and states that:

Fear and liberty are consistent; as when a man throweth his goods into the sea for feare the ship should sink, he doth nevertheless very willingly, and may refuse to doe it if he will: It is therefore the action, of one that was free. (Hobbes 1969, p.148)

The action was done willingly in the circumstance, in other words, it was not made impossible for him to do otherwise and this is consistent with Aristotle’s position. But Hobbes’ intention is even stronger than this, he means that the action was free in every sense of the word. Indeed, the presence of fear (the threatened evil) in no way diminishes the ability to act freely.

Hobbes seems to think that fear or the pressure upon one that is accompanied with fear does not preclude voluntary choice. He states that which put obstacles to freedom are "external impediments of motion", in our terminology "compulsion". Hobbes has jettisoned the notion of the
"initiative" being external to the actor that Aristotle included in his analysis of actions done under constraint. An action is unfree only if direct brute force is exerted upon an agent. Hence, direct physical compulsion is necessary and sufficient for unfreedom.

Hobbes discusses the threat of greater evil primarily in regard to contracts and covenants. He says:

Covenants entered into by fear, in the condition of mere Nature, are obligatory. For example, if I covenant to pay a ransome, or service for my life, to an enemy; I am bound by it. For it is a Contract, wherein one receiveth the benefit of life; the other is to receive mony, or service for it; and consequently, where no other Law (as in the condition, of mere Nature) forbiddeth the performance, the Convenant is valid. Therefore Prisoners of warre, if trusted with the payment of their Ransome, are obliged to pay it. (Hobbes 1969, p.94)

Hobbes consistently maintains that fear and liberty are compatible. As the above quote illustrates he meant that not only does the person have a choice in the situation, but that the choice is free in every sense since it generates an obligation. The analysis of liberty that Hobbes is working with is one in which free choice is equated with deliberate rational choice. Since certainly in the circumstances in the above quote the choice to avoid that which is feared is the most rational one and was deliberately chosen. But we need to question whether this conception of freedom is consistent with our entrenched views on moral responsibility. Particularly, we would want to ask why one has a moral obligation
to comply with the terms of the agreement when the only reason for agreeing with the deal was that at the time it was the rational choice, and it was only rational because of the threatened evil that the proposer will perform in case of noncompliance. The apparent confusion between rational choice and free choice arises again and again in discussions of coercion. If one equates the two then the only choices which are not free are those that are not motivated by a decision of the agents at all, as when direct physical compelling power is applied.

Hobbes does, however, maintain that there are some threats in civil society where the law should intervene and grant relief.

And even in Common-wealths, if I be forced to redeem my selfe from a Theefe by promising him mony, I am bound to pay it, till the Civill Law discharge me. For whatever I may lawfully do without Obligation, the same I may lawfully Covenant to do through feare: and what I lawfully Covenant, I cannot lawfully break. (Hobbes 1969, p.95)

The fact that consent or a promise came out of a situation of fear does not nullify the obligations that one has assumed. Hobbes thinks that some other feature must be present for us to say that the promise is coerced. That feature is that the coercer threaten what he has no legal right to threaten:

in the commonwealth...promises proceeding from fear of death or violence, are no covenants, nor obliging, when the thing promised is contrary to
laws; but the reason is not, because it was made upon fear, but because he that promiseth hath no right in the thing promised. (Hobbes 1969, p.95)

Notice that this invalidation of a contract has nothing to do with the person's liberty being undermined. Now we can understand why Hobbes believes that when a captive soldier gives his allegiance to the conqueror it is valid, because there are no laws which forbid it. The conqueror has the right to kill the captive soldier in the state of nature. For Hobbes the situations in which fear would play into the invalidation of a contract are those cases where the threatenier forces the person to promise to do what he has no right to do. For example: "a covenant not to defend my selfe from force, by force, is always voyd" (Hobbes 1969, p.95).

It is not the procedure in which the contract was entered into which constitutes coercion but rather the content of the negotiation. Whereas in the case of the conqueror, he has, according to Hobbes, the right to kill the conquered, the promise to obey him is valid even though made in the presence of considerable fear. For Hobbes "coercion" turns out to be a normative concept rather than the descriptive one that it was for Aristotle. When one threatens to do what he has no legal right to do or when one is forced to promise what one has no right to promise then that action is properly called "coerced". Consequently, the concept of rights is essential to the concept of coercion.
III. John Locke

Locke adamently disagrees with Hobbes' account. Locke maintains that force and liberty are not consistent and "promises, extorted by force...bind not at all, because whatsoever another gets from me by force, I still retain the Right of" (Locke 1965, p.440). The problem of coercion raised controversy in the Natural Law theorists who preceded Locke. Grotius argued that a promise gained through fear was binding but that the promisee was under a duty to release the promisor. This was rejected by another famous Natural Law scholar, Pufendorf, who found this too complicated and embraced the view that such promises were not binding at all. Locke joined forces with Pufendorf and this view became the accepted one in English law.

Locke's arguments in his Second Treatise on Government have as foundational that the legitimacy of government rests on the consent of the people. Hobbes and Locke agree that civil society is only formed by the consent of the governed, but Locke rejects the idea that true consent is generated when extracted by fear. Thus the conqueror has no right over those he extracted consent from through fear (Locke 1965, p.440). Any consent or promise attained by fear is not true consent and has no binding force, whether by a prince or a common thief. The reasoning behind this is: "For the Law of Nature laying an Obligation on me, only by
the Rule she prescribes, cannot oblige me by the violation of her Rules: Such is the extorting any from me by force" (Locke 1965, p.440). Promises or consent attained by force are no different from cases in which a thief steals one’s property. Just as the thief does not have title to what he has taken away no more does a coercer have any rights over the promises he takes.

In disavowing Hobbes’ position, Locke strengthened the moral basis of obligations rooted in consent. Consent to a government loses it illusory character (since almost all human interaction is free or voluntary on Hobbes’ model) and lays a solid foundation for moral arguments based on consent. Though Locke strengthens the moral foundation of consent, regrettably, he does not provide a full analysis of the conditions for coercion.

IV. Robert Nozick

Robert Nozick’s work entitled “Coercion” represents the cornerstone of recent work on coercion. Nozick, like Aristotle and Locke, sees coercion as intimately connected with liberty. If one is coerced to do some action A then one does not do so freely or voluntarily and thus one should not be held responsible for that action.

Nozick’s conditions for coercion are the following: P coerces Q into not doing some act A if and only if: P
threatens some consequence if Q does A and that consequence renders A substantially less eligible than it would be without the threatened consequence; and Q does not do A; and part of Q's reason for not doing A is to avoid P's threatened consequence. Satisfying the above conditions is sufficient for the truth of the statement: P coerced Q into not doing A. For Nozick coercion is intimately connected with unfreedom but it is neither necessary nor sufficient for unfreedom. That it is not necessary is illustrated by the following example:

If I lure you into an escape-proof room in New York and leave you imprisoned there, I do not coerce you into not going to Chicago though I make you unfree to do so. (Nozick 1972, p.101)

That coercion is not sufficient for coercion is illustrated by the following example:

You threaten to get me fired from my job if I do A, and I refrain from doing A. However, unbeknownst to me you are bluffing; you know you have absolutely no way to carry out this threat, and would not carry it out if you could. I was not unfree to do A (no doubt I thought I was), though I was coerced into not doing A. (Nozick 1972, p.101)

Excluding cases of bluffing, we can say that when P coerces Q, Q is unfree to do A. Since coercion is thought to be intimately connected with unfreedom the conditions for coercion need be tested against our intuitions about unfreedom. In terms of the characterization of Q's action as unfree as opposed to P's culpability in rendering Q unfree, the characterization of Q's action as unfree is analyzed in
terms of Q’s desire to avoid the consequence which P has threatened to bring about which P could and would bring about. Like Aristotle, Nozick’s analysis turns on the actor’s choosing some action which he would not have chosen had it not been necessary to avoid the evil consequence of not choosing that way.

In Nozick’s analysis the concept of a threat plays a central role in the characterization of an agent’s action being unfree because of coercion. Intuitively, we can see why threats are involved, since threats normally involve sanctions for noncompliance whereas offers involve rewards for compliance. A problem arises, however, since it is not always clear when someone is threatening another and when one is merely making an offer. Also, it needs to be determined whether offers can ever be coercive. (This, however, may turn on the method for distinguishing threats from offers.) Nozick wants to hold on to threats as necessary for coercion. He proposes the following criteria for distinguishing threats from offers: Whether someone is making a threat against Q’s doing an action or making an offer to Q to do the action depends upon how the consequences P says he will bring about changes the consequences of Q’s action from what they would have been in the normal or natural or expected course of events. Consequences “worse than” they would have been in the normal and expected course of events
makes the proposal a threat. When the consequences projected are "better than" the normal or expected course of events, it is an offer. The term 'expected', Nozick tells us, is meant to shift between predicted and morally expected (although this does not tell us much given that there are many ways to interpret the normal course of events).

Nozick illustrates how his criteria selects whether a proposal is a threat or an offer:

(a) P is Q's usual supplier of drugs, and today when he comes to Q he says that he will not sell them to Q, as he normally does, for $20.00, but rather will give them to Q if and only if Q beats up a certain person.

(b) P is a stranger who has been observing Q, and knows that Q is a drug addict. Both know that Q's usual supplier of drugs was arrested this morning and that P had nothing to do with his arrest. P approaches Q and says that he will give Q drugs if and only if Q beats up a certain person. (Nozick 1972, p.113)

In (a) Nozick maintains that P is threatening not to give Q the drugs since the normal course of events is one in which P supplies Q with drugs for money. In the second case, where P is a stranger, P does not threaten Q. In the normal course of events P does not supply Q with drugs nor is he expected to. In the second case P is offering to supply Q with drugs, he is inducing Q with drugs to beat a certain person up. Nozick says of (b): "P does not coerce Q into beating up the person, since P does not threaten Q" (Nozick 1972; p.113).
These examples are problematic. If what renders an action unfree is that an agent is put in a position where he must choose a lesser evil to avoid the consequence of non-compliance (the greater evil), then how could these examples render such different conclusions about the characterization of the agents' action? Is Nozick holding on to the theoretical unity of including only threats as necessary for coercion at the expense of an intelligible account of unfreedom? Perhaps Nozick is smuggling in a moral condition, that is, in the first case P has an obligation to continue to supply his goods to Q on the past conditions, whereas in the second he does not.

Nozick comments further about the first case, he asks, "In addition to threatening to withhold the drugs if Q doesn't beat up a certain person, hasn't P made Q an offer?" He says that in the normal course of events Q does not get drugs for beating up the person, and if P has made this offer, why do we view the overall situation as one in which P threatens Q, rather than as one in which P makes Q an offer?

We have here a situation in which P takes a consequence viewed as desirable by Q (receiving the drugs) off one action (paying $20.) and puts it onto another action (beating up the person). Since Q prefers, and P believes that Q prefers paying the money and receiving the drugs, to beating up the person and receiving the drugs, and since Q would rather not beat up the person, P's statement is a threat to withhold the drugs if Q doesn't beat up
the person, and this threat predominates over any subsidiary offer P makes for Q to beat up the person, making the whole situation a threat situation. (Nozick 1972, p.113)

Yet this explanation holds for (b) as well. In that case Q prefers the drugs for money and P knows that Q prefers that. Why in (a) does Q not act freely and in (b) he does? Notice also that the consequences that are projected in the "threat" case and the "offer" case are identical. If we thought as Aristotle did, that there are some evils it would be unreasonable not to avoid, and the drug example contained such an evil (at least for a drug addict), then it is difficult to assess the relevance of what the proposer "normally" does to the subsequent characterization of Q's action. (It might, however, be relevant to the moral assessment of P's action.)

Nozick points to another problem, having to do with the "normalcy" criteria:

If a statement's being a threat or an offer depends upon how the carrying out of the statement affects the normal or expected course of events, one would expect that there will be situations where it is unclear whether a person is making a threat or an offer because it is unclear what the normal and expected course of events is. (Nozick 1972, p.114)

People will disagree about what the normal or expected course of events is, consequently they will disagree about whether some proposal is a threat or an offer. Nozick gives an example of a person Q drowning in a lake, P comes along in a boat. Both Q and P know that there is no one else to
rescue Q. P says to Q 'I will take you in my boat and bring you to shore if and only if you first promise to pay me $10,000. The question is: Is P making an offer to rescue Q or is he threatening to let Q drown if Q doesn't make the promise? Nozick states:

If one views the normal or expected course of events as one in which Q drowns without P's intervention, then in saying that he will save Q if and only if Q makes the promise, P is offering to save Q. If one views the normal or expected course of events as one in which a person in a boat who comes by a drowning person, in a situation such as this, saves him, then in saying that he will save Q if and only if Q makes the promise, P is threatening not to save Q. (Nozick 1972, p.115)

The foregoing are two different interpretations of "the normal course of events", and Nozick does not provide grounds for judging between them.

If there was not enough problem determining what the normal course of events is, we want to ask further whether, under any interpretation, the normal course of events themselves could be coercive? So much hinges upon a person's "normal course of events" that we need to ask what relevance should be given to the background conditions of a person which are bad or "coercive" to begin with. What, if anything, does this do for Nozick's distinction between threats and offers? Nozick considers this problem: "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 A". Is the master threatening to beat the slave or is he offering him an inducement to do the task? Nozick's response is that in the morally expected course of events the slave would not be beaten everyday (indeed he would not be a slave). Consequently, if we judge this proposal against what is morally expected it would be a threat. If, however, we did not determine it against the morally expected course of events but against the normal course of events it would be an offer. What criteria are used for determining whether the background conditions are coercive? For example, were the background conditions in the drowning swimmer case coercive? What is the weight of this assessment? Are cases in which the background conditions are coercive the cases in which the moral course of events analysis is applicable? Also, the interpretation of the moral course of events is unclear. Couldn't we argue that in the second drug addict case (the one which Nozick labeled an "offer"), that the proposer was unfairly taking advantage of the drug addict's vulnerable position, thereby making it a coercive threat? The introduction of the moral course of events raises many questions for Nozick's account of coercion.

For at least one of our questions Nozick provides an answer. The recipient's preferences determines whether the
normal course of events or the morally expected course of events takes precedence. The slave himself would prefer the morally expected course of events to the normal course of events, whereas the addict prefers the normal to the morally expected course of events (that is, when the moral course of events is interpreted as one in which there are no drug dealers).

Another problem arises for Nozick's analysis, this one revolves around cases of blackmail. Blackmail is commonly thought to be a coercive relationship of a particular kind, yet under Nozick's analysis it would not be a threat under either the normal course of events or the morally expected course of events. The typical blackmail case is one in which the proposer proposes that he will turn over material to the police about a crime which Q has committed unless Q pays a certain amount of money. In the normal course of events P would just turn over such information, and in the morally expected course of events he should turn over such information. The implication is that P does not threaten Q and hence does not coerce Q into giving him money. This, however, does not coincide with our common understanding of blackmail nor account for its criminality.

Nozick sums up his distinction between threats and offers with the following:

when a person does something because of threats, the will of another is operating or predominant, whereas
when he does something because of offers this is not so; a person who does something because of threats is subject to the will of another, whereas a person who acts because of an offer is not; a person who does something because of threats does not perform a fully voluntary action, whereas this is normally not the case with someone who does something because of offers; when someone does something because of threats it is his own choice, whereas when he does something because of threats it is not his own choice but someone else's, or not fully his own choice, or someone else has made his choice for him; when a person does something because of threats he does it unwillingly, whereas this is normally not the case when someone does something because of offers. (Nozick 1972, p.128)

In support of the above Nozick offers the following argument. The Rational Person is normally willing to go and would be willing to choose to go from the preoffer to the offer situation. In the preoffer situation, the Rational Person is normally willing to do A if placed in the offer situation. On the other hand, the Rational Person is normally unwilling to go and unwilling to choose to go from the prethreat situation to the threat situation. In the prethreat situation, the Rational Person is normally willing to do A if placed in the threat situation. The Rational Person, however, in the prethreat situation, is unwilling to do A, and would not choose to do it. The Rational Person, when placed in the threat situation, would normally prefer being back in the prethreat situation, and would choose to move back. These differences, according to Nozick, in what choices are or would be made by the Rational Person make up the difference between the two and justifies the inclusion
of threats and the exclusion of offers from the conditions of coercion.

The argument that the Rational Person is willing to move to the offer situation whereas the Rational Person is not willing to move to the threat situation undermines Nozick's inclusion of drowning swimmer, the slave, the victim of blackmail, and even the drug addict as coercive threats. From the preproposal situation the drowning swimmer, the slave, the victim of blackmail and the drug addict all prefer to move to the proposal situation. In all these cases the agents "welcome" the threat and prefer to make the move. Nozick's distinction between threats and offers introduces many problems for his analysis. Nozick could, however, rid himself of the dogma that threats are necessary for coercion and give an account of how some offers can be coercive. Or he could rid himself of the normalcy criterion for distinguishing threats from offers and provide another account of the distinction between threats and offers, one powerful enough to capture cases like the slave one.

In this chapter I have presented and analyzed some influential theories of coercion. Important insights and problems are raised by each analysis. Hobbes's analysis diverges most greatly with our intuitions about coercive situations. Ultimately, we want to develop an analysis of coercion which accounts for our ordinary usage of the term
'coercion' and accounts for the belief that what makes coercion prima facie wrong is that it undermine the freedom of the victim of coercion. In the next chapter we will consider a number of modern philosophers' attempts to circumvent the problems which face Nozick's analysis and arrive at an accurate account of coercion.
CHAPTER 4

MODERN THEORIES AND CRITICISM

There are a number of critical and disputed themes that run through discussions of coercion. What makes coercion such a perplexing topic is the lack of consensus on so many central points. There is almost universal agreement that the practice of coercion is prima facie wrong. Yet the nature of coercion is an area in which little agreement can be found. Controversy arises over the following topics: Whether coercion is an essentially moral concept, i.e., do its conditions of application contain an uneliminable reference to moral rightness or wrongness? Are threats the only kind of proposals that can be coercive or can some offers be coercive? If threats are necessary for coercion then how are they distinguished from offers? If threats hold out harms and offers hold out benefits then does the question of threats and offers actually rest on the prior question of distinguishing harms from benefits? These questions and others will be the topic of discussion in this chapter. I will present and criticize various theories and attempt to bring into sharper focus the conditions necessary for an adequate account of coercion.
I. Coercion as a Moral Concept

A modern controversy has developed over whether coercion is essentially a moral concept or not. This dispute has a long history finding its roots in the different analyses of coercion given by Aristotle and Thomas Hobbes. Aristotle's analysis of coercion is descriptive or psychological whereas Hobbes analyzes coercion in moral terms. The claim that some concept is a moral concept is a conceptual one, i.e., that part of the necessary and sufficient conditions for the correct application of the concept include a reference to moral rightness or wrongness. The claim is that coercion does not (only) refer to psychological pressure on the person's will but refers to the moral wrongness of the pressure or threat itself. It is argued that coercion is different in kind from psychological pressure and not, say, one end of the spectrum of pressure. In other words, 'coercion' refers rather to morally illegitimate pressure. Characterizing an agent's action as coerced, then, does not mean that the person was psychologically unable to act against the will of the coercer. Rather it means that we do not morally expect the victim of coercion to resist the pressure.

On the other hand, philosophers who maintain that coercion is not essentially a moral concept analyze coercion in terms of a person's behavior under certain kinds of
pressure. They argue that coercion is intimately tied with liberty and that the elucidation of the concept should make reference to non-moral features of the interaction, features which have to do with the unfreedom of the activity. Morally neutral analyses of coercion do not, however, claim that substantive moral judgments are not made about the practice of coercion. In fact, they insist upon the moral neutrality of the conditions of coercion precisely because of the kinds of moral judgments we make about the practice of coercion.

I will argue that analyzing coercion as an essentially moral concept leads to a number of problems. One important problem is that moral analyses do not render a coherent explanation of coercion's prima facie wrongness, an explanation which is conceptually tied to the idea that coercion is prima facie wrong because it undermines freedom. Because of their reference to moral conditions, moralistic analyses lead to the conclusion that the question of coercion rests upon prior questions of justice or utility. What follows from this is that questions of the criteria for voluntary or free action will be inseparable from questions of the rights involved. Indeed, according to moralistic theories, the primacy of liberty is a sheer illusion since the factors that defeat consent or free choice rest upon prior moral questions. Once the moral questions are decided the question of coercion seems almost superfluous.
The implications of the moralistic analyses are far reaching, the following are among those implications. The debate in political philosophy over whether the legitimacy of the state rests upon the consent of the governed turns not on questions of liberty but on questions of justice. If one assumes, as Hobbes did, that prior to the state there are no moral rights, then there is no coercion. Coercion cannot be conceived of in the absence of moral rights. Further, libertarians who conceive of the primary threat to liberty as the imposition of obligations to which one has not consented and who conceive of liberty as safeguarded only by keeping such obligations to a minimum, leaving the greatest possible scope for voluntary agreement and exchange, are mistaken in the belief that one can analyze consent in the absence of rights. Consent, appearances to the contrary, will rest upon the rights of the parties. On this view justice, rather than being a separate consideration from liberty, is analytically prior to questions of liberty. Justice is actually the primary question from which liberty is defined.

On the other hand, Aristotle's basic strategy was to establish conditions for voluntary and involuntary behavior for the purpose of ascribing moral praise and blame. Moral ascriptions of responsibility and other moral assessments rest upon the prior questions of the characterization of an
individual's behavior as voluntary or involuntary and not vice versa. And this is as it should be. One of our deeply entrenched notions is that a person should be held responsible for only those actions that are freely done. This is not normally thought to be decided only when the rights of the parties are established. In fact, systems of rights are often criticized or challenged on the basis that they protect the liberties of some in a way that gives them an unacceptable degree of power over others. The challenge to a particular system of rights cannot be met merely by reaffirming the rights in question. Aristotle's program was to determine what are the factors that diminish voluntariness so that we could make judgments about moral responsibility.

In contrast, Hobbes thought that fear and liberty are consistent (Hobbes 1969, p.148) and that coercion only applies to those situations in which the victim's rights are violated. For Hobbes, a necessary and sufficient condition for free activity is that the person was not physically compelled (Hobbes 1969, p.87); hence choices which are made in the presence of fear are free. Free choice is coextensive with deliberate rational choice since in the presence of fear the victim still chooses what is most preferred in the circumstances. The implication is that one can freely choose when one has a gun to one's head. And that person, under Hobbes analysis, has consented and thus has an obligation to
perform. This is inconsistent with our basic views about freedom, and does not provide substantive support for moral arguments that consent generates obligations.

In the following exegesis of the moralistic analyses we will determine whether my criticisms are justified. Moralistic analyses include the theories of Vinct Haksar and Jeffrie Murphy. These theorists agree on the basic thesis that coercion is a mainly moral concept rather than a mainly psychological one. But they disagree about the moral conditions of application and thus the extension of the concept.

A necessary condition for a proposal to be coercive, according to Haksar, is that it involve a wrong to the recipient. That wrong Haksar analyzes as an unfairness to the victim of coercion (Haksar 1976). Unconvinced by Nozick's arguments that only threats can be coercive, Haksar divides coercive proposals into two classes: coercive threats and coercive offers. The two are distinguished by what he calls the proposer's "declared unilateral plan": what the proposer will do if the proposal is rejected by the other party. A necessary condition for a coercive threat is that the proposer's declared unilateral plan should be an immoral one, i.e., if the proposer carried out his declared unilateral plan he would be violating a moral duty. Haksar distinguishes threats from offers on the basis of the declared
unilateral plan, but his rationale for this distinction has different theoretical motives from that of Nozick.

A necessary condition of all coercive proposals, according to Haksar, is that the declared unilateral plan should make the proposal more eligible than it otherwise would have been. The declared unilateral plan should provide the recipient with a reason, though not necessarily an irresistible reason for accepting the proposal. It provides the recipient with a reason for accepting the proposal because the coercer’s declared unilateral plan is an attempt to take unfair advantage of the recipient’s vulnerability. Coercive offers are distinguished from non-coercive ones by the fact that “the former, unlike the latter, involve an attempt to take an unfair advantage of the recipient’s vulnerability” (Haksar 1976 p.69). An example that Haksar uses to illustrate a coercive proposal is the situation in which a boat owner meets a drowning swimmer in an isolated lake, and he proposes to save the swimmer for a fortune. In this situation the boat owner is taking unfair advantage of the swimmer’s vulnerable position. He is, according to Haksar, making him a coercive offer (this is, on the assumption that one does not have a moral duty to save him unconditionally). Haksar’s criteria, like those of other moral analyses, depend upon what moral duties and what ideas of fairness we assume. For example, if it was not immoral to
refuse to save him (the condition for a coercive threat) and not unfair not to save him (the condition for a coercive offer) then it would not be an instance of coercion.

