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ABSTRACT

The ideal of individual liberty and autonomy requires that society provide relief against coercion. In the law, this requirement is often translated into rules that operate "post-coercion" to undo the legal consequences of acts and promises extracted under duress. This Article argues that these ex-post anti-duress measures, rather than helping the coerced party, might in fact hurt her. When coercion is credible—when a credible threat to inflict an even worse outcome underlies the surrender of the coerced party—ex post relief will only induce the strong party to execute the threatened outcome, to the detriment of the coerced party. Anti-duress relief can be helpful to the coerced party only when the threat that led to her surrender was not credible, or when the making of threats can be deterred in the first place. The credibility methodology developed in this Article, descriptive in nature, is shown to be a prerequisite (or an important complement) to any normative theory of coercion. The Article explores the implications of credible coercion analysis for existing philosophical conceptions of coercion, and applies its lessons in different legal contexts, ranging from contractual duress and unconscionability to plea bargains and bankruptcy.

Keywords: Coercion, Duress, Credibility.

[*] Bar-Gill is a Junior Fellow, Harvard Society of Fellows; Ben-Shahar is a Professor of Law and Economics, University of Michigan. Helpful comments were provided by Douglas Baird, Laura Fitzgerald, Don Herzog and workshop participants at Michigan. Michael Daniel and Efrat Procaccia provided excellent research assistance. Financial support from the John M. Olin Centers for Law and Economics at Harvard Law School and at the University of Michigan Law School and from the William F. Milton Fund of Harvard University is gratefully acknowledged.

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INTRODUCTION

The ideal of individual liberty and autonomy requires that society provide relief against coercion. This Article argues that the legal measures against wrongful coercion are more limited than previously thought. It provides a skeptical view: when individuals are coerced into taking actions or making promises, some of the traditional anti-duress measures may not do much to redress their misfortune. In fact, it might often be better for these coerced individuals if such anti-duress measures would not be applied at all.

Coercion occurs when an individual is placed under a threat: "commit a requested act (or refrain from an act), or else an undesirable outcome would be inflicted upon you." When the individual has no alternative way to avert the undesirable outcome but to "surrender" and commit the requested act, it is tempting to diminish her responsibility for the consequences of the act. Thus, for example, when the requested act is a contractual promise—when an individual is coerced to accept contractual terms favorable to the threatening party—there is a long tradition in the law of contracts that relieves the coerced party from contractual liability.[1]

Under the skeptical view developed in this Article, nullifying such coercive promises, or any other coerced-into acts, might not always be in the interest of the coerced party. Instead, her well-being might be better served if the law were to deem her act voluntary and give it ordinary efficacy. This claim is based on the concept of *credible coercion*, which is developed in this Article.

To understand the logic underlying this counter intuitive claim, consider the perspective of the threatening party. This party is threatening to do something undesirable to the threatened party, should his demands be turned down. This act of coercion is considered *credible* if, were his demands to be turned down, it would be in the interest of the threatening party to bring about the threatened outcome. That is, if to prevent the threatening party from carrying out his threat the other party must surrender and commit the act or make the requested promise, the threat is credible. A credible threat is the opposite of a bluff.

When coercion is credible, the threatened party is unfortunately limited to only two choices: (1) surrender to the threat, or (2) refuse to surrender and suffer the threatened adverse outcome. The fact that the threat is credible establishes that a third possibility, one where the threat is turned down and the threatening party then refrains from carrying it out, is unattainable. It is unattainable because, if the threat were to be turned down, it would be in the interest of the threatening party to carry out the threat, rather than "retreat."

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[1] *See, e.g.*, 7 CORBIN ON CONTRACTS §28.6 at p. 57 (Rev. ed. 2002) ("A modification coerced by a wrongful threat to breach under circumstances in which the coerced party has no reasonable alternative should prima facie be voidable.")

Still, it might be thought that this third option can be salvaged by a legal regime that nullifies ex post the implications of a coerced act or promise. For example, it might be suggested that if a party were coerced into an undesired contract, he would be best served by the following strategy: surrender and remove the threat now and later petition the court to invalidate the contract. This option would of course be most favorable to the threatened part, as she would suffer neither the threatened outcome nor the consequences of the coerced promise.

Unfortunately, however, when coercion is credible, this option does not exist. If the threatened party were able to invalidate the coerced act, the threatening party would surely anticipate this ex-post retraction. Ex-ante, the threatening party would recognize that it is impossible for him to extract an *enforceable* surrender. Realizing that anti-duress rules would later invalidate the threatened-party's surrender, he would not bother to make the threat. He would simply do that which he would otherwise threaten to do. The anti-duress rules thus strip away the threatened party's choice between surrendering to the threat and facing the threatened outcome—a choice that the threatening party would otherwise be ready to give. Rather than a choice between two evils, the threatened party is left only with the greater of the two evils.

The concept of credible coercion runs against deeply rooted intuitions concerning the power of the law to alleviate the effects of duress. In a variety of contexts, most commonly in contractual settings, legal policy is founded on the premise that ex-post anti-duress measures such as invalidation of coerced promises and acts can help the threatened party.[2] The thesis developed in this Article provides reason to be skeptical of such anti-duress rules. It suggests that whenever the act or promise was induced by credible coercion, anti-duress measures will only hurt the threatened party.

The concept of credible coercion developed in this Article can be applied to shed light on a host of legal and moral issues related to coerced acts and promises. For example, there is an ongoing philosophical exploration of the boundary between coercion and "hard bargaining." Recognizing that, on the one hand, coercion can occur even without pointing a gun to the head, and, on the other hand, not every "take-it-or-leave-it" proposal is coercive, various criteria have been offered to distinguish between non-coercive proposals which are referred to as "offers," and coercive proposals which are referred to as "threats."[3]

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[2] *See*, *generally*, Restatement (Second) of Contracts § 175 ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim"). Specific examples are discussed in Part III, *infra*.

[3] *See*, *e.g.*, Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD 458 (Sidney Morgenbesser et al., eds., 1969); CHARLES FRIED, CONTRACT AS PROMISE 95 et seq. (1981); ALAN WERTHEIMER, COERCION 204 et seq. (1987).

The analysis in this Article contributes to this exploration by demonstrating that, at least for the purpose of determining the enforceability of the resulting concession, whether a proposal is classified as an enforceable offer or rather as a non-enforceable threat should depend on its credibility. If it is in the interest of the proposing party to carry out the adverse consequence, as he claims he will, in the event that the other party does not give-in, his proposal is credible and should be considered an "offer," not a "threat," even if it is offensive under some normative criteria.

Credible coercion analysis, while arguing that common anti-duress measures are often too "naïve" to help coerced parties, does not end with this skeptical nothing-can-be-done claim. Rather, it provides a new starting point—a different methodology—for anti-duress policy. Recognizing that the credibility of the threat is key, the analysis suggests that legal measures should be evaluated by their ability to affect the credibility of the threat. It demonstrates that a policy can promote the interests of the threatened party if it changes the incentives of the threatening party, inducing him to refrain from carrying out the threat, or from making it in the first place. Pursing this 'credibility methodology," we show that whenever credibility is acquired through deliberate investment that has the sole purpose of generating credible threats, anti-duress measures that strip away the gains from coercion can discourage such wasteful investment, and thus prevent the credible threat from ever being made.

The Article is structured as follows: Section I develops the concept of credible coercion. It explains what credible threats are, and what types of social policies would or would not be effective in dealing with such threats. Section II then compares the concept of credible coercion to some of the prominent normative concepts of coercion appearing in the literature. Section III explores the implications of credible coercion in different legal contexts, ranging from contractual duress and unconscionability to plea bargains and bankruptcy. Section IV Concludes.

I. THE CONCEPT OF CREDIBLE COERCION

A. Credible Threats

The genesis of any isolated act of coercion is usually a threat. The coerced party succumbs to a particular painful course of action—promise, act, omission—because it will help her avoid an even more adverse consequence which is threatened to be brought about. Deeming no other way to avert the threatened consequence, the coerced party surrenders and chooses that which the threatening party demanded.[4]

[4] The term "threat" is used here in a looser sense than the one employed in much of the coercion literature. In this Article, a "threat" is a factual characterization of a statement that has the structure "commit a requested act or else some (adverse)

The fear that the threat would be carried out induces the threatened party into a course of action that she would otherwise prefer to avoid. Focusing on the perspective of the threatened party, most accounts of coercion look at the voluntariness of the action. According to the prevalent inquiry, it is important to know what other alternatives were available to the surrendering party, why did she find herself unable to withstand the threat, and whether she readily committed the requested act or had done so under "protest." The freedom of her will is the key.[5]

While most philosophical and legal characterizations of coercion follow this line of inquiry and focus on the situation of the threatened party, this Article proposes a different methodology. In determining whether relief should be granted to the coerced party, the focus should be on the motivation of the *threatening party*. The single decisive factor in determining whether remedies should be granted is whether the threat was credible: was the threatening party ready and willing to carry out the threat in the event that the threatened party did not acquiesce, or was he merely bluffing?

A credible threat is one that the threatening party intends to carry out. Credibility is evaluated at the junction where the threat fails to induce the threatened party to surrender and thus fails to induce the demanded course of action. If that situation arrives—if the threatening party can no longer coerce the other party to surrender to his will—what would the threatening party prefer to do? If at that moment he perceives his payoff from carrying out the threatened outcome to exceed his payoff from not doing so, his threat is credible. Otherwise, if it is in the interest of the threatening party not to carry out the threatened outcome, his threat is not credible.

