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CONSENT AND COERCION

Kimberly Kessler Ferzan*

ABSTRACT

There are substantial disputes as to what sorts of behavior constitute coercion and thereby undermine consent. This disagreement was on full display during the public fray over Aziz Ansari's behavior on a date. Whereas some commentators condemned Ansari's behavior as nothing short of sexual assault, others believed his behavior did not rise to the level of undermining consent.

This Article claims that the way forward is to see that there are two normative functions for coercion, and each is at play with respect to consent. Sometimes coercion is about the blameworthiness of the coercer, and sometimes coercion is about the involuntariness of the consenter's choice. To deny the latter is not to deny the former. Because these are two disparate functions, much of the debate about Ansari may be commentators talking past each other.

After explaining this miscommunication, this Article broadens our understanding of how the blameworthiness of the coercer can bear on the permissibility of his actions. Just as no man may profit from his own wrong, coercers may not avail themselves of consent, even if it is sufficiently "freely given" such that the consenter is not acting involuntarily. This Article claims that the wrongful coercion "normatively impairs" the coercer, and that this normative impairment is at play in other legal doctrines.

With the normative grounding in place, this Article considers how and if these amendments to our view of coercion should be taken into account in the law, with a specific focus on sexual offenses. It offers a draft statute for discussion purposes, considers charges of paternalism in both the public and

* Harrison Robertson Professor of Law, Joel B. Piassick Research Professor of Law, University of Virginia Law School. My thinking about this paper benefitted from my keynote lecture at Cambridge University's Conference on Consent in Law and Morality, sponsored by the Society for Applied Philosophy, the Cambridge Forum for Legal and Political Philosophy, and the Arts and Humanities Research Council, as well as my Bloustein Lecture in Law and Ethics at Rutgers Law School, and I thank the attendees for their questions and comments. The paper further benefitted from presentation at the Neighborhood Criminal Law Conference at the University of Richmond Law School, as well as UVA's Faculty Workshop. For comments on the paper, I thank Larry Alexander, Charles Barzun, Kendall Burchard, Mark Dsouza, Margaret Gilbert, Rachel Harmon, Debbie Hellman, Alli Herzog, Ruth Mason, and Victor Tadros. I thank Scott Harman and Chandler Walpole for excellent research assistance.

private sphere, and points to other reasons to be cautious about criminalization. Finally, this Article defends this view as a more perspicuous account of the normative landscape than other coercion theories.

Ultimately, the goal of this Article is to define new conceptual territory for normative debate. Progress cannot be made until we ask the right questions and answer the same ones. This Article aims to provide the framework within which more nuanced discussions can be had.

INTRODUCTION

The effect of coercion spans legal doctrines.¹ Coercion impacts contracts,² unconstitutional conditions,³ plea bargains,⁴ duties to obey the law,⁵ medical ethics,⁶ and duress.⁷ Scholars have struggled to articulate the test for coercion that captures its range and limits.⁸

1. See ALAN WERTHEIMER, *COERCION*, at xi (Marshall Cohen ed., 1988) (searching for a unifying theory across legal doctrines); Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 *TEX. L. REV.* 717, 720 (2005) (arguing for a view of coercion and applying it across legal doctrines); Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45, 46 (2002) (arguing that legal doctrines require two distinct types of coercion).

2. See, e.g., WERTHEIMER, *supra* note 1, at 23 (surveying duress cases in contracts and looking for the underlying justification); Bar-Gill & Ben-Shahar, *supra* note 1, at 753 (“It is beyond dispute that an improper threat can create duress and justify the rescission of the contract . . .”); Stephen A. Smith, *Contracting Under Pressure: A Theory of Duress*, 56 *CAMBRIDGE L.J.* 343, 343 (1997) (noting that in contract law, “courts are regularly required to consider how far the scope of duress should extend”); Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 *U. TORONTO L.J.* 175, 176 (1997) (“A bargain entered into under duress is not enforceable.”).

3. See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 *GEO. L.J.* 1, 6 (2001) (defending “a new unified theory of unconstitutional conditions . . . that centers on coercion”); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. PA. L. REV.* 1293, 1352 (1984) (employing coercion’s threats/offers/baseline analysis and concluding “that the distinction between liberty-expanding offers and liberty-reducing threats turns on the establishment of an acceptable baseline against which to measure a person’s position after imposition of an allocation”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *HARV. L. REV.* 1413, 1433 (1989) (noting the Supreme Court “has often invoked coercion as the reason to strike down conditions that affect rights to freedom of speech, religion, and association, but without a consistent or satisfying theory”).

4. See, e.g., WERTHEIMER, *supra* note 1, at 122 (arguing critics may be wrong to see the problem with plea bargaining as its coerciveness); Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 *YALE L.J.* 1179, 1298 (1975) (“When our consciences cause us to deny the coercive character of the system that we have created, we magnify its injustice as we delude ourselves.”); Bar-Gill & Ben-Shahar, *supra* note 1, at 763 (“Plea bargains are a unique species of contract that raises frequent concerns of coercion.”); Josh Bowers, *Plea Bargaining’s Baselines*, 57 *WM. & MARY L. REV.* 1083, 1127 (2016) (arguing for a proportionality baseline in the determination of whether a plea bargain is coercive); John H. Langbein, *Torture and Plea Bargaining*, 46 *U. CHI. L. REV.* 3, 13 (1978) (“Plea bargaining, like torture, is coercive.”).

5. See, e.g., WILLIAM A. EDMUNDSON, *THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY* 71–124 (1998) (arguing that “law is coercive” is a fallacy); FREDERICK SCHAUER, *THE FORCE OF LAW* 8 (2015) (arguing that coercion is the distinguishing feature of law); Vinit Haksar, *Coercive Proposals [Rawls and Gandhi]*, 4 *POL. THEORY* 65, 78 (1976) (concluding that some forms of civil disobedience may be coercive in the non-pejorative sense).

6. See, e.g., Eric Chwang, *Against Risk-Benefit Review of Prisoner Research*, 24 *BIOETHICS* 14, 15–18 (2010) (rejecting use of methodology for children as appropriate for adult prisoners and discussing problems of coercion with respect to prisoner consent); Joseph Millum, *Consent Under Pressure: The Puzzle of Third Party Coercion*, 17 *ETHICAL THEORY & MORAL PRAC.* 113, 116 (2014) (arguing that consentee may sometimes proceed in the face of third-party

Coercion is particularly important to consent. Consent waives a right one has against interference with one's person or property, rendering something that was previously impermissible, permissible.⁹ But when coercion is present, it renders this act of consenting null and void. If someone points a gun at you and then asks whether he may enter your home, your "yes" is neither morally nor legally efficacious.

Consent and coercion bear on numerous boundary crossings, but their conjunction is at its most controversial in cases of sexual assault. It is in this context that we must settle disputed normative questions about the kinds of behavior that are sufficiently coercive so as to be designated "rape." Although threats of deadly force have always negated consent,¹⁰ other threats have proven more problematic. For instance, in the notorious *Thompson* case, a high school principal's threat that he would prevent a student from graduating unless she performed oral sex on him did not fall within the statutorily provided types of threats that invalidated consent.¹¹

Although many jurisdictions have broadened their definitions of coercion,¹² the kind of coercive behavior that invalidates consent still faces contested perimeters. Indeed, the recent debate about actor Aziz Ansari is the

coercion and suggesting how researchers should analyze such cases); O. O'Neill, *Some Limits on Informed Consent*, 29 J. MED. ETHICS 4, 5 (2003) ("The ethical importance of informed consent in and beyond medical practice is, I think, more elementary. It provides reasonable assurance that a patient (research subject, tissue donor) has not been deceived or coerced.").

7. See, e.g., WERTHEIMER, *supra* note 1, at 146 (discussing legal formulation of duress); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1334 (1989) (theorizing when duress should excuse).

8. See generally WERTHEIMER, *supra* note 1, for the most sustained cross-doctrinal analysis to date. For an example of the extraordinarily broad reach of coercion questions, see Mollie Gerver, *Refugee Repatriation and the Problem of Consent*, 48 BRIT. J. POL. SCI. 855, 859 (arguing that the United Nations and NGOs may face a "coercion dilemma" in deciding whether to assist with forced relocations of refugees).

9. DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 165 (2012) ("[C]onsent involves not the granting of a right but just the waiving of it."); Peter Westen, *Commentary, Some Confusions About Consent in Rape Law*, 2 OHIO ST. J. CRIM. L. 333, 334 (2004) ("[C]onsent creates a Hohfeldian 'privilege'" to engage in an action that would otherwise be wrongful).

10. See Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759, 781 (2017) ("All Western jurisdictions have always made it a crime to induce sexual intercourse by threats of death or serious bodily injury.").

11. *State v. Thompson*, 792 P.2d 1103, 1106 (Mont. 1990); see MODEL PENAL CODE § 213.1(2) (AM. LAW INST. 2017) (defining "Gross Sexual Imposition" as "[a] male who has sexual intercourse with a female not his wife commits a felony of the third degree if: (a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution").

12. See John F. Decker & Peter G. Baroni, "No" Still Means "Yes": *The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1120–26 (2011) (surveying statutory and case law conceptions of non-physical coercion).

latest boundary to be tested. The incident, as described to a reporter by a woman with the pseudonym “Grace,” involved Grace going on a date with Ansari, where they went back to his apartment and things quickly escalated.¹³ They went out to dinner and then went back to his apartment.¹⁴ When she admired his kitchen counters, he suggested that she hop up and sit on one.¹⁵ Within ten minutes, both were naked and both had, at least briefly, performed oral sex on the other.¹⁶ But Grace didn’t want to have sexual intercourse with Ansari.¹⁷ And he proceeded to needle and harangue her.

Grace says that she gave physical and verbal cues that she did not want to proceed to intercourse, but that Ansari was relentless.¹⁸ He kept grabbing her hand to touch his genitals.¹⁹ He would place his hand in her mouth and then try to digitally penetrate her. When she wanted to wait for another date, he said, “If I pour you a glass of wine now, would it count as our second date?”²⁰ She excused herself to the bathroom, and returned saying she didn’t want to feel forced into anything.²¹ He told her they could chill on the couch but—in a moment that was “particularly significant” for Grace—almost immediately then requested oral sex which she performed.²² He led her around the apartment to pick a spot for them to have intercourse, but when she said again that she was not going to do so, he relented.²³ They then put on their clothes, and Grace soon left.²⁴

Public opinion is significantly divided over the Ansari incident, so much so that *Saturday Night Live* did a sketch about how difficult many individuals find it to talk about this particular case.²⁵ In the *New York Times*, Bari Weiss

13. Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, *BABE* (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355>.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Saturday Night Live: Dinner Discussion* (NBC television broadcast Jan. 27, 2018). The Ansari debate also implicates controversial questions of race and power. *See, e.g.*, Caitlin Flanagan, *The Humiliation of Aziz Ansari*, *ATLANTIC* (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/> (“I thought it would take a little longer for the hit squad of privileged young white women to open fire on brown-skinned men.”); Flannery Dean, *10 Women, from 24 to 60, on Aziz Ansari, Sexual Assault and Bad Sex*, *FLARE* (Jan. 22, 2018), <https://www.flare.com/news/aziz-ansari-sexual-harassment/image/5/> (statement of Soraya Roberts) (“Aziz Ansari is a male celebrity who

wrote an opinion column arguing that Ansari was “guilty of not being a mind reader.”²⁶ She condemned the loss of female agency in Grace’s story, essentially arguing that if Ansari was being a boorish jerk, then Grace should have just left.²⁷ In contrast, other commentators condemn the sex that results from incessant cajolery like Ansari’s as nothing short of rape.²⁸ And some university’s Title IX regulations appear to cover conduct like Ansari’s as sexual misconduct.²⁹

brought a female non-celebrity to his apartment and, regardless of his unspoken politics or beliefs, that means, in our society, he holds the power.”).

26. Bari Weiss, Opinion, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html>.

27. *See id.*

I am a proud feminist, and this is what I thought while reading the article:

If you are hanging out naked with a man, it’s safe to assume he is going to try to have sex with you. If the failure to choose a pinot noir over a pinot grigio offends you, you can leave right then and there. If you don’t like the way your date hustles through paying the check, you can say, “I’ve had a lovely evening and I’m going home now.” If you go home with him and discover he’s a terrible kisser, say, “I’m out.” If you start to hook up and don’t like the way he smells or the way he talks (or doesn’t talk), end it. If he pressures you to do something you don’t want to do, use a four-letter word, stand up on your two legs and walk out his door.

Id.; *see also* Lucia Brawley, *Let’s Be Honest About Aziz Ansari*, CNN (Jan. 18, 2018), <https://www.cnn.com/2018/01/17/opinions/lets-be-honest-about-aziz-ansari-brawley/index.html> (arguing that Ansari is not like Harvey Weinstein and that women need to be more assertive in saying “no”); Flanagan, *supra*, note 25 (noting Grace did not feel “frozen, terrified, [or] stuck” and characterizing the babe.net article as “revenge porn” and Ansari as the victim).

28. Michaela Lindsey, Opinion, *Silence Is Not Consent: Sexual Assault and Aziz Ansari*, COLUM. DAILY SPECTATOR (Feb. 9, 2018), <https://www.columbiaspectator.com/opinion/2018/02/08/silence-is-not-consentsexual-assault-and-aziz-ansari/> (construing Ansari’s behavior to be sexual assault); Devon Price, *A Few Words About Sexual Coercion, in the Wake of the Aziz Ansari Accusations*, MEDIUM (Jan. 13, 2018), https://medium.com/@dr_eprice/a-few-words-about-sexual-coercion-in-the-wake-of-the-aziz-ansari-accusations-7db015c1cde5 (describing giving in to a man who “begged, bothered, asked, cajoled, [and] coerced” and characterizing the encounter as “sexual assault” and him as a “rapist”); Carol Shih, Opinion, *How 18 Women Responded to ‘Grace’ and the Aziz Ansari Allegation*, LILY (Jan. 18, 2018), <https://www.thelily.com/how-18-women-responded-to-grace-and-the-aziz-ansari-allegation/> (quoting one online comment as indicating “[C]onsent can only be given in the form of a verbal and enthusiastic, ‘YES!’ Not a ‘yes’ that feels guilted into performing any kind of sexual act. She did not consent. This was sexual assault”).

29. *See, e.g.*, QUINNIPIAC UNIV., SEXUAL MISCONDUCT AND HARASSMENT POLICY 9 (2017), <https://www.qu.edu/content/dam/qu/documents/Definition-and-Scope.pdf>.

Coercion is unreasonable pressure for sexual activity. Coercion is the use of emotional manipulation to persuade someone to do something they may not want to do, such as being sexual or performing certain sexual acts. Being

This debate stems from insufficient nuance as to how coercion works. One significant problem is that we often are not even talking about the same thing. In *The Normative Functions of Coercion Claims*, Mitchell Berman argued that identifying the conceptual contours of coercion is a quixotic quest, as there is not just one concept of coercion.³⁰ Instead, there are two. Sometimes coercion is a question of whether the coercer has acted wrongfully, coercion_w, and sometimes coercion is a question of when the coercee is excused for her conduct, coercion_E.³¹ Although Berman failed to attend to consent in any detail, his insight applies here. It also explains why, in the context of sexual assault, our judgments about “coerced sex” are so contested. We need one view of coercion to tell us when the consentor’s choice is so constrained that it cannot be deemed the exercise of the normative power of waiving her right not to be touched (and I will slightly modify coercion_E so as to cover such cases).³² But we need a second view of coercion to tell us when, even if this choice is not constrained to that extent, the coercer’s behavior is wrongful and condemnable.

Beyond deploying Berman’s insight, this Article raises a second and more central claim. There is more we can say about coercion_w than that the coercer behaved wrongfully. We can talk about the normative consequences of that wrongful behavior. Here, I contend that like the equitable doctrine that “no man may profit from his own wrong,” the coercion_w renders the coercer unable to avail herself of the consent.³³ The idea behind this further important

coerced into having sex or performing sexual acts is not consenting sex and is considered sexual misconduct.

Id. at 10. See also Eugene Volokh, *Getting Sex by Saying ‘If You Don’t Have Sex with Me I Will Find Someone Who Will’ = Rape or Sexual Assault?*, WASH. POST: VOLOKH CONSPIRACY (Dec. 1, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/01/getting-sex-by-saying-if-you-dont-have-sex-with-me-i-will-find-someone-who-will-rape-or-sexual-assault/?noredirect=on&utm_term=.5e863e28ff70 (discussing the then-existing Clark University definition of coercion).

30. Berman, *supra* note 1, at 46 (“The single unified conception of coercion that theorists seek, I will argue, is of little, if any, normative significance.”).

31. *Id.* at 49. Berman explains:

In short, then, I am assuming that coercion claims serve two normative functions: (1) to determine whether A’s conduct is at least prima facially wrongful or whether A is blameworthy; and (2) to determine whether B is excused for conduct that would otherwise warrant blame; that these are the only normative functions such claims serve; and that these functions are, in principle, quite distinct.

Id. at 48.

32. See *infra* Section II.A.1.

33. Cf. Arudra Burra, *The Significance of Consent* 19 (Oct. 23, 2011) (unpublished manuscript) (on file with author) (arguing that this conception of wrongdoing does all the normative heavy lifting).

implication is that the coercer's misconduct prevents her from helping herself to the consent. The coercer is normatively impaired from benefitting from the consent. Although absent coercion_E the harm or evil of *rape* is not present, the coercer's behavior is still wrongful, though the conduct may not be as wrongful as when it is the product of coercion_E.

This Article thus provides a more comprehensive structure to coercion debates. Part I gives a broad overview of coercion, including Berman's two normative functions, and consent. Part II begins by reconceptualizing coercion_E as coercion_C, that is, coercion where the choice is undermined, because coercion_E creates the misimpression that we are *excusing* rape victims instead of looking at the effectiveness of their constrained *choices*. Part II then parses the intersection of consent and the two types of coercion and explains why this conceptual division can illuminate the Ansari incident. Part III moves to a further normative implication beyond Berman's initial division of labor. It argues that the result of coercion_w is to prevent the coercer from availing himself of the fruits of his wrongdoing. That is, though it is a crime distinct from rape, the coercer acts wrongfully if he avails himself of the consent he procured through a wrongful threat. It further explains that coercion_C is not a necessary component for this normative impairment and defends the view that that any causal relation is sufficient to normatively impair the coercer. It also reveals that this type of normative impairment functions in other doctrines, including entrapment and unclean hands. Finally, it contends that this insight offers a better account of the cases than Berman's does. Part IV addresses criminalization. It provides a draft statute for discussion; it addresses charges of paternalism in the civil and criminal domains; and it raises, more generally, worries about criminalization. Part V addresses two alternative approaches to coercion, one of which argues that all the normative work can be done by coercion_w-type analysis and the other which argues that all normative work can be done by coercion_C-type analysis. This part explains why both normative functions better cohere with how coercion works, particularly when it comes to the implications for third parties. Ultimately, the ambition for this paper is not to endorse a particular substantive account of either type of coercion, but rather to create conceptual space for different types of arguments. We will make progress in our arguments only after we are actually arguing about the same thing.

I. SOME PRELIMINARIES

This Section provides an overview of the concepts of consent and coercion. It begins with the general theoretical understanding of what coercion is. It then turns to Mitch Berman's refinements to coercion,

separating when it is wrongful from when it is excusing. Finally, it turns to both the mental act and the communication views of consent.

A. Coercion Generally

The standard view is that coercion is an act that wrongfully reduces another person's choice set by threatening to make the coercee worse off if the coercee does not comply with the coercer's demand.³⁴ The man at the door with a gun to your head threatens to make you worse off (by shooting you) if you do not do what he wants (let him in). This is to be distinguished from compulsion, which is when another person deploys force to cause the act to happen, as when the person simply pushes you out of the way and barges in.³⁵

34. Joel Feinberg argues:

A coerces *B* into agreeing to his harmful or dangerous treatment of *B* in these cases when:

1. *A* demands that *B* consent to it;
2. *A* makes a threat to *B* (or in some cases a "coercive offer") that he (*A*) will cause or fail to prevent some consequences that *B* finds unwelcome unless *B* complies with the demand;
3. *A* gives *B* some evidence of the credibility of the threat, usually a demonstration of his power as well as his willingness to carry it out; and
4. unless he is bluffing, *A* has actively intervened in *B*'s option-network to acquire control of the relevant option-switches; in particular he can close tight the conjunctive option that consists of *B*'s noncompliance with the demand and *B*'s avoidance of the threatened unwelcome consequences; and
5. *B* understands the proposal and is frightened by it, and at least partly to avoid an unwelcome projected consequence, complies with *A*'s demand.

JOEL FEINBERG, HARM TO SELF 198 (1986). Feinberg later allows for bluffs to count as coercive, and as noted above, requires a success condition for "coercion." *Id.* With respect to the latter, it may be that we do not use the term "coercion" in ordinary language without a success condition, but the wrong of coercion may not require that the coercive behavior be successful.

Theorists also distinguish threats from warnings. "A warning is a prediction that an unwelcome event will happen or that it will happen if certain circumstances arise." Smith, *supra* note 2, at 346; see also Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1096 (1981) ("One person coerces another by putting him under such great psychological pressure that a rational decision is impossible, by creating unfair conditions of choice, or by manipulating belief about relevant facts; informing someone of true but disquieting facts beyond one's control is clearly not to coerce. [A] warning is not situation-altering, since it communicates about an environment that already exists.").

35. PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 186 (2004) ("Compulsion can play no role in

Essential to this definition, then, is that coercers threaten. The distinction between threats and offers is often critical to coercion discussions,³⁶ although there are those theorists who argue that there are coercive offers.³⁷ Our focus will be on when threats are wrongful,³⁸ though there are no doubt wrongful offers.³⁹

To know if something is a threat, we need to know whether its execution will make the coerced worse off. A threat brings the coerced below a baseline, whereas offers bring the coerced above the baseline.⁴⁰ This baseline can be conceptualized predictively or normatively. This was famously illustrated by Robert Nozick's slave case (using the standard denotations in the literature that *A* is the coercer and *B* is the coerced):

identifying wrongful pressures because compulsion brings about *x* not by pressuring [*B*] to exercise her will in favor of acquiescing in *x*, but by bringing *x* about *without regard* to any exercise of will on [*B*'s] part."); Berman, *supra* note 1, at 51 (arguing that the term "coercion" "envisions conduct that somehow induces action by another without forcibly compelling it"); Craig L. Carr, *Coercion and Freedom*, 25 AM. PHIL. Q. 59, 60 (1988) (arguing that coercion involves choice and compulsion does not); Harry G. Frankfurt, *Coercion and Moral Responsibility*, in *ESSAYS ON FREEDOM OF ACTION* 65, 65 (Ted Honderich ed., 1973) (calling compulsion cases instances of "physical coercion"); see FEINBERG, *supra* note 34, at 189 (describing a "spectrum of force" "running from compulsion proper, at one extreme, . . . to manipulation, persuasion, enticement, and simple requests at the other extreme").

36. STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 118 (1998) ("To distinguish legitimate influence from impermissible coercion, the best way to begin is to consider whether the inducement being deployed amounts to an offer or a threat.").

37. Coercive offers include exploitation, which is distinguished below, *infra* text accompanying notes 44–45. Frankfurt thinks that exploitative offers are threats. See Frankfurt, *supra* note 35, at 71–72 (setting forth conditions of wrongful exploitation and then concluding that *A* is threatening *B*).

38. The arguments made in Part III can be extended to apply to exploitation and deception as well. However, each of these areas requires its own analysis of the precise boundaries that fall within either category, and both would require separate articles. Moreover, the goal for this paper is conceptual clarity with respect to coercion claims. Hence, I have narrowed our focus to threats alone.

39. For an exhaustive study, see ALAN WERTHEIMER, *EXPLOITATION* 5 (1996) (surveying everything from college athletics to surrogacy contracts); cf. VICTOR TADROS, *WRONGS AND CRIMES* 228–29 (2016) (arguing that sometimes you can wrong someone by giving them options).

40. SCHULHOFER, *supra* note 36, at 120 ("A threat, in other words, is a proposal to make a person worse off than she has a right to be."); WERTHEIMER, *supra* note 1, at 204 ("The crux of the distinction between threats and offers is quite simple: A *threatens* B by proposing to make B *worse* off relative to some baseline; A makes an *offer* to B by proposing to make B *better* off relative to some baseline.").

The Slave Case. *A* is a slave owner who regularly beats his slave *B*. One day *A* proposes to spare *B* his regular beating if and only if *B* now does *X*.⁴¹

If coercion were simply an empirical question, this would be an offer because it is bringing the slave above his expected baseline. He is better off than he expected to be. However, if the idea is the baseline at which the slave has a right to be, then this is a threat. Coercion is certainly deployed in both senses in ordinary language, but this is not an ordinary language project. The project here, addressing questions of responsibility, wrongdoing, and choice, is thoroughly normative, and our baseline should likewise reflect these moralized features.⁴² Hence, we should, following Alan Wertheimer, use the sense of coercion that is moralized—that considers making someone worse off than he *ought* to be.⁴³ Given that *B* has a right not to be beaten, *A*'s statement is a threat, not an offer. Indeed, it would be extremely odd for our normative discourse not to reflect that. That is, the claim that the slave owner is only offering the slave a reprieve from beating rings hollow as a criminal defense.

Coercion is related to, but distinct from, exploitation. Whereas coercion is a threat to bring someone below a moralized baseline, exploitation is unfairly taking advantage of the fact that someone is already below a baseline.⁴⁴ If Alice happens upon destitute Betty and offers to make her better off if Betty will allow Alice to have sex with her, Alice is exploiting Betty. Exploitation can also involve constrained choice, but the conduct of an exploiter is distinct from the behavior of a coercer.⁴⁵

41. Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440, 450–51 (Sidney Morgenbesser et al. eds., 1969).

42. Economists also implicitly rely on moralized baselines. As Hamish Stewart explains:

Economists are so accustomed to working with the Pareto criteria that they are sometimes incapable of seeing it as an ethical standard. 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. 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.

Stewart, *supra* note 2, at 224.

43. WERTHEIMER, *supra* note 1, at 212 (arguing that a moralized baseline is necessary for coercion claims to have moral implications); accord WESTEN, *supra* note 35, at 182 (arguing wrongful threats need to be defined with respect to a normative baseline).

44. Berman, *supra* note 1, at 85 (“Exploitation . . . connotes taking unfair advantage of a person’s vulnerability.”).

45. See WERTHEIMER, *supra* note 39, at 16–28; for implications of this argument to exploitation, see *supra* note 38; see also Jeffrie G. Murphy, *Consent, Coercion, and Hard*

Finally, we should exercise care in deeming coerced acts to be “involuntary.” Unfortunately, the word “involuntary,” has numerous usages. It covers cases in which the person does not act, such as when he is pushed by another person; this is an instance that would fail to satisfy the voluntary act requirement of the criminal law.⁴⁶ It is used for crimes of “involuntary manslaughter” where “involuntary” means “unintentional.”⁴⁷ And finally, it is used for cases in which the actor is under duress.⁴⁸

It is this final sense of “involuntary” that is at work with coercion. John Hyman has argued that this is the only appropriate application of “involuntary” as “no act” is better viewed as an agency question and involuntary manslaughter is better viewed as a question of intention.⁴⁹ In contrast, Margaret Gilbert has cautioned against the use of “involuntary” because it “trades unacceptably on an ambiguity” between no choice and a rational, if constrained, choice.⁵⁰ For this reason, analysis of coercion should recognize that coercion does not render the person “witless” as Gilbert cautions,⁵¹ but rather, presents a situation in which the choice, an intentionally made and rational one, is constrained. Accordingly, an analysis of coercion should not rely on the notion that it renders a choice *involuntary* or that it gives the actor “no choice.”⁵²

B. An Introductory Glimpse at Berman’s Two Functions

Although I have attempted to give a rough working definition, it would behoove us to look at Berman’s conceptual categorizing at this point. As an entry point, consider the influential definition of coercion by Alan Wertheimer, which, with respect to sexual relations, is as follows:

Choices, 67 VA. L. REV. 79, 89–92 (1981) (arguing theorists are improperly employing coercion when they mean to argue that the state is behaving exploitatively).

46. MODEL PENAL CODE § 2.01 (AM. LAW INST. 2017) (delineating instances of involuntariness).

47. See, e.g., CAL. PENAL CODE § 192 (West 2018).

48. See JOHN HYMAN, ACTION, KNOWLEDGE, AND WILL 77 (2015) (arguing that “a certain thing is done voluntarily if, and only if, it is *not* done out of ignorance or compulsion”).

49. *Id.* at 5 (“The ideas of agency and voluntariness refer to different aspects of human action and they cannot be equated.”); *id.* at 8 (“[I]nvoluntary manslaughter’ means *unintentional* manslaughter.”).

50. Margaret Gilbert, *Agreements, Coercion, and Obligation*, 103 ETHICS 679, 686 (1993).

51. *Id.* at 685 (quoting Lord Scarman as stating, “[t]he classic case of duress is . . . not the lack of will to submit but the victim’s intentional submission arising from the realization that there is no other practical choice open to him”).

52. WERTHEIMER, *supra* note 1, at 63 (arguing that a cancer victim may have “no choice” but to consent to surgery if she will otherwise die but that “her consent is still morally and legally important”).

A coerces B into sexual relations when (i) A proposes to make B worse off relative to the appropriate baseline if she does not acquiesce *and* (ii)(a) it is reasonable for B to succumb to A's proposal rather than suffer the consequences.⁵³

The first prong focuses on the wrongful proposal. The second prong focuses on the limits to the coercee's choice.

Berman has argued that seeking one concept of coercion is a fool's errand. Instead, there are two. Within coercion, Berman's claim is that we can analyze the wrongfulness of the coercer's behavior—what he calls “coercion_w”—separately from the excusing implications for the coercee—what he calls “coercion_E.”⁵⁴ These are analytically and normatively distinct types of coercion.⁵⁵ Behavior can be coercion_w and wrongful without it giving rise to a claim of coercion_E, and behavior can be the result of coercion_E, without the existence of coercion_w.⁵⁶ In other words, each of Wertheimer's prongs is independently important.

Let us drill down on each of these concepts, and let us begin with coercion_E as it manifests many of the features that we typically think are important to coercion. “Put simply . . . , coercion_E is an excuse extended as a concession to the actor's severely constrained choice situation.”⁵⁷ As Berman has explained:

The gist of a coercion_E claim is that one has acted under circumstances in which the consequences of doing otherwise were so grave that one's ability to choose otherwise was substantially constrained. The claim therefore has two basic components: first, an explanatory requirement that constraining circumstances existed that caused B to do as she did—that, we might say, B “acted under duress”—and second, an objective moral evaluation of B's conduct

53. ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 165 (2003). I have omitted (iib) which entails a coercer taking advantage of the coercee's unreasonable fears. *See id.* at 184–85 (condemning such behavior as coercive). The intersection of normative judgments (“reasonable opportunities”) with diminished capacities raises complex questions which need not detain us here. *See* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 147–48 (2009) (arguing that person of “reasonable firmness” is an objective determination of what society can expect of a defendant but that the law ought to employ a separate excusing criterion for diminished rationality).

54. Berman, *supra* note 1, at 49 (stipulating “let coercion_w (for coercion-wrongful) stand for the normative conclusion that an individual (A) has *engaged* in coercion; let coercion_E (for coercion-excused) represent the normative conclusion that an individual (B) has *acted under coercion*”).

55. *Id.* at 48 (arguing “these functions are, in principle, quite distinct”).

56. *See infra* text accompanying notes 62–67.

57. Berman, *supra* note 1, at 59.

in light of those constraints or in light of the psychological pressure B experienced.⁵⁸

The Model Penal Code's definition of duress is instructive:

It is an affirmative defense that the actor engaged in conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.⁵⁹

In other words, if A threatens to break B's daughter's arm, unless B breaks C's arm,⁶⁰ then this will be excused if we believe that B's choice was constrained, that B felt psychological pressure, and that objectively the conduct (breaking C's arm) in light of the threat (the broken arm of her child) should excuse B.

Now consider coercion_w. Coercion_w is a subset of wrongful proposals. Coercion_w is wrongful "by dint of placing improper pressure on the recipient's choice."⁶¹ In other words, it is a threat to place the victim below the baseline at which she is entitled to be.

The presence of coercion_E is not necessary for coercion_w. Using Berman's example, assume that Charles tells David that unless David kills Edward, Charles will egg David's home.⁶² In such a case, clearly David will not be excused if he kills Edward. Still, it is the case that Charles wrongfully threatened David.⁶³ There is coercion_w without coercion_E. Moreover, even

58. *Id.* at 60.

59. MODEL PENAL CODE § 2.09(1) (AM. LAW INST. 2017); *see also* FEINBERG, *supra* note 34, at 192 ("[S]ome alternative has been made not impossible but *unreasonable* for me, or (as some writers put it) *ineligible* for my choice.").

60. I am intentionally creating a case where what A is requiring B to do is not the lesser evil, which would be its own justification under the Model Penal Code:

Conduct which the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that:

the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and . . .

MODEL PENAL CODE § 3.02(1)(a).

61. Berman, *supra* note 1, at 52. Some theorists dispute Berman's conception of coercion_w because it entails that if it is wrong to do *A* then it is wrong to threaten to do *A*. Scott Anderson, *Coercion*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2017 ed.), <https://plato.stanford.edu/archives/win2017/entries/coercion/>. Although in the context of nuclear weapons, some theorists suggested that it may be permissible to threaten to do what one may not do, these additional complications need not detain us.

62. Berman, *supra* note 1, at 59.

63. *Id.*

though David ought not to succumb to Charles' threat, Charles has still behaved wrongfully and could be subject to criminal prosecution for that threat.

Conversely, just as we can evaluate the wrongfulness of Charles' threat independently of whether David gets an excuse for being coerced, so, too, we can excuse someone for being coerced even without the presence of coercion_W. The argument that coercion_E is independent of coercion_W is familiar to criminal law scholars. The majority of criminal law scholars contend that the Model Penal Code's test for duress is wrong because it requires a coercer.⁶⁴ Why should it matter if B runs over two people in the road because (1) she needs to do so to avoid being killed by a falling rock, or (2) she needs to do so because otherwise A will kill her?⁶⁵ The unfair limitations to her choice exist irrespective of the source of the threat.⁶⁶ Accordingly, many scholars argue that B should be excused for her conduct.⁶⁷

For these reasons, Berman claims that coercion_W and coercion_E can be analyzed separately.⁶⁸ Coercion_E, which excuses an actor, is the theory that underlies duress. In contrast, the wrongfulness of the coercer's conduct can render the coercer's behavior blameworthy.

C. Consent Generally

Before applying coercion to consent, we should be clear what we mean by consent. First, let us understand the underlying moral relations. Typically, individuals have claim rights to non-interference. Another person is not

64. See, e.g., *id.* at 63–65 (concluding based on duress cases and a series of other hypotheticals that the normative question surrounding coercion_E does not depend on coercion_W); Dressler, *supra* note 7, at 1376 (“Assuming that natural and human threats are equal in coerciveness, the immediate actors’ blameworthiness are also equal, as their opportunities to act lawfully were equally constrained. The MPC and the common law, therefore, wrongly limit duress to human threats.”); Frankfurt, *supra* note 35, at 83 (noting that there is no difference in undermining free will between human and natural threats).

65. This hypothetical originates from Kadish and Schulhofer. See SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 934 (9th ed. 2012).

66. See FEINBERG, *supra* note 34, at 191, 193 (discussing compulsive pressure that arises from situational duress and noting that “[w]e can think of natural events like rockslides and hurricanes as also posing ‘threats’”).

67. See *supra* note 64.

68. Berman, *supra* note 1, at 65.

entitled to touch your person or property without your consent.⁶⁹ If he does so, then, *ceteris paribus*, he violates your rights.⁷⁰

Consent is the dropping of this right of non-interference.⁷¹ This is not all out forfeiture but merely the lowering of a normative fence, allowing the other person to now cross one's boundaries. Consent also differs from requests. Requests, such as "come to my house for a dinner party," are not just consent (dropping a claim right) but also providing a positive reason to engage in the action (I want you to eat dinner with me).⁷²

Theorists have generally debated whether consent is an internal act of acquiescence⁷³ or a communicative act,⁷⁴ or something in between.⁷⁵ For our current purposes, let us roughly say that are two potential normative incidents for consent. The first is that the consenter chooses to allow the conduct. This act, even if internal, is critical to many understandings of consent.⁷⁶

The second is uptake. This is the idea that consent is not effective unless the consenter acquiesces and the consentee knows this fact. Those who take consent to be a communicative act care quite a bit about uptake and find an analogy in promising. Promising and consent are normative powers that point

69. See *Mohr v. Williams*, 104 N.W. 12, 16 (Minn. 1905) ("[A]ny unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery.").

70. *Id.*

71. Victor Tadros formulates the mechanics of consent thus:

Typically, when X owes a consent-sensitive duty to Y not to *v*:

- 1) X owes a duty to Y not to *v*;
- 2) Y can release X from this duty by consenting to X *v*ing.
- 3) If X *v*s without Y's consent, X wrongs Y; but not if Y consents.

TADROS, *supra* note 39, at 204; see also Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 124 (1996) ("By consenting to another's touch, one puts that person at liberty to do what it was antecedently obligatory of her not to do.").

72. Feinberg calls these cases "consent in the strong sense." FEINBERG, *supra* note 34, at 178.

73. E.g., Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 165–66 (1996) (arguing consent is "a subjective mental state" of "choos[ing] to forgo or waive one's moral objection to the boundary crossing"); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 405 (2016) (arguing that if consent is about autonomy that autonomy is best respected through a mental act view).

74. DAVID ARCHARD, *SEXUAL CONSENT* 4 (1998) (arguing consent should be understood as a "performative"); FEINBERG, *supra* note 34, at 174 (mental states are mere "dispositional consent"); Tom Dougherty, *Yes Means Yes: Consent as Communication*, 43 PHIL. & PUB. AFF. 224, 236 (2015) (arguing that consent is like releasing someone from a promise which must be communicated to be effective).

75. E.g., TADROS, *supra* note 39, at 209 (consent requires "an attempt to communicate").

76. See *supra* note 73.

in opposite directions. Consenting waives a duty someone owes to you, thus granting that person a liberty. In contrast, promising is creating a new obligation that you owe to that other person.⁷⁷ Hence, promises require not just that the promisor make the promise but also that the promisee accept it.⁷⁸ For instance, Charles Fried argues that if someone wrote you a postcard promising to have no more than two children, and you had never met this person, you might not want to take on the burden of someone owing you something.⁷⁹ Accordingly, you might refuse acceptance. A promise whispered to your child, whom you know to be sleeping, is more akin to a silent vow than the creation of a duty to that child.⁸⁰ To these theorists, consent also requires a similar communicated act.⁸¹

The focus on both the consenter's acquiescence, as well as the consentee's uptake, yields that we care about the actions and choices of both the consenter and the consentee. Indeed, even when there is subjective acquiescence or communication, that acquiescence or communication can be defeated by force, fraud, or incapacity.⁸² Fiona's enthusiastic "yes" is meaningless if it is procured by the point of a gun. To some scholars and courts, *assent* (the mental act or communication) does not become *consent* if there is force, fraud, or incapacity.⁸³ To others, this is *consent* but not *valid consent*.⁸⁴

77. Cf. FEINBERG, *supra* note 34, at 178 ("The immediate effect of promises is to create obligations in the speaker; the immediate effect of acts of consent is to cancel obligations in the one addressed.")

78. See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 297 (1990) ("The metaphor 'give one's word' itself suggests that issuing an invitation is not enough: the invitation has to be received, and indeed accepted. . . . [T]here is no giving one's word unless there is 'uptake', which includes accepting as well as receiving.")

79. CHARLES FRIED, *CONTRACT AS PROMISE* 41 (1981).

80. Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1620 (2009) ("Rather than making a genuine promise, a merely subjective promisor, who subjectively intends to promise but fails to communicate that intent to his promisee, performs the moral equivalent of a silent vow.")

81. See Dougherty, *supra* note 74, at 234 ("Connecting promise and consent offers us leverage with the debate about whether consent must be communicated. No one seriously debates whether a noncommunicated intention is enough to create a promissory duty. We can exploit this point when theorizing consent.")

82. WESTEN, *supra* note 35, at 180 (arguing that "freedom, knowledge, and competence . . . together constitute what legislatures and courts mean in requiring that attitudinal consent be 'voluntary'")

83. See Ferzan & Westen, *supra* note 10, at 766 (arguing that consent requires two steps—whether the consenter signaled "assent" and whether it was given under sufficient conditions of freedom, knowledge, and capacity).

84. For example, Westen uses the example of the Travis County rapist, where the victim, threatened with a knife, "agrees" to intercourse if the rapist uses a condom. The grand jury did not indict. Westen notes the possible confusion of grand jurors in that the victim clearly chose to have intercourse over being killed (and thus consented under one understanding) but failed the

Although I will use the term “consent” to denote the mental act or communication, there are good normative arguments for restricting the usage of the term to only those instances in which the mental act or communication is successful in changing rights and duties.⁸⁵

II. CONSENT AND COERCION

A. Two Forms of Coercion and Consent

1. Consent and Coercion_E

Let us now turn to the question of how Berman’s view intersects with consent, and let us begin with coercion_E. Consent procured by gunpoint is ineffective. Moreover, it seems that at least one reason why it is ineffective is because the consenter lacks the appropriate range of choices.

At the outset, we must make an important change to our nomenclature. Berman’s focus on when coercion_E is “E”—that is, when it *excuses*—is under inclusive. At one point, he does adopt a slightly more capacious view that coercion_E “serves to release her from or reduce the demands of a normative obligation.”⁸⁶ The concept we are after is when it is responsibility defeating because of the impaired choice. But we wouldn’t say that the consenter is being *excused*. Rather, the idea here the coercion renders the consent ineffective such that the consenter does not drop the claim right.

Because both excuse and this concept of coercion are about rendering choices defective, Berman’s coercion_E is better understood as defeating the typical normative results of that choice.⁸⁷ Ultimately, it is not that the consenter is being released from the obligation. Rather, the obligation never existed because the consenter’s assent was never morally or legally efficacious in the first place.⁸⁸ The claim right was never waived, or the duty

second layer of analysis because she only “consented” under duress and thus the consent should not have been morally or legally effective. WESTEN, *supra* note 35, at 1–2, 180.

85. Heidi Hurd claims that “coerced consent is no consent at all.” Heidi M. Hurd, *Was the Frog Prince Sexually Molested?: A Review of Peter Westen’s The Logic of Consent*, 103 MICH. L. REV. 1329, 1332 (2005) (emphasis omitted).

86. Berman, *supra* note 1, at 60.

87. For the argument that defects in consent are akin to defects in choices, see Kimberly Kessler Ferzan, *Clarifying Consent: Peter Westen’s The Logic of Consent*, 25 L. & PHIL. 193, 204–11 (2006).

88. Indeed, compare in the context of promises, which Berman more fully considers, the view that a coerced promise is not a promise at all. See THOMSON, *supra* note 78, at 315 (“Where

was never created. That is, we should relabel coercion_E as coercion_C.⁸⁹ The form of coercion we are after is “choice undermining,” and I will use coercion_C to designate this function. Something can be choice undermining and then excuse or it can be choice undermining such that a promise or consent never existed in the first instance.

There are incredibly difficult questions here about how choice-impacting the coercion must be. This is true with duress as well. But our concepts for duress do not immediately translate to consent. This is because duress requires a further wrong—the harm is externalized to a third party. Consent does not operate like duress because the coerced act is internalized to the coercee. When you consent in the face of coercion, the unwanted harm falls on you. For this reason, threats that would be insufficient for duress might still overwhelm fair choices when the harm is totally internalized. Still, to the extent that both duress and coercion are about when choices are deemed involuntary, it should not surprise us to see parity between the formulations.⁹⁰

Although I cannot explicate all possible formulations here (nor need I do so for our purposes),⁹¹ consider the current draft revisions to the Model Penal Code sexual assault provisions on coercion:

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the uptake is a fault in the word-receiver, we can think of the claim as stillborn, forfeit from conception.”); Eric Chwang, *On Coerced Promises*, in *PROMISES AND AGREEMENTS* 156, 157 (Hanoch Sheinman ed., 2011) (arguing that coerced promises have no moral or predictive force).

89. Berman’s discussion suggests that he would willingly take this claim on board. *See, e.g.*, Berman, *supra* note 1, at 66 (suggesting that with respect to his argument’s application to promises, “the difficulty might lie not with the contention that coercion claims serve two discrete normative functions . . . , but with my definition of coercion_E.”).

90. *Cf.* Hurd, *supra* note 71, at 140 (defending identity between these formulations because “just as limiting a defendant’s choices may render his choice insufficiently autonomous to be praiseworthy or blameworthy, so limiting a victim’s choices may render her choice insufficiently autonomous to have moral force”).

91. *Cf.* ARCHARD, *supra* note 74, at 50 (arguing that coercion undermines consent when “the consequences threatened . . . are significant, proximate, and real”). Notably, Archard argues that legally it is impossible to articulate a particular standard for coercion:

Again the unreasonableness of the alternative threatened may be judged in various terms: as a function only of its awfulness in itself, of the awfulness of complying (assuming the threatened alternative is worse), of how much worse it is than what is demanded, and of how awful the situation as a whole—only either compliance or threatened consequences—is. Given these complications it may be impossible to specify any clear and agreed criteria whereby the point at which a choice is less than fully voluntary possesses that degree of involuntariness which invalidates any consent given.

Id. at 53 (footnote omitted).

(1) Sexual Assault by Coercion. An actor is guilty of Sexual Assault by Coercion if he or she recklessly causes another person to engage in or submit to an act of sexual penetration or oral sex by explicitly or implicitly:

(a) using or threatening to use physical force against that person or anyone else; or

(b) threatening to accuse that person or anyone else of a criminal offense or of a failure to comply with immigration regulations; or

(c) threatening to take or withhold action as an official, or cause an official to take or withhold action; or

(d) making any other threat that would cause submission to or engagement in such act by an individual of ordinary resolution in that person's situation under all the circumstances as that person believes them to be.⁹²

Although much of this provision is ripe for discussion,⁹³ consider subsection (d), which requires a threat that would cause a person of ordinary resolution to yield. Under this formulation, juries will need to resolve contested normative judgments about the degree of the threat to determine whether sexual assault by coercion has occurred.

Irrespective of the proper formulation, we can see that the question the jury must answer is one that focuses on coercion—it is about whether the consentor's choice was under such pressure that it should no longer count as a choice, that is, as the giving of legally valid consent.

2. Consent and Coercion

Because our goal is not to delineate the exact limits of coercion, let me turn to coercion. Coercion cases entail that it is the coercer's conduct that is morally relevant, as opposed to the coerced's choice. The David and Charles example above is an example where there is no duress, but there is a wrongful threat.⁹⁴

Now, sometimes this wrongful threat just looks like its own crime, and so we might wonder what the conceptual payoff is to calling this other threat "coercion." If A threatens to kill B's dog unless B has sex with A, and B

92. MODEL PENAL CODE § 213.3 (AM. LAW INST., Tentative Draft No. 3 2017).

93. See, e.g., Elizabeth Hanus, *Rape by Nonphysical Coercion: State v. Brooks*, 64 U. KAN. L. REV. 1141, 1174–75 (2016) (criticizing an earlier draft of the MPC and advocating a broader formulation).

94. See *supra* text accompanying notes 62–63.

refuses, we might wonder what additional insight we gain by saying that A *coerced* (or attempted to coerce) B.

However, there are cases in which the term “coercion” does have conceptual payoff, and part of the benefit of Berman’s teachings is that we can independently focus on coercion_w and thus we can stop looking for the coercion_E. One instance in which Berman claims this is true is unconstitutional conditions.⁹⁵ Coerced confessions may implicate just coercion_w as well. That is, Berman notes that sometimes the point is not that the coerced’s rights were so limited, but that as a matter of political morality, the state cannot use the confession because it employed coercion_w.⁹⁶ In other words, there may be a gap between the threats that constitute coercion_w (because any wrongful threat can satisfy that) and threats that meet coercion_E (because these threats must place a certain amount of pressure, both psychologically and in terms of magnitude, so as to warrant the judgment that the choice was not morally or legally efficacious). Thus, we may deploy the term “coercion” when our focus is simply on coercion_w cases.

B. *Illuminating the Aziz Ansari Debate*

We now have two types of coercion. Coercion_E which directly implicates the wrong of rape because the victim does not drop her claim right against being touched. And coercion_w, where the victim does drop the claim right, but the coercer’s behavior is still wrongful.⁹⁷

With two different concepts of coercion available for deployment, let us look at the Aziz Ansari debate. Some critics have denounced Ansari as a

95. Berman, *supra* note 3, at 41–42 (arguing that the magnitude of coercive pressure is relevant to coercion_E but not coercion_w and that unconstitutional conditions cases should be focusing on the latter).

96. Berman, *supra* note 1, at 72–73 n.73 (discussing *Colorado v. Connelly*, 479 U.S. 157, 170 (1986), and the Court’s focus on police overreaching, not involuntariness). This is also how Berman explains Harry Frankfurt’s example:

The courts may refuse to admit in evidence, on the grounds that it was coerced, a confession which the police have obtained from a prisoner by threatening to beat him. But the prisoner’s accomplices, who are compromised by the confession, are less likely to agree that he was genuinely coerced into confession.

Id.; see also Frankfurt, *supra* note 35, at 65. To Berman this is a case of coercion_w but not coercion_E.

97. It is, of course, possible that both types can be at play, and may indeed figure in to many instances of coerced sex. That, however, does not undermine that they each can perform distinct functions with respect to consent.

sexual assaulter.⁹⁸ His callous, boorish behavior aimed to induce sex, they claim. Others have been surprised that we can so easily deny women agency.⁹⁹ If a man is pestering you for sex, you have a very easy way to end it, they say: leave. The aim of this section is to show how employing both concepts of coercion can reveal how both sides of this debate might be right. They might simply be talking past each other.

1. Coercion

Let's start with coercion. The proponents of the "just leave" approach are making coercion claims. Surely, we would never excuse someone from wrongdoing because her boyfriend pestered her or relentlessly whined, and so forth. And even if coercion is importantly distinct in how it applies to internalizing harms when one consents, as opposed to externalizing harms onto third parties in the face of duress, it seems hard to say that one person's oral advocacy is the sort of behavior that limits another person's options in a truly choice undermining way.

With coercion, it is important to recognize that most choices are constrained to some extent and most involve tradeoffs.¹⁰⁰ I am tabling the question of whether society is so inherently patriarchal that consensual heterosexual sex is impossible.¹⁰¹ If we think that, then this project fails at the inception as there is no line to be drawn. And as we approach this question, we ought to take seriously that whatever we take to be coercive (as coercion

98. See sources cited *supra* note 28.

99. See sources cited *supra* notes 26–27.

100. See WERTHEIMER, *supra* note 53, at 191 (arguing "it is a mistake to think that difficult circumstances and inequalities should be regarded as invalidating consent in either morality or law. To the contrary. It is scarcity and constraints that explain the need for morally transformative consent . . .").

101. This idea goes back as far as Mill. See 2 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 579 (7th ed., London, Savill, Edwards and Co., 1871) (1848):

[T]he law makes everything which the wife acquires, the property of her husband, while by compelling her to live with him it forces her to submit to almost any amount of moral and even physical tyranny which he may choose to inflict, there is some ground for regarding every act done by her as done under coercion

It is famously defended by Catharine A. MacKinnon and Andrea Dworkin. See *e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175–76 (1989); ANDREA DWORKIN, INTERCOURSE 124–126, 137 (1987).

or coercion) is not behavior on which men have a monopoly. Women, too, can wheedle, whine, and cajole to get what they want.¹⁰²

But back to the question of what sort of coercion is required for coercion. Consider the following case from Sarah Conly:

A woman may want to . . . express love, even if she is not physically aroused. Perhaps she is tired, but her husband is leaving town for a two-week trip, and she wants to have sex to feel closer to him. Perhaps she even wants to do it just because he wants to do it. He has read a lot of feminist literature, however, and is a sensitive guy and won't sulk or become angry if she doesn't have sex; he just won't feel as happy as he would if she did. She loves him, however, and wants him to feel loved. Even in the latter case, where his attitude contributes to her decision—where indeed, were it not for his desire she wouldn't want to have sex—her having sex doesn't plausibly seem to be rape, any more than my buying Girl Scout cookies only to avoid hurting the feelings of the little girl selling them means I've been robbed.¹⁰³

As this example reveals, consent doesn't require unbridled enthusiasm or unrestrained choice to be morally efficacious. It also does not require that the consentor want or desire the act independent of the other person's wants and needs. Indeed, given that consent plays a role in all sorts of activities beyond sex, there are myriad other instances in which consent or some other choice is not the product of unbridled enthusiasm and yet is sufficiently autonomous. You aren't excited to have your appendix out. You would certainly rather not have appendicitis. You might not be having sex with your partner if you were smarter and better looking; you'd be with Heidi Klum instead. As most families know, there are constant debates about where to go for dinner. Sometimes everyone is up for pizza, and sometimes not. But being part of a group sometimes means eating at your second-choice restaurant. In our quest to condemn abusive relationships and unhealthy ones, we ought not to set up

102. See Scott A. Anderson, *Sex Under Pressure: Jerks, Boorish Behavior, and Gender Hierarchy*, 11 RES PUBLICA 349, 359 (2005):

The sort of pressures that we are concerned with here—wheedling, whining, guilt-tripping, and pressing beyond the bounds of decorum—would seem to be equal-opportunity techniques, available to women as much as to men. And, if some recent scholarly studies can be trusted, there is evidence that many younger women these days are also willing to use pressures of various sorts to encourage reluctant men to acquiesce to sex or sexual attentions.

However, Anderson also notes that studies reveal that men and women often react to unwelcome sexual advances quite differently. *Id.* at 367–68.

103. Sarah Conly, *Seduction, Rape, and Coercion*, 115 ETHICS 96, 103 (2004).

unrealistic expectations as to what morally healthy consent entails. Unconstrained choice is a mirage.¹⁰⁴

Determining the contours of coercion is itself a difficult project, then. It is about the kind of threats that are sufficiently restraining and place sufficient pressure that we believe that consent no longer exists. It is a normative judgment about where the person of ordinary firmness lies.

How do we assess Grace? There are myriad reasons why a woman might succumb to sex in the face of boorish persistence. One reason converts this type of behavior to a coercion question—she might be afraid. The woman who repeatedly declines advances and is met with steadfast persistence may worry that her choices are either to succumb or to see force escalate. Being alone in a secluded area with someone you don't know well who is bigger and stronger than you can be scary. And if that is the case, then these cases are actually about the parameters of coercion.¹⁰⁵

To be clear, in the Ansari case, there was no claim that Grace was afraid. She was annoyed, exhausted, disappointed, and disgusted. She was overwrought. So, this isn't a case in which the operative motivation was fear.

In contrast, another reason for submission takes this out of the realm of coercion. Women may like the men they are with—why else wind up alone at his place? And so, they are trying to walk a delicate balance of saying no, but saying it in a way that continues the relationship. If a man repeatedly whined and asked you to kill your neighbor, you'd dump him (or you should dump him). But the difficulties of determining how to decline intimacy while simultaneously attempting to further an intimate relationship are far tougher to navigate. The need to be a delicate negotiator, however, is not coercion.

104. Cf. TADROS, *supra* note 39, at 214 (observing that consent may negate the wrongdoing without making the act valuable).

105. Cf. Anderson, *supra* note 102, at 366:

Even if men and women were equally likely to resort to boorish behavior to achieve their sexual ends, men are known to turn sometimes to much more potent and dangerous techniques than women typically are, and men are generally able to fend off the relatively few women who might be inclined to use such techniques themselves. Hence the ability to apply pressure to have unwanted sex may differ markedly between men and women on average. Men are able to pressure women more effectively because their pressure is backed by their much greater ability to escalate that pressure into the range of the very dangerous.

See also WERTHEIMER, *supra* note 53, at 187 (noting that these cases are not cases of verbal coercion because it is the physical force doing the normative work).

Your choice is not undermined just because you are trying to manage two opposing forces.¹⁰⁶

Here, it seems we are hard pressed to explain how Grace's choice was undermined. Verbal and peer pressure can affect us, but unless the "all my friends were doing it" and every other form of peer pressure are about to become defenses, we can expect people to live up to certain expectations and to repel and withstand certain forces. As Heidi Hurd argues:

A woman who acquiesces to sex because she fears that she will not be asked out on another date, or because she seeks to avoid embarrassment, appears pathetic precisely because she is willing to sacrifice an important interest to avoid a fairly trivial threat. Do such pathetic choices manifest a lack of autonomy? Or are they pathetic precisely because they are the product of autonomous choice? On pain of declaring all bad choices nonautonomous, one must be cautious about excusing defendants who do bad deeds as a result of pathetic choices, and one must be cautious about declaring plaintiffs insufficiently autonomous when they are prepared to sacrifice important interests to avoid trivial losses.¹⁰⁷

Although Hurd's deployment of "pathetic" is jarring, it underscores her point that not all bad choices ought to be undone, simply because they are bad choices. Otherwise, we would have a paternalistic state that does not allow us to make mistakes. And sometimes our mistakes are our own.

It is discomfoting to reach the conclusion that Grace was not coerced. But abandoning coercion altogether would be too hasty. The fact that cases like Ansari's may not be instances of coercion is not the end of the matter. We still have to ask the coercion question. Was the behavior wrongful in a condemnable way? That is, the feminist response that Grace should have just left is talking past the feminist response that Ansari engaged in wrongful

106. In the *New York Times*' *45 Stories of Sex and Consent on Campus*, a surprising number of the explanations of consent seemed to follow this pattern. Consider two: Meaghan, New York, in response to a question to ascertain affirmative consent says "yeah" because: "[y]ou've let it go too far now, I thought. It would be rude to stop him"; and Rachel, New York reported:

You read stories of rape and sexual assault but never about your own manners pressuring you into having sex. Sometimes you just don't want to have sex after all the buildup but there is no way to get out of it without coming off as rude or disappointing your partner, who is probably a good person, not some creepy dude in a club.

Jessica Bennett & Daniel Jones, *45 Stories of Sex and Consent on Campus*, N.Y. TIMES (May 10, 2018), <https://www.nytimes.com/interactive/2018/05/10/style/sexual-consent-college-campus.html>.

107. Hurd, *supra* note 71, at 143.

behavior. Defeating coercion is insufficient to resolve the question of coercion. We still need to work through coercion.

2. Coercion

If the threats do not rise to the level of constituting coercion, might we still say that the coercer wronged the coercee because of the presence of coercion? We need a wrongful threat. Let me begin with instances in which it is clear that the threat is an instance of coercion before I turn to where I believe the Ansari incident leads us—to an examination of what kinds of threats are wrongful in relationships.

Can a threat be wrongful without giving rise to coercion? Surely this is true. Heidi Malm gives the example of the boyfriend who says, “have sex with me or I will kill your goldfish.”¹⁰⁸ Flushing someone’s pet down the toilet is wrong. But a person of ordinary resistance would direct the boyfriend to the bathroom before surrendering sex. From the law’s point of view, there is no coercion.

I suspect most people find it hard to believe this threat could happen. However, adjust the hypothetical to downgrade the sexual act requested, and I suspect you could reach a point where despite the fact that a person of reasonable firmness would not give in, you can imagine someone who would. Or consider Cameron, whose buddy Ferris says that he will flush Cameron’s goldfish down the toilet unless Cameron gives Ferris the keys to Cameron’s dad’s Ferrari. Clearly, the father would not find Cameron to be excused because of the goldfish threat. But it seems equally clear that Ferris should not make the threat (and, as I will soon argue, he also should not drive the car).¹⁰⁹

Of course, we understand why threatening to kill someone’s pet is wrongful. The question is whether Ansari’s behavior constitutes a wrongful threat or something that can fall within coercion. To make sense of this, we might consider two types of cases that Conly analyzes in *Seduction, Rape, and Coercion*.¹¹⁰ First, someone can threaten to end a relationship.¹¹¹ This is not what Ansari did, but this sort of behavior is often discussed in the same category as Ansari’s. Second and more directly comparable to Ansari’s case, someone can cajole and wheedle to get what he wants.¹¹²

108. H.M. Malm, *The Ontological Status of Consent and Its Implications for the Law of Rape*, 2 LEGAL THEORY 147, 153 (1996).

109. See *infra* Section III.

110. Conly, *supra* note 103, at 107.

111. *Id.* at 108.

112. *Id.* at 114–16.

Before analyzing these cases, however, note that what is important here are not the answers, but the questions. What we ought to notice about these cases is that the debate is about the terms of the relationship and what can be wrongful within a relation. The claim—“it is wrong on a date to repeatedly ask a woman to touch your penis after she has said no”—is not a claim about whether she can simply say “no,” or “put that away” or “I am out of here.” We should assume she can. And we should assume, therefore, that there is no coercion. Her acquiescence is sufficiently free.¹¹³ The question, though, is whether his behavior is wrong.

The kinds of coercion that are wrongful depend upon the relationship.¹¹⁴ An employer may threaten to fire an employee if she does not stop playing videogames, but the employer may not threaten to fire the employee unless she stops rooting for a particular basketball team.¹¹⁵ As Conly notes, “[t]here are ways we can bend others to our will and ways we can’t, and what these are seem to be determined by the nature of the specific relationship.”¹¹⁶

Conly suggests that threatening a break up unless the partner has sex does not constitute wrongful coercion as no one is morally obligated to stay in a relationship.¹¹⁷ Conly instead argues that part of being in a relationship is being able to craft the relationship you want.¹¹⁸ Conly rejects that a relationship, although grounding various duties, grounds a duty to stay. One may need to help one’s alcoholic partner, but one is not required to stay with him; even if he is suicidal, Conly maintains that one’s duties do not extend to a requirement to stay in the relationship.¹¹⁹

Conly admits that there can be conditions that are illegitimate:

113. In this respect, Conly is asking the wrong question because she consistently jumps from the question of whether the act is wrongful coercion to whether it can constitute rape. *See, e.g., id.* at 96 (“The question here, however, is whether he is also a rapist.”); *id.* at 103 (“Yet, it seems implausible to say that whenever someone . . . has sex only out of fear of displeasing someone . . . a rape has occurred.”); *id.* at 107 (“If [after having been threatened with a pinch if she does not have sex with him] she concedes to his wishes, we will probably think she didn’t really mind having sex to begin with, even given the uncouthness of his advance. We won’t think she was raped.”); *id.* at 108 (“Reflection shows that, while the second of these may be less than admirable, neither case constitutes rape.”). We might wish for more nuance in our judgments about the impact of coercion in the absence of coercion. Despite her focus on rape, one conclusion Conly does draw is that “[t]o subsume all areas of sexual wrong under the heading of rape does a disservice to all concerned.” *Id.* at 121.

114. *Id.* at 107.

115. *Id.*

116. *Id.*

117. *Id.* at 108, 110.

118. *Id.* at 108–09.

119. *Id.* at 109–10.

Demands placed within a relationship should have reasonable bearing on the health of the relationship, and should not be inherently immoral, and sanctions offered for failure to meet even reasonable demands are limited. I am assuming, however, that engaging in sex, all things being equal, is not immoral and has reasonable bearing on the relationship¹²⁰

But we ought to ask exactly what we think the relationship is and what the content of the demand is. If we are to imagine that two twenty-two-year-olds are in a three-year relationship, and the woman has decided that she wants to save sex until marriage, it is certainly true that the man can say that sexual compatibility is something that is important to him before marriage. If a husband decides he no longer finds his wife attractive and never wishes to have sex with her, she, too, can leave. On the other hand, how much of a claim does a relationship have to a demand of sex *on any particular night* backed by the threat of exit? Partners may negotiate all sorts of things over any period of time, and the failure to change or be compatible may mean the relationship ought to end. But it would be odd to think that anyone may simply demand that a dish be done, that the trash be taken out, or that sex be engaged in, on a particular occasion with a threat of exit. That is, a threat of exit might be a *disproportionate* demand on any single occasion. Accordingly, rather than deem exit as always being a legitimate consequence within the coercer's rights, we ought to ask whether exit is appropriate as a consequence to this particular demand. There is more discussion to be had about the contours of coercion.

As to cases like Ansari's, Conly also reaches the same conclusion—that there is no wrong—when the coercer deploys negative emotional sanctions. For this, she uses Cousin Beau who asks you to invest in a business opportunity:

He stresses his own suffering, hearkens back to the many times he's helped you, and suggests that he can't possibly feel the same in the future if you won't do this little thing, which can't possibly hurt you and which could help him so much. You feel guilty, you feel sorry, you feel Beau may turn against you if you fail him, and, most of all, you feel confused. The more Beau sees this, the harder he pushes.¹²¹

Though Conly concludes that Beau is “a sleaze,” she takes him to be neither a thief nor an extortionist.¹²² And, she concludes, he has not gone “beyond [his] rights” because the nature of family relationships includes that

120. *Id.* at 110.

121. *Id.* at 114.

122. *Id.* at 115.

we are vulnerable to them and they are “allowed” to use “the strength of family ties to their own ends.”¹²³

Again, the reach of this example may be more nuanced than Conly takes it to be. Parents and children (even grown children) use guilt as a weapon all the time, and yet it seems that every promise to come home for Thanksgiving that is procured by some parental guilt is not invalid. On the other hand, it does seem that if Beau’s needling became excessive, there would be a point at which Grandma Greta might tell Beau to give his cousin back the money, as he cannot accept something achieved by such emotional blackmail. There is a point at which it would be *wrong* for him to push you and *wrong* for him to accept the money.

Admittedly, in none of these cases are the threatened acts crimes. Berman has suggested that each realm has its own terms.¹²⁴ For this reason, he thinks that unconstitutional conditions cases can be instances of coercion, despite the fact that the government could simply deny the benefit altogether.¹²⁵ Other scholars have also noticed that what counts as “wrongful” for purposes of coercion may be relative to morality, or a relationship, as opposed to law.¹²⁶ This sort of move—that within a relationship new norms can be set and the baseline for one practice is not the baseline for another—may mean that we can wrong each other relative to the terms of a relationship. And, the law does piggyback on these relationships; the kind of wrongful threat necessary in contract law is not a threat that is otherwise prohibited by law.¹²⁷ Indeed, Wertheimer seems open to the following case being a threat:

123. *Id.*

124. Berman, *supra* note 1, at 55.

Because my explication of coercion—like other “moralized” resolutions—neither presupposes nor supplies any particular content to one’s obligations (whether ethical, political, constitutional, or what-have-you), all we can conclude for certain is that the conditional threat is coercive in a normative discourse in which the act threatened would be impermissible.

Id.; see also Carr, *supra* note 35, at 64 (arguing that interpersonal relationships have their own conventions and they establish “the conditions under which it is socially permissible to leverage another’s choice menu”).

125. Berman, *supra* note 1, at 53–55.

126. See WERTHEIMER, *supra* note 1, at 31 (“A’s threat can be wrongful—and therefore constitute duress—even if A threatens to do something which is not otherwise illegal”).

127. See Smith, *supra* note 2, at 351–52.

Yet the fact that for policy reasons certain wrongful behaviour is not deemed a tort or a crime does not mean that it should not count as wrongful for the purposes of determining contractual validity. The pragmatic considerations weigh differently. A refusal to enforce a contract is typically less serious than a finding of criminal or tortious liability, especially when the possibility of

The Drug Case. A is B's normal supplier of illegal drugs for \$20 per day. One day, A proposes to B that he will supply B's drugs if and only if B beats up C.¹²⁸

Although Wertheimer articulates Nozick's conclusion that this is an offer if one is using a moralized baseline as A has no duty to supply B with drugs, Wertheimer is not so sure.¹²⁹ He notes, "even if the drug relationship is immoral from an external perspective [A's moral perspective], it is arguable that *within* that relationship, A is morally required to continue to supply B with drugs, perhaps at no more than the market price."¹³⁰ In other words, relationships dictate what we may and may not ask of each other.¹³¹

Where does this leave us with respect to Ansari? It leaves us with a normative debate. What are the proper terms of a first date? What can we expect of each other? What forms of persuasion are right and which ones are wrong? Why? It is not my aim to answer these questions. Rather, my aim is to show that these questions play their own distinct role in our analysis of coerced sex, and accordingly, there is room for robust normative debate. Even if we concede that Grace could have left, we can still condemn Ansari.

C. *What Follows from Coercionw Without Coercionc*

My goal in this Article has been to open up the conceptual space to recognize that coercionw and coercionc may both impact wrongdoing. Thus, the failure of coercionc to undermine consent does not entail that the coercer has not engaged in wrongdoing. And those who argue that what Ansari did is, or should be considered to be, wrong, are arguing about the parameters of coercionw.

Some instances of coercionw are already criminal. On the other hand, we know that there are myriad behaviors that are wrongful, but are not criminalized. It is wrong to break a promise. It is wrong to lie. Our criminal

non-contractual protection of the plaintiff is taken into account (e.g., restitution). For this reason, there is in principle a gap between what is unlawful generally and what is wrongful behaviour in a contractual situation—as English courts recognise.

Id.

128. WERTHEIMER, *supra* note 1, at 209.

129. *Id.*

130. *Id.* at 209 n.27 (alteration in original).

131. *But see* SCHULHOFER, *supra* note 36, at 123–24 (arguing that the relevant category is one's legal entitlements).

law is not co-extensive with what is morally wrongful.¹³² Some coercion_w behavior lies at this boundary. And, if and how we might criminalize such behavior involves complicated questions of political morality.

In Part IV, I will return to the criminalization question. There is, however, a separate and distinct normative implication of coercion_w, an implication Berman failed to see. And, so, before turning to the questions about how the criminal law ought to regulate coercion_w, we should first understand the more significant question that follows from finding coercion_w.

III. CONSENT AND COERCION REVISITED: THE IMPLICATIONS OF THE COERCER'S WRONGDOING

One worry about my analysis to this juncture is that I seem to be missing the point. The Grace-defenders may say the following: It is not just wrong to issue a threat to get sex. It is wrong to have the sex that issues from the threat. Or, there is a difference between “coercion” and “coerced sex.”

That’s right. There is more to say. In this Part, I will argue that even in the absence of coercion_c, there is a wrong, a distinct wrong, in having sex that is the result of a wrongful threat—even if that threat is not choice-undermining and even if we think that only choice-undermining instances of coercion are the wrong of rape. This might simply be a different wrong.

The idea here is that as a result of the coercer’s wrongdoing, he is not entitled to avail himself of the consent. Although I will break this down more precisely in what follows, consider the following hypothetical case (which involves neither coercion nor consent):

Doug and John are sitting in a park. Admiring Doug’s laptop, John proceeds to point out to Doug the numerous socio-economically disadvantaged children around him. He points out that Doug has a hefty salary and a home computer and that maybe Doug should do something good for others. And because he doesn’t donate to Oxfam, the least Doug can do is leave his laptop here in the park for someone to find it. Now, John warns Doug, there is certainly a chance that the person who takes it won’t be needy, but this is just a good, morally meaningful risk to run, irrespective of who takes the laptop. Doug is sold. He leaves his laptop with a note that says, “Whoever sees this note may have this laptop.” Doug and John leave, but on their way to the parking lot, John says he left a book on the picnic table. John doubles back, takes the laptop as he had planned all along, and returns.

132. See Leo Katz, *Villainy and Felony: A Problem Concerning Criminalization*, 6 *BUFF. CRIM. L. REV.* 451, 455–56 (2002) (questioning why the sorts of villains in literature are often not felons according to the criminal law).

Just as we reject coercion in many circumstances, there is nothing to undermine the efficacy of Doug's choice. He even knew he was running the risk that a wealthy person would take the laptop. He voluntarily relinquished it. This counts as abandonment.¹³³ And, if anyone else in the park had taken the laptop, he would have no claim to take it back. But there seems to be something awry with John getting the laptop. It seems as though his deceptive behavior should prevent the property right from vesting in him, even though Doug's behavior abandons his rights in rem. Anyone else can acquire it. But not John.

It is John's wrongful conduct that supports the intuitive conclusion that he is prevented from availing himself of the abandonment just as a coercer's wrongful behavior may prevent him from availing himself of the consent. That would mean that there might be more to say about Ansari's behavior than just that he is a wrongful cad. Ansari might be what I am calling "normatively impaired." That means that because of his wrongdoing, he cannot avail himself of consent.

The normative impairment of the coercer thus derives from both a wrongful act and the fact that this wrongful act caused the consent. This idea is woefully undertheorized, and yet, it is a legally recognized principle.¹³⁴ It is most famously expounded in *Riggs v. Palmer*, in which Elmer murdered his grandfather before the grandfather could change his will and disinherit Elmer.¹³⁵ The court held the murderer could not inherit because he would profit from this wrong.¹³⁶

This Part begins by further spelling out the contours of profiting from one's own coercion. It then turns to other pockets of our law that also recognize this underlying moral principal. Some states adopt an objective approach to entrapment where it is the state's conduct, and not the defendant's predisposition, that determines whether the state is barred from prosecution.¹³⁷ This principle is also at play in the law of unclean hands when it bars a plaintiff from recovering if the plaintiff's wrongdoing plays a causal role in the current claim.¹³⁸

In such cases, the question is not what the grandfather's will actually gave away, nor is it whether the defendant actually committed the offense, nor is

133. There is both an intention to abandon and an act of relinquishment. *See* *Linscomb v. Goodyear Tire & Rubber Co., Inc.*, 199 F.2d 431, 436 (8th Cir. 1952); *Cash v. S. Pac. R.R. Co.*, 177 Cal. Rptr. 474, 476 (Ct. App. 1981); 1 AM. JUR. 2D, *Abandoned, Lost, and Unclaimed Property* § 10 (2018).

134. Burra, *supra* note 33, at 19 (noting the principle is "remarkably undertheorized").

135. 22 N.E. 188, 188–89 (1889).

136. *Id.* at 191.

137. *See infra* Section III.B.1.

138. *See infra* Section III.B.2.

it whether the defendant actually wronged the plaintiff. Rather, these questions are beside the point because the person's claim arises from his own wrongdoing. The nephew killed to inherit, the police procured the crime, and the actor's unclean hands tainted the cause of action. Coercion_w tells us more than that it is wrong to threaten. Sometimes, it is also wrong to receive a benefit, even when coercion_c is not present.

A. *The Wrong of Profiting from One's Coercion*

Let's start with a less controversial example than coerced sex. Tom Dougherty uses the following example in which you are asked by the passenger next to you on an airplane to borrow your pen to fill out the immigration form:

Suppose your pen is a gift with a delicate nib that is easily damaged. You politely explain that you are unwilling to share it, but the passenger takes the news badly. Increasingly agitated, he starts to bicker and moan, and repeats his request again and again. You hate confrontation and want a quiet flight, so you give in and loan it to him. Since you're consenting under some duress, this loan seems morally problematic. But it'd also be natural to say that the loan would be much more problematic if the passenger were coercing you with a threat of physical violence.¹³⁹

The loan does indeed seem morally problematic. And this account explains why. The passenger's needling you prevents him from availing himself of your consent. He is, as I argue, normatively impaired—he cannot take advantage of the typical normative effect of your consent. If we are barred from profiting from our wrongs, this should not turn on whether someone else's choice is overwhelmed, but merely whether the wrongdoing caused the profit.¹⁴⁰ He procured the consent via his wrongful threat, and that is sufficient to prevent him from availing himself of it.

As this is a case of coercion_w without robust coercion_c, let me spend a moment on how this fits into the argument thus far. It means that for Ansari, there is a separate question than whether Grace was forced or could leave, or even whether she was emotionally overwrought. There is simply the question of whether Ansari's behavior tainted his ability to avail himself of the consent.

Now, because there is no coercion_c, the consent does drop the claim right and *there is no rape*. The choice, from Grace's side, is not undermined. The

139. Tom Dougherty, *Degrees of Consent 1* (unpublished manuscript) (on file with author).

140. See Burra, *supra* note 33, at 19 (relying on no profit from own wrong); *id.* at 22 (employing a causal, not choice impairing, requirement).

wrong is not the harm or evil that is present in rape, but a distinct wrong in availing himself of a benefit that he obtained through his wrongful conduct. Similarly, the passenger on the plane does not violate your right; he just cannot benefit from your consent.

The normative impairment of the coercer thus derives from both a wrongful act and the fact that this wrongful act caused the consent. The idea is not that this is free floating punishment for an earlier wrong, nor is it the wrong of having unconsented-to sex. Rather, the idea is that although the consenters' conduct would normally change rights and duties, the coercion precludes the actor from availing herself of it.¹⁴¹

B. Doctrinal Support

To this point, I have gestured at the equitable doctrine of “no man profiting from his own wrong,” but this is a doctrine that is overtheorized in jurisprudence, having been famously deployed by Ronald Dworkin,¹⁴² and undertheorized, as a matter of what precisely grounds the normative impairment. Accordingly, to see this doctrine at work, it may be useful to travel to other areas—entrapment and unclean hands. That is, the kind of normative impairment I am discussing is alive and well in the law. It just takes a little uncovering.

1. Entrapment

Jurisdictions divide over the test for entrapment.¹⁴³ For some, the question is whether the defendant was predisposed to commit the offense.¹⁴⁴ In these jurisdictions, if the police officers cause the defendant to do something he would have done anyway, there is no defense.¹⁴⁵ Other jurisdictions, however, adopt an objective test that focuses on police conduct, rather than on the predisposition of the criminal defendant.¹⁴⁶ When police officers engage in

141. Cf. Alexander, *supra* note 73, at 171 (briefly gesturing in this direction before offering a different account).

142. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 29 (1977) (arguing “no man should profit from his own wrong” is a principle that is part of the law).

143. Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5, 29 (1986).

144. *Id.* at 33–34 (noting many states followed the Supreme Court’s subjective view).

145. *Id.* at 17–18 (“Entrapment, by definition, encompasses the idea that the entrapped defendant is not predisposed to commit the crime.”).

146. ARK. CODE ANN. § 5-2-209 (2018); HAW. REV. STAT. § 702-237 (2018); N.D. CENT. CODE § 12.1-5-11 (2018); 18 PA. CONS. STAT. § 313 (2018); TEX. PENAL CODE ANN. § 8.06 (West

behavior that is deemed sufficiently wrongful or outrageous, and that conduct causes the offense, the defendant has a complete defense to the crime.¹⁴⁷ It is the objective test that is our focus.

Although John Lombardo finds the following cases problematic for their causal requirements,¹⁴⁸ the “normative impairment” view explains them perfectly. In *Municipality of Anchorage v. Flanagan*, the defendant was deemed not to be entrapped because the crime of solicitation was complete at the time that a deal was struck to exchange money for sex.¹⁴⁹ The deplorable fact that the undercover officer availed himself of the illicit sexual contact was beside the point—it didn’t cause the crime.¹⁵⁰ And, in *People v. Hillary*, a paid confidential informant repeatedly requested drugs from the defendant who responded to her 976 date line advertisement.¹⁵¹ According to the defendant (whose request for an entrapment instruction was denied), after she offered him sex with both her and a friend, he agreed.¹⁵² However,¹⁵³ when he went to meet the informant, he found her too unattractive to go forward with the sex.¹⁵⁴ Still, having arranged to get her drugs, he proceeded to do so.¹⁵⁵ Because her conduct no longer was the proximate cause of his crime, there was no entrapment.¹⁵⁶

Notice what is happening in both of these cases. We are asking two questions: first, did the government engage in wrongful conduct, and second, did the wrongful conduct cause the crime? Although the purported rationale

2018); UTAH CODE ANN. § 76-2-303 (2018); see also MODEL PENAL CODE § 2.13 (AM. LAW INST. 2017).

147. John D. Lombardo, *Causation and “Objective” Entrapment: Toward a Culpability-Centered Approach*, 43 UCLA L. REV. 209, 211–12 (1995) (under objective approach “the defendant is acquitted or convicted depending on whether the government employed an intolerable or an acceptable investigative stratagem”).

148. *E.g.*, *id.* at 243 (objecting that “the courts’ added but-for causation element of the objective test sacrifices the test’s professed goal of deterring police misconduct in favor of avoiding its unsavory consequences, and in the process reinjects defendants’ predisposition into the entrapment analysis”).

149. *Municipality of Anchorage v. Flanagan*, 649 P.2d 957, 960 (Alaska Ct. App. 1982).

150. *Id.* at 959–60; see also *State v. Keitz*, 856 P.2d 685, 690 (Utah Ct. App. 1993) (finding no nexus between personal relationship and drug transaction).

151. *People v. Hillary*, 28 Cal. Rptr. 2d 415, 417 (Ct. App. 1994).

152. *Id.* at 417.

153. *Id.* at 420.

154. See *id.* at 417.

155. *Id.* at 417.

156. *Id.* at 419 (“[W]e find that defendant submitted sufficient evidence to explain as a matter of entrapment his decision to obtain cocaine for Ms. Ross. Unfortunately, he went too far. Defendant testified that when he saw Ms. Ross, he no longer desired to have sex with her. By his own admission, his non-criminal motive evaporated.”).

for the objective test is to deter police misconduct,¹⁵⁷ this justification leaves unexplained the causal requirement courts adopt.¹⁵⁸ After all, we would better deter police misconduct if we did not limit entrapment just to those cases with a causal connection. Indeed, we punish attempts as well as completed offenses. There is, however, a perfectly clear rationale for causation—this is not about deterrence but about the state’s normative impairment; it is barred from benefitting from its wrongful behavior in procuring the crime.¹⁵⁹

2. Unclean Hands

Unclean hands “prevents a wrongdoer from enjoying the fruits of his transgression.”¹⁶⁰ For instance, the Restatement (3d) of Restitution and Unjust Enrichment states: “Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant’s inequitable conduct in the transaction that is the source of the asserted liability.”¹⁶¹ The doctrine “spans every conceivable controversy.”¹⁶²

The doctrine of unclean hands is often justified as protecting the integrity of courts.¹⁶³ Yet, as Ori Herstein has forcefully argued, the doctrine, as formulated, is ill-suited to this goal.¹⁶⁴ Instead, Herstein claims that unclean hands may be about punishment.¹⁶⁵ But again, this is truly a question of normative impairment, not punishment, as punishment would not require a

157. Lombardo, *supra* note 147, at 214–15 (arguing that “the objective test withholds criminal convictions as a ‘stick’ to condemn certain government conduct, and parcels out criminal convictions in other cases as ‘carrots’ to applaud the official inducements employed, all the while ignoring the defendant’s personal accountability and using him as a pawn to manipulate executive branch behavior”); *id.* at 233–34 (noting state court decisions focused on the deterrence of police misconduct and analogizing to the exclusionary rule).

158. *Id.* at 236 (noting the deterrence rationale need not require causation).

159. See *Sorrells v. United States*, 287 U.S. 435, 458 (1932) (Roberts, J., concurring) (theorizing entrapment as “the refusal to lend the aid of the court’s own processes to the consummation of a wrong”).

160. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945).

161. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT: EQUITABLE DISQUALIFICATION (UNCLEAN HANDS) § 63 (AM. LAW INST. 2011).

162. T. Leigh Anenson, *Announcing the “Clean Hands” Doctrine*, 51 U.C. DAVIS L. REV. 1827, 1829 (2018).

163. *Bein v. Heath*, 47 U.S. 228, 247 (1848) (“The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity.”).

164. Ori J. Herstein, *A Normative Theory of the Clean Hands Defense*, 17 LEGAL THEORY 171, 191 (2011) (doubting the doctrine’s ability to “fully align” with the structural and instrumental concerns with court integrity).

165. *Id.* at 198 (defending unclean hands as a doctrine of retribution); see also *id.* at 194–95 (also suggesting *tu quoque* as a justification for the defense).

causal relationship and the unclean hands doctrine does. As Leigh Anenson summarizes the cases, “[t]hese situations still can be loosely rationalized under the concept of preventing litigants from benefitting from their own wrong.”¹⁶⁶

The unclean hands doctrine requires a causal relation,¹⁶⁷ though not one that is particularly well defined.¹⁶⁸ As articulated in *Mitchell Bros. Film Group v. Cinema Adult Theater*,¹⁶⁹ holding that the unclean hands doctrine was inapplicable where the defendant claimed the plaintiff could not recover for copyright infringement because the plaintiff’s movies were obscene:

The maxim of unclean hands is not applied where plaintiff’s misconduct is not directly related to the merits of the controversy between the parties, but only where the wrongful acts ‘in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. The alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show that he has personally been injured by the plaintiff’s conduct. The doctrine of unclean hands ‘does not purport to search out or deal with the general moral attributes or standing of a litigant.’ Here it is clear that plaintiffs’ alleged wrongful conduct has not changed the equitable relationship between plaintiffs and defendants and has not injured the defendants in any way.¹⁷⁰

Here, too, we see that wrongdoing by one party prevents him from availing himself of rights that he might otherwise have. And, this wrongdoing must be connected to the wrongdoer’s claim. Mere wrongdoing “in the air” will not do. In this instance, the plaintiff’s potential wrong of creating obscene movies was unrelated to the defendant’s copyright violation.¹⁷¹

In sum, these three disparate legal doctrines are of a piece. Law and morality are rightly concerned that individuals should not be able to act wrongfully and then keep the benefits of those wrongs. The state should not punish those it entraps. The plaintiff should not recover when her wrong contributes to her claim. And Ansari should not benefit from the consent he coerced.

166. T. LEIGH ANENSON, JUDGING EQUITY: THE FUSION OF UNCLEAR HANDS IN U.S. LAW (forthcoming Nov. 2018) (manuscript at 78) (on file with author).

167. See *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933) (requiring “immediate and necessary relation” between wrongful act and the equity sought). See ANENSON, *supra* note 166 (manuscript at § 2.7.2) (setting forth the “connection component”).

168. ANENSON, *supra* note 166 (manuscript at 65) (“[I]t is sufficient if the dirty deed infects the issue before the court.”).

169. 604 F.2d 852, 863 (5th Cir. 1979).

170. *Id.* at 863 (footnotes and citations omitted).

171. *Id.* at 854, 865.

3. Tightening the Causal Story

Some might think that unclean hands' causal requirement is over inclusive and entrapment's causal requirement is under inclusive. That is, unclean hands does not seem to even articulate any clear causal condition, whereas entrapment requires proximate causation as seen in *Hillary*. The normative underpinnings of coercion, as well as entrapment and unclean hands, suggest a Goldilocks solution. Specifically, any factual causation should count.¹⁷²

So long as what is done is wrongful, and that wrongdoing contributes to the consentor's acquiescence, the defendant's crime, and the unclean actor's claim, should itself be sufficient to taint the claim. We can see that *Hillary* gets this wrong when we consider the facts. True, the defendant got the drugs even after deciding not to have sex with the informant.¹⁷³ But that is not the question. The question is whether the state ought to be able to procure the commission of an offense through blatantly inappropriate conduct and then prosecute the fruits of that wrongdoing. The fact that the defendant acted voluntarily in the midst of it seems beside the point.¹⁷⁴ Indeed, for coercion's normative impairment, we are assuming that B is voluntarily consenting.

C. Berman's Missteps

Thus far I have argued that coercion can be extended beyond the wrong of threatening to the wrong of availing oneself of the profits of one's wrong.¹⁷⁵ And, I have argued that this "normative impairment" exists in other areas of law. Now, I will demonstrate how the failure to see this implication distorted Berman's own analysis.

Because Berman's objective was merely to substantiate that there were two distinct functions to coercion claims, he was insufficiently attentive to how normative powers, such as consent and promising, work. He clearly had

172. See Smith, *supra* note 2, at 354–55 (suggesting the application of broad cause in fact principles); see also *infra* note 240.

173. *People v. Hillary*, 28 Cal. Rptr. 2d 415, 417 (Ct. App. 1994).

174. For doubts that voluntary actors break causal chains, see LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLES* 21–26 (2018).

175. One might object that the wrong is the act and it is the threat that is derivative. Yet in most cases where we say it is wrong to threaten what it will be wrong to do, we assume that B will be acting involuntarily. The cases under consideration are distinct in that the coercer is not simply completing an act that he induces at gunpoint, but completing an act where consent counts as "freely given." We thus need an independent account of why it is wrong to avail oneself of another's freely given consent.

an inkling that promising might somehow be different, as he spent a section discussing why promising was not a case that required both coercion_w and coercion_E,¹⁷⁶ but he missed the fact that his coercion_w cases implicated the normative impairment that we have under consideration. Because of this blind spot, he fails to join issue with other theorists at times, and at others, he fails to correctly adjudicate the hypothetical at issue. The normative impairment implication I have defended better describes our moral landscape than does Berman's thinner account.

First, consider Berman's dispute with Joel Feinberg. Here is Feinberg's hypothetical and discussion:

B is an extremely neurotic person who cannot bear to be patted on the back. A, who is larger and stronger than B, knowing of this peculiar sensitivity, demands that B sign over to him most of his worldly goods or else A will pat him on the back. Filled with genuine horror by A's threat, B complies with the demand. . . . Given the account of voluntariness developed in these chapters, it would be an entirely intelligible result if the courts were to acquit A of the criminal charge, but find for the plaintiff B in his subsequent civil suit for full restitution.¹⁷⁷

In focusing on Feinberg's claim that "B's consent was voluntary enough to provide A with a defense to a criminal charge, since the coercive pressure was not coercive enough (by objective standards) for criminal liability," Berman replies, "This strikes me as wrong."¹⁷⁸ To Berman, A has clearly committed coercion_w. Berman deploys this example to show that even in the absence of coercion_c, A has still done wrong.

But the question is not whether A has engaged in *any wrongdoing*. Rather, Feinberg's focus is not on patting people on the back; it is on *taking their stuff by threat*. Having failed to find coercion_c, Feinberg finds no crime. What Berman should have realized is not just that patting someone on the back is wrong,¹⁷⁹ but rather, that having threatened to do so, it is also wrong to take their worldly goods. We may not have a crime for that now, but maybe we should.¹⁸⁰

176. Berman, *supra* note 1, at 67–73 (working through a series of hypotheticals to demonstrate that promises do not require both coercion_c and coercion_w).

177. FEINBERG, *supra* note 34, at 211–12.

178. Berman, *supra* note 1, at 75 (quoting FEINBERG, *supra* note 34, at 212).

179. *See supra* note 53 (discussion of thin-skulled victims).

180. To the extent that extortion does not have a success condition, this is arguably extortion.

Feinberg is working on the implications of shifting coercion formulations. That is a difficult question.¹⁸¹ But Berman's response, to point to coercionw, fails to follow through as Berman only gets us so far as telling us it is wrong to threaten. But what we want to know is whether it is wrong to keep B's worldly goods and we can reach the conclusion that it is, all within the framework of coercionw. Berman fails to see the further implications of a finding of coercionw.

Whereas Berman criticizes Feinberg for requiring both coercionc and coercionw in order to condemn A's action, he criticizes Jeffrie Murphy for what appears to be excusing B when all that exists is coercionw.¹⁸² Again, a more nuanced approach to the normative upshot of coercionw and to its effect on consent might have led Berman to a different answer.

Specifically, Berman argues that Murphy overstates his claim that "[w]hen a person B consents to a proposal from A, and when his only or paramount reason for consenting to the proposal is his suffering wrongful treatment from A, then in such a case B has no moral obligation (even *prima facie*) generated from the act of consent."¹⁸³ In response, Berman begins with the following hypothetical:

Imagine that A asks B, his neighbor and erstwhile friend, to pick up A's child, C, after school one day. When B demurs, A recalls that he is still in possession of B's lawn mower which he had borrowed some time ago: "Pick up C, please, or I won't return your lawn mower." "Okay," says B, "I'll get C." Later, though, B decides that she doesn't care about her lawn mower and consequently decides not to honor her promise to pick up C.¹⁸⁴

In assessing the case, Berman says, "It seems obvious that the mere fact that A threatened B with wrongful treatment would not morally excuse her for leaving C in the lurch."¹⁸⁵ "Pace Murphy, then, B's act of consent did in fact generate a moral obligation. And that's because the fact that her agreement was extracted in the face of coercionw does not itself entail that it was made under coercionE."¹⁸⁶

181. Feinberg's claim about civil restitution is an interesting one and turns on his sliding scale for coercionc. It is because he has the view that the behavior counts as coercionc for civil cases that he does not answer what to do in its absence. I turn to the question of whether we should find subjective coercionc *infra* Section V.B.2.

182. Berman, *supra* note 1, at 78.

183. *Id.* (alteration in original) (quoting Murphy, *supra* note 45, at 81).

184. *Id.*

185. *Id.*

186. *Id.*

Let's clean up the analysis a bit. First, this is actually a promising case. What B does is to *agree* to pick up C. Second, as I have argued above, the question is not whether B's nonperformance can be *excused* but rather whether B has promised A anything at all.¹⁸⁷ Third, note that to Berman, B is not coerced_C because that question is moralized and he believes that because of the harm to C, B cannot count as being coerced_C.¹⁸⁸

It is useful to approach this by assuming that B promised A to pick A up. Imagine that B fails to show, and A claims that B broke his promise. Here, it seems plain that B may claim, "You threatened me. There was no effective promise for you!" Similarly, if C's school fines A \$100 for A's late pick up (after B fails to show), it seems hard to believe that any court of law would give A a dime.

Of course, if we imagine that B's promise was to watch C at the pool, and then B walked away, most people will likely say B has done the wrong thing. So, the question is, what explains this intuition? Notice that what B does is to essentially become an (innocent) cause of C's peril. C is not picked up, or C is not watched at the pool, because A relies on B. And even if A has no moral claim against B, C clearly has a claim that B not create situations in which C will be placed in peril. Indeed, to see this, consider that even if A held a gun to B's head and said, "Watch my kid at the pool now or I will kill you. I am off to get a margarita," it seems that B's nodding that she will do so does create some obligation not to let C drown. Hence, this situation is best explained by the expansiveness of duty to rescue rules when one is a cause (even an innocent cause),¹⁸⁹ and not B owing a duty to A.¹⁹⁰

Hence, because Berman failed to see that the normative upshot of A's wrongdoing is his inability to avail himself of the fruits of that wrongdoing, Berman was unable to properly adjudicate cases that dealt with consent and promising. With the more nuanced approach suggested here, Berman would be able to come to more subtle and convincing conclusions.

187. See *supra* text accompanying notes 86–89.

188. Berman, *supra* note 1, at 78. Berman thinks that although coercion_W and coercion_C are not both necessary, coercion_C does require a "constraining choice predicament" and a "substantive moral evaluation." *Id.* at 68. Accordingly, the third-party harm to C affects whether B ought to be excused. *Id.* Another route to this conclusion is that we can deny that B is coerced_C given the potentially legally adequate alternatives. See *infra* text accompanying notes 203–05.

189. Cf. *State ex rel. Kuntz v. Mont.* Thirteenth Judicial Dist. Court, 995 P.2d 951, 958 (Mont. 2000) (finding duty to rescue where defendant was creator of peril because she acted in self-defense but then did not call 911).

190. Larry Alexander, *Duties to Act Triggered by Creation of the Peril: Easy Cases, Puzzling Cases, and Complex Culpability*, in *THE ETHICS AND LAW OF OMISSIONS* 180, 182–85 (Dana Kay Nelkin & Samuel C. Rickless eds., 2017).

IV. CRIMINALIZATION CONSIDERED

To this point, I have argued that coercion_C and coercion_W have independent functions, and that one of the most notable features of coercion_W is that it results in normative impairment. That is, the actor cannot avail himself of the consent even if it counts as sufficiently freely given. In that the behavior is wrong, we ought to then ask whether it should be a crime. This section sketches out such an offense. It then turns to countervailing concerns including paternalism and the potential to undermine progress towards affirmative, communicated consent. It tentatively concludes that criminalization is inappropriate, but that conversations about the wrongfulness of the behavior should continue.

A. Codifying the Crime

Although for reasons discussed *infra*, we should be cautious about enacting a crime to cover this wrongdoing, for discussion purposes, it is worth setting forth what this sort of crime could look like.

Accordingly, we might criminalize sex by threat as follows:

*Sex by Threat*¹⁹¹

A person is guilty of sex by threat if the actor recklessly causes another person to engage in sexual intercourse by using words or conduct that cause that other person to believe that the actor will breach a legal or moral duty the actor owes to that other person if that person does not comply with the actor's request for sex. For purposes of this statute, it is irrelevant that the other person consented to the sexual intercourse.

Even this formulation is under inclusive in two important respects. First, sex is certainly not the only thing that a wrongdoer can obtain in this way. But, just as we separate property offenses from sexual offenses, we can focus on sex by threat, an offense that might then apply more broadly. Second, the sort of wrongdoing from which one may not profit clearly extends beyond coercion. Coercive proposals are but some subset of wrongful proposals.¹⁹² Still, this allows us to articulate a core case of normative impairment resulting from coercion_W and interrogate its implications.

191. I thank Rachel Harmon for suggesting that what I was gesturing toward was this offense.

192. Berman, *supra* note 1, at 52 (clarifying that coercive proposals are not the *name* for wrongful proposals, but a *subset* of them).

There are several features of this formulation worth noting. First, it eschews the amorphous term, “threat,” within the actual offense definition. Threats can be either inchoate abilities to harm (I am a threat to you if I am hiding in your closet with a knife) or fear causings (I threaten you if I scare you by showing you a knife).¹⁹³ Second, abiding by the Model Penal Code’s default mens rea, it relies on recklessness.¹⁹⁴ This resolves unanswered questions from *Elonis* as to how to conceptualize the mental state for threats,¹⁹⁵ and it avoids questions about sincerity.¹⁹⁶ It does not matter whether the defendant really was going to breach the duty, just that he consciously disregarded the substantial and unjustifiable risk that he was creating that belief, and it was that belief creation that caused the consent. Third, for purposes of this offense, the “victim’s” consent is beside the point as this is not a coercion case.

This statute is not intended as the final word. Rather, it aims to be the first word in the conversation. If we are going to think about criminalization, here is what it might look like.

B. Is the Failure to Require Coercion for Normative Impairment Paternalistic?

There is a question here about whether this crime is paternalistic. The reason is as follows: this punishes coercion *without* coercion. There is little question that coercion *with* coercion is sufficient for criminalization.

Whenever we dictate the proper boundaries of sexual interactions, we should be attentive to whether we unconsciously adopt the very hierarchy we are aiming to avoid.¹⁹⁷ Are we being paternalistic toward women when we render sex wrongful even when it is a product of their free will, simply

193. Kimberly Kessler Ferzan, *The Bluff: The Power of Insincere Actions*, 23 LEGAL THEORY 168, 193–194 (2017) (distinguishing these types).

194. MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 2017).

195. *Elonis v. United States*, 135 S. Ct. 2001, 2012–13 (2015) (holding that threats require a mental state but declining to resolve if recklessness suffices).

196. One pair of scholars recently argued that the critical question is whether the threat is credible, and maintained that credible threats should be enforced. Bar-Gill & Ben-Shahar, *supra* note 1, at 721 (“The single decisive factor in determining whether remedies should be granted is whether the threat was credible—was the threatening party ready and willing to carry out the threat in the event that the threatened party did not acquiesce, or was he merely bluffing?”). If the robber really means “your money or your life,” he should be punished, but he should get to keep your money!

197. See Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 1 (1994) (arguing that battered women syndrome reinforces gender hierarchical views).

because they have been badgered by a cad?¹⁹⁸ There are two objections lurking here, one of which should cause us more hesitation than the other. Let's start with the easy case.

Recognizing that coercion can render sex wrongful does not infantilize women. Deeming one person to act wrongfully says nothing about the agency of the other. Let me illustrate this by turning to a different instance in which one person may be subject to incessant, wrongful whining by another: parenting.

Parenting a teenager is an exercise in being subjected to cajoling, wheedling, emotional blackmail, sulking, and being told you are hated and "the worst," with no option to exit and no end in sight. The requests, be they clothes, the latest iPhones, videogames, or ice cream, are plentiful, constant, and trivial. But good parents don't give in to their children's whims. Good parents stand their ground.

However, as even a good parent will tell you, sometimes the pressure gets to be too much and you say "yes" when you should say "no." You . . . just . . . want . . . it . . . to . . . stop. And so, against your better judgment, you have suddenly said yes to an afterschool trip to Dairy Queen.

Let's be clear. This is coercion without coercion. And, that means you are responsible. When your partner comes home and asks why you allowed this, you can be called to account for it. Your reasoning—I couldn't take it anymore—often neither justifies nor excuses your weak will. If you are the mommy, the buck stops with you.

That said, your child still acts wrongfully. At the very least, as he wipes the ice cream off his chin, he ought to apologize. And, at the most, he ought to get up to the counter and before he orders, think the better of it. But there is no doubt that he owes you an apology because of his wrongful procurement of that dripping cone. Your agency is neither undermined nor undone by the recognition that he coerced you. Blaming him is not undermining you.

Here is a deeper worry. Maybe some people want to have sex with cads and shrews. If your partner behaves wrongfully and procures your consent, why should her wrongful behavior restrict your freedom? If you choose sex with sufficient freedom that coercion does not exist, then why should the act be forbidden?

198. Cf. FEINBERG, *supra* note 34, at 249 ("Is the prevention of exploitation as such an independent ground for criminal prohibitions? An affirmative answer would endorse either legal paternalism or a form of legal moralism.").

In the context of contracts, we have an answer for this. Contracts made under duress are voidable, not void.¹⁹⁹ That means that in instances of both coercion and coercionw, the coerced has the power to allow the contract to stand—to remove the taint. Indeed, even consent procured at gunpoint may be treated as valid consent by the consentor. Here, we might imagine that Grace finds Ansari's incessant badgering attractive. Or, perhaps Warren Buffett is held up at gunpoint, but he does not give the money over because he fears death (perhaps he has been diagnosed with a terrible disease and would welcome the quick end) but because he admires the young lad's spunk.²⁰⁰

On the one hand, punishment seems troubling. Can't Buffett dispose of his money as he sees fit? And, can't Grace opt to find jerks attractive? On the other hand, why should Ansari and the would-be robber be off the hook? Should the robber get to keep the money? They both engage in wrongdoing by threatening someone, and it is that wrongdoing that results in them receiving the goal of their threats. Why wouldn't they be normatively impaired?

These disparate intuitions stem from two distinct concerns fighting each other: the interests of the victim and the wrongdoing of the perpetrator. The victim has interest in removing the moral taint.²⁰¹ It seems odd to think that we would not be able to remove the moral taint, when the reason why an action was wrong in the first place is because we are the victims. Of course, the other side of the equation is that the coercer is a wrongdoer. Victims do not usually get to remove the taint if the defendant shoots at them but then apologizes. Still, these cases may be different in that consent-sensitive crimes are particularly focused on the victim's autonomy. To give the victim no choice in how she wishes to treat the threat undermines the very interest we are trying to protect.

199. RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 2018) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."); *see also* Stewart, *supra* note 2, at 185 ("If [A's] coercion of [B] ceases, so that [B's] autonomy is restored, there is no reason why [B] cannot effectively exercise his or her autonomy to affirm the agreement."). Shotgun weddings are also voidable. *See* WERTHEIMER, *supra* note 1, at 72 ("A marriage produced by the threat of violence has always been voidable in most American courts.").

200. I thank Michael Livermore and Pierre Verrier for raising these hypothetical cases.

201. How could this be understood with respect to sex? Just as the "no means no" rule invites the question of when it is permissible to "try again," we would need to work out the boundaries for when consent would be permissible. And, just as with "no means no," the easiest cases will be those in which the consentor is the one who re-engages. I won't pretend that this is not also a difficult question. But again, we can't find the answers until we know what the right questions are.

There may be questions then about whether we should criminally (or otherwise) prohibit behavior, even if it is immoral, when the primary “victim” of the wrong is no victim at all.²⁰² That is, if Albert forces Bob to mow his lawn at gunpoint, we have coercion with coercion and that behavior is within the ambit of the criminal law. But when the lesser threat does not rise to the level of coercion then if we punish Albert, we may prohibit Bob from doing what he chooses to do, because we want to tell Albert not to act. Hence, although Albert’s conduct may be wrongful, before we let the law intervene, we might ask whether it should be given that the very “victim” of the wrongful threat chooses to allow it. This is not to say that all instances in which coercion is absent are instances that ought not to be prohibited, but it is to say that without coercion, the law may wish to take into account the interest of the would-be victim in allowing the conduct to occur. If my child is annoying and bratty for asking for ice cream, I, as the victim, may still wish to be able to give it to him. A law that prevents him from receiving the cone, inhibits my freedom to give it to him. Any criminalization question, then, must take into account the effect on not just the wrongdoer but the willing “victim.”

Notably, outside of the criminal law, the fact that the “victim” is no victim at all becomes a powerful objection. It is one thing to say that someone did something morally wrong or to use a legal process to punish someone for their wrongdoing, but it is another question whether we should allow the “victim” who was not coerced to avail himself of a legal remedy.

For example, assume I am giving a lecture and the dean at the relevant school, Mike, really wants my Monet painting, and he says, “I am going to cancel your hotel reservation for tonight (that the school is paying for) unless you give me your Monet.” And assume (1) I have a credit card, and (2) there are plenty of hotel rooms available. The law might rightly say that my appropriate course of action is to pay for my hotel and then sue to recover the \$150, not to hand over something far more valuable.²⁰³ When threats do not rise to the level of being coercion, the law might rightly say that it, too, can expect a person to have a certain amount of resilience.

202. This arguably falls into Feinberg’s category of “welfare-connected non-grievance evils.” JOEL FEINBERG, HARMLESS WRONGDOING 32 (1988) (“The evil is not the basis of anyone’s legitimate personal grievance, but it is not an evil that is unassociated with human interests and well-being. A criminal statute designed to prevent such evils would be a departure from strict liberal legitimizing standards, but it would not be contrary to the animating humane spirit of the liberal’s harm principle.”).

203. Stewart, *supra* note 2, at 185 (arguing that contract law should not give a duress defense if B had reasonable alternatives).

For further illustration, consider a variation on the oft-discussed hypothetical from Richard Epstein.²⁰⁴ You've paid the drycleaner at drop-off \$10 each for two shirts. At pickup, the drycleaner demands another \$20. You give him a check, though you have plenty of other shirts.

Now, we can imagine a few different reactions here: (1) if he cashes the check, you can sue him; (2) he could not complain if you stop payment on the check; (3) you may not sue him to recover the \$20 but he ought not cash the check and he commits a crime by keeping the money.

It is clear that 2 and 3 are true. The payment is morally tainted. This shows us that even if you had an adequate legal remedy and thus cannot claim you acted with coercion, the receipt of the cash is still morally tainted. We may nevertheless have a separate question of whether courts will step in to give you your money back given the adequacy of the remedy in the first instance.

This may mean that nothing short of coercion plus coercion should be sufficient for replevin and perhaps rescission, not because we do not think the transaction is morally tainted, but because we do not think the law should be employed to help those who had the opportunity to help themselves. As Alan Wertheimer says, "Our legal system is designed to provide remedies for (some) private wrongs. If one decides to forgo what is an adequate remedy, it is arguable that society has done all it needs to do."²⁰⁵

Ultimately, then, even if a lesser formulation than coercion plus coercion is sufficient to normatively impair the coercer, there may be reasons extrinsic to her wrongdoing for why this lesser formulation may seem problematic. Specifically, perhaps we want individuals to have the ability to remove the moral taint and hence do not want their conduct to be prohibited as a result of their partner's wrongdoing or perhaps the law does not want to provide a remedy for those who could have helped themselves. The former concern, in particular, may raise questions about whether criminalization is appropriate.

C. *Could This Crime Be Counterproductive?*

Not every wrongful behavior is criminalized. Not even every instance of coercion is criminalized. Moreover, coercion without coercion is, in some sense, a victimless crime, as the victim has consented.

204. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 296 (1975); see also Berman, *supra* note 1, at 69–73 (varying the hypothetical).

205. WERTHEIMER, *supra* note 1, at 35. I thank John Harrison for pressing me on this question.

Should we have the crime of Sex by Threat? I will confess to being rather ambivalent about this question. Certainly, I see the behavior as blameworthy and the defendant as deserving of some punishment. But I take seriously that there ought to be constraints on criminalization,²⁰⁶ though sexual offenses have been radically undercriminalized, not overcriminalized.²⁰⁷

One further consideration against criminalization warrants mentioning.²⁰⁸ At the moment, we are still debating what constitutes consent. And, irrespective of whether one takes affirmative consent to be necessary for permissible sex, one might still think it is an ideal we ought to aspire to.²⁰⁹ Views like Michelle Anderson's, that take sex to be about communication and negotiation are important, even if sometimes too aspirational for the criminal law.²¹⁰ However, if after we start encouraging people to talk, and specifically encouraging them to *negotiate*, and the criminal law then punishes some negotiations as over the line, we could chill the very speech we aim to promote. True, there are clear cases. But there will be plenty that are not. And, so, even if we think some of this conduct is wrongful, we may risk disincentivizing the very discourse feminists have been aiming to create.

Surely, this objection is not decisive, but it is an important objection. Again, my ambition is to start the debate, not resolve it. And so, if we recognize that some coerced sex is a lesser wrong, we can then ask whether it is a wrong that warrants punitive sanctions.

In summary, although there are reasons to condemn Ansari's conduct, we may need to tread wisely. We risk criminalizing behavior the victim condones, and we risk chilling the very speech we aim to promote. Along with these concerns, we must take seriously the inherent inequities of the criminal justice system.²¹¹ Although those inequities are not best dealt with

206. For the most thorough discussion to date, see generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW* (2009).

207. Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 *LAW & INEQ.* 335, 336–38 (2017) (discussing current state of American rape law as well as discussing reform efforts).

208. I am indebted to Josh Bowers for raising this thought-provoking objection.

209. *Cf.* Ferzan, *supra* note 73, at 437–38 (discussing how colleges could approach affirmative consent but offering cautions).

210. Michelle J. Anderson, *Negotiating Sex*, 78 *S. CAL. L. REV.* 1401, 1407 (2005) (advocating that individuals verbally communicate before intercourse).

211. *See* Schulhofer, *supra* note 207, at 351. Schulhofer characterizes the competing sides of rape reform as:

There is pervasive under-reporting and under-enforcement, pervasive unwillingness to credit well-founded victim complaints, and pervasive inadequacy of punishment in prosecutions that lead to conviction. All that is true. Those problems exist to an alarming degree. But victim advocates must be equally willing to acknowledge the opposing dynamic that exists side-by-

by failing to punish behaviors that are clearly criminal, they do counsel for caution in more borderline cases.

V. OBJECTIONS

To this point, we have seen that there are two functions of coercion claims, and that normative impairment follows from coercion_w. I have also addressed the legal implications for normative impairment. With respect to this, I have suggested a draft statute for discussion purposes but also raised concerns that criminalization could be paternalistic or counterproductive.

We have jumped through many hoops, and thus, we should confront the objection that perhaps things are not so messy. Perhaps a better understanding of coercion could eliminate these two distinct normative functions—at least insofar as consent is concerned.

This Part considers two “field occupancy” claims. One of which grabs all the territory for coercion_w, thereby eliminating coercion_c, and the other of which takes a nuanced view of coercion_c that would then eliminate the need to look to coercion_w. I conclude that neither type of account can explain all the features of consent and coercion, and thus both types of coercion are necessary for a full understanding of the normative landscape.

A. *The Claim that Coercion_w Is Sufficient*

Few theorists focus exclusively on coercion_w when it comes to questions of consent. In a rare exemplar of this sort of approach, Arudra Burra claims that coercion_c is beside the point.²¹² Focusing on deception (but noting his

side with that neglect: pervasive race bias and class bias in enforcement; pervasive abuse of charging power and plea bargaining; pervasive rigidity and disproportionality in punishment; pervasive overbreadth, overreaction, and inflexibility in the deployment of collateral consequences such as registration, community notification, and restrictions on public benefits, employment, and residency.

Id.

212. Burra, *supra* note 33, at 3.

I suggest an alternative picture of the role played by the absence of consent in explanations of why certain acts are impermissible. This role is mediated by the value or importance of having control over certain aspects of our lives in certain circumstances, a control which we can exercise by signaling our desires, wishes, and preferences, and having these signals respected. Under certain conditions, expressing and withholding consent are ways in which we can communicate this information. The wrongfulness of doing something

view's equal applicability to coercion), Burra claims that what is important in "nonconsensual" cases is that the deceptions "constitute domain-specific violations of duties involving getting other people to do things."²¹³

Burra considers a case in which one buys a forged painting from an art dealer.²¹⁴ Burra argues that when one is deceived, one may have acted culpably, negligently, or innocently in what happens to one, and so too the "deceiver" may be culpable, negligent, or innocent.²¹⁵ "The relevant question in every case is: who should be saddled with the fake [painting], and at what price? To answer this question we consider various issues" and to Burra these boil down to the duties the seller owes the buyer.²¹⁶ Burra thinks that you do not need consent to explain why the sale is invalid when it is.²¹⁷ Burra takes the question to be the duties, and if you breach the duty, you should not profit from your own wrong, and hence, ought to return the money.²¹⁸

Although there is certainly much to like about Burra's approach, he takes things a step too far when he eliminates consent from the picture. First consider third party cases. Rebecca Burnham was forced by her husband to work as a prostitute.²¹⁹ Assume the man who has sex with her is unaware of any of those facts and that Burnham intentionally kept him unaware. Here, it seems that Burnham was sexually assaulted, but the man behaved nonculpably because he was unaware of coercion by the husband. That is, when coercion is present, it taints the transaction, as it undermines the voluntariness of the underlying consent.

Burra recognizes that Burnham-type cases are a counterexample.²²⁰ He believes he has an argument around the problem.²²¹ Burra claims that if you are the innocent transmitter of poison (from A to B) then you have done

without another's consent will then depend (amongst other things) upon why control of this sort was morally important to being with. This importance, in turn, is contingent and variable: in particular, it might depend upon quite fine-grained empirical analysis.

Id.

213. *Id.* at 5.

214. *Id.* at 14.

215. *Id.* at 15–16.

216. *Id.* at 18.

217. *Id.* at 20.

218. *Id.* at 19.

219. WESTEN, *supra* note 35, at 139–60 (discussing *People v. Burnham*, 222 Cal. Rptr. 630, 639 (Ct. App. 1986)).

220. Burra, *supra* note 33, at 25 (noting this is "a difficult case to think about").

221. *Id.* at 25–26.

nothing wrong; you are just a tool in someone else's plan.²²² Burnham's clients are likewise innocent tools.

This approach is misguided. If you take it as possible to wrong someone without culpability—as would happen if you accidentally ran over your neighbor's child when he darted in front of your car to get a ball—then innocent actors can behave wrongfully. The fact that there is another actor, causally upstream of you, does not relieve your responsibility. Indeed, if instead of being an innocent transmitter of poison, you were negligent, it would be clear that you would be liable, despite being a 'tool in someone else's plan.'²²³

Second, consider the further implication that abandoning coercion leaves duress entirely unexplained. It takes the facts about B completely out of the picture, but the criminal defense would certainly require a focus on B. Admittedly, there are distinctions to be drawn between undermining the voluntariness of a criminal act—and thus seeking an excuse—and undermining the voluntariness of consenting—and thus arguing that one's consent is ineffective. Nevertheless, the idea that when a gun is pointed at you, the reason why your consent is ineffective is completely unrelated to why you are not criminal liable seems strange. After all, in both instances, the voluntariness of your choice is being assessed.²²⁴

Ultimately, Burra's myopic approach fails to give us the resources to recognize that choices can be tainted by the involuntariness of the chooser. This involuntariness may undermine criminal liability. But it may also undermine the normative force of the consent or promise.²²⁵

222. *Id.* at 26.

223. *See id.* This is akin to the conceptual error that students make in criminal law. After I teach them that voluntary actors break the causal chain and that per Hart and Honoré involuntariness in this case is broad (including not just no act, but no mens rea, as well as justifications and excuses), students will sometimes seek to run the involuntariness test on the actor and determine he is not a cause. *See* H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 76 (2d ed. 1985). If A points a gun at B and tells him to give C the poison, A is responsible because B does not break the causal chain because of duress. But when analyzing B it is a mistake to think that B is not a cause "as a tool in A's plan." Rather, one looks at causation from B to C, and finds no third parties who break the chain. B is a cause; he just acted under duress. (To be perfectly accurate in this hypothetical, one would run the voluntariness of C's taking the poison in assessing B's responsibility. Because C is ignorant of the poison, B is the cause.)

224. Hurd, *supra* note 71, at 140.

225. In defending that the explanation for coercion lies completely with the coercer, Hallie Liberto imagines two cases. In the first, A threatens to kill B and C unless they have sex with each other. B and C then agree to do so. In the second, A threatens to kill B and C unless they have sex with each other. B then forces herself on C despite C's protests. Given A's coercion, a voluntariness approach appears to be unable to distinguish between these cases. *See* Hallie

B. Rethinking Coercion

We will now take a look at the other side of the equation. First, I will consider Tom Dougherty's proposal that there are degrees of consent. Second, I will consider whether a more subjective formulation of coercion would resolve these questions.

1. Dougherty and Degrees of Consent

Tom Dougherty argues that there are degrees of consent.²²⁶ The strength of our duties depends on whether the consent is valid, invalid, or flawed. He thus contrasts the Severe Case in which Leila threatens to get Jem fired unless Jem invites Leila to her party,²²⁷ with the Mild Case where Leila procures an invitation to Jem's party by guilt tripping her.²²⁸ Jem sees Leila as "an unwanted nuisance. Seeking an easier life, Jem caves in and invites Leila."²²⁹ Both cases stand in contrast to the Benign Case wherein Leila does her best to hide that her feelings are hurt because she was not invited, and Jem, realizing she has upset Leila, then invites her.²³⁰

Liberto, Coercion, Consent, and Moral Debilitation 16–18 (unpublished manuscript) (on file with author).

This is a difficult puzzle. As noted by Millum, sometimes it can be all things considered permissible to act even when the coerced is acting involuntarily. Millum, *supra* note 6, at 115–20. The issue of whether the clients will all-things-considered wrong her depends upon the alternatives. *Id.* at 120–25. That is, in some cases, the coerced party may be better off if the third party engages in the act. In the Burnham case that is hard to believe, as the third parties have the option of paying her but not receiving sex, but in some cases, Millum has shown that the best result in the bad situation may be to engage in the act. *Id.* Notice then that the justification does not come from the fact that the person won't be wronged—the victim still does not consent. Instead, the unconsented-to act is still better than not engaging in the unconsented-to act.

Millum's example is helpful to illustrate this. *Id.* at 119–20. Assume that Alice threatens to break Betty's legs unless Betty sells her bicycle for \$100 and gives the money to Alice. Carl has just arrived in town and needs a bike to commute to work. Moreover, Carl does not have a lot of money so he needs to use his money to buy a bike. Although Betty is best off if Carl gives her money, this is not something she can fairly ask of Carl. At the same time, if Carl walks away and gets the bike from someone else, Betty is actually worse off than if she transacts with Carl. Accordingly, of the three options (no sale, sale, and gift), sale is actually the one that is best for Betty and Carl *jointly*. In such a case, then, the third party may act, even though the permissibility of his action does not derive from the victim's consent. Instead, the action is permissible in spite of the lack of consent. *Id.* at 120.

226. Dougherty, *supra* note 139, at 2 (arguing that consent can also be partially valid).

227. *Id.* at 7–8.

228. *Id.*

229. *Id.* at 8.

230. *Id.* at 6.

With respect to the Severe and Mild cases, Dougherty says Leila should not attend.²³¹ And with respect to the Severe Case, Dougherty says that “Leila would need a much stronger reason to justify turning up at the party.”²³² Dougherty’s puzzle is if the Benign Case and the Mild Case both “count” as consensual “then we have not articulated a difference between the Mild Case and the Benign Case.”²³³ Dougherty’s answer is that different degrees of coercion correlate with different degrees of consent.²³⁴ When consent is invalid, the consentor is wronged, and when the consent is “flawed,” then the coercer breaches a duty of lesser stringency.²³⁵ Essentially, this is akin to saying that the very same act can be very wrong or only slightly wrong, depending on the quality of consent.

Dougherty and I reach the same conclusions but have different explanations. We agree that Leila may attend the party in the Benign Case and that it would be worse for Leila to attend the party in the Severe Case than in the Mild Case. Dougherty believes this shows a scalarity of consent. I believe that the Mild Case is a case of coercion_w with normative impairment, whereas the Severe Case implicates coercion_c.

The question is how to adjudicate which view is correct. There will be the consistent intuition that the consent is flawed in the case of nagging and haranguing, and moreover, a sense that it is morally problematic for the coercer to avail herself of the benefit. How do we determine whether it is the coercion_c that is doing the normative heavy lifting or the coercion_w?

A crucial distinction between these explanations lies at the heart of the impairment. If the case entails coercion_c, then the output, or the consent, is tainted. If C sees A rob B and take B’s necklace, it is impermissible for C to take the necklace. She knows that B did not give the necklace willingly, and that the possession is tainted. In contrast, coercion_w cases are not instances of “involuntary” consent by B. Rather, they are cases in which there is something about A that prohibits A’s avilment of the consent. A is rendered morally powerless by his wrongdoing.

231. *Id.* at 10–11.

232. *Id.* at 7.

233. *Id.* at 8.

234. Dougherty’s view thus allows that the degree of sexual wrongdoing can depend on the type of threat. See SCHULHOFER, *supra* note 36, at 132:

Sexual coercion is simply any conduct that threatens to violate the victim’s *rights*. Conduct that forces a person to choose between her sexual autonomy and any of her other legally protected entitlements—rights to property, to privacy, and to reputation—is by definition improper; it deserves to be treated as a serious criminal offense.

235. Dougherty, *supra* note 139, at 15.

If Dougherty is right, then all the cases in which we are dealing will be cases in which C is prevented from benefitting if she knows of A's wrongdoing, because the flaw is with the consent, not with the consentee.²³⁶ To test our considered judgments, we might ask then whether my child's friend who is in the car ought not to have an ice cream if she knows it is because my child whined. Or whether the passenger's wife ought not to use your pen. Or whether Leila's friend ought not to go to the party if Leila procured the invite for her by whining. Indeed, given that having a culpable mental state is not necessary for wrongdoing,²³⁷ then the question is whether the friend may eat the ice cream even though my child whined the night before, or the passenger's wife may use the pen if she was in the restroom when it was procured, or whether Leila's friend may go to the party when she doesn't know what Leila did. Are the agreements in these cases tainted such that third parties are dealing with "damaged goods?" Or is it simply that the wrongdoer should not benefit? After all, this much is clear, when coercion is at work, it does bar the behavior. Burnham's client should not be having sex with her.

At some point, philosophical arguments will bottom out in different intuitions about these cases. If the underlying consent does not appear tainted, then the problem is with the coercer, and not the voluntariness of the consent obtained. Dougherty's explanation fails.

Along these lines, we may wish to return to our entrapment analogy. There are certainly cases where entrapment applies but third parties would have standing to complain. If the government offers Angela \$100,000 to punch Becca in the face, we might think the government now lacks standing to prosecute the assault, but that Becca may still sue Angela for damages. Dougherty's approach leaves these cases unexplained.

A final problem is that Dougherty's abandonment of binary relations may wreak havoc on other legal relations. Recall that Dougherty thinks duties can be more or less stringent, depending on the coercion.²³⁸ But what is it to "kinda promise" or "sort of abandon?"

In conclusion, an approach that takes into account degrees of voluntariness cannot explain why third parties may avail themselves of "flawed consent." It also sits uncomfortably with how promising and abandonment work.

236. Dougherty concurs with this methodological maneuver, or as he calls it, "neat trick." *Id.* at 16.

237. See Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 295 (1991) (suggesting the "Irrelevance-of-Fault-to-Permissibility Thesis").

238. Dougherty, *supra* note 139, at 6.

2. Subjectivizing Coercion

Even if one disputes Dougherty's notion that there are degrees of consent, one might still think that this project is misguided because it fails to formulate coercion correctly and that a different formulation of what counts as undermining choice does all the normative heavy lifting. Maybe the prior formulation for coercion should not require "a person of reasonable firmness." Maybe all that coercion should require is subjective coercion. If a man would prefer to hand over all of his earthly belongings than to be beaten with a wet noodle, why should it matter that that is not how the person of reasonable firmness would order her preferences? Or, to take this away from the absurd, why if a woman truly ranks some harm as worse than surrendering sex do we not deem it rape? Particularly with respect to sex, it seems that the unwanted nature of contact is the violation, not how that coercion relates to reasonability.

This issue raises the question of what constitutes coercion. As we have seen, the criminal law has traditionally required a person of reasonable firmness. But perhaps this is misguided. That would mean that when we think about the sort of coercion that undermines choice (the duress-like coercion), we have inappropriately inserted objective criteria.²³⁹

There is a clear and intuitive pull to defining coercion subjectively. We may then need to figure out, as we do with other wholly subjective tests, how to define its boundaries—what constitutes *too much* pressure? And, we might need to ask about grading—If I am the sort who surrenders Monets for hotel rooms or a man feels far more protective of his goldfish than whether he will have sex with his girlfriend, then should we view the harms as we objectively do (as grand theft and rape) or should we take into account the victim's preferences and reduce the gravity as the victims do?²⁴⁰ And, how should law

239. Cf. FEINBERG, *supra* note 34, at 211:

Restricting our attention, however, to wholly self-regarding situations, and the problem of protecting *B*'s choice about matters that directly concern only her own interest, I find no reason to apply any price tags to *B*'s options but those that *B* applies herself. If *B* accedes to *A*'s unwelcome proposal only because the cost she attaches to *A*'s threatened harm is even greater than the large cost of *A*'s demand itself, then her consent has been coerced no matter how eccentric her judgment of comparative evil may be, even if those judgments are unreasonable or perverse.

240. See Ferzan & Westen, *supra* note 10, at 778 (articulating this worry). Larry Alexander's formulation of coercion is moralized. The question is whether one is forgoing one's moral objection; his view also leads to trivial coercions yielding nonconsensual interactions:

react when I ask to have my Monet returned?²⁴¹ In private law, taking coercion as subjective will require courts to undo the choices that unreasonable people make.

At the theoretical level, however, we need not accept or worry about the law's rigid categories. And, at the theoretical level, we may wish to give coercion more ground. However, for my argument to fail, it must be the case that there are no instances that would fall within coercion_w but not coercion_c. Here are three reasons to think that coercion_w without coercion_c is not an empty set, even with a more expansive notion of coercion_c. First, some sorts of conduct are very low level instances of coercion. This is what is exemplified in the Aziz Ansari case, in which the coercion is whining. There is a live debate over whether this sort of behavior undermines consent. Second, in some coercion situations, the coercion creates causal complications. That is, the coercion may be neither necessary nor sufficient to cause the consent, yet still play a causal role.²⁴² When there are complicated "causal cocktails," we may be reticent to view the resulting consent as involuntary. Finally, the concern with "reasonable alternatives" appears.²⁴³ Even when coercion causes the behavior, we may worry about whether actors count as coerced if I could pay for the hotel room, rather than surrender my Monet, or whether you should take the dry cleaner to small claims court, or whether Grace ought to have just left. A more robust coercion_c might fail to condemn conduct when one or more of these reasons applies.

Hence, instead of fighting over whether "Grace could leave" does undermine consent, our gaze is better focused on Ansari's conduct and

Finally, the account of consent I have offered leads to the result that a threat to engage in a trivial boundary crossing—say, a threat of a pinch—can make acquiescence in sex nonconsensual if it, in fact, induces the acquiescence. That is not an embarrassing result for me. I want to say, rather, that although the sex is nonconsensual, the violation of rights that it represents is trivial. Obviously, if someone would rather submit to sex than to a pinch, she does not regard the sex as a more serious violation of her rights than the pinch. Not all nonconsensual sex should be regarded as a serious crime.

Alexander, *supra* note 73, at 173.

241. See text accompanying notes 203–05.

242. Cf. *Burrage v. United States*, 571 U.S. 204 (2014) (holding, as a matter of statutory interpretation, that causes that are neither necessary nor sufficient do not satisfy cause in fact). *But see* Eric A. Johnson, *Cause-in-Fact After Burrage v. United States*, 68 FLA. L. REV. 1727, 1731 (2016) (arguing that *Burrage* fails on its own terms because the ordinary understanding of cause in fact has always included work arounds when the but-for test fails).

243. See WERTHEIMER, *supra* note 53, at 183 (arguing that, with respect to a hypothetical married couple, that if A is going to be "verbally abusive and generally difficult to live with" B is not "justified in acquiescing first and prosecuting later" and concluding that it is "arguable that she should stand her ground or leave"); Stewart, *supra* note 2, at 185 (arguing that contract law should not give a duress defense if B had reasonable alternatives).

whether his behavior is itself sufficient to prevent him from availing himself of her consent *even if that consent counts as freely given*. Our normative and conceptual tools are impoverished by a focus on coercion alone.

CONCLUSION

Although I have since been unable to find the website, as I was researching coercion, I came across a chatroom where a woman complained that her husband would “whine like a wounded puppy” until she performed oral sex on him. She asked her fellow chat room inhabitants if this was “coerced sex.” They told her it was. Indeed, the tenor of the commentary deemed her husband a rapist.

We simply cannot make progress with such flat-footed approaches. It was coerced and it was not. We ought to be able to have conversations about how people treat each other, and the terms of sexual negotiations, without a conclusion that the crime is rape. And yet, having decided that coercion undermines consent, and sex without consent is rape, we seem to have no mechanism to bypass this conclusion.

One ambition, then, for this paper is simply to open up dialogue. We should discuss the contours of coercion, we should separately discuss the scope of coercion, and we should have a further debate about the implications of a finding of coercion. Even if you disagree with my precise line-drawings, my hope is to have opened up conceptual and normative space for nuanced disagreement. Ansari can have behaved wrongfully by badgering, wrongfully by availing himself of the oral sex, and yet still not be a rapist. We need space to acknowledge that.

In sum, there are two distinct normative functions of coercion, and each has a role to play with respect to consent. Using terms like “coerced sex” elides moral nuances and prevents engaged debates about the same topic. As we understand the mechanics of consent better, we can engage more fruitfully in the debates we wish to have about the sorts of behaviors that undermine choice and the sorts of behaviors that inhibit us from availing ourselves of choices by others.