Haksar and Hobbes agree that the fact that pressure and fear are present does not make a contract morally non-binding. Something else must be present for coercion, for Haksar, that something else is that the coercer propose to do what he has no right to do and/or that the coercer take unfair advantage of the person's vulnerability. Another way of putting this is that the proposer use "immoral means" in order to make his proposal more eligible to the recipient. What is morally wrong about the practice of coercion is: Since a violation of a moral duty is wrong, so is a readiness to violate a moral duty (this applies to coercive threats). Also coercive offers involve a violation of a moral duty, for they, like coercive threats, involve taking unfair advantage of the recipient's vulnerability or weakness.

Jeffrie Murphy's analysis differs significantly in its conditions and in its extension from Haksar's. He argues that in the paradigm gunman case, agreement or consent is exacted from the person because the coercer threatens to do that which he has no right to do. "We want to free Q from any claim of obligation because of our intuitive belief that P is engaged in wrongdoing and has no right to anything his
wrongdoing exacts" (Murphy 1981, p. 81). Murphy rightly points out that just because it is wrong to do some act \( x \), it does not follow that it is wrong to threaten to do \( x \). Coercion cannot, then, be analyzed simply as threatening to do what one has no right to do, the *very threatening* must be wrong. For instance, I might not have a right to kill a thief for stealing my television set but the threatening to do so in the circumstances is not necessarily wrong. Under Murphy's analysis, this would not be a case of coercing the thief to desist from stealing. In true cases of coercion the wrong consists in placing "the person in a position where he must listen to this threat and take it seriously where one has *no right* to place the person in that position" (Murphy 1981, p. 81 underlining added). Consent is invalidated because the coercer has done something he has no right to do to his victim.

Murphy maintains that it is a mistake to assimilate all hard decisions made under pressure of grim alternatives to cases of duress or coercion. This assimilation results from the belief that coercion is exclusively or primarily a *psychological* concept, i.e., that it refers to the extent to which a person is psychologically able or unable to act in a certain way. Murphy contends that "coercion" is a mainly moral concept rather than a psychological one: "[T]rue duress or coercion results when one's rights are violated by
others—something not always present when one has a hard choice to make under pressure" (Murphy 1981, p. 84). Under pressure, even extreme pressure, we do not think that a person could not act otherwise than the coercer wants. "Rather we do not even expect him to try. We rely instead on the belief that the choice itself is unfairly posed to the individual and that he should not (not that he could not)..." (Murphy 1981, p. 86) decide differently.

Haksar's and Murphy's accounts both include a moral component as central to the criteria of what constitutes coercion. The conditions of application of the concept contain an uneliminable reference to moral wrongness rather than a descriptive characterization of a person's behavior under external pressure. Coercion is an essentially moral concept since the conditions for applying the term involve, in one way or another, a particular moral wrong. On moral accounts of coercion, questions that arise about whether particular relationships are coercive rest upon these prior moral questions. Consequently, coercion turns out ultimately to rest on questions of justice or utility rather than freedom.

One problem for these analyses is that it is unclear how coercion is different from other ways of morally wronging another. An example of this is how coercion is differentiated from exploitation. On Haksar's account coercion
and exploitation seem indistinguishable. But some philosophers, specifically Feinberg, have argued that exploitation can be voluntarily consented to whereas coercion is thought to vitiate consent. Presumably, Haksar wants to argue that all cases of coercion involve exploitation, but surely there are cases of exploitation that do not involve coercion. Some examples of exploitation without coercion are: newspapers sensationalizing stories thereby "playing on" the public's ignoble desires, pandering to an individual's sexual eccentricities, and taking advantage of another's generosity. In all these cases of exploitation the exploiter profits by "using" a trait or characteristic of his victim. If these instances of exploitation are truly separable from instances of coercion and one of the ways in which cases of pure exploitation differ from coercion is that they do not invalidate consent, then we need to know what else is necessary for coercion.

Another problem that Murphy's and other moral accounts face is that there seem to be cases which we want to call instances of coercion yet they are excluded from the moralistic accounts because the proposer does have a right to do what he proposes to do. For example, a policeman calls to a holdup gunman "Come out or we will start shooting". Morally neutral accounts can handle this kind of case by maintaining that the gunman was coerced, that is, he did not
act freely, but that the policeman was justified in his use of coercion. It seems, then, that the moralistic analysis cannot account for justifiable uses of coercion.

The primary problem is that moralistic analyses seem to obscure what is centrally wrong about the practice of coercion, or what is morally objectionable about coercing another: that it renders another's action *unfree*. Citing other aspects of the coercive relationships as involving a wrong to that agent overshadows or entirely neglects the problem of unfreedom. The search for conditions for coercion has been around so long because of the entrenched belief that there are certain circumstances that exclude voluntary choice. If the moral analyses are correct then the dispute should be over the rights of the parties and not specifically about freedom or voluntary behavior. What we want to say is prima facie wrong with coercion is that it undermines freedom. The moral accounts focus upon some other wrong, for example, unfairly putting one in a position where one must take seriously a threat, or exploiting the vulnerabilities of the recipient, and so on. These most certainly are ways in which we can wrong another (and instances of coercion might involve them) but what is particular to coercion is that it undermines freedom.
II. Morally Neutral Conceptions of Coercion

If coercion is not an essentially moral concept then it must be possible to arrive at non-moral conditions of application. These non-moral conditions must account for how the victim's freedom was undermined. Coercion refers to rendering someone unfree under certain circumstances, and our task is to determine what circumstances those are. This approach affirms that we do in fact make substantive moral judgments about the practice of coercion, but denies that the conceptual analysis is moral. A theorist who gives a psychological account of coercion may yet distinguish wrongful from non-wrongful coercion. The following philosophers give descriptive or psychological accounts of the conditions of coercion: Robert Nozick, David Zimmerman, and Joel Feinberg. Since I have already considered Nozick's account I will start with Zimmerman's analysis.

David Zimmerman wants to rid the conditions of coercion of any reference to moral rightness or wrongness, by explaining the wrongness of coercion by some non-moral attribute which links up with the underlying assumption that coercion undermines liberty (Zimmerman 1981). Since theories of unfreedom, according to Zimmerman, are explained in terms of frustrated desire (both actual and possible), it seems a promising approach to seek the connection between the victim's frustrated desire and the coercer's action. However,
the embarrassment of coercion is that under coercion the victim does in fact do what he most wants to do under the circumstances. That is, faced with a gun the victim does have an overriding desire to hand over his money once he is in the threat situation. What he does not want to face, according to Zimmerman, is the disjunctive choice between his money and his life, and this is the frustrated desire which establishes the unfreedom of the action. What establishes the unfreedom of coercion, argues Zimmerman, is that the coerced person strongly desires not to make the move from his pre-proposal situation to the proposal situation, in which he must face the disjunctive choice.

Zimmerman recognizes, however, that there are coercive proposals that turn out to be non-coercive under the analysis of what the victim strongly desires to do. For instance Nozick's slave example, recall that the master beats the slave everyday and proposes to the slave that he will not beat him today if the slave performs some disagreeable task. The slave does prefer to move from his pre-proposal situation to the proposal situation. Yet the master's proposal seems to be coercive. This is the problem which forced Nozick to introduce the moral baseline. Zimmerman attempts a different tack: he admits some offers as coercive. An offer is coercive only if Q would prefer the post-proposal situation to his actual pre-proposal
situation, but Q would most prefer an alternative pre-proposal situation which P is actively preventing him from having (Zimmerman 1981, p.132).

Since not just any alternative pre-proposal situations will count in determining whether the offer is coercive, Zimmerman constrains the above criterion by the following conditions. The first requirement is that the situation is historically or technically possible (the "feasibility condition"). The second requirement is that P's costs do count against feasibility when his role in the unavailability of the pre-proposal situation Q highly prefers is merely one of not giving Q what he needs to gain it. And that P's costs do not count against feasibility when he plays an active role in preventing Q from gaining the pre-proposal situation which Q prefers (the "prevention condition"). Zimmerman now can account for the intuitive reaction that the slave was coerced, since P prevents Q from freeing himself. Under Zimmerman's analysis, however, the drowning swimmer case is not an instance of coercion, since the first condition is not satisfied and neither is the second. And yet the drowning swimmer case seems intuitively to be an instance of coercion.

Feinberg's analysis, on the other hand, can account for the coerciveness of the proposals in both the slave case and the drowning swimmer case (Feinberg 1985). He analyzes
coercion in terms of pressure put upon an agent to act in a particular way. If an actor has a choice between an "unwelcome" consequence that has been threatened by another actor or compliance with a demand, and the victim chooses compliance as the lesser evil, then the consent is properly characterized as coerced rather than free. For Feinberg coercion is clearly a psychological concept: The "analysis is entirely in terms of the coercee's own subjective preferences and desires, themselves analyzable in terms of psychological states and dispositions" (Feinberg 1985, p.1240). Notice that Zimmerman too wants coercion to be a psychological concept, analyzed in terms of the victim's preferences, but his analysis falls short because of his reliance on what the proposer did to Q prior to the proposal (his "prevention condition"). Feinberg maintains that subjective preferences can be ranked and the rankings produce judgments of comparative worth on the basis of the welcome-ness or unwelcomeness of the state of affairs. The subjective preferences of an individual can, however, be objectively assessed as reasonable or unreasonable (Feinberg 1984, p.1237-1238).

Feinberg's analysis of coercion is as follows: A coerces B into agreeing to his harmful or dangerous treatment of B in these case when:
1. He demands B consent to it [the proposal].
2. He makes a threat to B (or in some case a "coercive offer") that he (A) will cause or fail to prevent some consequence that B finds unwelcome unless B complies with the demand.
3. He gives B some evidence of the credibility of the threat, usually a demonstration of his power as well as his willingness to carry it out.
4. Unless he is bluffing, he has actively intervened in B's option-network to acquire control of the relevant option-switches; in particular he can close tight the conjunctive option that consists of B's noncompliance with the demand and B's avoidance of the threatened unwelcome consequence.
5. B understands the proposal and is frightened by it, and at least partly in order to avoid an unwelcome projected consequence, complies with A's demand. (Feinberg 1985)

Feinberg distinguishes between threats and offers, but admits that some offers are coercive. Proposals are offers when they expand the person's options. Offers are coercive when the proposer intends to pressure the person into a choice, usually by claiming not to prevent some consequence that the person finds unwelcome. And when the effect on the victim's will of the proposal is coercive. In the slave case, for example, the slave seems to have a new option opened, making it an offer. Yet the slave master intends to coerce the slave into complying and the effect on the slave is coercive.

Zimmerman and Feinberg explicitly attempt to give accounts of coercion which rely upon non-moral aspects of the coercive relationship. Zimmerman puts it in the following terms: that the victim **strongly desires** not to make a move from the preproposal situation. Feinberg finds
the nonmoral aspects in terms of the pressure applied to an agent to choose between evils; in other words, the frustrated desire of not having the conjunctive option (avoiding the threatened consequence and not complying with the demand). Nozick's analysis, too, is an attempt to give a descriptive account of coercion. Nozick develops a dual baseline, the normal course of events and the morally expected course of events, for determining the status of proposals. Which baseline takes precedence (or determines the status of the proposal) is determined by the victim's preferences. Like Zimmerman, Nozick's analysis is in terms of whether the victim prefers to move to the proposal situation, but that decision must be made on the basis of whether something is a threat or offer to begin with. In other words, built into the preference to move or not to move is the normalcy criterion which makes something a threat. Zimmerman doesn't seem to see this and develops an account of "coercive offers" to handle proposals that look like offers but are coercive.

III. The Threat/Offer Distinction

Much of the focus of debate in the literature on coercion has been on the kinds of proposals that could be coercive. Initially it was argued that threats are necessary for coercion. Problems arose, however, as to the correct
criteria by which to distinguish threats from offers. There remains much controversy over what distinguishes threats from other proposals. The first problem is that there are instances in which it is not obvious whether a particular proposal is a threat or an offer. A related problem is that some proposals have the characteristics of offers but seem coercive.

There are two basic approaches that have been taken to deal with the problems associated with the connection between threats and coercion. The first insists that threats are necessary for coercion, and then attempts to account for those cases that intuitively seem coercive and yet have the appearance of offers, by showing that they can be analyzed as threats. This approach is taken by Nozick and Zimmerman (Nozick 1972; Zimmerman 1981). The second approach is to admit that some offers are coercive, and account for how offers can be coercive while distinguishing them from threats and non-coercive offers. This approach is taken by Feinberg (Feinberg 1985). Both approaches will be considered. In this section I will analyze the arguments for including only threats in the conditions for coercion. This project will elicit the backgrounds assumptions for the differences between threats and offers. In the next section I will present and argued against the different methods of making the distinction between threats and offers.
Since Nozick explicated the distinction between threats and offers that distinction has taken many different paths. Most notably, the dogmatic conviction that only threats could be coercive has waned greatly. For Nozick, however, a necessary condition (and it often appears to be sufficient, too) for effective coercion is that a threat has been made. Many philosophers have followed this approach. For example, Michael Bayles states: "Coercion involves threats and threats refer to harms, not benefits" (Bayles 1972, p.23). Bayles' statement encapsulates the reason that threats are thought to be necessary for coercion, that is, since threats, unlike offers, hold out sanctions and sanctions always involve harms or deprivations. Offers hold out rewards or goods. Rational persons want to receive or welcome offers but do not welcome threats. And in terms of the liberty of the agent the rational person does not want to (is unwilling to) find himself in a threat situation.

The paradoxical nature of coercion is that in the proposal situation threats and offers seem indistinguishable, given that the recipient after all chooses the alternative he prefers. Concentrating on that choice will not clearly indicate whether the action is voluntary, whether it was willingly done, and so forth. For those further determinations we must look to the chooser's situation before the
proposal was made (the "presituation"). At that point there are two pairs of choices:

1. To move from the preoffer to the offer situation, and to do A in the offer situation.
2. To move from the prethreat to the threat situation and to do A in the threat situation. (Nozick 1972, p. 133)

According to Nozick, the Rational Person would (be willing to) make both choices in (1), whereas he would not make both choices in (2). Nozick's analysis, however, rests upon the prior determination that a particular situation is a threat situation, that is, (1) and (2) are not criteria for distinguishing threats from offers. For example, if we just asked whether the slave in Nozick's example (Nozick 1972, p. 115-116) wants to move from the preproposal situation to the proposal situation, the answer would be affirmative. This is also true of the drowning swimmer and the victim of blackmail, whereas it is not true in the standard gunman case.

We might question the welcome/unwelcome distinction in a more general way and question, whether unproblematic cases of threats are always unwelcome and whether offers are always welcome. A classic case of a welcome threat arises because of the "assurance" situation, where one welcomes threats to everyone including oneself to assure total compliance (e.g., one welcomes threats to everyone to assure that certain standards of justice are adhered to; other
examples involve public goods, for example, trial by jury). On the other hand, we are besieged with offers in our society that we would prefer never having had to confront. It may nevertheless be true, as a statistical generalization, that people welcome offers and do not welcome threats, but the significance of this statement may not warrant the assertions made by philosopher like Nozick that threats are unwelcome.

What lies behind the inclusion of threats and the exclusion of offers from the analysis of coercion is the insistence that the condition on the proposal be negative. Threats hold out sanctions whereas offers hold out rewards. Bayles argues that coercion always involves sanctions and sanctions must always be deprivations or harms, and that rewards or benefits cannot be sanctions (Bayles 1972, p22-23). He offers the following reasons for this: The first is that to include benefits as sanctions obscures the distinction between coercion and bribery. Bribery proposes a benefit for compliance and coercion proposes a harm for noncompliance. Second, the relation between the conduct an agent intends and punishment or harm differs from the relation between such conduct and reward or benefits. Rewards are given for compliance with an agent's wishes. Punishment and harm are imposed for noncompliance. "This difference is obscured or neglected if coercive sanctions include both
rewards and punishments....and the difference is the logic underlying the previous distinction between coercion and bribery" (Bayles 1972, p.22). The third reason is a linguistic objection to including rewards as coercive sanctions. If one person attempts to coerce another, he is usually said to threaten him with a sanction. "One may promise to harm another, but properly speaking one cannot threaten a reward to someone" (Bayles 1972, p.23).

Bayles sets up the dichotomy between coercion and bribery, because he sees bribery as paradigmatic of proposals to rewards that might be confused with coercion. He seems to be arguing against theorists who hold the position that there are some goods which one could not refuse, and thus maintain that coercion includes these proposals also. But there is another position, namely that there is a "benefit" for compliance and also an evil in noncompliance. Bribery, on the other hand, refers to situations in which only a benefit is gained but no evil is averted. This makes bribery an unlikely candidate for those theorist who want to include within the extension of coercion proposals that involve avoiding an evil and attaining a good. When the element of averting an evil is added, bribery begins to look more like blackmail or extortion and its coercive nature begins to be manifest. Nothing in Bayles' discussion precludes us from saying that some cases noncompliance with a
proposal that holds out a reward cannot be an evil for the recipient of the proposal, as is non-compliance with a threat.

Another reason for distinguishing threats from offers is proposed by Feinberg. He suggests that offers propose a "net increase in a person's open options" (Feinberg 1985). Coercion, which normally is thought to involve threats, is something that decreases freedom. Even though threats and offers differ in this way, Feinberg thinks that there are some instances of offers that are coercive. The problem that Feinberg sets out is to resolve the discrepancy between our pre-theoretical conception of coercion as freedom-decreasing and our intuitions about some cases of offers that seem coercive. Feinberg argues that we should "jettison the dogma" that coercion always decreases freedom and give an account of how these cases of offers can truly be coercive.

Offers normally are said to enhance freedom in the sense that they open a new option for the agent. In the cases that Feinberg takes to be "coercive offers", e.g., the slave case, which have some of the characteristics of coercion and also have the freedom enhancing characteristic of offers, have as well another characteristic: that of the victim being in a bad position prior to the proposal (e.g., the slave is beaten everyday). The assumption is that one
cannot threaten another with consequences that were bound to occur anyway. In the slave example Feinberg wants to say that the proposal made to the slave is an offer since it opens up a new option. The proposal enhances his freedom. Freedom enhancement is judged, as threats, against an agent's status quo.

We need to question whether "coercive offers" are "freedom enhancing" (at least in any important sense), or if they too restrict the recipient's freedom in the same way that coercive threats do but just happen to have this freedom-enhancing appearance because of the individual's poor bargaining position. What does it mean to enhance someone's freedom? Is it enough to increase the sheer number of options? Imagine the following case where a lecherous millionaire approaches a women with very few options and proposes to her: "Either you go to Europe with me, or China with me, or I'll kill you". In this situation would we say that her freedom was enhanced? In one way she has options that she did not have before the proposal was made to her. But, more importantly, her freedom is restricted in that she must choose between alternatives, alternatives that she would prefer not to have to chose between.

Consider two of Feinberg's examples, in the first a woman is threatened by a gunman "Sleep with me or I'll shoot your baby". Before the proposal, she has many open options,
after the threat is made she has only one eligible option. In the second example Feinberg considers an impecunious mother with the dying child. She is approached by a lecherous millionaire who proposes: "If you become my mistress I will pay for the operation that will save your baby's life". In her preproposal situation, the impecunious mother has only one "option", viz., her baby will die (if we want to call that an "option" of hers). After the proposal the impecunious mother too has only one eligible option, namely becoming the mistress of the millionaire to save her baby. In both cases the victim faces the evil consequence for noncompliance. Since in both cases the mothers have only one eligible option as a consequence of the proposal, it seems odd to say of one case that her freedom was enhanced and in the other it was decreased.

What seems perplexing is that Feinberg wants to say that the impecunious mother's freedom is enhanced and yet this is not the case with the drowning swimmer. This difference in the judgment in the two cases rests on the baseline from which threats are distinguished from offers since the enhancement of freedom depends upon what the normal course of events is. Without that baseline, the only justification for the claim that the impecunious mother's freedom is enhanced is that she has no options to begin with, but this is true of the drowning swimmer as well. It
could be claimed that since her options are so few in the preproposal situation that it is extremely easy to manipulate her option network and thus coerce her in the same sense as the gunman case. It may be that calling the situation freedom enhancing is misleading. Granted her freedom is enhanced in one sense, that is, it opens a new option that was closed before (although we might want to say that it closes another: that of not-being-a-mistress). But, more importantly, it restricts freedom in another sense: It "forces" her to choose the alternative that the proposer wants because of the evil of noncomplaince.

Imagine a case of a tyrannical despot who years earlier curtailed all rights of the citizens. Now in return for compliance to his oppressive rules he proposes to the citizens that he will give out some basic rights. Surely this would be a coercive system even though the citizens have new options open to them. This example also illustrates a problem of using the normal course of events as a point from which to distinguish threats from offers (for the purpose of only including threats as coercive), since the most oppressive governments will turn out to be the least likely to be coercive. We thereby lose one our most power forms of criticisms againsts such reigns.

In this section we have considered the arguments supporting the exclusive inclusion of threats in the
conditions of coercion. Further, I presented the general characteristics that are thought to differentiate threats from offers. All through this examination I pointed out some of the problems with the arguments advanced. In the next section I will formulated the specific approaches to distinguishing threats from offers.

IV. Different Methods of Distinguishing Threats from Offers

A number of methods have been proposed for distinguishing threats from offers. Offers and threats share the characteristic that there is something in them for the proposer. Threats the demand (or what is in it for the proposer) is backed by a sanction; and with offers the request is backed by an inducement. It is not enough to say this, as has been discussed earlier, since it is often difficult to determine whether the proposal is backed by a sanction or an inducement. We do know, however, that what differentiates threats and offers from other interactions, e.g., gifts, is that there is always something in it for the proposer. This controversy over the method of distinguishing threats from offers has become a focal point for the discussion of coercion.

Nozick first proposed that we distinguish threats from offers on the basis of "the normal course of events". It is not enough, however, to say that the proposal makes someone worse off in relation to the normal course of events.
since there are a number of ways in which the "normal course of events" can be interpreted. Nozick himself names at least four different interpretations. In Nozick's drug user example he characterizes the "normalcy" baseline in terms of what \( P \) does in the normal course of events. This interpretation leads to the absurd result that every time the butcher raises his prices he is making his customers worse off and hence threatening them. In his drowning swimmer example Nozick suggests two other interpretations:

If one views the normal course of events as one in which \( Q \) drowns without \( P \)'s intervention, then in saying that he will save \( Q \) if and only if \( Q \) makes the promise, \( P \) is offering to save \( Q \). If one views the normal or expected course of events as one in which a person in a boat who comes by a drowning person, in a situation such as this, saves him, then in saying that he will save \( Q \) if and only if \( Q \) makes the promise, \( P \) is threatening not to save \( Q \). (Nozick 1972, p.115)

The first interpretation is more hypothetical, we compare \( P \)'s proposal of nonrescue unless \( Q \) pays with what would have been expected to happen had \( P \) not come on the scene at all (on an isolated lake). The second interpretation is more closely tied to the actual case, comparing \( P \)'s proposal with what normally happens when someone with a boat comes by a drowning person. In the first it is assumed that \( Q \) would drown had \( P \) not come along, thus the proposal is "better than" the normal. In the second, it is assumed that normally a person would offer an unconditional rescue. If we used the
second interpretation for the drug case, the one closely tied to the actual situation, without reference to what P has done in the past then what the regular drug seller proposes is worse than the normal course of events since Q normally gets drugs for $20.00. The other drug addict, whose normal seller has been arrested, also normally receives drugs for money. Under the second interpretation, the more closely tailored one, of the normal course of events, P is proposing to make him worse off. We need to ask how closely tailored these comparisons need to be? Imagine a store owner who is forced to pay large sums of money to the mob every month for protection. This month they ask him for a little less than normal. Is this situation to be described as not coercive since the price is better than what he normally must pay? On the second interpretation, the tailored one, it is difficult to assess the standard gunman case. Is it assessed on the basis of what is normal when someone comes along with a gun, or do we exclude the relevant detail of the gun? The above illustrates the divergence between the three different interpretations of the normal course of events. Nozick provides no way to judge between the different baselines.

