

by resort to incompletely theorized agreements will often prove problematic, and that Sunstein ought to have drawn out more forcefully the advantages of incomplete theorization over monism. Whatever one makes of these criticisms, one ought not to lose sight of the fact that his most basic lesson – that judges ought to be wary of straying down the path followed by Justice Tating, of trying to achieve the impossible – is both salutary and important. American legal theorists of the twentieth century have rarely been short of grand proposals and designs. It is edifying indeed that there should emerge out of that jurisprudential culture someone so able and eager to show us just how much we can still learn from arguments in favour of modesty.

Hamish Stewart*

A FORMAL APPROACH TO CONTRACTUAL DURESS†

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I Introduction

A bargain entered into under duress is not enforceable.¹ This simple principle raises two related questions I will address in this paper. First, what is duress for the purpose of contract law? Does any sort of unfreedom in a person's situation raise an issue of duress, or are there certain types of unfreedom that are particularly relevant to contractual duress? Second, why should agreements made under duress not be enforced according to their terms? Is the justification for not enforcing such agreements instrumental to some other value or intrinsic to contract law? In this paper, I want to argue that while freedom can be understood very broadly, duress in contracts should be understood narrowly. While there are many ways in which a person's freedom can be impaired,² and while many of these ways can amount to grounds for avoiding a contract, only certain impairments of freedom should count as forms of duress. First, where one party proposes to do a legal wrong to the other unless the other submits to a demand, and where the other has no reasonable choice but to submit, any resulting agreement is voidable for duress. Second, where the first party's proposal does not amount to a legal wrong but would seriously damage the second party's interests, any resulting agreement is not voidable for duress unless relief for the second party can be justified as a limit on the first party's rights. The legal understanding of duress captured by these two principles is justified not by its instrumental usefulness in promoting some socially desirable consequence, such as economic efficiency (though it may well have desirable consequences), but by its consistency with the conceptual underpinnings of contract law.

This approach does not imply that duress is the only ground for avoiding a contract, but it does suggest that the various grounds for avoidance are distinct from each other. In contrast with certain influential trends in scholarship³ and judicial decision making,⁴ I shall argue that duress should be sharply distinguished from unconscionability. The

hallmark of duress is the impairment of the second party's autonomy, while the hallmark of unconscionability is the substantive unfairness of the bargain. Of course, both duress and unconscionability will often be present in a given fact situation, but they are logically distinct aspects of contractual unfreedom. Further, contracts may be unenforceable for other reasons, also logically distinct from duress, such as undue influence, fraud, mistake, and frustration; and contracts may be unenforceable for reasons unrelated to consent, for example, when they are illegal or contrary to public policy. While these other reasons may well have to do with freedom in a larger sense,⁵ they are not instances of coercion or duress, and to describe them as such is misleading.

The reason for taking this rather formal approach to duress is that freedom of contract is, from a legal perspective, neither an instrumental nor an intrinsic value but a presupposition of contract law as we encounter it. That is, apart from the instrumental or intrinsic value of freedom of contract, the doctrines of contract law presuppose that contracting parties are free agents with an abstract capacity to choose for themselves and to create new rights through mutually binding agreements. On this view, whether or not freedom of contract is instrumentally or intrinsically valuable, it is an inescapable aspect of contract law.⁶ Freedom of contract in this sense is not valuable unless there is some validity to the abstract conception of the person to which the presupposition relates. While a full defence of this conception is beyond the scope of this paper, it is worth noting that the image of the person as capable of choice is common to all three modes of valuing freedom of contract. Furthermore, I argue that theories of contractual duress that take freedom of contract to be valuable only for instrumental or intrinsic reasons tend not only to produce implausible results, but to offer reasons for those results that are inconsistent with other important features of contract law. Approaches to contractual duress that focus on the consequences of enforcement, rather than on the interactions of the contracting parties, risk enforcing agreements that do not respect these presuppositions, and thus risk inconsistency with the rest of contract law.

II Some examples

Most accounts of coercion in the philosophical literature proceed by presenting a series of fairly standard examples and attempting to match what seems to be the intuitively correct result with the author's theory. I proceed in precisely this manner. In each example, one person, α , is attempting to get another, β , to do or to promise something. To this end, α makes a proposal to β that changes β 's opportunities in some

way. Most accounts say that β is coerced by α 's proposal if the proposal makes β 's opportunities unavoidably worse as compared with some 'baseline' set of opportunities that β would, or should, have faced in the absence of α 's proposal. The accounts differ principally as to what the appropriate baseline is. I shall consider this question;⁷ my immediate purpose is simply to present the examples. Many of them have been thoroughly explored in the philosophical and legal literature on coercion, and none is original with me.

A. *The Armed Robber.* 'An armed robber [α] threatens his victim [β] on a dark and lonely street: "Your money or your life."⁸ The victim hands over his money.

B. *The Altruistic Robber.* An armed robber, α , wants β 's watch, which the market values at \$500, and which β would be willing to sell for \$500. The robber is aware of these valuations, and yet has an idiosyncratic desire for this particular watch. He points his gun at his victim, and says 'Your watch for \$1000, or your life' (i.e., 'Sell me your watch for \$1000'). β agrees to sell the watch at that price.⁹

C. *The Foundering Ship.* A tugboat, α , happens upon a ship in distress, β . β 's crew will die unless β is rescued immediately. The tug has done nothing to cause the ship's predicament. In return for a promised fee greatly in excess of the normal charge, the tug tows the ship to safety.¹⁰

D. *The Lecherous Millionaire.* α , the Lecherous Millionaire, 'will pay for the expensive surgery that alone can save her [β 's] child's life provided that she [β] becomes for a period his mistress.'¹¹

E. *The Penny Black.* 'One stamp collector [α] offers another [β] a "Penny Black" at a steep price, knowing that the buyer needs just this stamp to complete a set.'¹² The market for this particular stamp is so thin that it is not possible to determine a normal or competitive price, and the buyer has no reason to expect another opportunity to complete his collection for some time. β agrees to α 's price.

F. *The Competitive Grocer.* One of several competitive grocers in an affluent suburb offers bags of rice for sale at the prevailing, competitively determined price. A shopper, β , buys some rice from one of these grocers, α , on credit.¹³

G. *The Starving Peasant.* One of several competitive rice merchants in the Bengal famine of 1943 offers rice for sale at a competitively determined price that is five times the pre-famine price. Outside his store, peasants whose income is no longer sufficient to permit them to buy food starve to death; however, one starving peasant, β , convinces one of the merchants, α , to sell him some rice on credit.¹⁴

H. *Limited Warranties.* α , an automobile manufacturer, offers β a contract in which α 's liability for defects is expressly limited to replacement of defective parts. β needs a car quite desperately, and no other manufacturer offers a better warranty. β purchases the car and is injured owing to defective manufacture of the car. She seeks to recover from α in tort; α pleads the limited warranty.¹⁵

The Armed Robber is the classic case of a contract entered into under duress; but the robber's proposal reduces the victim's choices, reduces the victim's welfare, and violates the victim's rights. Which of these features creates the intuition that the robber coerces the victim? This question is already posed by some of the other examples, notably the Altruistic Robber, but to sharpen it further, I consider Sen's paradox of the Paretian Liberal. This case seems at first to have nothing to do with the problem of coercion, but that is precisely why it will turn out to be useful.

I. *Prude and Lewd.* There are two persons, Prude and Lewd, trying to determine whether D.H. Lawrence's novel *Lady Chatterley's Lover* should be read and by whom. Prude does not want to read the book, but believes it is safer for him than for the lascivious Lewd. Lewd feels that Prude would benefit from a good erotic novel, and therefore wants Prude to read the book, even if Lewd himself does not. But if Prude does not read it, Lewd will. Who will read the book? Who should read the book?¹⁶

There are four possible solutions to Prude and Lewd's problem: (a) Prude reads while Lewd does not, (b) both read, (c) Lewd reads while Prude does not, and (d) neither reads. The preferences of the two, from best to worst, are as follows:

Prude - d, a, c, b.

Lewd - b, a, c, d.

The Pareto-optimal solutions are (a, b, d); outcome c, where Lewd reads the book while Prude does not, is Pareto-inferior because both Prude and Lewd prefer outcome a, where Prude reads the book while Lewd does not.

Liberal principles, as formulated by Sen, require that each person have some sphere of control or decision-making power, so that each individual can dictate the social outcome for at least some matters. The choice of what to read is a plausible candidate for such a matter; all liberal democracies protect this right to some extent. Liberal principles, then, require that Prude be allowed to choose between a and d, and between b and c. Correspondingly, Lewd must be allowed to choose between a and b, and between c and d. Prude will choose d or c; from this set, Lewd will choose c.¹⁷

Thus, if each is individually allowed to decide whether to read *Lady Chatterley's Lover*, Lewd will read while Prude will not, which is the Pareto-inferior outcome. On the other hand, the Pareto-optimal solution, *a*, in which Prude reads while Lewd abstains, violates each party's right to control certain outcomes. Indeed, *b* and *d*, which are also Pareto-optimal, would by the same token violate liberal principles. Only the suboptimal outcome *c* respects Prude's and Lewd's individual choices. The paradox lies in the clash between the process-oriented value of respecting a protected sphere of decision making and the consequentialist value of ensuring a Pareto-optimal outcome.¹⁸ The paradox can be avoided by having Prude and Lewd write a contract specifying that Prude will read the book while Lewd will refrain.¹⁹ Lewd gives up his right to read in consideration of Prude's giving up his right not to read. Is the contract between Prude and Lewd a coerced one? I have argued elsewhere that the contract is voluntary but unenforceable;²⁰ the question for this paper is whether the theories of coercion examined below require the contract to be enforced or regard it as coercive.

The next three examples, drawn from or based on cases presented by Nozick, are offered for a number of purposes.

J. Unionization. A firm is facing the prospect that its workers may organize and seek collective bargaining rights.

J1. The firm announces that it will go out of business if the workers unionize, and the workers abandon their efforts at organization. Have the workers been coerced?²¹

J2. The unionization drive succeeds, and the union threatens a strike unless wages and benefits are significantly increased. The firm agrees to the increase and signs a collective agreement. Has the firm been coerced?²²

K. The Beaten Slave. A slave owner, α , normally beats his slave, β , every day. But today, he makes the following proposal: 'I will not beat you tomorrow if you do X today.'²³

L. The Rebellious Slave. A slave, α , 'holds up his owner [β] at gunpoint one night and demands his freedom.'²⁴

Some writers have suggested that cases like J2 and L show that the presence of coercion is not sufficient to make an agreement voidable. Despite the coercive pressure of the union's strike threat, the argument goes, the collective agreement should be enforced;²⁵ despite the slave's coercion of his master, he should be allowed to go free.²⁶ Example K,

Nozick's Beaten Slave case, sharpens the distinction between theories that depend on legal, moral, and empirical specifications of what β can expect to receive from α . All three cases, like the Starving Peasant and Limited Warranties, raise questions about the legitimacy of the legal and political background against which the particular interaction between α and β takes place.

A category of cases that offers some difficulty involves α threatening to breach an already existing contract with β , where β would be put in a very difficult position.

M. Business Compulsion. β has a contract to supply radar sets to γ and subcontracts with α to provide a certain number of components at a certain price. After the contract is made, the market price of the components rises substantially. α threatens to hold back the components it has agreed to provide unless β pays the higher price. β knows that it could obtain the components elsewhere and then sue α for breach of contract, but it cannot obtain the components in time to avoid breaching its contract with γ and incurring a substantial penalty for default.²⁷

Another difficult category of cases involves a proposal by α that is not unlawful.

N. The Professor's Secret. 'An enterprising journalist [α] discovers that a professor of moral philosophy [β] was convicted of embezzlement years ago. He proposes to publish this fact in a review of the professor's new book, unless the professor promises to pay him several thousand dollars.'²⁸

The difficulty of the business compulsion and blackmail cases arises from a number of considerations. First, the threat to breach a contract, though technically unlawful, seems far removed from the paradigm case of the Armed Robber, while what the blackmailer proposes to do is not unlawful when detached from the demand for payment. Second, inasmuch as the business world is thought to be an arena of struggle for advantage, any distinction between legitimate and illegitimate attempts to gain advantage is going to be difficult to draw.²⁹ Why, for example, is the subcontractor's or the blackmailer's threat more objectionable than that of the Penny Black's owner ('You can't complete your stamp collection unless you pay me a large sum of money.')}? I will consider these problems in Part III.B, which follows.

III *The formal approach to contractual duress*

A. STATEMENT OF THE FORMAL APPROACH

The image of human action that underlies the formal approach is a very abstract one.³⁰ A person is envisaged as an agent, that is, as having

the capacity for choice, the ability to formulate goals, and the ability to pursue those goals. But his or her actions are not simply determined by means-ends rationality; while action may be influenced by instrumental considerations, it is not determined by preference or inclination: ultimately, an agent's actions are the agent's autonomous choices. Therefore, it is not possible in advance to specify what an agent's goals will be or what particular ends the agent will pursue.

When people who are agents in this sense interact, they will require some principles to govern their interactions. Principles that respect the capacity for choice, which is characteristic of agency, must be concerned with the mutual consistency of different agents' choices, rather than with any particular outcome that might be promoted by their actions. The legal idea that respects this sort of autonomy is the idea of a right, because it is rights which give people protected zones in which they can pursue their own goals as long as they do not impinge on others' protected zones. Attempting to operationalize this capacity in another way, such as the pursuit of a particular goal, would entail imposing that goal on the parties, which would take away from the abstract capacity for pursuing goals that we started with, and would entail overriding the capacity for entering into contract when that capacity conflicted with the particular goal chosen. A theory of contractual duress, like other principles of contract law, should therefore refer to rights.

Thus, contractual rights, like other private rights, are principles which ensure external consistency among the choices made by autonomous agents. And contractual rights must be logically prior to any particular substantive conception of the good, such as efficiency or wealth maximization. To impose such a goal on the parties would undermine the autonomy that is reflected in their contractual choices.

Freedom of contract, then, must include respect for agents' choices as to the terms of their contracts and respect for the rights created by the terms so chosen. The law of contract must therefore treat freedom of contract as a presupposition, rather than as an instrumental or intrinsic value. If freedom of contract was only instrumental, the parties' choices could be overridden whenever they conflicted with the value to which freedom of contract was instrumental. If freedom of contract was only intrinsically valuable, the importance of the contract would lie in the opportunities for decision making that the contract represented rather than in the manifestation of agency inherent in the contract. Freedom of contract may well be instrumentally useful and intrinsically valuable; but if it is presupposed in contract law, it must mean respect for the abstract capacity to choose. When contracts are formed or enforced, the parties' agency in this abstract sense must be respected.

I have not given any independent reason for preferring a conception of the person as autonomous in this abstract way over a conception of the person as, for instance, a heteronomous maximizer of utility. But there must be some sense in which persons are ends in themselves, rather than simple bearers of utility; and persons who are ends in themselves must have some sort of autonomy. Rather than pursuing this argument here, I hope to support the proposition that freedom of contract is presupposed in the law of contract by showing that the formal approach provides a more satisfactory explanation of contractual duress than its rivals.

Most accounts of coercion distinguish threats, which may ground a claim of coercion, from offers or warnings, which do not ground a claim of coercion, by referring to some 'baseline' from which the threat makes β 's opportunities worse. The natural baseline for a theory based on rights is a legal one: α 's proposal is a threat if it worsens β 's opportunities with respect to β 's legal rights. On this approach, consent is never adequate where it has been extracted by a credible threat to violate β 's legal rights, and the reason is relatively simple: if β can be bound to an agreement obtained through a violation of his or her right, then the right has not been adequately protected. Coercion in this legal sense is a sufficient ground for contractual relief.

If enforcing a contract where α violated β 's rights denies β 's right, then, equally, refusing to enforce a contract where α did not act wrongfully denies α 's right. These simple points about rights entail two propositions for a theory of coercion in contract: (1) if α has threatened to violate β 's legal right, and β had no reasonable alternative but to comply, the contract is voidable on the ground of coercion; and (2) if α has not threatened to violate β 's legal right, the contract is not voidable on the ground of coercion (though it may, on some other grounds, be unenforceable or only partly enforceable).³¹ This approach can be followed whatever legal rights happen to exist in any jurisdiction; whether those rights themselves add up to a defensible or justifiable method of ordering human interaction is a question that cannot be answered at the level of a theory of contractual duress.

The first proposition may seem relatively uncontroversial, though I shall argue below that some theories of contractual duress either implicitly deny it or offer different reasons for it. The second proposition requires more defence. There are cases where α 's proposal does not seem to be wrongful in any legal sense, yet some sort of relief for β seems to be demanded. These cases include business compulsion, where α makes some sort of proposition such as a contract modification which, legally, is at most a threat to breach a contract; cases of highly

disagreeable but not unlawful proposals,³² including blackmail; and cases where, without doing anything unlawful, α is able to exert some special influence over β . The approach to these cases on the formal approach is twofold. First, rights must be taken seriously; both pre-existing rights and the process by which new rights are created must be closely scrutinized. Thus, I argue in Part III.B.1, which follows, that the business compulsion cases can be assimilated to the coercion cases, precisely because they involve the breach of a pre-existing right, even though the threat to breach is not unlawful in any criminal or tortious sense. Similarly, cases where α exerts influence over β are explained as cases where the contractual right that α relies on has not really been created, not because of coercion, but because α knew perfectly well that β 's choice was not autonomous.

Second, one must recall that coercion, in the narrowly defined legal sense, is sufficient but not necessary to relieve β from the contract. It is true that cases where α 's proposal is not unlawful but is wrongful, disagreeable, or exploitative in some sense are difficult to explain on the formal approach, which implies that they are not coercion cases. There are two responses to these cases consistent with the legal approach to coercion. First, outside the context of the case at hand, one might seek directly a change to the legal rights. This response would convert future cases to coercion cases but it is little comfort to β because it implies that, in the particular case, the court should not deny the right in a back-handed way by preventing α from relying on it while maintaining that it really exists.³³

The second response, which I pursue, is to seek a justification for limiting α 's right that is consistent with the presupposition of freedom of contract. It is important here to distinguish between limits on α 's right that are somehow related to the concept of autonomy that underlies the presupposition of freedom of contract and limits on α 's right that might be independently desirable. If the factor limiting the right is the same sort of consideration as that which founds the right, then the right is not negated by the limit; the limit serves rather to define the scope of the right. But if what limits the right is extrinsic to the consideration that founds the right, then the right is negated. The challenge, then, is to explain threats that are improper though not illegal, as limits in this sense.³⁴

So far, the focus has been on what α does to β . But there may be situations where α 's threat or improper proposal is not really the motive for β 's agreement; β may genuinely want to agree to α 's terms, and α may rightly complain if β then attempts to renege. The formal approach deals with this sort of case in two ways. First, β cannot escape

from the contract if he or she had a reasonable alternative to the terms proposed by α . A wrongful threat amounts to an attempt by α to effectively deny β 's autonomy, but β 's autonomy is not in fact denied (his or her rights are not effectively threatened) where he or she has a reasonable alternative to submitting to α 's demand. The presence of a reasonable alternative suggests that β still has an effective choice; thus, he or she cannot be heard to complain that complying with α 's proposal reflected a lack of autonomy. Second, it is possible for β to affirm the terms of the contract; and this idea leads to a consideration of the remedy for a contract entered into under duress.

An effective threat or improper proposal produces a purported agreement between α and β . The formal approach suggests that the agreement should be voidable, not void, at β 's option. If α 's coercion of β ceases, so that β 's autonomy is restored, there is no reason why β cannot effectively exercise his or her autonomy to affirm the agreement. But the option to affirm or avoid should be β 's, not α 's, because it is β 's, not α 's, autonomy which was impaired when the agreement was made; there is nothing to suggest that the original agreement was not an effective exercise of α 's autonomy, and thus no reason to give α the option. There may also be cases where the initial agreement was genuinely desired by both parties, but the impairment of β 's autonomy led to some unfairness in the terms; in these cases, the appropriate remedy would appear to be to allow some adjustment of the terms in β 's favour.

The formal approach to contractual duress thus has four features. First, proposals by α to violate β 's legal right are threats. Second, proposals by α that do not amount to violations of β 's legal right may nonetheless be improper if their impropriety can be explained in terms of the presupposition of freedom of contract. Third, β can complain of threats or improper proposals only if he or she had no reasonable alternative but to comply with the threat or improper proposal. Finally, assuming no reasonable alternative, the proper remedy for a contract entered into after a threat is to make the contract voidable at β 's option, while the proper remedy for a contract entered into after an improper proposal may instead be an adjustment of the terms of the agreement. Thus, strictly speaking, the terms 'coercion' and 'duress' should be used only to refer to situations where α threatens to violate β 's rights; situations where there is no such threat but the proposal is nonetheless improper are normally cases of exploitation or unconscionability. There is, however, no harm in using the term 'duress' to apply to both types of cases, as long as the fact that the structure of right and remedy is different in each case is borne in mind.

B. THE FORMAL APPROACH APPLIED TO THE EXAMPLES

1. *Legal wrong*

When the legal baseline approach is applied to the examples stated above, one must first inquire into the rights of α and β . The question of whether α 's proposal amounts to a threat, then, turns in part on what the rest of the law looks like.³⁵ It is clear that both of the Robber cases (A and B) are instances of duress, as the Robber is threatening to commit a tort and a crime, and the victim has no option but to comply. It is equally clear that the Penny Black case and the Competitive Grocer case (E and F) are not instances of duress, at least given the specification of property rights that we are familiar with in Anglo-American law.

Business Compulsion (case M) is also a case of duress on this account. This conclusion may seem troubling, since a proposal to breach a contract does not seem to be a very serious matter. The objection might go something like this: Breach of contract is not independently unlawful; it is neither a tort nor a crime. Furthermore, parties to a contract are not bound to perform in any event; they are bound to perform or to pay damages for non-performance. In the event of α 's proposal to breach a contract, β has an adequate remedy in damages. Therefore, proposals to breach contracts should not be treated the same way as proposals to commit independently unlawful acts.

This analysis is unpersuasive. It is, of course, true that breach of contract is not independently illegal, but this point merely reflects the fact that contractual rights originate in contracts and not elsewhere. To say that threatening a breach of contract is not unlawful in the same sense as threatening a crime is therefore unilluminating in this context; whereas to say that a breach of contract is not unlawful at all would be to deny that contracts create rights. It is also true that contractual obligations are conveniently thought of as consisting of a primary obligation to perform and a secondary obligation to pay damages,³⁶ and that β has no cause for complaint if α actually pays. But, in the threatened breach of contract cases, α 's proposal is not, 'Unless you do as I say, I won't perform; but of course I will pay damages'; the proposal is rather, 'Unless you do as I say, I won't perform; go ahead and sue me if you like.' This proposal amounts to a threat to breach both the primary and the secondary obligations under the contract. It is therefore just as unlawful as any threat to commit a tort or a crime. The issue then becomes whether β ought to seek a remedy in damages, or whether β is entitled to do what α says and seek relief later; in other words, does β have a reasonable alternative to submitting to α 's threat? The structure of the threatened breach of contract is thus the same as the other cases of coercion.³⁷

The legal baseline approach to determining whether α 's proposal is a threat provides the most promising basis for distinguishing Unionization (case J) from Prude and Lewd (case I). To see this, consider Nozick's presentation of Unionization in more detail. Nozick's purpose in introducing this example was to distinguish between threats and warnings: Would the firm's announcement that it will go out of business if the unionization drive succeeds be a threat or a warning? Nozick suggests that the answer depends on the firm's preferences. There are four possible outcomes:

- a. Workers do not unionize, firm remains in business.
- b. Workers unionize, firm remains in business.
- c. Workers unionize, firm goes out of business.
- d. Workers do not unionize, but firm goes out of business.

Assume that the employees' preferences are: *b, a, c, d*. Nozick suggests that whether the firm's announcement is a threat or a warning depends on which of the following preference structures obtains:

- Firm's preferences – Case 1 – *a, b, c, d*.
 Case 2 – *a, c* or *b, d*.
 Case 3 – *a, c, b, d*.

If, as in case 3, the firm really would go out of business because of unionization, quite apart from the announcement, then the announcement is a warning. However, if the firm would prefer to stay in business after unionization, as in case 1, but commits itself to going out of business if the unionization drive succeeds in order to encourage the employees to choose outcome *a*, then the announcement is a threat.

Consider how Nozick's reasoning plays out in the case of Prude and Lewd presented earlier. In Nozick's terms, if Lewd tells Prude that he will read the book if Prude does not, Lewd is warning Prude of, rather than threatening him with, the consequences of Prude's failure to read. If left to himself, Lewd will read in any event. The contract in which Prude reads and Lewd does not would, then, be uncoerced and, if unenforceable, not for that reason.

Now consider a variant of Prude and Lewd, analogous to Nozick's Case 2. Lewd's preferences are unchanged (that is, the same as in the original presentation of case I) but Prude's are as follows: *d, a, c* or *b*. That is, Prude is indifferent to reading when Lewd reads, but he would prefer to prevent Lewd from reading altogether. The firm's announcement that it will go out of business if the union wins is now analogous to Prude's statement that if Lewd has the temerity to read, Prude will refuse to read. Prude thus hopes to prevent Lewd from reading; with

outcome *b* ruled out in advance, Prude hopes Lewd will not read in the hope of getting to outcome *a*.³⁸

Nozick plausibly argues that in case 2, the firm's commitment to outcome *b* in the event that the unionization drive succeeds is a threat. 'Since part of this reason for deciding to go out of business if the union wins is that (he believes) this worsens his employees' alternative of electing the union, this constitutes a threat.'³⁹ The employees are therefore being coerced into rejecting the union. But is it plausible to describe Prude's announcement the same way? Is Prude's statement that he will not read a threat to Lewd? Is their subsequent agreement, if any, then coerced? Do we care? The point of this variant is to suggest that there is a relevant difference between the two cases that is not captured by Nozick's focus on the preferences and opportunities of the parties. This difference is the rights that the parties have, or that we think they ought to have, in the two cases.

In the absence of a contract, Lewd's proposal that he will read the book if Prude does not cannot count as a threat, whether Lewd honestly intends to execute the proposal or not, because it is open to Lewd to decide for himself what to read. In contrast, the firm's proposal to go out of business if the workers unionize may well be a wrongful threat, not simply because of its empirical characteristics, as Nozick suggests, but because it may be a breach of the firm's duty to bargain in good faith.