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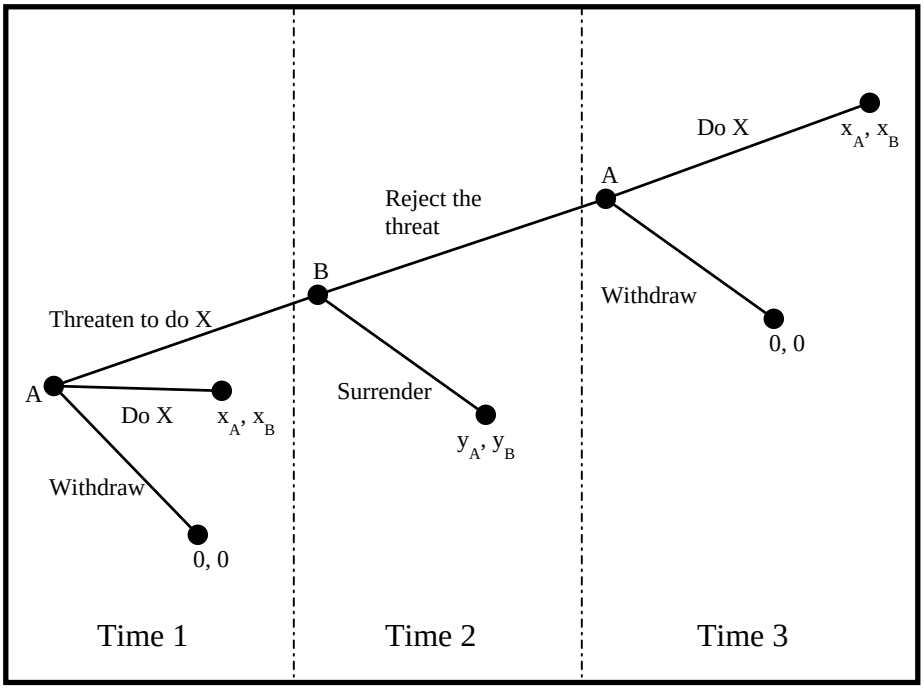
outcome would be imposed." In the literature, by contrast, such statements are usually labeled "proposals," and the term "threats" is a normative characterization of a sub-set of "proposals" that are concluded to be coercive. "Proposals" that are concluded to be non-coercive are usually labeled "offers." Put differently, in this Article "threats" are the starting point—the things that need to be analyzed to determine whether they are coercive; whereas in the literature "threats" are often the conclusion of the analysis. *See, e.g.*, Nozick, *supra* note 3, at 458 ("I have claimed that normally a person is not coerced into performing an action if he performs it because someone has offered him something to do it, though normally he is coerced into performing an action if he does so because of a threat that has been made against his not doing so."); FRIED, *supra* note 3, at 98-99 ("a promise procured by a threat to do wrong to the promisor, a threat to violate his rights, is without moral force. It is such threats that constitute the legal category of duress."); WERTHEIMER, *supra* note 3, at 204 ("When are proposals coercive? The intuitive answer is that threats are coercive whereas offers are not….").

[5] The centrality of this freedom-of-will test in determining the existence of coercion is a recognized feature of the doctrine of duress in contract law. *See, e.g.*, Restatement (Second) of Contracts §175 (1) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."); Robert A. Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 880-84 ("the issue of free assent is at the core.")

Figure 1



The interactive decision tree in Figure I depicts the choices of the threatening party, A, and the threatened party B. Initially, at time 1, A has to decide whether to carry out an act X which is adverse to B, not carry it out, or threaten that unless B performs Y, the adverse outcome X would be carried out. If A makes the threat, then at time 2 B has to decide whether or not to surrender. Lastly, at time 3, if B did not surrender, A has to decide whether to make good on his threat and carry out X or "withdraw." For any combination of strategies for both parties, the payoffs are denoted by a pair in which the first element represents A's payoff and the second B's payoff (subscripted "A" and "B" respectively). Specifically, if A carries out X, the payoffs to A and B are x_A, x_B, respectively. If, instead, B surrenders, and performs Y, the payoffs to A and B are y_A, y_B. Lastly, if B does not surrender and A does not carry out X, there is no change in the parties' well-being relative to their pre-interaction positions, and thus the payoffs are normalized to 0, 0.

To illustrate, consider the following example.

> Example 1: *Contract Modification.* "A, who has contracted to sell goods to B, makes an improper threat to refuse to deliver the goods to B unless B modifies the contract to increase the price. B attempts to buy substitute goods

> elsewhere but is unable to do so. Being in urgent need of the goods, he makes the modification."[6]

In this example, X is breach; Y is a modification of the contract. x_A measures how much better-off A is under breach relative to performance of the original terms (which depends on, among other things, his expected liability). x_B measure how gravely will B be hurt by breach, given that she may nevertheless be able to collect damages. y_A and y_B measure the change in A and B's payoff under the modified terms, relative to the original price.

The typical threat scenario involves two characteristics. It must be that $y_A > x_A$ namely, that A gets a higher payoff by inducing B to commit the requested act Y than by inflicting X unilaterally. Also it must be that $y_B > x_B$ namely, that the threatened party B is better off surrendering to the threat, than seeing it carried out. That is $y_A > x_A$ is a pre-condition for the threat to be made; and $y_B > x_B$ is a pre-condition for coercion to succeed. In the contract modification example, $y_A > x_A$ is equivalent to saying that the supplier will be better off under the modified price relative to unilateral breach; and $y_B > x_B$ is equivalent to saying that the buyer is better off paying the higher price than suffering breach and collecting remedies.

We say that A's threat is credible if $x_A > 0$, namely, if A's payoff from carrying out his threat exceeds his payoff from not carrying it out. In the example, whether $x_A > 0$ depends on how much A saves in performance costs by breaching, how much B already paid, how likely is A to pay damages, etc'. When A's threat is credible, we can make two predictions. First, a "time 3" prediction: if A made a threat and B rejected it, then, at time 3 A would proceed to carry out the threatened act. If the buyer rejects the supplier's modification demand, the supplier will breach. Second, a "time 1" prediction: if, when B surrenders, she can later revoke her surrender (e.g., have a court invalidate the coerced bargain, or otherwise undo the effects of the coerced act), then at time 1 A would carry out the adverse outcome. A would recognize that any act or commitment he extracts by the threat would later be revoked, stripping him of any advantage he gained by threatening the other party, and placing him in the same position as if the threat were rejected. A would recognize that his "ideal" payoff, y_A (e.g., a higher price), is not attainable/enforceable. Accordingly, when his threat is credible—when $x_A > 0$—the threatening party would rather carry out the adverse outcome at time 1 and get x_A, than make a threat that can only induce a revocable surrender and a payoff of, at most, 0.

> Example 2*: The Usury Case*.[7] In a time of war and instability, A, a rich individual, offers to loan money to B, a

[6] Restatement (Second) of Contracts § 175 cmt. b, ill. 5, describing a common scenario dealt with by the doctrines of duress and modification.

> poor individual, who cannot secure funds elsewhere. For the immediate loan of $25, B promises to pay $2,000 at a later period, after the war would end.

We say that A's implicit threat not to loan the $25 for anything less than a promise to pay back $2,000 is credible if, for a promise to pay back anything less, A would prefer not to make the loan altogether. Similarly, A's threat is credible if, under a legal regime that would scrutinize this deal ex-post and reduce B's obligation to pay to a sum smaller than $2,000, A would prefer not to make the loan. Conversely, A's threat is not credible if he would prefer to make the loan even for some lower rate of return.

What factors make a threat credible? A threat is credible, —but for surrender it would be carried out —if the payoff to the threatening party from carrying out the threatened outcome exceeds his payoff from not doing so. Therefore, factors that increase the relative payoff from executing the threat (as compared to non-execution) enhance the credibility of the threat. Conversely, and more importantly from a policy perspective, factors that reduce the payoff to the threatening party from affecting the threatened outcome, reduce the credibility of the threat.

> One major credibility-affecting factor is the legal repercussions of executing the threat. In many contexts the threatened outcome will be in violation of a legal norm and will thus entail a legal sanction. If A threatens to kill B unless B gives A all his money, then execution of the threat will entail a severe criminal sanction. In

Example 1, where A threatens to breach his contract with B unless B concedes to a price modification, the execution of the threat will invoke contractual remedies for breach of the initial contract. Generally speaking, when a substantial sanction can be expected to follow the execution of the threat, the credibility of this threat will be reduced.

Importantly, however, credibility is affected not by some theoretical legal sanction that the threatened party is hypothetically entitled to invoke, but rather by the effective sanction that the threatening party expects to bear. Thus, in the contract modification case the seller's threat would more likely be credible if an economic downturn had rendered the seller incapable of paying damages. The judgment-proof problem is a key factor affecting the credibility of a threat to breach, as well as the credibility of any other threat to inflict an illegal outcome. If the principal means to deter threats is a monetary fine imposed for the execution of the threat, the capacity of an insolvent threatening party to pay this fine will determine the credibility of the threat. Beyond insolvency, the power of legal sanctions to reduce credibility is weakened by a host of other factors.

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[7] This example is based on *Batsakis v. Demotsis*, 226 S.W.2d 673 (Ct. Civ. App., Tx, 1949).

First, there is normally a significant delay between the benefit derived from the execution of the threat and the legal sanction, a delay caused by back-logged courts. Second, even if legal sanctions take the form of delay-free out-of-court settlements, as is often the case, settlement amounts may be lower than the expected judgment at trial, further qualifying the credibility-reducing power of the legal sanction.[8]

While formal legal sanctions are of central importance, they are by no means the only and in some cases not even the most important credibility-affecting factor. Social norms and extra legal sanctions also affect the payoff attached to an executed threat. For instance, if A threatens to breach a contract unless B agrees to a price modification, A might be subject to non-legal sanctions in the form of trade reduction by third parties, reputational harms and the like, which may, even in the absence of legal liability, render the threat non-credible.[9]

Reputational concerns may also work to bolster a threat's credibility. A threat that would be costly to execute (due to, say, high legal sanctions) or which induces an act that generates a relatively minor benefit to the threatening party, may nevertheless be credible once repeat play dynamics and reputation-building concerns are taken into account. Consider a party, A, who engages in repeat contractual interactions. A may benefit from establishing a reputation for carrying out his threats—a reputation which would allow A to intimidate future negotiation counterparts and to extract better terms in each contractual transaction. When A threatens to walk away from a profitable deal unless B concedes a price which makes the deal even more profitable for A, the threat might seem non-credible. After all, carrying it out would mean forgoing the profit from the deal. But, if this one deal is but a first step in a reputation-building (or reputation maintenance) strategy, vis-à-vis B or third parties, which will ensure that future bargainers would view A's threat as credible, then walking away can suddenly become a profit-increasing strategy. The immediate loss in forgoing the present transaction must now be balanced against the expected stream of improved terms that A, equipped with more intimidating reputation, would be able to secure. Often the latter benefit will dominate the former cost, making the threat to walk away credible.[10]

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[8] For a detailed analysis of these factors, *see* Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, 33 J. LEGAL STUD. __ (2004).