Problems arise for Nozick when he is confronted with a case that clearly seems coercive but is not picked out as a threat on any of the above interpretations. This is
Nozick's slave case where the master beats his slave each morning for no reason, and then proposes "Tomorrow I will not beat you if and only if you now do A". Under all the above interpretations of the normal course of events this will turn out to be an offer. Nozick is forced to introduce his notion of the moral course of events to handle the case. In the moral course of events the slave is not beaten everyday. So that doing disagreeable task A, when judged against that baseline, appears to makes the slave worse off. Hence it is a threat. Introducing the idea of the moral course of events complicates matters. We want to know what is the relationship between the prior wrong of the coercer's which moved the victim from the moral course of events to the present proposal situation. Also, the moral course of events is not one baseline but many, some including a reference to a prior wrong of P's that put Q in the bad situation, others making no reference to P's past action. Further with the dual baseline account, two different explanations of the prima facie wrongness of coercion must be given.

On the face of it, in all the cases, the drug users, the drowning swimmer, and the slave case, the agents want to move from the pre-proposal situation to the proposal situation. They all prefer that proposal to no proposal at all. (Notice that this is not true of the gunman case.) In order to generate the coerciveness of these proposals, the status
of the proposal and the agent's willingness to move to the proposal situation must be then on the basis of some hypothetical pre-proposal situation.

Zimmerman utilizes the notion of a hypothetical pre-proposal situation to analyze some coercive proposals. Zimmerman's approach is actually very close to Nozick's, even though Zimmerman sees his work as a polemic to Nozick's. He, like Nozick, analyzes a proposal as a threat if the victim would strongly prefer not to move from the pre-proposal to the proposal situation.

To handle cases in which the person does want to move, but which appear coercive nevertheless, the relevant baseline is an alternative one which the victim strongly prefers to his actual baseline and P prevents Q from having it. This baseline is like Nozick's moral baseline since it relies upon a prior wrong that P has committed against Q. Zimmerman, however, does not want this to be a moral baseline. The prevention condition states that P's costs do not count against feasibility when he plays an active role in preventing Q from gaining the pre-proposal position that Q strongly prefers. This seems to be a moral condition. The distinction between "not giving" and "preventing" relies upon a prior wrong that P has done to Q. And it is precisely because of this prior wrong that P should give Q unconditionally what he gives conditionally which renders the
judgment that P "ought" to give Q better terms. If we look to the example Zimmerman gives, this objection will become clearer.

A kidnaps Q, brings him to the island where A's factory is located and abandons him on the beach. All the jobs in A's factory are considerably worse than those available to Q on the mainland. The next day A approaches Q with the proposal: "Take one of the jobs in my factory or I will let you starve"... B also owns a factory (the only other one) on the island, in which the jobs are just as bad. Seeing Q's plight, he beats A to the scene and makes the same kind of proposal... I would claim that only A makes a coercive offer. The intuitive idea underlying coercion is that the person who does the coercing undermines, or limits the freedom of the person who is coerced. (Zimmerman 1981, p.133)

What A has done to Q that B has not done, is a prior wrong to Q. A does not do any more in preventing Q from leaving the island than B does. Natural forces, i.e., the sea, seem to prevent him from leaving. A does not give Q a boat to leave but neither does B. No doubt A wronged Q in kidnapping him, but what is the relationship between that wrong and the proposal situation? If this is to count as what differentiates the two, then a moral condition must be met in order for it to be an instance of coercion. In order for an offer to be coercive the proposer must have put his victim in a vulnerable position. Then if judged against the victim's position before the proposer wronged him, the victim would prefer not to move to the proposal situation. Hence coercive offers are translatable into threats but only by introducing
a moral condition. Since I have already discussed the problems with such conditions I will not repeat them here.

Feinberg, too, interprets the normal course of events, yet his motives are different from those of Nozick (and Zimmerman). He wants the criteria to pick out those cases which intuitively seem like threats and those which seem like offers (since he gives a separate account of coercive offers). Nozick's account is directed towards picking out threats from offers, with a view towards accounting for everything that seems coercive as a threat. Feinberg thinks that threats and offers can be coercive but that they yield different judgments about consent.

Feinberg's interpretation of the normal course of events, e.g., in the drowning swimmer case, would be analyzed as follows:

In the drowning swimmer case, ...we can compare A's...[proposal with the consequence of nonrescue] with--

what generally happens when a drowning swimmer encounters a boat whose occupants have the ability to rescue him (what the swimmer has an 'epistemic right' to expect). (Feinberg 1985, p.1273)

Feinberg thinks that this interpretation supports the common sense view that the above situation involves a threat. What is appealed to on this interpretation of the normalcy criterion is "what generally happens in cases similar to this one in all relevant detail" (Feinberg 1984, p.1274). On
this view we look to what the person has a right to expect based on his experience, and the general practice. Since in our community it is a general practice to save someone unconditionally in these circumstances, the proposal is unwelcome. Hence, it is a threat to let him drown.

With the normalcy criterion interpreted in this manner, Feinberg thinks, we can vindicate common sense. In the cases of the woman and the lecherous millionaire, and the slave and master these would be as offers. But what I am interested in questioning is whether with this criterion we can make sense of what are commonly thought to be threats. For example, in the gunman case, what do we compare the gunman's threat with? If we are to compare it with what generally happens when someone encounters a gunman who has the ability to kill him (what the recipient has an epistemic right to expect), then what we have is an offer! It appears that one has the right to expect the worst when one has a gun pointed at him. And it seems that in our community one does expect that a gunman might kill (and that is why one unhesitatingly acquiesces to the proposal).

Certainly this will not do. How, then, should we interpret what B has an epistemic right to expect? Possibly, we should construe it as: what generally happens when a person is walking down the street. This, however, does not capture any of the relevant details of the situation. And
we might ask why we should construe the drowning swimmer case as much more "richly hypothetical", including in it the encounter expectation.

Focusing upon B's expectation leads to the problem that it may very well vary from situation to situation. In certain situations, e.g., in Times Square, one might have a different expectation about the general practice than in Placita Village. It is common in Times Square for people to expect to get mugged; in fact, some take money with them to prevent being hurt. In Times Square, given people's expectation (their assessment of the risks), do coercive proposals thereby become offers? Would the coercer be any more immune to criminal prosecution because his victim was in a rough part of town? Another situation in which this normalcy criterion does not appear adequate is Zimmerman's example of the kidnapped victim left on the beach. This situation appears analogous to the Hobbesian Conqueror example. Q's expectations, after P has kidnapped him and left him on the beach to starve, are for the worst. Consequently the proposal is an offer, a welcome deviation from what Q could have expected.

The expectation condition needs to be further specified so that it will more readily yield a determination of when a proposal is a threat and when an offer. Feinberg's account has the virtue, however, of recognizing some offers
as coercive. There is a strain on Nozick's analysis since he adamantly refuses to admit that offers could be coercive. He is left with four different accounts of the distinction as a means of accounting for all the proposals that he thinks are coercive. Zimmerman can account for offers as coercive but only at the expense of introducing a moral condition.

All of the accounts of distinguishing threats from offers fail to provide a theoretically sound and practically useful way of deciding when we have a threat and when an offer. This suggest that the entire approach may be flawed in some significant way. The justification of the entire approach is what I will question in the next section.

V. Assumption that the Status Quo is Legitimate for the Determination of Coercion

The normalcy criterion suggests that whenever one proposes to make a person "better off" one is not coercing that person, and this applies to any status quo point (bargaining position) from which the judgement is made. This approach to coercion seems to assume that all status quo points are equally legitimate, that is, equally tolerable, and thus that it is justified to use that general point to evaluate proposals for all persons at all times.

Recall Nozick's two drug addict cases. In the first the normal seller proposes to sell the addict drugs only if he will beat someone up. In the second case the normal
seller has been arrested, P knows this and approaches Q with the proposal: "I will sell you drugs only if you beat up a certain person". The first example, according to Nozick, is a case of threatening not to supply Q with drugs. In the first case P "normally" supplies Q with drugs, so he is threatening to make Q "worse off" by withholding the supply. Whereas in the second case, Q is already in a disadvantaged position—but through no action of P's—P is not threatening to withhold drugs from Q. In the normal course of events P does not supply Q with drugs nor is he expected to do so. "P is offering Q drugs as an inducement to beat up the person" (Nozick 1969, p.113). This response seems to beg the question. The problem is to specify the criterion by which we can determine if a proposal involves coercion, and merely stating without argument that the normal course of events is that criterion is insufficient. The normalcy criterion supposedly distinguishes threats from offers, and coercion, according to Nozick, always involves threats. But what is the argument for using this criterion to distinguish coercive proposals from noncoercive ones?

In both cases we have poor Q needing his drugs with no place else to get them. P knows of Q's desperate need and uses that need to get him to perform (induce him to perform) a horrendous act. Further, in both cases what Q is trying to avoid is an evil—being without the drugs he is addicted to.
To call the first an instance of a harm and the second an instance of conferring a benefit obscures the force of the power relationship that obtains when an individual is in a desperate situation. With these almost structurally identical situations one wants to ask how in the first case we can say that Q does not act freely but in the second he does. The assumption is that anything that improves a person's condition (improves it in relation to whatever his baseline is) is an inducement or enticement and is thereby freely accepted.

A good deal—conceptual and normative—turns on the claim that a person's status quo is the appropriate point from which to distinguish coercive from noncoercive proposals. For example, consider the distinction between threats and offers, and that between proposing harm and benefit. On the normative side, the extent, if any, of one's criminal or contractual liability, and the on-balance moral permissibility of what one does hangs on how the distinction is drawn. Indeed, what one can be said freely to accept and what not; what therefore, one can be held accountable for and what not turns on the person's status quo as an appropriate point from which to distinguish coercive proposals from noncoercive ones. This is a lot of weight for a distinction to carry and the weight may prove too great for the distinction.
So much hinges on the normalcy baseline, it is startling that no one who employs the baseline or normal course of events argument questions whether any baseline is sufficiently justifiable to serve these purposes. This is especially troubling since there are at least two significant problems that can be raised for the normalcy baseline approach. First, the proposed baselines themselves are not normatively neutral—each has a history. The same sorts of judgments follow whether the status quo point is secured by misfortune, bad judgment or just desert. One would think, prima facie, that the moral assessment of an action should include not only whether or not it advances one's position relative to a baseline, but some assessment of the appropriateness (morality) of the baseline itself. Since one is not coerced when one is advanced from the baseline, it turns out that the worse off in absolute terms a person is the more difficult it is to coerce him. The range of his voluntary acceptance seems to increase when we would ordinarily think of such an individual as being especially vulnerable to coercion.

This brings me to the second problem with the normalcy criterion as an appropriate standard by which we can distinguish coercive from noncoercive proposals. The baseline approach obscures the relationship of power to bargaining strength and the relationship between bargaining
strength and coercion. In what follows I want to explore this particular objection in more detail.

VI. Perfectly Competitive Market and the Normalcy Criterion

We might begin our analysis of what is wrong with the baseline approach by first considering whether there are any circumstances that might justify the use of it. To do so consider the perfectly competitive market. In a perfectly competitive market no party holds any bargaining advantages. Perfectly competitive markets are efficient and involve stable equilibriums. To say that something is Pareto efficient, from an economic point of view, is to say that there is no other allocation of goods that would make someone better off without making another worse off (For philosophical discussion of the perfectly competitive market see Rawls 1971, pp.270-273). The market will ensure maximum freedom and efficiency only without the interference of laws regulating exchanges. The motivating force of the market is self-interest, and self-interest guides people in the service of the common good--efficiency--as though by an "invisible hand".

the natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often encumbers its operations... (Smith 1937, p.508)
The conditions that must be met in order to have a perfectly competitive system are as follows: 1. There must be enough small (relative to the size of the total market) sellers and buyers of the goods to eliminate the possibility that any single seller or buyer could influence the price of the good. 2. The good produced by each seller must be identical to that made by every other seller, which is the same as saying that the good are homogeneous. 3. Firms, as well as all resources and inputs, must be mobile in the sense that there are no barriers or impediments preventing them from entering or leaving the industry (costless entry and exit, no externalities or transaction costs). 4. There must be perfect knowledge, meaning that all participants in the economic process must know all costs and prices in which they have an economic interest, and they must know the outcome of all economic events pertaining to them.

The market is meant to establish the exchange value of various commodities—the exchange value is the price; and it is set by competition. It is a requirement of a perfectly competitive system that the marginal rate of substitution be the same for all individuals (the marginal rate of substitution is a measure of an individual's willingness to trade one good for another). Also, the prices of the market are equilibrium prices; this means that supply will be equal to demand. All who engage in market interaction enjoy the full
benefit of their labors; since the value of total market output is equal to the sum of the marginal values each person contributes to that output—the sum of the marginal difference each person makes. In the free exchanges of the market each may expect a return equal in value to his contribution. Thus the income each receives, or the value of the goods each is able to consume, is equal to the contribution he makes, or the marginal difference he adds to the value of the total product.

In a perfectly competitive market there is no need for any constraints on individual utility-maximizing choices as there are in other markets where, for example, prisoner-dilemma situations require that constraints be put on individual utility maximization. There is no uncertainty and no strategic calculations. One chooses as if one's actions were the only variable factor. Since one can only consume the amount of goods that is equal to the contribution one makes and one can not receive less goods than one's contribution, this moves the market toward an equilibrium which must be optimal. All utility-maximization choices are also optimal: i.e., no one could be made better off unless someone were to become worse off.

The most significant implication of the assumptions of the perfectly competitive market is that no one is in a position to control the terms of exchange. Prices are set by
the market and so the price is the same for all. Also, all buyers and sellers possess all information about those prices. There are many sellers, so if a particular seller asked more than the market price the buyer could go elsewhere. Further, no one gets more or less than he bargains for.

This is the ideal of the laissez-faire economists wherein the "natural liberty" of the agents is allowed to flourish, and any governmental interference would be unjustified because it would be inefficient. Proposals that project consequences that will make people worse off are inefficient and are not rational to choose (i.e., not in one's self-interest). And proposals that project consequences that are better than normal are efficient and are utility maximizing options for individuals. All individuals are in the same bargaining position—in a sense there are no bargaining positions, because they have no relevance to the deals one can expect to make. The idea of disparate relative bargaining strengths is, in short, ruled out by the conditions of perfect competition.

What is different about this system from the current market structure? First, there are no monopolies or oligopolies; that is, there are no single or small groups of sellers that could control price and thus have controlling power over other individuals' choices. In a perfectly
competitive market we could say that individuals' power and freedom in the market are evenly distributed even if their initial endowments are not. There would be no power in the relative status quo points, because no one can control exchanges. We could say that no one has a "threat-advantage" in terms of the status quo. In other words, not trading would not be a threat given that one could just go elsewhere and get the product for the market price.

To illustrate this point imagine the following example which Hayek uses to illustrate the coercive power of a monopoly:

[A monopolist owns the only spring in an oasis] Let us say that other persons settled there on the assumption that they would get water at a reasonable price and then found, perhaps because a second spring dried up, that they had no choice but do whatever the owner of the spring demanded, if they were to survive. (Hayek 1960, p.136)

This situation would not occur in a perfectly competitive market because there are no monopolists who could control price and thus maintain an advantage over the actors. But in the monopoly situation, the normal course of events for people who settled in the region Hayek imagines is that there is no water, now that the well they had relied upon has dried up. So in proposing to sell them water—albeit at an astronomical price—the monopolist is making them better off, when judged against their baseline of no water. In this situation the monopolist has a threat-advantage of
"no-trade"; his implicit threat of no-trade unless they meet his (the monopolist's) price returns them to their undesirable status quo. But in a market in which individuals cannot control prices, this sort of advantage taking is inconceivable.

The absence of externalities is the second way in which the perfectly competitive market differs from the present market structure. An externality arises whenever an act of production or exchange or consumption affects the utility of some person who is not party, or who is unwillingly party, to it. These effects may be either beneficial or harmful: we speak of positive or negative externalities. An example of a positive externality is a lighthouse which everyone can utilize even if they don't pay for it—we call those who don't pay but use it "free-riders". A example of a negative externality is pollution; the industrialist pollutes the air with toxins and dumps the costs onto others who do not want the pollution. The industrialist pays only his direct costs and not the costs that he imposes upon others. The existence of externalities upsets the marginal matching of supply and demand. Lighthouses are undersupplied: the people who own them only supply them to their own own personal demand and not to the extent of the full demand of the market (to the demand of the non-paying users). And pollution is oversupplied relative to the demand. With both
positive and negative externalities all agents act in a utility-maximizing way given the actions of others, but the situation is not optimal. Everyone would benefit, if the demand for lighthouses could be channeled to bring forth the supply and everyone could benefit if pollution were controlled at the point at which there is marginal benefit to all. When there are no externalities no one is affected by market activities in which one does not willing participate. No one can receive goods without paying for them and no one can impose costs on others without their willing participation. The absence of externalities ensures the marginal matching of supply and demand; and consequently optimality is ensured.

If we could assume that in our present system of exchanges all the conditions for a laissez faire market economy are met, then the use of the status quo might be a legitimate point from which to distinguish coercive proposals from noncoercive ones. Individuals in a perfectly competitive market make decisions based on no one's action but his own; each maximizes within fixed parameters, and each has all the relevant knowledge of the outcomes of the various choices he could make. No one has a bargaining advantage over anyone else. We could suppose that one could only be forced (coerced) to receive a sub-optimal outcome and one could not be forced (coerced) to choose a better
state of affairs because no other person can maintain a threat-advantage. For example, when there are externalities, perhaps pollution, the pollutor has a threat-advantage over the persons he affects with his pollution, namely that of continuing to pollute. The pollutor can return his victim (upon whom he is a parasite) to the status quo of "no-trade". This, of course, can not happen in a perfectly competitive market.

Our economic system is not a perfectly competitive system, so the status quo may not be a justified point from which to determine coercion. There are many ways in which our economy fails to meet the assumptions that are crucial to the efficient allocation of resources. I will name but a few. First, there is imperfect competition in the market, imperfect competition is a situation in which some economic agents have enough power to determine price. Second, there is the problem of externalities. A third problem is that of public goods: goods or benefits that must be provided to everyone. Governments establish a program of taxation to avoid "free-riders" to the benefits.

This is admittedly a simplification of the conditions under which the perfectly competitive market fails. It is not my intention to argue for or against the possibility of a perfectly competitive market, but rather to use it as an illustration of a system in which the normalcy
criterion might be legitimately employed and to show that the criterion is less than compelling when the conditions of perfect competition are not satisfied.

When there is a market failure because of externalities, the market no longer produces optimal states when participants act to maximize their individual welfare. The presence of externalities leads to a divergence between optimality and utility maximization. The difference between the two may be recovered by cooperation. Under cooperation each agent's decisions are aimed at a joint strategy; the market, in contrast, is the paradigm of independent, non-cooperative choice. People will be motivated to cooperate because they can increase their welfare by doing so. Another way of saying this is that cooperation yields benefits that one could not achieve on one's own: benefits which can be secured only by abandoning individual utility maximization in favor of pursuing joint or cooperative strategies. In cooperative efforts, however, each actor attempts to have as much of the benefits of cooperation that he can. And, as I will argue, the proportion of the benefits of cooperation each can legitimately expect to secure is a function of the parties' relative "threat-advantage".

The argument to this point has been that the failure of the perfectly competitive market generates the need for cooperation. "Cooperation" in this context simply means that
individuals choose a joint plan of action. It does not imply that individuals sacrifice their own self-interest for that of others. The motivation for cooperation is the advancement of one's own self-interest within an imperfectly-competitive market. Each individual endeavors to have chosen a joint plan of action that benefits that individual most, minimizing his costs and maximizing his benefits. What remains to be considered is the relationship of one's initial power to the ability of each party to secure a plan of joint action that is most advantageous to each.

The baseline which may prove legitimate as an index or criterion for distinguishing threats from offers in the context of perfect competition breaks down when the conditions of perfect competition are not satisfied, precisely because of the existence of bargaining advantages. And it is the presence of superior bargaining positions in imperfectly competitive markets that is the key to understanding coercion in exchange—not gain and loss relative to a baseline.

The exegesis of contemporary analyses has lead us to the following conclusions. A moralistic analysis of the concept of coercion is inadequate since it obscures the essential connection between coercion and undermining an agent's freedom. The reason we object to the practice of coercion is because it undermine an agent's freedom and so
any adequate of coercion must specify nonmoral conditions which account for the prima facie wrongness of coercion in terms of its undermining the victim’s freedom. Psychological or descriptive analyses attempt to do this and have focused upon the notion of the threat as the key to undermining a person freedom. Threats, it is argued, are distinguished from offers on the basis of projecting consequences "worse than" what happens in the normal course of events. The normalcy criterion has been interpreted in a number of ways all of which are open to serious objections. These objections to the different interpretations of the normalcy criterion lead to questioning whether that approach itself is seriously flawed. In the final section I developed an argument against the use of any normalcy baseline. I argued that it assumes certain market conditions, and thus certain normal states of individuals, which just do not obtain.
CHAPTER 5

THE BARGAINING MODEL AND COERCION

There are a variety of circumstances in which coercion may arise; in this chapter I will focus on coercive exchanges. By narrowing my focus I will be able to deal with those problems that are particular to market exchanges. Market interactions have a particular character and occur within a specific institutional framework. Other accounts of coercion have failed to capture the unique character of coercion in the context of market interactions. I will attempt to show how failure to attend sufficiently to the character of coercive exchanges has led to inadequate general accounts of coercion.

The unique character of coercion in market interactions is most often obscured by the over-emphasis given, in the standard account of coercion, to gains and losses relative to a baseline. The most prevalent position is that a proposal can be coercive only if it projects consequences "worse than" what normally happens to that person. The paradigm of coercion is the classic gunman case in which the gunman, by threatening to shoot the person if he does not comply, projects consequences "worse than" normal. The general distinction between making a person "worse off" or
"better off" relative to the baseline and its importance to the standard analysis of coercion is illustrated by the following examples.

1. Ms. Pecunious is approached by a gunman who says: If you refuse to have sexual relations with me I will shoot your baby.

2. Ms. Impecunious has a baby who will die without an operation. Alas she has no money and no way of getting any. She is approached by a lecherous millionaire who puts the following proposal to her: If you agree to become my mistress, I will pay for the operation on your baby. (Feinberg, 1985)

The standard approach (see Chp. 4, sections III, IV, and V) to these kinds of examples has been to say that the first is an instance of coercion and the second is not. The reasoning behind this judgment is that the gunman threatens to make Ms. Pecunious "worse off" in relation to her "normal course of events". Whereas Ms. Impecunious is at a disadvantage initially, the lecherous millionaire does not threaten to make her "worse off", but rather proposes to make her "better off" in relation to her initial position. The difference between the two is put by Feinberg: that one cannot "threaten someone with consequences that were bound to occur anyway". Yet, in both the cases above, if the mother does not acquiesce to the proposal her baby will die.

The overarching question I want to address in this chapter concerns the relationship between coercion and bargaining positions. I have argued in the previous chapter
that other accounts of coercion have missed what is central to market coercion and possibly begged some important questions about coercion in assuming the legitimacy of the status quo as the focal point for the determination of coercion. I will argue that the "better off"/ "worse off" distinction ignores the power relationships that occur when there are radically disparate bargaining strengths. Missing the relevance of relative bargaining positions to coercion makes those who are worse off in the society the ones most difficult to coerce. The standard view does not count as coercive those situations in which the least well off find themselves. In the last chapter, I introduced the notion of the perfectly competitive market as a market situation in which the normalcy (or baseline) criterion might be justified precisely because of the absence of bargaining advantages in the situation of perfect competition. However, I argued that the normalcy criterion is less than compelling when the conditions of perfect competition are not satisfied. That criterion is only legitimate in the absence of bargaining advantages since, as I will argue, what one can rationally expect to secure from a negotiation is a function of one's bargaining power (or one's "threat-advantage"). And it is the presence of superior bargaining power in imperfect competition that is the key to understanding coercion in exchanges—not gain and loss relative to a baseline.
I argue that coercion involves exercising power over another; in the market, it involves exercising superior bargaining power. Superior bargaining power is a function of the bargaining advantages that one has over another. I examine the notions of bargaining advantages, exploiting advantages, bargaining power, and their relationship to freedom, and voluntary behavior, especially voluntary exchange. I buttress my argument that superior bargaining strength can lead to coercion with game-theoretic models.

