Remarks on Coercion and Exploitation

Alan Wertheimer

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
REMARKS ON COERCION AND EXPLOITATION

ALAN WERTHEIMER

INTRODUCTION

I am delighted to be participating in this Symposium on coercion and exploitation—topics that are near and dear to my heart. In the interests of launching a preemptive strike in self-defense against those who will want to take me to task on one legal issue or another and also in the interests of full disclosure, I want to make clear that I am a political philosopher. I am not a lawyer. I have never attended a single class in law school. My oldest child is now a third-year student at Michigan Law School, but that's as close as I come.

So my offerings will be philosophical, not legal. In an effort to further reduce your expectations, thus reducing the gap between what you expect and what I offer, I want to say at the outset that my philosophical message will itself be largely deflationary. It will be filled with more distinctions than arguments. And the first distinction I shall make is to note that there are two ways in which my remarks will be deflationary.

Roughly speaking, there are two philosophical questions about coercion (let me bracket exploitation for the moment): (1) What counts as coercion? and (2) When are individuals or the state justified in using coercion? The second question is, of course, a central problems of political philosophy. These are the issues that we discuss under rubrics such as liberty, paternalism, moralism, and so forth. This is the topic of Mill's On Liberty and Joel Feinberg's four volume treatise on the scope of the criminal law. And this, I suspect, is the issue at stake in the session on Coercion and Confinement.

Although I am happy to enter discussions of those issues, my first deflationary point is that I shall have nothing to say here about the justification of

* John G. McCullough Professor of Political Science at the University of Vermont. B.A., New York University, 1964; Ph.D., Case Western Reserve University, 1968.


2. See ALAN WERTHEIMER, COERCION (1987). To the extent this paper draws heavily on COERCION, that portion is protected by copyright © 1987 Princeton University Press. See also ALAN WERTHEIMER, EXPLOITATION (1996); Alan Wertheimer, Coercion and Exploitative Agreements, AM. PHIL. ASS'N NEWSL. ON PHIL. OF L., Fall, 1994; Alan Wertheimer, Consent and Sexual Relations, 2 LEGAL THEORY 89 (1996); Alan Wertheimer, Coercive Offers (Dec. 1994) (unpublished paper delivered at the 1994 meeting of the Eastern Division of the American Philosophical Association in Boston) (on file with the author).

3. JOHN STUART MILL, ON LIBERTY (1947).

4. JOEL FEINBERG, HARM TO OTHERS (1984); JOEL FEINBERG, HARM TO SELF (1986); JOEL FEINBERG, HARMLESS WRONGDOING (1988); JOEL FEINBERG, OFFENSE TO OTHERS (1985).

889
coercion. Rather, I shall be interested in the first and seemingly less morally charged issue—namely, what counts as coercion and exploitation. I suspect that this is the question that is at stake in the sessions on coercive and exploitative bargaining and coerced confessions.

My second deflationary point is that I shall argue that the questions (and their facsimiles)—what counts as coercion? What is valid or meaningful consent? What is exploitation?—are much less important than they first seem. Let me say a bit more about this at the outset. A standard picture about the role of conceptual analysis with respect to topics such as coercion and consent goes something like this: we start with a principle that agreements are valid and/or should be permitted if they are consensual or voluntary. By contrast, if an agreement is the result of coercion or is made under duress or fraud, then the agreement or decision is invalid, or we can justify prohibiting the formation of the agreement, ex ante. It is then suggested that to determine which agreements should be treated as invalid or prohibited, we should engage in an analysis of the concept of coercion (and related concepts such as fraud and consent). If such an analysis can, for example, tell us what counts as coercion, we can then identify the agreements that should be treated as invalid or prohibited.

I believe that this picture of conceptual analysis is mistaken. The concepts of coercion and exploitation provide important templates by which we organize many of the moral issues in which we are interested, but they cannot do much more than that. The questions as to what agreements should be treated as invalid and what behaviors should be prohibited will be settled by moral argument informed by empirical investigation rather than conceptual analysis. Inquires into the essence of coercion or exploitation will prove to be of limited help with respect to the substantive questions in which we are interested.

Consent as Morally Transformative

Let us begin by noting that the organizers of this Symposium are not, I believe, interested in coercion and exploitation as free standing concepts. This Symposium is not dedicated to conceptual analysis, per se. We are interested in coercion and exploitation because consent is typically morally and legally transformative—that is, it changes the moral and legal relationship between parties to an agreement and between those parties and others—and because coercion and exploitation may seem to threaten that moral transformation.

Let us note a few ways in which consent is morally transformative: B’s consent may legitimate or render permissible an action by A that would not be legitimate without B’s consent, as when B’s consent to surgery transforms A’s act from a battery to a permissible medical procedure. B’s consent to transact with A provides a reason for others not to interfere with that transaction, as

5. This principle is, of course, only prima facie. There may be good reasons not to uphold or permit some uncontroversially voluntary agreements.

when B’s consent to let A put a tattoo on her arm gives C a reason to leave them be. And B’s consent may give rise to an obligation to A. If B consents to do X for A, B ordinarily acquires an obligation to do X for A.