The legal baseline approach does not seem to have much to say about the proper result the two Slave cases (K and L). The intuitive response to these cases is to say that the Beaten Slave ought not to be beaten, and that the Rebellious Slave ought to be freed. But neither of these responses has very much to do with the particular interaction between the master and the slave; they are, rather, expressions of the idea that slavery is inherently unjust. Trebilcock offered the Rebellious Slave example to suggest that despite the legal wrongfulness of the slave's threat, 'we might well wish to enforce this agreement,' because slavery is itself unjust.⁴⁰ But this argument sheds little light on the problem of duress in the law of contract. On the one hand, it is inconceivable that a court in a jurisdiction that recognized slavery would uphold the agreement; quite apart from the question of whether the slave had the capacity to contract,⁴¹ his rebellion would be the ultimate wrong to his master.⁴² On the other hand, the slave's action would *not be wrongful* in a jurisdiction where slavery itself was illegal. In other words, the reasons that 'we' would offer for or against upholding the agreement have nothing to do with the nature of the interaction between the master and the slave, but everything to do with 'our' view of slavery.⁴³ Slavery itself is, of course, completely inconsistent with the

presupposition of freedom of contract that I have suggested should underlie the analysis of contractual duress, since it denies the capacity of the slave to form and to pursue his or her own goals,⁴⁴ but this point is once again systemic and not concerned with the actual interaction between the master and the slave. The difficulty of explaining the Slave cases within the formal approach, then, points simply to the brute (or brutal) fact that not every system of positive law can instantiate the presupposition of freedom of contract that underlies the law of duress, and not to a defect in the formal account itself.

The remaining cases – the Foundering Ship, the Lecherous Millionaire, the Starving Peasant, and Limited Warranties (cases C, D, G, and H) – are not cases of coercion on the approach outlined here, because they involve no legally wrongful proposal by α . This conclusion is troubling, because there is clearly something unpleasant about enforcing these agreements. The Professor's Secret (case N) is also troublesome. α 's proposal amounts to blackmail, which is generally a criminal offence, but to say that agreements obtained through blackmail are coerced because blackmail is criminal would be, though correct, conclusory and unilluminating. Since α 's proposal is not unlawful, blackmail does not have the same structure as other threats to commit crimes, such as the Armed Robber's. Whether in all of these cases β is entitled to some relief on the ground of some impropriety in α 's apparently lawful proposal will be considered next.

2. *Improper proposals*

a. Exploitation. The Tug's proposal in the Foundering Ship (case C) is not legally wrongful, unless the tug has a duty to rescue.⁴⁵ This case, particularly in its life-threatening variants, presents the classic instance of a proposal by α that is an offer but is nonetheless troubling. Many analysts of coercion are therefore anxious to find a ground on which the foundering ship can be relieved of its bargain with the tug. Dalzell, for example, suggested adding to the class of wrongful proposals 'a threat to violate the standards of decent conduct in the community.'⁴⁶ This suggestion does not fit well with the legal baseline, as it amounts to implicitly elevating standards of decent conduct from a moral to a legal duty, erasing the distinction between law and morality that is an important feature of the formal approach. But the legal baseline does not leave the foundering ship entirely at the tug's mercy. Relief short of avoiding the contract may be offered to the ship on the ground of unconscionability because the tug exploits the ship; the tug can, for instance, be awarded a reasonable fee. The question is how this solution is consistent with the presupposition of autonomy that underlies contract.

One solution would simply be to explicitly elevate a moral duty to a legal duty, by creating a duty to rescue. Fried suggests this basis for relief.⁴⁷ But, even if the creation of such a duty is consistent with the formal approach I am taking here, it cannot be a complete explanation because the tug would be bound to rescue the ship in any event, leaving no room for payment from the ship to the tug. While it would be possible to impose a duty on the tug to rescue and a corresponding duty on the ship to pay a fair price for rescue, the duty of rescue under this solution would nonetheless exist apart from the ship's promise to pay; the principle that would entitle the tug to a fair price would exist apart from the mutual exchange of promising that is central to Fried's theory of contract.

It is perhaps more promising to seek a second solution to the case of the Foundering Ship by expanding on Fried's insight that 'without civil society individual rights are practically worthless.'⁴⁸ The foundering ship and its potential rescuer find themselves, as Fried suggests, in a state of nature; therefore, while their agreement meets all the requirements of a contract, it cannot be a contract because it is made too far outside the boundaries of the social order on which contract law depends. There is therefore no reason for a court to respect its terms; the salvage fee can then be determined on other principles.⁴⁹ Fried's explanation is persuasive, but to be consistent with the formal approach, it needs to be integrated with the image of the person that underlies the presupposition of freedom of contract. Every situation where β is about to lose everything is, in a formal sense, outside civil society, even if geographically, so to speak, it takes place within civil society (e.g., β could be drowning in a pond in Toronto). Assume that there is no duty to rescue. There can nonetheless be a limit on α 's exercise of his right not to rescue. Where β 's only choice is to lose everything – 'everything,' in this context, refers not to β 's wealth or welfare, but to β 's capacity to be autonomous – it cannot be assumed that the resulting bargain is an effective exercise of his or her capacity to form and pursue goals. In order to pursue any such goals, β must accede to α 's proposal. Now, it is true that from the perspective of contract law, β 's plight is no concern of α 's; but all that tells us is that α 's proposal is not a wrong. It does not tell us that the bargain should be upheld in its full severity. Thus, the tug's demand for an excessive reward exploits the fact that β is about to lose his or her capacity to form and pursue goals as an autonomous agent. β 's expression of assent cannot, therefore, be reasonably construed in the same manner as if β had other options; that is, it cannot be construed as an exercise of β 's capacity because β is about to lose that very capacity. Thus, although β 's agreement is not

coerced, β is entitled to some relief because his or her apparent assent did not create a right in α to receive the full sum demanded.⁵⁰ On the other hand, to relieve β entirely would tend to suggest that α had a duty to rescue in the first place. The imposition of a reasonable price on the transaction is one way to limit α 's right without entirely negating it.⁵¹

The Starving Peasant's situation (case G) is much like the Foundering Ship's, with one important difference: the peasant faces a competitive market. His problem is not that he faces one supplier who is demanding an excessive price but that, although he faces many competing suppliers, he cannot afford anyone's price. The solution proposed in the preceding paragraph will not likely assist him: the price is, under the circumstances of the famine, already reasonable. There is thus, according to the formal approach, neither coercion nor exploitation in this case. The Peasant needs help, but there is not much that the law of contract can do for him.⁵²

The Lecherous Millionaire's distasteful proposal (case D) is, on the legal baseline approach, analogous to the Foundering Ship. In the absence of a duty on the Millionaire's part to pay for β 's child's surgery, and in the absence of any law that would make his proposal an attempt to commit some prostitution-related criminal offence, his proposal is an offer and not a threat. β 's agreement is therefore not coerced. That does not mean, however, that β will be held to her side of the bargain: her child faces certain negation of his capacity to form and pursue goals, and she has no alternative but to accept the Millionaire's offer. If the Millionaire pays for the surgery, and if β reneges on her agreement, the Millionaire's remedy is likely to be limited to nominal damages. It is clear that there could be no order of specific performance of such a contract, and it is unlikely that a court would be willing to quantify the value of β 's services.⁵³ In the alternative, the Millionaire might claim restitution of the amount paid for β 's child's surgery, but since the transaction would likely be found illegal or contrary to public policy, restitution would be unavailable to the Millionaire.⁵⁴

There are also certain affinities between the Lecherous Millionaire and Limited Warranties (case H). In both cases, α is declining to offer something to β that we feel he morally ought to offer, but that he is not legally bound to offer. But Limited Warranties is unlike the Lecherous Millionaire in two ways. First, many analysts feel that the competitive situation of the automotive industry in question should affect the law's response.⁵⁵ The usual assumption is that the automobile industry is somewhat oligopolistic, and that it could therefore offer a better warranty without becoming unprofitable. But this response really amounts

to a claim that there is a distributive wrong as between automobile manufacturers and consumers, rather than a wrongful threat by one manufacturer against one consumer. Second, however desirable it may be for β to have a car with a better warranty, it is difficult to construe the lack of the warranty as entirely negating β 's capacity to formulate and pursue goals.⁵⁶ There is thus no coercion or exploitation in Limited Warranties. The judicial response of refusing to enforce the warranty on its terms is better seen as a response to the distributive wrong than as a finding of duress. Whether this judicial response is consistent with the presupposition of freedom of contract outlined above, or whether it is legitimate or coherent, is another question, but it is hard to see it as a response to coercion.

b. The Restatement's Categories. The cases involving improper proposals considered so far are mostly rather extreme, life-threatening situations which seem to cry out for relief. The Restatement of Contracts, however, contemplates relief on grounds of duress in a wide-ranging set of circumstances which are less extreme. In this section I briefly consider the consistency of those situations with the formal approach to duress.

The Restatement's approach to proposals that are not unlawful in themselves has two elements. First, 'a threat is improper if the resulting exchange is not on fair terms.'⁵⁷ The unfairness of the exchange, while not determinative in itself, does act as an indication that the two parties may not have been interacting in the manner envisaged by the presupposition of freedom of contract. The second branch of the Restatement's test for improper threats asks if one of the three following conditions is met

- a. the threatened act would harm the recipient and would not significantly benefit the party making the threat,
- b. the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
- c. what is threatened is otherwise a use of power for illegitimate ends.⁵⁸

How do these three conditions, in light of the unfairness of the resulting exchange, relate to the presupposition of freedom of contract? The second condition is unproblematic. If there has been prior unfair dealing between the parties, there has been in the past a wrong, an unlawful or improper threat, which has set the stage for α 's current threat. The first condition is somewhat more difficult to explain. The Comment explains that 'if, on the recipient's refusal to contract, the maker of the threat were to do the threatened act, it would therefore

be done maliciously and unconscionably, out of pure vindictiveness.'⁵⁹ The third of the three conditions refers to the 'use of power for illegitimate ends.' These two ideas – α 's malice or α 's improper use of his or her legal rights – suggests some limitation on α 's freedom to exercise his or her rights that is not obviously consistent with the presupposition of freedom of contract described above.

The problem is this. The presupposition of freedom of contract depended on not ascribing any particular goals or preferences to the contracting parties, but the limitations on α 's right suggested by the Restatement seem to rule out a certain category of goals or preferences, namely malice and other 'illegitimate ends,' on the part of α . How, then, are these limitations consistent with the presupposition of freedom of contract which I have suggested should underlie the analysis of duress?

The power to enter into contracts, from the perspective of the presupposition of freedom of contract, is given so that people can make agreements that advance their interests; it is not given so that people can injure each other. It is true that the law of contract is not independently concerned with α 's malice; if α maliciously refuses to contract with β , but β can choose to contract with a number of other α s, there is no contractual remedy for β .⁶⁰ But if α proposes an unfair contract with β , in a situation where refusing to contract at all would not benefit α and where β has no choice, α is acting maliciously in the sense that he or she is seeking to use the power to contract for the sole purpose of extracting something from β . The contract advances α 's interests, but the circumstances under which it is made suggest that the transaction is a parasitic version of the usual contract, in that α is using β only as a means to his or her own ends. If β was not in a situation of limited choice, α would have no scope for the exercise of his or her malice in this sense.

To illustrate this idea, consider a case discussed by Kostritsky:

O. The Encroaching Driveway. '[T]he plaintiff [β] owned two adjacent lots, one with a house and one without. While negotiating for the sale of the house (on lot 1), the plaintiff sold off the vacant lot (lot 2). When the purchaser [α] of the vacant lot discovered that the driveway to the house on lot 1 encroached on his property, he threatened to destroy it unless... the plaintiff... gave him \$1500. The plaintiff agreed to pay that amount in return for a deed to the driveway.'⁶¹ This payment amounted to about 45.5 per cent of the purchase price of lot 2, or, prorated with respect to the area of the lot, was about 10.2 times the purchase price.⁶²

It is difficult to see how α 's proposal in this case was wrongful. The driveway belonged to α ; surely he was entitled to sell it to β for what-

ever price they could mutually agree upon. Yet the court held that the plaintiff had pleaded enough facts to raise an issue of duress precluding accelerated judgment in the defendant's favour.⁶³

The report of the case is factually quite sparse and, whatever one's theory of duress, one would want to know more before deciding the case. But I think that despite the apparent lawfulness of α 's proposal, a factual scenario in which duress is present can be imagined. Suppose that lot 1, for some reason, is completely impossible to sell without the strip of the driveway that encroaches on lot 2, and suppose further that destroying the driveway is neither particularly beneficial nor particularly harmful to α . α is not malicious in the sense that he dislikes or hates β ; he is simply, like the owner of the Penny Black, trying to get a good price from β for the driveway strip. Nonetheless, it would not be inconsistent with the presupposition of the freedom of contract for the court to hold that this agreement was entered into under duress, insofar as lot 1 is rendered completely sterile without the driveway strip from lot 2. It is true that β 's general capacity for forming and pursuing goals is not impaired in any way by this transaction; but the fact that α 's proposal, if carried out, will be of no benefit whatsoever to α and can only harm β , suggests that this transaction does not deserve the usual respect accorded to contracts by the presupposition of freedom of contract. It is this feature which distinguishes this version of the Encroaching Driveway from the Penny Black, where, no matter how firm α 's monopoly and how intense β 's desire for the stamp, α 's proposal is not malicious. Although the market is thin, the stamp remains a valuable asset for α if the transaction with β does not go through; thus, α 's proposal is not simply a parasitic use of the power of contract. If β decides to trade his entire net worth for the Penny Black, that is his concern. My conclusion about the Encroaching Driveway is, of course, very sensitive to the extreme facts that I have added to the report of the case, and it is also true that this conclusion is not compelled by the formal approach to duress that I am advocating; my purpose is simply to show that it is possible to reconcile the Restatement's categories of improper threats with the presupposition of freedom of contract.

c. *Blackmail*. Blackmail presents a difficulty to any analysis of coercion but perhaps particularly to the formal approach that I am advocating here. In a case of blackmail, what α proposes to do is not unlawful; it is frequently not even morally wrong. Further, there is usually nothing inherently wrong with the *quid pro quo* that α seeks to extract from β ; typically it is just a sum of money. Therefore, the coerciveness or the wrong of blackmail cannot be found in either of these parts; there must be something about the exchange that is wrong.

It is common to suggest that the wrong in blackmail is in the use of legal rights for a purpose that is somehow improper;⁶⁴ but this idea is difficult for the formal approach to spell out. According to the presupposition of freedom of contract outlined above, we are not to look to concrete purposes in determining whether a contract is enforceable or not, but only to the capacity to form and pursue goals. This formulation would appear to exclude any notion of proper and improper purposes in the use of legal rights. In any event, the blackmailer's purpose is often just to obtain money, which is not in itself an improper purpose from the perspective of freedom of contract. Cases where α has been granted some sort of fiduciary or agency power for one purpose and uses it for another purpose presents no problem to the improper purpose view, but blackmail covers many other cases where α has no such power, such as the Professor's Secret. The impropriety of the purpose must be found elsewhere.

Under the formal approach, we do not look to private law to support or implement independently desirable purposes, and by the same token we do not expect agents to be pursuing any particular purposes. But formalism does not entail complete indifference to purposes. Private law is premised on autonomy, and while this premise demands very little positively, it demands a great deal negatively, in that the autonomy of each agent must be consistent with the autonomy of all.⁶⁵ In particular, the autonomy that underlies freedom of contract entails that one may never use another person merely as a means to an end; of course, one can treat others as means, but only if the agency of others is respected in the process. In a normal market transaction, such as the Competitive Grocer or even the Penny Black, both parties may be primarily interested in what the transaction will do for them, but there is nothing about the transaction that manifests any disrespect for autonomy. In contrast, as we have seen in the Foundering Ship, where α takes advantage of a threat to β 's life, the transaction manifests a disregard for β 's autonomy, and α 's right to interact with β is accordingly limited.

Attention to α 's motive in this sense is the key to the formalist analysis of blackmail. A useful starting point is Wendy Gordon's deontological account of why blackmail is wrong.⁶⁶ Gordon begins by pointing out that blackmail is less paradoxical than it first appears: the blackmailer threatens to do what he has a right to do, but the wrong of blackmail is no paradox because it is not always true that one has a right to threaten to do what one has a right to do.⁶⁷ She goes on to explore both consequentialist and deontological accounts of the wrong of blackmail, and it is the latter that is of particular interest here. Gordon argues that the deontological case against blackmail is actually relatively

simple: 'One person seeks deliberately to harm another to serve her own ends – to exact money or other advantage – and does so in a context where she has no conceivable justification for her act.'⁶⁸ On this approach, blackmail is something like some of the improper proposals discussed in the preceding section; it is a case of one party using the other *purely* as a means, with no respect for the other's end-status.⁶⁹

This argument needs only to be slightly recast to be congruent with the formal approach to coercion. Blackmail places a limit consistent with the autonomy values underlying contract on α 's exercise of his rights. While α has the right to disclose damaging information about β , that right is limited by the principle that α must never treat β merely as a means to his own projects. α 's proposal denies β 's autonomy, not by violating β 's right or by taking advantage of an external threat to β 's very existence, but by using her merely as a means. An indication of this denial of autonomy is that if β agrees to the blackmail, the transaction benefits α but offers only detriment to β , while if β does not agree, α is not benefited but β again suffers detriment.⁷⁰

It may be objected that in making this argument I have switched baselines, that blackmail is a 'detriment' to β only from a baseline where α has no right to disclose, and that blackmail is not a detriment to β from a baseline where α has the right to disclose. In other words, how does my argument distinguish the Professor's Secret from the Penny Black? There are two related lines of response to this criticism. First, my argument is not that blackmail falls into the first category of duress, where α threatens to violate β 's rights. Rather, I am suggesting that the law of blackmail operates to limit what would otherwise be α 's right, in much the same way that the law of salvage operates to limit what would otherwise be the tug's right to demand as much as it wanted to from the foundering ship. The foundering ship had no right to expect rescue from the tug, but once the tug offered rescue, the payment it could extract from the foundering ship was limited by considerations of the ship's autonomy. Similarly, the professor has no right to the journalist's silence, but the use the journalist is permitted to make of the information is limited by the professor's status as an end in himself: he may not be used only as a means to the journalist's ends.

Second, the fact that the transaction between α and β depends so much on the particularity of β 's situation suggests that this transaction does not have the generality of a normal market transaction like the Competitive Grocer or even like the Penny Black. The journalist does not simply offer the information for sale to the highest bidder, like the owner of the Penny Black; rather, he seeks out the one person in the world who would be most harmed by the information and seeks a pay-

ment for his silence. In a market transaction, the two parties are juridically equal: neither party has a right to what is offered by the other, both are better off after the transaction, and there is no effect on their autonomy.⁷¹ In contrast, where one party has 'got something' on the other, the presumption of juridical equality is overcome. It is not α 's financial motive in itself that makes the transaction objectionable; it is the fact that α 's demand manifests indifference to β 's status as an end in herself. On this analysis, the most appropriate analogue to the Professor's Secret would be the Lecherous Millionaire.

The appropriate legal categorization of the improper motivation at work in blackmail is malice. As in the case of the improper proposals discussed above, malice here does not mean that α dislikes β or even that α benefits from β 's difficult position; it means rather that α 's purported exercise of his legal right cannot be recognized as a proper exercise because of its disregard for β 's status.

The impropriety of blackmail is thus unlike the impropriety of the other proposals considered in this section. What the blackmailer proposes to do is not necessarily a legal wrong, nor is β 's autonomy necessarily at stake in the same dramatic manner that we see in the foundering ship. Nonetheless, the limits on α 's right to act on whatever information he or she may have can be explained by reference to the values that underlie the presumption of freedom of contract.

3. *No reasonable alternative*

β must also show the lack of an alternative to compliance with α 's proposal. The cases tend to look to the adequacy of β 's legal remedy in case α carries out his threat.⁷² This requirement presents little difficulty in some of those in which α does a legal wrong to β , such as the Robbers (A and B), and in those cases which amount to improper proposals, like the Foundering Ship, the Lecherous Millionaire, some variants of Unionization, and the Professor's Secret (cases C, D, J, and N). In those cases where α 's proposal does not seem to violate any of β 's rights, it is only those where β does not seem to have any alternative but to agree to the proposal that are problematic: the Starving Peasant and the Limited Warranties. These are both cases where β 's lack of an alternative does cry out for relief, but the relief must be on some ground other than coercion.

The 'no reasonable alternative' branch of the test is particularly useful in analyzing Business Compulsion (case M) where the threat is to breach a contract. Although α 's threat to breach his or her contract with β is unlawful, it does not carry the same taint of independent illegality or immorality as α 's threat to commit a tort or a crime against β .

Further, any proposal to modify an existing contract could be construed as a threat to breach, but that would be a highly undesirable result: contract modification is an accepted and usually unproblematic business practice.⁷³ Thus, the most useful way to approach these cases would seem to be to ask whether β had a reasonable alternative to complying with α 's proposal. If so, β should choose that alternative; if he or she does not, he or she is responsible for the course of action followed. If not, all the features that motivate us to relieve β from liability are met: α 's proposal is legally wrongful, and because β had no real choice but to comply, he or she should not be responsible for the subsequent agreement.

4. Remedies

The discussion above indicated that the nature of β 's claim will affect the remedy available. In cases of pure coercion, such as the Armed Robber, the proper remedy is to make the contract voidable at β 's option. But why is the contract not simply void, given its origin in the negation of β 's right? Once the duress has ceased, β is permitted to hold α to the terms of the agreement; this feature indicates that the interaction between α and β somehow created a right for β but not for α . The reason, I think, is simply that α was acting autonomously; because α was not under duress, β is entitled to assume that the terms α proposed were terms that α would have been willing, even eager, to offer in an interaction with a party not under duress. But this apparent right of β 's cannot become a contractual right until it has the element of mutuality that characterizes contracts, that is, until β has assumed a corresponding obligation; thus, the agreement entered into under duress can become a contract when β affirms it.⁷⁴ Once we see that the contract is voidable, the reason for giving the option to β but not to α is apparent: α is not entitled to assume that the terms β agreed to under duress are expressions of β 's autonomy.

The appropriate remedies in cases of improper proposals are more varied. Giving β the option to avoid the contract is appropriate for the Lecherous Millionaire, at least prior to any performance, but this option does not make sense for the Foundering Ship, where both parties are anxious to have some sort of performance. In such cases, imposing a fair price on the transaction is the best way to recognize both that β 's autonomy was impaired and that α 's behaviour did not amount to a pure threat.⁷⁵

IV *Some critiques of the formal theory of duress*

The formalism⁷⁶ of the formal approach to duress leaves the approach open to a number of criticisms, some associated with Critical Legal

Studies, some associated with other approaches such as economic analysis of law. In this section, I consider four of the most important criticisms.

A. THE THINNESS CRITIQUE

The formal approach to duress rests on very thin conceptions of human agency and human freedom. The thinness critique takes this feature of the formal approach to be a serious flaw: how can it be that such a thin conception captures enough about human interactions to found a theory of contractual duress? The only cogent response to the thinness critique is a kind of confession and avoidance: it is indeed the case that the formal approach fails to capture much of importance about human interactions; but the ambition of formal approach is not to explain everything about humans, but to elucidate some aspects of contract law. The best way to see that thinness is a strength rather than a weakness of the formal approach to contractual duress is to consider different uses of the term 'coercion' and their relation to different meanings of the word 'freedom.'

To say that a person's act or promise⁷⁷ was performed or given under duress, or to say that a person was coerced, can mean many different things. It can mean that powerful structural forces, whether natural or social, were exerting pressure on him or her when the act was performed; or that another person had the power to prevent him or her from exercising certain choices; or that he or she was in a situation that offered few reasonable choices. While there may be some degree of coercion in each of these cases, coercion does not in all cases relieve a person of responsibility for the consequences of his or her acts.⁷⁸ Thus, a theory of coercion constructed around one of these interests will not necessarily yield results that are suitable or appropriate to the others. Coercion in the first sense, for example, is characteristic of totalitarianism, which depends upon coercion being so pervasive that it affects every aspect of human existence; indeed, a totalitarian regime depends largely for its success on the internalization of this coercion.⁷⁹ Yet one would not say that coercion in this sense relieves a person in a totalitarian state of responsibility for all of his or her actions. On the other hand, the notion of an all-encompassing coercion cannot be pursued very far without raising the question of whether all societies 'coerce' their members in some sense. We are not just influenced but forced to behave in certain ways and are constituted by the societies in which we grow up and live.⁸⁰ I do not mean to deny the categorical difference between totalitarian and democratic societies, but merely ask whether totalitarianism is the only system to 'coerce,' at least when 'coercion' is used in an extremely broad sense.

A second sense of 'coercion,' still too broad for the purposes of contract, is the political use of the term to describe the impact of state power in the enforcement of the law. The question of legitimacy is often posed as the question of when the state can coerce its citizens.⁸¹ But this cannot be the sense in which the term coercion is used in the law of contract. One would not, for example, say that the criminal law's prohibition on the Armed Robber's conduct amounted to coercion of the Robber in a contractual sense.

A third use of 'coercion,' to describe situations of limited choice,⁸² is closely linked to theories of coercion which attempt to define coercion purely empirically, without reference to moral or legal interests. Advocates of the empirical approach to coercion usually want their theories to do moral or normative work as well, to say for instance that a person who is (empirically) coerced is not (morally) responsible for the resulting act. I shall argue in Part V.A below that these moves are implausible for the purposes of contract law, rendering a purely descriptive notion of coercion inappropriate for the law of contract.

This paper is concerned with the use of 'coercion' in contractual contexts. The question to be kept in mind, then, is whether or to what extent β should have to perform the contract. This question cannot be answered by looking at β 's situation in isolation because α 's rights and interests are also engaged. For contractual purposes, the question of coercion must run along these lines: Is there something about the interaction between α and β that both excuses β of his or her obligation and legitimately deprives α of the benefit he or she was to receive? A negative answer to this question does not preclude relief on other grounds, but a positive answer entails relief.