In the first section I will provide an account of the concept of bargaining power. After the notion of bargaining power is illuminated I will argue that the key to understanding coercion in the market is superior bargaining power.

I. The Concept of Bargaining Power

What one can secure from a cooperative venture is a function of what one starts out with, or one's bargaining power. Imagine a rich man and a poor man playing a cooperative game. If they cooperate successfully, they can share $1000, otherwise each receives nothing (Bacharach 1976). Each wants to get the largest possible share. Yet the poor man worries more about not getting anything at all. Consequently, he places higher values (utilities) on getting something—even less than half—than does the rich man. Since the rich man already is well off he might be
interested in cooperation only if he can get a very large share. We can imagine the following assignment of utilities to payoffs.

<table>
<thead>
<tr>
<th>Money gain</th>
<th>Utilities assigned to Payoffs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rich</td>
<td>Rich</td>
</tr>
<tr>
<td>0</td>
<td>1000</td>
</tr>
<tr>
<td>250</td>
<td>750</td>
</tr>
<tr>
<td>500</td>
<td>500</td>
</tr>
<tr>
<td>750</td>
<td>250</td>
</tr>
<tr>
<td>1000</td>
<td>0</td>
</tr>
</tbody>
</table>

Being utility maximizers neither of them will cooperate if the other takes all the benefits. The Nash solution to the game—which is the maximum product—is 750 to the rich man, 250 to the poor man. The money gain is grossly unequal, yet the payoffs in utilities are not.

We might ask, why the discrepancy in assignments between the two? That disparity can be explained in terms of the risk aversion each has in regards to outcomes. The poor man, in this particular situation, prefers the greater probability of the lesser payoff to accepting a greater risk of not securing a larger payoff. Moreover neither party need be aware of his or her relative bargaining strength to ensure the 750/250 solution to the game. The poor man might be desperate and not want to take the chance of coming out with nothing. He assigns utilities according to his position which does not require that he be aware of the other party’s preferences—though he might adjust his preferences in the
light of such information. On the other hand, the rich man is not, at least in this instance, risk averse; he is willing to take chances that the poor man is not. One's bargaining position is likely to affect one's aversion to risk.

A. Bargaining Advantages

Bargaining power plays a central role in the cooperative deal one can negotiate; indeed, what one can rationally expect to secure from negotiations is determined by it. The terms by which any two agents will cooperate (e.g., exchange their goods), can be explained by the bargaining advantages of the agents. Bargaining advantages are a function of a number of background factors; for instance: one's knowledge of the subject of the negotiation, one's wealth (which among other things gives one the ability to wait and which affects one's attitude toward risk), one's business savvy, what one possesses that others want (this includes abilities and talents), and the alternatives open to one.

Another set of conditions that go into determining one's bargaining advantages are the rules that restrain or liberate that power—as Coleman suggests, "the practices and procedures that specify the ground-rules for negotiating the agreements in a particular context" (Coleman 1983, p. 11). For instance, rules prohibiting fraud restrain the advantage
of deception; such rules, like rules against coercion, restrict advantages in order to prevent individuals from entering agreements non-voluntarily. Other rules have as their justification that they equalize bargaining advantages, e.g., disclosure laws, nonwaivable warranties, "cooling off" periods. Notice that a change in those rules changes the bargaining power patterns.

Bargaining advantages give one power over others, and all of these factors that give one bargaining advantages give one relative power, i.e., power in relation to another, and not absolute power. Having power over another means that one can affect the behavior of that person, or in cases of great power can control the behavior. Power is a relational concept; that is, P has power over Q in terms of x; and power varies in degrees, i.e., P has a little power over Q in terms of x, or P has great power over Q in terms of x.

On the other hand, desires (which include pure wants and those wants that are also needs) are, in some sense, inversely related to power. If one desires to obtain something, the reason must be that one does not already possess it, or does not possess enough of it. As was shown in the rich man/poor man example, the poor man does not want to miss the opportunity to realize his desire to get something; in this sense he is dependent on the rich man's cooperation, which is to say that he is in the rich man's power. If the
rich man had exercised his power that came from his advan-
taged position—or taken advantage—he could have affected
how the poor man chose his utility assignments.

B. Having and Taking Advantage

The above suggests another distinction, that between
taking advantage and merely having an advantage. The rich
man has a bargaining advantage over the poor man in that the
poor man’s position made him more risk averse. In the rich
man/poor man example the rich man did not take advantage of
superior position, but he did benefit from having an advan-
tage over the poor man. Had he taken advantage he would have
been aware of his advantage, tried to capitalize on it by,
for example, informing the poor man that he would only co-
operate on the terms that he most preferred, and succeeded
in doing so (see Coleman 1983).

To take advantage, then, is to employ one’s advan-
tage to secure the deal that one wants, to causally affect
one’s subsequent gain. For example, if a philosopher knows
that the University of Tasmania is in great need of a
philosopher of science and that the U. of T. has been un-
successful in attracting one, then he (as a philosopher of
science) has a bargaining advantage over the U. of T.. He
can capitalize on that advantage by setting the terms of the
agreement he would accept much higher than he would have had
he been without that advantage. He will succeed in securing
the exchange he wants if he has calculated correctly his 
advantages over the U. of T. The more he knows of his actual 
advantage (how eager the U. of T. is, what pressures they 
are under, etc.) the more likely he will succeed in securing 
the agreement.

Many forms of advantage taking occur in the market. 
The more advantages one has over the agents with whom one 
negotiates the better the deal that one can secure. And, 
conversely, the less advantages one has the more likely one 
will be taken advantage of.

Since the concept of exploitation arises so often in 
discussions of market interactions, I will attempt a rough 
definition and will distinguish it from the other notions 
that have been discussed. Normally when we talk of exploi-
tation we mean that an actor P profits or gains at the 
expense of some other actor Q. P does this by using some 
factor which is outside the subject of negotiation—normally 
some trait or circumstance of Q’s—that enhances P’s bar-
gaining advantage over Q (see Feinberg 1981). Tentatively, 
we can say that P exploits Q if and only if P uses factors 
that give him more bargaining power but do not affect the 
value of the commodity exchanged to obtain a bargain more 
favorable to him than would otherwise be possible. Had P 
not played on or used some trait or circumstance of Q’s he 
would not have been able to secure this favorable bargain.
Exploitation is normally thought to be unfair to Q because P is able to secure a better deal for himself by using something about Q which is not germane to the subject of negotiation in order to increase his bargaining advantage over Q. Q would have been better off had P not used that factor. An example of exploiting a bargaining advantage is the following: Imagine an entrepreneur who owns the only well in the desert, and along comes some person whose car breaks down, and that person is now dying of thirst. The entrepreneur says that he can have a glass of water for $10,000 (Murphy, 1981). Here the entrepreneur uses the fact that the person is dying of thirst, in desperate straits, etc., to gain more bargaining power which leads to his securing a better deal than he would otherwise have been able to.

There are a number of judgments that can be made about advantages. Advantages can be illegitimate or legitimate. An illegitimate advantage would be one gained from, e.g., dealing with children or insane persons even while lacking the knowledge that the person with whom one is dealing is negotiating under such handicaps. A legitimate advantage is illustrated by greater knowledge of the subject of negotiation (at least, in most circumstances). Further, one can take advantage in legitimate or illegitimate ways (i.e., by employing one's advantage), and in some cases when an advantage is taken in an illegitimate way we refer to it
as exploiting an advantage (exploitation in interpersonal relationships has a pejorative connotation). Exploitation is rarely thought of as justified. It is assumed to be unfair as indicted by the reference to "taking unfair advantage".

Many forms of bargaining advantage-taking are illegitimate, for example, those which effectively prohibit voluntary choice (see Kronman 1980). Any form of advantage-taking that vitiates voluntariness is illegitimate and should be prohibited by the rules of agreement formation. Some forms of advantage-taking that vitiates voluntariness are the consequence of cognitive or emotional impairment of the weaker party which the other party capitalizes on. For example, the insanity or minority or even the ignorance of another can be used to secure an agreement involuntarily. In other cases the involuntariness is a result of some action on the part of the stronger agent, such as when he defrauds the agent with whom he deals or uses his superior strength physically to force the agent into agreeing (e.g., by grabbing his hand and physically moving it to sign the paper). Coercion, like fraud, involves an action on the part of the stronger party which results in the weaker party giving his consent involuntarily. What specific advantages make coercion possible will be discussed in the next section.
In this section I have developed a concept of bargaining power. The presence of bargaining advantages allows those with the bargaining advantages to secure more benefits from cooperation; this follows from merely having an advantage. One can secure even more benefits when one takes advantage of one's superior bargaining position. One takes advantage by intentionally capitalizing on that advantage over the other negotiating party to causally affect his subsequent gain. Bargaining advantages and advantage taking can be either legitimate or illegitimate depending on the advantage used and/or the way in which it is used. Some forms of advantage taking are referred to as exploitation, specifically, those in which one party profits from his negotiation with another at the expense of the other. The problem which we must now address is: What forms of advantage-taking are illegitimate because they are to coercive?

II. The Relationship Between Bargaining Power and Coercion

The problem of determining which forms of advantage-taking nullify voluntariness is more difficult than one might think. Not all bargaining advantages, even when used to exploit the other person's miserable circumstances, necessarily affect the voluntariness of the person's choice. For example, when prisoners are asked to participate in experimentation the experimenter is exploiting the boredom, lack of opportunities, lack of funds, etc., of the prison
population. Often the victim even knows of his exploitation but also desires the benefits of cooperation. We might object to this kind of exchange as being unfair, and possibly argue on distributive grounds that the initial endowments need to be altered, or that advantages need to be equalized by the ground-rules of contract formation. Yet these arguments do not necessarily suggest that the advantage which allowed the person to secure his agreement did so by rendering the other person's action not fully voluntary.

What we want to know is what forms of advantage-taking allow the stronger party to force the weaker party into consenting to the terms of his agreement; in other words, those transactions the consent to which is involuntary because of coercion. Coercion, we have said, forces compliance by making the alternatives to compliance "ineligible". It is not made impossible for the victim of coercion to do otherwise as with compulsion but the bargaining strength of the coercer makes the alternative to complying so undesirable that in effect the victim has only one choice. Hence the consent is unfree. Above I mentioned a case of prisoners who consent to be experimental subjects to escape their boredom; the experimenter secures agreement by exploiting the prisoners' boredom. Even though the experimenter exploits their situation on the face of it this does
not seem to be a case of coercion. What more is needed for coercion in exchange?

There are two advantages needed for the power to coerce. The first is dependence. Dependence comes from the weaker party having limited options, and it could be said that as the available alternatives get fewer the advantage, and hence the power, becomes greater. This opens the door for the stronger party to use the dependence to secure a better deal than he might otherwise have been able to secure. Having the weaker party dependent is essential since only then is it the case that the weaker party must deal with this person. The coercer needs his victim dependent upon him. Dependency of the victim can be created by the stronger party or, given certain states of affairs in the market, the stronger party may find himself with others dependent on him.

The second factor is that the greater the seriousness of the subject of negotiation (what the stronger party has that the weaker party is dependent on him for) to the weaker party the greater the advantage the stronger party has, and thus the power. The subject of negotiation in this case is what the coercer can affect if his victim does not comply. For example, the subject of negotiation in the gunman case is the victim's life. He is dependent on the gunman for his life, and his life, of course, is serious to
him. What is meant by 'seriousness' is that the greater the value to the weaker party of the subject of negotiation or the disvalue of being without the subject of negotiation, the greater the advantage the stronger party has. So that if we ordinarily ranked the preferences of the weaker party the subject of negotiation would be of great value to him, and being without it would be of great disvalue.

Dependence without seriousness is unlikely to result in coercive power. I can be indifferent to your proposal if the subject of negotiation is of little importance to me. The stronger party could, however, exploit that advantage of dependence (imagine a pornography theater that is the only one within 500 miles, and the proprietor uses that dependence to charge more than he could without the monopoly). Also, seriousness with many options precludes coercive power (e.g., individuals greatly value food but when there are many options for acquiring food those who sell it cannot coerce). However, in some cases the weaker party, due to lack of education or understanding, is not aware of the options and/or is led to believe that there are no other options (notice that the weaker party’s lack of knowledge and education gives the stronger party another bargaining advantage) and this can lead to coercive power.

Monopolies, 'having by definition the advantage of dependence, naturally narrow (or nullify) individuals'
options and thus allow the monopolies great advantages over others. And this accounts for most of the objections to them. Objections to monopolistic power become even more cogent when the monopoly involves something people cannot do without, i.e., the monopoly involves the advantage of seriousness.

Bargaining advantages that are derived from the dependence of the weaker party and the seriousness of subject matter grant P sufficient bargaining power to coerce Q. But, merely having these bargaining advantages is not sufficient to characterize the relationship between P and Q as coercive. These advantages are necessary for the power to coerce.

The notion of power is somewhat elusive as exemplified by its use in a variety of diverse circumstances. The language of 'power', however, fits comfortably in discussions of coercion, especially market coercion where the notion of "bargaining power" is emerging as the prime conceptual tool for analysis of bargaining relationships (see Weber 1979). Consider two market examples: P owns a Toyota dealership and Q wants to buy a car but is undecided about which car to purchase. When P exercises his power of persuasion over Q, Q is still free to act otherwise, for instance, to buy a Ford. Q has been given reasons for buying a Toyota, but whatever Q buys the purchase will be made on
the basis of how the reasons that were supplied by P coincide with other beliefs and desires that Q has that would motivate him to act. Another power relationship is illustrated by the case in which Q's life insurance policy provides for a waiver of premiums during the total and permanent disability of Q. Q has been permanently disabled but P (the insurance company) disagrees as to whether this disability exists. Q is faced with two unpalatable alternatives: continue payment when he should not have to, or risk losing his insurance coverage. Q is forced to pay the premiums for fear that his policy will be cancelled and he will be without protection. P and Q are in seriously unequal bargaining positions as illustrated by the fact that P has no incentive to resolve the disagreement, and thus P's bargaining power leaves Q with no choice but to continue payment. Q is dependent on P for the insurance money and the insurance money is of great value to him. P, then, has control over something of great value to Q (cf. Still v Equitable Life Assurance Society (1932) 165. Tenn. 224, 54 S.W. 2d 947).

A. Taking Advantage of "Dependence" and "Seriousness"

A necessary condition for coercion is that the stronger party takes advantage of the weaker party's dependence for something which is of great value to him. Recall that to take-advantage of one's superior position the stron-
ger party knows of his superior bargaining position and intentionally capitalizes on his advantages to causally affect his subsequent gain from the weaker party. So P's capitalizing on his advantage over Q means that P secures as much benefit from that position of superiority as he can, leaving the terms of the exchange undesirable to Q. When P has Q totally dependent on him for something of great value to him and P takes advantage of his position of superiority his proposal amounts to: "If you do not comply with my demand, then I will deprive you of the state of affairs that you strongly desire." This forces Q to face two undesirable alternatives: the demand (which involves P securing a profit which he could not have secured without having Q "over a barrel") and the deprivation. Q cannot both not comply with the demand and avoid the deprivation since Q is dependent on P. For P's advantage-taking of Q to be coercive the deprivation which is made a consequence of not complying must be undesirable enough to Q that Q's desire to avoid that evil state of affairs is so strong that he has a motive for complying with P's demand. With the bargaining power that P has over Q, P causes Q to have a motive to comply.

Taking advantage of the dependence and the seriousness of the subject matter the stronger party can cause the weaker to have a motive for acting in the demanded way. A person has a motive for an action only if he believes that
some end that he wants will be furthered by doing that action. Motives in this way are logically connected with one's desires. The end that the victim of coercion wants to further is that of avoiding the evil consequences the coercer has in his power to affect. Having a motive for acting means that one believes that some end that one wants will be furthered. This does not entail, however, that the person wants to do the action but that some end is wanted which the action will bring about. It is true of all acts of coercion that the victim does not want to do the demanded action, but he does have a motive for acting in the demanded way. Consider Aristotle's example of the man who was threatened by the tyrant that unless he did some "base deed" the tyrant would kill his family. The victim in this example does have a motive for complying, the end of which is avoiding his family being killed. The tyrant has made the lives of the victim's family contingent upon his complying with the demand. Since what the victim desires is to avoid the evil consequences of not acting in the demanded way, the tyrant's proposal has caused the victim to have a motive to act in the way the tyrant wants.

It is through controlling something that is serious to the weaker party that the stronger can cause him to have a motive to act. This is done by arousing a desire in the victim that he cannot fail to act upon. The gunman, for
example, has his victim dependent on him for the victim's life. The coercer is using the weaker party's own preference structure to cause him to have a motive for complying. In other words, the coercer plays on the victim's own evaluations of the seriousness of the subject of negotiation.

But which deprivations are serious enough for coercion? We can think of each individual ordinally ranking states of affairs that he desires to attain and that would motivate him to act. Conversely, states of affairs that individuals desire to avoid can be ranked ordinally also. Given the ranking of desires of a particular agent, the stronger party is able to coerce this agent when the state of affairs that the stronger party projects for non-compliance is higher on his victim's "desire-to-avoid" ranking than is the desire to avoid complying with the demand. The desire to avoid the evil of non-compliance, then, is great enough to cause the victim to have a motive for complying. When the employer whose funds have been embezzled secures repayment from the guilty employee's mother by threatening her with the criminal prosecution of the son, the employer has caused her to have a motive for complying (Dalzell 1979). Even though he had nothing to do with creating the state of affairs which allows him to threaten her (her son embezzled the funds), he can use that situation to gain a
bargaining advantage over her, leaving her dependent on him to avoid the state of affairs she greatly disvalues. Given her strong desire to avoid the criminal prosecution of her son (which is stronger than her desire to avoid repayment), the employer's projection of this as a consequence of non-compliance is sufficient for the mother to have a motive to comply with his demand.

One important qualification to the foregoing is that it is not sufficient for coercion that the stronger party have and exercise his bargaining power to cause his victim to have a motive to act in a way that the coercer wants, since other bargaining advantages can give one the power to cause those over whom one has an advantage to have a motive for complying. If we claimed that all instances of causing persons to have motives for acting were infringements on freedom, then enticing promises of reward or goods which cause people to have new motives would be infringements on freedom. The enticing employment offer, with its rich pecuniary rewards in an otherwise undesirable location, might cause a person to have a motive to do otherwise than he had intended to do. The enticer, no less than the coercer, has bargaining power over the person with whom he deals, in that the enticer has within his power something that the recipient strongly desires. Consider a case of bribery. P promises Q that if he turns over the company's secrets he
will be paid a large sum of money. Q had no intention of turning over the company's secrets before the proposal was made. Q, however, already has a strong desire for money so that this proposal ties in with desires he already wants to act upon. He may have always dreamed of having $100,000 so that this proposal is irresistible in so far as it allows him to achieve his dream. We do not, however, suppose that enticing someone to act constitutes a constraint on his freedom.

With instances both of coercion and enticement the stronger party uses the recipient's preference structure to ensure that the recipient has a motive for acting in the way the proposer wants. The proposer does this by combining the demand with the "sanction" that the person cannot resist being motivated to avoid, or by combining the request with the inducement that the person cannot resist being motivated to attain. The victim of coercion is justified in claiming that he had no choice but to comply with the demand since given the victim's preferences he could not help but be motivated to avoid the evil consequence. Coercion is tied to an individual's own subjective preference rankings of what will motivate him to act. It is in this way that individuals with "unreasonable" fears (e.g., phobias) can be coerced on the basis of them. In the case of enticement too, the recipient would be justified in claiming that not only was it
the reasonable choice (given his desires) but that he had no choice but to comply, since the inducement involved something so central in his preferences. Since both coercion and enticement involve causing a person to have a motive for complying, and yet enticement does not constitute a constraint on freedom, causing a person to have a motive must be necessary for coercion but not sufficient for coercion.

The difference between enticement and coercion lies with the differences in the objects of the desires which provide the actor a motive. The coercer's advantage over his victim is used to capitalize on his victim's desire to avoid the evil consequences that the coercer has in his power to affect. The enticer, on the other hand, causes his "victim" to have a motive to comply by holding out a reward. The object of the recipient's desire is to attain a good, not to avoid an evil.

Why are cases of enticement not equally restraints on the recipient's freedom? Enticement secures compliance by holding out some good that the person desires and wants to be motivated to attain. The person identifies with that desire and welcomes the chance to satisfy that desire. Imagine an up and coming writer who very much desires to see his work in print. A publishing house takes advantage of his desire by offering him a book deal with half the royalties that are customarily given to an author. What induces the
aspiring author to agree is that he strongly desires to reach the end of publishing his work, a good to him. It is not a restraint upon his freedom since he wants to have that desire aroused.

On the other hand, the victim of coercion does not want to have the motive that the proposer has caused him to have. The coercer's proposal holds out an evil to secure compliance. The coercer intends to secure compliance by the victim's fear of those consequences. The victim does not want to face those consequences which the coercer's proposal forces him to face. Those consequences cause him to have the motive to comply. Rational persons want to be motivated to attain goods and not to avoid evils.

Causing a person to have a motive to comply, the end of which is to avoid the evil consequences which are in the stronger party's power to affect, is that which constitutes an interference or restraint on that person's freedom. The reason is that the victim does not want to have that motive. This accounts for the inclusion of threats, which project evil consequences, as coercive; and offers, even enticing offers, as non-coercive.

B. Threats and Coercion

Generally, a threat is a proposal which projects evil consequences or a sanction for non-compliance. An offer is a proposal which holds out a good or benefit for com-
pliance. Subsequently, we will question whether all offers are non-coercive. First, consider the relationship between threats and coercion. The coencer uses a "threat" to make the choice of noncompliance substantially less eligible than before the threat was made. Or, without explicit threats, the coencer can just as easily accomplish his task by showing, with, e.g., weapons or by walking out of a negotiation, that unless the person complies he will suffer some evil.

But making the choice of non-compliance substantially less eligible than it was before the threat was made is not sufficient for coercion since any threat will have this effect. And not all threats are coercive in effect, i.e., not all threats undermine the liberty of the agent. When a threat coerces it not only makes noncompliance less eligible but it causes the victim to have a motive for complying. Only when the coencer has control over some state of affairs that his victim strongly desires to avoid, and can only avoid by compliance, can the stronger party coerce him. In other words, without the bargaining advantages over the recipient the threat will not be effectively coercive. With ineffective threats the alternatives are undesirable, but one of the alternatives is not clearly the greater evil to this person. The victim is allowed to weigh the alternatives and determine the most reasonable choice.
may very well be to comply with the demand, but the actor is free to act otherwise. For example, Q's employer says, "If you don't get to work on time, I'll fire you". Suppose Q does not care whether his employer fires him. He does, however, desire to avoid having people think of him as anything but punctual, and this is the desire that motivates him to act. One acts freely when one is motivated to act on a desire other than to avoid the threatened evil.

Another characteristic of threats generally, but specifically important to understanding coercion, is the relationship between what is threatened and what is demanded. It is not merely the projected evil consequence which determines whether a threat is effective in coercing an agent. It is the threatened consequence in relation to the cost of avoiding that consequence. The threat of insolvency might coerce an agent to change the terms of an agreement. But when the demand is changed to perjuring oneself in front of the grand jury the price is too high for the agent. Although he desires to avoid insolvency, his stronger desire is to avoid bearing false witness. Sometimes a particular evil consequence in relation to a particular demand will coerce an agent whereas another demand in relation to that evil consequence will not coerce. Coercion is analyzed in terms of an individual's preferences which include his desire to avoid the threatened consequence in relation to
his desire to avoid the demand, thus a threat is effective when the victim views complying as the lesser evil.

With effective threats the bargaining advantage that P has over Q makes it clear to Q that he cannot both not comply with the demand and avoid the threatened evil. When threats fail to have this characteristic, it will generally be the case that the threatener does not have superior bargaining power. In business contexts, for example, both parties in a negotiation often use threats against each other. Each party is attempting to pressure the other into agreeing with his terms. This has been viewed as a problem for accounts of coercion since, it is argued, pressure in the form of threats in business contexts is legitimate (what is often referred to as "legitimate business pressure"). How can we say that the same pressure, when used in other contexts vitiates consent? The problem of legitimate forms of pressure in business contexts can be explained in terms of the general equality of bargaining positions in which the pressure occurs. When threatening an agent where little or no bargaining advantages exist (or if bargaining advantages do exist each party has them over the other), it is not possible for one agent to coerce the other. Each party controls something that the other wants; hence, no one party has sufficient bargaining power over the other to coerce. This may account for the court's reluctance to find duress
in negotiations between two parties of equal bargaining power in the business arena (the courts require stronger conditions for a coercive threat, i.e., it must be an unlawful threat).

