

ARTICLES

POWER CONFERRING LEGAL RULES AS COERCIVE OFFERS?

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This paper deals with the question of if and to what extent power-conferring legal rules can be treated as coercive and whether the concept of coercive offers can help to substantiate the coerciveness of power-conferring in law. In his recent book, "The Force of Law," Frederick Schauer claims that power-conferring legal rules are coercive.¹ There are several ways to interpret this claim. In this piece I would like to explore one route of interpretation of this interesting and controversial claim, i.e., whether one can use a highly controversial concept of "coercive offers" to substantiate this claim. First, the very concept of coercive offers requires clarification. In fact, there are several distinct ways to interpret it and I explore them below. The second point is whether the coercive offers concept is applicable in the context of the power-conferring legal rules. Two influential theoretical models of coercive offers are analyzed and critically evaluated and their ramifications for the coerciveness of the power-conferring legal rules are demonstrated. In my view, the only possible route to substantiate the coerciveness claim from the vantage point of coercive offers concept is through the distributive non-neutrality of law narrative.

Keywords: coercive offers; threats; proposals; exploitativeness; pre-proposal situation.

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¹ Frederick Schauer, *The Force of Law* (Oxford: Oxford University Press, 2015), Ch. 3.

Table of Contents

Introduction: Coercive Offers Debate

1. David Zimmerman on Coercive Offers

2. Applicability to Power-Conferring Legal Regimes. Critical Remarks

3. Joel Feinberg's Equation of Coercion and Exploitation

4. Applicability of Feinberg's Concept to Power-Conferring Legal Regimes

Conclusion

Introduction: Coercive Offers Debate

Let us first explore the “coercive offers” debate in detail. The basic question was whether an offer can be coercive. The initial examination of this question was made in Robert Nozick’s seminal paper on coercion² in which he denies the fact that offers can coerce. Nozick claims that coercing somebody means diminishing his range of actions. At the same time, to offer something normally means to increase somebody’s options for actions because, prior to the offer, the offeree’s options did not include the offered option. In other words, starting from the baseline of a pre-existing set of options, an offer is definitely an improvement.

Still, the concept of the baseline is far more problematic than it seems at the first sight. In fact, Nozick himself proposes two different baseline concepts. Imagine that a drug dealer who usually supplies a drug for \$20 suddenly says that this time he will only supply the drug if an addict not only pays \$20 but also beats someone up. Judging from the baseline of the pre-existing course of action, this is a threat, not an offer, because, from the standpoint of an addict, his normal pre-existing range of options is diminished.

This solution may make one uneasy. The line of reasoning is a slippery slope: a sadist can tell you that his morbid fantasy is an integral part of his normal baseline. That is the basic reason for the second moral concept of the baseline. Imagine that the drug dealer from the previous case has been arrested and so the situation of an addict has changed drastically: now he cannot “normally” expect that the drugs “are there” for \$20 on an on demand basis. A new dealer offers the drugs in exchange for the addict beating someone up. From the non-moral baseline test this is an offer pure and simple. It is definitely an “improvement” in an addict’s situation, he would not expect such an improvement, etc. Still, it is immoral.

In order to fully explain the point, here is a final case. A slave owner who regularly beats his slave proposes that he will stop beating him if the slave does something

² Robert Nozick, *Coercion in Philosophy, Science, and Method. Essays in Honor of Ernest Nagel* 440 (S. Morgenbesser et al. (eds.), New York: St. Martin’s Press, 1969).

which is not particularly burdensome. Again, from a non-moral “statistical” or “empirical” baseline concept, this is undoubtedly an offer. And still here we feel the same moral confusion. If one is to reject slavery outright, one cannot acknowledge any baseline which includes slavery. In other words, a moral baseline presupposes the inviolability of the moral rights.

Here is the crux of the matter. There can be different descriptions of situations, each implying different concepts of a baseline judging from which the situation has been framed as coercive or voluntary. Nozick shifts frameworks: in one case the normal course of action takes precedence over the moralized account and vice-versa in another:

Sometimes the first takes precedence in determining the status of a proposal, as in the slave-owner case, but this will not always be so. In another case Nozick considers, a drug supplier proposes that he will give an addict the dose he usually sells him for \$20 only if the addict will, in addition, perform some disagreeable task. In the normally expected course of events, this supplier sells the addict the dose for \$20; in the morally required course of events (we shall suppose), he supplies no drug. Nozick suggests that the proposal is a threat. This time, the baseline established by the normally expected, and not the morally required, course of events takes precedence. Why? Nozick suggests that this is determined by Q's preferences. In general, a proposal is an offer only if Q prefers moving from the “pre-proposal situation” to the “proposal situation”; it is a threat if Q strongly prefers not making this move. And, where the morally required and normally expected baselines diverge, the relevant pre-proposal situation is also picked out by Q's preferences. The slave prefers the morally required course of events (he is not beaten at all) to the normally expected course of events (he is beaten); whereas the addict (we may suppose) prefers the normally expected course of events (he gets his dose for \$20) to the morally required course of events (he is not an addict). In each instance, it is the victim's preference which determines which pre-proposal situation determines the status of the proposal itself, and it is the frustration of this preference which makes acquiescence to the proposal a case of unfreedom.³

Another thing is that the concept of “the normally expected range of actions” or options seems to be rather vague. The problem is that the mere fact that a butcher raises the price of meat falls neatly within this description. Should we acknowledge that each and every rise in price is coercive?⁴ In order to overcome this difficulty,

³ David Zimmerman, *Coercive Wage Offers*, 10(2) *Philosophy & Public Affairs* 121, 128–129 (1981).

⁴ Harry G. Frankfurt, *The Importance of What We Care About* 30 (Cambridge: Cambridge University Press, 1988).