[9] Reputation effects may be sensitive to the specific circumstances leading to the breach of contract. If, for example, A's request for modification of the original contract was based on an unexpected cost increase, which according to industry norms justifies a modification of the initial agreement, than A may be able to breach without suffering any reputational penalty. For a thorough account of reputation sanctions, *see, e.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Value Creation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

[10] In particular, the long-term reputation benefit will dominate the short-term cost when the threatening party's discount rate is low, that is, if he is "patient" enough to

Importantly, however, reputation-based credibility is endogenous to the legal regime. That is, the rules determining what constitutes duress are one of the factors that can affect the credibility of the threat. In particular, reputation concerns can bolster the credibility of a threat only if those future deals that are influenced by a party's reputation are themselves enforceable. If the law refuses to enforce concessions that resulted from threats there is no point in building a reputation for carrying out intimidating threats, because future concessions extracted by such threats will also, under the same law, be un-enforceable. The credibility-generating role of reputation would disappear. In the above example, A's incentive to walk away from the current deal when his terms were not accepted had to do with the gain from future, *enforceable* deals that will have similar terms. Non-enforcement of the current as well as the future deals can effectively deter A from acting in a coercive manner. His threat will cease to be credible.

As suggested by the preceding discussion, the legal and extra legal implications of carrying out the threat are the main factors that determine the credibility of a threat. However, the payoff that the threatening party expects if he were to withdraw the threat is always the benchmark against which the execution payoff is measured. Therefore, this benchmark payoff clearly affects the credibility of the threat. In particular, if the threatening party expects a low benchmark payoff, then a lower execution payoff will be required to generate a credible threat. Consider, for example, a supplier that operates in a competitive market, enjoying only a narrow profit margin. If this supplier faces an unexpected cost increase, he is relatively more likely to end-up with a credible threat to breach absent a modification (as compared to a monopolist that enjoys a larger profit margin), even if this breach would trigger contractual liability.

Non-pecuniary costs and benefits may also play an important role in determining the benchmark payoff. In the contract modification example, if the seller had no way of anticipating or preventing the cost increase, and if absent a modification this cost increase would leave the seller with a loss while the buyer makes a nice profit, the seller may deem the deal to be unfair. Performance of the unmodified contract may thus impose on the seller not only pecuniary costs but also non-pecuniary costs arising from the experience of being treated unfairly. Consequently, the seller may be willing to carry out a threat even in the presence of significant legal sanctions, to avoid the emotional burden of dealing under unfair terms. Such non-pecuniary costs may well tip the credibility scale from non-credible to credible.[11]

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sacrifice some immediate profit for future profits. *See generally* Drew FUDENBERG & JEAN TIROLE, GAME THEORY, ch. 9 (1991).

[11] *See* Oren Bar-Gill & Omri Ben-Shahar, *Threatening an "Irrational" Breach of Contract*, 11 SUPR. CT. ECON. REV. 143 (2004).

B. Coercion and Credibility

To better understand the relationship between the concept of coercion and the concept of credibility, we begin with the case of a non-credible threat.

> Example 3: *The Highwayman Case*. A, a highwayman, stops, B, a traveler at gunpoint and threatens to kill B unless B turn over all the money that B is carrying with him to A.

Assume initially that A's threat is not credible. Namely, given A's anticipation of the likelihood of being caught and (severely) punished if he were to kill B (in the case where B refuses to turn over the money), A would withdraw rather than execute his threat and shoot B. In other words, A is bluffing. If B knew that A's threat is not credible, B would not succumb to A's demand and would call the bluff. At least under our benchmark assumption of complete information, credibility is a necessary condition for coercion. *A threat known to be non-credible cannot and will not coerce.*

Now assume that the highwayman is operating in a lawless land, where the threat of capture and punishment is minimal. Under this alternative assumption it may well be that if B refuses to pay-up, A will in fact kill B. The payoff from doing this—the money that A will be able to take from his victim—would exceed the expected cost of the sanction. Facing a credible threat, B knows that he has only two choices: to give-up his money or to be killed by A. B prefers the former and thus A's threat will be successful in extracting money from B. A credible threat is able to coerce. If A credibly threatens to do X (kill B) unless B does Y (surrenders his money), and if B prefers Y over X, then A's threat will coerce B to do Y. The fact that B prefers yet a third outcome, Z (not be killed and not surrender his money), is irrelevant. When A's threat is credible, Z is not attainable. In terms of the game tree in Figure 1, when A's threat is credible (when $x_A > 0$), B's choice is between y_B and x_B. Both may be "bad," relative to the benchmark of 0 (if A were to withdraw the threat), but B's only power is to choose the lesser of two evils.

The preceding discussion assumed complete information, at least with respect to the credibility dimension. Namely, it was assumed that B could distinguish a credible threat from a non-credible bluff. While this assumption will likely hold true in some cases, there are other cases in which it is not apparent whether the threat is credible. Even in these cases, though, the benchmark insight above holds: only a threat that is *perceived* to be credible has the power to coerce. A threat can induce B to surrender only if B perceives a great enough risk that the threat is credible. In this asymmetric information environment, however, a bluff can be mistaken for a credible threat and can induce surrender. It is only in these situations—non-credible

threats that were perceived to be credible and succeeded to coerce—that the law may step in and nullify the consequences of the coercion. We discuss this claim in the next section.

C. Relief from the Consequences of a Coerced Act or Promise

As explained, the credibility of a threat depends on the comparison between the two courses of action available to the threatening party in the event that the threat was rejected: carrying out the threat versus retracting it. If the threat was "commit act Y or else some consequence X would be imposed," once the threat was rejected and act Y was not committed, the threatening party will carry out the threat only if the threatened consequence X raises his utility (if $x_A > 0$). Importantly, whether a threat is credible does *not* depend on anything that could potentially happen when the threat is successful. In particular, it does not depend on the benefit to the threatening party from act Y, or on any policy designed to relieve the consequences of a coerced act or promise.

Ex-post relief from the consequences of a coerced act or promise is counter productive in combating coercion because it does not affect the credibility of the threat. If a credible threat exists, such a policy of ex-post relief can, at most, uproot the strategy of extracting benefits through threats. The threatening party would realize that it is pointless to try to secure gains via threats, as such gains would be stripped in accordance with the ex post relief policy. He would then have to choose whether or not to commit X—the act that he would otherwise be willing to trade away—and, when $x_A > 0$, he would indeed commit X. In situations in which the threat would have been credible, the threatened consequence would be carried out without offering an opportunity to avoid it.

Consider the usury case under the assumption that A has a credible threat not to provide the $25 loan unless B promises to repay $2,000 after the war. Since A's threat is credible and B is in dire need of the $25 loan, B will make the promise. It is conventionally suggested that the law should deny enforcement of B's coerced promise, and thus undo the adverse consequences of A's coercive conduct.[12] This relief policy would often take the form of reducing B's obligation below the coercive $2,000.[13] However, in situations in which A's threat is credible, such an ex post remedy would not only fail to help the coerced party, B, but it would in fact hurt her. The credibility of A's threat implies that absent a guarantee of receiving $2,000 after the war A would not provide the loan. But, if the law is not expected to enforce B's promise to repay $2,000, B cannot

[12] *See*, *e.g.*, FRIED, *supra* note 3, at 109-111 (criticizing the ruling in *Batsakis v. Demotsis*).

[13] Indeed, the trial court in the case *Bataskis v. Demotsis* reduced the promisor's obligation from $2,000 to $750. In the appeal, however, the $2,000 obligation was reinstated, not on the basis of credibility analysis, but on the basis of the court's reluctance to scrutinize the adequacy of consideration.

guarantee the $2,000 repayment. The result is that A would not provide the loan. True, B would have preferred a less expensive loan. But when A's threat is credible, A would not go along with a cheaper loan. Given this constraint, B has indicated that he prefers the expensive loan over no loan at all. The law's refusal to enforce the expensive/coercive loan would not provide B with a less expensive loan. It would leave B with no loan at all.

To further illustrate the harm of the ex-post anti-duress remedy, consider the following hypothetical suggested by Robert Nozick.[14]

> Example 4: *The Flogged Slave Case*. A, a slave owner, flogs his slave, B, every day. One day A proposes to B that if B performs a certain unpleasant act, Y, he will stop beating him. B performs Y. Was B coerced?

Surely, a slave's existence is one of continuous coercion, and in discussing his well being it would be odd to isolate but one instance of coercion. Still isolating this particular event can help us distinguish the ways in which legal policy can, and in the ways in which it cannot, help the coerced party.[15] Here, B was given a choice, which itself may or may not deepen his duress. Our argument is the following. If A's threat to proceed with the daily beating of B unless B performs Y is credible, B's interest (evidenced by his choice to perform Y) is to avoid the beating, even at the cost of the requested act. If B can invoke an anti-coercion relief policy to undo his acquiescence (or get any form of remedy for it), it would only deprive him of the opportunity to escape the beating. That is, B does *not* have a third alternative, the "ideal" one, of avoiding both the beating and the obligation to commit Y. If B were to have the law on his side, granting him relief from his coerced acquiescence, A would anticipate that B would be likely to seek this relief and A would not offer the deal in the first place. Saying that A has a credible threat means that if A expects B to undo his acquiescence, he would simply proceed to apply the beating. B's interest cannot be served by allowing him to invoke such ex-post relief measures.[16]

Another way to restate this argument is to note the tension between B's ex-post and ex-ante interest. Ex-post, after performing the act and inducing A to refrain from beating—that is, after getting his side of the "bargain"—B prefers to undo the act Y. He can now enjoy the best of both worlds: no beating, no Y. Ex ante, however, his

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[14] Nozick, *supra* note 3, at 450.