The argument up to this point has been that P coerces Q into an agreement when P’s bargaining advantage over Q is such that when P threatens Q, P causes Q to have a motive to act based upon Q’s desire to avoid the evil consequences that P controls. There is another objection to this formulation which now must be considered. Imagine that P and Q enter into a contract for the purchase of a car. Q promises to pay P $100 by the 15th of each month and he understands that if he does not pay by the 15th then P will attach a penalty to the payment. Q is motivated to pay by the 15th in order to avoid P’s attaching the penalty to his payment. Such unexotic examples abound in our everyday life; we do some act to avoid the bad consequences of some other agent’s action. This does not undermine the account that what differentiates actions done under restraint or coercion from other actions is the object of the desire and hence the motive from which one acts. Notice that in the above kind of case the contract or agreement was freely entered into. One’s action is not unfree when one is motivated by the desire to avoid the consequence of another’s action when the penalty was a condition of the contract. One went into the
contract with one's eyes open and constrained one's own freedom in accordance with the terms of the agreement. It is relevant that one freely bound oneself to the specific terms of an agreement. And even though one may presently regret the agreement, this does not make it an instance of coercion.

I have characterized an agent's action as free or unfree in terms of the differences in the ends of the motives from which an agent acts. When P causes Q to act from a motive to avoid the evil consequences that P has projected for noncompliance, Q's action is unfree. This accounts for the inclusion of threats as coercive since threats project evil consequences. The coercer uses his bargaining power to put a sanction on non-compliance. By avoiding an evil and choosing to comply the victim is choosing the lesser of the two evils. Q's action is unfree since P caused Q to have the motive to avoid the evil consequence and this motive Q does not want to have. P's proposal leaves Q with no choice but to be in that position.

G. Can offers ever be coercive?

The general difference between successful threats and offers is that with threats either alternative puts the victim in a worse position than his status quo (e.g., the enemy says to the captive soldier: "Either you tell us about
the secret weapon or we will torture you"). Whereas the recipient of an offer can be made better off in relation to his status quo (e.g., the employer says to the new employee: "If you work hard we will pay you a big salary"). We said that threats hold out evils or sanctions, and offers hold out goods or benefits. Both, however, have a price. That is, what is in the deal for the proposer. But since what is in it for the recipient of an offer is a "benefit" or good whereas what is in it for the recipient of a threat is a "sanction" or evil and individuals want to attain goods and avoid evils threats are thought to be the only kind of proposals which can be coercive.

The distinction between "benefit" and "sanction" is not so easily drawn once we realize that individuals in different bargaining positions experience "benefits" and "sanctions" in different ways. The person who controls the "benefit" or "sanction" can exert different degrees of power over the person he is dealing with depending on the weaker party's relative position. Sanctions are generally thought to include only positive interferences (positive actions of some determinate individual) to a party's status quo which make him "worse-off" than he would have been without that interference. He would have been in a better position apart from the exchange. Here we think of causing death, inflicting physical abuse, perpetrating loss of property and
loss of freedom as positive interferences in a person's course of events. Included in this category would be legitimately expected acts or goods (e.g., the lifeguard and the policeman are expected to prevent harm or the contractor is expected to fulfill the terms of the contract). On the other hand, "benefits" are additions to one's status quo that make one "better off" than without those additions. Benefits are thought to include such things as food, shelter, money, and other material possessions. Not preventing death, physical abuse, loss of property, etc., are not thought to be sanctions; nor are withholding food, shelter, etc., thought to be sanctions.

There are problems with supposing that only proposals which project positive interferences in an agent's normal course of events which make that person "worse off" can be coercive. Many individuals find themselves in situations deprived of basic "benefits", facing severe deprivations of one kind or another. What follows from this is that the "normal" state in which many individuals find themselves is one with many bargaining disadvantages relative to other agents in the market. We cannot ignore cases where social circumstances in general and the more or less impersonal operations of economic forces, and not the actions of a determinate individual, render an individual's bargaining power so weak and his needs so great that he can be forced
into the most exploitative deals. Given the position of the weaker party, non-conferral of a "benefit" in some instances enables the stronger party to have more power over the weaker than would a threat of a "positive interference". For example, imagine a drug experimenter who goes off to Ethiopia in search of experimental subjects. The drugs that he wants experimental subjects for are very dangerous and the long term effects are unknown. He approaches an Ethiopian whose family is without food and proposes to give him and his family food if he will become an experimental subject. If an agent's family is without food, making it a consequence of his non-compliance that he does not get food, has much more causal impact on his motivational structure, so to speak, than the consequence that he will be beaten or other positive interferences. In other words, "not receiving food" would be a greater evil than "being beaten".

In terms of the power that one agent can exert over another the sanction/benefit distinction drawn in terms of the distinction between making a person better off/ worse off in terms of the status quo does not compute necessarily into more power. The view that threats are necessary for coercion ignores the power relationship that occurs when agents with radically disparate bargaining strength negotiate. If coercion is a power relationship whereby one agent is able to force another into his agreement by controlling
the occurrence of a state of affairs that a person desires to avoid then non-conferral of a benefit can sometimes be used as an evil sufficient to force compliance. The sense in which it is said that the person is made "better off" is just that any contract, even the most exploitative one, would make him better off. When one is in a vulnerable position it does not follow that one acts freely because the contract makes him better off.

One problem with allowing cases where nonconferral of a benefit is taken to be an evil which is sufficient for coercion is the following. It is objected in cases like Feinberg's lecherous millionaire and the impecunious mother what the millionaire proposes to do if she does not comply is something which he has a perfect right to do, i.e., not pay for the baby's surgery. Whereas, the objection continues, the gunman proposes to do something that he has no right to do, namely, kill the baby. The lecherous millionaire does no more than anyone else with the money to pay and thus how could the use of that projected consequence be sufficient for coercion? Is it necessary for coercion that the projected consequences of one's proposal be an action which one has no right to do? I think not.

Sanctions can include actions that one has a legal right to do. Consider a few examples. (1) Imagine a person who has been grossly negligent in paying his mortgage note,
months have passed and he has not paid. His banker now says to him: "If you don't pay your note, I will foreclose on you". Certainly the banker is threatening to foreclose, yet the banker acts perfectly within his rights. (2) Now imagine that a woman has a family to support, has lost her job, and is presently out of money. She has failed to pay her mortgage for one month. In this case the banker says: "If you don't have sex with me, I will foreclose on your mortgage". Suppose that the banker has a legal right to foreclose after one month's failure to pay but that the general practice is to wait for three months. Consider two other cases. (3) Mr. Employee has become sloppy and lazy about his work. His employer says to him: "If you don't straighten up and improve your work I will fire you". Again a threat is involved and yet the employer has a legal right to do the action he threatens. (4) Finally, imagine that B has bought stocks in the company that he works for and that the company retained an option to repurchase the stock if B's employment were terminated for any reason. B is approached by an officer of the company and told: "If you don't sell your stocks to me for x, then you will be fired".

All of these cases include threats and in all the threatener has a legal right to do what he threatens to do. Why is it that the first and third appear to be cases of legitimate threats and the second and the fourth
illegitimate ones? The first and third differ from the other two in that the victim should legitimately expect to perform the conditions of demand and if he fails to perform the sanction will follow. Specific institutional arrangements entail certain expectations, e.g., owing money requires that one pay and failure to pay at some point is followed by foreclosure. Consequently, neither the first case nor the fourth involve coercion.

On the other hand, in the second and fourth examples the victims do not legitimately expect the threatened action for the demand. In these cases the stronger party takes advantage of what he has a legal right to do. What makes these cases coercive is that the threatener uses his superior bargaining position (which includes an action which he has a right to do) to demand something from his victim that the victim does not expect (as a trade for the sanction) and that thing is an evil.

The case of the banker taking advantage of his position to secure sexual favors and the company official procuring stock from his employee have similarities with the cases of so called "coercive offers", namely, that in the coercive offers examples the deprivation or consequences of noncompliance is something that that proposer has a legal right to do. The experimenter in Ethiopia can no more be held responsible for the deaths of people there than anyone else
with the ability to provide them with food. The point is that threats sometimes involve actions that the threatener has a legal right to do. So the fact that the consequences of what one proposes to do is something that one has a legal right to do is not a counterexample to the idea of coercive offers. Moreover what these examples show is that just because one has a legal right to do some action, it does not follow that one can take advantage of that power in all circumstances. Specifically, when what one has a legal right to do is cause or prevent some harm to another, it does not follow that one can use that power to secure any agreement that one wants.

There does, however, remain the difference that the victim of a threat will find himself in a worse position than before the proposal was made and the victim of an offer will find himself in a better position than he would have been apart from the contract. Consider the following examples. In the first case P takes Q out in a boat with full knowledge that Q cannot swim. He makes the following proposal to Q: "Either you promise to give me $10,000 or I will throw you overboard and leave you to drown." In the second case P merely finds Q drowning in an isolated lake and puts the following proposal to him: "Either you promise to give me $10,000 or I will leave you to drown". What differentiates the cases is that in the first P creates the
dependency to avoid an evil and then takes advantage of the power he has over Q. Whereas in the second, P finds Q in a desperate situation. Q's vulnerable status quo gives P power over Q. One difference between the two cases is the status quo that the victim finds himself at before the proposal is made. In the first case the coercer created the vulnerability and in the second impersonal forces put the person in the same vulnerable position.

In the first case we find that since the victim was not facing drowning the proposal projecting the consequences that he will drown is a threat, i.e., projecting an evil. Whereas in the second case the victim is facing drowning so the proposal would make him better off. Thus it is thought to involve a benefit, hence it is an offer. It involves a "benefit" only because of that person's desperate position. Yet since drowning is a harm and drowning is made a consequence of noncompliance, it seems that noncompliance involves a "harm". The "benefit" is avoiding the occurrence of the harm.

In both cases the proposer intends to secure consent by the evil consequences of non-compliance. Clearly, P knows that he could get Q to hand over $10,000 only if Q is in a desperate situation with no other possibility of avoiding the harm. And the effect on Q is to leave him to face two evils (undesirable alternatives) and only one eligible
choice. Coercive offers, like offers generally, make the recipient better off in relation to that person's status quo; but unlike offers generally the recipient of a coercive offer must choose between evils (the exploitative demand or the harm). The intention and the effect of coercive threats and offers are the same; the difference lies with how the person got into the vulnerable position.

The relevant difference between threats and coercive offers lies in how the victim came to find himself in the vulnerable position where the proposer could take advantage of him. In the case of threats the proposer puts his victim in a vulnerable position and then takes advantage of it. The threatener wrongs his victim in two ways: initially undermining his victim's freedom by placing him in the vulnerable position where he must take the proposal seriously and then forcing him to comply with the demand. Imagine that the boat owner intended to throw his passenger (who could not swim) overboard and then propose to save him only if the passenger would agree to pay him $10,000. But after the boat owner throws his passenger overboard he remembers that he has a prior engagement so leaves his passenger to drown. In this case we would say that the boat owner wronged his passenger, but not that he coerced him. Coercive threats, then, involve a double wrong. Coercive offers, on the other hand, involve
a single wrong, namely, forcing the victim to comply based upon the ability to control the occurrence of a evil.

Up to this point my argument has been that some offers are coercive. This conclusion is based on a number of considerations: first, that many agents find themselves in miserable positions, facing deprivations or harms; second, that the distinction between holding out sanctions and holding out benefits does not necessarily translate into more power for the proposer. Further, that an agent with a "benefit" can exploit the vulnerability of a weaker party who needs that benefit and who is dependent upon him for it. Having the ability to control the occurrence of a harm and exercising that control to secure compliance is central to coercive power, so that when the victim is motivated to comply to avoid the harm then coercion is involved. Coercive offers make the person "better off" in relation to his status quo. It is, however, a peculiar kind of "benefit" since moving away from one's status quo in these situations is avoiding a harm. The stronger party intends that the evil consequences of non-compliance will secure the compliance. The evil that the weaker party wants to avoid he cannot avoid unless he complies. And the effect on the victim is to leave him with two evil alternatives. The one evil is an exploitative deal. And the other evil is his status quo the
occurrence of which is now, after the proposal, a condition on his refusal of the demand.

It will be objected that not gaining a benefit of any kind could be construed as an evil, consequently all offers are coercive. I recognize that this analysis of coercive offers relies upon our being able to distinguish between "evils" and "goods". We have been considering only the core or clear examples of choosing between evils so that we are open to the attack that we are clouded by considering only an overly selective and not representative sample of examples. Yet the examples do illustrate that there are cases which are clearly offers but yet the recipient chooses between evils. At least in some cases we can appreciate how the distinction would be made, so that when a grocer offers bread for a dollar a loaf we suppose that no evil is involved. Of course, we would prefer to keep our dollar and get the bread but one does not expect to get the bread for no money. As the price for bread goes up because the grocer has bought all the stores in town then paying the higher price is less desirable. At some point in the grocer's taking advantage of his food monopoly may require that the individuals face a good (getting food) and an evil (paying an exploitative price). Depending on the extent of the individuals in the community's dependency on the grocer for food the proposal may involve two evils (not having food and
paying an exploitative price). The distinction between goods, lesser goods, evils and lesser evils is not an exact one. It is, however, tied to an individual's situation (e.g., the consequence of a proposal that one will not get food when that person has plenty of food versus that same consequence to a person who has no food). And evils, sufficient for coercive offers, refer to needs as opposed to wants (not preventing one from dying is an evil but not giving one caviar is not an evil).

We said that effective threats use the victim's preference structure to cause him to have a motive for complying. The sanction is the one that will get this person to comply with the demand. The victim does not want the motive, i.e., he does not want to act to avoid an evil, but the coercer has caused him to act that way. Analogously, in the "coercive offer" situation the proposer uses the victim's preference structure to cause him to have a motive for complying with the proposer's exploitative proposal. The desperate victim does not want to comply with this demand but even more he does not want to face the harm which is now a consequence of non-compliance.

Consider the following method of distinguishing threats from offers in terms of two bargaining games. In the first we imagine agents who go to market with their respective baskets of goods to trade. They will agree on some
particular exchange only if they will both be better off (e.g., I'll give you six apples for one kumquat). If they fail to agree they go home with what they come with, i.e., they revert to the status quo. In this bargaining game, which I will call the "offer game", the players cannot get any worse off than before they went to market. Whatever exchange each player makes will make him somewhat better off.

In the other bargaining game, which I will call the "threat game" the players can leave the market worse off than when they got to the market. In this case one or more of the players attempt to secure the profit-sharing agreement he wants by insuring that his negotiating party leaves in a worse position than what he came to market with. Rather than reverting to one's status quo in the event of failure to agree, the weaker party reverts to a "threat-point". The threat-point becomes his status quo for the game. No trade in this case reverts to the threat-point. Whatever happens the weaker party is worse off than before going to market.

On this analysis we consider a proposal a threat or an offer if it involves making a person better off or worse off in terms of the person's status quo before the game begins. The gunman case involves a threat since the gunman sets a new status quo for his victim in the event of no trade. A case of blackmail where the victim had committed a
crime but had gone undetected would make the proposal to expose him a threat, i.e., setting a threat-point which is worse than his original status quo. The drowning and the boat owner who just happens along and proposes to save him for a price, Nozick's slave example, Feinberg's lecherous millionaire example, the drug experimenter in Ethiopia, all these would be cases of coercive offers.

The conditions under which an offer would be coercive are the following. First, Q's (the victim) bargaining power is weak. Possible contributing factors to his impoverished bargaining strength are social and economic forces, or natural disaster or misfortune and particularly his pressing need (or needs). Second, based on his pressing need he faces an evil and has no options to prevent the evil from occurring. Third, P (the proposer) intentionally capitalizes on Q's dependency on him to avoid the evil, i.e., P proposes to prevent the evil but at a highly exploitative price. P intends to secure the deal with the evil consequences of noncompliance. (Included in this condition is that P knows that he could not have secured his price without Q's desperate need.) Fourth, Q views the alternatives as evils but that complying is the lesser of the two evils. Q's motivation for complying is to avoid the evil consequences which will occur if he does not comply. Fifth, Q does not want to
act on that motive, i.e., the motive the end of which is to avoid an evil, but P's proposal has caused him to do.

A caveat to my analysis is that not gaining a "benefit" is not a sanction, however, when there are readily available other means of attaining that benefit. One common argument that is raised against the present market is that it is coercive since goods and services are offered on a "take-it or leave-it" basis. But if the argument up to this point has been correct the fallacy of this attack on the market rests with the mistaken assumption that all goods need to be open to negotiation. It is not whether goods and services are offered on a "take-it or leave-it" basis that makes the market coercive, but whether if someone decides to leave it that there is a workable range of alternatives open to him. And even though there is no workable range of alternatives, this does not go far enough in characterizing the market as coercive. We need to establish that the person with the monopoly is taking advantage of his superior position. It is not the case that anyone who has a monopoly over something people cannot do without coerces those people regardless of the terms he offers. The monopolist must be attempting to "squeeze" out the most favorable deal for himself that he can given the weaker party's relative position.
D. Summary of the Connection between Bargaining Power and Coercion

Market interactions often have the characteristic that the stronger party has an advantage over the recipient's status quo. Failure to realize the power that this gives the stronger party obscures the coercive relationships that result in the market. Market power often involves some item that the weaker party is dependent on the stronger for, and this dependency does not just occur when there exists a market-wide monopoly, but also when there are "situational monopolies" where the stronger party has abnormal market power over some particular agent but not over all other agents in the market. Other cases occur where the weaker party has no workable alternatives since there is collusion in the industry making actual alternatives an illusion (see *Henningsen v Bloomfield Motors, Inc.*). These considerations lead us to conclude that some offers can be coercive.

The relationship between bargaining power and coercion can be stated as follows: For P to coerce Q and render Q unfree to do x (or not cooperate with P's terms), P must have an advantage over Q and his advantage must give P the power to control the occurrence of a harm to Q if he does x. The following is the crucial difference between threats and offers. With threats the coercer puts his victim in a vulnerable position, viz., facing a harm, thereby forcing his
victim to take the proposal seriously. Whereas with coercive offers the proposer finds his victim in a vulnerable position. P must take advantage of Q. We could say that P exploits his advantage over Q, but exploitation explains P's motivation of his advantage-taking. The notion of exploitation explains the fact that P profits by utilizing his bargaining advantages over Q. In market interactions exploitation is involved in coercive relationships, that is, what P is attempting to do is to secure the most benefits he can from Q.

P's advantage over Q enables him to secure a much more favorable deal than could be secured otherwise. The cooperative exchange has more benefits for P than could have been exacted in the situation without P's power to control the occurrence of a harm. P determines what benefits he can secure for himself given the deprivation that he can make Q suffer if Q does not comply. An example might be the power that the monopolistic water company has over the water users. Suppose the water company said to the water users "Pay $1000 a month each or the water will be shut off.". The water company makes the users unfree not to pay the $1000, because of the threat-advantage that the monopolist has. When P has a bargaining advantage over Q and P employs that advantage so that if Q does not comply Q is left with a severe deprivation, then, Q is unfree to do not-\(x\). P leaves
Q theoretically the choice between two "evils", either to comply with the undesirable deal or to suffer the harm. However, when P coerces Q in the market the alternative to not complying is so disvaluable to Q in comparison with complying, that P has ensured that Q has a motive to comply. The unfreedom of Q's action when he is threatened is established on the basis that P causes Q to act on a motive which he does not want to have. The unfreedom of Q's action when he is the recipient of a coercive offer is based on P's causing Q to act on a motive on which he does not want to act.

III. Bargaining Advantages, Coercion and Game Theory

In analyzing how an agent's bargaining advantages can yield him enough power to coerce another, I will use game-theoretic models. Analyzing agreements in terms of cooperative games is appropriate, because in the model of games, as in real agreements neither agent sacrifices his own interests. The agents communicate before agreement and decide upon a pair of actions that each will take. The game-theoretic model does not, of course, show when something is an instance of coercion, but rather illustrates the effect of bargaining advantages on the deal one can negotiate.

To define a game, it is necessary to specify the choice of actions (strategies) of each player and the ex-
pected utilities or payoffs which correspond to each strategy by the players (Nash 1950). In cooperative games the players may choose a pair of payoffs, i.e., decide together what strategy each will play. As was mentioned earlier each player attempts to get most of the benefits of the cooperation, thus he will try to ensure that the joint strategy chosen favors him. Nash's solution to cooperative games utilizes the notion of the "strategic strength" that is conferred on the individual by his non-cooperative security level. This is what I have called one's bargaining advantage.

The type of cooperative game we will begin with is what I have called an "offer game". This game mimicks most market exchanges, because if there is a failure to agree the players return to their original place—or status quo. The payoff of "no-trade" is their status quo point. If we think of the players as traders with goods that go to market, then we can imagine that if they fail to agree they go home with what they brought to the market. Not cooperating with another leaves them with what they had originally. The status quo payoff is what each player can be sure of whatever happens. That is why Nash called them the players' "security levels". Each player uses his particular security level to hold the other player down in price, by refusing to trade unless he gets at least that. Obviously, the better one's
security level in relation to the other agent the better
deal he can secure.

To illustrate the relationship between bargaining
advantage and the power one can exercise over another we
will use the example that was introduced in the beginning of
the chapter--Feinberg's example of the lecherous millionaire
and the impecunious mother. Remember that she has no money,
and her baby will die without an operation and she has no
alternative deals or ways of getting money. He obviously
has a great bargaining advantage over her, not only is his
status quo more than tolerable but he has control over
something that is very serious to her, giving him the bar-
gaining advantage that comes from dependence and serious-
ness. He obviously knows his advantage and exploits it. He
offers to pay for the baby's operation if and only if she
will become his mistress.

Imagine his strategies are (a) he proposes paying
for the operation for her becoming his mistress, and (b) he
proposes to lend her money for the surgery to be paid by
working as his maid. Her strategies are (c) becoming his
mistress in exchange for him paying for the surgery and (d)
becoming his maid in exchange for the loan of money which
will pay for the surgery. If they do not agree to one of
these exchanges they will return to the status quo. For her,
her baby will die without the necessary surgery; and for
him, he will be without this mistress. She, of course, views the status quo as the most horrible catastrophe. He views returning to the status quo as a mild disappointment, giving him a great advantage over her. Suppose too, that he hates the thought of lending poor people money, and she hates the thought of becoming a mistress. The payoff matrix is as follows:

\[
\begin{array}{c|c|c|c}
   & a & b & c \\
\hline
He & (2 \frac{1}{2}, -4) & (1 \frac{1}{2}, -10) & (1 \frac{1}{2}, -10) \\
\hline
SHE & (1 \frac{1}{2}, -10) & (-1, 5) & (-1, 5) \\
\end{array}
\]

The payoffs of \( (a,d) \) and \( (b,c) \) are identical because those are the players' expected utilities if there is no ex-change—those are the payoffs of the status quo (those are also their security levels). If they don't agree, that is where they will be. It should be mentioned that the idea that she dislikes returning to the status quo "more than" he does is not expressed by her no-trade utility \(-10\) being less than his \( 1 \frac{1}{2} \); because the utilities of the two are not directly comparable. What the utility indices do express, his \( 2 \frac{1}{2}, 1 \frac{1}{2}, \) and \(-1\) compared to her \(-4, -10, \) and \(5, \) is how each views the status quo. Even though the utility functions don't tell us that she fears the status quo "more than" he does, the comparative corresponding relationships
do. Indeed, since he does not disvalue the status quo, this greatly enhances his bargaining advantages over her. This is an important aspect of his bargaining advantage, allowing him to run up his price and hold firm.

The solution of the game is: (a, c). He will not play (b), and only get a payoff of -1, when his security level is $1 \frac{1}{2}$. She has no choice but to play (c), since her security level is -10, and if she doesn't agree to (c) he will not trade. His not trading with her leaves her worst off.

Looking at the solution in terms of changes from the status quo it could be said that she is better off, surely -4 is better than -10. Under the "normalcy" criterion this would not be an instance of coercion. Under that type of analysis, it might be contended that the changes are equitable in terms of the status quo. Yet the status quo points are tremendously unequal. And it is precisely those grossly unequal bargaining positions, and the advantage that he has by possessing something that she greatly needs (the projected consequences of being without it as an evil) that allows him to coerce her. The implicit threat of no-trade lies behind this game; that threat would not be effective if she had not had such a grossly disadvantaged bargaining position. That threat lies behind and accounts for the payoff pair ($1 \frac{1}{2}$, -10) -- that he will not pay for the
operation and the baby will die. His optimal proposal or the threat which he will be assured of obtaining the best terms that can be exacted at all in the given situation from a rational opponent—without raising his own costs—is not cooperating (Harsanyi 1982, p. 11). The lecherous millionaire proposes to withhold his cooperation unless a profit-sharing agreement satisfactory to him is reached.

Under the present account an offer is coercive only if the victim would not comply but for the harm that will occur if he does not comply. The victim is made to choose between evils, and he chooses what the proposer wants—the lesser of the two evils. The coercer must have it in his power to prevent something that will be a harm to the victim. The proposer makes it a consequence of the victim's non-compliance that some evil will occur. Even though that evil would have occurred anyway it would not have been a consequence of one's action, it was not conditioned upon performing in a particular way.

Another kind of game I would like to look at is the "threat game". In this game the players have explicit "sanctions" at their disposal. In these games "no-trade" does not necessarily revert back to the status quo that one begins with. The players can make explicit threats during the game to do certain things if the other player fails to agree to his terms. The threat that a player makes during
the game becomes the status quo point of the other person. If the weaker party fails to agree he will revert to the threat-point.

The threats of which one can avail oneself are a function of one's bargaining strength. For example, to threaten breach of contract effectively, one must have an advantage that allows one to survive without the present cooperative surplus of the contract. One can only, at least effectively, threaten to do something that is in his power to do. An example of this game would be the other example that was used in the beginning of the chapter: the gunman and the mother. In this game the gunman puts forth his threat and a demand that must be complied with. In some games of this form both players put forth threats, which then become the status quo points of the game. They then go on to make demands in a manner similar to those employed in union and management negotiations.

In this game we can suppose that the gunman puts forth the threat of shooting her baby and his demands (strategies) are (a) have sexual relations with me; and (b) give me all your money. Her strategies are reciprocal to (a) and (b), i.e., (c) and (d) respectively. In this game if they fail to agree they return to their status quo points, in her case the threatened action. She, of course, views the status quo as the most horrible catastrophe and he views
it as a mild upset. And suppose that he has no desire for her money and she views with horror the thought of sexual relations with this man. The payoff matrix:

\[
\begin{array}{ccc}
\text{SHE} & \text{a} & \text{b} \\
\text{d} & (2 1/2, -4) & (1 1/2, -10) \\
\text{HE} & b & (1 1/2, -10) & (1, 5)
\end{array}
\]

Again the payoffs of (a,d) and (b,c) are identical because those are the players' expected utilities if there is no agreement—the status quo. The solution is apparent: He will not play (b) and get less than his status quo utility; consequently he will only agree on (a) so she must agree on (c).

In this example, the gunman must set a threat-point in order to have an advantage over her—an advantage great enough to give him the power to get his desire. The gunman could not ensure his desired result had he not employed this sanction. That is, he does not have a threat-advantage over her initial status quo which he could exploit. For the gunman, his optimal threat, to ensure the exchange he wants, is to employ this sanction. On the other hand, with Ms. Impecunious and the lecherous millionaire, the millionaire does not need to resort to an explicit sanction. The millionaire’s bargaining advantage is so great over Ms. Impecunious that he can deprive her—damage her—by not cooperating. He has an advantage great enough to coerce by merely
refusing to trade and he exploits that advantage to coerce her into the deal he wants.

The matrices for both examples illustrate the disutility of the status quo points for the game. Particular notice should be paid to the fact that because the millionaire did not create Ms Impecunious's bargaining disadvantage it does not diminish the disvalue of the consequences of non-compliance to her. Imagine a drowning swimmer who is approached by a boat, the occupant of which says, "I will save you only if you pay me $10,000" (Nozick, 1972). It would not change the swimmer's utility assignments whether the person in the boat created his predicament or merely found him in it. In other words, it would not increase his desire to avoid the evil consequence. It is the advantage of controlling the occurrence of a harm that gives the stronger party the power to coerce.

Some final remarks about this analysis. There is an apparent paradox of our analysis. The following two statements are true: that the coerced choice is the rational choice and that it is a less than fully voluntary choice. This apparent paradox can be dispelled when it is noted that rationality has to do with furthering one's interests within a set of options. Surely the coerced choice is always the rational one, because the person chooses between evils and chooses the option that is most in his interests.
Voluntariness, on the other hand, has to do with the mode and circumstance in which one chooses. We could, of course, associate all rational choice with voluntary choice; but, indeed, that would be an impoverished notion of voluntariness. In the traditional gunman case where the gunman proposes: "Your money or your life" your act would be voluntary, for certainly handing over one's money would be in one's interest. Indeed, it is curious that theorists who maintain that a proposal which "better" one's position in relation to the normal course of events often cite that it was voluntarily acceded to because it was in the agent's interest. But being in one's interest has to do with rationality and does not entail voluntariness.

IV. Conclusion

In this chapter I have argued for an analysis of coercion which focuses on the notion of bargaining power. What I have attempted to show is that the key to understanding coercion in the market relies upon the notion of bargaining advantages. The importance of bargaining advantages rests on the power that the possessor can thereby use over another. Further, introducing the concept of bargaining advantages into the analysis of coercive exchanges sharpens the focus of the relationship between the coercer and the victim. That is, the coercer has certain bargaining advantages and hence power over this person and not necessarily
over other persons in the market. This analysis brings the peculiar characteristics of market interactions into view. I have argued that assuming the legitimacy of the status quo is unjustified since it ignores the power relationships that occur when there are radically disparate bargaining strengths. Further, it ignores those who are worse off in the society since by implication they cannot be coerced. In an imperfectly competitive market bargaining advantages play an essential role in the cooperative deal one secures.

From the analysis of the concepts of bargaining advantages, bargaining power, and taking advantage, I was lead to question what particular bargaining advantages are necessary for the power to coerce. First, I arrived at the bargaining advantages of having the weaker party dependent and that the subject of negotiation (what the stronger party can do) is serious to the victim. Later, I said that the coercer controls the occurrence of some state of affairs that his victim strongly desires to avoid.

It is not, however, sufficient for coercion that the stronger party have these bargaining advantages over his negotiating party; he must take advantage of them. In other words, P must intentionally capitalize on controlling some state of affairs that Q wants to avoid to secure his subsequent gain. Most cases of coercion involve threats, but we argued that some offers can be coercive also. Threats,
however, involved two wrongs: first, putting the victim in the vulnerable position (by setting the threat-point) and then taking advantage of that vulnerability. Whereas with coercive offers the coercer finds his victim in a vulnerable position and takes advantage of his victim’s gross disadvantage.

The following conditions are necessary for coercion. P threatens Q with an evil and thereby creates Q’s vulnerability (Q is now dependent on P to avoid the evil) or P finds Q in a desperate position facing an evil and makes him an offer. P intends to secure compliance through Q’s desire to avoid the evil state of affairs which P can affect. P’s demand is much higher than he could have secured without having Q dependent and facing the evil. Since Q is dependent on P he cannot avoid the evil without complying. Since the consequences of non-compliance involve an evil to Q he cannot be indifferent to P’s proposal. The proposal causes Q to have a motive, the motive is based upon his desire to avoid the consequences of non-compliance. Q does not want to have the motive that P has caused him to have or Q does not want to act upon the motive which P caused him to have.
CHAPTER 6

MARKET COERCION AND CONTRACT LAW

In the previous chapter I developed an account of coercion which can accommodate the specific conditions of market interactions. Coercion was analyzed as an exercise of superior bargaining power, which is a function of the bargaining advantages that one brings to the negotiating table. In this chapter I will apply that analysis to contract law; specifically, to the doctrines of duress and unconscionability. "Duress" like "coercion" has been variously defined. I will consider two prominent accounts and show what underlies those positions. I will examine the institutional framework of contract law and hence the appropriate shape that the legal doctrine of duress should take. I will deal with particular problems that arise in market interactions, for example, business pressure, and investigate what might constitute the appropriate legal responses to them.

I. Development of the Doctrine of Duress

The doctrine of duress as a bar to enforcement has long been part of the law of contracts. Its scope, however, was originally confined to actual or threatened violence to
the person. The common law required a "wrongful" or "unlawful" act for duress. The wrongful or unlawful act consisted of threats of physical harm which would cause fear of death or physical torture in the victim such that it would cause the "constant man" to accede to the demand. The courts of Equity handled cases of less overwhelming pressure in which the use of unfair bargaining power forced the person into the deal. In the 18th century an exception to the duress of persons was introduced, involving duress of goods. In Astley v. Reynolds ((1731) 2 Str. 915, 916; 93 E.R. 939) the plaintiff pawned a plate to the defendant for £20. When the plaintiff went to redeem his plate at the end of three years, the defendant insisted that an additional £10 of interest was also owed. The plaintiff paid this additional interest to redeem his plate and then sued to recover the £10. The court said:

[W]e think ...that this is a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action in trover would not do his business: where the rule volenti non fit injuria is applied, it must be where the party had his freedom of exercising his will, which he had not: we must take it he paid the money relying on his legal remedy to get it back again. (Astley v. Reynolds)

The court thought that this case involved a wrongful threat to pay, which constituted duress.

A later case, Skeate v. Beale ((1841) 11 Ad & E. 983; 113 E. R. 688 (Q.B.)), contradicted the ruling in Astley. In Skeate the court ruled that the ground of duress
of goods, as opposed to duress of persons, does not deprive a person of his free will if he possesses "that ordinary degree of firmness which the law requires all to exert." Today the victim of duress need not be a constant man. The court now applies a subjective test requiring that this person's will be "overborne"; "now it may be enough if the complaining party is actually coerced, whether he be brave or timorous." (Hellenic Lines Ltd. v. Louis Dreyfus Corp. (1969, 372 F.2d 753)). But the requirement of wrongful threat has remained. The definition of duress presented in the Restatement of Contracts is the following:

(a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or

(b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.

The two major components to a finding of duress are (1) the element of wrongful pressure on the part of the defendant and (2) the element of overcoming the plaintiff's will.

Academic commentators, however, disagree about the criteria for the doctrine of duress and its justification. The vast spectrum of interpretations is exemplified by the following commentators. Charles Fried argues for what is often referred to as the "classical" interpretation that
duress relates to the freedom or volition of the actor. Hence the justification for excluding agreements exacted by duress is the fact that the assent was not voluntary. For Fried, however, the primary determinant for duress is that the proposer threatens what he has no legal right to do. The proposal makes the victim "worse off" in terms of his status quo, and the status quo that the proposal alters is defined in terms of the rights of the parties. Fried maintains that duress undermines the freedom of the recipient, and this is the justification for not enforcing such agreements. He does not, however, explain the connection between threatening to do what one has no right to do and the unfreedom of the victim's action. This is especially troubling when in other areas of the law threats to do lawful acts can constitute duress; e.g., threats amounting to criminal blackmail. The requirement of unlawful threat points to the act of the coercer and not its effect on the victim, where, one would think, Fried's attention should be directed.

Atiyah, on the other hand, argues that the tendency to treat duress as something affecting the free will of the actor was unfortunate. He states:

The idea that a man's will is 'overborne' by certain types of pressure and not by others is, both in logic indefensible and in practice impossible of application. The reality is that some forms of pressure are in conformity with the social and economic system and moral ideas of the community and others are not. The line can only be drawn by distin-
guishing between different kinds of pressure, not by attempting to analyze the effect of the pressure on a man's mind." (Atiyah 1979, p. 435)

According to Atiyah, forms of pressure are deemed "legitimate" or "illegitimate" on the basis of community standards. The use of illegitimate forms constitutes duress, and the voluntariness of the victim's behavior is not called into question.

These differences in views about the criteria for duress reflect a deeper dispute over the legitimate purpose of contract law. Depending on what purpose contract law serves, different accounts of the criteria for such doctrines as those of duress and unconscionability are given. The competing theories of the purpose of contract law are the following. First, Fried argues for the classical conception of the contract law resting on the "promise principle"; the purpose of the law is to enforce promises (more accurately, a certain class of promises). The second view, advocated by Atiyah, is that the legitimate purpose of the law of contracts is to enforce principles of liability somewhat analogous to those based on tort and restitution, tailored to the specific problems of exchanges. And a third view is that of Anthony Kronman's, that the rules of contract liability should be based on redistributive ends of the society. Both the Atiyah and Kronman positions share the
view that the rules of contracts should not be neutral to the goals and policies of society.

II. The Harm Principle and the Purpose of Contract Law

Problems arise with the aims of contract law as set forth by Fried, Atiyah, and Kronman if one accepts Mill's harm principle (or some version of it) as generally the only good or relevant reason for the state's limiting the liberty (or withholding legal powers) of individuals or for the state's imposing obligations upon individuals. Advocates of Mill's principle would doubt the legitimacy of imposing duties on individuals in order to force them to behave morally or punish them for their immorality. When the end or goal of contract law is enforcing promises then it is enforcing morality, and as such that purpose is inconsistent with the harm principle. (It should be noted that enforcing promises can be seen as a means to the end of preventing harm, thus it is then conceptualized in terms of protecting rights. We shall consider the question of protecting against harms momentarily.) Using contract law as a ground for social policy (including the redistributive goals of society) conflicts with the general liberal idea that individuals should be guaranteed an area in which they can operate where they do not have to answer to the state or other individuals. The basic idea is that "if one individual is entitled to do within the confines of the tort law what
he please with what he owns, then two individuals who operate with those same constraints should have the same right with respect to their mutual affairs against the rest of the world" (Epstein 1979, p.93).

The purpose of contract law which is consistent with Mill's harm principle is that of protecting the practice of assuming voluntary obligations from harm (e.g., protecting abuses to the practice which might cheapen the currency of obligations) and harms resulting from its abuse (compensating those who relied upon obligations Raz 1982, p.93). We include more than just promises, since the same justification for protecting promises applies to protecting a wider class of voluntary obligations. The inclusion of more than promises does not diverge from the common practice in contract law since, although the conventional wisdom of contract law is that a contract is an exchange of promises, in practice the law encompasses much more than this. The purpose of protecting the practice of assuming voluntary obligations is consistent with the harm principle when that principle is not so narrowly construed as to be applicable to prevent harm to others only. The harm principle is most plausible when it includes both harm to specific individuals and harms to public institutions. Feinberg calls this the "The Public Harm Principle" and defines it to include: "impairment of institutional practices that are in the pub-
lic interest" (Feinberg 1973, p.33). There are many public institutions that all citizens have an interest in preserving and which the law can legitimately protect from harm. Although no specific individual can claim to be harmed by some particular abuse, as is exemplified by "free rider" problems (e.g., evading jury duty, taxes etc.), everyone has an interest in protecting that institution from erosion and debasement.

The law of contracts protects one such social practice in which all citizens have a stake. Individuals value making their own arrangements, and establishing and pursuing their own goals with whomsoever they please. The practice of assuming obligations would not, however, be as effective and as generally available without some mechanism to ensure its reliability; specifically, by making sure those who have relied and are harmed are compensated for the harm. The market based economy has grown up precisely because of the reliability of the practice. Had it not been for the legal support, only those who could enforce their own contracts would risk agreement with total strangers. This would exclude many individuals without the means of private enforcement from venturing too far afield. With contract law supporting and protecting the practice everyone can receive the benefits from cooperation with others.
Since the predominant purpose of contract law is to protect and support the existing moral practice of assuming obligations, the validity of contracts should reflect moral conceptions concerning the validity of obligations. The doctrines which lay down the ground-rules for valid contract formation including such doctrines as mistake, fraud, duress, unconscionability, and other doctrines based on public policy should be based on common moral views. Moral standards for determining the validity of obligations require more than statements that are, for example, promissory on their face. More is required than that a certain procedure was adhered to (e.g., the person uttered the correct words). Morally we require that it was done in a certain way, namely, voluntarily. The fact that a contract was voluntarily made explains why a person should be held to his agreement. What disqualifies many situations flows logically from the moral definition of assuming an obligation: the defect is that it was not voluntarily made.

Contract is intimately tied to individual autonomy, based on the sense that people should be free to order their own affairs by agreement and should abide by them once made. It is because the promisor has voluntarily bound himself by his agreement that the commitment should be given the force of law, not through enforcing the voluntary obligation, but by compensating individuals for harms. The idea is that
voluntary obligations themselves are not necessarily enforced but rather that individuals are compensated if they are harmed by relying on those voluntary obligations. The practices and procedures which specify the ground-rules for valid contract formation must find their justification in that they prevent contracts from being secured involuntarily (the criteria for which come from moral views) and prevent other abuses to the practice; e.g., there are some situations where even though a person did not assume an obligation, he should be held liable for certain harms. (For example, if he negligently and recklessly created the impression that he was assuming an obligation and another relied to his detriment on the "alleged" obligation, then the reckless person should be held liable for that harm. This is a way to prevent abuse to the practice and protect individuals from harm. The doctrine of estoppel is the applicable one; it stops persons from denying that they have promised.) It follows that the criteria for duress must establish the involuntariness of the victim's consent and as a consequent the contract is not deserving of respect and enforcement of the law.

In summary, given that the underlying purpose of contract law is to protect against harms to the practice of assuming voluntary obligations and to rectify harms resulting from its abuse, the factors that make up the
criteria of duress must be consistent with our moral conceptions of the conditions under which one party to a negotiation secures consent from the other party involuntarily. Objective tests for duress are not morally acceptable because of the variety of different individual situations and their relationships with others, the differences in needs and wants of individuals, and the differences in individuals' responses to pressure put upon them. Nevertheless some general objective standards enter into the determination, e.g., that in business contexts our expectations are different from our expectations in consumer contexts.

Central to the criteria of duress are the means by which one agent coerces the will of another and which, therefore, establish the involuntariness of the victim's consent. I have previously argued that coercion can be analyzed in terms of advantage-taking; we will consider this analysis in relation to contract law.

III. Advantage-taking and Coercion

In the previous chapter I argued that we can analyze all bargaining relationships in terms of the bargaining power of the agents involved in a negotiation. Bargaining power plays a central role in the cooperative deal one can negotiate; indeed, what one can rationally expect to secure from a negotiation is determined by it. The bargaining power
that an agent has is a function of the bargaining advantages that he has over his negotiating party. The terms by which any two agents will cooperate (e.g., exchange their goods), can be explained by the bargaining advantages of the agents. Further, I distinguished between having an advantage over another and taking advantage. For example, just having the only water hole in the desert gives one an advantage from which the well owner can benefit. If the well owner takes advantage of his monopolistic position he can secure even more benefits from cooperation. Taking advantage involves the intentional capitalization on one's advantages to secure as much as possible from the exchange.

The conditions that determine one's bargaining advantages are the background rules of agreement formation; those rules can restrain or liberate that power. These conditions are the practices and procedures embodied in contract law that specify the ground-rules for negotiating agreements in particular circumstances. For instance, the rule that there is a "cooling off" period for sales from door-to-door salesmen restrains the advantages of those salesmen who often rely upon high pressure tactics and misrepresentation to secure a sale. More generally, the rule prohibiting fraud restrains the advantage that one would have by deceiving another. The rule prohibiting fraud, like the rule against coercion, restricts advantages in order to
prevent individuals from securing involuntary agreements from others. Our question of the criteria for duress can be rephrased to ask: What forms of advantage taking should be restrained by the background rules of contract formation on the grounds that they enable the stronger party to coerce the weaker? Along the way we need to question whether already existing patterns of bargaining advantages when taken advantage of can give the stronger party the power to coerce the weaker party.

I have argued that the key to understanding coercion in exchange is that the coerker has certain bargaining advantages over the person he is negotiating with and he takes advantage of those bargaining advantages. It is abuses of bargaining power that result in aberrations in the contracting process. Our question is, when are bargaining advantages abused? Consider the following answer for duress. The factors to be considered in an assessment of duress are the following. First, that which makes it possible for one agent to coerce another is the initial inequality of bargaining positions of the agents. Courts have recognized inequality of bargaining power as a primary indicator for consideration of the defense of duress. For example, in *Hellenic Lines, Ltd. v Louis Dreyfus Corp.* (2d Cir., 1969, 372 F.2d 753), Dreyfus, a multimillion dollar corporation, claimed duress on a payment made to Hellenic. The court
rejected the claim; it stated: "because the facts suggest that Dreyfus, a large company, was substantially in an equal bargaining position with petitioner, it ill behooves Dreyfus to argue that it was the victim of serious economic duress in the classic legal sense."

The second factor to be considered in an assessment of duress are the bargaining advantages that the stronger party has over the weaker. The necessary bargaining advantages are that of having his victim dependent on him for something that his victim strongly desires to avoid (the coercer controls the occurrence of a harm). This gives the coercer sufficient power to coerce his victim. The third factor is the advantage-taking of the stronger party which determines the three important elements of coercion: the means, the intent, and the effect on the will of the victim.

For the advantage taking to be coercive the stronger party must control some harm. P coerces Q into his agreement if P takes advantage of his superior bargaining position by proposing to deprive Q of the state of affairs Q values if Q does not comply with P's terms. For example, in Link v Link the husband, after his wife had confessed that she had committed adultery, had procured the transfer of stock by threatening to institute legal proceedings against her to obtain sole custody of their children. The information which the husband had which would permit him to bring the custody
suit constituted his bargaining advantages over his wife. She was dependent on him for something that was of great value to her, i.e., retaining custody of their children. His threat forced her to face two undesirable alternatives: the demand and the deprivation. Since she was dependent on him not to bring the custody suit, she was in a position where she could not both not comply with the demand (to turn over the stock) and avoid the deprivation (the custody suit which would result in her losing her children).

IV. Legitimate Advantages and Duress

Before considering each of the factors that go into a determination of duress I want to investigate a major criticism of the claim that coercion can result from taking advantage of one's legitimate advantages (For example, the husband in Link v Link had the knowledge of his wife's adulterous relationship; this gave him an advantage over her. The advantage is legitimate in the sense that he would commit no crime or tort by exposing her, and he could even use that advantage to secure agreements: "I'll tell the world about your adultery unless you promise to stop such relationships". Whereas using the advantage of his superior strength is illegitimate for securing any agreement: "I'll beat you up unless you cook dinner".) Under the analysis I have presented of coercion the advantages that the stronger party has over the weaker are often legitimate advantages.
(the advantage is legitimate to have and even benefit from having). Consider, for example, a situational monopoly where the stronger party has abnormal market power in respect to his contracting party but not in respect to other parties in the market. A situational monopoly is illustrated by the example of a well owner in the desert and a man who, after wandering in that desert, is dying of thirst. Even though there are other sellers of water, the dying man can walk no farther to attempt to get a better price. The well owner proposes that for $10,000 the dying man can have a glass of water. Having the monopoly, we suppose, is not illegitimate. It is only when the well owner exploits his bargaining advantages over the dying man that we object to the resulting bargaining power. The exchange between the well owner and the dying man is obviously substantively unfair, but this is not the grounds upon which I want to object to it. Rather, this form of advantage taking vitiates consent since the dying man had death as his only alternative to complying. The well owner did not create the circumstances which made his victim vulnerable and which made his proposal effective, but he intentionally took advantage of the vulnerability to ensure his subsequent gain.

The well owner case which we have envisaged is a case of a coercive offer. Traditionally, the idea of coercive offers has been suspect, making this example a bad one
to test our intuitions about whether in some cases taking advantage of legitimate advantages is unjustified. Consider another example which I introduced in the previous chapter. In this example, Mr. Employee has purchased stocks in the company he works for. These stocks were subject to an option retained by the company to repurchase the stocks if the employment of Mr. Employee was terminated for any reason. Suppose further that there is high unemployment and thus Mr. Employee cannot afford to lose his job. Mr. Employee is approached by a company official who says to him: "Either you sell me your stocks for $x$ or I will fire you". Mr. Employee does not want to sell his stocks as they have been going up continually. In this case the company official's sanction was an action which she had a legal right to do. Consequently, the advantage which she has over Mr. Employee is a legitimate one. But the undoubted effect of the threat on Mr. Employee was to force him to agree to the contract. The argument that I want to defend is that it does not follow from the fact that one has a legal right to do something (a legitimate advantage) that one can use it in all circumstances (can take advantage of it in all circumstances).