In light of this question, there would seem to be three possible reasons for an analyst of contract law to value freedom of contract.⁸³ First, freedom of contract might promote general welfare, economic efficiency, or some other goal. This instrumental approach to valuing freedom of contract is characteristic of economic analysis of law.⁸⁴ Second, freedom of contract might be valuable in its own right; apart from its instrumental value, freedom of choice might be a good thing in itself. Perhaps people are happier when they are able to choose for themselves, or perhaps having more choices is a good thing, quite apart from its effect on efficiency or welfare. Being able to contract for oneself may be part of a good way of life, even if more beneficial (more efficient) outcomes could sometimes be achieved by intervention in contract formation or execution.⁸⁵ Third, it may be that freedom of contract is important in contract law for neither instrumental nor intrinsic reasons, but that freedom of choice might be presupposed in

the doctrines of contract law, in that those doctrines treat the contracting parties as autonomous agents who are free and equal in some sense. I briefly consider each of these three ways of valuing freedom of contract, with reference to the examples laid out above.

1. *The instrumental and the intrinsic*

The normative claims of economic analysis and the notion of freedom have a long-standing connection. 'Free markets' and 'free trade' are supposed, under certain conditions, to produce efficient outcomes; 'freedom of contract' is said to be an essential underpinning to free markets. But if the only normative value is efficiency, as is the case in most economic analysis, freedom has only an instrumental role; it can never be valued for itself but only for its role in directing the economy to a Pareto efficient (or wealth-maximizing) state. The exact nature of freedom is unimportant for this view because of its purely instrumental role. On the other hand, if freedom has any independent value, then the precise nature of freedom must be analyzed and the extent to which it may conflict with efficiency must be explored.

This distinction is often obscured in the work of many libertarians, perhaps because of an implicit assumption that the instrumental and the intrinsic values of freedom never do conflict. Milton Friedman, for example, both praises the *achievements* of a free and capitalistic economy and speaks of freedom as an *end in itself*:

... free institutions offer a surer, if perhaps at times a slower, route to the ends they [people] seek than the coercive powers of the state.⁸⁶

As liberals, we take freedom of the individual, or perhaps the family, as our ultimate goal in judging social arrangements.⁸⁷

This unrestricted praise for 'the fecundity of freedom'⁸⁸ is only possible because Friedman does not perceive any conflict between the instrumental and the intrinsic values of freedom.

In contrast, Amartya Sen has made much of these conflicts, both theoretically⁸⁹ and empirically.⁹⁰ The Paradox of the Paretian Liberal (case I) shows how, in theory, the intrinsic value of freedom, to the extent that it requires respect for the consequences of choice, does not always further independently desirable goals such as Pareto optimality. This potential conflict has led Sen to develop measures of well-being that focus not on utility or preferences satisfaction, but on objectively defined measures of capability to achieve,⁹¹ empirical investigation, in turn, can be informed by these measures to assess progress in solving problems such as undernourishment and gender bias in the distribu-

tion of commodities.⁹² This decoupling of well-being from utility suggests, in Sen's view, that freedom, or at least one aspect of freedom, is best understood substantively as relating to 'our capability to live the way we would choose'⁹³ rather than to our ability to obtain commodities. On this view, it is difficult to conceive of freedom in purely instrumental terms because it directs our attention to a way of life rather than to an end-state such as utility or preference satisfaction.⁹⁴

This distinction between the instrumental and the intrinsic value of freedom has consequences for the analysis of freedom of contract. If freedom is valued in itself, then the case for enforcing contracts freely entered into is strong, regardless of the consequences for efficiency or distribution, because to enforce such contracts is to reaffirm the value of freedom for its own sake. On the other hand, if freedom is valued primarily for what it can do for efficiency or welfare, then the extent to which the contract was freely entered into is not relevant in itself, but only to the extent that freedom of contract forwards some other goal.⁹⁵ On the intrinsic view, it is important to have some theory about what freedom is so that free contracts can be distinguished from coerced contracts. But on the instrumental view, a theory of freedom is unimportant because some other value is driving the analysis; respect for 'freedom of contract' becomes a willingness to enforce contracts when enforcement would tend to promote an efficient outcomes.

2. Negative and positive freedom

The distinction between the instrumental and the intrinsic value of freedom may appear at first to correspond to another familiar distinction, that between negative and positive freedom. There is a good reason for this appearance; the freedom celebrated by Friedman, Nozick, and other libertarians is negative freedom, while those such as Sen, who are more supportive of state intervention in economic life, tend to be more attentive to the intrinsic value of freedom. Negative freedom is primarily concerned with the ability to act without interference from other people,⁹⁶ in the legal context, without wrongful interference from the state or others. '[L]iberty in this sense means liberty from.'⁹⁷ But negative freedom does not necessarily entail a completely passive state; it may require a high degree of state involvement in, for instance, the enforcement of contracts.⁹⁸ The enforcement of promises freely undertaken is actually a recognition of freedom, even if it appears as coercion to the party now trying to renege. The justification for enforcement of contracts, from the perspective of negative freedom, is not the beneficial effect of enforcement, but the recognition of the right.⁹⁹

But perfect respect for negative freedom may be cold comfort to those who lack basic access to resources. Consider the Starving Peasant. Famines can coexist with complete respect for everyone's negative freedom and with a supply of food that would be adequate to ensure survival if evenly distributed; people starve to death when the terms on which they are able to acquire food worsen substantially.¹⁰⁰ As Sen puts it, 'recent famines seem to have taken place in rather orderly societies without anything 'illegal' about the process leading to starvation.'¹⁰¹ The starving peasant's negative freedom is respected and, yet, he is unfree. The merchant respects the starving peasant's negative freedom because he is not stopping him from doing anything, and in particular is not violating any of his rights; yet the starving peasant is unfree because he has no choice but to starve. Similarly, if less lethally, Lewd's right to read *Lady Chatterley's Lover* may not mean much if he has never been taught to read; there may be no person preventing him from reading, yet there is a sense in which he is not free to read. Without access to resources, the respect accorded to negative liberty seems illusory from the perspective of what is actually achieved by the agent.¹⁰²

Some scholars have therefore contrasted negative freedom with a notion of positive freedom, which has to do with the ability to achieve something, with the person's feasible set. Sen's suggestion that a person's freedom should be assessed in terms of a person's ability to function is perhaps the best developed conception of positive liberty in this sense. Sen argues that we should look, not to a person's income or bundle of actual goods, but at 'his or her "capability" to function.'¹⁰³ This capability will frequently be a function of the income and goods available to the person, but Sen focuses instead on a person's ability to convert income and goods into 'functionings' such as the ability to move about or the ability to be nourished. This approach is probably as close to the notion of positive freedom as one can get without actually identifying positive freedom with welfare in the economist's sense.

But there are at least three reasons to question the usefulness of trying to connect freedom of contract with either pole of the contrast between negative and positive freedom. First, to import these concerns into the common law of contract through the doctrine of relief for coercion would create confusion and incoherence in the law.¹⁰⁴ The 'wrong' to the Starving Peasant is a distributive one, not a corrective one. The needs of famine victims are more directly and successfully handled by government intervention than by private law remedies.¹⁰⁵ The denial of freedom in a famine is real, but it appears to be a different sort of freedom than that vindicated in private law.

Second, the distinction between negative and positive freedom does not correspond to the distinction between the instrumental and the intrinsic value of freedom, nor does either pole of the distinction correspond with the presupposition of freedom of contract. It is perfectly coherent to believe that negative freedom is intrinsically valuable, and that positive freedom is instrumentally valuable. One may support the enhancement of potential famine victims' entitlement to food, as Sen does, either on the instrumental ground that this enhancement of their positive freedom is the best way to ensure a good outcome, or on the intrinsic ground that this enhancement is valuable in its own right, or on both grounds; similarly, one can believe, as Friedman does, that negative freedom (at least in the sense of minimal state intervention in economic activity) is both intrinsically and instrumentally desirable.

Third, the distinction between negative and positive freedom ought not to have much impact on the appropriate concept of duress and coercion in contract. This suggestion may seem odd. One might think that a formal analysis of coercion would run as follows. The term 'duress' should be restricted to those situations where α worsens, in a sense to be specified, β 's situation, and where β has no choice but to comply. One might specify the 'worsening' in terms of β 's negative freedom: actions that reduce β 's negative freedom are threats, whereas actions of α that are merely refusals to enhance β 's freedom are not threats (even if they may produce other grounds for other remedies). One would then note that a remedy for a lack of positive freedom will often be unavailable, both in fact and in law, at the individual level. Remedies must be sought from society at large, in the form of redistribution, special statutory provisions, and so forth. The denial of positive freedom is thus not coercion but a form of oppression.

This approach has a certain logical appeal, but I think it founders on two difficulties. First, there are many ways in which one can reduce a person's negative freedom without exposing oneself to a valid allegation of coercion. Whenever one exercises one's rights, there is an impact on others that can be described as a reduction of negative freedom: one's right necessarily appears as a duty, or as a constraint, to others. Second, it is impossible to make the purely empirical distinction between negative and positive freedom that this approach requires. The Foundering Ship and the Starving Peasant present this impossibility in classic form. Does the tugboat's offer enhance the ship's positive freedom by offering rescue, or does the tugboat reduce the ship's negative freedom by insisting on a high price for the rescue? Similarly, is the merchant's extension of credit to the starving peasant in a competitive environment a

simple exercise of negative freedom on both sides, or is the peasant's positive freedom somehow implicated? The distinction does not in itself answer this question;¹⁰⁶ I will argue in Part V.A, which follows, that whether a particular intervention may reduce or enhance β 's options in some empirical sense cannot determine whether β has been coerced in the responsibility-relieving sense required in the law of contract.

One might therefore argue that duress should encompass both positive and negative freedom. Coercion is, after all, the negation of freedom of contract; thus, it would seem that the more aspects of positive freedom that are included in freedom of contract, the more contracts will appear to be voidable on this ground. One might argue that providing relief for duress vindicates a party's freedom by declaring that α impinged on β in some way, and by making α pay. In other words, perhaps the baseline could be drawn by saying that actions of α that reduce β 's freedom, whether negative or positive, are wrongful threats.

This second approach founders, perhaps paradoxically, on one of the same difficulties as the first. It is certainly true that the Starving Peasant's positive freedom will be enhanced by not requiring him to honour his promise to pay for the food,¹⁰⁷ that the Foundering Ship's positive freedom will be similarly enhanced by relieving it of the obligation to pay the tug, and so forth. But the same will be true of any contract (e.g., the Penny Black or the Competitive Grocer): one party's positive freedom will always be enhanced by permitting him or her to retain the benefit of the agreement without performing his or her obligation. Further, the notion of positive freedom does not seem to assist in determining which contracts should be voidable. It is arguable that the victim's positive freedom is enhanced in the Altruistic Robber case, and that the robber's positive freedom is enhanced in the Armed Robber case, yet there is something intuitively appealing about the notion that neither of these agreements should be enforceable. The distinction between positive and negative freedom may be very useful for some purposes but it does not assist in the quest for an appropriate baseline in cases of contractual duress.

3. *Freedom of contract as a presupposition*

It has often been noted that the fact that a decision is rational tells us nothing about whether it is free. Speaking of the Armed Robber, Trebilcock says that while '[β 's] decision to hand over the money may be perfectly rational, deliberate, and fully informed, ... it would seem to violate all ... theories as to what constitutes a voluntary decision.'¹⁰⁸ The mere reduction in the victim's opportunity set does not, on the theory of rational choice, make the choice any less rational, since a rational

choice can be made over any number of alternatives. Furthermore, if freedom is valued only as an instrument to welfare, as in the economic analysis of law, only the removal of the choice the victim would have made before his interaction with the robber can present a problem; the victim is not made 'worse off' if α leaves the choice that would have been made in any event undisturbed.¹⁰⁹

But the conceptual problem runs deeper than this. Not only is it impossible to describe freedom in terms of rational choice, the paradigm of rational choice may itself be an expression of unfreedom. When I choose 'rationally,' I am doing what my preferences tell me to do, given the constraints I face. I may well ask, 'Where do my preferences get such authority?' Unless I am my preferences, rather than a person who has preferences, it would seem that a preference-based choice is not a free one, unless I have in some sense chosen the preferences as well.¹¹⁰ Freedom must include the freedom to choose 'irrationally,' that is, against my preferences;¹¹¹ but in saying so I assume and assert that there is more to freedom than the ability to choose rationally in an instrumental fashion.¹¹²

The nature of freedom in this sense is not easy to identify. One might follow Macpherson and call this sort of freedom 'developmental liberty,'¹¹³ the idea being that the ability to reflect upon and alter one's own preferences – to be autonomous in a very broad sense – is a kind of positive freedom that cannot be measured even with Sen's approach.¹¹⁴ If so, then the opposite of freedom in this sense might be ideology or false consciousness, which prevents the person from seeing that what appear to be preferences (or constraints) can be altered.¹¹⁵ This approach invites critiques of the ideological functions of contract law;¹¹⁶ but it is difficult to see how these critiques play out in the adjudication of particular disputes, or how a regime of contract law could vindicate Macpherson's developmental liberty.

Another way of looking at freedom of contract in this third sense is to observe that the law of contract presupposes that people are, at least sometimes, autonomous agents who are capable of making their own decisions about when to contract and on what terms. The principles governing contract formation, the rules about capacity and about mistake, and concepts such as unconscionability, inequality of bargaining power, and undue influence all presuppose a paradigm case of two free and equal parties who create rights and duties through bargaining.¹¹⁷ This presupposition can be seen in two ways. First, it is manifested in the substantive content of doctrines themselves. The paradigm case is the norm, while cases of undue influence¹¹⁸ or unconscionability are seen as departures from this norm.¹¹⁹ There is, of course, an

important Critical Legal literature which questions this way of characterizing the relationship between the paradigm and the departures from it, and demonstrates that the substantive content of the doctrine does not itself determine cases.¹²⁰ But for the moment I am concerned only to make the point, which the Critical Legal Scholars do not deny, that the possibility of autonomous choice in contract formation is presupposed by existing contract law. A law of contract without this presupposition would look very different.

Second, the presupposition of freedom of contract is manifested in the formal bilateral structure of contract doctrine.¹²¹ Why, for example, does the successful plaintiff get damages or other relief from the defendant? If, as economic analysis suggests, contract law functions solely as a method of creating incentives for efficient behaviour, there is no reason in principle why the particular defendant's damages should go to the plaintiff (they might as well, like criminal fines, go to the state), or why the particular plaintiff's relief should come from the defendant (it might as well, like a Crime Stoppers award, come from a public authority).¹²² This bilateral feature of contract law makes a lot more sense when contract is seen as a method of creating rights rather than as an instrument for achieving independently desirable social purposes. Accordingly, some scholars have argued that the conception of the person that underlies contract law is a Kantian one: the person is conceived of not as having any particular goals or interests but as having a capacity to formulate and pursue goals.¹²³ Persons who are free in this sense would order their legal relationships so that each one's actions would be limited by those principles that are necessary for the freedom of all.¹²⁴ This very abstract formulation does not in itself determine which of the situations outlined above will amount to duress, but it does point in a certain direction.

The fact that freedom in this abstract sense is *presupposed* by contract law does not mean that freedom of contract is intrinsically or instrumentally a good thing. Economic analysts of law believe that it is instrumentally valuable, and it is hard to imagine a human society in which this sort of freedom had no intrinsic value whatsoever. But the presupposition remains, whether or not it serves these other ways of valuing freedom. The thinness of the formal approach to contractual duress is thus a strength, not a weakness.

B. THE CIRCULARITY CRITIQUE

By saying that β is coerced only if α is proposing a wrong, are we not determining too quickly the question of whether β should be relieved of his bargain? Or, as Wertheimer summarizes the circularity critique:

- (1) It is wrong to make coercive proposals.
- (b) A makes a coercive proposal to B.
- (c) Therefore, A acts wrongly.¹²⁵

One strategy for avoiding this critique is to argue that the moral (or legal) judgment that β should be relieved and the moral (or legal) judgment that α acted wrongly are not identical; argument¹²⁶ is required to get from the latter to the former.¹²⁷ While this move strikes me as correct, my response is rather different. There is a sense in which the circularity of the legal approach is a strength, rather than a weakness, insofar as it indicates the most logical – perhaps the only possible – response of a legal system to a claim of improper threats.

Robert Hale, often identified as a realist precursor of the Critical Legal Scholars,¹²⁸ presented a particularly strong form of the circularity critique.¹²⁹ Hale considered the claim that the functions of the limited state included refraining from 'coerc[ing] people to work' and 'prevent[ing] any private person from exercising any compulsion.'¹³⁰ After observing that what we call non-coercive behaviour and what we call 'coercion' often have similar effects on a person's available choices,¹³¹ Hale notes the following possible definition of coercion: 'Popular speech ... seems to apply the term coercion to demands made as a price of not violating a legal or moral duty, whether the duty consists of acting or letting alone.'¹³² The critique Hale proposes therefore applies to both legal and moral theories of coercion; the popular definition just cited 'will not do,' he says:

If an act is called 'coercion' when, and only when, one submits to demands in order to prevent another from violating a legal duty, then every legal system by very definition forbids the private exercise of coercion – it is not coercion unless the law does forbid it. And no action which the law forbids, and which could be used as a means of influencing another, can fail to be coercion – again by definition. Hence it would be idle to discuss whether any particular legal system forbids private coercion. And if an act is called 'coercion' when, and only when, one submits to demands in order to prevent another from violating a *moral* duty, we get right back to the use of the term to express our conclusion as to the justifiability of the use of the pressure in question; with the ensuing circular reasoning of condemning an act because we have already designated it 'coercive.' ... Hence, it seems better, in using the word 'coercion,' to use it in a sense which involves no moral judgment.¹³³

The consequences of such a sweeping empirical account of coercion are quite striking. Practically everything becomes an act of coercion; even demanding payment for goods according to their competitive

price is coercion, and the price simply a measure of coercive power.¹³⁴ The Grocer proposes to withhold the rice unless the Shopper pays the competitive price. In the absence of any moral or legal concepts with which to characterize the Grocer's proposal, this case is indistinguishable from the Armed Robber. So broad is Hale's view of what coercion is that there is some doubt as to whether he takes the word to have any meaning at all:

Increased buying of one product will make it worth while for more industry to flow into the production of that product than elsewhere. This is pointed out time and time again by Mr. Carver. It is what he calls the 'method of price persuasion' as distinguished from the 'method of government compulsion' To call this 'persuasion' rather than 'coercion' is to use the same logic as that which would conclude that the tobacco tax is paid by persuasion rather than compulsion.¹³⁵

The conclusion follows because Hale, like a rational choice theorist, focuses only on the effect of action on a person's opportunity set, disregarding any legal or moral characteristics of the transaction.

Hale's critique of moral theories can, I think, be successfully answered along the lines suggested by Wertheimer and Fried; the claim that β was coerced, in an empirical sense, does not by itself entail that β is not responsible for his or her actions. His critique of legal theories is more troublesome. There is a sense in which it is entirely correct. In a legal theory of coercion, a threat must be wrongful in some way (if not independently illegal) before β 's resulting act can be called coerced; nor will coercion be present unless such a legally wrongful threat is present. Perhaps the theory is just an elaborate way of saying that the law forbids what the law forbids.

But what else could a legal system possibly do? It would be entirely contradictory for a legal system not to forbid what it forbids. Consider again the Armed Robber. How could a legal system in which a tort or a crime of assault existed enforce the contract so concluded and at the same time punish the Robber? Or consider Nozick's unionization example. As we have seen, the firm's threat to go out of business (in Nozick's case 3) is a wrongful threat if the firm has a duty to bargain in good faith. If, in a legal system containing such a duty, a labour tribunal found that the firm had not bargained in good faith, would it not be absurd for it to deny a remedy to the union? That is, to echo some ideas deployed above, to enforce a contract made under conditions that negate the very idea of freedom of contract would be contradictory. The underlying idea of contract is that two free agents create new rights through agreement. To hold that this process has occurred

where one of the agents, α , has violated the pre-existing rights of the other, β , in circumstances where β had no choice but to comply would be to say that contractual rights could be created even where one of the agents was not free in the sense required for contract.

A second response is closely related to the defences used by Wertheimer and Fried. The point of a legal theory of coercion is not to claim that the law forbids coercion (that was the claim of the book Hale was reviewing). Rather, the point of the theory is to identify the conditions under which β will be relieved of his or her bargain. This is a different project. Whatever other responsibility-relieving conditions applicable to contract there may be, the law must at a minimum relieve responsibility where the law's own demands have been violated.

But the legal theory of coercion may be circular in a larger and more difficult sense. Why is it so obvious to most analysts that the *Competitive Grocer* and the *Penny Black* cases are not instances of coercion? Why is the *Starving Peasant's* plight a difficult case, rather than an obvious case for relief? How would the *Slave* cases have been decided in, say, North Carolina in 1830?¹³⁶ These cases become easy or difficult according to the perceived stability or legitimacy of the legal background against which they arise; but, if Hale's critique is taken seriously, that background is destabilized and delegitimized. Gary Peller, for instance, wants to push Hale's arguments farther and suggest that they imply that the American legal system is a contingent effect of social life rather than the embodiment of some transcendent values:

[Hale's] arguments suggested that no instituted social order rationally could be legitimated by appeals to freedom or efficiency. If free will, coercion, productivity, and property were all reified metaphors, none was available to justify a particular state of affairs.

... the critical legal realist approach could be seen as a general affirmation of contingency in social relations.¹³⁷

If this is so, if the legal background from which the legal approach to coercion derives its results is itself contingent, where does the approach get its validity?

The legal theory of coercion need not deny the contingency of the legal background because the legal theory does not claim that its concept of coercion has any justificatory force apart from the legal background. The claim is not that the legal approach to contractual duress is the sole concept of coercion, suitable for all political, legal, or moral purposes; rather, the claim is that as long as the law of contract reflects the idea that people are autonomous in a certain sense, contractual duress must somehow be related to the rights that arise from

this idea. This claim does not purport to represent anything 'out there'; it does not, in itself, justify the particular results which emerge from particular cases, insofar as the results depend on the specification of legal rights which must themselves be justified. It is precisely the status of this theory as an effect of 'the relational play within ... legal discourse'¹³⁸ that gives it its coherence and plausibility.

C. THE INDETERMINACY CRITIQUE

Critical legal scholars often allege that formalist models are unsatisfactory because they do not give determinate answers to legal questions. One version of this critique of contract law can be found in Dalton's deconstruction of contract doctrine. Her project may be briefly described as showing that contract achieves its apparent privateness and objectivity only by pushing problems of power and knowledge into other areas of the law:

Contract law describes itself as more private than public, interpretation as more objective than subjective understanding ... I suggest ... that while the method of hierarchy in duality allows our doctrinal rhetoric to avoid the underlying problems of power and knowledge, it is an avoidance that is also a confession: The problems are only displaced, not overcome.¹³⁹

Her account of modern American duress doctrine, as summarized in the Restatement, does not differ greatly from Wertheimer's; but she regards the interplay of the objective test of 'no reasonable alternative' with the subjective test of whether β actually succumbed to the threat as generating an unacceptable degree of manipulability and indeterminacy.¹⁴⁰ Further, she argues that the Restatement's attempt to define improper threats as consisting of independently illegal acts and bad faith acts is an example of the displacement she identified at the outset:

Threats to commit crimes or torts do not necessarily influence the threatened party more than other threats not singled out for special treatment; ... The only advantage of this strategy is that it displaces the problem of identifying unacceptable behavior over to some other area of the law, leaving the law of contract apparently free of the need for making such controversial moral choices.¹⁴¹

Dalton's complaint here is similar to Trebilcock's critique of Fried and is closely related to the circularity critique. It is certainly true that the formal approach I am advocating neither avoids this displacement nor solves the problem of indeterminacy. But it is not clear exactly why this displacement is a problem. A system of contract law cannot tolerate assent obtained through violations of norms deriving from other areas of the law. Suppose new and radically different legal norms, perhaps

those Dalton desires, come to govern our legal system. It will then still be the case that 'the problem of identifying unacceptable behavior' will not be confined to the law of contract, even for contractual purposes. If that legal system has a law of contract, one in which the norms of interaction are less Hobbesian, more cooperative, and more sympathetic to the powerless than ours, I suggest that the legal approach to coercion will still prevail. Indeed, in such a system, a breach of a norm to assist or to act in good faith might look far worse than it does in our system because such breaches would be more serious departures from the expected legal standard of behaviour. A person faced with a threat of such a breach would have a very strong case for relief from any resulting bargain; and the reason, at least from the perspective of the law of contract, would be the wrongfulness of the threatened action.¹⁴²

Wrongful threats that are not in themselves illegal admittedly present a difficulty for a legal theory of coercion:

The problem with identifying conduct that breaches a contractual duty of good faith and fair dealing ... is that our doctrine has not developed reliable guidelines for distinguishing this unacceptable conduct from the kind of self-interested and self-reliant conduct on which the contractual system is based. Here, the problem of normative choice is not displaced, only deferred until an individual judge is required to make an individual decision.¹⁴³

But, again, it is not clear that this deferral is as serious a problem as Dalton thinks. It would be remarkable, if not impossible, for a legal system to determine in advance all questions which might conceivably come before its judges. Furthermore, the critical legal model of doctrine seems to be not all that different from the common law model, at least insofar as both envisage a continual process of doctrinal revision:

The aim is not closure and completeness but continued criticism and self-revision, not finality but corrigibility.¹⁴⁴

A juridical concept does not carry with it instructions that allow it to be applied to any possible set of facts through the operation of deduction. Nor do the facts themselves come pre-attached with labels that classify them according to juridical concepts and that simply have to be consulted to produce a determinate conclusion. Rather, adjudication involves the exercise of an articulated judgment that specifies what the judge considers to be the meaning of the concept in relation to a set of particular facts.¹⁴⁵

The pressure of various claims of economic duress forces the court into just such a continual process of revising the legal theory of coercion; indeed, the deferral of decisions until particular cases require that they be made is essential to this process.¹⁴⁶

D. THE QUIBBLING CRITIQUE

A fourth critique of the formal approach is that it is just quibbling to describe some grounds of relief as 'duress' and others with other words.¹⁴⁷ I have suggested several times that although the Foundering Ship, the Lecherous Millionaire's victim, and the buyer in the Limited Warranties case are not coerced, they may be entitled to relief on some other basis. If so, if there is relief for the Foundering Ship as well as for the Armed Robber's victim, does it matter whether we call the basis of the relief 'coercion,' 'exploitation,' 'unconscionability,' or 'undue influence'? I think it does matter, and one way to see how it matters is to examine the nature of the relief.