[15] We understand Nozick's interest in the slave example to be similarly "sterile," using this extreme scenario to flesh out defining characteristics of coercion. *See* Nozick, *supra* note 3.

[16] This is not an argument that society cannot help coerced parties such as slaves. It is merely an argument that ex-post relief of the coerced act would not be of much help. *See infra* Section II.F for the discussion of policies that could be effective in combating coercion.

situation is not as bright, because at this moment in time A still has control over the set of choices available to B. Thus, ex-ante B does not have the ability to enjoy both worlds, he must choose one of them or else—if A's threat is credible—end up with 'beating' being chosen for him. The only way B can avoid this is by making the surrendered act non-relievable.

The reason that the ex-post anti-coercion measures are futile is that they do not address the source of the slave's problem. It is not the deal that the slave struck that is responsible for the coercion, but rather the initial unequal allocation of power, the relative starting points of the "negotiation," that are coercive. The expectation of daily beatings is the manifestation of coercion, not the proposal of an arms length "bargain." A social policy of undoing the deal, which does not purport to address the unequal starting points that gave rise to this deal in the first place, is futile in helping the slave.

D. Non-Credible Threats

When coercion arises from a credible threat, we argued, an ex-post remedy would not be of much help to the threatened party. But coercion may also arise from a threat that was not credible, a bluff, which was mistakenly perceived to be credible by the threatened party. The traveler who surrenders to the highwayman at gunpoint may doubt the credibility of the threat to pull the trigger, but as long as he perceives at least some chance that it is credible—that it would be carried out if he were to reject it—he might be coerced to turn over his money.

In these situations, an ex-post remedy can help the coerced party. If a court can confirm that the threat to which the coerced party surrendered was not credible, it can undo the consequences of the coercion and provide a meaningful remedy. Unlike the case of credible threats, in the case of bluffs the anticipation of this ex-post intervention would not induce the threatening party to carry out his threat ex-ante, but rather to refrain from making it in the first place. He would realize that he cannot secure any advantage by coercion, and would thus prefer not to make the threat. Stated differently, if non-credibility is known to be verifiable ex-post, the threatened party's imperfect information at the time she needs to evaluate the threat is immaterial from an incentive point of view. Under a regime that undoes the consequences of non-credible coercion, the threatened party effectively "postpones" her decision whether to surrender until the time at which the court will make the accurate observation of whether the threat was credible.

Hence, when threats are non-credible, courts can effectively undo the consequences of coercion. However, it should also be clear that the more apt courts are in evaluating credibility, the greater the incidence of credible coercion that they will face (and which they will correctly decide not to nullify). The reason for this counter-intuitive claim is the following: If courts are expected to verify credibility and

nullify the consequences of non-credible threats, parties whose threats are not credible will not bother to make them. Thus, those cases in which surrender occurs and which eventually reach courts are much more likely to involve credible threats.

While ex-post relief can be effective in the case of non-credible coercion, this does not mean that any time a party utilizes "bluffs" the court ought to intervene. Our argument is narrower; it merely says that if courts want to intervene, they can effectively do so only when the threat was non-credible. In other words, non-credibility is a necessary condition for the effectiveness of legal intervention. It is surely not sufficient. To illustrate this distinction, consider the following familiar example.

> Example 5: *Penny Black*. One stamp collector offers another a "Penny Black" at a steep price, knowing that the buyer needs just this stamp to complete a set.[17]

The seller is making a threat: "unless you pay me the steep price, I will not let you have the stamp." If this threat is credible, legal intervention in the form of ex-post price reduction is harmful to the buyer, since the seller will prefer not to sell. If, instead, the seller's threat is non-credible—a mere bluff, as is commonly observed in arms length negotiations—ex-post price reduction would not deter the seller from trading. The seller might be willing to pursue the transaction even if he anticipates the possibility of a court-mandated price reduction. Nevertheless, even though intervention could be effective, it is not clear that coercion is present and that the law should intervene. Any used car sale involves similar negotiation techniques in which a party "threatens" to walk away unless some stated price is accepted. Often, these threats are bluffs, yet the resulting transaction does not usually give rise to legal intervention. Non-credibility is a necessary but not sufficient condition for intervention. The credibility inquiry supplements (or, more precisely, it is preliminary to) the substantive weighing of the consequences, it does not substitute it. Legal policy must be based on a normative guideline determining which consequences are so objectionable that intervention is called for. The credibility criterion does not provide such a normative guideline; it merely identifies the situations in which intervention in the form of ex-post relief is not likely to advance the underlying normative principle.

E. Credibility-Enhancing Investments

We have thus far assumed that a threat is either credible or non-credible, as an exogenous matter. In many cases this assumption is perfectly valid. A party may inadvertently arrive at a situation where

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[17] FRIED, *supra* note 3, at 95.

he is in a position to make a credible threat. Consider again Example 1, in which a supplier threatens to breach a supply contract unless the buyer acquiesces to a price modification.[18]

Contract law often considers this price modification to be coercive and unenforceable. Specifically, after describing this example, the Restatement of Contracts instructs that since "B has no reasonable alternative, A's threat amounts to duress, and the modification is voidable by B." But consider A's position. In many situations, A's "improper threat to refuse to deliver" is associated with a cost increase and other adverse market shifts which A suffered after the original contract was signed. A, who at this stage might be on the brink of bankruptcy, could be making a credible threat to breach. If he did not anticipate the market shift and if he had no influence on its occurrence, his threat is "exogenously credible." Its credibility is exogenous—namely, independent of the legal rules of duress—because it is a result of factors which the threatening party had no hand in creating (nor an incentive to create). The threat to breach would remain credible even if he knew for certain that the resulting modification is unenforceable.

There is, however, a second group of cases, in which credibility is not the inadvertent result of circumstances beyond the control of the threatening party, but rather the result of a deliberate choice by the threatening party to make his threat more imposing.

> Example 6: *Blackmail*. A threatens to publish harmful information regarding B's past unless B pays him a significant amount of money.[19]

Blackmail is a typical act of coercion. It might also be an act of credible coercion: now that he possesses the harmful information, it is costless for him to publish it, and he might benefit from doing so by gaining an intimidating reputation, even if he already failed to extract hush money. Yet the credibility of A's threat is a result of his decision to acquire the harmful information in the first place. If the law were to invalidate the deal and force A to return the money paid to him, parties like A might find it less profitable to invest in acquiring the harmful information, ex-ante. When the information was acquired deliberately, credibility is endogenous—it is a result of factors which the threatening party created—and legal measures for ex-post relief can serve B's interest.[20] Stated differently, if the acquisition of

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[18] This example was based on Restatement (Second) of Contracts § 175 cmt. b, ill. 5, describing a common scenario dealt with by the doctrines of duress and modification.

[19] FRIED, *supra* note 3, at 96-103. *See also* Nozick, *supra* note 3, at 452.

[20] Fried similarly argues against enforcement of B's coerced promise on the basis of the endogenous credibility perspective. "In condemning blackmail we exclude the use of property (including property in one's effort [i.e. the effort of gathering the harmful information]) for the general purpose of harming others; we exclude

information is deliberate, A's enterprise of investing in gathering libelous information for the purpose of blackmail can be deterred if the law were to deprive A of the gains from this enterprise.

In the case of exogenous credibility, given the existence of a credible threat, we have shown that in order to serve the well-being of the coerced party the law should enforce the coerced promise and refuse to otherwise nullify coerced acts. This prescription must now be qualified. When the threatening party can take initial actions and investments that are intended to enhance the credibility of his subsequent threats—such that would enable him to effectively extract a coerced act or promise—the law may be able to deter such actions by nullifying the coerced act or promise. That is, if courts can differentiate their treatment of coerced acts, and selectively validate only those that are a result of exogenous, inadvertent credibility (like the cost-increase case), while invalidating coerced acts that where extracted by "manufactured" credibility, the incentives to invest in credibility enhancing actions will diminish. Credibility that is endogenous—that may or may not emerge depending on the legal policy towards the gains that it achieves—can effectively be uprooted by standard ex-post anti-coercion remedies.[21]

In fact, many cases that at first appear to exhibit exogenous credibility may reveal deliberate acts or choices without which there would have been no credible threat. These are cases in which the threatening party deliberately assumes a certain role or places himself in a certain position that later allows for the generation of credible threats. The highwayman case is such a case. Looking at the highwayman pointing a gun at the innocent traveler it would seem that the credibility of the threat to kill the traveler is an inadvertent consequence of the surrounding circumstances, e.g., the failing law enforcement. But, from a broader perspective it is the actor's deliberate choice to become a highwayman and hold-up travelers that put him in a position to take advantage of these circumstances and make credible threats. Likewise, the supplier's threat to breach, although coming in the aftermath of an exogenous cost increase, is credible also because the supplier initially agreed to charge a price only slightly above his anticipated cost. If the supplier knows that a price modification would not be enforceable he would initially charge a higher price, reducing the chance that any future cost increase would give him a credible threat to breach.

Finally, consider the case in which the supplier's cost increase is not exogenous (as in the case of a market shift), but rather a result of a business decision he made. For example, the cost increase may be due to higher than expected input costs because the supplier decided to produce the input in-house, rather than use sub-contractors. After

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investments in the *harmful* potential of things, effort, or talent." FRIED, *supra* note 3, at 102.

[21] *Cf.* The Selmer Company v. Blakeslee-Midwest Company, 704 F.2d 924 (1983) ("Such promises are made unenforceable in order to discourage threats by making them less profitable.")

the realization of this cost increase, the supplier indeed has a credible threat to breach, and may extract a modification. But if the modification were unenforceable, the supplier would realize, at the time of selecting his inputs, that he would not be able to roll the costs of higher inputs onto the buyer, and would instead choose the cheaper inputs. In terms of credibility, while the supplier's threat *given* the choice of inputs may be credible, his hypothetical threat evaluated at the time of input choice, is not. Namely, if the supplier were to know that the modification would be unenforceable, he would not incur the high cost and would perform the original contract.

The possibility of endogenous credibility moderates the skeptical tone voiced thus far. It implies that traditional ex-post measures aimed at the consequences of duress can be effective in reducing the incidence of duress. But while the legal policy conclusion ought to be qualified in this fashion, our main methodological argument holds just the same: in order to ascertain whether coerced parties benefit from ex-post intervention, we must engage in credibility-of-threats analysis. It is this type of analysis, nuanced and complex as it might be, that determines the efficacy of legal intervention.

F. Credibility-Reducing Policies

The credibility criterion might prescribe policies that are in sharp contrast to those derived from other normative criteria. In fact, Section II of the Article will be devoted to exploring this possible tension between the credibility criterion and other normative criteria, and to defend the proposed primacy of the credibility criterion. Our analysis would thus reach a junction in which coercion could be both credible and immoral. It is here that our skeptical argument bears most relevance, suggesting that the intuitive inclination to "do something" to combat coercion may lead to counter-productive measures.

This argument does not mean, however, that society should encourage the coercive act, or even accept it as a moral necessity. True, given the credibility of the threat, the coerced party is better off with a choice to surrender, and this choice ought to be enforceable for it to exist. But to the extent that a negative moral judgment concerning the threat as a coercive act remains, society can utilize other institutions—criminal sanctions, non-legal sanctions, remedies for breach, etc'—to directly influence the credibility of the threat and thus its incidence. When the carrying out of a threat ("your money or your life") is subject to criminal sanctions, its credibility diminishes. If other threats ("pay me more or I will breach the agreement") are subject to summarily enforced fully-compensatory remedies or to heavy non-legal sanctions by future traders, their credibility similarly diminishes.

Our analysis suggests that coercion can be prevented, and the welfare of the threatened party improved, if society were to utilize

credibility-reducing policies. Policies that reduce the payoff to the threatening party if he chooses to carry out the threat are a primary means of reducing the credibility of the threat. Note, however, that these policies are different than ones aimed at reducing the payoff to the threatening party in the event that the threat was successful. Such post-surrender penalties do not affect the credibility of the threat and, as argued above, would only induce parties with credible threats to carry out their intentions without bothering to make the threat. Credibility-diminishing policies should target the threatening party's hypothetical payoffs in the event that the threat failed, to affect his choice between carrying out his threat versus retracting it.

To combat the highwayman problem, the optimal policy is to increase the likelihood of apprehending murderers and bringing them to justice as well as to increase the sanction for murder, not to allow victims to sue for restitution of their robbed possessions. If a highwayman expects to suffer severe criminal penalties, the threat to shoot, that might otherwise be credible, would become non-credible and the highwayman will be deterred from making it in the first place. If, instead, the highwayman expects to be liable in restitution, he will only be induced to carry out his credible threat.

In contract law, the credibility of the coercive threat can be reduced by various policies. A common type of threat is to breach an already existing contract unless the threatened party agrees to modify the terms. The more severe the remedies that the threatening party expects to bear in case of breach, the less credible his threat. A high damage measure, however, while clearly a necessary condition for diminishing credibility, is not a sufficient condition for the deterrence of threats to breach. If the aggrieved party cannot readily collect such damages, due to litigation and collection costs, or due to insolvency of the threatening party, remedies for breach would not deter the threatening party from carrying out his threat and the credibility of his threat would remain un-diminished. Nevertheless, the legal treatment of contractual duress should be aimed at changing the ex-ante calculus of the threatening party, not at relieving coerced parties from contractual liability ex-post.

Credibility-reducing policies are not always available and are rarely perfect. Whenever coercion arises from fundamental inequality between the parties' starting points (as, say, in the slave example, and, perhaps, in the usury example), credibility-reducing measures involve a much greater social effort than merely sanctioning the threatening party. If a lender monopolizes the capital market and extracts usurious interest rates, sanctioning him for setting such rates or for failing to make cheaper credit available might not help potential borrowers much. Such policies do nothing to resolve the underlying market structure which gave rise to the unequal bargaining positions. Short of price regulation or complete scrutiny of the content of allocations, there is not much that legal doctrine can do. As Professor Leff recognized, while we might have the urge to leave it for the parties to set their terms but impose fairness oriented constraints, "*we cannot*

have both at the same time."[22] So while the main lesson of credibility analysis is in marking the limits of social intervention, the agenda it sets is constructive. It channels society's urge to help coerced parties away from ineffective efforts.

II. CREDIBLE COERCION VERSUS OTHER PRINCIPLES OF COERCION

A. The "Inevitability" of the Credibility Criterion

After introducing the credibility criterion in Part I, Part II of the Article proceeds to explore the proper role of this criterion vis-à-vis other normative theories of coercion. The main argument developed in this Part is that credibility analysis is inevitable in any coercion discussion. Regardless of any normative theory of coercion, credibility analysis provides a necessary perspective, one that could significantly complement or limit the pragmatic validity of other theories.

The credibility criterion is, loosely speaking, an "incentive-compatibility" constraint. It tells us whether some socially desired outcomes are feasible—are they compatible with the incentives of the threatening party. What it adds, in other words, is a "positive," or descriptive, perspective. The credibility criterion is the single factor that determines whether the ideal outcome for the coerced party—namely avoiding both the coerced act or promise and the outcome threatened to be inflicted if the act or promise are not surrendered—is attainable. It tells us that if the threat is credible, this ideal outcome is not attainable. Under such circumstances, it would be in the interest of the surrendering party that the act or promise be held valid and legally enforceable, even if it is coercive under some normative criterion.

This descriptive understanding of the threatening party's incentives is inevitable because choosing to ignore it would not make it go away. If an ideal outcome is not feasible, not attainable, there is no point in advocating it. To the extent that we choose a different, normatively appealing approach to the characterization of coercion, and decide whether to enforce a deal on the basis of an autonomy-based criterion for example, it would still be the incentives of the threatening party that determine whether the outcome would indeed promote the rights of the coerced party. If, say, society decides not to enforce a deal reached under a credible threat, on the basis that the threat constituted contractual duress, it cannot escape the outcome that the threatening party would end up carrying out his threat. As long as the credibility of the threat is undiminished, the policy may be counter-productive.

In the reminder of this Part, we take a closer look of several prominent normative criteria of coercion, and explore their interaction with the credibility criterion.

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[22] Arthur A. Leff, *Thomist Unconscionability*, 4 CANADIAN BUS. L. J. 424 (1979).

B. The Credibility Principle versus the "Involuntariness" Criterion

Most legal and normative accounts of coercion focus on the voluntariness of the act or promise that were undertaken in the shadow of a threat. If the act or promise was voluntary—if other, reasonable courses of action were open to the threatened party—there is no coercion. Conversely, if the act or promise was involuntary, then it was coerced, leading to the conclusion that the consequences—moral and legal—of the coerced act or promise should be nullified.

We argue that, for the purpose of granting relief to the party under pressure, voluntariness analysis is incomplete if it is not informed by credibility analysis. Technically, the threatened party's choice is always voluntary. Even the traveler who surrenders all his money to the gun pointing highwayman is acting voluntarily in choosing the better course of action.[23] Involuntariness, then, must stand for a normative judgment concerning the restrictions put on the choice set that this party is facing. If all choices are bad, so goes the involuntariness test, choosing one over another does not represent free, voluntary action. Some other alternative, a better one, should have been made available to the coerced party for the choice to be voluntary in a meaningful, rights-oriented, sense. But while such "other alternative" might ideally exist, it is the credibility test that determines whether it is feasible, whether it *pragmatically* exists. If the threat is credible, then it rules out, as a descriptive matter, the threatened party's more favorable choices, leaving her with a choice between only two alternatives: to undertake the demanded act or promise, or to suffer the consequences of the carried-out threat.

To illustrate this claim that incentive and credibility analysis is, in some sense, "preliminary" to the voluntariness inquiry, consider the following example.

> Example 7: *Williams v. Walker-Thomas Furniture Co.*[24] Williams, a mother of seven children with low income, regularly purchased furniture and home appliances from a seller on installment credit. The seller, the only retailer for such items in the neighborhood, required buyers to secure the debt with the following provision: until the buyer

[23] As Charles Fried puts it: "If a promisor knows what he is doing, if he fully appreciates the alternatives and chooses among them, how can it even be correct to say that his was not a free choice?" FRIED, *supra* note 3, at 94. *See also* Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 477-78 (1980); John Dalzell, *Duress by Economic Pressure*, 20 N. CAR. L. REV. 237, 239-40 (1942); John Dawson, *Economic Duress: An Essay in Perspective*, 45 MICH. L. REV. 253, 267 (1947); Robert Lee Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603, 616-17 (1943).

[24] 350 F. 2d 445 (D.C. Cir. 1965). *See also* Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (Sup. Ct., 1969).

> brought her total unpaid balance on every single item to zero, the seller could repossess any and every item purchased in the store in the past. And when Williams missed a payment the seller sought to invoke this repossession provision.

The case was decided by the DC Circuit on the basis of the unconscionability doctrine, involving reasoning that resounds the involuntariness analysis. The majority, as did many commentators since, raises the possibility that Williams' acquiescence to the harsh terms was not voluntary. Williams ought to have a choice to make purchases not subject to such coercive, or unconscionable, terms. Credibility analysis, however, could teach us that such choice is probably not feasible. If the seller's implicit threat, "sign these terms or else I will not sell to you" is credible, Williams does not have a 'better choice'—to purchase the same items without harsh credit terms.[25]

Leading commentators often overlook this constraint. Charles Fried, for example, argued that the court should have enforced the contract in Example 7.[26] Fried dismisses the involuntariness argument, by observing that "any consumer facing a perfectly competitive market for some necessity or set of necessities has no real choice but to pay the market price; just as the producers have no real choice but to accept that price."[27] At first, it seems that Fried is engaging in what looks like a credibility analysis. He recognizes the possibility that "the far greater frequency of default made high prices and harsh credit terms a necessity for doing business with an often nearly destitute clientele."[28] But, the subsequent discussion makes clear that Fried does not appreciate the centrality of the credibility principle. Fried does not limit enforcement of these harsh contracts to cases where less harsh terms would force the seller to refrain from selling or to charge higher prices/interest rates. His claim is much broader. Walker-Thomas, the retailer, has no duty of fairness to his poor customers.[29]

Credibility analysis is neutral with respect to such normative judgments. It merely suggests that if the retailer's threat not to sell for a lower price or with less harsh credit terms is credible, then non-enforcement will not provide the consumer with more favorable terms. However, if the retailer would have made a profit even with a

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[25] For an analysis of cross-collateral provisions such as the one in the *Williams* case, *see* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 306-308 (1975).
[26] FRIED, *supra* note 3, at 103-109.
[27] *Id.* at 104.
[28] *Id.* at 105. *See also* Epstein, *supra* note 25, at 308-315 (discussing the economic and social backgrounds justifying harsh contract terms).
[29] FRIED, *supra* note 3, at 106 ("But there is no reason why the retailer or employer should assume more of a burden in this regard than, say, a Beverly Hills plastic surgeon with ten times their income, just because the surgeon never has occasion to deal with the poor and unemployed.")

less stringent contract, such that his threat not to deal is not credible, then (and only then) can there be a debate whether other values justify non-enforcement. In the case of the Walker-Thomas retail store, the evidence is mixed. On the one hand, many of the items repossessed by the story had almost zero resale value.[30] This suggests that the cross-collateral provision was not all that valuable to the seller. On the other hand, some of the repossessed goods did have non-trivial resale value. From the seller's perspective at the time of the sale, the credit provision was a cost-reducing measure, and seemingly a much needed one. Economic indicators surveyed by the FTC showed that profit margins for such retailers were lower than those enjoyed by similar retailers in other demographic areas.[31] The costs of loan collection and other labor and marketing costs for low-income neighborhood retailers reduced profits significantly below normal, such that any tinkering with the terms against the seller would drive it, in the long term, to shut down its business. Credibility here is exogenous: it is not the product of market manipulation by the seller, but rather a reflection of an environment in which the business of selling in low-income markets is costly. Accordingly, unconscionability standards applied by courts will only reduce, not increase, buyers' choices.[32]

To be sure, credibility analysis does not suggest that the unconscionability doctrine is useless. In cases, where the seller does not have a credible threat not to deal, namely where the seller would still profit under a less one-sided contract, unconscionability doctrine may provide consumers with a meaningful remedy.[33] We merely propose that the pro-consumer case can be made more effective if it is required to clear the credibility hurdle.

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[30] *See* Dostert, *Appelate Restatement of Unconscionability: Civil Legal Aid at Work*, 54 A.B.A.J. 1183 (1968).

[31] *See* U.S. Federal Trade Commission, Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers (1968), excerpts reprinted in FULLER & EISENBERG, BASIC CONTRACT LAW 67-69 (7th ed. 2001).

[32] A reduction of buyers' choices may be justified on paternalistic grounds. Buyers, who, as a result of inadequate education or poor social standing, are unable to make sensible choices concerning their consumption, can be made better off by additional constraints on their choice set. *See* Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445 (D.C. Cir. 1965) (referring to Williams' lack of education and to her inability to understand the terms of the contract); Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982). For an alternative non-paternalistic justification for reducing buyers' choices – *see* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract*, 24 J. LEGAL STUD. 283 (1995).

[33] In particular, where the seller enjoys monopoly power it is more likely that the threat not to deal under less one-sided terms is not credible. *Cf.* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (1960) (The existence if a cartel of auto manufacturers lead to pro-consumer intervention.) Similarly, in cases in which sellers exploit consumers ignorance and weakness of will, such as in door-to-door sales, prices may be set far above the normal-profit level. *See, e.g.*, Jones v. Start Credit Co., 298 N.Y.S.2d 264 (NY 1969).

C. The Credibility Criterion versus Rights-Based Theories of Coercion

Recognizing the weakness of the voluntariness principle, philosophers and legal scholars have proposed a methodology of evaluating the threatened party's choice set against some normative baseline.[34] By most accounts, this normative baseline represents a conception of basic rights—moral or legal—that a liberal society should endow every individual. If B has a right to be free from situation X, then his agreement to do Y in order to be freed from the threat of having X inflicted on her must result from (or, it is the definition of) coercion.[35]

To compare the credibility principle with this moral baseline approach to coercion, consider again Robert Nozick's flogged slave example. The question, recall, is whether the law should accord the slave, who does Y to avoid the daily beating, the remedy of a release from the act. According to the rights-based approach, the slave has a fundamental right not to be beaten-up. This is, according to Nozick, the "morally expected course of events."[36] Hence, a deal in which the slave has to pay dearly in order to secure this right is coercive, and ought to be undone. While recognizing that the slave is subject to coercion and that he is entitled to be free from beating, we argued above that nullifying the coerced deal will only reduce the slave's well-being.[37] If the slave-owner has a credible threat to continue with the daily beating, the slave would benefit from the option to undertake a less painful act or promise and escape the beating. Credibility analysis teaches that providing an ex-post remedy to the coerced slave strips away this valuable option.

True, a rights-based approach can do what credibility analysis cannot: it can identify an incidence of coercion; it can distinguish types of pressure along criteria of moral legitimacy. It can tell us what may, and what may not, be extracted from an individual. But it is only the credibility analysis that can identify whether an ex-post remedy would be effective. The slave example demonstrates the tension between the two approaches. Whereas rights-based theorists would conclude that the coerced slave should be released from contractual accountability, we think otherwise. Whereas Nozick argues that "the slave himself would prefer the morally expected course of events" to

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[34] Some writers have argued that a morally-neutral baseline can be defined. *See, e.g.*, David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981). The comparison with the credibility principle is largely independent of whether the baseline is rights-based or morally-neutral.

[35] FRIED, *supra* note 3, at 95-103; JOEL FEINBERG, HARM TO SELF, chs. 23, 24 (1986); WERTHEIMER, *supra* note 3, at 450; Nozick, *supra* note 3, at 447.

[36] Nozick, *supra* note 3, at 450.

[37] *See supra* Section I.C.

determine whether his promise is enforceable,[38] we are confident that a slave facing a credible threat would actually prefer otherwise.

It is tempting to object to this notion of credibility in the context of coercion. One's fairness intuitions surely conflict with some of the skeptical claims that are bound to emerge from the rational choice methodology. Whether a threat is coercive or not, so goes the objection, should be determined on the basis of some normative baseline, not on the basis of incentives. Coercion should be a characterization of the wrongfulness of an act as derived from the moral fabric of our society, not of its incentive compatibility as determined by morally-neutral parameters. It is the aggrieved party's fundamental rights that should be in the center of the coercion theory, not the wrongdoer's idiosyncratic payoffs. Plainly, what is right or wrong should be differently determined than what is feasible.

There are several ways to respond to this objection. Primarily, it should be highlighted that the credible coercion criterion does not purport to answer whether an act is coercive or whether it is morally wrong. It is wholly possible that an act of coercion would be both credible and yet morally wrong. What our analysis says is that if the purpose of identifying wrongful coercion is to accord some remedy to the coerced party, credible coercion is one place where such a purpose would be frustrated. When coercion is both credible and morally wrong, our conclusion that the coerced act should nevertheless be enforced merely suggests that, given the initial unequal allocation of power between the strong and the weak, non-enforcement would do nothing to improve the weak party's position.

Credibility analysis reaches policy conclusions that differ from other, normative analyses because it frames a different dilemma. Under a rights-based approach, for example, the outcome of the coercion is compared to the threatened party's situation prior to the coercion in the "morally expected course of events."[39] If, as a result of the threat, the threatened party's position becomes worse relative to this "pre-threat" baseline, the threat is coercive. Our analysis suggests that the correct baseline (for the purpose of granting an effective remedy) is not the position of the threatened party prior to the threat, but rather the position that she would be in if she were to reject the threat. This hypothetical future position takes the existence of a threat to be part of the unfortunate but relevant reality in which the dilemma has to be resolved. Only by comparison to this hypothetical future position can we tell whether the surrender to the threat hurt or improved the threatened party's well-being.

Given the potential discrepancy between credibility analysis and moral analysis of threats, what is the hierarchy between credibility and morality? Fried, for example, who, for the purpose of granting remedies against contractual duress, embraces a rights-based

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[38] Nozick, *supra* note 3, at 451.
[39] Nozick, *supra* note 3, at 450. Nozick considers also a non-moral baseline defined by "the normal course of affairs" *Id*.

normative criterion, acknowledges that some baseline must be provided to assess whether a proposal adds or reduces the options available to its recipient. Fried admits that a conception of coercion divorced from any normative baseline could be preferable.[40] In his analysis, however, Fried cannot come up with such a morally "neutral" baseline, and thus considers it to be necessary to set up a normative baseline.[41]

Our analysis can be viewed as a framework providing at least a preliminary factual baseline: when a threat is credible, it is a proposal that adds an option to the threatened party's choice set; it does not reduce the threatened party's alternatives. The determination of credibility is a factual one that does not require an identification of the threatened party's moral entitlement. While it might be that the threatened party has a moral right not to suffer some threatened consequence, it might also be true that there is no way, given the existing distribution of powers for this party to avoid it other than by making an enforceable deal in which she surrenders other valuable rights or resources. While a coercion theory based on the threatened party's initial bundle of rights would render such a deal immoral and unenforceable, our theory—having no such moral baseline—would make the deal enforceable (and would channel the social response against the immoral threat to other, more effective policies). Ironically, as we explained, this divorce of duress policy from the moral pre-disposition in favor of the coerced party only serves the well-being of this party.

To be sure, credibility analysis leaves much room for a normative inquiry, even in pragmatic, policy-oriented contexts. While we argue that whenever a threat is credible the deal should be enforced, we do not argue that whenever a threat is not credible, the deal should not be enforced. Many deals are reached, and many acts are taken, as a result of pressure and threats that are not credible. But not all of them should be subject to social intervention—not all of them represent coercion. A normative theory is necessary to determine which among those non-credible threats are coercive.

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[40] FRIED, *supra* note 3, at 96 ("It would be nice if the benchmark for determining whether a proposal worsens the situation or not could be a purely factual one.") *See also* WERTHEIMER, *supra* note 3, at 8 ("[I] must be said that an empirical theory would be more attractive—if it turned out to be true.")

[41] Similarly, Nozick finds the non-moral "normal course of affairs" baseline inadequate (at least in certain cases), and resorts to a moral baseline ("the morally expected course of events.") *See* Nozick, *supra* note 3, at 450.

D. The Credibility Criterion versus Substantive Justice Approaches

A different approach to coercion focuses on the substantive fairness of the interaction. In particular, as applied in the contractual context, this approach views a threat as coercive if it results in a one-sided transaction. This substantive justice criterion has multiple theoretical underpinnings. For instance, it has been argued that according to Hegelian principles of autonomy the free and equal personality of the two parties to a contract mandates equivalence in exchange.[42] Alternatively, the substantive justice criterion has been traced back to Aristotelian corrective justice, which—designed to maintain the pre-existing distribution of wealth—requires equality of the values exchanged in the transaction. In a market-based economy, market prices are said to provide one benchmark for equality of exchange.[43] Accordingly, coercion is manifested when a party exploits superior bargaining power to dictate terms that deviated from the prevalent market terms of exchange (if a market exists), or the hypothetical market terms (if a market does not exist).

From the credibility perspective, grounding coercion on theories of equivalence or equality in exchange is over-inclusive. It is over-inclusive, since a deal that violates exchange equality would be deemed coercive and unenforceable even if the advantaged party's threat to walk away unless such terms are accepted were credible. Gordley, an advocate of the equality-in-exchange conception recognizes the possibility that the advantaged party would not be willing to exchange at the market price.[44] But what is at stake in such a case, Gordley believes, is mainly the advantaged party's autonomy. If the court reforms the contractual price and reverts it to the market price, the advantaged party is deprived of his autonomy to transact under his individually favored terms. Our analysis suggests, however, that in the case of a party not willing to exchange at the market price—the party who makes a threat to walk away unless a more favorable price is accepted—more than ex-post "autonomy deprivation" is at stake. The advantaged party's ex-ante conduct is also likely to be affected. Anticipating that his advantage will be stripped away, the advantaged party would walk away from the contract.[45]

The discrepancy between the credibility criterion and the equality-in-exchange criterion can be narrowed down if the

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[42] *See* Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract Theory*, 10 CARDOZO L. REV. 1077 (1989).
[43] *See* James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587 (1981).
[44] Gordley, *id*, at 1619.
[45] Gordley recognizes that a reasonable solution is to "enforce the contract at the price closest to the market price at which it is certain that the advantaged party would still have agreed to exchange." *Id.*, at 1620. However, he restricts this solution to a narrow set of circumstances, and favors a rule requiring the advantaged party to choose between a court-adjusted price or rescission of the contract in its entirety.

conception of equality incorporates some of the factors that are also relevant to determination of credibility. For example, if one party has a very attractive outside option whereas the other party does not, the terms of the exchange might be skewed in favor of the party with the attractive outside option. The resulting distribution of the surplus would not conflict with the principle of equality if it is based on the conception of "to each according to his sacrifice." The party who forgoes a more attractive outside option in entering the exchange can be viewed as sacrificing more, thus deserving more. Hence, the value of the outside option, which is the major factor that would affect the credibility of the threat to refrain from dealing, is also the factor that would determine the normative account of whether the substantive terms are unequal.

In a similar vein, when markets are thin or inexistent and thus cannot provide a pragmatic benchmark of equality-of-exchange, other factors must be invoked. Gordley proposes that in such situations a party should be entitled to a price equal to "his costs plus whatever additional amount is necessary to ensure [that] he would willingly have contracted."[46] Thus, for example, in the famous case of the rescuing ship that salvaged the sinking ship's cargo for a huge profit,[47] the rescuer's fee can be trimmed to equal its costs plus some bonus.[48] This ex-post adjustment of the "price" is justified on equality grounds: the rescuer has no legitimate claim to the rescued property and thus his fee should not be measure by the property's value. But it is also consistent with—and in fact it is tailored to satisfy—the incentive compatibility constraint.

All in all, although the two criteria may merge, the substantive equality criterion is nevertheless the one most sharply in conflict with the credibility criterion. Under this approach, the decision whether to grant the disadvantaged party relief depends solely on measuring how badly she is hurt by the contractual terms, and whether and why she was unable to protect herself. The perspective of the advantaged party—how his behavior would be affected by reformation of the contractual terms—is overlooked. Put differently, the substantive equality approach addresses a distributive concern: who is entitled to the benefits of the exchange. It is only a coincidence if this inquiry would reach the same conclusion as the incentive-oriented credibility criterion.[49]

E. The Credibility Criterion versus other Economic Approaches to Duress

The economic analysis of law has also proposed various criteria to identify a coercive interaction. A prominent economic

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[46] *Id.*, at 1622.
[47] *Post v. Jones*, 60 U.S. 150 (1856).
[48] *See infra* Section III.F.
[49] For the view that the two perspectives rarely coincide, *see* Leff, *supra* note 22.

justification for the duress doctrine focuses on ex-post allocative inefficiency. According to this view, the confidence that we would otherwise have, that voluntary choices increase the well-being of actors, is rebutted when the behavior results from duress. Thus, duress is a potential source of inefficient allocation: it threatens the applicability of Paretian concepts of welfare that are central to any economic theory of inter-subjective interaction.[50] In the contractual context, duress undermines the allocative efficiency guaranteed by voluntary exchange.[51]

The economic approach developed in this Article is different in that it focuses on ex-ante incentives rather than ex-post efficiency. This difference in perspective has numerous implications. For one, we have not invoked any efficiency criterion in defending the credibility principle. In fact, the only normative grounds we have invoked is the concern for the well-being of the threatened party.

But the pragmatic difference between our approach and the ex-post efficiency approach is most conspicuous when coercive deals are ex-post inefficient but ex-ante credible. Namely, even if the threat not to deal is credible, it might nevertheless lead to a transaction that violates Pareto efficiency—one that involves a loss of welfare to the threatened party, relative to the pre-threat benchmark. According to the ex-post allocative view, such a transaction should be invalidated. According to the ex-ante credibility-oriented view, in contrast, the transaction should be enforced. The reason for this discrepancy, we know by now, is that the ex-post view utilizes a false benchmark. Under the ex-post view, the consequences for the threatened party are measured vis-à-vis his pre-threat well-being.[52] Indeed, the threatened party may be worse off relative to his pre-threat position. Under the credibility approach, the appropriate benchmark is not this pre-threat position but rather the post-threat hypothetical position. If the threat is credible, the threatened party's welfare is *improved* relative to what it would be had the threat been carried out. [53]

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[50] *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 79 (1993).

[51] *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 269-71 (4th ed., 2003)

[52] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 115 (6th Ed., 2003) ("We know that this class of contracts is nonoptimal because ex ante—that is, before the threat is made—if you asked the [threatened parties] of this world whether they would consider themselves better off if extortion flourished, they would say no."); TREBILCOCK, *supra* note 50, at 84 (According to the "literal Paretian principle," there is no coercion whenever the specific transaction renders "both parties to it better off, in terms of their subjective assessment of their own welfare, relative to how they would have perceived their welfare had they not encountered each other.")

[53] This analysis asks whether, in the specific circumstance in which the threat was made, the threatened party's well being would be advanced by anti-duress measures. A similar ex-ante view was proposed by Anthony Kronman. Kronman proposes that coercion be judged by what he calls a "modified Paretian principle." Kronman's approach goes beyond the specific interaction, asking whether the welfare of most people subject to this type of threat is likely, in the long-run, to be increased by nullifying the act or promise. *See* Kronman, *supra* note 23. If we interpret Kronman's "type of threat" in line with our approach, distinguishing

Another insight from the existing economic analysis of duress concerns "rent-seeking costs." It recognizes that if coercive threats were legal, parties would be driven to spend resources on precautions that would protect them against such threats (or on finding opportunities to make coercive threats).[54] Nullifying the consequences of the threat would discourage the making of threats and thus reduce the need to invest in private anti-coercion measures. This ex-ante approach is an integral part of our endogenous credibility analysis.[55] Credibility can be the product of investments by both the threatening party and the threatened party.[56] But credibility can also be the result of exogenous factors. Applying duress rules without accounting for these two sources of credibility, while discouraging wasteful investments in threats, can also deprive threatened parties of the power they would want to have, to acquiesce to exogenously credible threats.[57]

The possibility of subsequent threats might lead to ex-ante distortions beyond the wasteful investment in precaution. For example, in the contract modification context, the prospect of subsequent threats leading to modification of the initial contract might prevent the parties from implementing the efficient allocation of risks in the initial contract.[58] Anticipated modification might also discourage value-enhancing reliance investments.[59] While these distortions can be potentially significant, we demonstrated elsewhere that their magnitude is actually—and counter-intuitively—decreased under a regime that is founded on the credibility criterion.[60] When threats are credible, the only choice from a legal policy perspective is whether to enforce the coerced-into terms, or provide remedies for breach of the original terms. There is no third alternative of enforcing the original contract. Between the two feasible choices, breach is

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between the credible type and the non credible type, we obtain a rough equivalence between the two approaches. Kronman's approach is different than ours whenever a threat of the "credible type" turns out to be non-credible in a specific context, and visa versa. Moreover, while Kronman's modified Paretian principle is offered as a *necessary* condition for enforcement, our credibility principle is not. As argued above, we do not believe that deals struck as a result of bluffs should always be nullified. *See supra* Section I.D.

[54] *See* Frank Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33 (1990); COOTER & ULEN, *supra* note 51, at 270. *See also* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 336 (2004).

[55] *See supra* Section I.E.

[56] *See* POSNER, *supra* note 52, at 115 ("enforcement of such offers would lower the net social product by channeling resources into the making of threats and into efforts to protect against them.") *See also* Buckley, *supra* note 54, at 37; SHAVELL, *supra* note 54, at 335.

[57] *Cf.* SHAVELL, *supra* note 54, at 335-37 (distinguishing between "induced duress" and "naturally occurring duress.")

[58] *See* Varouj Aivazian, Michael J. Trebilcock & Michael Penny, *The Law of Contract Modification: The Uncertain Quest for a Bench Mark of Enforceability*, 22 OSGOODE HALL L. J. 173 (1984).

[59] This is the well-known hold-up problem. *See, e.g.*, OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE, ch. 2 (1995).

[60] Bar-Gill & Ben-Shahar, *supra* note 8.

generally more detrimental than modification in terms of its effect on risk allocation and on reliance decisions. Since remedies for breach are less valuable to the threatened party than the modified terms (we can confidently infer this from the fact that the threatened party opted to accept the modified terms rather than seek remedies for breach), anti-duress policy that effectively deprives the threatened party from the option of accepting a modification and limits her to breach remedies has the effect of imposing on her a lower contingent payoff. This lower contingent payoff implies an inferior outcome both in terms of risk allocation and in terms of reliance investment.

Finally, an economic argument has been made that "hard" bargaining can lead to inefficient breakdown in negotiations, and that setting aside such bargains can enhance efficiency by discouraging "hard" bargaining strategies.[61] To the extent that this approach equates "hard" bargaining strategies with non-credible bluffs, it is perfectly consistent with our credibility analysis.[62] However, if the definition of "hard" bargaining includes the making of credible threats, we have shown that setting aside the resulting contract would not achieve the desired goal of encouraging successful negotiations. "Hard" bargaining would indeed be deterred. The alternative, however, would not be "easy" bargaining, but rather no bargaining at all.

F. The Prevalence of Credibility Analysis

The analysis thus far emphasized the features of the credibility criterion that set it apart from other criteria for coercion. It now turns to the opposite task, of demonstrating that in fact different criteria for coercion formulated in the legal and philosophical literature can be understood as recognizing, and often implementing the credibility criterion.

Outside economic theory, philosophers have recognized the importance of credibility in determining the existence of coercion. Joseph Raz, for example, recognizes that coercion cannot occur unless the threatened party perceives the threat to be credible. In other words, Raz includes credibility as one of the necessary conditions of a coercive proposal.[63] Others simply assume credibility, either explicitly or implicitly.[64]

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[61] *See* Buckley, *supra* note 54, at 49-50.
[62] *See supra* Section I.D.
[63] *See* Joseph Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, in Peter French et al., eds., MIDWEST STUDIES IN PHILOSOPHY, vol. VII, p. 108 (1982) (a condition for coercion is that [the threatened party] believes that it is likely that [the threatening party] will bring about [the threatened outcome] if [the threatened party does not acquiesce].")
[64] *See, e.g.*, Harry Frankfurt, *Coercion and Moral Responsibility*, 4 POL. THEORY 65, 66 (1976) (assuming that everyone involved "has sufficient reason to believe that the proposals in question will be carried out if their conditions are fulfilled.");

Moreover, philosophers have recognized the relationship between credibility and the well-being of the threatened party. Robert Nozick, for example, makes a fundamental distinction between 'threats,' which are coercive, and 'warnings,' which are not.[65] When a party warns another—makes a credible statement about something that he would do if the other party would not perform the requested act—he is not acting in a coercive manner. In Nozick's example, when an employer warns the employees that he would shut down the factory if they unionize, and when it is true that the employer's preferences would be to shut down (to avoid losing money), the employer's action is not a threat and should not be deemed coercive. Indeed, Nozick clarifies that the single factor that makes the statement a 'warning' rather than a coercive 'threat' is its credibility: the fact that the employer truly prefers to close down the factory if the employees unionize.[66] If the employer's preferences were different—if he were merely bluffing in saying that he would shut down—his action would be deemed a threat, not a warning, and thus coercive.[67]

Surely, Nozick did not intend to suggest that anytime an intimidating statement is credible it is not coercive. The highwayman who tells the innocent traveler that he would shoot him unless the traveler hands over all his money could be making a truthful report of his "preferences." If his intentions are truly such that he would prefer to shoot the traveler that does not surrender—that is, if it is credible—should his act be deemed merely a warning, and thus non-coercive? What Nozick recognized, in drawing a distinction between threats and warnings, is the need to pay attention to the credibility of the intimidation. A credible statement should not be treated the same way as a non-credible one. In Nozick's framework, warnings are unlike threats because they are informative: they help their recipients take superior courses of action.[68] But this is precisely what distinguishes credible coercion in our analysis: it represents the feasible course of action to avert an even worse outcome.

Furthermore, in distinguishing between coercive threats and non-coercive warnings, Nozick implicitly recognized the difference between what we called exogenous versus endogenous credibility. Nozick considers an example in which the employer prefers to stay in business even if the union wins, but nevertheless threatens his employees that he will go out of business, and "*[commits] himself before hand, for strategic reasons*," to this course of action.[69] Here, when the employees have to choose whether or not to unionize, the

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WERTHEIMER, *supra* note 3, at 203 ("I shall assume that all proposals are credible and clear….")

[65] *See* Nozick, *supra* note 3, at 453-58.

[66] *Id*. at 456. ("In the normal course of events, [the employer] would go out of business if the union wins, whether or not he has previously announced that he would do so…. In making the announcement, he does not worsen this alternative [of the union winning] but rather makes known what its consequences will be.")

[67] *Id.* at 455

[68] *Id*.

[69] *Id.*, at 454-455.

threat to go out of business is already credible, given the employer's commitment to it. But it is credible only because it is not sanctioned. If society were to view this behavior by the employer as coercive—as Nozick suggests—and grant the employees a remedy, it can deter the employer from engaging in such prior commitments and from making the threat in the first place. Endogenous credibility can be remedied by anti-duress measures.

Charles Fried has also recognized the importance of credibility. In discussing *Williams v. Walker-Thomas Furniture Co.* (**Error! Reference source not found.**), Fried emphasizes the need to consider circumstances beyond the apparent harshness of the contract. Suppose, Fried argues, "that the far greater frequency of default made high prices and harsh credit terms a necessity of doing business with an often nearly destitute clientele."[70] Under such circumstances, Fried refuses to condemn the retailer, who "[is] offering [the] supposed "victims" further options, enlarging their opportunities."[71] Thus, Fried recognizes that when backed by a credible threat not to deal, seemingly harsh contracts in fact enhance the well-being of the threatened party.

In the economically oriented contracts literature the importance of a threat's credibility has been long recognized. Specifically, in the context of contract modification, Jason Johnston and Alan Schwartz have each argued that the enforceability of a modification should be conditioned upon proof of a change of circumstances—a change of circumstances that would render the threat to breach absent a modification credible.[72] Credibility analysis has even begun to find its way to court rulings. Some courts have adopted the changed circumstances test, although generally without recognizing the relationship between this test and the credibility criterion.[73] In a few rare cases, however, the credibility test, while not

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[70] FRIED, *supra* note 3, at 105.

[71] *Id*.

[72] *See* Jason S. Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISCIPLINARY L. J. 335 (1993); Alan Schwartz, *Relational Contracts and the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992). *See also* Richard Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 421-424 (1977); Daniel A. Graham & Ellen R. Peirce, *Contract Modification: An Economic Analysis of the Hold-Up Game*, 52 L. & CONTEMP. PROB. 9 (1989).

[73] *See, e.g., Angel v. Murray*, 322 A.2d 630 (R.I. 1974) ("The modern trend appears to recognized the necessity that courts should enforce agreements modifying contracts when unexpected or unanticipated difficulties arise"). Also, the U.C.C., in Section 2-209, and the Restatement (Second) of Contracts, in Section 89, invoke a changed circumstances analysis. *See* U.C.C., Section 2-209, comment 2: "… the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith…. The test of "good faith" between merchants or as against merchants… may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason…."; Restatement (Second) of Contracts, Section 89: "A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair

explicitly invoked, in fact underlies the decision.[74] Yet, unfortunately, courts by and large fail to apply credibility analysis in contractual duress cases.[75]

While the credibility criterion has significantly informed previous discussions of coercion, it was not—as far as we can tell—elevated to the role that our analysis demonstrated it merits. Many, including economists, have argued that the credibility of the threat is a necessary condition for enforcement of contracts. But they went on to argue that additional conditions must also be met, conditions that focus on the threatened party's volition.[76] The analysis in this Article differs in that it accords the credibility criterion a more prominent role: credibility of the threat is a *sufficient* condition for the law to refrain from intervening via anti-duress relief.

III. POLICY IMPLICATIONS

A. Contractual Duress

The negotiation of a transaction (or of its modification) often involves threats by one party to refrain from dealing (or to breach) unless a particular provision, strongly favorable to the threatening party, is accepted. For centuries, contract law has been searching for a unifying principle that will determine when such threats go beyond hard legitimate bargaining and should be considered "improper," rendering the resulting agreement unenforceable on the grounds of duress. Thus far, such a general criterion has failed to emerge.[77]

It is beyond dispute that an "improper threat" can create duress, and justify the rescission of the contract, even if it does not involve the infliction of physical harm (the "gun-to-the-head" case). The term

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and equitable in view of circumstances not anticipated by the parties when the contract was made…."

[74] For example, during periods of economic slowdown, courts realize that if parties would be unable to renegotiate terms agreed upon prior to the recession, they would likely breach and suffer bankruptcy, leaving the breached-against party without remedy. One recurring scenario in which such analysis was conducted involves long-term tenants who, in the face of solvency problems, demand a price reduction midway through the lease or else abandon the premises. As one court explained: "A lease which provides for too high a rent may be less valuable to the landlord than one providing for a proper rent [. . .] They desired that their tenants should continue in business under circumstances which should afford more assurance of success." Jaffray v. Greenbaum, 20 N.W. 775, 778 (Ia. 1884). *See also* Ten Eyck v. Sleeper, 67 N.W. 1026 (Minn 1896). More recently and explicitly, Judge Posner explained that if a party cannot commit to a modification, the modification would not be offered, with the adverse effect of suffering breach and litigation costs. *See* The Selmer Co. v. Blakeslee Midwest Co., 704 F.2d 924, 928 (7th Cir. 1983).

[75] *See infra* Section III.A.

[76] *See* Schwartz, *supra* note 72, at 308-313 (arguing that modifications should be enforced when the paying party is cut from the market).

[77] "The history of generalization in this field offers no great encouragement for those who seek to summarize results in a single formula." *See* