

## THE CONCEPT OF LEGAL COERCION AND POWER-CONFERRING LEGAL REGIMES

SERGEY TRETYAKOV,

National Research University Higher School of Economics  
(Moscow, Russia)

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*The basic question of the paper: are power-conferring legal rules coercive and in what sense can we say that power-conferring legal rules coerce? In his recent book, Frederick Schauer answers the first question in the affirmative and proposes an interesting account of how it works. I believe that this claim is unsustainable due to the inconsistencies in the psychological account of coercion applied by Schauer, and his theory's unrestricted reliance on counterfactuals. In what follows, I try to reconstruct the thesis on the coerciveness of the power-conferring legal rules. The basic insight is that the power-conferring legal rules coerciveness claim is inextricably connected to the unmoralized account of coercion, as any moralized theory shifts the problem from coercion to the issue of distributive justice. However, the unmoralized concept of coercion can hardly be coherent in law because it makes coercion a matter of context, dependent on the willpower of each individual, which threatens to eliminate the force of law as such. Even applied on its own terms, the unmoralized concept of coercion is unworkable within the context of power-conferring through law because power-conferring legal regimes do not eliminate non-legal alternatives, making it dependent on the will of the legal subjects themselves. Schauer's everlasting contribution lies in his ingenious attempt to substantiate the coercion (of power-conferring rules) claim relying on counterfactuals. A (coerced) choice has been limited relative to some situation which never occurred but would or should have occurred. In order to limit a set of counterfactuals, making them realistic (preferences and needs are limited only by imagination), one should impose severe limits on them, which makes it impossible to characterize the particular situations described by Schauer as coercive in that sense.*

*Keywords: coercion; power-conferring legal rules; baseline.*

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## Table of Contents

### Introduction

#### 1. The Problem

#### 2. Schauer's View on the Coerciveness of Power-Confering Rules

#### 3. The Ambiguities of the Hartian Account and Schauer's Interpretation

#### 4. Analysis of Schauer's Theory. Preliminary Remarks

#### 5. The Concept of Coercion. Problems and Ambiguities of the "Pressure Theory" of Coercion

#### 6. Difficulties with the Concept of Voluntary Action

#### 7. A Purely Psychological Account of Coercion and Authority of Law

#### 8. Indeterminacy of the Psychological Account of Coercion

#### 9. The Threat/Offer Dichotomy as a Way to Solve the Problem

#### 10. Unmoralized Theory of Coercion and Power-Confering Legal Rules

### Conclusion

## Introduction

"Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of social control... The reduction of rules conferring and defining legislative and judicial powers to statements of the conditions under which duties arise has, in the public sphere, a similar obscuring vice. Those who exercise these powers to make authoritative enactments and orders use these rules in a form of purposive activity utterly different from performance of duty or submission to coercive control."<sup>1</sup> This groundbreaking passage from Herbert L.A. Hart's masterpiece "The Concept of Law" was one of the major arguments against early legal positivist conceptions of law such as "coercive orders." Hart has shifted the focus from coercion to the normativity of law. Nevertheless, the role of coercion within the Hartian theory of law remains highly disputed, even among the adherents of the Hartian legal positivism. On several occasions, Hart himself stressed the importance of coercion without specifying its status.<sup>2</sup>

<sup>1</sup> Herbert L.A. Hart, *The Concept of Law* 40 (3<sup>rd</sup> ed., Oxford: Oxford University Press, 2012).

<sup>2</sup> See, for example, *id.* at 37.

Therefore, there is a certain tension between two clusters of issues, which can be defined as “power-conferring legal rules” and “legal coercion.” In what follows, I want to reflect on some aspects and mutual interactions of these two issues.

## 1. The Problem

In what sense can power-conferring legal rules can be coercive? There are, at least two possible ways to assert the coerciveness of legal powers.

Firstly, legal powers as *powers* are capable of affecting others’ sets of options by limiting them. If one interprets coercion as a limitation of one’s range of possible choices, the “coercion talk” in the context of legal powers seems, at least, not to be self-contradictory. More than that, the law very often imposes some formal requirements on the exercise of legal powers. To create a will, one should make it in some (written) form. Again, by the application of a definite interpretation of coercion, one can find some limitations of choice even here. These problems will be the major focus of this paper.

Secondly, formal analysis of the concept of legal power can raise the question of coercion. Traditionally, legal duties are conceived as a paradigm of cases of legal coercion. This seems quite natural because duties are intrinsically limiting, setting constraints on the range of the possible choices. Can legal powers also impose limits, *conceptually*, as a matter of purely logical analysis? Some legal scholars believe so. We postpone our reflection on this matter for future.

## 2. Schauer’s View on the Coerciveness of Power-Conferring Rules

Frederick Schauer, in his marvelous book “The Force of Law,” put forward the first point. Schauer stresses that the importance of the Hartian discussion of power-conferring rules is not limited simply by the asserted existence of “non-duties” within the law. The most important innovation of “The Concept of Law” is much more profound: “Hart took these criticisms further. He not only reemphasized that coercion seems not to explain the legal status of contracts, wills, trusts, and other optional features of law, but he also explored a topic noted only briefly by Pound and Allen: the role of law in constituting such arrangements in the first place.”<sup>3</sup>

In fact, Hart supposes that law creates the very possibility of these non-optional phenomena. Law creates this possibility *ex nihilo*. To elucidate the point, Schauer masterfully applies to this context the dichotomy between constitutive rules and regulative rules put forward by philosopher John R. Searle.<sup>4</sup> “Regulative rules, the

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<sup>3</sup> Frederick Schauer, *The Force of Law* 27 (Oxford: Oxford University Press, 2015).

<sup>4</sup> John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* 33–42 (Cambridge, UK: Cambridge University Press, 1969).

most familiar sort of rule, govern conduct whose conceptual existence is logically prior to the rules. My ability to drive a car at 90 miles per hour may be a function of the car, the road, and my preferences, but it does not depend on the law.”<sup>5</sup> Constitutive rules differ radically from the previous type of rule in that they create and define the very possibility of the relevant type of conduct. They are wholly dependent on the rules and cannot exist without the rules. Neither existed prior to the enactment of the constitutive rules. “A group of people can run a business together without the law, but they can only create a corporation by virtue of legal rules that establish the very idea of a corporation. And the same is true of trusts, wills, pleadings, and countless other law-constituted and thus law-dependent institutions and practices.”<sup>6</sup>

An extremely important thing about constitutive rules is that they create possibilities, multiply options, but in no way limit the choices of the legal subjects. That is what distinguishes them from the regulatory rules which govern the social practices that existed before the rules. Constitutive rules do not govern relevant social practices; they define them.