To say that B’s consent is morally transformative is not to say that B’s consent is either necessary or sufficient to change an “all things considered” moral judgment about A’s or B’s action. It may be legitimate for A to perform surgery on a delusional or unconscious B without B’s consent. It may be wrong for A to perform surgery on B even with B’s consent if the procedure is not medically indicated. Similarly, we may think that exchanging money for sexual relations is wrong even if the prostitute consents to the exchange. But this does not show that the prostitute’s consent is not morally transformative. After all, the prostitute’s consent to sexual relations with A eliminates one very important reason for regarding A’s behavior as wrong, namely, that A had sexual relations with B without her consent. The prostitute’s consent may provide a strong although not dispositive moral reason for not interfering with A’s and B’s behavior.

The Logic of Consent Arguments

To put the point of the previous section schematically, we are interested in the following sort of argument:

*Major Premise:* If, in response to A’s proposal, B voluntarily consents to do X, then B’s agreement to do X is binding or valid (or A and B should be permitted to enter into such agreements).

*Minor Premise:* B has not voluntarily consented to do X because A’s proposal has coerced B to consent to do X.

*Conclusion:* B’s agreement to do X is not binding or valid (or A and B should not be permitted to enter into such agreements).

Given the major premise, it seems that we must determine when the minor premise is true if we are going to know when the conclusion is warranted. For that reason, we may be tempted to think that an analysis of the concept of coercion will identify the criteria or necessary and sufficient conditions of coercion, and that empirical investigation can then (in principle) determine if those criteria are met. If the criteria are met, then the minor premise is true and the conclusion follows. If not, then the minor premise is false and the conclusion does not follow.

If things were only so simple. It is a mistake to think that we will be able to make much progress towards resolving the substantive moral and legal issues in which we are interested by philosophical resources internal to the concept of coercion (or consent). In the final analysis, we are always going to

---

7. For example, it may be wrong for a physician to accede to a beggar’s request to have his leg amputated so that he can enhance his success as a beggar.

8. “It is a non sequitur, but a disturbingly common one, to argue from the premise that some act is bad because it is nonconsensual, to the conclusion that the same act, if consensual, is therefore good . . . .” Robin West, *A Comment on Consent, Sex, and Rape*, 2 LEGAL THEORY 233, 247 (1996).
have to ask: Given the facts that relate to issues of coercion, how should we think about the moral and legal status of a transaction or relationship? In that sense, I am squarely in the camp that maintains that the best account of coercion is normative. To say that coercion is normative or moralized is not—as some have thought—to say that it is vague or subjective or has no correct application. The antinomy of normative is empirical or value-neutral, not objective or precise.

In suggesting that coercion is essentially normative, I do not deny that it is possible to produce a morally neutral or empirical account of coercion that would allow us to determine whether B is coerced by reference to specific empirical criteria (such as B’s state of mind). I do maintain that if we were to operate with a morally neutral account of coercion, we would have to go on to ask whether that sort of coercion renders B’s agreement invalid and that we will be unable to answer that question without introducing substantive moral arguments. In the final analysis, it does not matter much whether we adopt a thin morally neutral account of consent or a thick morally laden account of consent. Either way, the point remains that we will not be able to go from a morally neutral or empirical account of coercion to interesting moral or legal conclusions without introducing substantive moral arguments. The only question (to paraphrase a commercial for motor oil) is whether we want to pay the moral price up front by including moral considerations within our account of coercion or pay the moral price after we have determined that A’s proposal has coerced B but before we say that the agreement is invalid.

The Fallacy of Equivocation

Precisely because we can pack a lot or a little into our account of coercion, it is all too easy for a “coercion argument” to commit the fallacy of equivocation, where the meaning of coercion assumed by the major premise is not identical to the meaning of coercion in the minor premise, and thus the conclusion does not follow even though both the major premise and minor premise may be true (given different meanings of a word).

Consider a classic problem of political philosophy: Do citizens have a general (prima facie) obligation to obey the laws of society? A standard argument goes like this:

**Major Premise:** One is obligated to obey the laws if one consents to do so.

**Minor Premise (Version-1):** One who remains in his society rather than leaves thereby gives his consent to that society (Plato). 9

**Minor Premise (Version-2):** One who benefits from living in a soci-

---

9. Plato described the basis for this consent:
You have never left the city, even to see a festival, nor for any other reason except military service; you have never gone to stay in any other city, as people do; you have had no desire to know another city or other laws; we and our city satisfied you. So decisively did you choose us and agree to be a citizen under us.

ety gives his consent to that society (Locke). 10

Conclusion: One who does not leave his society or benefits from living in a society has an obligation to obey its laws.

Is either version of the minor premise true? The problem is this: there may be a linguistically plausible sense in which one who accepts the benefits of one’s government has consented to that government or in which one who remains in one’s society has consented to remain in that society. In that sense, both versions of the minor premise may be true. But, even if that were so, the conclusion may not follow. We will have to determine if the type or strength of consent that figures in the major premise has been met in the minor premise. And it may not. Thus we could agree with Plato that there is a sense in which one who does not leave his society gives his consent, while also agreeing with Hume that it is not the sort of free consent that would justify the ascription of a strong obligation to obey the law. 11 We can make a similar point about Locke’s view.

A similar point can be made about the concept of harm. Suppose we start from the Millian principle that the state can justifiably prohibit only that conduct that causes harm to others. The following questions arise: Does the psychic distress caused by hate speech count as harmful? Does trespass that causes no physical damage to one’s property constitute a harm? Does a peeping-tom harm his target? Clearly there is a sense in which psychic distress caused by hate speech is harmful. As a matter of empirical psychology, it is simply untrue that “sticks and stones will break your bones, but names will never hurt you” (just as it is untrue that absence makes the heart grow fonder). And there is clearly a sense in which one has not been harmed by trespass which causes no physical damage, or by the peeping tom, particularly if the target is unaware of his voyeurism. But these observations will not tell us which activities can be legitimately prohibited by the state under the Millian principle. 12

So we can opt for a morally neutral or moralized account of harm. We can opt for a morally neutral or neurological account of harm, but we will

10. The benefits derived from society compel consent, according to Locke. [E]very man that hath any possessions, or enjoyment of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government during such enjoyment . . . whether this his possession be of land to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway.


11. Hume questions the consent to a society by one who remains in that society: Can we seriously say, that a poor person or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.

DAVID HUME, Of the Original Contract, in HUME’S MORAL AND POLITICAL PHILOSOPHY 363 (1948).

12. “[T]he question is . . . not what ‘harm’ really means, but what reasons of principle there are for preferring one conception to another. . . . the question is not simply which is the better conception of harm, but which conception answers more adequately to the purposes for which the concept is deployed.” JEREMY WALDRON, LIBERAL RIGHTS 119-20 (1993).
then have to go on to ask whether harm so defined should be prohibited and whether some acts excluded by that definition can be legitimately prohibited. We can opt for a moralized account of harm, say one in which one is harmed if one's rights or moral interests are violated. On this view, we could maintain that the psychic distress caused by hate speech does not count as a harm because it does not violate one's rights, whereas trespassing and voyeurism do count as harm because they violate one's rights to property and privacy.\footnote{I am not maintaining that this is what we should say on a moralized account of harm, only that such an account allows us to make these distinctions.}

A similar danger of equivocation arises with respect to coercion. Consider 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 his confession, are less likely to agree that he was genuinely coerced into confession.\footnote{Harry G. Frankfurt, \textit{Coercion and Moral Responsibility in Essays on Freedom of Action} 65 (Ted Honderich ed., 1973).}

Was the prisoner's confession coerced? There is no reason to think that there must be a single acceptable answer to this question. The answer to this question will depend upon the sort of moral transformation that consent is meant to trigger. We may think that the sort of pressure to which the prisoner was subject may be sufficient to deprive his confession of legal validity. At the same time, and if there is anything like honor among thieves, the very same pressures may not be sufficient to excuse his betrayal of his accomplices. (We need not assume the prisoners are thieves; they may be political prisoners in a just cause). It will do no good to ask what appears to be a conceptual and empirical question: Was his confession coerced or not? Rather, we need to answer two moral questions: What sorts of pressures on prisoners to confess are sufficient to bar the introduction of the confession as evidence? and What sorts of pressures on prisoners are sufficient to excuse the ascription of blame by those to whom the prisoner has obligations of silence? These are irreducibly moral questions, not questions about the concept of coercion.

I have said much more about coercion than exploitation to this point. Whereas we are inclined to refer to some agreements as coerced, other agreements are more naturally characterized as exploitative. And I shall try to say something about the character of exploitative agreements. It is worth noting that whereas the moral force of coercion is relatively clear, as a coerced agreement is not binding, the moral force of exploitation is not clear, for it is not obvious what follows from characterizing an agreement as exploitative. But before proceeding further with an analysis of both exploitation and coercion, it will prove useful to get some more concrete examples in mind. So let me introduce some cases in very simplistic or stylized form.
**Cases**

1. Extortion: A proposes to break the windows on B's store unless B agrees to hire A to collect B's garbage for an exorbitant fee. B agrees.

2. AZT: A owns the patent on AZT, a drug that offers some help to patients with AIDS. A proposes to sell a year's supply of AZT to B, who has AIDS, for $8,000. B agrees.

3. Enlistment: A proposes to offer B monetary compensation if B enlists in the army. Because B lacks any decent civilian career opportunities, B enlists.

4. Stripper: A proposes to hire B as a topless dancer. B, who has been admitted to law school, accepts A's proposal because she expects to earn up to $1,000 a night.\(^5\)

5. Surrogacy: A, whose wife is infertile, proposes to pay B $10,000 to become impregnated with A's sperm through artificial insemination and waive custody rights to the child upon birth. B, who is not affluent, agrees.

6. Automobile: A, a used car dealer, turns back the odometer on a car and sells it to B for a price that B would not have paid if she had known the car's true mileage.

7. Organs: A, who suffers from a kidney ailment, proposes to buy one of B's kidneys for $25,000. B, a poor Egyptian with a wife and several children, accepts A's proposal.\(^6\)

8. Psychotherapy: A, a psychotherapist, proposes to B, his patient, that they have sexual relations. Because B is in the grips of transference and is sexually attracted to A, B agrees.

9. Unfair Rescue: A, a tug, encounters a ship (B) in distress and proposes to take it in tow for a fee that greatly exceeds the normal market price for such services. B agrees.

10. Fair Rescue: A, a tug, encounters a ship (B) in distress and proposes to take it in tow for a fee that is no greater than the normal market price for such services and from which A makes only a modest profit. B agrees.

11. Lumber: There has been a hurricane in Florida. A, a lumber retailer, triples his price for lumber. B, who needs lumber to rebuild, pays A's price.

12. Drowning: A comes upon B, who is drowning. A proposes to rescue B if B agrees to pay A $10,000. A and B know that there are no other potential rescuers.

13. Lecherous Millionaire: B's child will die unless she receives expensive surgery for which the state will not pay. A, a millionaire, proposes to pay for the surgery if B will agree to become his mistress.

14. Experimentation with Prisoners: A (the state) offers B (a prisoner) various benefits, such as a reduced work schedule, a color television, higher quality food, or the likelihood of earlier parole, if B will allow a drug company to test

---


the safety of a drug on B. B agrees.

15. Attractive Offer: A, a prestigious Ivy League university offers B (a full professor at a reputable state university) a large salary, a reduced teaching load, and her own secretary, if B will join university A. B accepts.

16. Surgery: A proposes to amputate B's leg for a fair fee. Because B will die unless she agrees to the amputation, B authorizes A to perform the surgery.

17. Plea Bargaining: A, a prosecutor, tells B that B can plead guilty to second degree homicide, in which case, the maximum punishment is 30 years, or stand trial for first degree homicide, conviction for which might result in execution. B pleads guilty to second degree homicide.

18. Norplant: A, a judge, tells B, who has been convicted of a drug offense, that he will place her on probation if she allows a court designated doctor to implant the contraceptive Norplant in her arm. B agrees.

19. Ticket Scalping: A buys a block of tickets to a rock concert for $50 and proposes to sell tickets to B for $200. Because B has no viable alternatives, B agrees.

20. Dance Studio: A, a dance instructor, gets B, a 60-year-old widow, to believe that she has talent for ball-room dancing, and proposes that B purchase $50,000 in dance lessons. Although the payment would require B to sell her home, B agrees.

21. POW: A, proposes to take B as a prisoner of war and provide benevolent quarantine, if but only if B agrees to give up fighting his captors. If B does not surrender, A will attempt to kill B as an enemy soldier. B accepts A's proposal.

22. Part-Time Professors: A, a university, proposes to pay B, an unemployed academic, $2,000 a section to teach a section (or sections) of basic writing, or French, or whatever. B agrees.

23. Unprofitable Employer: A, whose firm will go out of business unless he can reduce his labor costs, proposes to continue to employ B if B agrees to a reduction in her salary. B accepts.

Coercion and Exploitation: A First Cut

Which of these agreements are exploitative? Which of these agreements are coercive? Although I shall try to say something about both exploitation and coercion, in the final analysis I do not believe that much turns on whether we can legitimately say that one agreement or another is exploitative or coercive on some linguistically plausible account of these terms. Rather, the crucial questions concern the moral status of such agreements: Should they be prohibited? Should they be enforceable? Or does the description of the agreement as coercive or exploitative have some other moral force?

Let us begin with the two central concepts. Exploitation and coercion appear to have different foci. Whereas coercion refers to the formation of an agreement, exploitation seems to always include reference to the substance or outcome of an agreement. A wrongfully exploits B when A takes unfair ad-
vantage of B, but A can coerce B to agree to do X without exploiting B, as when A paternalistically coerces B to make an agreement that will serve B’s interests but not A’s.

**Exploitation**

Let us consider two dimensions of exploitative agreements: (1) the effect of the agreement on B’s interests; and (2) the voluntariness of B’s agreement.\(^{17}\) If one considers the definitions of exploitation that have appeared in the philosophical literature, one finds disagreement on both dimensions. On some views, an agreement between A and B is exploitative only if it is harmful to B.\(^ {18}\) On other views, exploitation can be beneficial to the exploitee.\(^ {19}\) On some views, exploitative agreements are always coerced or involuntary.\(^ {20}\) On other views, exploitation can occur “despite the exploitee’s fully voluntary consent to the exploitative behavior.”\(^ {21}\) I think it would be a mistake to tighten up the criteria of exploitation prematurely. Indeed, if agreements are exploitative only when they are also harmful or coerced, exploitation would be of much less theoretical interest. We do not need to be moral rocket scientists to argue that harmful exploitation may be legitimately prohibited by the state or that coerced agreements are neither morally nor legally binding. By contrast, it is more interesting to consider whether we might be justified in prohibiting or refusing to enforce an agreement that is beneficial to B, that is not the result of a direct threat to B, and that B (rationally) wants to make.

For these reasons, I shall distinguish between harmful exploitation and mutually advantageous exploitation.\(^ {22}\) By harmful exploitation, I refer to agreements that are beneficial to A but are harmful to B. By mutually advantageous exploitation, I refer to agreements that are beneficial to the exploiter (A) and are also beneficial to the exploitee (B). In the language of economics, these agreements are Pareto superior: They leave both parties better off. If we reflect on the list of examples, it seems clear that whereas some allegedly exploitative agreements are harmful to the exploitee (as in Extortion), others seem to be beneficial to B, at least as contrasted with the alternative of non-agreement (Lumber). We say that the mutually advantageous agreements are

---

17. I believe that exploitative agreements must also be advantageous to A, but I shall ignore that dimension of exploitation in this paper.
18. “Persons are exploited if (1) others secure a benefit by (2) using them as a tool or resource so as (3) to cause them serious harm.” STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 171 (1990).
19. For example, Andrew Levine states:
   An exploitative exchange is . . . an exchange in which the exploited party gets less than the exploiting party, who does better at the exploited party’s expense . . . [T]he exchange must result from social relations of unequal power . . . . Exploitation can be entered into voluntarily; and can even, in some sense, be advantageous to the exploited party.
20. “It is the fact that the [capitalist’s] income is derived through forced, unpaid, surplus [wage] labor, the product of which the workers do not control, which makes [wage labor] exploitive.” Nancy Holmstrom, *Exploitation*, 7 CANADIAN J. OF PHILO. 353, 357 (1977).
22. Id. at 176-87.
exploitative because we think that the content of the agreement is unfair or wrong.\textsuperscript{23} Without prejudging whether our account of what makes a transaction fair is correct, we may think that a transaction is exploitative because the price that B must pay is too high (AZT, Rescue, Lumber) or perhaps because the compensation that B receives is too low (Surrogacy). In other cases, we may say that an agreement is exploitative because it involves the exchange of a good or service that should not be exchanged for money (Enlistment, Surrogacy, Organs, Lecherous Millionaire) or because we think that the service is degrading (Stripper).

It will prove similarly useful to distinguish between consensual exploitation and nonconsensual exploitation. By nonconsensual exploitation, I refer to agreements in which A coerces B (as in Extortion) or in which A's action inducing B's agreement suffers from a cognitive defect (as in Automobile, Dance Studio, and Psychotherapy). By consensual exploitation, I refer to those cases in which A does not threaten B with an adverse consequence should B refuse to agree and in which B's agreement represents a reasonable, non-distorted decision under the circumstances (as in Unfair Rescue). There will, of course, be controversies as to whether an agreement is harmful or advantageous to B or exploitative at all. Those judgments will require us to develop and apply criteria for harm and fairness. In my view, we can say that the agreement is harmful to B in Extortion and Automobile. And it is likely to be harmful in Psychotherapy. In all the remaining cases, it is at least plausible to argue that the agreements are beneficial to B, even if they are also exploitative. Whether an agreement is actually harmful will depend on factual inquiries, for example, the effects of surrogacy on surrogate mothers. It may also depend on moral inquiries, for example, whether an activity is degrading, whether degradation is a harm to the person who is degraded, and, if so, whether the harm of degradation exceeds the benefits to B, all things considered.\textsuperscript{24} Moreover, whether an agreement that is mutually advantageous is also exploitative will depend on whether it is a fair agreement, for “high prices” are not necessarily “unfair prices.” If A is demanding a fair price for AZT, given the research, development, and production costs of producing the drug, then there is no exploitation.\textsuperscript{25}

Still, it might be argued that even to consider mutually advantageous and consensual transactions as exploitative is to fundamentally misconceive the nature of exploitation, that there can be no wrongful exploitation if both parties gain from and consent to a transaction. I do not want to quarrel over words or labels. If someone wishes to insist that exploitation must be harmful and/or nonconsensual, then we can say that the cases of mutually advantageous consensual but arguably unfair agreements are cases of “mexploitation” or shmexploitation or whatever. I am interested in the moral character of cer-

\textsuperscript{23} A moral defect in the distribution of benefits is, I believe, a necessary condition of exploitation. It may not be sufficient.

\textsuperscript{24} For example, even if a stripper is degraded and therefore harmed by her stripping, it is possible that the gains to her from the activity exceed the harm.

\textsuperscript{25} Of course, we may think that B should not have to pay A's price out of his pocket, even if A is not exploiting B.
tain sorts of transactions and relationships, whatever we want to call them. I believe, however, that we call at least some of these cases exploitative.

Coercion

There will be similar controversies as to whether B's agreement is nonconsensual. The voluntariness of B's agreement is clearly defeated by coercion in Extortion and fraud in Automobile. In Psychotherapy, the voluntariness of B's agreement may be compromised by transference. In Dance Studio, the voluntariness of B's agreement may be compromised by manipulation of B's beliefs and desires. In many of the remaining cases (AZT, Enlistment, Stripper, Surrogacy, Organs, Unfair Rescue, and Lumber), it is plausible to maintain that the transaction is consensual, at least in the sense that it is plausible to maintain that A does not propose to violate B's rights if B rejects A's proposal.

But that does not end things. There are consensual agreements and consensual agreements. In many of these cases, B agrees to A's proposal because B's situation is desperate or because B believes that she has no better alternative. And, it may be thought that at least some such agreements are rightly regarded as coerced. Consider B's decision to serve as a surrogate mother. Many commentators have argued that such decisions are coerced: "[A monetary offer] may be difficult for a person of little financial means to refuse and would, in that case, be coercive." But the opposing view maintains that surrogacy offers women an additional option to their present menu of choices, and that additional options are never coercive.

Which view is correct? Rather than try to answer that question directly, I propose to take a different tack. I propose to temporarily put aside the questions as to what counts as coercion and exploitation. Instead, and with reference to the cases that I have described, I shall first enumerate several different characteristics of such proposals and acceptances in which we might be interested. I will then distinguish among several possible moral judgments we might make with respect to agreements and sketch some possible relations between the characteristics of proposals and acceptances and the various moral judgments. The crucial question, after all, is how certain specific characteristics of proposals and acceptances are related to certain specific moral judgments and not whether we call them coercive or exploitative.

26. Ruth Macklin, Is There Anything Wrong with Surrogate Motherhood?, in SURROGATE MOTHERHOOD 136, 146 (Larry Gostin ed. 1990). Rosemarie Tong adds "[t]o say that a woman 'chooses' to do this . . . is simply to say that when a woman is forced to choose between poverty and exploitation, she sometimes chooses exploitation as the lesser of two evils." Rosemary Tong, The Overdue Death of a Feminist Chameleon: Taking a Stand on Surrogacy Arrangements, 21 J. OF SOC. PHIL. 40, 45 (1990). Martha Field argues that "to portray surrogacy contracts as representing meaningful choice and informed consent on the part of the contracting surrogate mother, rather than to see her as driven by circumstances . . . [fails] to take account of realities." MARTHA A. FIELD, SURROGATE MOTHERHOOD 27 (1990).

Characteristics of Choice Situations

Status Quo
In some cases, such as Extortion, Unprofitable Employer, and Plea Bargaining, A proposes to make B worse off than B's present status quo or pre-proposal baseline if B rejects A's proposal. In other cases, A proposes to leave B in B's present status quo if B rejects the proposal. Because we often refer to the latter sorts of proposals as offers, most of the cases above can be described as offers rather than threats. This would include, among others, AZT, Enlistment, Stripper, Unfair Rescue, Fair Rescue, Attractive Offer, Surgery, Part-time Professor.

Moralized Baseline
In some cases, A proposes to violate B's rights if B does not accept A's proposal. In some cases, A proposes not to do what A has an obligation to B to do if B does not accept A's proposal. Let us say that in both such cases, A proposes to make B worse off relative to B's moralized baseline if B does not accept A's proposal. In other cases, A does not propose to make B worse off relative to B's moralized baseline if B rejects A's proposal. From this perspective, we might say that Plea Bargaining and Unprofitable Employer are cases in which A proposes to make B worse off than B's status quo but A does not propose to make B worse off than B's moralized baseline if B refuses A's proposal. By contrast, if A has an obligation to rescue B for free in Drowning, then A does propose to make B worse off than B's moralized baseline if B rejects A's proposal, although A does not propose to make B worse off than B's status quo if B rejects A's proposal. Setting B's moral baseline is often controversial. We can disagree, for example, as to whether A does have an obligation to rescue B for free in Drowning. Still, there is a distinction between the claim that a proposal would make B worse off relative to her status quo and the claim that a proposal would make B worse off than her moralized baseline.

Rationality
In some cases, B's decision to accept A's proposal is arguably irrational in terms of B's stable long-term preferences. This may occur when A employs deception as in Automobile and Dance Studio or manipulates B's judgment as in Psychotherapy. In addition, even if A does not intend to distort B's decision-making capacity, A's proposal may lead B to make a decision that cannot reasonably be expected to serve B's long-term interests or aims, perhaps because B underestimates the long-term costs of accepting A's proposal. This may or may not be true in Enlistment, Surrogacy, Organs, Experimentation, Stripper, Norplant, and Lecherous Millionaire. In still other cases, however, there is no reason to doubt the rationality of B's decision to accept A's proposal, and this includes cases that fall on both sides of the first two distinctions, for example, Extortion, AZT, Unfair Rescue, Fair Rescue, Drowning, Attractive Offer, Surgery, Plea Bargaining, Part-time Professor, POW, Unprofitable Employer, and Ticket Scalping. Just as there is no reason to
doubt the rationality of B's decision in Attractive Offer and Fair Rescue, there is no reason to doubt the rationality of B's decision in Extortion and Unfair Rescue.

No Other Rational Choice

In some cases we may say not only that B is acting rationally or reasonably in accepting A's proposal, we may say that A has no other rational choice but to accept A's proposal. This might be true in Extortion, AZT, Unfair Rescue, Fair Rescue, Lumber, Drowning, Surgery, POW, and Attractive Offer. In other cases, we may think that while it might be reasonable for B to accept A's proposal, it may also be reasonable for B to refuse. This might be true of Enlistment, Stripper, Surrogacy, Organs, Lecherous Millionare, Experimentation, Norplant, Part-time Professor.

Desperation

In some cases, B's status quo is arguably desperate, for example, AZT, Organs, Unfair Rescue, Fair Rescue, Drowning, Surgery, POW, Lecherous Millionare. In other cases, B's status quo is not desperate, but it is arguably not good, for example, Enlistment, Surrogacy, Part-time Professor, Unprofitable Employer. In still other cases, there is no reason to think that B's status quo is objectively unsatisfactory, for example, Stripper, Automobile, Attractive Offer, and Ticket Scalping. Note that some cases in which B has no rational choice but to accept A's proposal are ones in which B's present situation is desperate, but not in all (as in Attractive Offer).

Unjust Background Conditions

In some cases, B's status quo is unjust; in other conditions, it is not. Whether this is so will, of course, depend upon a theory of justice. In any case, the injustice of B's status quo may be related to but is independent from desperation. Thus, B's status quo is desperate but not obviously unjust in Surgery, Drowning, Unfair Rescue, Plea Bargaining, POW, and Lecherous Millionare. B's status quo in Enlistment and Surrogacy might be unjust, even if it is not desperate, depending upon whether people would be in B's status quo situation in a just society. It is important to note that the injustice of B's background conditions must be distinguished from B's "moralized baseline" with respect to A: Whereas justice may require that society place B in a better status quo, it may not require A to do so.

Fair Terms

In some cases, the terms of the transaction may be fair on some plausible criterion of fairness, for example, Stripper, Fair Rescue, Surgery, POW, Plea Bargaining. In some cases, such as Unprofitable Employer, we may think that A's proposal is not "fair" by some independent standard, but A may not be in a position to make a better proposal (although here we may have to rethink our conception of fairness). By contrast, in other cases, the terms of the transaction may be unfair and A may well be in a position to make a better proposal, as in, for example, Unfair Rescue, Drowning, Part-time Professor, Ticket Scalping, and AZT. Let me note here that while "equal utility gain"
might be advanced as a criterion of a fair transaction, I believe that this criterion is mistaken. The exploitee typically gains more utility from a transaction than the exploiter. Indeed, it is precisely because the exploiter stands to gain relatively little from the transaction that he is able to drive what we may take to be an exploitative bargain.

Incommensurability and Commodification

In some cases, A's proposal may ask B to choose between goods that should not be treated as commensurable or treated as commodities, as in, for example, Stripper, Surrogacy, Organs, Lecherous Millionare, Experimentation, and Norplant. In saying that A's proposal gives rise to a problem of incommensurability or commodification, I do not mean that B might not reasonably regard herself as better off if B accepts A's proposal; I mean simply that A's proposal requires B to exchange one good (e.g., money, better prison conditions, probation) for another good (bodily exposure, procreational labor, organs, sexual services, bodily risk, non procreation) that ought not to be exchanged for that good.

Rationality and All the Others

Before going forward, I want to stress that the rationality of B's decision is entirely separable from all of the other criteria (except the no other rational choice criterion). That B will be worse off than B's status quo if B rejects A's proposal, or that A proposes to violate B's rights (or to do less than A has an obligation to do) if B rejects A's proposal, or that B chooses under considerations of desperation, or that B chooses under unjust background conditions, or that the terms of the proposal are unfair—none of these considerations defeat the claim that B may rationally choose to accept A's proposal. I do not deny, of course, that A's deception or manipulation or B's background conditions themselves may lead B to irrationally accept A's proposal, nor do I deny that such irrationalities compromise the voluntariness of B's decision and may justify prohibiting such proposals or invalidating the acceptance of such proposals. This would be most obviously true in cases such as Automobile, Dance Studio, and Psychotherapy, and might also be true of cases such as Surrogacy, Organs, Experimentation, and Norplant. I do want to claim that it is important to distinguish between the cases in which A has acted wrongly because his proposal distorts the rationality of B's choice and the cases in which A acts wrongly because he creates a certain objective situation for B, but where B acts perfectly rationally given that objective situation (as in Extortion). To anticipate two topics that we will be discussing later on in this Symposium, there is no reason to think that plea bargaining typically compromises the rationality of B's decision to accept a plea, whatever else we may want to say about it. By contrast, there may be reason to think that behavior that results in allegedly coerced confessions does compromise the rationality of B's decision to confess, putting aside other objections to such behavior.
Moral Judgments

There are several different moral claims that we might want to advance with respect to agreements that are described as coerced or exploitative. Here are three or four:

Condemnation

It is wrong for A to make some proposals. This is certainly the case with respect to those cases in which A proposes to render B worse off than B's moralized baseline if B rejects A's proposal, as in Extortion and perhaps in Drowning. But we might well regard A's proposal as wrong, even if A does not propose to violate B's moralized baseline if B rejects A's proposal. This might be true when A proposes unfair terms (as in AZT, Unfair Rescue, Lumber) or violates notions of incommensurability or commodification, as in Stripper, Lecherous Millionare, Organs, and Norplant.

Prohibition and Invalidation

In some cases, we think it justifiable to prohibit A from making proposals, or we may regard the acceptance of the proposal as invalid or not binding on B. This is most obviously so in the paradigmatic cases of coercion such as Extortion, in which A proposes to render B worse off than B's moralized baseline if B rejects A's proposal. The interesting question is whether there are reasons to prohibit proposals which would not violate B's moralized baseline if rejected, and to treat as invalid agreements that are advantageous to B—if (for example) the terms are unfair or they are made under unjust or desperate background conditions. It is worth emphasizing here that there may be relatively little distance between prohibition and invalidation. It may be thought that we can allow A to make a proposal but not treat B's acceptance as binding. This suggestion is often made with respect to commercial surrogacy. But that solution will generally prove to be unstable. For if A knows that B's acceptance will not be treated as valid and binding, the transaction will typically not occur, and bracketing whatever interests A may have in the matter, the present point is that if the transaction does not occur, then B will not obtain the benefit from the transaction that she sought.

There are at least three different sorts of reasons that might be offered for the prohibition or invalidation of mutually advantageous consensual transactions. First, it is possible that if we prohibit or refuse to enforce grossly unfair transactions, then A will propose fair (or less unfair) terms rather than choose not to transact with B. This will often occur when A is in a position to secure monopoly rents as in AZT, Unfair Rescue, Lumber, and may even apply to cases, such as Ticket Scalping, when B's position is neither unjust nor desperate nor even unfortunate. We can refer to this as strategic intervention.

Second, we may consider prohibiting or refusing to enforce certain trans-
actions not because of their effects on the parties to the transaction but because of their effects on third parties. It is, for example, argued that pornography has harmful effects on virtually all women because it reduces their perceived value as persons, even if pornography is not harmful, all things considered, for those women who are portrayed in pornography and who are compensated for their services.  

Similarly, it may be argued that permitting or enforcing transactions such as Surrogacy would have harmful effects on women as a class, because such agreements reinforce inequalities of gender, although those transactions might not be harmful, all things considered, to the surrogates themselves, who are compensated for their services.

Third, we may consider prohibiting or refusing to enforce certain transactions not because it would be clearly better for B or for third parties, but because such transactions are immoral, for reasons involving commodification or incommensurability. Such moralistic or perfectionist arguments for prohibition are sometimes made with respect to cases such as Stripper, Organs, Surrogacy, Lecherous Millionaire, Experimentation, and Norplant. Note that unlike strategic intervention, which seeks to encourage a transaction between A and B on fairer terms, moralistic arguments typically maintain that A and B should not transact at all—even if B might reasonably regard herself as better off if the transaction were to occur.

Background Injustice

In some cases, we may be less concerned with criticizing or prohibiting A's proposal than with calling attention to the injustice or wrongness of the conditions under which it is rational for B to accept A's proposal, and with arguing for the repair of those conditions. It is, however, of capital importance to distinguish arguments for the repair of background conditions from arguments for prohibiting transactions given those background conditions.

SUMMARY AND CONCLUSIONS

In the way of summarizing and concluding these remarks, I want to make three general points. The first general point is that the notions of coercion and exploitation can be used to describe several quite distinct worries about proposals and acceptances. For example, I have argued that there is an important distinction between those proposals that distort the rationality of B's decision and those in which B acts rationally and to her own benefit under the objective conditions in which she finds herself. I have also argued that there is an important distinction between those cases in which the alleged coerciveness of A's proposal turns on whether A proposes to make B worse off than B's

29. "The mass production of pornography universalizes the violation of the women in it, spreading it to all women, who are then exploited, used, abused, and reduced as a result of men's consumption of it." Catharine A. MacKinnon, Toward a Feminist Theory of the State 247 (1989).

30. As Debra Satz puts it, "[Surrogacy] contracts will turn women's labor into something that is used and controlled by others and will reinforce gender stereotypes that have been used to justify the unequal treatment of women." Debra Satz, Markets in Women's Reproductive Labor, 21 PHIL. & PUB. AFF. 107, 123-24 (1992).
moralized baseline (as in Extortion) and those in which A acts exploitatively because he takes advantage of unjust or desperate background conditions (as in Lumber), but where A does not propose to make B worse off than B's moralized baseline if B rejects A's proposal and where A's proposal does not distort B's decision-making capacity.

The second general point is that the moral upshots that stem from some worries about transactions may well be different from the moral upshots that stem from other worries. Let us assume, for the sake of argument, that the phrase "coercive proposals" can legitimately be used to describe proposals to violate B's moral baseline, such as Extortion and Drowning, but that it can also be used to describe proposals and acceptances made under conditions of desperation or injustice, such as Surgery, Organs, and Experimentation, but where A would not violate B's moral baseline by making no proposal at all. Still, it does not follow that we should prohibit proposals or invalidate acceptances on grounds of coercion in the latter cases, just because we should prohibit proposals or invalidate acceptances on grounds of coercion in the former cases. To press this point a bit further, consider the following argument:

1. If a proposal is coercive, then its acceptance is not binding.
2. Proposal X is coercive because A threatens to violate B's moralized baseline if B rejects A's proposal.
3. Proposal Y is coercive because, say, its acceptance stems from desperation or unjust background conditions.
4. Therefore, just as the acceptance of Proposal X is not binding on B, the acceptance of Proposal Y is not binding on B.

The problem with the argument is that the characteristics of the type of proposal that underlies the coerciveness assumed by (1) and true in (2) may be quite different than the characteristics that underlie the coerciveness of proposals assumed by (3). Thus (4) does not follow from these premises, even though (2) and (3) are both true, given their different accounts of coercive proposals. Such arguments run the risk of falling into the fallacy of equivocation.

My final general point relates to those proposals that are thought to be coercive because they arise out of desperation or injustice. And here I wish to make three points. First, our propensity to worry about certain transactions may well be an important indicator that the background conditions that give rise to those transactions should be repaired. Second, that B accepts A's proposal under conditions of desperation or injustice signifies nothing with respect to the moral quality of A's proposal and signifies nothing with respect to whether A's acceptance of B's proposal should be regarded as valid or binding. Recall Fair Rescue, Surgery, and POW. In all of these cases it is arguable that B's status quo is so desperate that B has no viable alternative but to accept A's proposal. But there is nothing obviously wrong with A's proposal in any of these cases, and I can see no reason not to regard B as bound by his acceptance of A's proposal. How to determine when agreements born of desperation or injustice should and should not be treated as valid is one of the more important challenges presented by such agreements. Third, whatever our
concerns about the unjust or desperate background conditions under which transactions are made, we must still decide—as a matter of non-ideal theory—whether we want to prohibit or invalidate those transactions that do occur under these conditions, as for example, in Organs. For when the day is done, and on the assumption that A is not required to repair B’s background conditions, we must decide whether B should be permitted to engage in a transaction with A that B reasonably regards as beneficial to B, particularly given that B may reasonably regard efforts to prohibit or invalidate such transactions as adding insult to the injury of her background conditions. We can call A’s offer coercive and/or exploitative, but such labels will not resolve that moral problem.

Having said that, it does not follow that the best moral answer is always to allow A to propose and B to accept any proposal that would be advantageous to B and rational for B to accept. For reasons I have noted in my reference to strategic intervention, it would often be better for B, ex ante, if A were not allowed to make certain proposals to B and if B were not bound by any such acceptance. And that suggests one plausible approach to determining when A should be permitted to make a proposal and when B’s acceptance of that proposal should be regarded as binding, namely, to ask whether, ex ante, B would want A to be permitted to make such a proposal and would want to be held to the terms of his acceptance, ex post. For example, I think that B might well think that if he were to find himself a soldier in the position of being killed or surrendering, he would like A to be able to take him as a POW, and similar things could be said about the offer of life-saving surgery. On the other hand, it is less clear what would be said about Norplant, or Organs, or Experimentation, or Stripper. Again, to say it is less clear is to say it is less clear. Some regard these as easy cases for prohibition. I do not. In any case, if I am right, conceptual analysis of notions such as coercion and exploitation will be of little help.