The claim that I want to defend, that one may not take advantage of all of one's legitimate advantages, diverges from the standard interpretation of the kinds of
proposals that constitute duress. Recall from the Restatement on Duress that the two major components in finding duress are the element of wrongful pressure on the part of the defendant, and the element of overcoming the plaintiff's will. The general formula for the element of "wrongful pressure" has been that: "It is never duress to threaten to do what one has a legal right to do". (Fidelity and Casualty Co. of N.Y. v United States (1974) 490 F. 2d 960, at 966 (Ct. Cl.).) The requirement that the threat involve a legal wrongdoing (where this is taken to mean criminal or tortious act) does not, I think, go far enough. I want to argue that when one has a legitimate advantage (i.e., one has a legal right over it) it does not follow that one can take advantage of it in all circumstances (one obvious example is blackmail).

Most of the resistance to the argument that I want to support comes from the classic laissez faire market advocates who reject that the use of bargaining power can result in aberrations in the contracting process. They argue that the "outcome of economic activity within the common law framework of contract and tort rules mechanically applied would be a natural allocation of resources and distribution of income" (Kennedy 1979, p.103). The laissez faire advocates argue that the distribution is natural since it was "a reflection of the real bargaining power" of the parties
involved, within the supply and demand conditions of the market. Further, they claim that the substantive content of the rules of common law are an embodiment of the idea of freedom, and therefore as long as everyone acted within his legal rights no procedural aberrations would occur. The bargaining power patterns of the actors in the market reflect the natural freedom of the actors.

What follows, on the laissez faire view, is that one could not coerce another by taking advantage of the bargaining power that was permitted within the common law framework. Only threatening a criminal or tortious action against one's victim are sufficient to coerce. The traditional interpretation of the doctrine of "duress" reflected this naturalism in requiring that duress be found only when what one threatens is "wrongful", and wrongful is defined in terms of the unlawfulness of the action threatened (i.e., acts that amount to a crime or a tort). The threat then makes the victim worse off in terms of his status quo and the status quo is defined in terms of his legal rights. Yet the criterion that to threaten a person sufficiently to take away his "free agency" one must threaten something that is unlawful (a crime or a tort) assumes that individuals start out equally and hence the
same sanctions will affect them all in the same way. It follows that only threats to do crimes or torts could have the effect of rendering an agent's action unfree.

The laissez faire advocates object to courts interfering and refusing to enforce contracts where there is a threat to do what one has a legal right to do, e.g., the company official threatening to fire Mr. Employee unless he sells his stocks to her. In what follows I will attempt to present the objections that the laissez faire advocates put forth against judicial intervention into perceived abuses of bargaining power (e.g., if the court found that the company official secured the stock from Mr. Employee under duress).

Consider Robert Nozick's arguments against objections to certain uses of bargaining power. Nozick, in his discussion of voluntary exchange, challenges an objection to an exchange that involves gross disparity in bargaining power.

The objection maintains that a situation in which workers

1. There may be a confusion here since I continually refer to "unlawful" acts and yet what we are attempting to question is what ought to be lawful. Let me dispel any confusion by saying that when I refer to "unlawful" and "lawful" I am using them in the sense of which one is legally entitled to do or not to do an action, as circumscribed by the rules of criminal law and tort law. This is the sense in which it is used when it is said that a person must threaten what is unlawful. What I am questioning is whether all actions, or threats to do such actions, which are "lawful" (actions which are not crimes or torts) ought to be lawful in all circumstances.
accept employment at very low wages is not a voluntary agreement, since the alternatives faced by the workers may be so bad (their only alternative is starvation) that they have no choice but to accept the terms offered them.

Nozick's response to the objection is that whether limitations on one's alternatives undermine the voluntariness of one's action depends on what the limitations are. "Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends upon whether these others had the right to act as they did" (Nozick 1974, p.262). Whereas acts of nature can put limits on one's alternatives, one's action is not thereby involuntary. Nozick's criterion is that as long as an agent acts within his rights the resulting exchange is voluntary. Coercion results only when the limitations on the victim's alternatives are brought about by the coercer's not acting within his rights.

Nozick's response is not satisfactory once we realize that what is really at issue in the objection to the wage negotiation is whether it is justified to allow wages (or other contracts) to be determined by bargaining under the conditions presented in the example. Imagine that the employer has a monopoly on employment, the workers have no other possibilities for support, and unions are nonexistent. The question is not the justification of the employer having
the advantage over the workers, but whether in the conditions envisaged the employer can take advantage of the workers' great need and dependence on him. Could any contract he offers them (even the most grossly exploitative one) be voluntarily agreed to? Nozick demands justification for individual human actions, justification that is supplied by citing the rights of the agents involved. But his search for justification does not go far enough. What I am questioning is the justification for the institution that makes it possible for agents to do what they do. My attack on the established bargaining power patterns challenges the assignment of rights which determine the bargaining power of the employer and workers. This challenge rests not on the question of whether the employer has a right to employ others and benefit from his advantage of owning the factory. But rather whether his right extends to the point where he may take advantage of that right in all situations. To this question I would respond that he does not. Because the employer has the advantage of owning the factory and can benefit from that advantage, it does not follow that he can take advantage of that advantage in all situations.

Even Nozick would agree that because one has a legitimate bargaining advantage it does not follow that he can exploit that advantage in any way he wants. P may have a legitimate advantage of superior intelligence over those he
negotiates with. He is not, however, permitted to employ that advantage to convince ignorant Q to believe a lie. Presumably, the Nozickian response to why that form of advantage taking is illegitimate is that P does not act within his rights. But surely we could question why this form of advantage taking is not within P's rights. The appropriate answer to this question would make reference to the circumstances being incompatible with the negotiating party acting voluntarily.

The objections to courts' intervening in contracts and barring enforcement on the basis of abuses of bargaining power are unjustified. The central problem with these objections is that they assume that because one has a legitimate advantage one has a legal right to use that advantage in any and all circumstances. The justification for using those advantages in a particular circumstance, it is argued, is that it is within one's rights. But this response was shown to be inadequate; the justification for assigning rights in a particular way is that that assignment of rights does not allow agents to have sufficient power to secure agreements involuntarily. I may have a legal right to fire my employees but it does not follow that I may use that advantage to secure sexual favors from them. The basis for the judgment that a form of advantage taking is not permissible is what I will take up in the next section. The
claim that one cannot take advantage of one's legitimate advantage in all circumstances facilitates our task of discovering which forms of advantage taking are impermissible since we now know that we should not confine ourselves to threats of crimes and torts.

V. The Elements of Duress

In this section I will shape a workable set of criteria for duress which is consistent with our moral views about the conditions under which one is coerced. In the following section I will consider the doctrine of unconscionability and how our conception of coercive offers can be accounted for under that doctrine. Duress includes the idea of subjugating another to do what he does not want to do, and the means of doing this is through the use of threats which make the victim fear he will suffer some even greater harm if he does not comply. Coercive offers share with threats the intention to coerce and the effect on the victim, but they differ at the crucial point that the victim of a threat is put in the vulnerable position by the coercer.

I will utilize the analysis of coercion to shape our analysis of duress. The factors that are necessary for duress, then, are the following. 1) The initial inequality of bargaining positions of the parties to a negotiation. 2)
The advantages which the stronger party has over the weaker which gives him the power to coerce. These advantages are tested against the availability of adequate alternatives for the weaker party. If there are none then the victim is dependent on the stronger. And the stronger party's advantages are measured in terms of the severity of the consequences to the weaker party. 3) The advantage taking of the stronger party in the form of a threat establishes the means by which the stronger party coerces his victim and his intention to coerce. 4) The actual effect of the threat on the victim's will is established by his dependence and the severity of the consequences to him. Each of these factors is necessary for a finding of duress. In what follows I argue how each factor contributes to an assessment of duress.

The doctrine of the inequality of bargaining power as a bar to enforcement of contracts has come under fire because of a conceptual confusion. I am not arguing that courts should act as roving police, rectifying substantive inequalities that result from disparity of bargaining power. A major assumption of contract law is that the process of voluntary exchange imparts justification on the redistributive outcomes of agreements. Judicial intervention which rectifies distributional inequalities would contradict that principle. Rather, I am arguing that since what one can
rationally expect to secure from a negotiation is a function of one's bargaining advantages, and one can secure even more benefits by taking advantage of those bargaining advantages, questions need to be raised about the justification of the advantages which can determine outcomes.

There are two general categories of factors that contribute to the inequality of bargaining power and the resulting bargaining advantages of the stronger party. The first category contains personal factors of the weaker party that contribute to the disparity of bargaining power. For example, his limited knowledge of available options, personal circumstances that prevent him from acquiring alternative financing, his pressing need, his inability to speak the language, and so on are all factors about the individual which put him at a disadvantage. A word of caution about these personal factors that contribute to a party's weak bargaining position: Because an individual has some particular weakness this does not mean that his overall bargaining power is weak. But a particular weakness, e.g., his pressing need for some good, might be sufficient to gain a bargaining advantage strong enough to coerce him. For example, imagine that the United States is in a war and contracts with a ship builder to build ships for the war effort, and further that this company is the only company that can build the required ships. Now imagine that after
the builder had partly completed the contract he says that he will continue work only if the United States agrees to pay an exorbitant price for the completion of the ships. The United States does not generally have a weak bargaining position but, because of its pressing need to get the ships built in a timely manner, it does have a weak bargaining position in relation to this deal. The second category of factors which contribute to the bargaining advantages of the stronger party are factors in the market itself; for example, the stronger party has a market-wide monopoly, or there is collusion of all suppliers in the market.

The advantages that give one the power to coerce are those which have the weaker party dependent on the stronger to avoid some harm. The dependency of the weaker party is tested by the availability of adequate alternatives open to the weaker party. For example, in *Austin Instruments v Loral Corp.* ((1971) 29 N.Y. 2d 124, 272 N.E. 2d 533) the defendant was awarded a contract with the Navy for the production of radar sets. The plaintiff was subcontracted to supply the defendant with components for the sets. After partial performance of the contract the plaintiff threatened to stop supplying unless he got more money. The defendant was compelled to accede to the plaintiff's demand because of his commitments to the Navy. The defendant was unable, within the short period of time available, to obtain parts
elsewhere. The contract with the Navy contained substantial liquidated damages clauses and there was the possibility of cancellation on default by the contractor. Further, most of the defendant's business was with the government and he believed that failure to perform would jeopardize future contracts with the government. The court ruled that the defendant could recover the excess payments made as having been acceded to under duress. The court said:

[A] mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that the threatened party could no obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate. (Austin Instruments v Loral Corp.)

This case illustrates that finding that a victim was dependent does not mean that the victim had no alternatives. Indeed in this case he had alternatives; he could have subcontracted with someone else and sued for breach of contract. Nevertheless, these were not viable alternatives since he was under a time constraint facing heavy financial penalty if he did not perform in time and possibly financial ruin since he would not secure future contracts from his major buyer. Hence the appropriate test is the unavailability of adequate alternatives.

The second advantage necessary for the power to coerce is the ability to affect the occurrence of a harm to the weaker party. The harm must be judged against the
victim's own subjective preferences of the relative undesirability of the consequences that the coercer has in his power to affect. The advantages of dependence and causing harm are necessarily conjoined to create a coercive effect since, if the weaker party had readily available adequate options to avoid that harm, the advantage would be ineffective. On the other hand, if the weaker party is dependent but the consequences are not severe the weaker party can be indifferent to the threat.

Most important in the assessment of duress is whether the stronger party took advantage of controlling the occurrence of a harm. P must make a threat to Q, but since not all threats are coercive the fact that a threat was made is not sufficient for coercion. The threat must capitalize on the bargaining advantages of controlling the occurrence of a harm. Since P is capitalizing on the advantages that he has over Q the demand will be undesirable to Q. P intends to secure the demand because of the harm he can cause Q. Thus both alternatives are undesirable to Q since both make Q worse off in relation to his status quo. Q would be better off apart from the proposal. But because Q is dependent on P he cannot go elsewhere to avoid the consequences of non-compliance. And because the consequences involve a harm to Q he cannot be indifferent to the proposal. P has ensured that Q can only avoid the harm by complying. Without the
bargaining advantages of controlling the occurrence of a harm threats are ineffective.

By taking advantage of Q, P is using his controlling position to secure as much as possible from Q given the advantages that he has over Q. Suppose that P is an ice dealer and Q is a beer maker; they form a contract that P will sell Q ice for $2 a ton in May. P assures Q in the spring that he will be able to supply Q with the ice he needs for his brewery in May so that Q need not secure other arrangements with other ice dealers. In May, P demands $5 a ton for the ice. Q now has nowhere else to purchase ice (since all of the ice has been sold), and his beer will spoil in two days without ice. Q could sue for breach of contract and get "all legally attributable damages" to the wrong. But there is a great difference between legally attributable damages and actual damages, since in this case Q would have no business left. Suing for breach is not a viable alternative for P, leaving him with no choice but to comply with P's demand. On the other hand, if Q does have another supplier of ice in the wings, then P's proposal to sell Q the ice for $5 a ton is a threat but an ineffective one since Q is not dependent on P.

In determining whether advantage taking occurred, the courts must consider that having control of some good or service that people need does not entail that every proposal
that party makes is a threat. P may have control over some good or service that Q needs, but if P proposes to give it to Q at a reasonable price P cannot be said to be taking advantage of Q, nor can P be said to be making a threat. P must intend to secure his deal on the basis of the evil consequences of noncompliance. P is aware that he could only secure this deal with his victim facing that harm; so that Q is dependent on P to prevent his situation from becoming worse.

Confusion arises about coercion when we recognize situations which have coercive elements but are not cases of coercion proper. Suppose the monopolistic power company charges a reasonable rate (determined by the public utility corporation) for its power. Everybody in the community freely accepts the terms of the agreement. But Q has lost his job and is desperately poor. Alas, winter is coming on and his family will freeze without the electric heater. In this situation, although P does not coerce Q (he does not take advantage of Q), the proposal has the effect on Q of being coercive. For many individuals their bargaining power is so grossly weak that offers for basic needs have a coercive effect on them. Nevertheless, P could not be blamed for coercing them.

The means of advantage taking for duress is through the use of threats. But since not all threats are coercive
we need to question what is sufficient for a threat to be coercive? We rejected the criterion that a threat must involve an unlawful act (in the sense of an act amounting to a crime or a tort), since threats to do lawful acts in a given circumstance have the effect on the victim of coercion. In the *Restatement of Contracts* it is stated that the threat must be "wrongful". The notion of "wrongful" is elastic as is illustrated by one definition of it: "a threat must be wrongful in the sense that it should amount to a crime such as blackmail or extortion, a tort such as inducement to breach a contract or intimidation, or any other wrongful act, such as threatened breach of contract, breach of trust, breach of a statutory duty or even a threat to violate the standards of decent conduct in the community" (Ogilvie 1981, 314). Should the courts determine whether a threat is coercive on the basis of the criterion of "wrongful"? There are a number of problems with that criterion. First, once criminal and tortious acts are excluded, the vagueness of the concept of wrongfulness deprives it of practical utility and gives the courts little assistance in determining what is wrongful. Second, the criterion of "wrongful" puts too much focus on the act of the coercer or the moral assessment of the coercer’s action rather than the effect of the action on the will of the victim.
It would seem that any threat which exploits the advantages of controlling the occurrence of a harm is "wrongful" so it is not clear how the notion of "wrongful can help us. It might, however, sharpen our focus in one way. In the previous chapter we discussed two cases in which the sanction to fire an employee was used. In the first case lazy, sloppy Q was threatened by his employer: "Either your work improves or you are fired". In the second case Mr. Employee had purchased stock in the company and was threatened by a company official: "Either you sell me your stocks for x or I'll fire you". The first threat seems perfectly appropriate, and I would say noncoercive, the sanction is expected in relation to the demand. In the second case the sanction is not expected in relation to the demand and it does seem coercive. We could say that the second threat is "wrongful", i.e., not an expected or appropriate threat. The determination of wrongfulness in these cases is judged against community standards of the appropriateness of the sanction being used to secure the demand. Pressure in the form of a threat is perfectly justifiable when the sanction is expected, i.e., if one does not fulfill the content of the demand as determined by a specific institutional setting. In conclusion, we might say that the condition of the threat being "wrongful" is necessary but not sufficient for duress.
The final consideration is the actual effect of the threat on the victim's will. This is established by two elements. They are: 1) the availability of adequate alternatives as a factor to establish the victim's real position in relation to the threat; and 2) the severity of the consequences to the victim (by a subjective test). The victim of the threat is faced with two alternatives, both undesirable, and both making him worse off in relation to his status quo. Since he has no adequate alternatives and the consequences of noncompliance are severe he is in a position with one eligible option, viz., to comply with the demand. Avoiding the harmful consequences which would occur if he does not comply causes the victim to have a motive to comply. And it is a motive which he does not want to have, i.e., a motive to avoid the evil consequences of non-compliance.

We said that coercion involves submitting to the lesser of two evils, and the fact that the victim deliberately chooses the lesser of two evils does not preclude that he acted under duress. But the fact that an agent submitted to the lesser of two evils is not sufficient to show that he was coerced. The bargaining position of the victim and his relation to the threat comes into consideration again when we consider the distinction between pressure which constitutes duress and what is called "legitimate
business pressure" (Ogilvie, 1981 pp. 297 ff). Courts recognized that business people often wish to change the terms of their agreements to reflect changes in circumstances and can put pressure on each other in the form of threats to make such changes. We decide whether pressure is legitimate business pressure by the relative bargaining positions of the agents within the particular commercial setting. Legitimate business pressure is indicted by such factors as: the person sought legal advice on the alternatives, the person was not facing insolvency or other severe financial problems, and his business reputation was not at stake. Generally, though he chose the lesser of two evils his bargaining position was not impaired, and this can be indicated by the consequences not having been a hardship, since possibly he had other alternatives open to him. The bargaining advantages that are involved determine two things: the effect on the victim and whether the threat is one which results in duress or business pressure.

The distinction between commercial and consumer contracts is a good one for the determination of the appropriate standards which courts should use in determining duress. Certain forms of advantage taking between business people are legitimate since there is an assumption of a certain equality of bargaining power. Large companies do not normally find themselves with personal disadvantages. (There
are exceptions, however, e.g., *United States v Bethlehem Steel Corporation*. We can assume certain things about companies that are not always justified in consumer settings, for example, corporations have a wider range of alternatives open to them and ways of finding out about alternatives. In *Pao On v Lau Yiu* ((1980) A.C. 614 (P. C.--from Hong Kong)) the plaintiff threatened to breach the original contract unless the defendant gave a guarantee to sell stocks to the plaintiff at a certain price and time. The defendant claimed he acted under duress when he gave the guarantee. At the time when the plaintiff threatened breach on the original contract the defendant knew that he could get specific performance on the original agreement. The defendant gave the guarantee on the calculated risk that the market would not slump; the market did slump and the defendant lost. The defendant need not have agreed to the new terms. He had other legal remedies and alternatives available, but he gambled and lost. This was business pressure and not duress.

Nevertheless, the elements of duress can arise in commercial settings; for example, where threatened breach of contract may put the weaker party in a position in which his only alternative is the destruction of his business. There is a presumption, however, that business people do not labor under the same handicaps that consumers do. For consumers the access to the information about the alternatives is not
easily obtained, and it is often too costly to pursue. Hence, the standards used for assessing the adequate alternatives of an agent must be tailored to these and other relevant facts which distinguish commercial and consumer transactions.

I have argued that the conditions for duress should reflect moral views on coercion. Objective standards are not acceptable since they assume that all individuals start out from the same bargaining position and thus that the same threats will affect everyone the same. One version of an objective standard is expounded by the laissez faire market advocates. They hold that the only threats sufficient for coercion are those in which the threatener threatens to do what he has no legal right to do. What they mean by legal rights are those circumscribed by the criminal law and the law of torts. This position claims, without justification, that these are the only threats that can coerce. If asked why only threats to commit criminal or tortious acts are coercive the laissez faire advocate will merely reaffirm the rights in question. Threats to do actions that do not amount to crimes or torts can, I argued, also have coercive effects on their victim and are intended for that purpose.

Further, I set out the analysis of coercion that I defended in the previous chapter and argued for its application in cases of duress. That analysis included the ideas
that there is an initial inequality of bargaining power. That the stronger party has the weaker dependent on him to avoid some harm; moreover that the stronger party take advantage of his position of superiority through employing a wrongful threat. The stronger party intends that the evil consequences of noncompliance will force his victim to comply. The effect on the victim is to force him to choose the lesser of the two evils, namely, to comply, in order to avoid the evil of noncompliance. The real effect on the victim is tested by the unavailability of adequate alternatives and the severity of the consequences to him (subjective test). The coercer caused him to have a motive that he does not want to have, namely, the motive the end of which is to avoid the evil consequences of compliance. The claim of duress can be defeated on any one of these conditions. One prime example is that of pressure between business people where one party must choose between evils but some or all the other conditions are missing.

VI. The Doctrine of Unconscionability

Coercive proposals in the form of threats have found a place under the doctrine of duress but what we called "coercive offers" differ in relevant ways from threats, making coercive offers inappropriately analyzed under the doctrine of duress. The victim of a coercive offer is not
put in a vulnerable position, but rather the coercer finds his victim there and uses that vulnerability for his own gain. The problem is that the proposal does make the victim "better off" in relation to his status quo. But it should be remembered that the victim of a coercive offer is better off in the sense that any contract, even the most grossly exploitative one, would be better than no contract at all. We cannot ignore these cases where social circumstances in general, and the more or less impersonal operation of economic forces, not the actions of determinate individuals, render a person's distress so great and his bargaining power so weak that all he can do is be taken advantage of by stronger parties in the market.

The recognition of the gross disparity of bargaining power and the victimization of the weaker parties hidden under the cover of freedom of contract led to the development and articulation of the doctrine of unconscionability. A contract will be unconscionable, generally, if there is a gross inequality of bargaining power, inequality to the degree that the powerful party is able to force the weaker

1. It should be noted that courts of Equity, which we no longer have, in the eighteenth and nineteenth century set aside contracts which they thought were "harsh" and "oppressive" and they refused to allow one party to take unfair advantage of the power he had over the other as a result of the latter's weakness or necessity. See: Chesterfield v Janssen ((1750) 2 Ves. Sen. 125; 28 E.R. 82) and Fry v Lane ((1880) 40 Ch. D. 312).
into a contract of the stronger party's choosing, and the contract is unreasonably favorable to the stronger party. In other words, the stronger party must take advantage of his position of superiority. The kind of pressure involved in unconscionable contracts is not the same as the pressure involved in cases of duress. In cases of duress the victim is attempting to avoid the harm that the threatener will cause if he does not comply. In unconscionable contracts the pressure is caused by the weaker party's poverty or need being taken advantage of by the other party, who occupies a position of superiority; in other words, pressure resulting from an inequality in their bargaining positions. In the doctrine of unconscionability we can account for the non-bindingness of contracts which result from coercive offers.

The doctrine of unconscionability is justified in that it puts constraints on the bargaining advantages under which valid contracts can be formed when those forms of advantages, when capitalized upon, are likely to vitiate consent on the grounds of coercion, fraud, undue influence, and/or incompetence. The doctrine of unconscionability
serves the same general purpose as the Statute of Frauds in preventing fraud, by putting constraints upon the process by which valid contracts can be formed. The Statute of Frauds prevents agents from taking advantage of the fact that there was no written agreement by which to verify the claims later made. Even though some valid agreements will be unenforceable the idea is that generally this rule will constrain an advantage that as a matter of probabilities will lead to illegitimate contracts. The doctrine of unconscionability militates against certain advantages that are likely to vitiate consent on some traditional ground (duress, fraud, etc.) without requiring specific proof of those grounds.

In what follows we will consider more closely the conditions for the unconscionability. They are often divided into two categories: procedural and substantive unconscionability. Substantive unconscionability refers to the "unfair terms of the contract and the unfair results arising from the transaction" (Deutch, 1977, p. 121). Substantive

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1. The Statute of Frauds requires that most contracts must be in writing. Almost every state has statutes defining the kinds of contracts that must be in writing to be enforceable. It is important to note that the writing doesn't make the agreement enforceable; it keeps it from being unenforceable. The primary purpose of the statute is to prevent fraud, i.e., it serves an evidentiary function, thereby lessening the danger of perjured testimony.
unconscionability differs from procedural unconscionability in that there is not an exhaustive list of elements, terms, or types of contracts that can be specified as unconscionable. That "harsh" terms were used or oppressive contracts made makes up the criteria for the determination of substantive unconscionability. An example of harsh terms are what are called "add-on" clauses. Imagine the following case: A, a retail furniture store, sells furniture on installment credit to B, retaining a security interest. As A knows, B is a woman of limited education, separated from her husband, maintaining herself and seven children by means of $218 per month from public assistance. After 13 purchases over a period of five years for a total of $1,200, B owes A $164. B then buys a stereo set for $514. Each contract contains a paragraph of some 800 words in extremely fine print, in the middle of which are the words "all payments shall be credited pro rata on all outstanding accounts." The effect of this language is to keep a balance due on each item until all are paid for. On B's default, A sues for possession of all the items sold. These terms are "unreasonable favorable to the other party". Corbin suggests, the the test for the unfairness of the terms is whether the terms are "so extreme as to appear unconscionable according to the mores and business practice of the time and place."
An example of an oppressive contract would be one in which the stronger party's interests are protected from various contingencies and no such protection is given the weaker party, as for example, in a lease agreement where the landlord exonerates himself from all liability even due to his own negligence. Excessive profits or grossly unequal gain for the stronger party is also an indication of substantive unconscionability.

Terms are harsh or contracts oppressive based upon the particular setting. This is specifically relevant in contracts between business people where particular practices are known and accepted by the individuals within the commercial setting. The courts need to look at the risks involved by the contracting parties and whether, among other things, this allocation of risks actually facilitates contracts in the commercial setting. Terms that are found to be harsh in one commercial setting are found not so in another.

For a finding of unconscionability both substantive and procedural elements must be found. However, when there are harsh terms or the contract is oppressive these factors militate a finding of procedural unconscionability. Procedural unconscionability refers to "unfairness involved in the contracting and unfair circumstances of bargaining" (Deutch, 1977, p.121). Any of the following elements is sufficient for procedural unconscionability. The first
element is "lack of meaningful choice". The courts have identified the conditions of absence of meaningful choice in cases where the weaker party had little bargaining power (e.g., lack of alternatives, little chance of obtaining information about the contract), lack of reasonable opportunity to understand the contract terms (e.g., because of lack of education or understanding of the language), "fine print", and deceptive sales practices (e.g., the salesperson does not explain important aspects of the contract). The second element is "unfair surprise". Unfair surprise would be found when there are conditions of the contracts that are apt to mislead individuals into agreeing to the contract only afterwards to discover aspects of the contract which they were totally unaware of and ones which had they been aware they would not have agreed to. This condition is thought to reveal that no specific consent was ever given by the weaker party to the clauses at issue. Unfair surprise arises from disparity of bargaining power especially in consumer cases where even after reading the terms it is impossible for the consumer to understand the terms because of the complicated technical jargon.

"Sharp and deceptive practices" is the third factor which is sufficient for procedural unconscionability. An example of this is the following: A, literate only in Spanish is visited in his home by a salesman of
refrigerators for B. They negotiate in Spanish: A tells the salesman he cannot afford to buy the appliance because his job will end in one week, and the salesman tells A that A will be paid numerous $25 commissions on sales to his friends. A signs a complex installment contract printed in English. The contract provides for a cash price of $900 plus a finance charge of $250. A defaults after paying $32, and B sues for the balance plus late charges and a 20% attorney's fee authorized by the contract. The appliance cost B $350. Preying upon those who do not speak the language or have other conditions which made them vulnerable to deception, and then leading them to believe there are benefits from the contract which are not explicitly contained in the contract, are conditions which would lead to a finding of sharp and deceptive practices.

The fourth element is "superiority of bargaining power". Superiority of bargaining power is in many ways a catch all for the other elements for procedural unconscionability. The other elements have as a foundation inequality of bargaining power. But the point is that if none of the above elements can be found then just the gross inequality of bargaining power will suffice for procedural unconscionability (see Williams v Walker Thomas and Henningsen v Bloomfield Motors Inc; also see Deutch, p.127). For example, "contracts of adhesion" are contracts where the
consumer must merely "adhere" to the contract, and has no choice regarding the terms. There is not lack of notice about the terms but lack of power to bargain about them. And the problem is not so simple that the consumer could just go elsewhere since all the other companies, e.g., insurance companies, have the same disclaimers and exclusions too. The consumer has to accept the terms or be without insurance, or whatever. It is not that the weaker party does not understand the terms, although this may be true too, but that he has no choice in the matter.

Some commentators argue that the doctrine of unconscionability is justified on the grounds of fairness or justice and not on the grounds that there was some procedural aberration in the contracting process (Murphy 1981, Trebilcock 1979). This justification of the doctrine of unconscionability has led others, for instance, Charles Fried, to call it a "social fraud". There are good reasons, I think, for not using contract law as a ground to redistributive justice, not the least of which is that it denies people an area in which they can pursue their own plans by making agreements with others without the interference of the law or other individuals. In saying this it is not meant that the law should not define the parameters within which voluntary agreements take place. The doctrine of unconscionability functions as a constraint on the kinds of
bargaining advantages that agents can employ because it is recognized that in the circumstances defined under the doctrine voluntary consent can be vitiated. The doctrine has evolved in the recognition that being in grossly unequal bargaining positions, exasperated often by the pressing need of the weaker party, can lead to proposals by the stronger party where the stronger party has the intention to coerce and the proposal has the effect on the victim of coercion. The effect of finding a contract unconscionable is that it is voidable, that is, that the weaker party can avoid performing and the stronger party cannot enforce it upon the weaker.

The analysis I gave of coercive offers in the previous chapter was that an offer is coercive if the stronger party has the weaker party dependent on him for some good or service that the weaker party needs and the stronger party takes advantage of the weaker party. The stronger party must intend to coerce; in other words, intend to secure compliance based upon the deprivation the weaker party will experience if he does not comply. The proposal forces the weaker party to face two undesirable alternatives, the lesser of the two evils is compliance. The effect of the proposal is coercive on the victim since the victim only complies to avoid the harm of noncompliance. If the weaker party had no adequate alternatives and would have been
deprived of something he needed, then the proposal had a coercive effect on the victim. Was there gross and excessive gains for the stronger party and gains which could only be secured by an evil of noncompliance? And did the stronger party intentionally secure those profits by using his superior position? If it can be established that the stronger party took advantage of the person being in a vulnerable position, in need of something that the stronger party had, and thus that there was pressure resulting from the inequality of bargaining position then the proposal is a coercive offer and not binding upon the weaker party.

Coercer offers, it should be mentioned, can vary in respect to the amount of coercive effect that is put on the victim. This depends upon the subject matter of the demand and what the person will be deprived of if he does not agree. The worse off the person is in absolute terms and the more desperate he is the greater the coercive effect proposals pertaining to his basic needs will be. Obviously the proposal to the starving Ethiopian to become an experimental subject will have greater coercive effect on that person than the person who will be without a car if he does not consent the agreement excluding the dealer from any liability. This variation in the effect of coercive offers on their victims should not force us to reject the idea that some offers are coercive since threats too have this charac-
teristic, e.g., "If you don't give me more caviar I will spill wine on you".

Before I conclude I would like to mention a number of objections to the doctrine of unconscionability. These objections come from the laissez faire market advocates. They object to courts intervening and refusing to enforce contracts or contract terms when the court disapproves of certain uses of bargaining power. Among the objections that are raised are the following. It is argued that this kind of judicial intervention makes everyone worse off. The argument is that each party was willing to exchange on the terms of the negotiation, hence each thought he would benefit. The court's refusal to enforce the contract, the argument goes, deprives each party of that benefit and does not change the bargaining power of the parties. Not enforcing particular contracts means that the stronger party will extract in the form of a higher price (or some other form of compensation) for the readjustment of the allocation of risk. The result of the courts' intervention in contracts where an abuse of bargaining power is supposed is to force some agents out of the market, since they cannot afford the higher price perpetrated by the courts' intervention into such contracts. The end result is to drive those in the worse bargaining positions out of the markets, exactly those whom the initial
court intervention was supposed to protect (Kennedy 1979, p.103).

The objection that judicial intervention in contracts where there are perceived abuses of bargaining power makes everybody worse off begs the question at issue. It only makes everybody worse off if the initial property rights are assumed to be the ones in the original exchange. That is, if we assume that one may take advantage of the fact that there is collusion in the auto industry and offer an agreement excluding oneself from liability from one's products then not enforcing that agreement will make that person worse off. But the function of the doctrine of unconscionability is to define precisely what one has a right to do. Just as one cannot take advantage of the ability to deceive people to get them to agree to contracts, one cannot take advantage of one's superior bargaining power concerning something that the weaker party desperately needs and has no place else to get it.

Duncan Kennedy argues correctly that: "the optimizing tendencies of the market will work, within the leeways we choose to leave for them, no matter how we make the initial definition and allocation of property rights." He gives the example of limiting the tactics employers can use in bargaining with employees. "This changes the
balance of power that existed under the old rules about what people could do with their property. But it does not 'impede the functioning of the market' any more or less than we impede it by imposing the rules of property and contract in the first place" (Kennedy 1979, p.106).

Furthermore the refusal of courts to enforce certain contracts does alter the bargaining power of the parties by disallowing certain forms of advantage taking which may be employed in contract formation. These rules tend to equalize or at least militate against the more grievous effects of imbalance of bargaining power. Finally, the above objection to court intervention regarding abuses of bargaining power maintains that both parties "willingly" exchange on the terms of the negotiation, and consequently judicial intervention is unjustified. Yet the term 'willingly' needs to be explicated. Because an agent deliberately chooses to go along with the terms and it is in his self-interest to do so does not preclude that his action was involuntary. As Holmes stated in Union Pacific Ry Co. v Public Service Commission: "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." Consequently, it is not clear that because a party agreed to a contract, even when the contract
apparently puts the weaker party in a better position, that it was done "willingly".

In this chapter I have tried to give an account of duress and unconscionability that reflects moral views about coercion. I argued that one's views about the legitimate purposes of law dictate one's interpretations of such doctrines as duress and unconscionability; e.g., Atiyah favors purely objective standards for duress since he views the ultimate goals of contract law as furthering social policy. I rejected this and other analyses and argued that contract law's legitimate purpose is the support and protection from harm the moral practice of assuming voluntary obligations and rectify harms resulting from its abuse. Since the law is supporting the moral practice of assuming voluntary obligation the ground rules for valid contract formation should be derived from moral conceptions of the validity of obligations.

What we want to establish are the moral conditions under which an agreement is to be held to be coerced and hence not voluntary. I defended the analysis of coercion that I presented in the last chapter as providing an adequate account of the conditions under which one acts under duress. First it was necessary to dispel the common view that it is only duress when the threatener threatens
what he has no legal right to do, when legal right is understood as acts amounting to crimes or torts. There is no reason to suppose that threats to do "lawful acts" (in the above sense) cannot be intended to coerce and have the effect of coercion.

I argued that the conditions for duress should be the following. 1) There is an initial inequality of bargaining power. 2) The stronger party has the advantages of having the weaker party dependent and can cause or fail to prevent some harm. 3) The stronger party takes advantage of that position of superiority through the vehicle of a "wrongful threat". The notion of a wrongful threat was introduced as a glimmer of an objective standard to define the kinds of threats that would constitute duress; e.g., "Either pay your rent or I will evict you" is not coercive since the sanction is expected if the demand is not fulfilled. Since the recipient freely entered into a specific institutional framework knowing the conditions that are expected of him he is not coerced. The wrongful threat is intended to secure compliance by the harmful consequences of noncompliance. 4) The effect on the victim is judged against the unavailability of adequate alternatives and the severity of the consequences. The threat forces the victim to choose between evil and causes him to have a motive for complying based upon his desire to avoid the evil conse-
quences of noncompliance. And that motive he does not want to have. Failing to meet any one of these conditions defeats the claim of duress. This gives us a way of judging the kinds of pressure that are often found in business contexts but fail to satisfy all the conditions of duress proper.

Finally I discussed the doctrine of unconscionability and the analysis of coercive offers under that doctrine. I argued that the justification of that doctrine is that it excludes valid contracts from being formed when the advantages that are taken are likely to have the intention and effect of coercion, fraud, or undue influence. In the most general terms a contract will be unconscionable if there is gross disparity in bargaining power and there are excessive gains for the stronger party at the expense of the weaker. Next I defended the doctrine of unconscionability from some of its critics. The doctrine of unconscionability is an exemplification of the growing realization of what can result from disparity in bargaining power. The rigid interpretation of the maxims of caveat emptor and volenti non fit injuria seem unjustifiable and blind to the variety and subtlety of the ways in which individuals' freedom can be undermined.
CHAPTER 7

SUMMARY

In this study I have characterized and argued for a new conception of coercion in the market. Coercion occurs in the market when one agent has superior bargaining power over another; this power includes the power to control the occurrence of harm (either by a positive action or by failing to prevent the occurrence of a harm), and the stronger party takes advantage of his superior bargaining position. The advantage taking involves the stronger party's intentional use of his ability to affect a harm to secure his exorbitant gain. The fact that an agreement advances the weaker party from his status quo is irrelevant to the determination of coercion. What is important is whether the proposal was intended to secure consent on the basis of the harm which is a consequence of noncompliance (that harm could involve remaining at one's status quo) and the weaker party views the alternatives as evils the lesser of which is to comply.

The conditions that are necessary for P to coerce Q into his agreement are the following:

1. P threatens Q with an evil and thereby creates Q's dependency on P to avoid a harm or P finds Q in a position facing a deprivation of one (or more) of
his needs with no way of avoiding that evil and P makes him an offer.

2. P knows that he could only have secured his price by controlling the occurrence of a harm. Thus P intends to secure compliance through Q’s desire to avoid the consequences of noncompliance, i.e., the evil that is in P’s power to cause or prevent its occurrence.

3. Q views both of the alternatives as evils, but he views complying as the lesser of the two evils.

4. Since Q is dependent on P he cannot avoid the consequences without complying and since the consequences of noncompliance involve an evil to Q he cannot be indifferent to P’s proposal.

5. The proposal causes Q to have a motive for complying; the motive is based on his desire to avoid the evil of noncompliance.

6. Q complies with the proposal but does not want to have or act on that motive.

The overall analysis of coercion rests upon the taking advantage of the power to control the occurrence of a harm. Threats are important but not the whole story about coercive relationships. An account of unfreedom must be sensitive to the positions that individuals find themselves in, situations where social circumstances in general, and
the more or less impersonal operations of economic forces, render an individual's need so great and his bargaining power so weak that when he is taken advantage of he does not act freely.

In what follows I will sketch the argumentative support for my analysis. I argued that the widest view of voluntariness, that view which associates voluntariness with deliberate rational choice, is unacceptable. Hobbes's analysis fails since, for him, an agreement will only be unfree if it is not motivated by a decision of any sort at all on the agent's part. Thus, for Hobbes, one acts freely when faced with fear. This view is inconsistent with our deeply entrenched view that individual liberty is a basic value and our views about moral responsibility. Needless to say, Hobbes's analysis does not provide a strong moral basis for obligations rooted in consent.

When assessing the voluntariness of an agreement it is not enough merely to determine that the agreement was motivated by a deliberate decision. We want to know something about the circumstances under which it was given. Aristotle recognized that certain circumstances, other than brute force, are inconsistent with voluntary action and set out to establish those conditions. He argues that when a person is faced with certain evils, he will be forced to do what he would not otherwise do. The initiative of his action
is external; he acts under constraint, and hence the action is involuntary. Locke agreed with Aristotle that when a person acts to avoid an evil he does so involuntarily. Promises exacted through fear, according to Locke, are not binding. Although Aristotle and Locke considered the problem of acting to avoid a greater evil, neither recognize the subtleties of the conditions that can result in coercion as Robert Nozick does. Nozick's account is fascinating in the problems it raises, problems which I argued Nozick is unable to resolve; but problems which set the stage for all the subsequent work on coercion.

Contemporary accounts of coercion have taken two general approaches: analyzing coercion as essentially a moral concept and analyzing coercion as a psychological or descriptive concept. I argued that coercion is not an essentially moral concept on the following grounds. Moral analyses do not render an explanation of coercion's prima facie wrongness, an explanation which is conceptually tied to the idea that coercion is prima facie wrong because it undermines freedom. Moralistic analyses lead to the conclusion that the question of coercion rests upon prior questions of justice or utility. And thus it turns out that questions of the criteria for voluntary or free action will be inseparable from questions of the rights involved. In this way, justice, rather than being a separate
consideration from liberty, is analytically prior to the question of freedom or liberty.

The claim that 'coercion' is not essentially a moral concept is insisted upon because of the kinds of substantive moral judgments we want to make about the practice of coercion. The basis of our moral judgments about coercion is the fact that it undermines liberty. A morally neutral account of coercion analyzes coercion in terms of persons' behavior under certain forms of pressure and should make reference to the non-moral features of the interaction which account for the unfreedom of the victim's behavior.

I considered attempts that have been made to provide a morally neutral account of coercion. The non-moral feature that has attracted many theorists is the idea of the threat. This approach has intuitive appeal since threats propose to do harms to their victims, whereas offers are thought to propose benefits. Since rational persons want to avoid harms, then the notion of threats can account for how the person was unfree not to comply. But problems arose in the criterion by which threats are distinguished from offers. The criterion used by most theorists is some version of the "normalcy" criterion. This criterion refers to the "normal course of events" in the victim's life to determine whether one is proposing to make one "worse off", hence making a threat, or "better off", hence making an offer. The normalcy
criterion is interpreted in many different ways, each with its own particular problems.

The general problems which face all the accounts are the following. The normalcy criterion suggests that whenever one proposes to make a person "better off" one is not coercing that person, and this applies to any status quo point (bargaining point) from which the judgment is made. This approach to coercion seems to assume that all status quo points are equally legitimate, that is, equally tolerable, and thus that it is justified to use that general point to evaluate proposals for all persons at all times. I rejected "objective tests" in favor of "subjective" ones for the determination of coercion. However, the normalcy criterion veers back toward the objective since the implication of the criterion in some situations is that structurally identical situations can result in opposite conclusions about the nature of the proposal on the basis of the persons initial status quo. Since one is not coerced when one is advanced from the baseline, it turns out that the worse off in absolute terms a person is the more difficult it is to coerce him. The range of his voluntary acceptance seems to increase when we would ordinarily think of such an individual as being especially vulnerable to coercion.
A good deal—conceptual and normative—turns on the claim that a person's status quo is the appropriate point from which to distinguish coercive from noncoercive proposals. For example, consider the distinction between threats and offers, and that between proposing harm and benefit. On the normative side, the extent, if any, of one's criminal or contractual liability, and the on-balance moral permissibility of what one does, hangs on how the distinction is drawn. Indeed, what one can be said freely to accept and what not; what, therefore, one can be held accountable for and what one cannot turns on the person's status quo as an appropriate point from which to distinguish coercive proposals from noncoercive ones. This is a lot of weight for a distinction to carry and the weight proves too great for the distinction.

The baseline approach obscures the relationship of power to bargaining strength and the relationship between bargaining strength and coercion. I argued that if we could assume that in our present system of exchanges all the conditions for a perfectly competitive market were met, then the status quo might be a legitimate point from which to distinguish coercive proposals from noncoercive ones. In a perfectly competitive market no one has bargaining advantages over anyone else, thus no one has a threat advantage in terms of another's status quo. That is, no one can use
another's vulnerable position to his own advantage by controlling something that the weaker party needs.

In imperfectly competitive markets individual agents do have bargaining advantages over each other. The proportion of the benefits that one can secure is a function of the advantages that one has over his negotiating party. I analyzed the concept of bargaining power in terms of bargaining advantages one has over the agent he negotiates with. Bargaining advantages are a function of a number of background factors, e.g., one's knowledge, wealth, and what one possesses that others want or need. Another set of factors that go into determining one's bargaining advantages are the ground rules of contract negotiation and formation that restrain or liberate that power. I argued that there is a distinction between having an advantage and taking advantage but that one can benefit from either. Further, having advantages and taking advantage can be legitimate or illegitimate, and some forms of advantage-taking are referred to as exploitation, i.e., when the stronger party takes advantage of the vulnerability of the weaker and profits at the expense of the weaker party.

From the preceding considerations I was led to the conclusion that coercion involves advantage taking, specifically, taking advantage of controlling the occurrence of a harm to the weaker party. In other words, P intentionally
capitalizes on controlling some state of affairs that Q wants to avoid in order to secure his subsequent gain. I distinguished between threats and offers but not in order to exclude offers from the domain of coercive proposals. Threats and coercive offers differ in the following way. Threats involve putting the weaker party in a vulnerable position (by setting a threat point) and then using that point to secure compliance. Threats involve two wrongs: making the person vulnerable (i.e., dependent on the stronger to avoid the occurrence of a harm) and undermining the person's freedom by leaving him no choice but to comply. With coercive offers the coercer finds his victim in a vulnerable position and takes advantage of it. Coercive offers involve only one wrong, that of undermining the victim's freedom.

One of the important implications of the study is the application to contract law. In the final chapter I argued that the account of coercion based upon taking advantage of controlling the occurrence of a harm provides a coherent account of duress. I began by presenting various theories of duress and suggested that their differences could be explained in terms of the different theorists' conceptions of contract law. I argued that the proper end of contract law should be protecting the practice of assuming voluntary obligations from harm and compensating for harm
that results from its abuse. This view of the purpose of contract law is consistent with the harm principle. Since the predominate purpose of contract law is to protect and support the existing moral practice of assuming voluntary obligations, the validity of contracts should reflect moral conceptions concerning the validity of obligations. The conception of coercion that I defended is consistent with our moral intuitions about the kinds of situations that can give rise to coercion.

It follows from my analysis of coercion that coercion can arise from agents taking advantage of their legitimate advantages (e.g., owning the only water hole in the desert). I defended this part of my analysis from the attacks of the laissez faire market advocates who argue that coercion cannot result from taking advantage of legitimate advantages. They argue that so long as what one threatens is "within one's rights" then the subsequent consent is voluntary. This analysis was shown inadequate since it fails to allow us to question the justification of the assignment of rights. When we question a form of advantage taking we want the justification for assigning the rights in a particular way. Because one has a legitimate advantage it does not follow that one can legitimately use that advantage in all circumstances. If it is found that a particular form of advantage taking in a particular setting is inconsistent
with the free consent of the other party then the ground rules should exclude that form of advantage taking in that particular situation.

I argued that duress includes the notion of the victim acting because of a threat; the pressure put upon the weaker party is the result of his attempting to avoid the harm that the stronger party will cause if he fails to comply. I argued that the stronger party takes advantage of his position through employing a wrongful threat. The real effect on the victim is tested by the unavailability of adequate alternatives and the severity of the consequences to the victim. The coercer causes his victim to have a motive for complying with the proposal based upon his desire to avoid the evil of noncompliance. The claim of duress can be defeated on any one of the conditions which I set out. One class of examples I considered was the pressure in the form of threats that business people put upon each other. Often these threats are not coercive because there was no inequality of bargaining power, or the victim had other alternatives, or the consequences were not severe to him.

Coercive offers can be accounted for under the doctrine of unconscionability. The pressure involved in unconscionable contracts is not the same as the pressure in cases of duress where the stronger party has put his victim in a vulnerable position and his victim is trying to avoid the
harm that the stronger will cause, but it is pressure caused by the weaker party's need being taken advantage of by the stronger party. I argued that the doctrine of unconscionability is not justified on the grounds that it prevents unfair contracts from being enforced, but rather that it constrains agents in superior bargaining positions from taking advantage of that inequality of bargaining position when it is likely to vitiate consent on the grounds of coercion or fraud. The doctrine recognizes that individuals are susceptible to coercive pressures stemming from their relatively weak bargaining position when taken advantage of by agents in superior bargaining positions.

It is generally thought that society has progressed to a point where individuals have more freedom to shape the course of their lives. Freedom of contract is one of the contributing factors to this overall increase in freedom, allowing individuals to have more control over what affects them and dictate the conditions under which they will live. Freedom of contract is justified on the grounds that it facilitates individual autonomy by providing an area for self-determination. Contracts is an area in which individuals can pursue their good as they see fit without interference by other individuals or the state; thus the voluntary agreement itself justifies the resulting distribution. If the resulting distribution of contracts is
justified then we want to ensure that the bargaining advantages that create that distribution preserve voluntariness. All the background rules of contract formation alter the bargaining power patterns from what they would be without those rules; in other words, the rules expand or restrict that power. Because we are not allowed to question the redistribution of a particular contract we need to ensure that the ground rules which form the backdrop from which contracts are made guarantee that contracts are not entered into involuntarily. The focus of this study was to establish the conditions which defeat voluntariness because of coercion.
LIST OF REFERENCES


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