Hence, significant divergences between the legal technicalities exist. When you have to deal with a more or less firmly established social practice and you want to legalize it somehow via regulation, you inevitably transform it. This means, among other things, that you limit somebody’s range of choices within the practice with the same inevitability because regulation of something which existed before the regulation means interference and change. For some, this is for the better, for others, the worse. Typically, regulation promotes the imposition of legal duties as the basic technique for governance. When you have to deal with established activities, you can only change them by suppressing the undesirable types of such activities. These undesirable types of activities are practiced, so you cannot simply declare them legally non-existent. In fact, you can do that, but that alone will not work. The problem is that you are trying to eradicate a non-legal, and, in some way, “factual” phenomenon. It existed before the law, can exist without it and it “does not care” about the law. When your strategy was neutrality, you could ignore it and not try to eradicate it. Some law professors call this “legal irrelevance,” i.e., the law does not recognize the thing as relevant from the legal point of view. Still, it can exist as a matter of fact.

However, in our case the law is trying to suppress a type of conduct which cannot simply be treated as legally nonexistent, precisely because it exists as a matter of fact. The only possible way to suppress it is to impose a duty on the relevant group with sanctions for non-compliance. In so doing, the law discourages the legal subjects from the prohibited activity by raising its cost for would be violators.

Within the realm of constitutive rules, the legal landscape differs tremendously. Constitutive rules create social practices and determine the conditions of their validity.

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<sup>5</sup> Schauer 2015, at 27.

<sup>6</sup> *Id.* at 27.

As I have already stated, law defines the relevant practice. The basic formula is: "A counts as X." Law creates some new artificial phenomenon. Its mode of existence is validity.

This is a purely legal phenomenon, it never existed before the rule and could not exist independently of it in a "parallel reality." It lacks factual independence. It means that regulative rules do not suppress or try to eradicate some factual practices. They themselves are created in a "parallel reality" of law. And it can peacefully coexist with competitive "factual" social practices in "mutual disinterest." Here the law solves another type of problem. It needs not to suppress, but to supplant the "factual" competitor. Take the example, which Schauer applies, of contract and promise. Contract is a purely legal creature. Before the contract was introduced into law, nothing of *that* kind existed. Promise, a "factual" equivalent of a contract, cannot provide a level of reliability in any significant way comparable to the "service" of a legally defined and administered contract.

In that sense, law creates new possibilities and does not suppress the previously existing ones. Not only does law have no "need" to suppress anything coercively because it can obtain the same result through competition. More importantly, within the power-conferring legal regimes, law simply lacks the devices of discouragement of the undesirable behavior. All that it can do is define the conditions of validity and establish the rules of the practice. Everything that cannot fulfill these conditions would be simply irrelevant to the practice. But it can exist as a pure matter of fact or as an element of a different practice. So, you need not impose a duty, you only have to determine the conditions of validity.

Accordingly, the legal technique is distinctive. One need not use the legal duties, resorting predominately to legal powers, liberties and inabilities. The fact is that power-conferring legal regimes do not only create entirely new possibilities for their legal subjects. They create totally legal, in a sense, "virtual," regimes. This sort of artificial reality can only be created through the constitution of different legal capacities and assignment of legal statuses. The relevant legal techniques here are legal powers, legal liberties and legal immunities.

All the abovementioned contributes to an understanding of the problem; if the law is coercive, if the duty-imposing rules are coercive, both of which sound not entirely wrong, in what sense (if any) could power-conferring rules be coercive?

### **3. The Ambiguities of the Hartian Account and Schauer's Interpretation**

Hart himself was not entirely clear on the matter. In analyzing power-conferring rules, he states: "Such laws do not impose duties or obligations. Instead, they provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law."<sup>7</sup>

<sup>7</sup> Hart 2012, at 27.

What does this “within the coercive framework of the law” mean exactly? Can we say that legal coerciveness is due to duties and sanctions? Or should we agree that powers and liberties are also coercive in some way?

In fact, Hart himself has contributed greatly to the shift in the research focus from coercive to normative and institutional aspects of law. At some stage of development, it was inevitable that some influential group of Hartian legal positivists would finally reject the essential character of coercion in law. Whereas the other (no less influential group) of the Hartians prefers to defend the importance of coercion for law. But the debate centered substantially on duties and rarely involved power-conferring rules. With the notable exception of Frederick Schauer. Ironically, he seems to demonstrate the same sort of deliberate refusal to answer in a straightforward “yes or no” manner.

On the one hand, Schauer agrees: “The law is hardly coercing anything or anyone, at least in the sense of requiring people to engage or not to engage in any of these law-constituted activities. Law constitutes corporations, but it does not mandate that anyone create one.”<sup>8</sup> On the other hand, the author continues, “If the point is to show the importance of law even when it is not being coercive by backing its prescriptions with sanctions, then we should consider the possibility that law, even in its constitutive mode, may be more coercive than is often appreciated. Sometimes, to be sure, coercion consists simply of telling people what to do, but sometime coercion exists when it tells people that what they want to do must be done in one way and not another. When law creates the very possibility of engaging in an activity, it often supplants a similar and law-independent one. And if the law-independent activity is part of people’s normal behavior and background expectations, eliminating this possibility and compelling people to use law’s alternative operates as a form of coercion.”<sup>9</sup>

Why and how thoroughly do the constitutive rules eliminate “similar and law-independent activities”? When law creates a contract, its non-legal equivalent, the promise, “has been pushed to the side psychologically.”<sup>10</sup> Schauer elucidates this point: “I can promise to sell you my house for a certain amount, but in a world with contracts, a background understanding emerges such that a contract to sell a house is the only way to promise to sell a house. To repeat, this is a psychological and not a logical claim, but that makes it no less sound. By moving into some domain of behavior, law often occupies the field, crowding out preexisting non-legal alternatives.”<sup>11</sup>

But how does this “crowding out” actually take place? As we have seen, definitely not through the imposition of duties and sanctions. Otherwise, it is not power-

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<sup>8</sup> Schauer 2015, at 28.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

conferring rules that coerce, but the duty-imposing. As I understand it, Schauer thinks that the comparative inefficiency of the non-legal alternative in relation to its legal counterpart, is the crux of the matter. Take wills, for instance. "Telling someone that he will get all my money when I die, and doing that outside of established legal processes, is less effective in a world that uses wills than in a world that does not."<sup>12</sup>

In other words, legal regimes are comparable with "similar" non-legal regimes, but in an elaborately specific manner. We should not compare all the advantages and disadvantages of the two. Rather, we should determine whether a legal regime is stricter anywhere and anyhow in comparison with its non-legal alternative. Taking into account the power-conferring character of the legal regime under discussion, the only point where limits and restrictions can be identified is conditions of validity or invalidity: "When legally constituted forms of conduct supplant similar law-independent forms of conduct, therefore, or when law regulates optional but law-independent conduct, the sanction of nullity becomes a real sanction. If I want to make a contract but do not do so in accordance with the forms prescribed by law, the contract is no contract at all. My expectations and desires will have been frustrated, and my disappointment will be palpable. If I wish to avoid that disappointment and achieve a particular goal by entering into a contract, the law's ability to frustrate these desires gives it a power of coercion not dissimilar to more direct coercion."<sup>13</sup> In the final analysis, a power-conferring legal regime coerces because it makes alternative non-legal regimes inefficient by providing more predictability, certainty (which outperforms the non-legal competitors), and creates "access conditions" through (in)validity rules (which are often stricter than in non-legal regimes). In this way, the power-conferring law "crowds out" its non-legal alternatives.

Finally, Schauer states that, even within the legal regime itself, rules of (in)validity can be experienced by the participants as coercive, because nullity can "frustrate parties expectations": "To be sure, the invalidity of a contract is sometimes not experienced as unpleasant, but for most people making most contracts most of the time, the law's ability to say that it must be done in a particular way on pain of non-enforcement will be experienced as coercive."<sup>14</sup> In other words, if people successfully use the power-conferring regime most of the time and are accustomed to the fact that they are successfully contracting all the time but suddenly experience the application of the nullity rule in the case of their contract, they feel disappointed and frustrated, which reveals the coerciveness of contract law in that one cannot treat as a contract whatever he considers reasonable.

Schauer finds the ultimate justification of this last thesis in the transformation of constitutive rules into regulative for those who are a part of the practice: "It is true that

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<sup>12</sup> Schauer 2015, at 28.

<sup>13</sup> *Id.* at 29.

<sup>14</sup> *Id.*

nullity is in some sense an essential component of any constitutive rule and thus that 'if failure to get the ball between the posts did not mean the 'nullity' of not scoring, the scoring rules could not be said to exist.' And so nullity may best be understood as part of a constitutive rule rather than a conceptually distinct enforcement of an independent requirement. But, once one is inside the game, whether that game be judging or contracts or football, the rules lose some of their constitutive power and appear regulative and coercive."<sup>15</sup> This is an extremely interesting point and which I shall return to in some detail later on.

Still, the final verdict is rather nuanced: "We must concede that law's ability to create the power to make wills and trusts and contracts, just like its ability to create the power to enact legislation and issue judicial decrees, is not completely captured by a coercion-based account of law. But even with this concession, we can also recognize that attempting to explain the operation of constitutive rules without recognizing the coercive dimensions of nullity is incomplete as well. Still, it seems an error to understand all legal rules as coercive."<sup>16</sup>

#### 4. Analysis of Schauer's Theory. Preliminary Remarks

Schauer definitely views power-conferring legal rules as at least potentially coercive even if he flatly refuses to deduce far-reaching conclusions from this: "What to make of the widespread but nonessential presence of coercion-based reactions to law even in its constitutive mode remains a difficult question..."<sup>17</sup> This ambivalence can probably be explained by the very logic of the Hartian positivist debate on the role of coercion in law. Those who felt skeptical of the overuse of the concept of legal normativity and practical reason-based explanations of legal practices because of its inherently Dworkinian import preferred to stay on the stable ground of "facts," reversed, to a certain extent, the significance of coercion in law within the post-Hartian philosophy of law.

The second point is that there has always been a certain ambiguity about the place of coercion in Hartian theory. As I have already mentioned, Hart has radically and extremely convincingly shifted the focus of legal positivism from coercion to legal normativity, the internal point of view concept, the secondarity concept, and the like, but he never said that coercion does not matter. As the radical innovator, he left plenty of undecided issues to his followers.

Pre-analytically, we feel that coercion matters in a significant way. At the same time, we feel that the key concepts of the Hartian synthesis (the secondarity concept and the internal point of view) are devoid of the coercion concept.

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<sup>15</sup> Schauer 2015, at 30.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*



Schauer has made an ingenious attempt to retain both the crucial importance and the (conceptually) non-essential character of coercion in law. From that vantage point, one should interpret his deliberations on the coerciveness of constitutive power-conferring rules in law.

Probably, the most important thing to know is what concept of coercion Schauer applies. He uses the term in the widest sense: "...law is coercive to the extent that its sanctions provide motivations for people, because of the law, to do something other than what they would have done absent the law."<sup>18</sup> The fact is that Schauer explicitly refuses to comment on the concept of coercion in general. He considers it to be unnecessary for the purposes of his research: "Accordingly, the running claim in this book that coercion has jurisprudentially underappreciated the importance in understanding and explaining the phenomenon of law does not require that we have a definition of coercion that will distinguish instances of coercion from those of voluntariness. We need only keep in mind the basic idea that law, and not just this law or that law, generally makes us do things that we do not want to do or not do things that we do want to do. How and why law does this is assuredly of great importance, but identifying the coercive dimension of each individual law is equally assuredly not."<sup>19</sup>

Nevertheless, it seems as if Schauer was somewhat closer to the unmoralized versions of the coercion concept than to the moralized theories of coercion. More than once, Schauer stresses that legal regimes limit the range of people's reasonable choices by imposing costs on their choices which are undesirable from the legal point of view. Exactly that idea, as we have seen, justifies the asserted coerciveness of the "sanction of nullity."

The first problem here is the problem of the baseline, according to which one should identify the limitation of reasonable choices. As we have already mentioned, regulative rules are a more likely candidate for being coercive because they govern the pre-existent social practice, which can hypothetically be a baseline. In that case, when the law imposes a duty to abstain from some sort of behavior previously regarded as normal by the community and sets up a sanction for violations, it can be regarded as a limitation on the reasonable range of choices.

The real problem is with the constitutive rules, which create previously non-existent types of behavior. As we have seen, Schauer thinks that, notwithstanding the fact that constitutive rules create practices *ex novo*, sometimes the non-legal twins of such practices are supposed to exist. And, if he is right, we have the baseline from which we are able to assess the impact of a new legal regime on the range of options of the relevant group and communities and the reasonableness of alternatives. A power-conferring legal regime can be coercive if it limits the range of choices (by making

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<sup>18</sup> Schauer 2015, at 129.

<sup>19</sup> *Id.* at 128.

some previously existing options reasonably ineligible in comparison to the more efficient legal regime, but also more demanding one, from the point of view of formal conditions of validity) relative to the pre-existing non-legal alternative. Paradoxically enough, a legal regime, which undoubtedly creates more opportunities and options, can, at the same time, limit them. A contract, as an utterly legal creature, generates new opportunities that are inaccessible in the non-legal regime of the “promise.” One can now rely on the complex legal infrastructure in order to assure the attainment one’s goals. But, at the same time, a contract is coercive in that it is more restrictive on the conditions of the formal validity of legal acts than promise used to be.

The first point is how accurate and transparent this search for some “alternative non-legal regime” should be. For some legal institutions and regimes, especially those that are highly complex, there is no obvious non-legal equivalent. What about, say, promissory notes, derivatives or the German *Abstraktes Verfügungsgeschäft*? Law creates innovative regimes which are purely legal. But I think this is not the problem for Schauer as he carefully states that constitutive rules are not necessary coercive. They can be.

But in that case we should clearly understand what we are comparing to what. I have already remarked earlier that Schauer proposes an extremely unusual method of comparison. One should compare the costs and the benefits of the power-conferring regime with the costs and the benefits of some strange hypothetical hybrid, combining the benefits of the legal regime (more pre-visibility, legal institutions, etc.) with the benefits of the “similar” non-legal regime (relaxed formal requirements). But how legitimate is this type of methodology? A set of choices like this is nonexistent. One can only choose between existing alternatives in our case.

I could agree that, in our case, we can only refer to hypotheticals if the law makes the legal regime non-optional at the expense of legally suppressing its non-legal counterpart. In that case, the range of choices has been deliberately limited and, theoretically, one can use hypotheticals in order to fix the order of things which would normally take place were coercive legal intervention not undertaken. But this case is unproblematically coercive from the vantage point of the unmoralized accounts of coercion because a legal duty is imposed in order to suppress the non-legal alternative.

What makes us use this hypothetical when, in a real life situation, choices exist between two actually existing regimes?

I will try to reconstruct the hypothetical response of Schauer. When we treat as coercive in principle each and every limit of a set of possible reasonable choices deliberately imposed by another person, any limit of the relevant kind counts as a limit. Immortalized theories of coercion treat coercion as a matter of fact, or a more or less factual phenomenon. That is why what really matters is deliberate imposition of limits and the psychological sense of loss. Both conditions are, strictly speaking, fulfilled in our case. New restrictive form requirements are deliberately imposed as an

entrance condition and the participants may feel frustrated because of the imposed impossibility of combining the privileges of the new legal regime with the relaxed form of the requirements of the older non-legal regime.

At a deeper level, the problem is with the widest understanding of coercion in the sense of the unmoralized theory, which Schauer uses. This factual or “psychological” concept of coercion enables treatment of virtually everything as coercive because, psychologically, each pressure or desire can frustrate, i.e., “pressure” or “overwhelm the will.” And a wide-range of social phenomena from previous choices made by some others and competitive activities in the market economy are coercive in the literal sense of the unmoralized theory. Being aware of these difficulties, Schauer declines to comment on his theory of coercion. Instead, he applies the unmoralized account of coercion in its most unqualified and immodest form.

Let us explore this theme and ask whether our case is genuinely coercive from the vantage point of the unmoralized theory. You have a choice between the two regimes, each has its costs and benefits, is it coercive that you cannot combine the benefits of both regimes and decline both costs? One can be wholly aware of the fact that such a “nirvana regime” is non-existent. Obviously enough, the more restrictive form requirements of the legal regime (costs) are a direct consequence of the institutional structure of law responsible for the benefits of the legal regime. They cannot be simply “picked out” of the legal regime. The same type of “optimal equilibrium” is characteristic of the non-legal regime, only the point of optimality is different.

Under these circumstances, can we conclude that someone deliberately limits the range of choices? Both of the regimes are optimal. The more restricted “entrance conditions” of the legal regime are motivated entirely by the internal considerations of more efficient administration of the legal regime and not because of a deliberate attempt to limit someone’s set of choices. Within the non-legal alternative you have same sort of trade-off, i.e., more accessibility with less predictability and efficiency. I hope I have shown clearly that the unqualified and implicit use of the unmoralized theory of coercion has an internal tendency to widen its scope of application.

This very important aspect of the problem raised by Prof. Leslie Green in his extremely thoughtful review of Frederick Schauer’s book: “The theoretical point is that although the ordinary semantic range of ‘coercion’ is broad enough to cover all sorts of things, including social embarrassment, brick walls, and tempting offers, its use in jurisprudence is shaped by two considerations. First, it is a feature of the normative character of law: law is a guide to action, and those who defend the coercion thesis take the view that law guides by coercive proposals, normally by threats. Second, coercion is marked by the intention to direct someone’s will in a particular way, by a proposal they would not normally welcome, and which will make them significantly worse off if they do not behave that way. We say figuratively that coercion leaves people with ‘no choice’ or, less figuratively, with ‘no reasonable

choice', but to comply. ...It is only by washing out such distinctions that Schauer can treat so many cases of law-provided incentives as forms of coercion."<sup>20</sup>

### 5. The Concept of Coercion. Problems and Ambiguities of the "Pressure Theory" of Coercion

My basic insight is that the principal source of all these ambiguities and incoherences may be explained by a more rigorous analysis of the concept of coercion, which Fredrick Schauer seems to apply. There are two main types of coercion concept. The first *moralized* theory denies a purely psychological nature of coercion. Various "pressures," imposed on the will are a relatively common phenomenon. So the real question is what sort of pressures are coercive? To answer that question one needs a normative (moral) theory within the framework of which one can discriminate between coercive and non-coercive phenomena. In some sense, the whole "coercion issue" vanishes completely from this vantage point. As Jeffrie G. Murphy notes, "in most cases properly called duress or coercion, however, what we are characterizing is really something quite different – something mainly moral rather than mainly psychological – namely that an individual has been unfairly placed in the situation where his only choice is to make a morally unacceptable sacrifice in order to avoid what is being demanded..."<sup>21</sup> In other words, the whole problem has been reconfigured and transferred into the reality of the theory of distributive justice, i.e., the basic issue here is not whether the will or set of options were restricted, but rather whether this is fair. That particular point makes moralized theories of coercion an unlikely candidate to serve as an impediment to the claim that power-conferring laws can be coercive. Any moralized account of coercion enables one to discriminate between cases where a restriction on options is considered unfair (coercive in the sense of the moralized account) and cases where restrictions on options are not considered unfair. In other words, not each and every restriction on options or pressure is coercive. But the basic premise of the coerciveness of power-conferring rules, as we have seen, is that each restriction is coercive *ipso facto*.

