

COERCION

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The concept of coercion figures in the philosophy of law in two main ways.

The first way casts coercion as an essential, defining element of *law*, or of *a law*, or of a *system* of laws or some combination of the three. I will call this first way the explanatory use or the explanatory sense of the concept of coercion. When I refer to the explanatory use or sense of the concept I mean to include uses intending not as much to explain as to describe or mark off law from other phenomena, or a law or legal system from another. Although coercion is a concept that figures into a variety of specific doctrines within the law—e.g., in criminal law: the duress defense, the offense of extortion; in contract law: to negate elements of formation and modification—this chapter will not discuss them.

The second main way seeks not to explain or to describe law but is concerned with the need to *justify* the coerciveness of law, laws or legal systems, once it is assumed or concluded that coercion is either a necessary feature of law, laws or legal systems, or that it is a contingent but pervasive feature of laws or legal systems. (I assume here that the nature of law itself has no contingent features, but only necessary ones.) The second way encompasses challenges to the justification or legitimacy of laws and legal systems as well as efforts to meet such challenges. (The nature of a thing, such as law, cannot stand in need of or receive a justification—unless its nature requires that it be actualized. The concept of law is not necessarily instantiated, for the world might have existed and may yet exist without containing any laws or legal systems or anything else answering to the concept of law.) I will call this second way the normative use or sense of the concept of coercion.

The Explanatory Use of the Concept of Coercion

The explanatory uses of the concept of coercion that I will discuss cast it as an essential, defining element of law, a law, or a legal system or some combination of the three. One might say that no social phenomenon can count as a legal system unless it employs coercion. One might say that no rule can count as a legal rule unless it is connected to some coercive sanction against violations. One might say that no theory of law can be adequate unless it explains how law and coercion are related. One might deny all of these three things (cf. Schauer 2011: 610–21); or one might say any one of these three things and deny the other two, for they are logically independent. One might say, for example, that an adequate theory of law will have to say something about the relation between law and coercion, while denying that a legal system necessarily employs coercion, and also denying that every law of a legal system carries a coercive sanction.

Or one might say that law itself can be understood without relying on the notion of coercion, and that laws need not carry coercive sanctions, but go on to deny that legal systems can be individuated one from another without taking account of their respective coercive reaches or purported reaches. Or one might say that no rule can be a legal rule unless it is connected with an authorization to use coercion if the rule is not followed, but go on to say that coercion has nothing further to add about the unity of legal systems or the nature of law.

Consider law itself, laws and legal systems as three distinct foci of concern. Coercion may and has been used as an explanatory notion with respect to any or all of these in any combination, and so combined with (or perhaps without) logical consistency. Hans Kelsen, the preeminent legal theorist of the twentieth century, held that norms are legal norms only if they are coercive (Kelsen 1945/1961: 19). By this he meant that a scientific account of the content of a legal system would necessarily consist of a set of statements of the following hypothetical form. The antecedent of each such hypothetical will specify a condition, and the consequent a coercive sanction that is authorized or required in case the antecedent condition is met. Such a statement, or *rechtsatz*, could take this form: "If anyone murders another, then that person ought to be executed." Execution is the coercive sanction. The norm of law described by jurisprudence—the science of law—need not be of hypothetical form, and need make no reference to a coercive sanction. If the norm is expressed in a statute, it might simply state: "The penalty for murder is death." The legal norm is not to be confused with the scientific statement of the content of the law. The latter makes essential reference to coercion, or so Kelsen believed, while the former need not. Legal theory, whose task is not to inventory the legal norms of any given system of law, but to explain how those norms are both valid and a unitary system, has no further use of the concept of coercion. So, to summarize (while oversimplifying) Kelsen's view, coercion is an essential element in the scientific statement of the content of a legal system, and in that sense a legal system is necessarily coercive. A legal norm itself need not employ the idea of coercion. But no norm is a legal norm unless it is both valid—that is, authorized by some superior norm—and a condition of a coercive sanction.

Kelsen's account of law employs a conception of coercion that is roughly equivalent to the idea of compulsion. This usage sets him apart from recent Anglophone theorists, who distinguish between coercion and compulsion (but cf. Anderson 2008). Coercion, according to the currently dominant view, is properly understood as involving a threat, or an expression of some undesired consequence to be brought about if, but only if, the addressee fails to do as commanded. Coercion differs from altering another's behavior by issuing a warning, in that the coercer at least pretends to have control over the occurrence of the undesired outcome (Nozick 1969). John Austin's (nineteenth-century) account of law was founded on the concept of coercion as a threat—law was properly defined as a set of orders from a sovereign, given under threat of sanction, to subjects who habitually obey (Austin 1954/1832). Both Kelsen and Austin are key figures in the history of legal positivism. Both believed that coercion had an essential role in what we call law. But they had different ideas of what coercion is, and where it figures in.

For Kelsen, a statement of law describes a condition, a "delict," the occurrence of which requires, or authorizes, some official to compel the delinquent (or someone suitably related to the delinquent) to do something or undergo something. The legal norm described by a true legal statement need not be addressed to the potential delinquent

at all—although frequently legal norms have and are meant to have that effect. For Austin, on the other hand, a law is just an order backed by a threat. (The threat might be a threat to use force to compel conformity, but it need not be: it might be a threat to bring about some unpleasant consequence.) If Rex, the sovereign, merely authorizes some subordinate to apply force to a subject should the subject behave in a certain way, then what all that amounts to is not a law, at least not in the strict, proper and primary sense. Obviously, if Rex's subordinates conspicuously apply force with some regularity to a certain type of behavior, his subjects are likely to come to regard themselves as ordered not to behave in that way. Austin could consistently count that situation as adding up to an order backed by a threat, and hence a law. But Austin viewed the order backed by a threat as the "positing" of law, whereas Kelsen saw the legal norm to be accurately describable without reference to coercion in Austin's sense. Duly authorized compulsion was enough.

Which conception of coercion better explains what law is: Austin's notion of coercion as threat, or Kelsen's notion of coercion as compulsion? This essay will not take a position on that, but it is worth noting that more recent legal theorists have been more of Austin's mind than Kelsen's on this point. Lon Fuller, a natural law theorist, insisted that making law involves more than merely authorizing force. Law, in Fuller's view, is essentially a public direction to all citizens subject to law, and is therefore not in essence duly authorized compulsion (Fuller 1964). H. L. A. Hart, a critic of both Austin and Kelsen, conceived of law as in essence a matter of rules, and of rules, in turn, as human practices, organized in a distinctive way, having both an internal and an external aspect (Hart 1961). A rule can be said to exist only if someone views it as a standard of behavior, such that lapses from that standard are subject to criticism. But not everyone subject to a rule need view it that way. Distinctively legal rules, however, are backed by authorizations to apply "serious social pressure" to assure conformity. By social pressure, Hart did not mean to confine law to the application of force, at least not proximately. Law takes hold in a society when a certain set of rules of conduct are recognized and insisted upon as binding, in the sense that nonconformity may be met with serious social pressure to conform. The greater the degree to which "physical sanctions are prominent and usual," the more inclined one will be to regard the rules as forming a "primitive or rudimentary" legal system, even though these sanctions be "neither closely defined nor administered by officials." But a legal system and laws, in a robust sense, depend upon the presence of "secondary" meta-rules identifying the rules of conduct that are enforceable by serious pressure, providing for the introduction and retirement of rules so sanctioned, and—most importantly—rules governing the resolution of disputes involving the "primary" rules of conduct. It is this (distinctively organized) serious social pressure antecedent to the unwanted conduct that marks the existence of a legal rule, and that rule's membership in a legal system.

For Hart, it is a mistake to think that coercion, in either Austin's threat sense or in Kelsen's compulsion sense, is essential to any particular rule or norm or command counting as a law. A rule may for example empower private parties to make binding agreements, or may disable a legislative body from regulations in some field, without failing to be law. But Hart agreed that coercion, at least in the sense of serious social pressure (forms of which may be culturally various, and need not include what we would describe as physical compulsion) was an essential part of any legal system and, to that degree, an essential part of an adequate theory of law.

The Normative Sense of the Concept of Coercion

It is important not to confuse the explanatory enterprise of showing law to be more than and distinct from mere coercion from the normative enterprise of redeeming the apparent coerciveness, or coercive element or dimension, of law. That law is coercive as a straightforward matter of descriptive fact is a commonplace view (Lamond 2000: 39). The coerciveness of law as a descriptive matter is often invoked as a way of introducing or of framing the question whether the state—regarded as a legal system effective in some territory—can be morally justified, and the (separate) question of whether law imposes a moral obligation of obedience. As John Rawls put it, “political power is always coercive power [and] this raises the question of the legitimacy of the general structure of authority” (Rawls 1993: 136–37). In particular, the assumed coerciveness of law, as a descriptive fact, is often taken to frame the questions of justification and legitimacy in a way that casts a burden of proof upon the defender or apologist for the state. Hart, for example, wrote, “We are committed . . . to the general critical principle that the use of legal coercion by any society calls for justification as something *prima facie* objectionable” (Hart 1963: 20–21). The rhetorical significance of casting the burden of proof upon the state is that the issues of justification and legitimacy are to be decided against the state, in case the argument in favor is inconclusive or contestable. The defender of the legitimacy of legal authority thus bears a “risk of non-persuasion” (Gaskins 1992) that the skeptic does not. Moreover, even if the apologist for the state succeeds in carrying this burden, many will maintain that the “objectionable feature that attaches to each instance of coercion persists even after a demonstration that the particular deprivation of freedom is justified [for it] is simply *outweighed* in such cases” (Husak 1983: 355, emphasis in original; see also G. Dworkin 1968).

The thought that the defense of the state has to bear a burden of proof has also influenced the kind of justification that political philosophers have believed to be required. In particular, many prominent twentieth-century philosophers have believed that the inherent coerciveness of law entails that any adequate defense of the state must command unanimous assent, at least at some level. The clearest statement of this unanimity requirement is put forward by Thomas Nagel: “In view of the coercive character of the state, the requirement [of unanimity as at least to some “higher-order principle”] becomes a condition of political legitimacy” (Nagel 1991: 150–51). But a similar stringency can be located in the work of Rawls, and Jeremy Waldron finds common to a wide range of liberal, libertarian and socialist theories the “requirement that all aspects of the social world should either be made acceptable or be capable of being made acceptable to every last individual” (Waldron 1993: 36–37). It is perhaps worth noting also a curious way of running this requirement in reverse: legal theorist Ronald Dworkin identifies the law of certain legal systems (i.e., those of most English-speaking countries) with whatever would justify—at least to an ideally perspicacious mind—their past applications of coercion. Whatever at a given time “figures in or follows from” the most attractive account of the legal history and practices of a given polity is identical with its law at that time (R. Dworkin 1986: 225). From this idealized judicial perspective, the law of modern Anglophone nations (if it exists at all) is necessarily coercive, but also necessarily justifiably and legitimately so.

What is it about coercion and, particularly, state coercion, that is “*prima facie* objectionable” (Hart) and such as to demand of it a special justification not required of run-of-the-mill human activity? This question—a foundational one for political philosophy

of the Rawlsian era—was the focus of Robert Nozick's attention in a 1969 paper, titled simply, "Coercion." This is the seminal article in the field, and the diligent reader might wish to put this chapter to one side until she has read and digested what Nozick had to say. The paper was intended as "a preliminary to a longer study of liberty, whose major concerns will be the reasons which justify making someone unfree to perform an action, and the reason why making someone unfree to perform an action needs justifying" (Nozick 1969: 440). That "longer study" was *Anarchy, State, and Utopia* (1974). It did not address the question "why making someone unfree to perform an action needs justifying," but instead assumed that "the anarchist claim that in the course of maintaining its monopoly on the use of force . . . the state must violate individuals' rights and hence is intrinsically immoral" (Nozick 1974: xi) was sufficiently compelling to serve as a premise.

Analyzing the Concept of Coercion

Assessing the normative sense that the concept of coercion has been assigned must wait upon further analysis of the concept itself. This analysis can best proceed by concentrating on a canonical form of the *coercion claim*, and the contexts in which such a claim might be asserted or rejected. A coercion claim is any statement approximately equivalent to one of the form:

By ϕ ing, person A coerces or attempts to coerce person B into ψ ing.

The ϕ ing by A will typically involve a declaration or threat of conditional form, which can be termed the *coercive proposal*. "Proposal" is meant to be a morally neutral term. Some writers have thought it important to distinguish threats from offers, and to analyze coercion claims in terms of threats; but the more promising approaches have avoided being drawn into disputes about where and how the line between threats and offers is to be drawn. Coercion claims—including statements that someone has been coerced or subjected to coercion—can occur in one or more of three distinct kinds of context. Coercion claims in these types of contexts at least potentially raise questions about justification. The three can be called, respectively, *justification-supplying*, *justification-defeating* and *justification-demanding* contexts.

A coercion claim occurs in a justification-supplying context if the claim is offered in order to satisfy a demand for justification of another action that need not itself be coercive, but could be. "I was coerced!" is a representative coercion claim made in a justification-supplying context: it functions as an excuse more often than as a straightforward justification. An affirmative defense of duress raised to avoid criminal liability creates this kind of context. The proper dimensions of the duress defense in criminal law are a matter of controversy; and it might be argued that a coercion claim can never, in and of itself, supply a justification for wrongdoing, as opposed to a mere excuse (a distinction whose import is, itself, a matter of dispute).

A coercion claim occurs in a justification-defeating context if the claim is made in order to negate a justification of consent to what would otherwise be wrongful. If, for example, an alleged rapist protests that his victim consented, then a coercion claim by or on behalf of the victim may be made in order to defeat that justification. The justification-defeating use of coercion claims is not unfamiliar to political philosophy: it is a standard rejoinder to consent theories of political obligation. In law and morals generally, consent is ineffective if coerced. Opponents of the Lockean idea that the

governed at least tacitly consent to obey the state's authority are quick to point out that most citizens have no real alternative to those actions said to betoken consent, such as remaining in the territory of one's birth, or receipt of benefits such as a stable currency, public rights-of-way and defense from foreign invaders. Nothing more will be said here about coercion claims in justification-defeating contexts, for the central importance of the concept of coercion has to do with coercion claims in justification-demanding contexts, to which I now turn.

A vivid sense of a justification-demanding context of a coercion claim can be gotten by considering hypothetical cases such as the following:

Highway Robbery

Gunman stops Traveler on the highway and threatens to shoot Traveler if Traveler does not surrender Traveler's wallet. Gunman's proposal is *coercive*. Traveler gives up the wallet. Traveler has been *coerced*.

In a case such as Highway Robbery it should be clear that the coercion claims are true, and that Gunman's conduct stands in need of justification. Moreover, it seems obvious that precisely the same features that make Gunman's conduct coercive ground the demand for a justification. Compare the following case:

Tax Statute

A state enacts a statute providing that anyone who fails to pay taxes duly assessed is guilty of a felony punishable by a term of imprisonment. The initial intuition registered by many is that the statute is a *coercive* proposal, and that those who pay are *coerced*.

The analogy between Highway Robbery and Tax Statute is imperfect, but is widely believed to be close enough to support the commonplace belief that the claim that the state is coercive is both true and sufficient to ground a demand for a justification. Normally the state can provide a justification, most would be quick to add, if the taxes are assessed fairly and go to benefit the payor. Gunman, on the other hand, normally cannot provide a justification but, in unusual circumstances, might be able to: if for example Gunman was hoping to foil a terrorist plot in which Traveler was an unwitting accomplice. A good justification would not, however, alter the fact that, in both the Highway Robbery case and the Tax Statute case, coercion was involved.

The fact that coercion claims can create, or occur in, each of the three types of context does not in itself foreclose the possibility of a univocal semantic analysis of the concept of coercion (but see Berman 2002). Following on some of Nozick's suggestions, and drawing upon a body of legal examples, political philosopher Alan Wertheimer has offered an influential "two-prong" account, which (as modified below) will be the focus of much of the discussion here:

A coerces B to ϕ if and only if A makes a proposal to B which (1) creates a choice situation for B such that B has no reasonable alternative but to ϕ and which (2) is pro tanto wrongful of A to make.

One immediate objection to this analysis is that it unduly restricts coercion to circumstances in which a proposal is involved. Mitchell Berman, admitting that most cases

involve proposals, i.e., conditional threats, nonetheless finds this feature inessential. He poses a case in which person A wants to make sure that another person, B, is not in B's office at 2:00 pm. A therefore plants a bomb at B's house set to detonate at 3:00 pm, leaves town, then calls B with instructions on how to defuse the bomb in time. *Pace* Nozick, A, in calling, does not make a proposal, for A has no further control over the bomb. But A has coerced B, because "A's course of conduct seems functionally and morally equivalent to [the paradigmatic] case of a [wrongfully coercive] conditional proposal" (Berman 2002: 51–52). On Nozick's behalf, one might insist that there is both a functional and moral difference: in the example, A lacks further control. In cases of coercion, the coercer exercises continuing control (Yaffe 2003). Coercion involves the coercer's declaration that his will is to prevail, or else. Trickery and manipulation, though objectionable and usable to achieve the same ends, do not involve one actor humbling another in a contest of wills.

More widely voiced objections go to other aspects of Wertheimer's schema. For convenience, I adopt Wertheimer's terminology and refer to condition (1) as the "choice" prong and to condition (2) as the "proposal" prong. The choice prong reflects the commonsense idea that one cannot be coerced, properly speaking, unless one's range of options has been constrained in a significant way. If, in the Highway Robbery example, Gunman had proposed to pinch, rather than to shoot, Traveler, the case would not count as one of coercion even though it is wrongful of Gunman to propose either.

The "proposal" prong is more controversial. Its inclusion makes the analysis a conspicuously "moralized" one (although determining the reasonableness of alternatives, under the "choice" prong, may call for moral judgment as well). A moralized analysis is what one would expect of coercion claims that have a justification-demanding sense, and it is consistent with intuition. As Hans Oberdiek writes:

Coercion is a *moral notion*. [L]ike deception, wantonness, [and] bribery . . . coercion embodies a moral assessment: insofar as an act or institution is coercive, it is morally unjustified and therefore stands in need of a moral defense or excuse. At the same time, coercion is an incomplete moral notion, since truly describing an act or institution as coercive does not conclusively settle its moral unjustifiability, though it does place a definite *onus probandi* on anyone who wishes to defend or excuse the act or institution.

(Oberdiek 1975: 80, emphasis original)

The correctness of moralized analyses of coercion has been a matter of extensive debate (see, e.g., Frankfurt 1973; Ryan 1980; Zimmerman 1981 and 2002; Murphy 1981; Alexander 1983). Before exploring this issue, it must be clarified that normally what makes a proposal wrongful is the wrongfulness of what Vinit Haksar has usefully called the coercer's "declared unilateral plan" (Haksar 1976: 68). In the Highway Robbery example, Gunman's proposal is to shoot unless given the wallet, and the declared unilateral plan is to shoot unless put in possession of the wallet. It is wrongful to shoot, and therefore wrongful to propose to shoot unless put in possession of the wallet. Under this description, the wrongness of making the proposal derives straightforwardly from the wrongness of shooting. But in other cases the wrongness of the proposal does not derive from or depend upon the wrongness of the declared unilateral plan. Blackmail is an example. Blackmail consists in a coercive proposal to publish embarrassing information unless some condition is met, usually a payment of money. But publishing embarrassing

information need not, itself, be wrongful, and in some circumstances might be laudable or even a duty. Nonetheless, blackmail is classified as coercive.

Thus, although the quality of the declared unilateral plan often determines whether or not a proposal is pro tanto wrongful, this is not always the case, and the critical issue is whether the proposal (i.e., the proposing, the act of making the proposal) is pro tanto wrongful. This suggests a vivid way of evaluating the proposal. Compare the proposee's pre-proposal to his post-proposal situation: if it is pro tanto wrongful of the proposer to move the proposee away from the proposee's pre-proposal baseline, the proposal is pro tanto wrongful. The usefulness of this framework is plain when it becomes necessary to distinguish coercion from hard choices one must make because of unwelcome proposals by others. Many, though not everyone, will register the distinction. To bring it into relief, consider whether the following case is one of coercion:

Hard Bargain

A learns that B, whose train has derailed, is about to miss a steamship connection that is essential to B's avoiding a huge monetary loss. A proposes to carry B to portside on A's elephant, but only on condition that B buy the elephant for a large sum. B agrees.

The first, or "choice" condition, of the two-prong analysis is satisfied. But the second, or "proposal" condition, is perhaps not. One's intuition about the coerciveness *vel non* of A's proposal in Hard Bargain might be affected by comparing:

Easy Rescue

A, while boating, discovers B drowning in the water. A offers to rescue B, but only on condition that B buy the boat for a large sum of money. B agrees.

Many would classify Easy Rescue as a case of coercion, but not Hard Bargain. Some writers might disagree, at least in the more common case of capitalist wage offers (Hale 1923; Zimmerman 1981; Murphy 1981; Cohen 1983); but whatever one's classification of the two, the crux on a moralized account is whether B's baseline included A's performing the service A proposes to render only on the onerous stated condition. If one believes that B is entitled to be rescued, B's moral baseline includes the rescue, and B is made worse off by A's proposal, and, on Wertheimer's analysis, should be classified as a case of coercion. On the other hand, if one denies that B is entitled to easy rescue, then B's moral baseline does not include it, and A's proposal does not make B worse off with respect to it, and, accordingly, A's proposal is not coercive.

The "baseline" metaphor was original with Nozick; but Nozick's analysis formulated the "choice" prong in terms not of wrongness but in terms of making the proposee worse off with respect to either of two baselines. One baseline was the moral baseline which Wertheimer adopted. The other was a "normal and expected," non-moralized baseline, which Wertheimer decided against including. The two baselines gave different results, as appears vividly in a hypothetical case:

Nozick's "Slave Case"

A owns slaves, among whom is B. A routinely flogs his slaves, and B has been flogged daily for years. One day, A proposes not to flog B if B will do some deed that B would much rather not do. B agrees, and performs the deed.

Nozick acknowledged that the case seems to be one of coercion even though the proposal makes *B* better off, not worse, in terms of the normal and expected. *B*'s "normal and expected" baseline includes being flogged; but *B*'s moral baseline does not. *B* has a moral right not to be flogged, and if that is the relevant baseline, *A*'s proposal makes *B* worse off with respect to it, and *A*'s proposal is thus coercive.

In Nozick's view, the Slave Case was not conclusive. This was because, in other cases where the two baselines diverge, intuition favors the result directed by the "normal and expected" one, and not the moralized one. Consider:

Nozick's "Addict Case"

A regularly sells illegal, highly addictive drugs to *B*. *B* has no other source of supply, as *A* knows. One day, *A* tells *B* the supply will cease unless *B* performs some deed which *B* would much rather not perform. *B* performs the deed.

In this case, one's intuition is likely to be that *B* is coerced because in the normal and expected course of events *B* pays only the going black-market price. The moral baseline, however, is one in which *A* does not sell drugs to *B*, so *A*'s proposal does not make *B* worse off with respect to that. Nozick concluded that the intuitions in both the Slave and the Addict cases were sound enough, and thus that making the proposee worse off with respect to either would suffice to render a proposal coercive (assuming that *B* had no reasonable alternative). To track intuitions across cases faithfully, Nozick appeared to endorse a kind of "dual-baseline" analysis, with the following observations:

The relevant difference between these cases seems to be that the slave himself would prefer the morally expected rather than the normal course of events whereas the addict prefers the normal to the morally expected. . . . It may be that when the normal and the morally expected . . . diverge, the one of these which is to be used . . . is the course of events that the [proposee] prefers.

(Nozick 1974: 450)

This suggestion could be characterized as a "dual baseline with a preference tiebreaker" analysis. Nozick was evidently not fully satisfied with it, and it is reasonable to suspect that he perceived—but chose not to pursue—the difficulties that arise if the coercion judgment is hostage to the structure and history of the proposee's preferences. For example, in Nozick's Addict Case, the coercion judgment hinges upon whether the addict would prefer to continue to use drugs. The preference tiebreaker would classify the unwilling addict as not coerced, the willing addict as coerced. (Those lacking a preference function, such as the ambivalent, and those having incomparable or intransitive preferences, would presumably be unclassifiable.) These discriminations seem not to correspond to intuition, and to that extent Nozick's effort to "save the phenomena" is in difficulty even before confronting further complications, such as the question of whether the proposee's preferences are to be taken as given, or are rather to be assessed with reference to what, counterfactually, the proposee would prefer given better information, or freed from bias, self-deception and addiction.

Is Law Coercive in the Justification-Demanding Sense?

Legal theorists have generally been drawn to the idea that law, laws and legal systems are coercive in a descriptive sense that has an explanatory significance; but, as noted

in the first section, there has not been wide agreement about what coercion is, about where it comes into the depiction of law, laws and legal systems, or about its normative implications. By contrast, political philosophers across the spectrum from libertarians to egalitarian liberals to Marxists have tended to take the coerciveness of legal systems as a descriptive fact having far-reaching normative implications. Nozick, almost alone among recent political philosophers writing in English (an exception is Felix Oppenheim 1961), took up the task of analyzing the concept of coercion, and in so doing noticed the tendency of that analysis to undercut the descriptive assumption that states and legal systems are by their very nature coercive. If locating coercion in the world involves a preliminary drawing of moral baselines, then coerciveness in the justification-demanding sense can no longer be viewed as a cold and neutral descriptive attribute of the state. As Wertheimer puts it, “entire political theor[ies] may rest on a theory of coercion” that leads straight on to “a theory of coercion [that] rests on a moral and political theory—in particular, on a theory which allows us to set moral baselines” (Wertheimer 1987: 220–21). The presumptive wrongness of the state and its activities can no longer be taken as given by its descriptive coerciveness. Moreover, depending upon what emerges as the best theory of moral baselines, it may turn out that the rule of law is not coercive, and thus not pro tanto wrongful (Haksar 1976: 73 and 74, n. 11; Edmundson 1998: 73–124).

Some regard this tendency of moralized analyses as self-refuting (Cohen 1983: 3–4), and dismiss them without further argument. But there are numerous cases in which attention to a moralized baseline does seem to correct an initial intuition about coerciveness. Consider this case:

Ninety-Eight-Pound Weakling

Weakling, a man of modest build, is taunted by Nemesis, who is more muscular. In particular, Nemesis kicks sand in Weakling’s face at the beach. To put an end to this, Weakling joins a health club and bulks up. Weakling, thus conspicuously enlarged and empowered, returns to the beach. As Weakling hopes and intends, Nemesis stops the teasing.

Has Weakling coerced Nemesis? It would seem not, and this intuition survives if the case is altered by substituting the course of prior taunting with Weakling’s anxiety that it might begin. Although, discussing a similar case, Zimmerman (2002: 579) dismisses the “not coercive” verdict as “absurd,” the very fact that intuitions about the presence of coercion are, for many at least, responsive to the pre-proposal distribution of rights and permissions lends some support to the moralized form of analysis. Alter the 98-Pound Weakling case so that Weakling, instead of going to the gym, asks his friend Big Buddy to go to the beach with him. Again, it does not appear that Nemesis is coerced and, analogously, it would not appear that the state, through its legal machinery, coerces Nemesis either.

Nozick (1969: 451–52) sought to avoid the counterintuitive conclusion that law and the state are not inherently coercive in the justification-demanding sense. He argued that the relevant pre-proposal situation is not one in which the state punishes stealing generally. Rather, the relevant baseline is one in which the state does not punish a particular act of stealing, though it otherwise punishes stealing generally. Against this as the normal and expected baseline (which the thief can be assumed to prefer to the moralized alternative), the state’s proposal to punish this act of stealing makes the thief

worse off, and thus coerced. Nozick's "token-subtractive" technique, though ingenious, cannot plausibly be employed elsewhere (cf., Zimmerman 1981: 121, 142). It would, for example, entail that anyone who unfavorably affects the consequences of anyone else's doing anything acts, ipso facto, coercively, no matter how far from the "normal and expected" (or the morally tolerable) the putative coercee's preferred, pre-proposal outcome might be.

Non-Moralized Accounts

David Zimmerman warns that without access to non-moralized conceptions of coercion and related concepts, classical and neo-liberal, libertarian and (one should add) liberal Marxist political philosophies lack the "normative Archimedean point" (2002: 602) needed to give them leverage against competing visions of the social and political world: "[E]ssential moralization renders the very content of liberty and coercion [unable to] do any foundational work in a deontological moral theory" (2002: 600). Hoping to avoid this result, Zimmerman and others have proposed alternative, non-moralized analyses. On some of these accounts, given sufficiently great pressure upon *B* to accept, *A* coerces *B* in case *B* prefers that *A* had not made the relevant proposal at all (Gunderson 1989; Gorr 1986). Another non-moralized approach looks beyond the proposal situation, and holds that *A* coerces *B* when *A* actively frustrates *B*'s preferred, feasible, pre-proposal outcome (Zimmerman 1981).

Non-Moralized "Pressure" Theory

A "pressure theory" holds that coercion is at heart a matter of psychological pressure, pure and simple, and that any action that creates or exploits such pressure is pro tanto wrongful. Identifying instances of coercion, then, is primarily a matter of attending to the degree of pressure a suspected coercer brings to bear upon another (Yankah 2008). One difficulty with this approach is that of specifying a threshold at which noncoercive pressure becomes coercive. The alternative, to say that any degree of pressure suffices, unacceptably counts as coercive what most users of language would regard as not pro tanto wrongful. One person's "Good morning" to another will normally call for an acknowledgement of some kind, but it would be extravagant to say that it was coercive. A threshold must be set, but where? If it is set above zero but still too low, it will count as coercive a vast range of everyday dealings that intuition will not be prepared to regard as coercive in the justification-demanding sense. For example, an employee may be offered a promotion that she, though free to refuse, might find irresistible. Surely the offer is not pro tanto wrongful.

Non-Moralized, Preference-Baseline Accounts

To avoid the difficulty affecting a straightforward pressure theory, some have offered preference-baseline accounts. On such an account, intentionally bringing great psychological pressure to bear upon another is coercive (in the justification-demanding sense) just in case the person under pressure would prefer that the action creating the pressure not have been performed at all. Thus, an offer "too good to refuse" is coercive in the justification-demanding sense just in case it creates a kind or such a degree of pressure that the offeree would prefer it not have been made at all. This and similar

preference-baseline approaches are open to numerous objections, many of which are noted by Wertheimer. One objection is that the coerciveness of a proposal or other conduct, because it so depends upon the vagaries of the psychology of the putative coercee, will have to be relativized to an unacceptable degree. Moreover, the account is insensitive to the way the offeree's preferences have been formed. Non-moralized accounts, as noted above, must normalize the concept of pressure they employ, and for similar reasons the concept of preference seems to demand to be normalized as well. Extensive normalization could be taken to indicate that moralization has already begun to infect avowedly non-moralized baseline approaches (Yankah 2008: 1219).

Even if some non-moralized account were able to overcome the objections gathered above, whether it could count law and the state as coercive in the justification-demanding sense is questionable. Coerciveness would seem to have been relativized to the psychology and circumstances of each putative coercee, at least within the normal range. And those of a generally law-abiding disposition could not be said to be coerced at all, except in exceptional cases. For parallel reasons, coerciveness would have to be further relativized to particular legal requirements. But law is only seldom felt as pressure. Those laws backed by heavy penalties typically forbid what morality forbids anyway, such as murder, assault and larceny. The remaining body of mandatory law is, arguably, morally obligatory by operation of a moral principle of fairness, given widespread legal compliance by others (Edmundson 1998: 113–17; Hart 1955). As indicated above, it is a disputed question whether proportionate penalties for violation of such laws is even *pro tanto* wrongful (Haksar 1976). Moreover, laws backed by lighter penalties, or by heavy ones for which the likelihood of sanction is small, appear incapable of bringing to bear sufficient rational pressure to reach the aforementioned threshold. Where the perception of pressure has been dulled by a course of habituation or indoctrination there may yet be reason to count the state's posture as coercive (Anderson 2008: 419); but that fact would only shift the focus of argument to earlier points in the supposed chronology. The objectionableness of coercion may remain despite the coercee's habituation; but whether the putative coercee's earlier condition involved coercion in the justification-demanding sense must still be shown.

If pressure to comply with a given directive is not counted as coercive unless it is high enough to alter an individual's behavior, the prevalence of legal coercion falls significantly short of the expectation that political philosophers may have excited. But if coercion were pressure plus something else—a non-moralized something else—that the state invariably exhibits, then the pressure threshold might be lowered even as the prevalence of recognized legal coercion were expanded. Recent contributions to the literature shed light on what that further, non-moralized factor might be.

A Non-Moralized, Coercer-Intention Account

A non-moralized account might acknowledge that unwelcome pressure, even great pressure, taken alone, does not capture what is *pro tanto* wrongful about coercion. The crucial additional element might be the intention with which that pressure is applied. Grant Lamond suggests such a position:

Why should it be thought that action-inducing coercion is *prima facie* impermissible in every instance? In the face of physical compulsion the answer is clear: it is because it involves a physical interference with another person.

Rational compulsion, on the other hand, is *prima facie* impermissible because it involves the threat *deliberately* to bring about an unwelcome consequence—some disadvantage—if the other person does not comply with a demand: thus it involves the proposal *deliberately* to set back their interests or deprive them of some expectation if they are uncooperative.

(Lamond 2000: 49, emphasis added)

It is undeniable that intentional physical interference is often at least pro tanto wrongful, and likewise undeniable that rational compulsion is often at least pro tanto wrongful. Do these facts establish that action-inducing coercion is pro tanto wrongful? With respect to intentional physical interference, the key notion of interference is ambiguous. If it is a purely spatial concept, like physical displacement, there are many instances in which intentional physical interference is not even pro tanto wrongful. If, for example, I stand on the summit of a hitherto unclimbed peak, with the intention of preventing your doing so first, I do not wrong you even a little bit. If I take the best seat in the house for the sole purpose of depriving you of it, I may disappoint you, but I do not wrong you—not even a little—unless you can claim some entitlement (cf. Ripstein 2004). Unless you have a ticket giving you that right, you have none. Or is it pro tanto wrongful intentionally to spite others? To say that it is would, I think, be to confuse two importantly distinct categories: the pro tanto wrongful and what Julia Driver (1992) has called the “suberogatory.” What is pro tanto wrongful is wrongful unless redeemed by important justifying reasons. What is suberogatory is what is permissible though less than the best, or less than one’s best. The suberogatory is to the wrongful as the supererogatory is to the morally required. I may be small-minded in depriving you of the distinction of being the first to summit Peak X, or of the pleasure of the best seat in the house. But what I do is not pro tanto wrongful unless one supposes that you had more than an interest or an expectation. Once that “more” is built into the case—a protected interest, or a legitimate expectation—we will have already introduced morally evaluative elements. A parallel argument applies to the case of rational compulsion.

A Not-Necessarily Moralized Account Keyed to Compliance-Tracking

Gideon Yaffe is another recent writer to have sought an explanation of the distinctive wrongness of coercion. Yaffe’s focus is the intermediate idea of a reduction in freedom. Constraints of all kinds reduce freedom in some sense, but we intuitively regard the constraints imposed by coercers as diminishing our freedom in a distinctive way. This way is not a matter of mere effects, as can be seen by considering the difference between losing \$10 to an armed robber and losing \$10 to a sudden gust of wind. The former, coercive loss is felt to represent a diminution in freedom while the latter is not, despite the fact that the monetary loss is the same. If this is correct, then on the further assumptions that a loss of freedom is a harm and that harming another is pro tanto wrongful, the conclusion could be drawn that law is coercive in the justification-demanding sense because it diminishes freedom, or diminishes it in a harm-constituting way.

The crux is to explain how coercion diminishes freedom in a way that mere bad luck does not, even where the effect on the agent’s options is identical. Yaffe’s proposal is this:

The key to the explanation for the freedom-undermining force of coercion is that, as a general rule, coercers don't merely produce, but also track, the compliance of their victims. . . . The coercer tailors his threat to the features of the mechanism for response to reasons that the victim possesses.

(2003: 351)

Assuming this is correct, the characterization of the coercer bears only a distant resemblance to the modern state; and this distance renders unlikely the prospect of bolstering the assumption that political society is inescapably tainted by the pro tanto wrongness of its essential and central mode of operation. The state ordinarily does not closely monitor the compliance of its citizens. The panoptic dystopias familiar from twentieth-century literature should indeed be thought to track citizens' conduct in a way inimical to freedom. But those caricatures cannot fairly be extended to modern (post-) industrial democracies. Yaffe does not suggest, and we cannot assume, that the rule of law is, by its very nature, a coercer in the requisite sense. Indeed, Yaffe (breaking ranks with non-moralized approaches) adds that manipulation whose effect is to keep the manipulated on the track of rightful conduct does not diminish freedom, and thus is not coercive in the justification-demanding sense (2003: 349).

A General Difficulty for Non-Moralized Approaches

Non-moralized analyses of coercion in its justification-demanding sense assume that a logical passage from non-moralized factual description to a moral judgment of pro tanto wrongness can be made. The familiar "is-ought" objection is bound to come up. It should not be assumed that the objection is decisive, here or elsewhere; but, in the matter of the law's alleged coerciveness, it might serve as a reminder that the burden of justification that political philosophy has routinely assigned to the state and its defenders stands, itself, in need of justification.

Summary

Coercion is often assumed to be an essential feature of law, both in an explanatory sense and in a justification-demanding sense. Explanations of law have cast coercion in a variety of roles, and the conception of coercion fitted into these roles has been variously understood. Some, like Kelsen, equate coercion with physical compulsion, but the currently dominant view is that coercion essentially involves the wills of at least two persons. One person, a coercer, communicates to the other, the coercee, a proposal to alter the coercee's situation in an unwelcome way unless the coercee performs some specified act. Typically, the coercer makes it understood that the unwelcome alteration will not occur if the coercee complies with the coercer's demand.

Some philosophers argue that the coercer's role in this type of entanglement of wills is pro tanto wrongful, without further description or with no further description than what will assure that the psychological pressure brought to bear upon the coercee is objectively nontrivial. Others, perhaps the greater number at this writing, argue that these conditions are not coercive without what will amount to a further stipulation that the coercer's proposal was wrongful to make. No matter which of these two views is correct, the commonplace view that law, laws and legal institutions are essentially coercive in a justification-demanding sense can no longer be taken for granted.

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Further Reading

R. Nozick (1969) "Coercion," in S. Morgenbesser, P. Suppes and M. White, eds., *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel*, New York: St. Martin's Press, pp. 440–72. Reprinted in Nozick, R. (1997) *Socratic Puzzles*, Cambridge, Mass.: Harvard University Press, pp. 15–44 (the chief landmark in the literature); F. Oppenheim (1961) *Dimensions of Freedom*, New York: St. Martin's (combines lucid analysis with an effort to locate coercion in a wider conceptual terrain); A. Wertheimer (1987) *Coercion*, Princeton: Princeton University Press (is both a thorough discussion of the literature up to that date and a systematic defense of the moralized approach); and S. Anderson (2006) "Coercion," in E. N. Zalta, ed., *The Stanford Encyclopedia of Philosophy*, Winter 2011 Edition, <http://plato.stanford.edu/archives/win2011/entries/coercion> (a valuable later discussion of the state of the literature, and appends an extensive bibliography).