Harry G. Frankfurt proposes imposing restrictive conditions. An offeree should be dependent on the offeror due to the absence of any rational possibility to get the required good elsewhere, he should be in need of the good and the offeror should exploit his need and dependency.⁵ The basic problem here is whether we are ready to equate coercion and exploration *tout court*. One can exploit the hard choice, which another has to make, but which he has not created. More than that, such a choice can be created by chance, for which nobody is to blame. Under such circumstances, it is at least inaccurate to state that each case of exploitation is a case of coercion. Coercion normally implies some intentional stance of the coercer in that he creates the situation that coerces. What is more important from our perspective is the shift in focus from the normally expected range of actions and options to counterfactuals. This shift is even more dramatically manifested in Daniel Lyons' and David Zimmerman's papers on coercive offers.

Daniel Lyons created his own methodology, which boils down to the following:

P's offer counts as coercive if 1) P knows that Q is rationally reluctant to give y to P for x; and 2) Either Q knows that he has a right to x from P on easier terms, or Q knows that P would have given x to Q, on easier terms, if the chance had not arisen to trade x for y.⁶

Lyons interprets Nozick as follows:

Nozick said that whenever a seeming offer really involves a threat, it is because the package offered falls short of what might be expected (either morally or customarily).⁷

Lyons clarifies that "what might be expected" is a "minimum transfer price." If the price is sufficiently higher than the "economically rational" minimum transfer price, it is likely to be coercive because the offeror is trying to exploit an existing vulnerability of the offeree and to acquire a surplus to which he is not entitled under normal circumstances.

Grossly oversimplified, Lyons' basic insight follows the lines of Harry G. Frankfurt. He treats each exploitative offer as a coercive one, basically because it is the fact of the offeree's vulnerability to the otherwise (normally) inaccessible offer that makes him accept it. What seems to be the genuine contribution of Lyons himself is a more precise and more technical definition of this "otherwise (normally) unacceptable offer." In contrast to Frankfurt, who applied a relatively vague criterion of "need," Lyons

⁵ Frankfurt 1988.

⁶ Daniel Lyons, *Welcome Threats and Coercive Offers*, 50(194) *Philosophy* 425, 436 (1975).

⁷ *Id.* at 426.

claims that “non-normalcy” means significantly higher than the minimum transfer prices or violation of the previously existing moral right of the offeree (Nozick’s example of the slave owner’s offer fits well here).

1. David Zimmerman on Coercive Offers

David Zimmerman has provided the most sophisticated and thought-provoking analysis of the coercive offers problem. Zimmerman rejects the exploitation and coercion equation, as well as the two-baseline demarcation of coercive and voluntary, but retains, develops and extensively relies on counterfactuals in his analysis of the problem.

In any event, for a coercive offer is not merely an extremely unattractive offer which Q cannot afford to refuse: it is all-important how Q came to be in such a vulnerable position. I would claim that for P’s offer to be genuinely coercive it must be the case that he actively prevents Q from being in the alternative pre-proposal situation Q strongly prefers.⁸

The most important thing to understand about Zimmerman’s concept of coercive offers is that this “pre-proposal situation,” which the offeree strongly prefers, has nothing to do with the actual pre-proposal situation. It is a pure contrafactual. An alternative situation would have taken place, if offeror had not actively prevented it.

In order to elucidate the point, let us take the much-discussed example of the slave owner promising to stop to beating his slave (which he does on a regular basis) in exchange for the slave’s promise to do something which is not particularly burdensome. In this case, the slave does not want to retain the pre-proposal situation. The post-proposal situation is altogether coercive because, from each moral baseline, slavery is wrong from the beginning.

It is somewhat misleading, therefore, to analyze coercion solely in terms of whether or not the move from pre-proposal to proposal situation makes Q considerably worse off, because this does not bring out explicitly the connection between the structure of coercion and unfreedom. The more important (as well as more basic) feature is that Q strongly desires not making the move. Nozick himself implies as much when he talks about situations in which the morally required and normally expected baselines diverge.⁹

Furthermore, Zimmerman claims that the moral baseline is incoherent in itself:

⁸ Zimmerman 1981, at 133.

⁹ *Id.* at 128.

On Nozick's account, the slave-owner's proposal counts as coercive in part because he has a prior obligation to refrain, without conditions, from beating the slave. This invites an explanation of the wrongness of his proposal directly in terms of the violation of this prior obligation: what he should give unconditionally he gives only conditionally. But this explanation makes no explicit reference to the non-moral features which figure in the utilitarian and Kantian accounts of the prima facie wrongness of the coercion itself. To be sure, utilitarian and Kantian reasons can be given for why the slave-owner ought to refrain unconditionally from beating the slave, but it is one thing to say his proposal is coercive because he *violates a prior obligation*, which is itself grounded in either utilitarian or Kantian reasons, and quite another to say that his act of coercing the slave is wrong because it has *those non-moral features* which figure in the utilitarian and Kantian principles. Only the second explanation makes explicit reference to the relevant non-moral features, therefore only the second tells us what it is about coercion that makes it prima facie wrong.¹⁰

So, the task is to construe an unmoralized one-baseline account of coercion, which should not include cases of exploitation pure and simple. The solution is quite remarkable: counterfactuals. The essence is as follows:

My suggestion is that we retain the normally expected course of events as the relevant pre-proposal situation in *all* cases, and then broaden the framework as follows to account for the coerciveness of certain offers. The slave does in fact prefer to move from the pre-proposal situation in which he is beaten every day to the proposal situation in which he is spared the customary beating for performing the disagreeable task, so let us concede, for the sake of theoretical uniformity, that the slave owner is making a genuine offer. We can account for its being a coercive offer by bringing into the picture an *alternative pre-proposal situation* which the slave strongly prefers to the actual one. This suggests a hypothesis: an offer is coercive only if Q would prefer to move from the normally expected pre-proposal situation to the proposal situation, *but he would strongly prefer even more to move from the actual pre-proposal situation to some alternative pre-proposal situation*. The slave, for example, would strongly prefer not being a slave to having a choice between being beaten and being spared a beating for performing a disagreeable task.¹¹

To make this alternative pre-proposal situation more precise, Zimmerman formulates two conditions.

¹⁰ Zimmerman 1981, at 130–131.

¹¹ *Id.* at 132.

First, there has to be some kind of a feasibility condition: in assessing the coerciveness of offers, we do not need to take into account alternative pre-proposal situations which are not possible, historically, economically, technologically, or the like, however much Q prefers them to the actual pre-proposal situation.¹²

The second is the prevention condition:

...the coercive offer is not merely an extremely unattractive offer which Q cannot afford to refuse: it is all-important how Q came to be in such a vulnerable position. I would claim that for P's offer to be genuinely coercive it must be the case that he actively prevents Q from being in the alternative pre-proposal situation Q strongly prefers.¹³

Now, we have finally solved two problems in one go. First, we have got the one-baseline unmoralized framework of coercive offers. Because, even in the most difficult cases, such as that of the slave owner's offer, we can get rid of "violation of the pre-existing moral right (of the slave)" criteria and compare the factual post-proposal situation with the alternative *counterfactual* situation. In order to make sure that this contrafactual is a *real alternative* and not just some fantasy or desire that has no chance of being realized in the real world, relatively strict conditions are imposed on it. What makes the whole scheme even more plausible is that it separates the cases of coercion and exploitation.

2. Applicability to Power-Conferring Legal Regimes. Critical Remarks

These reflections help us to understand why Schauer chose such a strange baseline to assess the coerciveness of a power-conferring legal regime.¹⁴ If the application of a contrafactual, at least under some restrictive conditions, is valid, then why not hypothesize something like a power-conferring regime without restrictions on the form of legal acts? In that case, a power-conferring legal regime with form restrictions would be made up of coercive offers.

In my view, the problem is that a hypothetical situation like that does not fit any of the descriptions of coercive offers which we have analyzed. In "offering" power-conferring legal rules, legal orders do not normally exploit weaknesses or vulnerabilities of the legal subjects to get something from them that they should

¹² Zimmerman 1981, at 131.

¹³ *Id.* at 133.

¹⁴ Schauer 2015, at 28–29.

not or would not have got if not for the said weaknesses and vulnerabilities. The form requirement has an entirely different objective in the standard case: to soften the proof in the court and to assure the seriousness of the intention of the parties involved in the transaction.

That is why one cannot conclude that legal orders intentionally and actively remove some feasible alternative in order to coerce one to “choose” power-conferring rules with form restrictions. The goal of the law is entirely different. There is considerable doubt as to whether most power-conferring legal regimes could have existed without form requirements. In other words, neither the non-prevention, nor the feasibility condition are present.

Still, there exists a possibility to conceptually assert the coerciveness of the power-conferring legal rules from the standpoint of Zimmerman’s theory. One should bear in mind the initial motive of Zimmerman: to clarify the extent to which the capitalist labor market is coercive. This is an old and quite traditional element of Marxist sociology. Interpreted in this context, Zimmerman’s model of coercive offers can be applied to power-conferring legal regimes.

In order to fully understand the theory, let us examine the “non-prevention condition” more closely. Zimmerman assumes that the coerciveness of an offer in the relevant cases means two things. First, the fact that the proposal of the coercer is very inappropriate, presenting a “hard choice” from the standpoint of the coerced. And, secondly, that the whole situation involving this hard choice was totally created by the coercer himself. In other words, it was not bad luck that put the offeree in the hard choice situation but the actions of the offeror himself. Zimmerman illustrates the whole thing using the following case.

Consider the difference between these two cases. A kidnaps Q, brings him to the island where A’s factory is located and abandons him on the beach. All the jobs in A’s factory are considerably worse than those available to Q on the mainland. The next day A approaches Q with the proposal “Take one of the jobs in my factory and I won’t let you starve.” Coercive or uncoercive? B also owns a factory (the only other one) on the island, in which the jobs are just as bad. Seeing Q’s plight, he beats A to the scene and makes the same kind of proposal. Coercive or uncoercive? Let us concede that both A and B make genuine offers, for in each case Q would presumably prefer to go from the actual pre-proposal situation in which he starves on the beach to the proposal situation in which he has a choice between working at a terrible job or starving. Let us also concede that both A and B exploit Q’s misfortune by offering such bad terms. (Whether their terms are unfair we can leave to the theory of justice.) The question is whether they both coerce Q.¹⁵

¹⁵ Zimmerman 1981, at 133.

The difference between the two cases marks the difference between the exploitative offer pure and simple, on the one hand, and the coercive offer, on the other:

The intuitive idea underlying coercion is that the person who does the coercing undermines, or limits the freedom of the person who is coerced, so coercing goes beyond exploiting, however morally objectionable the latter may be. If the island wage-level is unfairly low, then B wrongs the dependent Q in only one way: he offers him an exploitive wage. But A wrongs him in two ways: first, he places Q in a dependent position where he is vulnerable to exploitation, and then he offers him an exploitive wage.¹⁶

In other words, in the case of coercive offers, coerciveness stems from the fact that the offeror has placed an offeree in the situation of a hard choice. When this is not the case, and an offeror simply exploits the preexistent vulnerability of an offeree, there is no coercion. It seems reasonable, because “trade threats” is a model case of coercive proposals.¹⁷ Threats are some evils, e.g., inflicting pain, which are intentionally created by the coercer in order to obtain what he wants from the victim. Offers are proposals of something good and valuable to the offeree in order to obtain what the offeror needs. Coercive offers are a hybrid in the sense that the coercer offered something valuable to the offeree, but it becomes valuable only because the offeree has been placed in a deplorable situation by the offeror himself in order to obtain his consent.

The most interesting thing in the whole story is how Zimmerman applies it to the assessment of the coerciveness of the capitalist labor market:

Whether capitalist wage offers are coercive or not depends on whether an alternative pre-proposal situation is feasible *which is sufficiently better* than the terms of the actual wage offer *and* which capitalists prevent workers from having.¹⁸

A possible description of the feasibility condition is as follows:

¹⁶ Zimmerman 1981, at 134.

¹⁷ By this I mean that threats are biconditional statements, as Joel Feinberg has convincingly demonstrated. Proposals are asserted in the form: “1. If you do Y, then I will do X, and 2. If you do not do Y, then I will not do X,” where the threat is something “bad,” which would be intentionally inflicted on the victim in the case he rejects the proposal (the first prong of the biconditional). See more in Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* 217 (New York: Oxford University Press, 1986).

¹⁸ Zimmerman 1981, at 140.

The main alternative pre-proposal situations *outside* the capitalist framework are various kinds of cooperative and communal enterprises.¹⁹

The word “outside” (italicized by Zimmerman) is key to comprehending the idea. This is not about higher or lower salary proposals within an existing system of a capitalist labor market. Within *that system*, an employee always (or nearly always) has a choice. It is about some other possible alternative system with far better labor conditions, which is economically and technologically possible but non-existent because it is prevented by the capitalists.

Zimmerman is rather cautious about the non-preventing condition in that case:

Various actions and policies within the capitalist framework would count as preventing, and it is clear that most of the important ones involve collective activity, coordinated in one degree or another. (Just how much coordination is required for the satisfaction of the prevention condition is not clear.) For example, capitalists might attempt to depress wage levels by union-busting, or by actively lobbying for “right to work” legislation, or, more subtly, by threatening to move their plants to neighboring regions, or even overseas, where unions are already weak or non-existent. They might oppose an improvement of working conditions by resisting anti-pollution or safety-device regulations. More radically, they might resist attempts to create alternative enterprises outside the capitalist framework.²⁰

This is a rather curious list. The basic problem with it is that it is not entirely clear whether a specific intention, a kind of *animus doli*, on the part of “the capitalists” is required. After all, they could simply strive for better and more competitive business conditions. And the deterioration (or, more accurately, distribution of the surplus between employers and employees which is worse for the employees compared to a possible more equal distribution) for the employees is a side effect of the employers’ activities at best.

Zimmerman is quite aware of this and added:

It might be claimed that this is less a matter of preventing the emergence of a non-capitalist alternative than simply one of not providing the necessary resources, less a matter of capitalist interests harming their non-capitalist competitors than simply of not helping them. This raises difficult issues which I will not try to tackle here. Again, I will rest satisfied with a conditional claim: if this kind of discretionary control of capital resources counts as preventing

¹⁹ Zimmerman 1981, at 140.

²⁰ *Id.* at 143.

the emergence of an alternative non-capitalist pre-proposal situation, then one condition for the coerciveness of capitalist wage proposals is satisfied, but if instead it is a case of not helping a potential competitor, then these wage proposals are, at most, exploitive.²¹

It seems as if there were a certain qualitative difference between Zimmerman's "kidnapping case" and his own assessment of the coerciveness of the capitalist labor market. In the "kidnapping case," the coercive intention to place the victim in a situation of a forced difficult choice between hard labor or starving is evident enough: the very situation of the hard choice was artificially created by the "employer" with the intention of getting what he wants anyway. The second situation with the capitalist labor market as a whole is not all the same. Here, any given capitalist is not responsible for the existence of the "hard choice" of any given employee, i.e., for the existence of the capitalist labor market. In a sense, any capitalist is "coerced" to the same extent to which any laborer is.²² Anyway, in most cases a special intention to coerce (what continental private law scholars used to call *animus doli*²³) is absent from the labor market.

This means that, in the case of the capitalist labor market, coerciveness can be conceived far more broadly so as to include some market activities which are typically considered "business as usual." Take the "discretionary control of capital resources." Capitalists generally control the capital resources, which is a kind of conceptual necessity. If the capital market is closed to "various kinds of cooperative and communal enterprises" precisely because the capitalists want to suppress the alternative and not solely on efficiency grounds, then the situation is similar to the "kidnapping case."

However, the fact is that the capital market is subjected to the same kind of "coerciveness" of efficiency considerations: if something generates value it will be financed anyway. One can hardly "close the capital market" to profitable initiatives, whatever they may be. Efficiency considerations work against biases.

We still need to try and make sense of the analogy between the asserted coerciveness of the labor market, on the one hand, and power-conferring legal regimes, on the other. Power-conferring legal rules are offers in the sense that they

²¹ Zimmerman 1981, at 144.

²² The point was masterfully demonstrated by Lawrence A. Alexander in *Zimmermann on Coercive Wages*, 12(2) *Philosophy & Public Affairs* 160, 162–164 (1983).

²³ A brief and useful presentation of the history of the *actio doli* within the continental legal dogma is one by Hans-Peter Haferkamp in *Historisch-kritischer Kommentar zum BGB. Bd. I: Allgemeiner Teil, §§ 1–240* 1035–1058 (M. Schmoeckel et al. (eds.), Tübingen: Mohr Siebeck, 2003). Prof. Haferkamp is the author of another marvelous piece on the latter development (probably a mutation) of doctrine in the context of German legal doctrine of the 20th century: Hans-Peter Haferkamp, *Die heutige Rechtsmissbrauchslehre – Ergebnis nationalsozialistischen Rechtsdenkens?* (Berlin: Berliner Wissenschafts-Verlag, 1995).

promise benefits, not costs. But while conferring benefits, they define the conditions of their own application restrictively. One cannot simply “come and take” the benefits; one should comply with some formal requirements. These formal requirements are often freedom-limiting.

It would not be completely unreasonable to hypothesize some alternative proposal situation, where the benefits of power-conferring is combined with the absence of formal restrictive “entry conditions.” In other words, it is possible to attempt to apply Zimmerman’s theory of coercive offers to power-conferring legal rules with some formal requirements. In this case everything depends on whether or not it is possible to satisfy feasibility and non-prevention conditions. Only if both conditions are satisfied can one conclude that this alternative arrangement can serve a baseline from which we can say whether the power-conferring rules are benefits or costs.

Feasibility conditions cause many problems. It is really hard to imagine the existence of power-conferring regimes without some legal requirement in the form of legal acts. The form of legal acts requirement is normally indispensable with regard to the values of predictability, legal certainty and the efficiency of administration of justice. This alone makes the feasibility conditions problematic in our context. Still, I think there are at least two important considerations that speak for the plausibility of further research with regard to feasibility conditions.

The first thing one should bear in mind is the widespread doubt about the distributive neutrality of power-conferring legal regimes. Simply put, the problem is as follows: power-conferring presupposes some sort of a distributional scheme that determines who can own what and to what extent goods can be legally owned and by whom. The extent of legal rights is not a matter of natural necessity, nor can it be defined on purely conceptual considerations. If this is correct, one can define the boundaries of legal entitlements in a variety of ways, each of which will be genuinely distinct in its possible impact on the distribution of wealth between different classes of legal subject (owners, creditors, debtors, third parties, etc.). Some legal entitlement schemes will be more beneficial for some classes of persons and more detrimental to others. This is, in brief, the theory of distributional non-neutrality of private law.²⁴

What is even more important from our perspective is that the level of the formality in private law has been considered distributively loaded.²⁵ The more formal the law of the capitalist society, the more it reflects the values of individualism and self-reliance

²⁴ There is an immense body of literature on that subject. The distributive non-neutrality of private law is a key thesis of the Critical Legal Studies Movement. *See, for example*, Duncan Kennedy, *The Rise and Fall of the Classical Legal Thought* (Washington: Beard’s Book, 1975); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41(4) *Maryland Law Review* 563 (1982). For a more mainstream perspective see Anthony T. Kronman, *Contract Law and Distributive Justice*, 89(1) *Yale Law Journal* 472 (1979–1980).

²⁵ Kennedy 1975.

at the expense of a more communitarian version of social relationships. The logic is simple: economic calculability requires the maximum previsibility of each economic agent vis-à-vis the others with regard to his legal duties and rights. This can be best achieved by way of making the boundaries between the legal spheres of different subjects clear cut. This means, first and foremost, that legal acts through which the boundaries being established should be formal, as the artifice of the form makes the boundaries easily recognizable and guarantees the seriousness of the intentions of the subjects of legal acts.

Alternatively, laxity towards form requirements is typical of more communitarian societies where values of mutual help are widespread. Here, implicit duties, duties arising from reliance, etc., are far more present. Under such circumstances, strict form requirements lose their importance because rights and duties are considered the products of the contexts of the mutual relationship of the parties; the boundaries exist but they are not so clear cut.

Even the proponents of the CLS Movement continue to dispute the plausibility of the picture drawn here.²⁶ But let us take the thesis for granted as a hypothesis. In that case, the form requirements of legal acts are not distributively neutral. This means that alternative arrangements with different form requirements can be beneficial to some social groups and detrimental to others. For example, those social groups controlling the legal system can manipulate the form requirements of legal powers to extract rents. This makes the whole picture entirely different. There can be alternative legal arrangements with stricter and stricter form requirements, which really are feasible.

The second point about the feasibility condition is about its relationship to the non-prevention condition. The initial problem with the feasibility condition as Zimmerman models it lies in its partial indeterminacy. Feasible means economically and technologically possible. Such level of abstraction is acceptable for macro-sociological or philosophical research. But it is not particularly convenient in order to determine the baseline for assessment of the coerciveness of the proposal in a concrete case. In a sense, the non-prevention condition helps to bridge this gap. If it is possible to establish that the offeror actively prevented the emergence of an alternative social arrangement (pre-proposal situation in Zimmerman's theory), it is at least quite plausible to suppose that this alternative has been feasible. In other words, the non-prevention condition makes the feasibility condition more determinate and practically operative.

Applied to our case of power-conferring legal regimes, one can state the following: if it is possible to claim that some alternative power-conferring legal regime was actively prevented by those controlling the legal system, then, *ipso facto*, the feasibility condition is established.

²⁶ See, for instance, Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1990), Chs. 2, 3.

Taken together, these two points make the analogy between Zimmerman's concept of coercive offers and power-conferring legal regimes. The distributional non-neutrality thesis demonstrates the possibility of alternative legal arrangements with differential distributional consequences vis-à-vis different social groups. The non-prevention condition helps us pick the relevant (really feasible) alternative from a set of possible socio-legal arrangements.

The key question is in what sense the non-prevention condition is to be interpreted. As we have already seen, Zimmerman is pretty ambiguous on this point. In some cases, "actively prevent" means to act intentionally, perhaps even to commit a crime. This was crystal clear in the "kidnapping case." In other cases, the expression "actively prevent" is anything but an intentional crime.

This ambiguity has been critically reflected by Lawrence A. Alexander in his thoughtful and invigorating analysis of Zimmerman's model of coercive offers.²⁷ Alexander sees three possible interpretations of the non-prevention condition. The first interpretation lies in the distinction between acts and omissions. The very distinction is extremely difficult to sustain. Besides, as Alexander remarks,

...Zimmerman wants to say that B, the non-kidnapping factory owner, does not coerce Q, the kidnap victim, even though B acts to prevent Q from helping himself to the content of B's safe and omits providing Q with money and/or transportation back to the mainland.²⁸

This is particularly true of those cases in which the allegedly "coercive effect" is not attributable to any individual intentionality but is the result of the function of a complex social system. Labor markets, as well as power-conferring (private) legal arrangements are precisely such cases. Let us return to Robert Nozick's slave owner. Here, the mere fact that the slave owner is reluctant to free the slave is a relatively robust example of how mere non-action can be an instance of "active prevention." Is it possible to compare a capitalist in the labor market acting out of self-interest and not supporting "alternative arrangements" for his employees to the slave owner failing to consider freeing his slave? Generally speaking, to what extent is a given capitalist responsible for the freedom-limiting effects of the workings of anonymous and impersonal market structures?

One can probably apply some moral standard of mutual responsibility and care to others, which dominates in a given society. But, as Alexander rightly states, this is not an option for Zimmerman taking into account his firm intention to preserve an uncompromisingly unmoralized model of coercion.

²⁷ Alexander 1983.

²⁸ *Id.* at 162–163.

The only remaining way of drawing the distinction is to say that X prevents Y from obtaining a given preproposal situation if Y would have obtained that situation in a world without X, whereas X merely does not produce Y's preferred preproposal situation if Y could not obtain it in the absence of X. Libertarian liberals such as Nozick are primarily distinguishable from welfare-state liberals such as Rawls because the former do not allow any nonconsensual appropriation of X's body, talents, or labor-assets that would not exist to be appropriated by Y if X did not exist. If, in Zimmerman's island hypothetical, Q's strongly preferred pre-proposal situation would require that B give Q assets that would not have existed had B not existed, then B's refusal to put Q in such a preproposal situation is a case of not producing the situation rather than one of actively preventing it, and B's wage proposal to Q is noncoercive. If Q has an alternative, strongly preferred preproposal situation in which he possesses resources now possessed by B, but resources that are not human products – for example, land, air, and scenic views that could have been possessed by Q had B not existed – then B's refusal to put Q in such a situation is coercive. Of course, the implications of this are uncertain. For instance, if the natural resources are given to Q rather than B, and now B must work at a distasteful job for Q or starve, Q's wage proposal to B will also be coercive. If the resources are split evenly, both B's and Q's wage proposals to the other will be coercive if each strongly prefers the preproposal situation in which he could have possessed all the resources.²⁹

In other words, when it comes to monopolies, the difference between coercion and exploitation, i.e., the cornerstone of Zimmerman's coercive whole offers narrative, fades away completely.

Applied to the power-conferring legal regimes, all this means that they can have a coercive effect in the case of their dominance as a mode of governance within a given society. In other words, when (state law) power-conferring legal regimes outperform and crowd out the previously existing alternative scheme of governance (more beneficial for some social groups at some points), such power-conferring legal rules should be treated as coercive offers.

Interestingly enough, in view of Alexander's extremely smart *reductio ad absurdum* criticism, Zimmerman has made some qualifying remarks precisely on this point:

...note that where P has a monopoly over some scarce resource, whether natural or humanly produced, the only way *at time t* for him to prevent Q from having it, and thus from having Q's strongly preferred preproposal situation, is for him either to refrain at *t* from giving it to Q or to prevent Q at *t* from taking

²⁹ Alexander 1983, at 163.

it. But this means that under conditions of monopoly the distinction I have been so eager to build into my analysis collapses. Is there any way to save it and with it the distinction between coercive and exploitive monopolies? One which comes to mind is to place constraints on *how P came to be a monopolist before t*, so that P prevents Q from obtaining some scarce resource on his own only *if P acted before t* to acquire all of the resource. If, on the other hand, P enjoys a natural monopoly (suppose that all but P's holdings in the resource were destroyed before t), then P merely refrains from giving or merely prevents Q from taking, and is thus merely an exploiter. Note that this way of handling monopolies entails that P's offer is also merely exploitive if he has become a monopolist by being *given* all of the resource.³⁰

But how should one treat the dominance of the power-conferring legal regimes from this angle? One should bear in mind that power-conferring legal rules do not make alternative schemes of governance illegal, or legally impossible by prohibiting them or imposing duties to use only state law because, conceptually, they do not impose duties at all. As I have already mentioned above, power-conferring legal regimes can dominate by outperforming their competitors. Now, does that mean that a monopoly is coercive or purely exploitative? Again, it is not clear. On the one hand, the establishment of the monopoly in question has never been the result of pure chance but implies intentional efforts and reflects cost/efficiency considerations. On the other hand, this competitive result as a whole is not attributable to any individual intent. In other words, everybody uses power-conferring legal regimes primarily because of their competitive advantages, but this widespread utilization of them by most of the population most of the time makes them predominant and supplants their competitors.

All this means that only two possibilities remain. One can agree that the distinction between active prevention and mere omission to support collapses in the context of complex social arrangements, in the case of which power-conferring legal regimes could be interpreted as coercive. But the price seems to be prohibitive for the whole Zimmerman model as the non-prevention condition becomes redundant.

The other possibility is to try to reinterpret the non-prevention condition in a more "classical" intentionalist fashion. In that case, only those social outcomes that have been generated by the purposeful activity of the coercer are to be considered as coercive. However, this is not the case when those outcomes are the effects of the workings of the anonymous dominant social structures. This interpretation seems to be even more problematic for Zimmerman. Not only are the power-conferring legal regimes as well as competitive labor markets non-coercive according to it; that

³⁰ David Zimmerman, *More on Coercive Wage Offers: A Reply to Alexander*, 12(2) *Philosophy & Public Affairs* 165, 168–169 (1983).

the narrative is utterly libertarian. Ironically enough, the non-prevention condition seems to be redundant either. In this case as well because it has been reinterpreted into *animus doli*.

In other words, Zimmerman's model of coercive offers, ingenious as it may be, is incoherent on its own terms. Consequently, we should state that it cannot be applied to justify the coerciveness of the power-conferring legal rules thesis.

3. Joel Feinberg's Equation of Coercion and Exploitation

Still, the list of possible justifications is not exhausted. The fact is that the fundamental source of the incoherence of Zimmerman's model of coercive orders lies in its basic insight: to discriminate between purely exploitative and non-coercive offers, coercive exploitative offers and coercive threats. Traditionally, there existed only a dichotomy, not a trichotomy. The sole question has been whether one should treat each and every offer as voluntary and each and every threat as coercive. Or whether one should acknowledge the parallel co-existence of the two pairs, i.e., threats/offers and coercive/voluntary. In that latter case, offers could be coercive not only in the paradigm case of a threat, but also in some other cases, for instance, in the case of exploitation of some vulnerabilities of the coercee.

The uniqueness of Zimmerman's theory of coercive offers lies in the fact that Zimmerman models his coercive offers according to the "threat pattern." Namely, pure exploitative behavior is not sufficient to make an offer coercive. One needs much more to "move" an offeree somehow to face rather a hard choice. This is basically the point of Zimmerman's non-prevention condition. As we have seen, its crucial function is twofold. First, it serves as a proxy for the feasibility of the offeree's pre-proposal situation. Second, it makes the difference between coercive and purely exploitative offers clearer. In both cases an offeree is faced with a proposal which enhances his freedom in the sense that he now has more options to reflect upon than before the offer was made. And in this respect offers, both standard, exploitative and coercive, differ from threats which are freedom-limiting and diminish the range of the possible options of an offeree. What distinguishes coercive from exploitative offers is that, in the first case, an offeror has artificially created a hard choice for an offeree by "actively preventing" him from moving to a less dramatic pre-proposal situation. As Alexander has demonstrated, this distinction between active prevention and mere exploitation collapses precisely in the context of the workings of complex social systems. Under circumstances like this, the most plausible alternative would be to treat only (freedom-diminishing) threats as coercive and each and every (freedom-enhancing) offer as voluntary. In this case, the mere fact of the exploitativeness of an offer is not considered as coercive and it goes without saying that, in that case, all power-conferring legal regimes are treated as non-coercive.

But there is another possibility: to treat all exploitative offers as coercive. This seems to be the viewpoint of Joel Feinberg. Feinberg thinks that only “uncritical acceptance of the dogma that coercion *must* have an immediate effect on restricting freedom on balance”³¹ make us suppose otherwise.

Suppose opportunistic A holds out to unfortunate B the prospect of rescue or cure – but for a price. B is in an otherwise hopeless condition from which A can rescue her if she gives him what he wants. He will pay for the expensive surgery that alone can save her child’s life provided that she becomes for a period his mistress. A thus uses his superior advantages to manipulate B’s options so that she has no more choice than she would have if a gunman pointed his pistol at her healthy child’s head, and threatened to shoot unless she agreed to become his mistress. The difference between the two cases, of course, is that the lecherous millionaire makes no unlawful *threat*.³²

Still, such proposals are coercive offers:

They appear to be coercive in that they rearrange a person’s options in such a way that he “has no choice” but to comply or else suffer an unacceptable consequence. They are offers because the proposer does not threaten any harm beyond what would happen anyway without his gratuitous intervention.³³

The most interesting point in Feinberg’s analysis is that he thinks coercion can be freedom-enhancing:

A’s purpose is to force B to do what A wants, so when thought of as an instrument for achieving A’s goals, his offer is an exercise of coercion. From B’s standpoint... her only choice is a coerced one – sleep with me or your child dies – so there is a real point in characterizing A’s offer as coercive. She must now do as he wishes. Yet there is also a point in B’s welcoming an option she did not have before. Hence from B’s standpoint, the description “freedom-enhancing coercive offer” is entirely felicitous in having this double point...³⁴

Feinberg acknowledges several problems with this description. First of all, as he claims himself, there exists a difference between the model “gunman case”

³¹ Feinberg 1986, at 233.

³² *Id.* at 229–230.

³³ *Id.* at 230.

³⁴ *Id.* at 233.

of coercion³⁵ and the cases of purely exploitative “coercive offers.” He lists three conditions of coerciveness: the coercive effect on B’s choice, coercive intent and the coercive mechanism employed to achieve the intended effect. The first two conditions are present in the cases of purely exploitative coercive offers:

In the lecherous millionaire example there is surely coercive intent, since A’s purpose in making his proposal is to force B to do his bidding. Equally surely there is coercive effect, since B is left with a forced choice between evils, one of which is extreme and intolerable to her, and therefore “ineligible,” while the other, that favored by A, is highly repugnant but the lesser of the evils has to choose between.³⁶

The basic problem lies in the lack of the third condition:

What is not as clear is whether the mechanism used by A to achieve his intended effect on B is of the proper sort to be called “coercive.” In the paradigm cases, the coercive method involves active manipulation by A to limit B’s options, thus creating the very circumstances that A intends to exploit in order to make his subsequent offer effectively coercive. In the borderline cases we can also ascribe some “manipulation” to A, but no active intervention in B’s affairs to limit B’s options and thus create the exploitable circumstances. In these cases, A is an opportunist, not an arranger, so very likely his manipulations are not active enough to satisfy the initial defining conditions of the “coercive mechanism.”³⁷

Simply put, Feinberg’s solution is to ignore the difference. He thinks that the problem cannot be resolved “on purely conceptual grounds.” But why so? The second idea is that coerciveness does not necessarily invalidate the consent of an offeree. An offer can be coercive but not necessitate involuntary acceptance due to coercion:

Active coercion which both creates and exploits a situation of vulnerability always reduces voluntariness, typically to the point where consent is invalid, whereas offers that exploit a condition already made also reduce voluntariness, but usually not to the point where consent is invalid.³⁸

³⁵ A gunman with a gun says: “Money or life.”

³⁶ Feinberg 1986, at 247.

³⁷ *Id.*

³⁸ *Id.* at 248.

But what function will such a coercion concept serve? It has long been asserted that coercion contexts vary.³⁹ One can probably claim that there is one set of conditions for the coercion concept to fulfill its function in the context of the invalidation of the coerced choices and quite another set of conditions in the context of the justification of coercion by the state through legal institutions. But the peculiarity of power-conferring legal regimes is precisely that they lie at the intersection of the both sets of conditions, and this is the most interesting thing about the power-conferring legal rules.

On the one hand, power-conferring law is law. And, as (state) law, it is in need of justification, as it imposes itself and is mandatory and coercive in one sense or other. On the other hand, power-conferring is optional conceptually. In that sense they resemble offers, not threats. So one cannot simply discriminate between two contexts of application of the coercion concept with different conditions of assertability for each. Ironically, precisely this problem was raised by Feinberg and Zimmerman from with regard to the coerciveness of the capitalist labor market. Here we too have anonymous social structures that determine the sets of options and the extent of voluntariness with which the market actors are faced. This conditioning cannot be attributable to somebody's malice or even individual intent. The "leftist" general premise to question the voluntariness of labor market outcomes in purely exploitative contexts explains why the term "coercive" was retained by both Feinberg and Zimmerman with all its connotations, whether pejorative or not, and still raises legitimacy issues.

4. Applicability of Feinberg's Concept to Power-Conferring Legal Regimes

Let us test the level of coherence of this unitary concept of coercive offers. First of all, it eliminates the non-prevention condition of Zimmerman's model and makes every exploitative offer coercive. But at a price. From a vantage point like that one simply cannot equate coercion to limiting freedom as offers do not limit freedom. This "quantum" of coercion has been preserved even in Zimmerman's model, not to mention the traditional that only threats are coercive because they limit freedoms. Now, what is the coercion "quantum" if not a limitation on freedoms according to Feinberg? Feinberg writes that the basic problem with coercive offers is that an offeree is faced with a forced choice between undesired or even unbearable alternatives. But most people have to make hard choices between undesirable alternatives. What makes a hard choice coerced? If one is threatened, i.e., intentionally placed in a situation involving a hard choice between evils, or even evil and good, where the whole situation of the choice is artificiality created, the case is relatively simple.

³⁹ Grant Lamond, *The Coerciveness of Law*, 20(1) *Oxford Journal of Legal Studies* 39, 47–51 (2000); Mitchel N. Berman, *The Normative Functions of Coercion Claims*, 8(1) *Legal Theory* 45, 46–50 (2002).

But, in our case, the coerciveness steams from the fact that an offeree is placed under a choice between a totally unacceptable and unbearable result and a less undesirable alternative, created by an offeror. The difference is that, in the first case, a coercee would not have to make a hard choice at all and, the second case is very different in that the least desirable alternative offered is the only way to escape the totally unacceptable result for which nobody is to blame. What both cases have in common is not that the coercee is placed in a position that necessitates the making of a difficult choice. The real common denominator is that both coercees experience considerable psychological pressure.

Purely psychological accounts of coercion are not particularly good for several reasons. First of all,

there does not appear to be a psychological distinction, from the standpoint of voluntariness, between fear, desire and other motivating conditions. Even behavior motivated by fear is typically characterized as free, as when the agent escapes some dangerous condition. Thus, being motivated by fear or the instinct for self-preservation is not sufficient for a claim of involuntariness. Indeed, it is not clear how behavior motivated by desire, fear or any other conscious motivation could ever be involuntary in the sense that it is not volitional.⁴⁰

Secondly, purely psychological theory of coercion is unable discriminate a purely coercive context (whether coercive threats or coercive offers) from cases of simple offers. In the last case, an offeree is faced by an extremely profitable and irresistibly attractive offer. In such a case the psychological pressure can sometimes be even more intense than in cases of a choice between two "evils." In that sense, purely psychologically, it is also the case of a "hard choice." Feinberg rejects this intuitively implausible implication of the pressure theory. The problem is that he makes this rejection a pure stipulation: offers which are coercive by definition are only those offers which place an offeree in a situation in which he must choose between two "evils" (which, nevertheless, increases his freedom), not "goods."

Returning to the lecherous millionaire case, Feinberg claims the following:

it suffices now to remind the reader of the manner in which the lecherous millionaire did intervene. He did not himself produce the child's possibly fatal ailment, nor did he cause the price of the remedial surgery to be so high. But he did alter B's options in a sufficiently manipulative way to warrant our use of the metaphor of new track construction. His role was not entirely passive. It cannot be far off the mark then to call his proposal both an offer and coercive.⁴¹

⁴⁰ John L. Hill, *A Utilitarian Theory of Duress*, 84 *Iowa Law Review* 275, 293 (1998–1999).

⁴¹ Feinberg 1986, at 232–233.

Here, a second criterion for the coerciveness of an offer is added: its exploitativeness. So, an equivalent of Zimmerman's non-prevention condition, i.e., a second party's intentional influence on an offeree's set of choices, is added to make coerciveness more precise. The problem is that second party influence results not in limiting, but in enlargement of an offeree's set of choices. Precisely what makes such offers coercive? One can speculate that the terms of this new proposal could be less exploitative, and that is the main problem. But in that case the real source of the coerciveness concept is a moral theory (perhaps, a more communitarian and a less individualistic moral theory). This is a result which Feinberg would like to avoid, so there is considerable doubt on whether the theory is coherent enough.

But how can all this be translated into the coerciveness of the power-conferring legal regimes which is my main concern? The alleged distributional non-neutrality of power-conferring legal regimes can be seen as an equivalent of an "altering of options in a sufficiently manipulative way." In that case, a distributionally non-neutral power-conferring legal regime can be considered as coercive offers in Feinberg's sense. At the same time, if the choice has not been manipulated, as in the case of form requirements for legal acts, i.e., Schauer's case there is no coercive offer even according to Feinberg's relatively wide coerciveness concept. In other words, *if* one ignores the inconsistencies existing within Feinberg's theory *and* treats distributionally non-neutral power-conferring as a kind of exploitation, one can conclude that some egalitarian power-conferring regimes are coercive.

The problem, however, has been transferred into the realm of the theory of distributive justice, i.e., into the *normative realm*. In other words, one changes the whole focus: instead of asking whether an act is coerced, one asks whether it is *fair* to treat an act as voluntary.

Conclusion

The major difficulty with the applicability of the coercive offers concept to power-conferring through law is that the very concept is a highly contested and partially indeterminate one. The two most impressive and sophisticated versions of the concept are David Zimmerman's and Joel Feinberg's. Both of these can be utilized to defend the claim of the coerciveness of power-conferring legal regimes. However, neither can escape the considerable normative load reproach. In my view, the only possible route to substantiate the coerciveness claim from the vantage point of coercive offers concept is through the distributive non-neutrality of law narrative. This is also a highly disputable frame of reference. Determining to what extent it can be successfully applied requires further research.

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