The second theory is the so-called *unmoralized* theory which treats coercion as a purely factual phenomenon: "The traditional theory views coercion as an overcoming of the will of the victim such that the resulting action is viewed as unfree, involuntary, or against one's will."<sup>22</sup> The very fact that the will was, in some way, unfree, obviating from what would be considered normal behavior in the standard case, makes the coercion claim reasonable. As John L. Hill formulates it, "the use of

<sup>20</sup> Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, University of Oxford Legal Research Series, Paper No. 12/2015, at 19–20 (Feb. 20, 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2588588](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2588588)##.

<sup>21</sup> Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67(1) *Virginia Law Review* 86 (1981).

<sup>22</sup> John L. Hill, *Moralized Theories of Coercion: Critical Analysis*, 74(4) *Denver University Law Review* 907–908 (1997).

the term 'coercion' to represent cases of physical compulsion and instances of duress reflects the prevailing view that duress is an excuse which exculpates because the actor's will is 'overborne' or because, most generally, the act was unfree insofar as the actor was forced to act against her will.<sup>23</sup>

In that sense, the difference between pure compulsion, where "free will" is totally absent, and coercion, where the will is somewhat "distorted," is not categorical, but a matter of degree.<sup>24</sup> In both cases<sup>25</sup>, an actor prefers to act "otherwise" if she acted "voluntarily." The mere difference between compulsion and coercion resides in the absence of the very act (as a criminal law scholar would say, *actus reus*) in the first instance. In the case of coercion, the will is present, but distorted in the sense that an actor would not prefer to act in the same way when she acted voluntary, i.e., when the process of decision-making was totally free.

All this explains two critically important traits of coercion phenomenon as interpreted by "unmoralized" accounts. Firstly, the mere fact of coercion distorts a voluntary act, making it involuntary to some extent at least. Secondly, it is implied that one can more or less easily identify the instances of coercion relying on its empirical characteristics.

## 6. Difficulties with the Concept of Voluntary Action

The main problem with the "unmoralized" theory of coercion resides in the concept of voluntary action it implies. At the outset, there seems to be an ambiguity of a sort. On the one hand, to be coerced one needs to act free in the sense that his will is distorted, but not totally absent. In other words, using the language of criminal law, we need an *actus reus*. On the other hand, however, the coerced act needs to be "involuntary," at least in a sense. The will of an actor is distorted and overwhelmed by the fact of coercion. This means that, if not coerced, an actor would act otherwise. Hill distinguishes between volitional and voluntary acts: "There is, however, a second sense of the term 'voluntary' which must be discussed. The term is sometimes used with a subjunctive connotation to mean that a person could have acted in an alternative manner had she so chosen. In this sense, to say that an act is voluntary is to say more than that the act was volitional, as in the first sense. It is to say that, with other reasonable choices open to the actor, she nevertheless chose the course of action to which she ultimately committed herself. It is in this sense that an act is involuntary when it is 'against one's will,' and thus is deemed a coerced act thought to be involuntary."<sup>26</sup>

<sup>23</sup> John L. Hill, *A Utilitarian Theory of Duress*, 84 Iowa Law Review 275–286 (1998–1999).

<sup>24</sup> Michael D. Bayles, *A Concept of Coercion in Nomos XIV: Coercion* 17 (J.R. Pennock & J.W. Chapman, eds., Chicago: Aldine-Atherton, 1972).

<sup>25</sup> Michael Bayles calls the two forms "occurrent" and "dispositional" coercion, respectively.

<sup>26</sup> Hill 1998–1999, at 287.

## 7. A Purely Psychological Account of Coercion and Authority of Law

Another important problem faced by the proponents of the unmoralized theories of coercion, is that a purely psychological account makes the coercion phenomenon rather illusive. Generally, each person has her own “degree of resistance” against any external pressures. More than that, some intentional external pressures with the goal of changing somebody’s course of action may not be coercive as a sort of psychological pressure when the “coerced” is directed to behave in the same way for independent (for instance, moral) reasons.

This creates a problem for the law. Should we agree in this case that law is not coercive for those who act in accordance with it for independent non-legal reasons and that only those who act according to law motivated solely by law<sup>27</sup> are technically coerced by the law in the sense of the pressure theory? Also, psychologically conceived coercion has an individualizing effect. In the legal context, this means that one never knows for sure whether any given law coerces or not. Everything depends on contexts and individual cases.<sup>28</sup>

This corresponds barely to the conventional wisdom about the authority of law. We cannot simply say that law is sometimes coercive and sometimes not, and we know not exactly when and where. If one ascribes some sort of essentiality to the coerciveness of law,<sup>29</sup> coercion cannot be dissolved in the numerous empirical contexts of the application of law. In some sense, it should be omnipresent.

In his excellent piece on legal coercion, Ekow N. Yankah questions the alleged inconsistency here: “That one may act for independent reasons does not undermine the coerciveness of pressure if one would have no choice in acting if those independent reasons failed. If a prisoner, during a blizzard, does not wish to try his luck in the forest surrounding the prison, do his independent reasons for not leaving suddenly render the fact that he is prohibited in any case from leaving the prison non-coercive? Dormant coercive force remains coercive force.”<sup>30</sup>

The problem is that if one is to assess the relevance as well as the impact of the pressure from the psychological point of view, there is no room for the “dormant coercive force.” Empirically, coercion is always actual pressure and only actual pressure

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<sup>27</sup> In those cases, legal subjects can act because of a fear of sanctions (a “bad man” in the sense of Hart’s “The Concept of Law”) or because they are disposed to act according to law just because it is law (the famous Hartian “puzzled man”). See Hart 2012, at 39.

<sup>28</sup> William A. Edmundson, *Is Law Coercive?*, 1(1) Legal Theory 94 (1995).

<sup>29</sup> One need not immediately think that law is necessary coercive. It suffices to treat coercion as empirically important (important in most cases), as Frederick Schauer, in fact, does. See Schauer 2015, at 4–7.

<sup>30</sup> Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42(5) University of Richmond Law Review 1995–1222 (2007–2008).

makes you do what you otherwise would not have done. So the dilemma remains. Either one has to reject the coerciveness of law thesis or one should sacrifice the pressure theory of coercion. In the latter case, one should *add* something normative to the pressure theory. In other words, if law coerces through psychological pressure to avoid the individualizing effect there should be some “pressure threshold,” which is inherent to law, no matter how legal prescriptions actually affect individual incentives to obey. But this is impossible precisely because a level of psychological pressure cannot be universal, i.e., common to all human beings. So if one sets a baseline it will be a *normative baseline molded by a certain moral theory of coercion*. We simply presuppose that some type of pressure, or a certain intensity of pressure, etc., deserves to be labeled as coercive. Therefore, the psychological theory of coercion either collapses into a myriad of highly contextualized instances or seems to be completely dissolved into some normative (moralized) theory.

### 8. Indeterminacy of the Psychological Account of Coercion

Under the pressure theory, any incitement, i.e., any attempt to induce a person to do what she otherwise would not have done, would be enough to qualify the relevant behavior as coerced. In fact, as we have already seen, Schauer works with this very wide concept of coercion. And here lies the crux of the problem. Such a wide concept of coercion is an unworkable concept. It is not only unable to discriminate between coercion and incitement in any meaningful fashion. More than that, it leaves unexplained its basic premise, i.e., the distinction between volitional and voluntary acts. What remains unclear is how to define the potential range of choices, limited by the act of coercion. Intuitively, it seems that only externally “imposed choices” can be meaningfully labeled as coercion. Choices, even “hard choices,” are entirely “internally” generated, i.e., generated by the balance of internal motivation without any sort of external interference.<sup>31</sup> Furthermore, to make the concept of coercion more operative, one needs to add one more component, “an interpersonal relation involving a complex intention on the part of a coerced.”<sup>32</sup> This helps to exclude those situations in which the will was “overwhelmed” by natural or unintentional “forces” and which nobody treats as instances of coercion. As Jeffrie G. Murphy put it: “True duress, to put it crudely, requires not merely an unhappy choice but a *villain* who is responsible for creating the necessity of making such choice.”<sup>33</sup>

<sup>31</sup> Strictly speaking, this is an arguable twist from the standpoint of assimilation of compulsion and coercion, because compulsion can also have internal sources. But this is the only reasonable way to “save” the volitional nature of coercion.

<sup>32</sup> Bayles 1972, at 17.

<sup>33</sup> Murphy 1981, at 87.

But, even fashioned like that, the concept seems to be too broad and ambiguous. Hill notes, "As such, the will of the coerced actor is viewed to be a passive mediating structure through which the will of the coercer is transmitted. ...Where coerced acts are characterized as those in which the will of the coerced actor is rendered passive, it becomes difficult to distinguish cases in which a person acts because of threat of harm from those where she acts because of compelling desire. Moreover, cases in which acts are motivated by compelling desire may be difficult to distinguish. And how are we to distinguish coerced acts from those that result from external conditions that serve to shape the will of the actor, such as those embodied in the process of socialization?"<sup>34</sup> If so, the entire internal/external dichotomy seems to be of a questionable value as regards rendering the (unmoralized) coercion concept more intelligible: "To the extent that a person adopts and 'internalizes' various desires, motives, values, and beliefs in response to her perception of the available range of alternatives, her internalized preferences and values may be as much a function of external options as is the desire to avoid the coercive stimulus on the part of the victim of duress."<sup>35</sup>

### 9. The Threat/Offer Dichotomy as a Way to Solve the Problem

Another way to characterize the coercion phenomenon is an offer/threat distinction. "Threats may be viewed to be freedom-limiting in one of two ways: by their effect on the will of the actor, or by their impact on the range of external contingencies or choice options open to the actor. One version of the theory holds that offers and threats are distinguished in that threats appeal to sources of motivation over which the agent has less control, e.g., fear, self-preservation, while offers evoke only desires. In other words, threats undermine the voluntariness of the act in a way that an offer never could because threats cannot be refused in the way that offers can."<sup>36</sup>

Still, even this much more satisfactory account is not entirely satisfactory. Psychologically, there is no way to distinguish between, say, a seductive offer, an extremely profitable offer and a threat. Even more, sometimes from the purely empirical psychological point of view, the former can induce far more effectively than the latter.

Here the whole problem is vividly demonstrated. If coercion is to be unpacked as an instance of inducement, you cannot discriminate between inducement through a threat of evil and inducement through an offer of good on purely factual psychological grounds. Psychologically, there is the same "distortion" of will.

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<sup>34</sup> Hill 1998–1999, at 289–290.

<sup>35</sup> *Id.* at 292.

<sup>36</sup> *Id.* at 293.



What remains is to state that offers cannot coerce, whereas threats can. The underlying idea may be that offers create new options whereas threats limit them relative to some previously existing baseline. But such a theory cannot be purely factual or empirical. First of all, the supposition that offers cannot coerce cannot be justified on purely empirical psychological grounds. Secondly, and this is even more important, the baseline which distinguishes a pre-offer situation from a post-offer situation of an offeree is also normative. And, finally, it is hard to see why a limit on the range of choices imposed by a threat should *eo ipso* have a coercive impact on the will. "Having fewer options from which to choose – even where the range of options is radically reduced – does not render the choice itself involuntary, even if it might otherwise be unfair to punish the actor for the choice."<sup>37</sup> At minimum, one should make explicit the relevant connection between the range of choices, on the one hand, and the coercion, on the other.

It seems to me that the major problem here is the same. There is a certain incoherence between two basic insights of the unmoralized account of coercion. On the one hand, one should regard coercion as a purely empirical psychological phenomenon. In the final analysis, to call something coercive means to find some constraints imposed on the free will of an actor. But, so defined, the phenomenon becomes omnipresent; it is much harder to find the pure voluntary (totally unrestrained, whatever this happens to mean) act. That is why one should make some qualifications in order to make the definition workable. Hence two dichotomies (external/internal and threat/offer) occurred. The problems is, however, that these qualifications are external and therefore not explained solely by psychology of will. In other words, psychologically, all restraints on the will are on an equal footing, no matter whether they are external or internal, or whether the will is being "overwhelmed" by the threat of imposing evil, or by the offer of the good. Therefore, one cannot apply the pure empirical or psychological concept of coercion in any meaningful way because the distinction between voluntary and involuntary actions collapses totally.

Quite unsurprisingly, even within the circle of the proponents of the unmoralized account of coercion, the value of the threat/offer dichotomy is questioned. Ekow N. Yankah writes: "But it is not obvious why coercion should be limited to threats to deprive another as opposed to offers that cannot be reasonably declined. Indeed, accepting this depends on accepting that it is coercion only when one reduces another's opportunities as opposed to the possibility of coercion where one severely restricts another's opportunity sets. After all, if one's opportunity sets are restricted by certain offers in ways that one could not reasonably choose to act otherwise, it seems one's will is equally overcome."<sup>38</sup> And Yankah is absolutely correct if one applies

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<sup>37</sup> Hill 1998–1999, at 295.

<sup>38</sup> Yankah 2007–2008, at 1228.

the empirical (or psychological) test in a more or less rigorous fashion in order to identify the “rationally irresistible pressure,” which blocks the free will. From a purely empirical standpoint, the peculiar way it blocks the will (external or internal, threat or offer, or whatever it may also be) is conspicuously irrelevant.

What remains, is only one of the two: either next to everything would be “voluntary.” Or, *vice versa*, there are no voluntary acts at all, and we live in a world of mutual coercion. One can state some threshold conditions of the voluntariness: “there must be both a mental state approximating some conscious intention or desire to bring about the act, and a corresponding bodily movement by which this mental state is manifested.”<sup>39</sup> This definition can discriminate between voluntary and involuntary on purely factual grounds. The problem is that, defined as it is, it happens to be quite unhelpful as a practical guide. By widening the concept of voluntary acts, it equates coercion to compulsion. As a matter of fact, the will can be wrongfully “distorted” only where there is no will at all. It contradicts our basic intuitions and human practices, which more or less clearly distinguish between coercion and compulsion. More importantly, legal systems sometimes qualify acts which were “volitional” in the sense of “bodily movement plus corresponding mental state,” as involuntary.

This is the second alternative. One can treat voluntariness in the sense of capacity to “choose the alternative.”<sup>40</sup> In this sense, to say that an act is voluntary is to say more than that the act was volitional, as in the first sense. That is to say that, with other reasonable choices open to the actor, she nevertheless chose the course of action to which she ultimately committed herself. It is in this sense that an act is involuntary when it is “against one’s will,” and thus is deemed a coerced act thought to be involuntary. But this sense of the term is too strong. Not each and every “restricted” or “imposed” option is conventionally considered coercion. Sometimes imposed choices are qualified by legal systems as coerced and sometimes they are not. This means that the criteria applied to discriminate between coerced and non-coerced choices is utterly normative.

Summing up for the coercion theories. Neither of the two interpretations of the empirical or psychological concepts of voluntariness can explain the coercion phenomenon adequately. “If the defender of the traditional theory argues that coerced acts are involuntary and uses the first (volitional) sense of the term, the argument is simply false. Coerced acts are, perhaps by definition, acts characterized by volitional responses to impossible choices. On the other hand, if ‘voluntary’ is used in the second sense to require the existence of reasonable external alternative courses of action, there are other difficulties. Not only does this second sense of the word depart from the conventional legal sense in which the term is used in other

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<sup>39</sup> Hill 1998–1999, at 286.

<sup>40</sup> *Id.* at 287.

contexts, but it requires highly nuanced normative judgments regarding the range of options open to an actor."<sup>41</sup>

I hope that this long journey to coercion theory will help us to understand some crucial points. First and foremost, all intuitive appeal and simplicity apart, unmoralized accounts of coercion are incoherent and require some normative impediment. Secondly, there is an inherent tendency to overstate or to understate the role of coercion in social practices from the standpoint of the unmoralized account of coercion. Thirdly, some more should be said about the particularities of the application of the unmoralized account of coercion to power-conferring legal regimes. I suppose that even being applied to them *on its own terms*, it is unable to generate a genuinely coercive legal regime. Let us see why.

### **10. Unmoralized Theory of Coercion and Power-Conferring Legal Rules**

Now we are able to apply the unmoralized theory of coercion, with all its implications, to the power-conferring legal regimes, whose asserted coerciveness is our major focus of analysis. As we have seen above, the key role belongs to two dichotomies (external/internal and threat/offer) which help to identify coercion instances.

We can agree that power-conferring legal rules, like any other tokens of legal rules, are externally imposed. In and of itself, this does not make power-conferring rules coercive. One also needs "an interpersonal relationship involving a complex intention on the part of a coercer."<sup>42</sup> This would probably mean some sort of intention to induce a coercee to act in a certain way. I cannot help finding this type of intention in our case. One cannot deduce the relevant intention altogether. As we have seen, the only "possibly" coercive instance of the power-conferring legal regimes is form requirement. Can we seriously state that the only intention of the legal system here is to induce the legal subjects to fulfill the relevant form requirements? If this is true, there is a far more efficient way to achieve this objective – to impose a duty or to prohibit the alternative (non-legal) ways of achieving a similar result.

The offer/threat dichotomy even confirms the alleged non-coerciveness of the power-conferring regimes. In fact, this is a classical case of offers which improve the offeree pre-proposal situation in contrast to the threats which make the offeree worse off compared to her pre-proposal situation. I do not think we can seriously qualify power-conferring legal rules as threats in the strict sense, as a statement or intention to inflict pain, evil, etc., if something is done or not done by the threatened person. Again, two important characteristics of the threat in its classical form seem to be absent.

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<sup>41</sup> Hill 1998–1999, at 287.

<sup>42</sup> Bayles 1972, at 17.

Primarily, there is no intention to induce somebody to do or not to do something. Power-conferring rules are facilitative, they are offered as devices for the legal subjects to achieve their goals and objectives. There is no particular inducement intention on the part of the legal system, apart from the very general desire to facilitate markets. To induce means in some way to block the alternatives, which is totally absent in the concept of power-conferring.

Secondly, there is no evil or pain threatened. The power-conferring legal regimes are conceptually facilitative, i.e., enabling.

These two traits together make power-conferring legal regimes more similar to offers than to threats. So we should qualify power-conferring legal rules as non-coercive if we agree that offers are non-coercive.

However, as we have already seen, not every proponent of the unmoralized accounts of coercion is ready to acknowledge the non-coerciveness of offers. Yankah, for instance, states that "While it may be uncomfortable to describe a job offer to the starving man as coercive, it is natural to imagine the man saying he had no choice but to take the job (though, depending on other factors, this may also be a justified coercive offer). Further, if one imagines an economic system in which the only jobs available were grueling, physically destructive jobs at subsistence wages but people were perfectly free to turn them down and starve to death, literally an offer one cannot refuse, the idea that these 'offers' would be coercive is not at all implausible, but rather natural. Similarly, if the legal benefits in a society were such that with marriage, one secured a job, a home and a large dowry assuring one lifelong comfort and without marriage one faced a lifetime of uncertainty and near poverty, it would seem that the legal system would be coercing citizens to marry."<sup>43</sup>

Again, the author seems to be reluctant to state explicitly and unconditionally that each and every offer which cannot be "reasonably" (whatever that is supposed to mean) avoided or refuted, is coercive. And it seems quite plausible. In fact, Yankah himself explains this twist in the next passage: "Again, it is possible that these circumstances would be created without the intent of any will to restrict others to a course of action, i.e., people could simply be forced by circumstances or unfree to act in their desired ways. We need not take the position that any unfree or non-voluntary choices that a person may face is appropriately labelled coercive. But where the circumstances of the offers were created with the intent to restrict available courses of action it seems we have a coercive offer."<sup>44</sup>

In other words, we have come full circle. In any case, one needs to somehow limit the range of coercive offers. Otherwise, every offer would be coercive because each offer presupposes some existing structures for the distribution of wealth in a given society, the existence of which can hardly be attributed to any particular person.

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<sup>43</sup> Yankah 2007–2008, at 1229.

<sup>44</sup> *Id.*

But, in that case, the coercive/voluntary dichotomy collapses. That is why some qualifications are required.

The key qualification was masterfully introduced by David Zimmerman. The central focus of Zimmerman's analysis is the capitalist wage system and in what sense it can be coercive. Zimmermann suggests two additional criteria of a coercive offer: feasibility and prevention conditions. In this sense a coercive offer would only be one which was purposefully created in order to prevent the alternative choice (with which an offeree would feel more comfortable), when such an alternative choice was real, if not prevented.

For the feasibility condition: "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... 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."<sup>45</sup>

For the prevention condition: "(I)n 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 preproposal situation Q strongly prefers."<sup>46</sup>

This theory is undoubtedly far more coherent. Particularly interesting is an ingenious attempt to reformulate the baseline problem. The distinction between offers and threats presupposes a certain baseline. An offer is each proposal which enlarges the scope of eligible options. Consequently, a threat diminishes that scope. As Robert Nozick put it in his highly influential text on coercion: "if C makes the consequences of Q's action worse than they would have been in the normal and expected course of events, then P's proposal is a threat; if C makes the consequences better, the proposal is an offer... the term 'expected' is meant to shift or straddle predicted and morally required."<sup>47</sup>

So the scope of eligible options before Zimmermann was basically interpreted either statistically: only really existing options in the pre-proposal situation matter, or morally: violations of pre-existing moral rights are also included. Zimmermann wants to enlarge a set of options; not only options existing in the pre-proposal

<sup>45</sup> David Zimmerman, *Coercive Wage Offers*, 10 *Philosophy and Public Affairs* 132 (1981).

<sup>46</sup> *Id.* at 133.

<sup>47</sup> Robert Nozick, *Coercion in Philosophy, Science, and Method. Essays in Honor of Ernest Nagel* 447 (S. Morgenbesser et al., eds., New York: St. Martin's Press, 1969).

situation are included, but also those both historically and technologically possible which are prevented by the intentional effort of the offer.

In other words, we compare a post-proposal situation with some hypothetical pre-proposal situation of the offeree which never existed but could have existed if not prevented by the offeror. This is rather an ingenious attempt to solve the problem of how to limit the range of contrafactual alternatives which could have been real if not for the routines of the existing institutional structure. As Seth F. Kreimer remarked: "This is the shortcoming of the existential counterfactual as a baseline; in our World, the government does exist, and we lack the theoretical or investigative apparatus to determine what the world would look like in its absence."<sup>48</sup> In an epistemological situation like that, the only plausible way to "save" counterfactuals is to control their proliferation with some kind of intentionality condition. Only those counterfactuals which were actively prevented by the intentional efforts are relevant.<sup>49</sup>

This line of thought can shed some light on the similar methodology applied by Frederick Schauer, when he compares the costs and benefits of the power-conferring legal rules with cost and benefits of the artificially construed hypothetical non-legal alternative, which combines only the benefits of the legal regime and the its pre-legal alternative.

As a matter of fact, Schauer's interpretation of the baseline will not satisfy the requirements put forward by Zimmermann. Counterfactuals, proposed by Zimmermann, are carefully delineated in order to make them feasible, thinkable or possible in a real world. A more or less strict delineation is crucially important, otherwise the whole project fails because the only limit on possible (contrafactual) alternatives is one's own imagination. It is quite clear that, via creation of power-conferring legal rules, a legal system could prevent legal actors from using non-legal alternatives only by imposing a legal prohibition on them, which is not the case. It is also evident that the hypothetical alternative normative regime constructed by Schauer, combining the beneficial sides of both the factually existing normative regimes and none of the costs thereof, is highly unlikely to survive the feasibility condition.

To sum up the whole story of the unmoralized account of coercion, it seems that, in its purest form, as a "pressure theory," it is unworkable because it is too wide and indeterminate with a considerable risk either to make everything or nothing at all coercive. More satisfactory and functional restrictive accounts are literally inapplicable, at least on their own terms, to the context of power-conferring legal regimes.

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<sup>48</sup> Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 University of Pennsylvania Law School 1293–1352 (1984).

<sup>49</sup> Even this is not beyond doubt. See, for instance, Lawrence A. Alexander, *Zimmermann on Coercive Wages*, 12(2) Philosophy & Public Affairs 160–164 (1983).

## Conclusion

1. The power-conferring legal rules coerciveness claim is inextricably connected to the unmoralized account of coercion, as any moralized theory shifts the problem from coercion to the issue of distributive justice.

2. The unmoralized and extremely wide concept of coercion can hardly be coherent in law because it makes coercion a matter of context, dependent on the willpower of each individual, which threatens to eliminate the force of law as such.

3. Even applied on its own terms, the unmoralized concept of coercion is unworkable within the context of power-conferring through law because power-conferring legal regimes do not eliminate non-legal alternatives, making it dependent on the will of the legal subjects themselves.

4. The most interesting thing about Schauer's theory lies in his ingenious attempt to substantiate the coercion (of power-conferring rules) claim relying on counterfactuals. A choice has been limited relative to some situation which never occurred but would or should have occurred. But that does not work either. In order to limit a set of counterfactuals, making them realistic (preferences and needs are limited only by imagination), one should impose severe limits on them, which makes it impossible to characterize the particular situations described by Schauer as coercive in that sense.

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### Information about the author

**Sergey Tretyakov (Moscow, Russia)** – Senior Researcher, Institute of Legal Studies, National Research University Higher School of Economics (3 Bol'shoy Trekhsvyatitel'skiy pereulok, Moscow, 109028, Russia; e-mail: openstructure@gmail.com).