The appropriate remedy in the two Robber cases is to permit the victim to avoid the contract; similarly, the appropriate remedy in Business Compulsion is to set aside the second contract and restore the terms of the first. In contrast, the appropriate remedy for the Foundering Ship is to set aside the agreed price and to award the tug a reasonable fee; similarly, the appropriate remedy in Limited Warranties is not to undo the entire transaction but to modify the warranty. This difference in remedy signals an important difference in the rights involved. The first group of cases involves α 's breach of β 's right; this breach must be recognized for the law of contract to remain coherent. The second group of cases appears to involve no breach of right. The challenge, then, is to explain why α is not allowed to take full advantage of the bargain, since he did nothing wrong in proposing it to β . Various responses to this challenge are possible.

Consider first the Foundering Ship. It is fairly clear from the case law that a reasonable price will be imposed on this transaction, and this rule suggests that the interaction between the Tug and the Ship is not to be regarded as contractual at all. As we have seen, there is justification for taking this transaction out of the law of contract that is nonetheless consistent with the concept of the person that underlies the formal approach to coercion. Brudner argues, in the drowning man analogue to the Foundering Ship, that the contract should not be enforced because an autonomous person cannot renounce life in the same way that he or she can renounce any other particular end or goal. Since 'the entity relinquished for value is the capacity to form and pursue values itself,'¹⁴⁸ the agreement is analogous to an agreement to sell oneself into slavery. Thus, α is not allowed to take full advantage of the agreement.

The unconscionability of a limited warranty presents different problems. Because there is no immediate peril to the buyer, the argument just presented cannot be deployed.¹⁴⁹ Benson has suggested

that equality of values exchanged is entailed by a formal approach to contract law;¹⁵⁰ Brudner, in contrast, has suggested that an agreement is unconscionable only where it is 'objectively harmful' to β and obtained through α 's exercise of superior bargaining power.¹⁵¹ The importance of objective harm is that it relates not to what the particular individual happens to want but to what is 'universally required for the autonomous pursuit of subjective values';¹⁵² on Brudner's view, the law of contract can take account of this sort of harm, though not of harm subjectively conceived (as in Feinberg's coercive offers), because it relates to the autonomous capability to pursue goals. Whether either solution assists the purchaser of the limited warranty will turn on facts that are not fully presented in the example above; my purpose in offering these solutions at this point is simply to show that an account of unconscionability need not be an *ad hoc* adjustment to an otherwise formalist account of contract law.

*v Finding the right baseline:
A critique of other approaches to contractual duress*

A central debate in the theory of coercion is whether the baseline from which the reduction of β 's opportunities resulting from α 's proposal can be described purely empirically or only with some normative criteria.¹⁵³ In a sense, this distinction is a false one. Normative judgments about β 's situation always depend in part on the facts of β 's situation, while the facts that are considered relevant always depend on the analyst's moral perspective. Thus, whether the baseline is empirical or normative, a decision must be made about what sort of information to admit into the analysis of coercion. Economic theories will admit only the sort of information that economists find relevant and useful, namely, information about preferences and opportunities. Non-economic theories, on the other hand, will admit a wider range of information, in particular, facts about the rights of the parties.¹⁵⁴

The formal approach to contractual duress takes the legal rights of the parties as the baseline from which the wrongfulness of proposals is measured; it is thus firmly on the normative side of this debate. The purpose of this section is to reinforce the formal theory by demonstrating that other approaches generate implausible or inconsistent conclusions about contractual duress.

A. EMPIRICAL, NON-ECONOMIC THEORIES OF COERCION

Empirical, non-economic theories of coercion are at first sight very attractive because they hold out the promise of determining questions

of coercion without confining themselves to the narrow informational basis of economics, but without engaging contested political and moral questions. I shall argue that these theories, though perfectly coherent on their own terms, are inappropriate in the contractual context, for two reasons. First, they imply relief from all sorts of agreements that the law does, and should, enforce, and second, where the law and the theory agree that relief should be granted, the reasons are quite different.¹⁵⁵

1. Nozick's empirical baseline

Because of the central place of rights in Robert Nozick's political theory, his analysis of coercion has often been taken to be a moralized one. Consider, for example, the following brief account of voluntariness: 'Whether a person's actions are voluntary depends on what it is that limits his alternatives. If facts of nature do so, the actions are voluntary. ... 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.'¹⁵⁶ On the basis of this passage, Wertheimer, for example, plausibly takes Nozick's theory of coercion to be moralized,¹⁵⁷ and it may well be true that his political theory does rest on a moralized conception of coercion. But Nozick's important earlier discussion of coercion¹⁵⁸ attempts, I shall argue, to develop a purely empirical account.

Nozick's account combines consequentialist and procedural concerns, paying attention both to the effect of α 's action on β 's feasible set and to the process by which the feasible set is changed. On the first point, Nozick distinguishes between 'threats,' which are coercive, and 'offers,' which are not; the basic distinction, which does not refer to rights, is as follows: '... whether someone [P] makes a threat against Q's doing an action or an offer to Q to do the action depends on how the consequence he 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. If it makes the consequences of Q's action worse than they would have been in the normal and expected course of events, it is a threat; if it makes the consequences better, it is an offer.'¹⁵⁹ The normal course of events is illustrated by the following example, which also shows that coercion may depend on α 's identity, not just his or her actions. Suppose that β is a drug addict, α_1 is his usual supplier, and α_2 is another drug dealer. α_1 says he will give β drugs provided β beats up a third party, γ . β agrees. The next day, to α_2 's knowledge, α_1 is arrested. α_2 now says he will give β drugs provided β beats up a third party, ϵ .¹⁶⁰ β agrees. Nozick treats α_1 's statement as a threat to withhold drugs and α_2 's statement as an offer to

supply drugs, even though β 's feasible set is the same after both announcements, precisely because $\alpha 1$ is the usual supplier.¹⁶¹ From β 's point of view, $\alpha 1$'s supplying drugs is the usual course of events, while $\alpha 2$'s is not.

This example also shows the difficulties in determining 'the normal and expected course of events'; what is the *status quo* or baseline from which the effect of a proposal should be measured? Nozick recognizes this problem, but while he makes a helpful distinction between the 'normal' and the 'morally expected' course of events, he refuses to allow either to determine the question of coercion, preferring to suggest that 'when the normal and morally expected courses of events diverge, the one of these which is to be used in deciding whether a conditional announcement of an action constitutes a threat or an offer is the course of events that the recipient of the action prefers.'¹⁶² The Beaten Slave (case K) illustrates the distinction: being beaten every day is the normal course of events, but the morally expected course of events is, arguably, that the beatings will cease. On Nozick's account, then, the master's proposal is a threat because it worsens the slave's opportunities as compared with the morally expected course of events. But Nozick is also concerned about whether Q would be willing to move from one feasible set to the other. For P's announcement to constitute an offer rather than a threat, Q must 'be willing to move and to choose to move from the preoffer to the offer situation.'¹⁶³ It is not enough that Q is 'better off' with the offer; he must also be willing to put himself in the offer situation. A proposal can be capable of making Q better off and yet still be a threat. Thus, on Nozick's account, there is more to coercion than making the victim worse off in the sense of reducing his or her options; if that was all there was to it, there would be no question that Q would go to the offer situation.

Nozick makes a further distinction between threats and warnings. A necessary condition for a threat is that 'P's reason for deciding to bring about the consequence if Q does A ... is that ... this worsens Q's alternative of doing A.'¹⁶⁴ In other words, if α 's reason is not to worsen β 's alternative, but is something else such as preserving his own interests, then α is merely warning β of the consequences, rather than threatening the consequences. If anyone, or anything, caused A, α would bring about the consequences; thus, α 's proposal is not directed specifically at β 's actions. To illustrate the distinction, Nozick introduced the Unionization example considered previously in part III.B.1. The Employer's announcement is a warning if unionization leads to an increase in costs that would, regardless of its source, lead to a shut-down of the firm; it is a threat if this increase would not in itself lead to a shut-down, but the employer commits to a shut-down in order to discourage unionization.

Finally, Nozick argues that coercion is not present unless the cause of β 's act is more closely related to α 's will than to anything else. For example, if α is a natural force, there is no coercion, even where the consequences of its intervention severely constrain β 's opportunities; further, even if α does will β 's action, if β wills it as well, there is no coercion. This requirement is a consequence of Nozick's 'closest relative view' of action; β 's action would still be attributed to β if, despite α 's intervention, it was more closely related to β 's will than to α 's. It is only where α 's will supplants β 's in this sense that β 's action can be considered coerced.¹⁶⁵

At each step of the analysis – in the distinctions between offers, threats, and warnings – Nozick relies on empirical facts about α 's and β 's preferences, about the normal course of events; even the moral background is treated as an empirical phenomenon. Nozick thus presents an empirical view of coercion.

Although Nozick does not indicate whether his analysis of coercion has implications for contractual responsibility, it is worth briefly considering how his approach would handle the aforementioned examples. Nozick would treat the Armed Robber's behaviour as coercive, but his treatment of the Altruistic Robber and of the Lecherous Millionaire would depend on whether the Robber's or the Millionaire's proposal satisfied all the requirements of an offer. Once in the offer situation, the victim would choose to sell his watch, or save her son, as the case may be, and would thus be better off than before the encounter; but Nozick's theory also requires that the victim would be willing to experience the encounter to begin with. This willingness would no doubt vary from victim to victim. The 'normal' and the 'morally expected' course of events appear to coincide in these cases; on most accounts of normality and morality, one does not expect strangers to propose these types of deals, combining improvement and degradation of one's opportunities. It seems that, on Nozick's view, there is no coercion in the Penny Black, the Competitive Grocer, the Starving Peasant, Inadequate Warranties, and Prude and Lewd (Cases E through I); whether either variation of Unionization involves coercion depends, as we have seen, on empirical facts about the firm's and the union's preferences.

Nozick's theory of coercion is perfectly logical and may be quite useful for some purposes. But, ironically in light of Nozick's political theory, the analysis leads to a negation of the notion of a right. To see this, consider one of a class of hard cases that Nozick regards as a clear instance of coercion. Suppose that α has a valid, enforceable legal claim against β . For example, α holds a mortgage on β 's property, and β is in default, with no defences. α now seeks to exercise this right for the sole purpose of extracting some *quid pro quo* from β . For example, α tells β

that she will foreclose unless β pays some additional sum, but without the prospect of the additional payment, α would not bother to enforce the right ('it's not worth the trouble, [α] has no pressing need for funds, etc.'¹⁶⁶). Is β coerced when he agrees to hand over the additional sum? According to Nozick's analysis, β is coerced because both the normally expected and the moral course of events would lead α not to foreclose (although he adds that α is morally permitted to foreclose).¹⁶⁷ But this analysis suggests that the right to foreclose is not α 's right at all; if, in the absence of any legal or moral impediment to foreclosure, α is not allowed to use the potential of foreclosure to her advantage, one may as well say that she has no right to foreclose. It is, again ironically in light of Nozick's political theory, like voiding an agreement of sale and purchase even though there is no legal or moral bar to the seller's sale and the buyer's purchase. What Nozick's analysis of this case lacks is an explanation of the limit it places on α 's right which is somehow linked to the autonomy interests that rights serve.

This account is related to Nozick's account of blackmail. He argues that blackmail is unproductive. '[P]roductive activities are those that make purchasers better off than if the seller had nothing at all to do with them.'¹⁶⁸ Purchasing forbearance from a right that the seller proposes to exercise only for the purpose of extracting a payment is not productive in this sense: 'it merely gives relief from something that would not threaten if not for the possibility of an exchange to get relief from it.'¹⁶⁹ Thus, blackmail is unproductive in Nozick's sense. Another way to see the point is to ask whether forbidding the exchange would leave one party no worse off and the other party better off; if the answer is 'Yes,' then the exchange is unproductive.¹⁷⁰ Nozick argues that the journalist in the Professor's Secret could legitimately 'charge an amount of money equal to his expected difference in royalties between the [review] containing the information and the [review] without it';¹⁷¹ any greater amount would be unproductive blackmail.

Nozick's account of blackmail seems both overinclusive and underinclusive.¹⁷² First, as in the foreclosure example discussed above, it limits α 's right to act without explaining how the limitation is consistent with the concern for autonomy that underlies contract law. In what sense is the blackmailer 'no worse off' if the blackmail transaction is forbidden? He loses the payment he would have received from his victim. It is true that forbidding the exchange leaves him no worse off than he would have been if he had never encountered the victim; but that is true of many perfectly unobjectionable transactions, such as the Penny Black (case E) and Prude and Lewd (case I). Adding the requirement that the victim be better off when the transaction is prohibited only serves to sweep in other

unobjectionable transactions, such as the case where a tort victim (α) threatens to sue a tortfeasor (β) unless an out-of-court settlement is reached.¹⁷³ Second, Nozick's suggestion that the journalist in the Professor's Secret could charge his opportunity cost of using the information is at odds with the intuitive view of blackmail; on most accounts, the journalist's charging any amount for his silence is objectionable.

Thus, on several grounds, Nozick's empirical approach to coercion is ill-suited to the analysis of contractual duress. In some applications, it negates α 's right without satisfactorily explaining why the right should be negated, and it does not provide a good explanation of blackmail.

2. *Feinberg's empirical baseline*

Feinberg's analysis of coercion is only a part of his ambitious attempt to provide a liberal, harm-based, account of the limits of the criminal law. His goal is to develop an account of coercion that can be used to justify legal intervention in certain situations on 'soft paternalist' grounds. 'Soft paternalism holds that the state has the right to prevent self-regarding harmful conduct ... when but only when that conduct is substantially non-voluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.'¹⁷⁴ Intervention into a contract between α and β that looks harmful to β will therefore only be justified if β did not enter into the contract voluntarily. Feinberg's main interest is to determine whether coercion vitiates voluntary consent in such a way as to justify relief.

Feinberg attempts to develop a non-moralized account of coercion, resting on facts about β 's preferences and choice situation. His account of threats makes this clear. He accepts the need for a baseline or 'norm of expectability'¹⁷⁵ and examines four possible baselines. The first is the *talis qualis* which compares α 's 'projected consequence to a norm consisting of the exact circumstances that obtained with the projected act subtracted [*sic*];' the second is 'a statistical test' which compares 'the projected consequence to a statistically normal set of circumstances with the entire episode subtracted.'¹⁷⁶ The third compares 'the projected consequence to a morally proper or morally required state of affairs.'¹⁷⁷ The fourth is Nozick's test, which asks whether β is willing to move 'from the pre-proposal into the proposal situation.'¹⁷⁸ Feinberg prefers the 'statistical test' because it is 'more richly hypothetical than the *talis qualis* test, and independent of the moral standards employed by the moral requiredness test.'¹⁷⁹ Thus his account of coercion avoids the narrow consequentialism of the *talis qualis* test, does not require that what α proposes to do to β 's choice set be a moral wrong to β (moral requiredness test), and avoids the extra step involved in Nozick's test.

But the statistical test derives its 'richly hypothetical' nature in part from assumptions about existing moral standards. Consider, for example, Feinberg's solution to the drowning man case, where α says he will rescue the drowning β only if β promises to pay him a lot of money. Feinberg asserts that 'given the practices that prevail in our community, the [projected consequences of α 's disfavored alternative, i.e. allowing β to drown] in the boatsman's proposal would be a shockingly unwelcome deviation from the normal expectation.'¹⁸⁰ α 's proposal is therefore a threat because it causes β 's opportunities to depart from the normally expected statistical baseline in which α rescues β , and the community's moral standards are factored into this baseline.

But the distinction between threats and offers does not exhaust Feinberg's definition of coercion. Feinberg believes in the possibility of coercive offers, as in the example of the Lecherous Millionaire. The Millionaire's proposal is an offer because it expands the possibilities open to β ; what makes it coercive? To answer this question, Feinberg makes a distinction between 'goods' and 'evils'; the former having positive value and the latter negative value. A coercive offer is one which gives β only a 'choice of evils': 'Offers are classifiable as coercive in their effect only when they satisfy a requirement of appropriate polarity; typically they force a choice between evils'¹⁸¹ Thus the key to the coercive offer, on Feinberg's view, is that it simultaneously worsens and improves β 's opportunities, but in such a way as to make β 's opportunities all bad in some sense. To see this idea more clearly, characterize the outcomes for β in the Lecherous Millionaire case as follows:

- a_1 : β 's child receives surgery.
- a_2 : β 's child does not receive surgery.
- b_1 : β does not become α 's mistress.
- b_2 : β becomes α 's mistress.

β 's preference ordering is as follows:

$(a_1, b_1); (a_1, b_2); (a_2, b_1); (a_2, b_2)$.

Before α 's intervention (a_2, b_1) is the only possible outcome; but after α 's offer (assuming α keeps his bargain), β 's choice is between (a_1, b_2) and (a_2, b_1) . Of course, all things considered, the first option is better for β , but while the first option is better along the dimension of the b 's, it is worse with respect to the a 's. It is only because β is willing to 'trade off' her sexual autonomy for her child's life that (a_1, b_2) is better, all things considered. To make α 's offer appear coercive, Feinberg must therefore attach a non-moralized polarity of good and evil to each outcome; 'good' and 'evil' cannot be moral terms in this context (if they

were, the theory would become moralized). Instead, the standard of good and evil must be internal or subjective, dependent on β 's perceptions.¹⁸² For example, if β does not regard becoming the Millionaire's mistress as an evil, then his offer no longer creates a choice of evils and is not coercive.

But this sort of trade-off happens all the time and can easily be expressed in rational choice terms, without reference to 'good' and 'evil' (a standard example is the income-leisure trade-off that economists use to analyze decisions about employment). Indeed, given that 'good' and 'evil' appear to depend on the intensity of β 's dislike of her choices, rather than on any external moral feature of her situation, it is hard to see what work these morally loaded terms do in Feinberg's argument. Furthermore, Feinberg favours partial enforcement of coercive offers, an odd stance to take when only a choice of evils is on offer,¹⁸³ it seems to be the offer rather than the coercion that is crucial in this recommendation. It is hard to resist the conclusion that Feinberg, despite his disavowals, considers the Lecherous Millionaire's offer coercive because he considers it immoral.

To see this point, consider a related example. β 's current job in New York 'is so odious that it is intolerable [and] no welfare payments are available to him.' α offers β a job in Houston. This job 'is itself distasteful and unrewarding though by far the lesser of the evils.'¹⁸⁴ Feinberg suggests that α 's offer is coercive in much the same manner as the Lecherous Millionaire's. Yet it is hard to see what consequences flow from this characterization, nor does Feinberg suggest any. If β accepts α 's offer and moves to Houston, is α liable to pay him for a certain period even if he quits in dismay? That is, as in the Lecherous Millionaire, is β entitled to at least some of the benefits of α 's offer despite his failure to perform? Recall, too, that the assessment of evil is made from β 's subjective perspective. Suppose that β is a miserably unhappy but talented litigator, that he has no viable option to this career (perhaps he has accumulated a crushing debt load while in law school), and that α has no idea that β is unhappy (α is just looking for another good lawyer). It seems highly implausible to describe α 's offer as coercive in this example. If there is a difference between the Lecherous Millionaire and the unhappy litigator, it surely lies in some quality of α 's conduct rather than in the subjective facts of β 's situation.

The possibility of a coercive offer implies the possibility of a non-coercive threat:¹⁸⁵

If a gunman wishes to give money to B (whom he wrongly supposes reluctant to accept it), he says: 'Take this money or I'll blow your brains out! ..., then he

creates a redundant intimidation – what might even be called a ‘noncoercive threat’ – a proposal that is coercive in intention and technique but not in effect – to a willing victim whose acceptance of his terms is entirely voluntary, and who may not evade responsibility for his avarice later by pleading coercion.¹⁸⁶

This case is essentially the same as the Altruistic Robber and indicates that Feinberg would enforce his contract with his victim. I suggest that there are two things wrong with Feinberg’s approach to this case. First of all, in keeping with Feinberg’s own subjective approach, his conclusion about the Altruistic Robber is psychologically implausible. β may feel free to enter into a transaction with α when the option is transacting instead with γ , but may feel very unfree when the option is having his brains blown out.¹⁸⁷ Second, it is hard to see why the description of the initial interaction as coercive should turn on the degree of β ’s willingness to accept the money. Of course, β may ratify the transaction by confirming it in some way when the coercion has been removed, but it is hard to see why he should be precluded from arguing that the transaction was coercive. Surely the coercion in this situation derives from the gunman’s act (whether because it drastically reduces β ’s options or because it violates his rights) and not from β ’s state of mind.

This theory of coercive offers and non-coercive threats is not responsive to bilaterality of contract. The theory of coercive offers privileges β ’s subjective need over α ’s right, as we see in the case of the unhappy litigator, while the theory of non-coercive threat privileges α ’s need over β ’s right, by presuming that β must respond in a certain way to α ’s proposal. Without a positive act by β – that is, ratifying or affirming the contract when the coercion ceases – we cannot presume that β ’s autonomous choice would be to accept α ’s terms.

Applying his approach to the examples in section III, Feinberg would presumably enforce contracts B, E, F, and G but not contract A. In the Foundering Ship (contract C), the tug’s proposal is a coercive offer; Feinberg would presumably restore to the ship the excess over the tug’s normal fee. The Lecherous Millionaire (case D), as we have seen, may or may not result from a coercive offer, depending on β ’s perception of goods and evils; but assuming that the Millionaire’s offer is coercive, Feinberg’s theory assimilates this case to the Foundering Ship. The Beaten Slave (case K) is a coercive offer, though Feinberg does not specify the remedial consequences of this holding;¹⁸⁸ on Feinberg’s account, the Rebellious Slave (case L) must be a straightforward instance of coercion: the slave’s proposal is, from the master’s point of view, a most unwelcome departure from the expected course of events.¹⁸⁹ Lewd’s proposal to Prude, ‘If you don’t read this book, I

will,’ might well, if Prude is sufficiently prudish to regard both prospects as evils, amount to a coercive offer on Feinberg’s view.

Many of the features of Feinberg’s argument derive from his desire to avoid a moral theory of coercion. As a brief critique of views in which coercion arises only if α proposes to do a moral wrong to β , Feinberg offers the following examples, in which α threatens ‘to do what [he] ... has a perfect right to do if he chooses’: ‘A teacher warns a child not to repeat his bad conduct ‘or else I will tell your mother’; a judge warns the parolee that if he is convicted again, ‘I will impose the maximum sentence on you, without mercy’; a creditor threatens his debtor to sue if he does not pay up immediately.’¹⁹⁰ According to Feinberg, these are all cases of ‘coercive pressure.’ Yet none of them appear to constitute threats on Feinberg’s own definition because in each case α proposes a consequence which is perfectly reasonable to expect on the statistical baseline test; and at the same time they are plainly not coercive offers in Feinberg’s sense because they are not offers at all. Furthermore, these examples are not of much interest in terms of Feinberg’s project. His theory of coercion is used to justify legal intervention on soft paternalist grounds; yet none of these seem to be cases where any resulting agreement would be set aside on such grounds.¹⁹¹ Further, Feinberg is ultimately concerned not only with α ’s and β ’s contractual liability but with α ’s criminal liability. In either case, Feinberg needs to ask whether α is allowed to keep the gains from the transaction and whether β is responsible for his or her promise. While cases such as the Lecherous Millionaire present difficulties, no one would regard the examples quoted earlier in this paragraph as cases where β ’s response to α ’s ‘threat’ would relieve β of his or her responsibility. They are, therefore, not cases of coercion on Feinberg’s own account. The broad conception of coercion that Feinberg uses in criticizing moralized theories does not correspond with the narrower, responsibility-relieving conception he uses in presenting his own empirical account.

B. ECONOMIC THEORIES OF COERCION: MORAL OR EMPIRICAL?

Like many other applications of economic reasoning, economic theories of coercion have an appearance of being entirely non-moral and purely empirical. These theories rest heavily on facts about preferences and opportunities, and any resulting indeterminacy can be resolved, at least in principle, by empirical investigation. Yet, I shall argue that economic approaches to coercion are moral theories, in that they all ‘contain an ineliminable reference to moral rightness or wrongness.’¹⁹² This standard is usually, depending on the theory, either wealth-

enhancement or Pareto optimality. Economists are so accustomed to working with the Pareto criterion that they are sometimes incapable of seeing it as an ethical standard.¹⁹³ Similarly, law and economics scholars are so comfortable with the notion of wealth maximization that they, too, sometimes forget that while it is an alternative to the Pareto criterion, it is still an ethical standard.¹⁹⁴ But these are ethical standards, and because economic theories of coercion tend to define coercion with reference to these standards, economic theories of coercion are moralized.

I argue that this ethical focus leads economic analysts of law to attempt to define coercion in terms of welfare; and that economic theories of coercion encounter difficulties when welfare and more traditional notions of liberty or freedom conflict. For economic analysis, voluntariness can serve at best to create a presumption that the contract is wealth-creating;¹⁹⁵ references to other values tend to be eliminated. Again, this approach to coercion is not incoherent or demonstrably wrong, but economic analysts of law appear to have nothing to gain by invoking the concept of coercion rather than simply relying on welfarist values. The economic approach to coercion explains neither common intuitions nor legal reasoning about the examples.

1. *Posner: The irrelevance of voluntariness*

The irrelevance of voluntariness and coercion to the economic analysis of contract law is seen most clearly in Richard Posner's work. For Posner, the law of contract has three functions: to provide incentives for efficient behaviour, to reduce transactions costs by supplying a set of implied standard terms, and to facilitate planning.¹⁹⁶ Therefore, when a judge is deciding whether or not to enforce any given contract, he or she need not consider the rights or interests of the individual parties, but only the effects that his decision will have on future contracts.¹⁹⁷ Posner's analysis of the Armed Robber case makes the point clear:

A points a gun at B saying, 'Your money or your life.' B is very eager to accept the first branch of this offer by tendering his money. But a court will not enforce the resulting contract. The reason is not that B was not acting of his own free will. On the contrary, he was no doubt extremely eager to accept A's offer. The reason is that the enforcement of such offers would lower the net social product, by channeling resources into the making of threats and into efforts to protect against them.¹⁹⁸

On this reasoning, there is no reason not to enforce the contracts in the cases of the Lecherous Millionaire, the Penny Black, the Competitive Grocer, the Starving Peasant, or Limited Warranties (cases D

through H).¹⁹⁹ Similarly, Posner would favour enforcement of the Altruistic Robber's contract and of the contract between Prude and Lewd (case I) (unless a purely economic argument against the alienability of the right to read could be constructed). The only basis for refusing enforcement would be the unlikely event that enforcement caused potential victims to expend excessive resources to protect themselves; a welfare-based approach cannot criticize these transactions on any other basis.²⁰⁰ On the other hand, if the Foundering Ship contract is not to be enforced, it is only because 'if we permit monopoly profits in rescue operations, an excessive amount of resources may be attracted to the rescue business.'²⁰¹ Business compulsion (case M) is best seen, on the economic view, in the light of the need to control opportunism, defined as the form of monopoly power that arises out of the contractual relationship itself.²⁰² Whether there is opportunism in a demand for a contract modification turns on whether the risk that prompts α to seek the modification was already allocated, expressly or impliedly, in the original contract. If so, enforcement of the modification would tend to disturb the risk-allocation function of contract law and thus produce inefficiency.²⁰³ Blackmail is criminalized to protect public law enforcement, at least where permitting blackmail would lead to significant under- or over-enforcement of the law.²⁰⁴ This rationale would apply to the Professor's Secret, given that the Professor has already been (presumably optimally) punished for his crime.

This approach to duress treats law as an instrument in the pursuit of a morally desirable outcome. There is considerable doubt that the outcome pursued is morally desirable, but for the purposes of this paper, the oddity of Posner's approach lies in its disregard for the particulars of the interaction between α and β . The two Robber cases make this point clear. It may well be that the Altruistic Robber's victim may subsequently affirm the contract, but to say, as the economic approach seems to entail, that the contract should be enforceable because it is not the sort of transaction that people will expend resources to guard against demonstrates a tremendous disregard for the autonomy of the victim.

2. *Kronman's modified paretian approach*

Unlike Posner, Kronman purports to be concerned about voluntariness. But since he starts from the view that contract law should be understood in terms of its distributive effects, his approach, like Posner's, ultimately has nothing to do with freedom of contract.

Kronman argues that a person complaining of coercion 'is asserting that his agreement, though deliberately given, lacked voluntariness

because of the circumstances under which it was made – circumstances that in one way or another restricted his range of alternatives to a point where [his] choice could be said to be free in name only.²⁰⁵ This approach seems to point to some sort of notion of having a 'real choice,' perhaps some version of positive freedom; but Kronman goes on to make a bold claim that takes his approach out of the realm of freedom altogether:

In my view, this problem is equivalent to another – the problem of determining which of the many forms of advantage-taking are compatible with the libertarian conception of individual freedom. ... the fundamental question is whether the promisee should be permitted to exploit his advantage to the detriment of the other party, or whether permitting him to do so will deprive the other party of the freedom that is necessary, from a libertarian point of view, to make his promise truly voluntary.²⁰⁶

Kronman is already, at this preliminary stage, pointing to the consequences of enforcement, rather than the circumstances of making the contract, as the touchstone of voluntariness; and his 'principle of modified paretianism' does just this. 'In some cases, it is reasonable to think that a person who has been taken advantage of in a particular way will be better off in the long run if the kind of advantage-taking in question is allowed than he would be if it were prohibited. ... I shall call this ... view paretianism, because of its close connection with the idea of Pareto efficiency.'²⁰⁷ Since this principle might be extremely difficult to apply to individual cases, Kronman modifies paretianism by 'requiring only that the welfare of *most people* who are taken advantage of in a particular way be increased by the kind of advantage-taking in question.'²⁰⁸

It is no accident that the notion of 'voluntariness' disappears from Kronman's application of this approach²⁰⁹ because the principle of modified paretianism has nothing to do with our intuitive notions of what is voluntary and what is not. The principle looks not to the conditions under which the contract was formed but to the consequences of enforcing it; and the consequences in question are not even consequences for the individual parties but for the groups to which the parties belong. The principle is based on the advantages accruing to other persons in the situation of the parties, not on any rights or interests of the actual parties to the contract. The 'principle of modified paretianism,' like Paretianism in all forms is welfarist and not procedural and, therefore, has nothing to say about freedom.²¹⁰

Since Kronman's principle, like Posner's approach, strives to be empirical,²¹¹ its application to the examples given above must be somewhat speculative but will still serve to illustrate the distance between

Kronman's view and concepts of freedom. Kronman's principle would almost certainly prevent the Armed Robber's contract with his victim from being enforced;²¹² but by the same token, his principle would require the Altruistic Robber's contract to be enforced, even over any individual victim's objections. The contracts in cases C, D, E, F, and G would presumably also be enforced because they appear to provide long run benefits to those taken advantage of. Even if the Starving Peasant dies, future starving peasants will presumably benefit from the increased willingness of merchants to sell them food on credit that would result from enforcement; even if the desperate mother feels degraded, enforcement will benefit future desperate mothers who might need to enter into similar contracts with future lecherous millionaires.

The contract between Prude and Lewd presents similar issues. Suppose Prude reneges, refusing to read the book, and Lewd seeks specific performance. Kronman's principle requires the judge to consider whether the class of Prudes would be benefited by forcing them to read the book (assuming that Lewds tend to perform their side of the contract). If the judge has evidence of Prudes' preference orderings, he or she is clearly required to enforce the contract. But this argument depends solely on the prospects for Prudes' welfare and not at all on the conditions under which the contract was made. The enforcement of the business compulsion case (M) will depend, rather in the manner of Posner's analysis, on the empirical consequences for future contracting parties. It would seem to be more to the advantage of future β s to refuse enforcement: if suppliers in α 's position know that they can always extract payment in addition to that set in the contract, they will have an incentive to do so, and β s will be disadvantaged. But note that this conclusion in no way turns on the quality of the interaction between α and β .

Kronman's attempt to define freedom of contract in such a way that the class of contracts freely entered into will coincide exactly with the class of contracts that should be enforced for Paretian reasons is implausible because it ultimately undercuts the concern for voluntariness with which it began.

3. Trebilcock: Controlling monopoly

Trebilcock criticizes moralized theories of coercion on the following ground: '[W]hile it is possible to determine whether A's proposal is coercive once B's moral base-line has been set, once B's moral base-line has been set all the interesting theoretical work will already have been done ...'²¹³ He therefore seeks a sort of empirical baseline, beginning by situating the question of freedom of contract within the paradigm of

rational choice: 'The question is whether the constrained choices facing one of the contracting parties renders her consent to the express contract in question involuntary so as to vitiate that consent.'²¹⁴ Trebilcock attacks the problem with three distinctions: exploitation versus creation of risk, life-threatening versus non-life-threatening risk, and monopoly versus non-monopoly. The Armed Robber, for example, both creates and exploits life-threatening risks, while the offeror of the Penny Black exploits, but does not create, non-life-threatening risk. The Starving Peasant finds himself in a non-monopolized but life-threatening situation. The other examples can be similarly classified. But for Trebilcock, these three distinctions are ultimately understood in terms of a fourth, situational versus structural monopoly:

In a situational monopoly ... it is the relatively fortuitous circumstances surrounding the interaction between the particular parties to the exchange which creates the monopoly power which A opportunistically exploits in return for a quid pro quo that has no or negative social value ... or in respect of which B is induced to pay vastly more than the competitive or normal value of the services

Generally in the case of structural monopolies ... the market power is non-transitory, obtains against all parties in the relevant market, and is exogenous to and precedes the particular circumstances of the interaction between parties to a given exchange²¹⁵

Trebilcock concludes that '[t]he principal focus of a theory of coercion in the common law of contracts in two-party disputes should be situational monopolies that arise out of the particular circumstances surrounding specific exchanges,²¹⁶ and would apparently grant relief only in a situational monopoly and only if the situational monopolist extracted much more than the competitive value of the good or service.

This approach is appealing because it captures many of our intuitions about which contracts should be enforced while making room for some of the insights of the economic analysis of law. It plausibly solves the question of why the contracts in the Armed Robber, the Foundering Ship, and Business Compulsion (cases A, C, and M) should not be enforced, while the Penny Black and the Competitive Grocer (E and F) should. But the distinction between situational and structural monopolies does not seem to capture what really constrains the parties in some of the other cases. For instance, Trebilcock would have to enforce the rice merchant's contract with the Starving Peasant, who faces neither a monopoly nor a non-competitive price. Further, Trebilcock's suggestion of remitting the problem of structural monopolies to public law (anti-trust) would solve Limited Warranties (case H) but does not assist the Starving

Peasant (case G); what seems problematic about his situation is certainly that his range of choice has been restricted, but it is precisely through the operation of private ordering that this restriction has come about. Assuming that Starving Peasant's situation is properly described as one of unfreedom, and that we should do something about it, Trebilcock's approach does not seem helpful. I agree that there may be no case for contractual intervention because contract law is not always an appropriate 'vehicle for achieving our distributive justice goals relative to the tax and transfer system.'²¹⁷ But my concern is that Trebilcock's framework, by focusing on competitive market outcomes as the ultimate measure of freedom, appears to miss the real unfreedom in the Starving Peasant's situation, treating it as a welfare problem only.²¹⁸

Further, the distinction between situational and structural monopolies raises some of the same baseline problems as other theories of coercion. How far back in time, or in the chain of causation, do we have to look to determine whether 'market power is exogenous to and precedes' the interaction between the parties? Consider again the Foundering Ship. Trebilcock's argument that this is a situational monopoly makes sense when viewed from the perspective of normal everyday interactions between ships and tugs. But suppose the tug industry has been monopolized, that tug owners have deliberately restricted the supply of tugs or the number of salvage voyages undertaken precisely for the purpose of raising tug fees. While this particular tug did not seek out this particular foundering ship, there would have been more tugs out looking for ships if the industry was not monopolized, thus increasing the probability that the ship would have been found. Is the monopoly now situational or structural? Does the fortuity of the interaction or the structure of the industry govern the analysis? Or consider Prude and Lewd. Is their power over each other's welfare structural or situational? The answer – and therefore the rule of enforcement²¹⁹ – would seem to depend on the nature of the relationship between the two. Have they always known each other and tried to influence each other's reading (structural); or did they accidentally meet in the modern British fiction stacks at their local library (situational)? No doubt the relationship between Prude and Lewd affects our understanding of how they should resolve their dilemma, but Trebilcock's distinction does not seem helpful in this case.²²⁰

Finally, Trebilcock's attempt to avoid as far as possible a moralized baseline fails. Recall that Trebilcock's objections to theories that moralize the baseline is that they leave all the interesting work outside the law of contract. But there are two ways in which Trebilcock, too, pushes much of the 'interesting theoretical work' outside his own

framework. He recognizes the first; speaking of the Lecherous Millionaire and related cases involving sexual proposals, he says: '[I]t seems to me to be difficult to avoid a moral base-line (rights theory) approach if we are to give effect to the moral intuition that most of us are likely to feel about these cases. This seems to implicate similar issues to those canvassed in Chapter 2 [Commodification], where to enforce transactions in these circumstances is viewed as likely to violate basic notions of human dignity and self-respect.'²²¹ Trebilcock is quite right to raise the question of commodification, but to refuse to enforce the contract on these grounds points in a direction which Trebilcock seems reluctant to go. If sexuality is not to be a commodity, then it really doesn't matter how eagerly or reluctantly the desperate mother enters into the agreement with the Lecherous Millionaire; coercion is beside the point. But if the reason for refusing to commodify sexuality is that there is something inherently coercive or involuntary about certain transactions (such as selling oneself into slavery), then one has to consider difficult questions about when autonomy imposes limits on its own exercise. These questions cannot be answered from a purely economic perspective.²²²

Trebilcock shares with other economists his reluctance to recognize the second way in which his theory is moralized. Recall that Trebilcock's theory has two branches. First, there must be a situational monopoly; second, the consideration flowing from β to α must be unjustified by 'the normal competitive environment.'²²³ α 's proposal to β is, then, being assessed from a competitive baseline; even in a situational monopoly, where β has 'no choice,' Trebilcock's theory would not give β relief if the consideration extracted by α is no greater than the competitive value of α 's service. The competitive baseline can, at least in principle, be derived empirically; but to use it as a reference point for assessing coercion is to endow it with normative significance.²²⁴ The competitive market price functions in Trebilcock's account not just as a measure of the substantive fairness of the bargain, but as a determinant of the voluntariness of the transaction. Because Trebilcock makes the competitive outcome the reference point, his theory, like Posner's and Kronman's, must ultimately require values of freedom and autonomy to yield to welfarist values.

4. *Are economic theories moral or empirical?*

This review of economic approaches to coercion suggests that economic theories of coercion strive to be empirical but are in fact moral. They appear to be empirical because the baselines adopted do not refer to rights or other deontological phenomena; instead, they refer to states of the world that can, at least in principle, be described. But the rules

about enforcement depend, not on the baselines themselves, but on the implications of enforcement for efficiency. Since efficiency is a moral value, economic theories of coercion turn out to be moral.

C. MORAL, NON-ECONOMIC THEORIES OF COERCION

The main alternative to the economic approach has been what is usually called a moral approach to coercion. These approaches generally start with the view that it is impossible, or not helpful, to describe a person's behaviour as coerced without reference to some normative features of his or her situation. A normative theory of coercion typically makes use of the distinction between offers and threats but argues that the baseline to be used in assessing threats must be moralized. Economic theories of coercion derive their moral force not from the characteristics of the interaction between α and β but from empirical guesses as to the efficiency effects of enforcing the contract. In contrast, moral theories focus on the interaction itself. In this section I discuss two of the leading moral theorists of coercion.²²⁵ These theories are closely related to the legal baseline approach that I have advocated. They differ, I shall suggest, by minimizing the difference between legal and moral duties and thus tying legal outcomes too closely to moral requirements. This sort of approach is appealing because it is very responsive to the limited choices often faced by β but it is inconsistent with the underlying presupposition of freedom of contract. If contracting parties are conceived of as I have suggested above, and if their contractual relationships are governed by right, law and morality cannot be merged in the manner that we see in the theories about to be discussed because this merger subordinates α 's right to β 's need.²²⁶

1. *Wertheimer: The convergence of law and morality*

Alan Wertheimer has produced an extensive moralized account of coercion, approaching the concept from two sides, the legal and the philosophical. Despite his willingness to recognize that statements about coercion can be used for many different purposes, his primary interest in 'responsibility-affecting contexts'²²⁷ of coercion leads him to the view that 'the structure of the law's theory of coercion is correct.'²²⁸ Wertheimer, then, finds a surprisingly high degree of congruence between moral and legal theories of coercion.

Based on the *Restatement of Contracts*²²⁹ and American case law, Wertheimer argues that the common law has a 'two-pronged' theory of coercion or duress. The 'proposal prong' refers to the characteristics of α 's proposal, while the 'choice prong' refers to the nature of β 's choices after the proposal is received. The choice prong provides that

the person alleging duress must have found himself or herself in a situation where he or she had 'no choice' but to comply with α 's proposal. While 'no choice' could conceivably be an empirical criterion, such a reading would greatly narrow the number of cases in which a plea of duress would be successful. Wertheimer finds instead that the case law generally uses the term to mean 'no reasonable choice,' where reasonableness is assessed primarily with respect to the remedies available to β for what α proposes to do in case of β 's non-compliance.²³⁰

The central idea of the proposal prong is that α 's proposal must be, in some sense, wrongful, if β is to claim that he or she acted under duress: 'Not any wrongfulness will do. What would do? The most important principles are these. First, it is wrong to propose that which is independently illegal. Second, and a corollary of the first principle, it is generally not wrong to propose to exercise a legal right Third, there are exceptions to these two principles.'²³¹ The third principle is, of course, the most problematic. If α proposes, for instance, to sue β over a disputed debt or to report β 's crime to the police, and β nonetheless refuses to comply with α 's demands, it would seem that α 's subsequent carrying out of his threat would not be illegal and might under some circumstances even be admirable. Yet there is something very distasteful about using the threat of criminal prosecution to secure repayment of a debt, perhaps because there is a qualitative moral difference between being accused of a criminal offence and being accused of withholding monies owing. This difference suggests to Wertheimer that in such cases the wrongfulness of α 's proposal derives from 'a more general principle, to wit, that legal processes should not be used outside their proper sphere or to secure an unrelated or improper benefit.'²³² Both the proposal prong and the choice prong, then, are moralized.

This interpretation appears to be an accurate account of the law, but Wertheimer goes farther and claims that the best moralized philosophical account of coercion is congruent with this legal theory. The key to Wertheimer's view is his recognition that the claim ' β was coerced' can have quite different uses. Consequently, he does not argue that a philosophical theory of coercion must rest upon a moral theory; an empirical theory may have perfectly plausible uses.²³³ However, if a coercion claim is to be used to relieve β of responsibility, both the choice prong and the proposal prong must be moralized. Consider first the proposal prong. Wertheimer argues, though not very clearly, that the theory of coercion he found in the law provides a good motivation for a moralized baseline for distinguishing threats from offers.²³⁴ He argues further that 'the moral baseline approach rests on a theory of rights.'²³⁵ Whether a given proposal is an offer or a threat, from a

philosophical point of view, will depend on whether α has or has not the right to make his or her proposal to β .

Consider next the choice prong. There are almost always logically or physically possible alternatives to complying with α 's demand; what determines which of these alternatives is relevant? Wertheimer proposes the following:

... the sense of having 'no acceptable alternative' that is relevant here is not that B finds the other alternatives unacceptable or that it would be irrational or unreasonable for B not to accept A's proposal, but that B has no obligation to accept the other alternatives, or, ... B is entitled to yield to A's proposal and then be released from the normal moral and legal consequences of his act.²³⁶

For a responsibility-avoiding coercion claim to be made out, then, α 's threat must be wrongful and β must be morally entitled to succumb to the threat. In other words, both the proposal prong and the choice prong must be moralized: 'Receiving a coercive proposal and having no acceptable alternative ... but to succumb to the proposal are each necessary and jointly sufficient to establish that A coerces B.'²³⁷

There is much to be said for this approach from a moral point of view. It would be odd to say that β had a morally acceptable way out of the dilemma posed to him by α , and yet to release β from the consequences of his or her actions. At the same time, it would be odd to say that α had no right to pose the dilemma to β , and yet to hold that fact irrelevant to the determination of β 's moral responsibility. Consider two examples from Feinberg:

Give me \$10,000 or I will break your legs.

Give me \$10,000 or I will be momentarily annoyed.²³⁸

Feinberg's empirical explanation for the intuition that the first is coercive and the second is not is based upon an implausible and admittedly 'inappropriate'²³⁹ attempt to construct indices of coercive pressure. Wertheimer's two-pronged theory points instead to morally relevant features of α 's and β 's situation. To break β 's legs would be a tort, a crime, and an immoral act, whereas to be momentarily annoyed at not receiving a substantial gift is neither a tort nor a crime (though it could conceivably be immoral in a minor way). Whether β has a reasonable alternative to compliance is not clear without more facts, but assuming that α can make his threat effective in each case and wants the money only for his own selfish purposes, it would appear that β is not legally or morally required to resist the threat to have his legs broken, but should be able to tolerate α 's momentary annoyance. β

would therefore be able to get his \$10,000 back in the first case but not the second.

Wertheimer's focus on the differing uses of coercion claims and on the use of rights to set the moral baseline for threats is close to the position that I adopt in this paper, but his argument is not without difficulties. First, Wertheimer seems to assume that the only way to set the moral baseline is to use rights. As we have seen, economic theories of coercion can be interpreted as moralized theories which use a substantive (if implausible) view of the good to set the baseline. Wertheimer's claim that 'the moral baseline approach to coercion is fundamentally *neutral* with respect to the *content* of ... the criteria for just treatment'²⁴⁰ is then, true only of rights-based moral baselines. Further argument is needed to show that rights-based moral baselines are to be preferred over efficiency-based moral baselines.

Second, Wertheimer is too quick to minimize the difference between moral and legal rights. He suggests that 'there is not much difference between the way coercion claims function in legal and in moral contexts.'²⁴¹ If Wertheimer means that in both cases, people who use coercion claims are concerned with the ascription of responsibility, he is correct. But the same factual situation may lead to very different ascriptions of responsibility if adjudicated according to moral rather than to legal criteria, and rightly so. It is probably immoral, but not illegal, to insist upon sexual relations as the price of continuing a friendship;²⁴² whereas it is probably illegal, but not immoral, for the Rebellious Slave to escape the custody of his owner. Wertheimer invokes Rawlsian criteria to justify this minimization of the difference: '... if Rawls is correct, any conception of right (and that would, I think, include conceptions of coercion and duress) must be general, universal, public, and final. In other words, it must exhibit precisely those characteristics which are properly regarded as essential characteristics of the law.'²⁴³ But to apply these criteria to the question of coercion and duress is to undermine Wertheimer's recognition that different coercion claims do different work. Wertheimer's own analysis suggests that what is coercion for one purpose and for one legal system may not be coercion for another purpose or another legal system; but if conceptions of coercion must be universal and final, then this suggestion must be wrong. Further, Wertheimer does not address in any detail the troubling question of what to do, legally, about proposals that are morally but not legally wrongful.²⁴⁴ My claim is thus more modest than Wertheimer's. I suggest, not that the legal approach to coercion delivers on the Rawlsian criteria that Wertheimer adopts, but that from a standpoint internal to the law a legal approach to coercion is the only real possibility.

2. *Fried: Coercion in a theory of promising*

Charles Fried's account of coercion derives from his Kantian approach to contract law.²⁴⁵ Whether he intends it to function as a general philosophical account of coercion or to confine it to legal contexts is not entirely clear; the former is more likely, given the comprehensive moral and political role Fried assigns to his theory of contract.

For Fried, the central characteristic of the law of contract is that it enables people freely to impose obligations upon themselves in order to work together. Contractual obligations are promises that are binding for moral, rather than instrumental, reasons. Promising is a social convention of which people make use; breaking promises is immoral because it involves using another person and thus denying the respect and autonomy to which he or she is entitled. Therefore, enforcement of promises 'is grounded not in arguments of utility but in respect for individual autonomy and in trust.'²⁴⁶

On this theory, coercion renders a contract void because the coerced party has not 'really' promised anything; β 's apparent promise is not really an exercise of his or her autonomy. But how does Fried define coercion? He cannot follow the approaches of Posner and Kronman because for them enforcement has to do not with autonomy but rather with welfare consequences. Nozick's approach is more promising for Fried because the extra step in Nozick's definition of an offer – that β would be willing to move from the pre-offer to the offer situation – appears to accord respect to the party's autonomy which a purely consequentialist approach would not. But Fried ultimately rejects Nozick's approach because of Nozick's attempt to solve the problem of baseline in a purely empirical way. After a brief discussion of the difficulties of establishing a plausible empirical baseline, Fried argues that

These conundrums should be sufficient to show that we cannot escape using some normative criterion to distinguish offers from threats. And that is a pity because the purpose of the inquiry is itself normative: to identify coercion and this to determine which promises (and contracts) are not morally (or legally) binding.²⁴⁷

This dismissal of empirical theories is a bit too quick; quite apart from the fact that an inventive devotee of the empirical approach could probably solve all the 'conundrums' listed, Fried assumes that the purpose of a theory of coercion is necessarily normative. I have suggested above that empirical theories may be perfectly acceptable for descriptive purposes; furthermore, a theory of coercion appropriate for one purpose (e.g., relieving β of his promise) may not be appropriate for another (e.g., drawing attention to political oppression). It would be

more accurate, if circular, for Fried to say that 'if the purpose of the inquiry is normative, then we cannot escape using some normative criterion to distinguish offers from threats.'

But given that Fried's purpose is normative, like Wertheimer he turns to violations of rights to set the baseline: 'A proposal is not coercive if it offers what the proponent has a right to offer or not as he chooses. It is coercive if it proposes a wrong to the object of the proposal.'²⁴⁸ A promise extracted by coercion in this sense is not enforceable because to enforce it would be equivalent to holding that the promisor did not have the right that was infringed. To recognize the promisee's claim would be 'to deny that the exchange threaten[ed] the promisor's rights.'²⁴⁹ This is, of course, exactly what economic approaches to contract law do; they deny the relevance or the existence of the right in favour of a goal such as Pareto efficiency or wealth maximization.

Trebilcock has criticized normative criteria of coercion such as Fried's because 'the prior determination of B's rights take issues of coercion outside the domain of contract law.'²⁵⁰ This criticism can be countered on two grounds. First, Fried himself never claims that his conception of contract law will answer the question of consent internally. Quite the contrary: 'The success of this criterion of coercion will depend on whether it is possible to fix a conception of what is right and what is wrong, of what rights people have in contractual relations *independently of whether their contracts should be enforced*.'²⁵¹ Second, every criterion so far examined in this paper is based on 'norms extraneous to the contract law regime'; indeed, this is particularly true of the economic approaches, in which contract law is important only for its instrumental role in assisting the economy in getting to efficient outcomes. It appears that no theory of contract, or of coercion in contracting, is complete in itself.

Fried's rights-based analysis gives fairly clear answers to the examples in section III. The robbers' contracts (A and B) will not be enforced, while the affluent rice shopper's and the stamp collector's contracts (E and F) will be. Whether the Starving Peasant's contract (G) would be enforced would depend on whether the famine conditions constitute the kind of 'state of nature,' like the Foundering Ship's predicament, where Fried would offer relief. A more serious problem for Fried's approach is presented by case D. The Lecherous Millionaire looks like a classic Bad Samaritan, making β an offer she can't refuse which nonetheless appears to violate none of her rights. Furthermore, interaction between α and β is neither 'a random event, an accident for which ... no systematic provision could be made' nor a case where 'the social order has melted away,'²⁵² the factors which Fried takes to be crucial to

the Foundering Ship. Fried would, then, presumably reluctantly have to enforce this contract.

Fried's analysis can be fruitfully applied to Nozick's union election example and to the contract between Lewd and Prude. The firm has the right to go out of business but the firm does not have the right to bargain in bad faith. Therefore, if the employer would prefer to stay in business in case of unionization but commits himself to going out of business, in order to discourage a successful vote (case 3), the employer is behaving coercively. The result is the same as Nozick's; the employer's tactic constitutes coercion because the firm is not behaving in accordance with its duty to bargain in good faith; the union would be entitled to another vote under good faith conditions.²⁵³ But the route is different because it is based on the rights and duties of the parties, not on the effects on their feasible sets. The rights-based analysis of Prude and Lewd yields a different result; Lewd and Prude can only warn each other, not coerce each other, because each has the right to decide for himself what to read or not to read. Any contract formed between them is then not the result of coercion. Two examples which are similar from the point of view of rational choice yield different but plausible results under a rights analysis.

Fried's approach to coercion is similar in spirit and in result to the legal baseline approach that I am advocating. There is one subtle but important distinction. Fried locates the legal obligation to honour contracts in a moral argument: it is immoral to invoke the social convention of promising and then to violate the convention because that would be to use others as means not as ends; in particular, it would be an abuse of others' autonomy.²⁵⁴ One difficulty with this argument is that it offers no reason for preferring to recognize β 's autonomy when a contract is made over α 's autonomy when a contract is broken. A solution to this difficulty is to treat the contract as creating rights, but then the reason for enforcing the contractual obligation is not to vindicate the convention of promising but to uphold the right.²⁵⁵ Another difficulty with this argument is its scope: it is not confined to legal institutions such as contracts but spreads to promissory and other obligations more generally. Thus, with respect to coercion, the theory offers no reason to confine the baseline to legal rights, as Fried seems to want to do. Both difficulties indicate the need for a legal baseline in the analysis of contractual duress.

D. LEGAL AND NON-LEGAL BASELINES COMPARED

There are several advantages to using a formal theory of coercion to answer legal questions. The first relates to the institutional role of the

judge who must adjudicate claims of duress. Every philosophical approach to coercion, including economic theories as well as theories based on moral right, depends on factors extrinsic to law itself. The judicial application of these theories would, therefore, involve judges in doing something other than judging. On the economic approach, for instance, judges would have to assess the consequences for efficiency of enforcing transactions. In contrast, the norms on which the formal approach to coercion depends, though often extrinsic to contract law itself, are primarily legal norms and therefore the subject matter of judging. This point is related to, but not the same as, Trebilcock's argument for keeping courts within their institutional competence.²⁵⁶ The point is not the instrumental one that judges are not good economists or good philosophers (they may or may not be), but that by acting as arbiters of efficiency they would be attempting to achieve good results for society at large rather than adjudicating between the parties. They would, in other words, no longer be judges.²⁵⁷

Second, I would argue that while the narrow focus of a legal baseline may look like a drawback, it is actually an advantage. There are many ways in which a person can be unfree; being coerced in a legal sense is only one. To call all forms of unfreedom coercion, as empirical theories come close to doing, is to obscure the differing remedies that may be required for different problems. Consider, for instance, the Starving Peasant and the Lecherous Millionaire. The positive freedom of the Starving Peasant and of β 's child are severely impaired by their situations: they cannot achieve much of anything, not even survival itself, the precondition for any other accomplishment. Yet it appears that, on the formal account, they are not coerced. The shopkeeper's offer to the peasant is not wrongful, nor is the Lecherous Millionaire's proposal to withhold payment for β 's child's surgery. Creating a duty of rescue that could extend to these situations would effectively convert both of them to cases of coercion.²⁵⁸ But with or without such a duty, these cases do not easily fit the remedial structure of coercion. For the Starving Peasant, the classic remedy of rescission will be counter-productive (the peasant needs to keep the rice) while a remedy imposing a competitive price on the transaction (along the lines of the Foundering Ship) will be no help at all because *ex hypothesi* the contract price is the market price. The peasant is starving because he cannot afford to pay the competitive price. What this peasant needs is improved access to food. Our attention should be directed, not to the particulars of his contract with the shopkeeper, but to the price of food, the peasant's income, and on the possibility of public famine relief, and it is to these matters

that a claim of a violation of freedom that goes beyond the contractual concern with duress will lead.²⁵⁹ Much the same could be said of the Lecherous Millionaire: while Feinberg's proposal of partial enforcement will achieve a good result here, the real problem is that β 's child is depending on the kindness of strangers, rather than on a properly developed system of public medicine, for the necessary surgery.

Finally, the formal analysis of duress is more coherent than competing approaches. As we have seen in the discussion above, there are two ways in which a finding of coercion can be disconnected from β 's legal rights. First, a non-legal theory of coercion might enforce the contract in cases where β 's right has been violated, even though β has no reasonable alternative but compliance with the violation. This solution is incoherent, because it states that what appeared to be β 's right was not really a right at all; the consent extracted from the breach of the right, the taking-away of the right, is validated despite the fact that β had no choice but to alienate the right. An egregious example of this incoherence is given by the analysis that Kronman would, I argue, have to apply to the Altruistic Robber. The formal approach would render this transaction voidable, but Kronman would require its enforcement, on the ground that it will benefit the class of victims in the future. The 'principle of modified Paretianism,' then, requires the court simultaneously to recognize the Robber's wrongdoing and to ratify the bargain he obtained from his wrongdoing. The formal approach to duress in contracting avoids this incoherence.

Second, a non-legal theory might refuse enforcement even though there was no legally wrongful threat. The incoherence here lies not in the result, which may be justified, but in the attempt to assimilate these situations to coercion. A contract may be avoided, or partially avoided, on many grounds other than coercion in the legal sense. There may be undue influence: α may be able to take advantage of his or her special relationship with β , or of β 's known weakness or incapacity, to obtain an advantage. The remedy here is to permit β , once properly advised, to avoid the contract, but the reason for the remedy lies not in α 's creating a situation in which β has no choice but to comply, but in α 's more direct manipulation of β 's will. Further, a contract may be unconscionable: its terms may be unduly favourable to α or otherwise unfair to β . The remedy here is to impose fair terms, which is itself an indication that we are dealing not with complete negation of β 's consent but with an adjustment to the terms on which β 's consent was given. The reason for the remedy lies not in α 's wrongful conduct toward β - indeed, in the common instance where a contract of

adhesion is declared unconscionable, β comes to α – but in the substantive unfairness of the bargain. Whether the bargain is substantively unfair turns on many factors that are extrinsic to the relationship between α and β , particularly whether the terms are comparable to others offered in the same market and whether the market itself is fairly structured. To attempt to assimilate all of these cases to the category of coercion, which focuses on α and β , creates conceptual confusion by distracting attention from the relevant features of the relationship between α and β .

Consider, for example, Feinberg's suggestion that Limited Warranties is a case of a coercive offer. He suggests that the buyer is 'offer[ed] a lesser evil (a car without protection from accidents caused by defective workmanship) as the sole alternative to an extreme evil (no car at all).'²⁶⁰ What is odd about this proposal is that it focuses narrowly on β 's subjective attitude toward the transaction (recall that in Feinberg's framework whether going without a car is 'an extreme evil' depends on β 's subjective assessment of that prospect). Surely the question of whether the terms were unconscionable should also depend on what α could offer. Suppose, as Feinberg seems to assume, that α could offer a better warranty but does not have to do so because the industry is partially monopolized: α 's profit-maximizing strategy is to offer the very limited warranty that appears in the contract.²⁶¹ On Feinberg's account, β 's notional demand, 'Give me a better warranty or I will not buy your product' is also a coercive offer because it presents α with a choice of evils (offer an improved but less profitable warranty or lose the sale). α and β are thus coercing each other; yet there still seems to be scope for saying that α 's terms are unconscionable. The point of this analysis is to detach Feinberg's concept of coercion from the feature of Limited Warranties that moves most analysts: α could afford to offer a better deal but does not because of its market power.

The argument that duress should be distinguished from other grounds of relief, such as undue influence and unconscionability, raises the question of how these grounds are related to each other and to the underlying presupposition that contracting agents are autonomous, being capable of choice. There seem to be three main possibilities.²⁶² First, a pluralist might argue that a different moral concern underlies each of these grounds for relief and might propose a more or less *ad hoc* ordering or balancing of these concerns in the context of any particular transaction.²⁶³ Second, a Kantian might try to explain each of the grounds of relief as a different manifestation of the underlying presupposition of freedom of contract. This strategy is worked out in

some detail by Benson²⁶⁴ and is also adopted by Weinrib.²⁶⁵ Third, a Hegelian might try to integrate the concern for autonomy that underlies the presupposition of freedom of contract and coercion with the concern for fairness that underlies unconscionability. Brudner attempts this integration by arguing that the apparently competing concerns of abstract right and substantive freedom are interdependent in that each needs the other for its realization.²⁶⁶

In this paper, I take no position on this question but I do suggest that whichever solution is adopted, the formal theory of coercion must play a role. For the pluralist, there is no compelling reason not to adopt the formal approach, since the pluralist's justification for intervention on other grounds does not have to be systematically related to the justification for relief in cases of coercion. The formal approach is perhaps most compelling for the Kantian. The stark separation between law and ethics in Kant's moral theory means that breach of a legal duty must be relevant to contractual duress, while breach of a moral duty cannot be so relevant. Finally, the Hegelian will adopt the formal approach as a part of a larger normative framework, in which the formal approach will be partial and indeed misleading when fully developed.²⁶⁷ But all of these approaches have one thing in common: to the extent that they conceive of law as a system of right, they must adopt a legal approach to coercion, since any other approach entails negating right.

VI Conclusion

In this article I have tried to suggest that coercion in the law of contract is best understood from a formal perspective. An agreement obtained by a threat to do a legal wrong when the object of the threat has no reasonable alternative but to agree is voidable. A proposal to do something less than a legal wrong may be improper and give rise to some form of relief where the proposal derives its force from some impairment of the autonomy of the object of the proposal. This approach to contractual duress has several advantages. It gives some content to the conceptual structure of duress claims, which economic theories of coercion tend to read out of the law of contract; it is connected to the value of freedom that the law of contract is most concerned to vindicate; it is more coherent with the rest of the law than other theories; it does not purport to foreclose other possible grounds of relief; and it is compatible with various theoretical approaches to contract law.

NOTES

- 1 *Restatement (Second) of Contracts* (St. Paul: American Law Institute Publishing, 1979) section 175 [hereinafter *Restatement*]; Joseph M. Perillo, ed., 1 *Corbin on Contracts* (St. Paul: West, 1993) section 1.6 [hereinafter 1 *Corbin*]; Stephen Waddams, *The Law of Contracts*, 3d ed. (Toronto: Canada Law Book, 1993) par. 502 [hereinafter Waddams, *Contracts*]; P.S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford: Clarendon Press, 1993) at 265-6 [hereinafter Atiyah, *Contract*].
- 2 Cf. Robert Nozick, 'Coercion,' eds., Sidney Morgenbesser, Patrick Suppes & Morton White, *Philosophy, Science and Method* (New York: St. Martin's Press, 1969) [hereinafter Nozick, 'Coercion'] 440 at 440 (coercion only one of several ways in which a person can be unfree); John Lawrence Hill, 'Exploitation' (1994) 79 *Cornell L. Rev.* 631 at 661-4 (distinguishing between coercion, which worsens a person's options, and exploitation, which preys on weaknesses in a person's cognitive abilities).
- 3 Waddams, *Contracts*, supra note 1, par. 506 (arguing that duress should be treated as a branch of unconscionability); John P. Dawson, 'Economic Duress - An Essay in Perspective' (1947) 45 *Mich. L. Rev.* 253 at 282-8.
- 4 *Lloyds Bank v. Bundy*, [1975] Q.B. 326 at 337-40 (C.A.) (Lord Denning M.R. arguing that duress, unconscionability, undue influence, undue pressure, and salvage are all instances of 'inequality of bargaining power.').
- 5 I will consider broader conceptions of freedom below, but the contrast I have in mind here is usefully summarized as follows: 'Freedom refers or should refer to the range of choices open to a person, and in its broad sense is nearly synonymous with "power." Freedom of contract, on the other hand, means simply absence of formal restraint in disposal of "one's own."' Frank H. Knight, *Risk, Uncertainty and Profit* (New York: Augustus M. Kelley, 1964) at 351 (footnote omitted, original emphasis).
- 6 Accounts of contract law based on this abstract conception of the person include Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991) at *229-31; G.W.F. Hegel, *Philosophy of Right*, trans. T.M. Knox (Oxford: Oxford University Press, 1952) at pars. 72-81; Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) at 136-40 [hereinafter Weinrib, *The Idea of Private Law*]; Peter Benson, 'Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory' (1989) 10 *Cardozo L.R.* 1077 at 1175-7 (1989); Alan Brudner, 'Reconstructing Contracts' (1993) 43 *U.T.L.J.* 1 at 21-38.
- 7 Parts III.A and V.D, which follow.
- 8 Charles Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981) at 95; cf. Michael J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA: Harvard University Press, 1993) at 84-5 [hereinafter Trebilcock, *Limits*] (highwayman); *Byle v. Byle* (1990), 65 *D.L.R.* (4th) 641 (B.C.C.A.) (parents conveying land to son following son's threat to kill his brother); *Restatement*, supra note 1, section 176 illustration 1 (threat to poison true owner of painting unless true owner sells rights for a small sum).
- 9 Cf. Nozick, 'Coercion,' supra note 2 at 449 ('If you go to the movies I'll give you \$10,000. If you don't go, I'll kill you.');
- 10 Cf. Trebilcock, *Limits*, supra note 8 at 85-6; Fried, supra note 8 at 109-11 ('bad Samaritan'); Nozick, 'Coercion,' supra note 2 at 449 (drowning man); Westen, supra note 9 at 586 (drowning man); Feinberg, supra note 9 at 220-5 (drowning man); Alan Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987) at 207 (1987); Melvin Aron Eisenberg, 'The Bargain Principle and its Limits' (1982) 95 *Harv. L. Rev.* 741 at 755 (injured traveller in desert); *Post v. Jones* 60 U.S. 150 (1856) (rescuers of ship unloading cargo and paying owner a fraction of its value); *The Port Caledonia and the Anna* [1903] P. 184 (tug demanding £1000 to tow drifting ship).
- 11 Feinberg, supra note 9 at 229; see also Trebilcock, *Limits*, supra note 8 at 90-1; Wertheimer, supra note 10 at 229-33; Hill, supra note 2 at 631, 685-90; *Thomas v. LaRosa*, 400 S.E.2d 809 (W.Va. 1990) (woman agreeing to act as man's wife in exchange for financial security and education for her children).
- 12 Fried, supra note 8 at 95; see also Trebilcock, *Limits*, supra note 8 at 87-90.
- 13 Cf. Fried, supra note 8 at 95. I assume that the rice is sold on credit simply to facilitate comparison with example G.
- 14 Cf. Trebilcock, *Limits*, supra note 8 at 97-101 ('non-monopolized necessity'); Harry Frankfurt, 'Coercion and moral responsibility' in *The importance of what we care about* (Cambridge: Cambridge University Press, 1988) 26 at 33 (needy customer facing high-priced but competitive butchers). For an account of the Bengal famine, see Amartya K. Sen, *Poverty and Famines* 52-85 (Oxford: Clarendon Press, 1981) [hereinafter Sen, *Famines*]; for the increase in prices, see *ibid.* Table 6.6 at 69; for starvation outside shops during the famine, see Amartya K. Sen, 'Ingredients of Famine Analysis: Availability and Entitlements' in *Resources, Values and Development* (Cambridge, MA: Harvard University Press, 1984) 452 at 458 [hereinafter Sen, 'Famine Analysis'].
- 15 Cf. Trebilcock, *Limits*, supra note 8 at 91-6 (automobile manufacturers' cartel with standard warranty); Fried, supra note 8 at 104-9 (standard warranty offered by colluding automotive manufacturers); Feinberg, supra note 9 at 251-2; *Henningsen v. Bloomfield Motors, Inc.* 161 A.2d 69 (N.J. 1960).
- 16 The original presentation of the paradox may be found in Amartya K. Sen, 'The Impossibility of a Paretian Liberal' (1970) 78 *Journal of Political Economy* 152. For a discussion of the extensive secondary literature, see John L. Wriglesworth, *Libertarian Conflicts in Social Choice* (Cambridge: Cambridge University Press, 1985) see also Amartya K. Sen, 'Liberty and Social Choice' (1983) 80 *Journal of Philosophy* 5 [hereinafter Sen, 'Liberty and Social Choice']. The paradox illustrates the distinction between right and advantage: Weinrib, 'Right and Advantage,' supra note 9 at 1284.
- 17 Equivalently, Lewd will choose *b* or *c*, from this set, Prude will choose *a*.

- 18 The last three paragraphs are based on Hamish Stewart, *A Savour of Serfdom: Contractual Solutions to the Paradox of the Paretian Liberal* (1992) [unpublished] at 2-4 [hereinafter Stewart, *A Savour of Serfdom*]; on Hamish Stewart, *Taking Goals Seriously* (PhD dissertation, Harvard University, 1989) at 85-6 [hereinafter Stewart, *Taking Goals Seriously*]; and on Amartya K. Sen, 'Liberty as Control: An Appraisal' (1982) 7 *Midwest Studies in Philosophy* 207 at 210-1 [hereinafter Sen, 'Liberty as Control'].
- 19 Brian Barry, 'Lady Chatterley's Lover and Doctor Fischer's Bomb Party: Liberalism, Pareto optimality, and the problem of objectionable preferences,' eds., Jon Elster & Aanund Hylland, *Foundations of Social Choice Theory* (Cambridge: Cambridge University Press, 1986) 11 at 15-9; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 164-6 [hereinafter Nozick, *Anarchy*]; cf. *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891) (agreement to refrain from drinking, smoking, swearing, and gaming good consideration for promise to pay \$5000).
- 20 Stewart, *A Savour of Serfdom*, supra note 18 at 18-21.
- 21 Nozick, 'Coercion,' supra note 2 at 453-7; cf. *N.L.R.B. v. Gissel Packing Co.* 395 U.S. 575 (1969), *rehearing denied* 396 U.S. 869 (1969).
- 22 Michael Philips, 'Are Coerced Agreements Involuntary?' (1984) 3 *Law & Philosophy* 133 at 134.
- 23 Nozick, 'Coercion,' supra note 2 at 450.
- 24 Trebilcock, *Limits*, supra note 8 at 85. Cf. *United States v. The Amistad* 40 U.S. (15 Pet.) 518 (1841) (Africans kidnapped and taken aboard Spanish ship illegally engaged in the slave trade, seizing control of ship and asserting their freedom.).
- 25 Philips, supra note 22 at 134; see also Feinberg, supra note 9 at 254-62 (arguing that coercion does not always negate voluntariness). For a philosophical argument that coerced agreements can create obligations, see Margaret Gilbert, 'Agreements, Coercion, and Obligation' (1993) 103 *Ethics* 679 at 701-3. Gilbert is primarily concerned with agreements less formal than those at issue in the law of contract, *ibid.* at 680. However, the one example she gives that draws on the legal concept of duress turns on β 's ratification of the agreement after the duress has ceased, *ibid.* at 702-3. It is unclear to me how her approach would generate an obligation on β 's part in the absence of this ratification.
- 26 Trebilcock, *Limits*, supra note 8 at 85. See also text accompanying notes 41-5, following.
- 27 *Austin Instrument, Inc. v. Lorul Corp.* 272 N.E.2d 533 (N.Y. 1971); see also John Dalzell, 'Duress by Economic Pressure I' (1942) 20 *N.C. L. Rev.* 237 at 255-76; Joseph M. Perillo & Helen Hadjiyannakis Bender, eds., 2 *Corbin on Contracts* (St. Paul: West, 1995) section 7.21 [hereinafter 2 *Corbin*]; *Restatement*, supra note 1, section 176 comment e; Rick Bigwood, 'Coercion in Contract: The Theoretical Constructions of Duress' (1996) 46 *U.T.L.J.* 201 at 239-51.
- 28 Fried, supra note 8 at 96; see also Wertheimer, supra note 10 at 91; Wendy J. Gordon, 'Truth and Consequences: The Force of Blackmail's Central Case' (1993) 141 *U. Pa. L. Rev.* 1741 at 1746 (defining blackmail's "central case" as that 'where the blackmailer acquires information for the sole purpose of obtaining money or other advantage from the victim, and where he has no intent or desire to publish the information except as an instrument toward this purpose.'). *United States v. Pignatelli* 125 F.2d 643 (2d Cir. 1942), *cert. denied* 316 U.S. 680 (1942) (threat to publish book alleging that victim had falsely assumed a title was blackmail, even if the allegation was true); *Restatement*, supra note 1, section 176, illustration 4 (threat of criminal prosecution).
- 29 '[O]ur doctrine has not developed reliable guidelines for distinguishing this unacceptable conduct from the kind of self-interested and self-reliant conduct on which the contractual system is based.' Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale L.J.* 997 at 1035. See also *Restatement*, supra note 1 section 176 comment f ('The proper limits of bargaining are difficult to define with precision. Hard bargaining between experienced adversaries of relatively equal power ought not to be discouraged.'). Bigwood, supra note 27 at 204-5; *CTN Cash and Carry Ltd. v. Gallaher Ltd.*, [1994] 4 All ER 714 at 719 (C.A.) (bona fide exercise of 'commercial muscle' not amounting to economic duress, per Sir Donald Nicholls V.C. concurring).
- 30 This account draws on the following sources: Kant, supra note 6 at *211-4, *271-6; Hegel, supra note 6 at pars. 72-9; Benson, supra note 6 at 1147-87; Weinrib, *The Idea of Private Law*, supra note 6.
- 31 I thank Richard Craswell for suggesting this formulation.
- 32 Along these lines, Richard Craswell suggested to me the following variant of the Lecherouse Millionaire: "Sleep with me or I'll dismiss you from your job," in a state where employment is at-will and there are no legal limits on the possible reasons for dismissal.' Letter from Richard Craswell (18 Jan., 1995), University of Chicago, to Hamish Stewart at 7-8. Add that the jurisdiction has no legislation prohibiting sexual harassment in the workplace, and it becomes difficult to see what is unlawful about the employer's threat. My general response to examples of this sort is that the jurisdiction in question needs a radical reform of its employment law. Compare Trebilcock's *Rebellious Slave* case, where the real problem is the institution of slavery and not the particular interaction between α and β .
- 33 There may be cases where it is appropriate for the court itself, because of its power and its duty to develop the common law, to modify the right; the court should then be conscious that that is what it is doing.
- 34 The concept of a limit on a right in this sense is familiar to students of Canadian constitutional law. Section 1 of the Charter states 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, section 1, being Schedule B to the *Canada Act 1982* (U.K.), 1982, chapter 11. A persuasive body of case law and academic commentary supports the proposition that the limitation of the rights must refer to the same values that underlie the rights themselves: see *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136; *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 216-7; Lorraine Eisenstat Weinrib, 'The Supreme Court of Canada and Section One of the Charter' (1988) 10 *Sup. Ct. L. Rev.* 469 at 504-13; see also Peter W. Hogg, *Constitutional Law of Canada*, 3d. ed. (Toronto: Carswell, 1992), sections 35.1 to 35.3. For an example of this type of reasoning in private law, see Jonathan Dawe, 'The Change of Position Defence in Restitution' (1994) 52 *U.T. Fac. L.R.* 275 at 291-9 (arguing that the change of position defence should be understood not in terms of equity and fairness but in relation to the elements of restitution itself). See also Bigwood, supra note 27 at 269-70 ('[C]oercion has to do with the freedom of both parties to the relation or dealing. Consequently, we must consider the conduct, circumstances, rights, expectations, entitlements, and personal circumstances or characteristics of both coercer and coercee in determining the outcome of a duress claim.').
- 35 This requirement raises the question of whether the formalist approach to law that I have adopted here makes any other demands on the law: that is, are certain rights or duties in crime, tort, or contract also entailed by the conception of the person as an abstract will? Kant, Weinrib, and Benson would clearly say 'Yes.' See Kant, supra

- note 6 at *331-7 (crime); Weinrib, *The Idea of Private Law*, supra note 6 at 145-203 (tort); Benson, supra note 6 at 1184-96 (contract). If this analysis is correct, then the formalist account of contractual duress is just a small part of a larger, comprehensive account of the law. I prefer, for the purposes of this paper, to make the more modest claim that whether or not the rest of the law can be explained in this formalist manner, the law of contractual duress must determine the question of wrongfulness with reference to the prevailing legal standards.
- 36 This rule is explained in various ways. Economic analysts argue that to have a general remedy of specific performance would be likely to create excessive transactions costs: Richard A. Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little, Brown, 1993) at 130-2 [hereinafter Posner, *Economic Analysis*]. Formalists seek an explanation related to the nature of the right created by contract; the argument is that contract creates a right to obtain a value, not a right to a specific piece of property: Brudner, supra note 6 at 28-9.
- 37 The Restatement does distinguish between two types of improper threats, one of which requires no inquiry into the substantive fairness of the bargain and one of which does, but not all threats to breach a contract will necessarily fall into the second category: 'a breach of the duty of good faith and fair dealing' comes under the first. *Restatement*, supra note 1, section 176(1)(d). The analysis I offer here is largely consistent with Waddams's, though he views the reasonableness of β 's alternatives as going to the fairness of permitting α to retain the benefits of the contract modification rather than to the more formal conception of rights and wrongs that I am working with. See Stephen M. Waddams, 'Restitution as Part of Contract Law,' ed., Andrew Burrows, *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) 197 at 198-203 [hereinafter Waddams, 'Restitution']. See also Bigwood, supra note 27 at 251 (suggesting that proposed breaches of contract be considered *prima facie* wrongful, leaving it open to α to show that 'the modification in question was ... justifiable in all the circumstances').
- 38 Note, however, that the employer is content to stay at *a*, while Prude would like to trick Lewd by going from *a* to *d*. Lewd knows this, and may therefore choose to read the book anyway. This Prisoners' Dilemma feature is missing from Nozick's game.
- 39 Nozick, 'Coercion,' supra note 2 at 455. See also Wertheimer, supra note 10 at 98-9 (discussing warnings and threats in labour law, though without reference to Nozick's example), and *N.L.R.B. v. Gissel Packing Co.*, supra note 21 at 618-20 (employer permitted to warn of natural consequences of unionization but prohibited from threatening retaliation unrelated to those consequences).
- 40 Trebilcock, *Limits*, supra note 8 at 85.
- 41 'A slave can make no contract.' Jacob D. Wheeler, *A Practical Treatise on the Law of Slavery* (New York: Allan Pollock, Jr., 1837) at 190. A slave could, however, act as agent for his master: *ibid.* at 225.
- 42 In the view of one antebellum judge, the right of the master to discipline his slave flowed directly from the logic of slavery. In a case concerning the liability of a hirer for injury to a slave, Judge Ruffin of North Carolina considered the liability of a master for a battery on his slave. He held that there was no common-law limit on the master's right to beat his slave: 'This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. ... [I]t is inherent in the relation of master and slave.' *State v. Mann*, 13 N.C. (2 Devereux) 263 (1829), quoted in Mark Tushnet, *The American Law of Slavery 1810-1860* (Princeton: Princeton University Press, 1981) at 60; see also Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975) at 77-9. On this view, there would be no coercion in the Beaten Slave Case because the Master's proposal to continue beating the slave would not be wrongful. This legal conclusion only serves to reinforce the point I am trying to make in the text, namely, that one's reaction to the two slave cases turns on one's view about slavery rather than on one's view about the particulars of the interaction described in these cases.
- 43 For a fascinating account of what happens when 'we' are anti-slavery judges in a slave-owning society, see Cover, supra note 42 at 197-255. Analysing *State v. Mann*, supra note 42, Tushnet suggests 'that courts could recognize no foundation [for slavery] other than force, and that control of cruelty must, and did, occur outside of the law.' Tushnet, supra note 42 at 62. In *The Amistad*, supra note 24, two Spanish subjects claimed the rebellious Africans as their property, *ibid.* at 590-1. The Court refused to recognize this claim; because the enslavement of the Africans was unlawful according to Spanish law, the Court held that the Africans were free, *ibid.* at 593-4. But if the enslavement had been lawful, it appears that the Court would have returned them to their owners, *ibid.* at 593. Story J.'s opinion does make passing reference to 'the eternal principles of justice,' *ibid.* at 595, but, as Cover argues, it was the unlawfulness of the enslavement that left room for the operation of these principles: Cover, supra note 42 at 109-12.
- 44 Hegel, supra note 6, pars. 66-67; Kant, supra note 6 at *330.
- 45 For further discussion of this possibility, which is usually coupled with an entitlement of a normal fee to the Tug, see text accompanying notes 48-52 below.
- 46 Dalzell, supra note 27 at 366.
- 47 Fried, supra note 8 at 110.
- 48 *Ibid.* at 110; see also *Post v. Jones*, supra note 10 at 158.
- 49 Trebilcock states that Fried's argument 'proceeds simply by way of assertion rather than by derivation of the rights of B from predetermined legal norms or more general moral entitlements.' Trebilcock, *Limits*, supra note 8 at 86. This critique is too harsh; Fried's treatment of the Foundering Ship is consistent with his view that contract law is embedded in a social order: see Fried, supra note 8 at 17.
- 50 Brudner, supra note 6 at 50-1.
- 51 In *Post v. Jones*, supra note 10 at 157-8, the lives of the Foundering Ship's crew were at risk. This idea cannot be applied to situations where β 's life is not threatened, but he or she is about to lose a valuable piece of property, as in *The Port Caledonia and the Anna*, supra note 10. In these cases, β is not about to lose his or her capacity to form and pursue goals, but merely a given interest. Benson argues that the notion of equality that underlies contract law requires equivalence in exchange; he would therefore suggest that a fair price can be imposed on such contracts. Benson, supra note 6 at 1187-96. This suggestion, if correct, is complementary to but independent of the formal analysis of duress that I offer here.
- 52 I discuss this point further in the text accompanying notes 100-7 below.
- 53 The reluctance of Anglo-American courts to order specific performance of contracts for personal services is well-known, but this reluctance does not in itself entail that damages for breach would be nominal. However, in cases where the value of the promised performance could not easily be quantified by looking to a well-functioning market, and where the quantification exercise itself would be rather offensive, it is likely that an award of nominal damages would be appropriate. For a related discussion, see Stewart, *A Savour of Serfdom*, supra note 18 at 13-8. As recently as 1990, a court refused to enforce an agreement in which a woman agreed to act as a man's wife in return for support for herself and her children. *Thomas v. LaRosa*,

supra note 11 at 811, 813-4. The result would probably have been different if the man had not already been married: *ibid.* at 815 (Miller, J., concurring). The woman may also have had additional rights that arose independently of the agreement: *ibid.* at 811-82.

- 54 Arthur Linton Corbin, 6A *Corbin on Contracts* (St. Paul, MN: West, 1962) section 1476, sections 1534-7; see also *Cougler v. Fackler*, 510 S.W.2d 16, 18 (Ky. 1974) ('A bargain in whole or in part for and in consideration of illicit sexual intercourse or a promise thereof is illegal'; *ibid.* at 19 (no restitution of sums paid under such a contract)).

Another approach to the Lecherous Millionaire focuses on β 's cognitive capacity. Hill suggests that an offer should be considered exploitative only when α 'intentionally, knowingly, or recklessly' takes advantage of 'a psychologically recognized vulnerability or weakness on the part of the offeree' which weakness 'results in a significant impairment of the rational-emotional capacity of the individual': Hill, supra note 2 at 683-4. On this view, what is exploitative about the Lecherous Millionaire's offer is that the Lecherous Millionaire knows that β is likely to be desperate to save her child, and will therefore be less likely to make fully rational decisions: *ibid.* at 686. This suggestion has considerable appeal because it seems to focus on what really is morally objectionable about the Lecherous Millionaire's conduct. Furthermore, the formal approach can certainly accommodate some forms of relief for decisions that are made without full cognitive capacity because such decisions do not necessarily reflect β 's exercise of her agency. But Hill's approach does not capture what is objectionable about, for instance, the Foundering Ship, where β 's decision may be rational in every sense of the word.

An approach more consistent with the formal approach would be to argue that β 's ability to alienate her sexuality is limited by β 's autonomy itself.

Most important to the preservation of autonomy are goods embodied in the person, such as freedom of action and the powers of productive and reproductive labor. To sell these goods to another person without retaining rights to consultation, self-judgment, and control over the conditions in which one acts is to reduce one's autonomy by subjecting oneself to another's domination. Liberals recognize this as a reason for prohibiting the sale of persons into slavery, but they often fail to think through its implications for employment contracts and for contracts involving a person's sexual and reproductive powers. Autonomy requires that many rights in ourselves be inalienable.

Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1993) at 142; see also Elizabeth Anderson, 'Is Women's Labor a Commodity?' (1990) 19 *Phil. & Publ. Aff.* 71. I am sympathetic to this line of argument, but it is clear that Anderson is relying on a thicker concept of autonomy than mine, and I prefer to leave the question of the relationship between these two concepts for another time.

- 55 It is unlikely that the possibility of competition makes a difference to the Lecherous Millionaire case, since what most people find distasteful about his offer is not that his terms are uncompetitive but that he is proposing commodification of β 's sexuality.
- 56 I am not unsympathetic to the idea that certain functionings, such as being able to move around, might be so essential to the capacity to form and pursue goals that their denial would negate β 's agency in the same way as a natural threat to β 's phy-

sical existence, but I am not persuaded that owning a car - more precisely, owning a car that has certain guarantees attached to it - is essential to this functioning.

- 57 *Restatement*, supra note 1, section 176(2).
- 58 *Ibid.*
- 59 *Ibid.* Comment f.
- 60 That is not to say that such a situation might not raise other grounds of relief; if, for instance, α 's refusal to contract was motivated by racial hatred, β may well have some civil rights claim against α .
- 61 Juliet P. Kostritsky, 'Stepping Out of the Morass of Duress Cases: A Suggested Policy Guide' (1989) 53 *Alb. L. Rev.* 581 at 616, citation omitted, presenting the facts of *Beznos v. Martin* 177 N.W.2d 226 (Mich. 1970).
- 62 Calculation based on *Beznos v. Martin*, supra note 61 at 227.
- 63 *Beznos v. Martin*, supra note 61 at 227-8.
- 64 Wertheimer, supra note 10 at 101-2; Fried, supra note 8 at 102; *Restatement*, supra note 1, section 176(2) (c).
- 65 Kant, supra note 6 at *230-1.
- 66 Gordon, supra note 28 at 1758-75.
- 67 *Ibid.* at 1743.
- 68 *Ibid.* at 1758.
- 69 *Ibid.* at 1760-1.
- 70 It is not always the case that α 's carrying out of his threat to reveal information cannot benefit him and can only hurt β . Sometimes, α will have the opportunity to sell the information to a third party, such as a newspaper. This possibility takes us away from Gordon's 'central case' in which the only use of the information is to extract payment from β , but it does not change the essence of the wrong in the transaction, which is that α completely subordinates β 's end-status to his own.
- 71 Recall, again, that this is how a market transaction appears from the perspective of the formal approach to contract. Parties like the Starving Peasant and the Merchant may be juridically equal without having equality in any other meaningful sense; but as I argue below in the text accompanying 101-8 other sorts of inequalities are best handled outside the law of contract.
- 72 *Gordon v. Roebuck* (1989), 64 D.L.R. (4th) 568 at 573 (Ont. H.C.J.), aff'd 9 O.R. (3d) 1 (C.A.) (no duress because 'an adequate legal remedy'); *DiMartino v. City of Hartford* 636 F.Supp. 1241 at 1251-2 (D.Conn. 1986) (no duress because legal alternatives for redress not attempted). For a useful discussion of Commonwealth and United States cases on reasonable alternatives, see Bigwood, supra note 27 at 260-9.
- 73 It is still the law in Canada that contract modifications unsupported by fresh consideration are not enforceable: *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 67 D.L.R. (3d) 606 (Ont.C.A.). The solution to this problem in article 2 of the Uniform Commercial Code is that contract modifications do not need to be supported by consideration, though this provision should be read in light of the general obligation of good faith performance in article 1. *Uniform Commercial Code* section 2-209(1), section 1-203. This solution is akin to the notion that a threat to breach a contract should not amount to duress where the party not in breach has a reasonable alternative to submitting to the threat: see 2 *Corbin*, supra note 27, section 7.21 at 462. For a critique of both solutions, see Waddams, 'Resitution,' supra note 37.
- 74 There are many cases where an agreement entered into under duress has been enforced because β affirmed it. See *Stott v. Merit Investment Corp.*, supra note 9 at 308; *DiMartino v. City of Hartford*, supra note 72 at 1252.

The most important consequence of the distinction between void and voidable contracts has to do with the rights of third parties. A void contract or other transaction can give rise to no third party rights, whereas voidable contracts can sometimes be relied upon by third parties. *Restatement*, supra note 1, section 174 comment b; 1 *Corbin*, supra note 1, sections 1.6-1.7. The rights of third parties are beyond the scope of this article.

- 75 Richard Craswell has proposed understanding the remedies in such cases in economic terms. Richard Craswell, 'Property Rules and Liability Rules in Unconscionability and Related Doctrines' (1995) 60 U. Chicago L. Rev. 1. Craswell suggests that when α cannot enforce any obligation against β , we can say that β is protected by a property rule; whereas when β 's complaint leads to the imposition of reasonable terms on the parties, β is protected by a liability rule, *ibid.* at 2-3. He goes on to argue that a conceptually acceptable theory of consent is important where β is protected by a property rule, but is irrelevant where β is protected by a liability rule. Since, under a liability rule, the court is going to impose fair or reasonable terms anyway, the precise nature of β 's complaint against α loses significance, *ibid.* at 34-7. The logically prior question of whether a property rule or a liability rule should be chosen depends on whether α or the court is better placed to make contractual terms that will best serve an interest such as economic efficiency, *ibid.* at 38-41. For instance, if α is a monopolist, '[α 's] monopoly should be treated as invalidating [β 's] consent if and only if we think courts can do a better job at setting prices than [α] can,' *ibid.* at 39.

A rough translation of my terms into Craswell's is as follows. I propose that in cases of true coercion, where α credibly threatens to violate β 's legal rights, β should be protected by a property rule: β should have the right to avoid the contract entirely. In cases of duress which do not amount to coercion but which can be explained as limits on α 's exercise of his or her rights, β will often be protected by a liability rule (e.g., in the *Foundering Ship* the court should impose a reasonable price on the transaction). Thus, for the formal approach, the philosophical definition of coercion remains important, as it marks an important difference in the rights and remedies of the parties. Craswell's proposal reverses the logic of the formal approach: the proper definition of consent becomes important only if a property rule has been chosen, and a property rule will be chosen only if the cost of removing the impediment to consent is low.

- 76 I use the term in the sense proposed by Roberto Unger: 'Formalism is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.' Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986) at 1. The legal baseline approach to coercion is formalist in this sense. It expressly seeks to exclude 'open-ended disputes' from adjudications about coercion by adverting to rights rather than to other social interests, even those that may underlie those rights.
- 77 I have been using the terms 'act' and 'promise' interchangeably, on the ground that a contractual promise is an act, a 'performative' in Austin's sense: J.L. Austin, *How To Do Things With Words* (Cambridge, MA: Harvard University Press, 1962) at 4-7.
- 78 Cf. Wertheimer, supra note 10 at 3-10 (coercion claims function differently in different contexts).

- 79 'Totalitarian government can be safe only to the extent that it can mobilize man's own will power in order to force him into its gigantic movement of History or Nature' Hannah Arendt, *The Origins of Totalitarianism*, 2d ed. (New York: Harcourt, Brace, 1958) at 473.
- 80 'We sometimes use coercion claims to emphasize the efficacy or unfairness of informal pressure that do not involve specific penalties.' Wertheimer, supra note 10 at 187.
- 81 See also H.J. McCloskey, 'Coercion: Its Nature and Significance' (1980) 18 Southern Journal of Philosophy 335 (defining coercion to include virtually all exercises of power, but leaving open the question of what forms of coercion would make contracts voidable); Paul H. Brietzke, 'Law, Legitimacy and Coercion: One View from Law and Economics' (1991) 25 Val. U.L. Rev. 343 (using 'coercion' to refer to the state's exercise of power); Kant, supra note 6 at *231-3 (right authorizes use of coercion); Wertheimer, supra note 10 at 186 ('the state has required some behavior as a matter of law.');
- contrast William A. Edmundson, 'Is Law Coercive?' (1995) 1 Legal Theory 81 (arguing that law is not coercive because, or at least when, its proposals are not immoral).
- 82 Wertheimer, supra note 10 at 186.
- 83 I use 'freedom of contract' as shorthand for (1) allowing contracting parties to determine the terms of contract for themselves and (2) holding contracting parties to the terms so determined.
- 84 Trebilcock, *Limits*, supra note 8 at 15-7; T.M. Scanlon, 'The Significance of Choice,' *The Tanner Lectures on Human Values VIII*, ed., Sterling M. McMurrin (Salt Lake City: University of Utah Press, 1988) 149 at 178-9.
- 85 Trebilcock, *Limits*, supra note 8 at 8-9; Amartya K. Sen, 'Freedom of Choice: Concept and Content' (1988) 32 E.E.R. 269 at 270-2 (1988) [hereinafter Sen, 'Freedom']; Scanlon, supra note 84 at 179-83.
- 86 Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 202.
- 87 *Ibid.* at 12.
- 88 Milton Friedman and Rose Friedman, *Free to Choose* (New York: Avon Books, 1981) at xvii; cf. Sen, 'Freedom,' supra note 40 at 270.
- 89 Amartya Sen, 'Liberty, Unanimity and Rights,' in *Choice, Welfare and Measurement* (Oxford: Basil Blackwell, 1982) 291 [hereinafter Sen, 'Liberty'].
- 90 Sen, *Famines*, supra note 14; Jean Drèze & Amartya Sen, *Hunger and Public Action* (Oxford: Oxford University Press, 1989) at 42-5. Trebilcock is much less sanguine than Friedman about the convergence between the instrumental and the intrinsic value of freedom of contract: see Trebilcock, *Limits*, supra note 8 at 241-2. At the same time, he resists seeing a conflict in some of the situations that concern Sen, such as the Starving Peasant: see Michael J. Trebilcock, 'Critiques of *The Limits of Freedom of Contract*: A Rejoinder' (1995) 33 Osgoode Hall L.J. 353 at 369 [hereinafter Trebilcock, 'Rejoinder'].
- 91 Sen, 'Freedom,' supra note 85 at 276-9; Amartya Sen, *Commodities and Capabilities* (Amsterdam: North-Holland, 1985) at 1-37 [hereinafter Sen, *Commodities and Capabilities*].
- 92 Sen, *Commodities and Capabilities*, supra note 91 at 73-104; Sen, 'Freedom,' supra note 85 at 279-89.
- 93 Amartya Sen, 'Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms' (1993) 45 Oxford Economic Papers 519 at 532.

- 94 '[C]hoosing may itself be an important functioning.' Sen, 'Freedom,' supra note 85 at 290.
- 95 Demsetz makes this point very clearly: 'To claim irrationality is to assert that goals or objectives are not being pursued efficiently, and therefore that freedom is compromised. If there were some way to certify the validity of this claim for specific individuals, they could be coerced into behavior that is believed to be efficient. The difficulty is obvious. If efficiency indexes freedom, then, as the remedy to irrational (inefficient) behavior, so does coercion!' Harold Demsetz, *Ownership, Control and the Firm* (Oxford: Basil Blackwell, 1988) at 290; see also Timothy J. Brennan, 'Voluntary Exchange and Economic Claims' (1990) 7 *Research in the History of Economic Thought and Method* 105 at 109-12.
- 96 Isaiah Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) 118 at 122-31.
- 97 *Ibid.* at 127, original emphasis.
- 98 Cf. Friedman, supra note 86 at 14; Nozick, *Anarchy*, supra note 19 at 113-8; Trebilcock, *Limits*, supra note 8 at 6; Posner, supra note 37 at 90-1.
- 99 Fried, supra note 8 at 7-27; cf. Weinrib, *The Idea of Private Law*, supra note 6 at 136.
- 100 Perhaps the most remarkable feature of Sen's work on famines is his finding that the cause of most major modern famines is this entitlement collapse, rather than a decline in the overall availability of food. Sen, *Famines*, supra note 14 at 162-6; Sen, 'Famine Analysis,' supra note 14 at 479-80; Drèze & Sen, supra note 90 at 21-34.
- 101 Sen, 'Famine Analysis,' supra note 14 at 458; cf. Sen, 'Freedom,' supra note 85 at 275, and Sen, *Famines*, supra note 14 at 166 ('Starvation deaths can reflect legality with a vengeance.').
- 102 This idea is at the root of Macpherson's critique of Friedman; Macpherson takes seriously Friedman's proviso 'that individuals are free to enter or not to enter into any particular exchange,' Friedman, supra note 86 at 14, emphasis added, and argues unless people have real alternatives to participation in the capitalist economy, Friedman's conclusions do not follow. See C.B. Macpherson, 'Elegant Tombstones: A Note on Friedman's Freedom' in *Democratic Theory: Essays in Retrieval* (Oxford: Oxford University Press, 1973) 144 at 146 [hereinafter Macpherson, 'Elegant Tombstones'].
- 103 Sen, 'Freedom,' supra note 85 at 279. See also Sen, *Commodities and Capabilities*, supra note 91; and Amartya Sen, 'Well-being, Agency and Freedom' (1985) 82 *Journal of Philosophy* 169 at 200-3 [hereinafter Sen, 'Well-being'].
- 104 This point does not turn on the empirical effectiveness of incorporating this concern for positive freedom into the law of contract. If it was the case that relieving starving peasants of these bargains actually helped them, that would certainly be an argument in favour of doing so, but the conceptual basis of the relief would still have to be elucidated.
- 105 See Drèze & Sen, supra note 90 at 65-161, for the effectiveness of public action in alleviating famines. Drèze and Sen emphasize that while direct food aid may be important in alleviating famine, ensuring entitlement to food is far more effective in preventing famine: *ibid.* at 85-103.
- 106 In this regard it is worth noting that two of the leading proponents of the distinction would give opposite answers to this question. Isaiah Berlin, whom many credit with originating the distinction between negative and positive freedom, would accept the view that the Starving Peasant's negative freedom is being reduced. The availability of necessities such as food seems to be, in Berlin's terminology, an aspect of negative freedom: Berlin, supra note 96 at 122. Indeed, Berlin speaks of the 'oppression' that results from an 'unjust or unfair' social arrangement as a deprivation of negative liberty, *ibid.* at 123. Positive freedom, for Berlin, is concerned with 'the wish on the part of the individual to be his own master,' *ibid.* at 131. See also C.B. Macpherson, 'Berlin's Division of Liberty' in *Democratic Theory: Essays in Retrieval* (Oxford: Oxford University Press, 1973) 95 at 103 [hereinafter Macpherson, 'Berlin's Division of Liberty'] (arguing that the welfare state and socialism can enhance negative freedom in Berlin's sense). In contrast, Sen treats the Starving Peasant as suffering from a deprivation of positive freedom because his lack of access to food is an impairment 'in what he can choose to do or achieve, rather than ... [a] restraint that prevents him or her from doing one thing or the other.' Sen, 'Freedom,' supra note 85 at 272. See also Stewart, *Taking Goals Seriously*, supra note 18 at 97-9. Berlin was suspicious of claims that the state could offer positive freedom in his sense - his concern was about the potentially totalitarian impulse behind these claims, in precisely the sense mentioned in note 80 supra - but this suspicion did not seem to extend to the state's role in alleviating deprivations of positive freedom in Sen's sense. Berlin, supra note 96 at 162-6.
- 107 Whether the positive freedom of all Starving Peasants will be so enhanced is a more difficult empirical question, and posing the question that way points to the essential-distributional nature of the wrong to the Starving Peasant.
- 108 Trebilcock, *Limits*, supra note 8 at 84; see also Frank Knight, 'Freedom as Fact and Criterion' in *Freedom and Reform* (Indianapolis: Liberty Press, 1982) 3 at 17; Anthony T. Kronman, 'Contract Law and Distributive Justice' (1908) 89 *Yale L.J.* 472 at 477-8; Wertheimer, supra note 10 at 192-201; Brennan, supra note 96 at 113-4; Atiyah, *Contract*, supra note 1 at 266.
- 109 Cf. Sen, 'Freedom,' supra note 85 at 271.
- 110 'Action, to be free, must be free from motive on one side, from its intended goal as a predictable effect on the other.' Hannah Arendt, 'What is Freedom?' in *Between Past and Future* (New York: Viking Compass, 1968) 143 at 151. Rational choice, if it is dictated by preferences that are not themselves the product of reflection and choice, is not free in this sense.
- 111 This idea is also important to Frankfurt's conception of the person; thus, for Frankfurt, inability to resist desires is a central aspect of coercion. Frankfurt, supra note 14 at 41.
- 112 This may in turn imply that there is more to rationality than rational choice: see, for example, Hamish Stewart, 'A Critique of Instrumental Reason in Economics' (1995) 11 *Economics & Philosophy* 57 [hereinafter Stewart, 'Critique']. It is arguable that Berlin located at least some aspects of his notion of positive freedom here: Berlin, supra note 96 at 131-4.
- 113 Macpherson, 'Berlin's Division of Liberty,' supra note 106 at 119, in debate with Berlin over the meaning of liberty. See also Harry Frankfurt, 'Free will and the concept of a person' in *The importance of what we care about* (Cambridge: Cambridge University Press, 1988) 11 (distinguishing between 'first-order' and 'second-order preferences'); Amartya Sen, 'Rational Fools: A Critique of the Behavioral Foundations of Economic Theory' (1977) 6 *Phil. & Publ. Aff.* 317 (distinguishing between preferences and 'meta-preferences'); Stewart, 'Critique,' supra note 112 at 62-74 (proposing that economists take seriously the possibility of reasoning about ends).
- 114 Though positive freedom in Sen's sense is almost certainly instrumentally necessary to developmental liberty in Macpherson's sense.
- 115 I have in mind here 'ideology' in the Marxist sense: Jorge Larrain, 'Ideology,'

- Dictionary of Marxist Thought*, ed., Tom Bottomore (Cambridge, MA: Harvard University Press, 1983) 219.
- 116 For example, Jay M. Feinman & Peter Gabel, 'Contract Law as Ideology,' *The Politics of Law*, rev. ed., ed., David Kairys (New York: Pantheon, 1990) 373. Dalton's deconstruction of contract doctrine may also be seen as an ideological critique of this sort, seeking to reveal how purportedly private and determinate principles such as duress and unconscionability are public and indeterminate. Dalton, *supra* note 29 at 1038-9.
- 117 Cf. *Restatement*, *supra* note 1, section 17 (bargain principle); Eisenberg, *supra* note 10 at 742 (bargain principle); Weinrib, *The Idea of Private Law*, *supra* note 6 at 136 ('In contract law, the parties themselves create the plaintiff's right to the defendant's performance of the promised act.')
- 118 'Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.' *Restatement*, *supra* note 1, section 177(1). Under these circumstances, the presupposition of freedom of contract does not apply because α knows that he or she can treat β as not having the abstract capacity on which the presupposition depends.
- 119 *Restatement*, *supra* note 1, section 12(2) (capacity); *ibid.*, section 24 (definition of an offer); *ibid.*, section 50(1) (definition of acceptance). These sections of the Restatement do not presume that the parties to a bargain are pursuing any particular goal, or that their bargain has to have any particular content; they are best understood as representing agents who have at least sometimes, a very abstract capacity for choice.
- 120 Dalton, *supra* note 29 at 1009-10; Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv. L. Rev. 1685 at 1774-6; Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987) at 18-25. See also Kostritsky, *supra* note 61 at 584 (describing autonomy view as 'mythical').
- 121 Weinrib, *The Idea of Private Law*, *supra* note 6 at 136-40.
- 122 Cf. *ibid.* at 40-1 (arguing that the deterrent rationale for tort damages provides no reason for the defendant to compensate the successful plaintiff).
- 123 Kant, *supra* note 6 at *226; Hegel, *supra* note 6, pars. 36-40; Weinrib, *The Idea of Private Law*, *supra* note 6 at 139; Benson, *supra* note 6 at 1170-2. I have argued elsewhere that this approach to private law is correct insofar as it provides a structure in which to analyze private law relationships, but that it does not in itself deliver specific doctrinal results as directly as its advocates think: Hamish Stewart, 'Contingency and Coherence: The Interdependence of Realism and Formalism in Legal Theory' (1995) 30 Val. U.L. Rev. 1 at 18-23.
- 124 Kant, *supra* note 6 at *230-3.
- 125 Wertheimer, *supra* note 10 at 243.
- 126 Though perhaps not much; this is what Wertheimer, *ibid.* at 257, calls 'the triviality objection.'
- 127 Cf. Fried, *supra* note 8 at 97-8.
- 128 Gary Peller, 'The Metaphysics of American Law' (1985) 73 Cal. L.R. 1151 at 1232-8; Dalton, *supra* note 29 at 1028-30; Kelman, *supra* note 120 at 103-4.
- 129 Robert Hale, 'Coercion and Distribution in a Supposedly Non-coercive State' (1923) 38 Political Science Quarterly 470. This piece was ostensibly a review of Thomas Nixon Carver, *Principles of National Economy* (New York: Ginn, 1921).
- 130 Hale, *supra* note 129 at 471.

- 131 *Ibid.* at 471-5.
- 132 *Ibid.* at 476.
- 133 *Ibid.* at 476, original emphasis.
- 134 *Ibid.* at 477 (referring to the determination of wages by marginal product and labour supply).
- 135 *Ibid.* at 490.
- 136 Judge Ruffin of the antebellum North Carolina Supreme Court would have had little difficulty deciding against both Slaves. See note 42 *supra*.
- 137 Peller, *supra* note 128 at 1237-8.
- 138 *Ibid.* at 1239.
- 139 Dalton, *supra* note 29 at 1000-1. For another version of the indeterminacy critique, see P.S. Atiyah, 'The Liberal Theory of Contract' in *Essays on Contract* (Oxford: Oxford University Press, 1986) 121 at 130-2 [hereinafter Atiyah, 'Liberal Theory'].
- 140 Dalton, *supra* note 29 at 1034.
- 141 *Ibid.* at 1035.
- 142 Consider Gabel and Feinman's suggestion that '[w]e might ... recognize that people rely in intangible ways on more diffuse promises and representations' than the law of contract normally supposes. Gabel & Feinman, *supra* note 116 at 384. As an example, they suggest that 'contract law might prohibit an employer from firing a worker without good cause even in the absence of a specific contractual provision': *ibid.* But this sort of rule has for a long time been the law in Canada, where at common law an employer can dismiss an employee only for cause or with reasonable notice: see Innis Christie, Geoffrey England & Brent Cotter, *Employment Law in Canada*, 2d ed. (Toronto: Butterworths, 1993) at 635-3 (cause); *ibid.* at 572-98 (notice). This difference in the law does not invalidate the formal approach to duress but influences its application. The formal approach says that an employer's threat to dismiss without cause is wrongful in Canada, and can found a claim of duress if used to extract an agreement from the worker, while in the United States, where employment is generally at-will, the employer's threat to dismiss without cause is not legally wrongful (though it may, depending on the circumstances, nonetheless be improper).
- 143 Dalton, *supra* note 29 at 1035.
- 144 Unger, *supra* note 76 at 82.
- 145 Weinrib, *The Idea of Private Law*, *supra* note 6 at 223, citation omitted.
- 146 One way to make the law of duress more determinate would be to advert to external considerations, such as economic efficiency, in deciding duress cases. This is the essence of Kostritsky's proposal: Kostritsky, *supra* note 61. In my view, her approach either replicates the results of the formal approach to duress, or undermines the logic of right which underlies the formal approach. Consider, for example, 'judicial economy,' which is one of the bases suggested by Kostritsky for resolving duress cases. She has in mind cases where a successful claim of duress on the part of β would only serve to provoke a second lawsuit in which α would succeed. She suggests that this consideration could come into play in cases where the wrongfulness of α 's original proposal is unclear. Consider, for example, a case where 'an employer gives an employee at will the option of being fired or accepting a favourable severance package. The employee acquiesces in the severance pay and then challenges the agreement on duress grounds and seeks reinstatement,' *ibid.* at 610. Kostritsky observes that if the court finds duress in this situation, refuses to enforce the severance package, and reinstates the employee, the employer will nonetheless have the option of simply firing the employee because the employment

- relation is at will. Thus, the finding of duress would not benefit β . But this analysis ultimately turns on the fact that α 's threat was not wrongful to begin with; if the threat was wrongful, as it would be in Canada or as it might be under a collective agreement, α would not be able to fire β if β was reinstated. Therefore, the consideration of judicial economy adds nothing to the analysis. Or consider a case where the wrongfulness of α 's original proposal is admittedly more difficult to assess, such as the Encroaching Driveway. Kostritsky suggests that the plaintiff's duress claim should not succeed, not because the purchasers' original proposal was wrongful, but because even if because the plaintiff's claim succeeded, 'the defendant would then bring an action for restitution for the value of the property conveyed,' *ibid.* at 618. This analysis is unpersuasive. Although it is difficult to see how the defendant's proposal was improper, assuming that it was, the appropriate remedy is to fix a fair value for the driveway, as in the salvage cases. To deny this remedy on the ground of judicial economy would be incoherent; the court would, in effect, be saying that although β was wronged, he should be denied a remedy because of an extraneous consideration. On the other hand, if the defendant's proposal was not improper, the consideration of judicial efficiency adds nothing to the analysis because β will lose in any event.
- 147 Michael Trebilcock and Richard Craswell have both urged this objection on me.
- 148 Brudner, *supra* note 6 at 51.
- 149 The limited warranty will, if enforced, prevent β from recovering from α if β is injured or killed as a result of α 's design defects, but β does not face this peril at the point of purchase and could, in principle, accept this risk.
- 150 Benson, *supra* note 6 at 1187-94.
- 151 Brudner, *supra* note 6 at 52.
- 152 *Ibid.* at 52.
- 153 Feinberg says the baseline need not be moralized, while Wertheimer argues that a moralized baseline is unavoidable. See Feinberg, *supra* note 9 at 213-5; Wertheimer, *supra* note 10 at 242-66. I think Trebilcock is mistaken to describe Feinberg as a rights theorist because Feinberg attempts to avoid a moralized baseline and to elaborate a harm-based, rather than a rights-based, theory of the criminal law. See Trebilcock, *Limits*, *supra* note 8 at 79.
- 154 Sen has been particularly attentive to the role of information in moral theory, including normative economics: see Amartya Sen, *Inequality Re-examined* (Cambridge, MA: Harvard University Press, 1992) at 73-5 [hereinafter Sen, *Inequality*]; Sen, 'Well-Being,' *supra* note 103 at 170-2.
- 155 Another empirical theory, which I will not deal with extensively, is proposed by David Zimmerman, 'Coercive Wage Offers' (1981) 10 *Phil. & Publ. Aff.* 121. He suggests that the appropriate baseline is 'the normally expected course of events,' supplemented by a conception of coercive offers in which β strongly prefers an alternative pre-proposal situation and α actively prevents β from getting there, *ibid.* at 131-3. Zimmerman's account is quite persuasive for the purpose he has in mind, which is to expand on Macpherson's critique of Friedman, *ibid.* at 138-45; see also note 102 *supra*. But it is not clear to me that the purely empirical baseline that Zimmerman adopts is as persuasive in the contractual duress situations I am concerned with; at least, its persuasiveness in these situations may derive from a covert reliance on rights and wrongs. Hill, *supra* note 2 at 661-4 also works with an empirical theory of coercion, which serves as a foil for his cognitive theory of exploitation.
- 156 Nozick, *Anarchy*, *supra* note 19 at 262.
- 157 Wertheimer, *supra* note 10 at 201 and 251-5; see also Trebilcock, *Limits*, *supra* note 8 at 79 (describing Nozick as a rights theorist of coercion); and Zimmerman, *supra* note 155 at 122; but see *ibid.* at 126 (noting inconsistency between Nozick's two approaches to coercion) and Weinrib, 'Right and Advantage,' *supra* note 9 at 1295-7 (arguing that Nozick's attempt to found a political theory of rights on considerations of advantage is incoherent).
- 158 Nozick, 'Coercion,' *supra* note 2.
- 159 *Ibid.* at 447. Evidently, Nozick's P is my α and Nozick's Q is my β .
- 160 *Ibid.* at 447-8.
- 161 *Ibid.* at 447; see the critique of this distinction in Frankfurt, *supra* note 14 at 29-32. Of course, both transactions would, as a matter of positive law, be unenforceable as contrary to public policy.
- 162 Nozick, 'Coercion,' *supra* note 2 at 451.
- 163 *Ibid.* at 462.
- 164 *Ibid.* at 453.
- 165 Robert Nozick, *Philosophical Explanations* (Cambridge, MA: Harvard University Press, 1981) at 48-9.
- 166 Nozick, 'Coercion,' *supra* note 2 at 453.
- 167 '[α]'s action is not part of the morally expected course of events (not that [α] is morally expected *not* to do it)...,' *ibid.* at 453. It is certainly possible that this proposal would be improper in the Restatement's sense, though to make it so one has to swallow Nozick's unlikely factual assumption that the institutions that typically act as mortgagees have 'no pressing need for funds'; otherwise, there is nothing improper about α 's motivation.
- 168 Nozick, *Anarchy*, *supra* note 19 at 84, original emphasis.
- 169 *Ibid.* at 85.
- 170 *Ibid.*
- 171 *Ibid.*
- 172 Leo Katz makes a similar point about Nozick's theory of blackmail, though he has a different view about what makes Nozick's theory underinclusive: 'It covers only the kind of blackmail in which the blackmailer threatens to *omit* an act in return for a payoff; it does not cover the kind of blackmail in which the blackmailer promises to perform some beneficial *act* in return for the payoff.' Leo Katz, 'Blackmail and Other Forms of Arm-Twisting' (1993) 141 *U. Pa. L. Rev.* 1567 at 1579, original emphasis.
- 173 This objection is suggested by James Lindgren, 'Unravelling the Paradox of Blackmail' (1984) 84 *Colum. L. Rev.* 670 at 699; see also Gordon, *supra* note 28 at 1772 note 140.
- 174 Feinberg, *supra* note 9 at 12, original emphasis.
- 175 *Ibid.* at 219.
- 176 *Ibid.*
- 177 *Ibid.* at 219-20.
- 178 *Ibid.* at 225. Feinberg attributes this test to Zimmerman, but in the passage cited, Zimmerman is characterizing Nozick's argument rather than presenting his own: see Zimmerman, *supra* note 155 at 124. Zimmerman's baseline is somewhat more complex than Nozick's. Zimmerman's solution to the Beaten Slave case is not, as Feinberg suggests, simply to say that the owner's proposal is an offer, but to define it as a coercive offer, because the active involvement of the slave-owner in the slave's servitude prevents a strongly desired pre-proposal situation from emerging: see Feinberg, *supra* note 9 at 224; Zimmerman, *supra* note 155 at 136.

- 179 Feinberg, *supra* note 9 at 227–8.
- 180 *Ibid.* at 226.
- 181 *Ibid.* at 235.
- 182 *Ibid.* at 399 note 2.
- 183 '[C]oercive offers made by a party who had no role in creating the circumstances of vulnerability very often do not invalidate consent,' *ibid.* at 246. Feinberg suggests that if α sleeps with the Lecherous Millionaire 'for a few nights until the day of the operation,' and if β then reneges, neither α nor β is liable to the other, *ibid.* at 253. Nowhere does Feinberg suggest that an appropriate remedy is to undo the agreement completely, or to have β pay restitution to α .
- 184 Feinberg, *supra* note 9 at 234.
- 185 A different sort of non-coercive threat would be one which β could simply brush off because α cannot really affect his options (for example, if the gunman's victim knows that the gun is not loaded). One might say that in these cases β has an obviously reasonable alternative to succumbing to α 's threat, but it might be better to regard this case as not a threat at all.
- 186 Feinberg, *supra* note 9 at 259.
- 187 How would one react if all newspapers other than that which one ordinarily reads were banned? Sen suggests that one rational response is to refuse to continue reading one's customary paper, as a form of protest: see Sen, 'Freedom' *supra* note 85 at 292.
- 188 Feinberg, *supra* note 9 at 222, 245.
- 189 It is only fair to observe that these cases are remote from Feinberg's project, which is clearly rooted in a liberal society without slavery.
- 190 Feinberg, *supra* note 9 at 215.
- 191 'Soft paternalism holds that the state has the right to prevent self-regarding harmful conduct ... when but only when that conduct is substantially nonvoluntary, or when temporary intervention is required to determine whether it is voluntary or not,' Feinberg, *supra* note 9 at 12.
- 192 Zimmerman, *supra* note 155 at 122.
- 193 Cf. Mark Blaug, *The methodology of economics, or how economists explain*, 2d ed. (Cambridge: Cambridge University Press, 1990) at 112–35 (arguing that Pareto-based propositions should not be thought of as propositions of positive economics).
- 194 But see Jules Coleman, 'Efficiency, Utility and Wealth Maximization,' *Markets, Morals and the Law* (Cambridge: Cambridge University Press, 1988) 95. Posner understands that wealth maximization is an ethical criterion and defends it as such: Richard A. Posner, 'The Ethical Basis of Wealth Maximization' in *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981) 88.
- 195 Cf. Trebilcock, *Limits*, *supra* note 8 at 15–6.
- 196 Posner, *Economic Analysis*, *supra* note 36 at 89–96.
- 197 'For the economic approach, the function of law is not to declare rights but to lubricate the mechanisms that will put goods to their most valued uses,' Weinrib, 'Right and Advantage' *supra* note 9 at 1299.
- 198 Posner, *Economic Analysis*, *supra* note 36 at 113.
- 199 But see Kostriksky, *supra* note 61 at 605 note 106 (suggesting that if the Lecherous Millionaire's agreement is enforced, '[a] waste of resources might result if millionaires seek out desperate mothers secure in the expectation that courts will not void their contracts').
- 200 The Altruistic Robber is an example of a 'hypothetical-market transaction': Richard A. Posner, 'Utilitarianism, Economics, and Social Theory,' *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981) 48 at 62.

- 201 Posner, *Economic Analysis*, *supra* note 36 at 114.
- 202 *Ibid.* at 91–2.
- 203 *Ibid.* at 97–8. For an economic critique of Posner's reasoning on this point, see Varouj A. Aivazian, Michael J. Trebilcock, & Michael Penny, 'The Law of Contract Modifications: The Uncertain Quest for a Benchmark of Enforceability' (1984) 22 *Osgoode Hall L.J.* 173.
- 204 William Landes & Richard A. Posner, 'The Private Enforcement of Law' (1975) 4 *J. Legal Stud.* 1 at 42–3.
- 205 Kronman, *supra* note 108 at 479.
- 206 *Ibid.* at 480.
- 207 *Ibid.* at 484–5.
- 208 *Ibid.* at 487.
- 209 *Ibid.* at 489–97.
- 210 For a related critique, see Benson, *supra* note 6 at 1138–40. Trebilcock argues that Kronman's analysis puts the entire economic approach to contract in doubt because it proposes that efficient agreements should be deemed voluntary, rather than presuming that voluntary agreements are efficient. Trebilcock, *Limits*, *supra* note 8 at 83–4. Trebilcock's observation is apt but only serves to highlight the subordinate role of voluntariness in the economic analysis of contract: whether voluntary agreements promote efficiency is ultimately an empirical question, and if efficiency is the goal of law, voluntariness must yield to efficiency. See also Bigwood, *supra* note 27 at 224–5 (arguing that the 'wrongfulness' of a transaction entered into under duress derives not from the substantive fairness of the transaction but from the involuntariness of β 's agreement).
- 211 Kronman, *supra* note 108 at 489–97.
- 212 See Trebilcock, *Limits*, *supra* note 8 at 85.
- 213 *Ibid.* at 80.
- 214 *Ibid.* at 78.
- 215 *Ibid.* at 93, 95.
- 216 *Ibid.* at 101. For a similar distinction, see Atiyah, *Contract*, *supra* note 1 at 270–3 (which distinguishes between 'large-scale monopolies' and 'micro-monopolies,' and argues that the law grants relief much more readily to victims of the latter).
- 217 Trebilcock, *Limits*, *supra* note 8 at 101.
- 218 See Sen, 'Freedom,' *supra* note 85 at 276–9; Sen, *Inequality*, *supra* note 154 at 31–8, 56–72. One might think that Trebilcock's careful attention to the importance of autonomy might make him sympathetic to Sen's argument that the Starving Peasant is unfree, but Trebilcock does not regard the Starving Peasant as unfree in any sense: see Trebilcock, 'Rejoinder,' *supra* note 90 at 369.
- 219 Trebilcock's discussion of Radin's critique of commodification suggests that he would not likely see the right to read as inalienable. Margaret Jane Radin, 'Market Inalienability' (1989) 100 *Harv. L. Rev.* 1849; Trebilcock, *Limits*, *supra* note 8 at 23–9.
- 220 For a critique of Trebilcock's brief treatment of the two Slave cases, text accompanying notes 40–4 above.
- 221 Trebilcock, *Limits*, *supra* note 8 at 91.
- 222 I have pursued this criticism of Trebilcock in Hamish Stewart, 'Where is the Freedom in Freedom of Contract? A Comment on Trebilcock's *The Limits of Freedom of Contract*' (1995) 33 *Osgoode Hall L.J.* 259.
- 223 Trebilcock, *Limits*, *supra* note 8 at 101.
- 224 It is not entirely clear, though, what the normative significance of the competitive baseline is in Trebilcock's theory. It cannot be the instrumental value of setting

- appropriate incentives for resource allocation; situational monopolies, because they are unsystematic, do not provide incentives in the same way as structural monopolies. The normative basis must either be some sense that competitive prices are fair or must be related to the autonomy of β .
- 225 Other moralized accounts of coercion, which I do not discuss here, are given by Cheyney C. Ryan, 'The Normative Concept of Coercion' (1980) 89 *Mind* (n.s.) 481; Martin Gunderson, 'Threats and Coercion' (1979) 9 *Canadian Journal of Philosophy* 247; Mark Fowler, 'Coercion and Practical Reason' (1982) 8 *Social Theory* 329; Sian E. Provost, 'A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law' (1995) 73 *Tex. L.R.* 629 (1995); and Bigwood, *supra* note 27. Westen offers a broad, empirical account of 'coercion,' and a narrower, though not fully specified, normative account of 'duress': Westen, *supra* note 9 at 558-9. His purpose is less to define the appropriate concept of contractual duress than to argue that words like 'freedom,' 'coercion,' and 'duress' have powerful rhetorical force and, therefore, need to be unpacked before they have any use, *ibid.* at 591-3.
- 226 Another way to merge the legal and the moral baseline is to convert, explicitly and honestly, moral duties into legal ones. Whether this solution is consistent with the presupposition of freedom of contract is another story but it is not usually proposed by advocates of moralized baselines.
- 227 Wertheimer, *supra* note 10 at 6.
- 228 *Ibid.* at 15.
- 229 Curiously, Wertheimer uses the first *Restatement* of 1932 rather than the second *Restatement* of 1979, which was evidently available at the time he wrote.
- 230 Wertheimer, *supra* note 10 at 35-8.
- 231 *Ibid.* at 38-9.
- 232 *Ibid.* at 43.
- 233 *Ibid.* at 212.
- 234 *Ibid.* at 214-7.
- 235 *Ibid.* at 217.
- 236 *Ibid.* at 267.
- 237 *Ibid.*
- 238 These examples are constructed from the two lists in Feinberg, *supra* note 9 at 199 and 200.
- 239 Feinberg, *supra* note 9 at 202.
- 240 Wertheimer, *supra* note 10 at 218, original emphasis.
- 241 *Ibid.* at 308.
- 242 This case is constructed from the fifth demand and the ninth threat in Feinberg, *supra* note 9 at 199-200.
- 243 Wertheimer, *supra* note 10 at 308; the reference to Rawls is to John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 131-6. Rawls lists a fifth criterion, 'that a conception of right must impose an ordering on conflicting claims,' *ibid.* at 133-4, but it is fairly clear that this would be met by Wertheimer's scheme.
- 244 This oversight may derive in part from the development of Wertheimer's project, which was to consider the structure of the law of duress first, to see what light it could shed on the moral theory of duress: see Wertheimer, *supra* note 10 at 15. See also Tony Honoré, 'A Theory of Coercion' (1990) 10 *Oxford J. Legal Stud.* 94 at 95-8 (arguing that because moral judgments are not always two-valued in the same way as legal judgments, Wertheimer should have distinguished more carefully between legally wrongful and morally wrongful proposals).

- 245 Fried's theory can be seen as an expansion of Kant's second example of the categorical imperative. Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. H.J. Paton (New York: Harper & Row, 1964) at *422.
- 246 Fried, *supra* note 8 at 16.
- 247 *Ibid.* at 97.
- 248 *Ibid.*
- 249 *Ibid.* at 98.
- 250 Trebilcock, *Limits*, *supra* note 8 at 80-1.
- 251 Fried, *supra* note 8 at 98, emphasis added.
- 252 Fried, *supra* note 8 at 110.
- 253 The precise content of the employer's and the union's duty to bargain in good faith varies from one jurisdiction to another, but I think Nozick's case 3 would violate the duty in all jurisdictions where collective bargaining is governed by statute.
- 254 Fried, *supra* note 8 at 16.
- 255 Benson, *supra* note 6 at 1110-1; Brudner, *supra* note 6 at 21 note 27.
- 256 Trebilcock, *Limits*, *supra* note 8 at 248-50; compare Coleman, *supra* note 194 at 131.
- 257 I thank Bruce Chapman and Richard Craswell for helping me recast this point. The distinction between institutional competence in the instrumental sense and the point I am trying to make here can also be seen by considering Craswell's argument that the precise rule protecting β should depend on whether α or the court can make more efficient contract terms: Craswell, *supra* note 75 at 38-41; compare Kostitsky, *supra* note 61 at 641 (suggesting that '[i]f granting the duress claim would involve the court in having to set a price or undo a transaction that would necessitate a complex evaluation, the court should be reluctant to grant a duress claim'). My approach does not necessarily protect the court from complex inquiries about appropriate pricing, or if it does so protect the court, it is not on the instrumental ground that these inquiries are difficult for the court to make.
- 258 Weinrib once proposed the judicial creation of a duty of easy rescue in tort, but now argues that any such duty would be incoherent with the other features of tort law: see Ernest J. Weinrib, 'The Case for a Duty to Rescue' (1980) 90 *Yale L.J.* 247 at 289; Weinrib, *The Idea of Private Law*, *supra* note 6 at 154.
- 259 See Drèze & Sen, *supra* note 90.
- 260 Feinberg, *supra* note 9 at 251.
- 261 It is worth asking whether we still think the agreement is unconscionable if this assumption does not hold. That is, suppose, implausibly, that automobile manufacturing is a perfectly competitive industry and that the warranty offered by α is the best the industry can do. β has no real choice because all manufacturers offer the same warranty, but by the same token, no manufacturer can offer a better warranty and remain minimally profitable. Is the agreement still unconscionable? Feinberg's analysis, because it focuses on β 's subjective response to the alternatives, would seem to say that it was; but this conclusion strikes me as implausible.
- 262 A fourth possibility is that no coherent relationship among these grounds of relief is possible. I take this to be the position of the Critical Legal Scholars.
- 263 Pluralist accounts of contract law include Waddams, *Contracts*, *supra* note 1, par. 4 ('no single theory accounts for all of the existing law [of contract]'); Atiyah, *Contract*, *supra* note 1 at 34-7 (contract law attempts to protect reasonable expectations, prevent unjust enrichment, and avoid certain kinds of harm). With specific reference to duress, see Eisenberg, *supra* note 10 at 743-8 (efficiency and fairness); Honoré, *supra* note 244 at 101-5 (common law of contract does not reflect a single

moral theory); Kostritsky, *supra* note 62 at 608–51 (in adjudicating duress claims, courts should consider a number of goals, including but not limited to economic efficiency).

264 Benson, *supra* note 6 at 1187–96 (unconscionability).

265 Weinrib, *The Idea of Private Law*, *supra* note 6 at 138–39.

266 Brudner, *supra* note 6.

267 *Ibid.* at 53 (arguing that Kantian right does not exhaust the considerations relevant to contract).

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CONSTITUTIONALISM
AND DIFFERENCE†

James Tully has chosen to tackle a question that is on the minds of a growing number of us today: is the legacy of modern constitutionalism up to the task of recognizing and accommodating cultural diversity? Tully is hardly the first to point out that a burgeoning variety of demands to recognize the special needs of minority cultures raises difficult questions for contemporary constitutional democracy.¹ Nor is he the only author to emphasize the significance for contemporary political thought of the horrors committed against indigenous cultures by precisely those governments claiming to represent the ideals of the Enlightenment and the legal and constitutional notions spawned by its most important theoretical representatives. In Tully's view, this legacy suggests that thus far unnoticed aspects of modern constitutionalism can be brought to life by focusing on the special case of Aboriginal peoples. Their experience is 'exemplary of the "strange multiplicity" of cultural voices that have come forward in the uncertain dawn of the twenty-first century to demand a hearing and a place, in their own cultural forms and ways, in the constitutions of modern political associations' (3).

What is special about Tully's discussion is the profound depth of his hostility to the mainstream of modern constitutionalism. In his account, the challenge of difference requires an abandonment of the most basic categories and concepts of modern constitutional theory. Recent writers who have struggled to show that a revised and more robust brand of liberal theory can accommodate recent demands for cultural recognition – Will Kymlicka and Yael Tamir should come immediately to mind²

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† Review of James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (New York and Cambridge: Cambridge University Press, 1995) pp. xvi, 253 \$16.95 US. Unless otherwise noted, all page references in the text are to the book.

1 For a good sampling of this genre: Will Kymlicka, ed. *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995).

2 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995); Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993). In a similar vein: Jeff Spinner, *The Boundaries of Citizenship: Race, Ethnicity, and Nationality in the Liberal State* (Baltimore: Johns Hopkins Press, 1994).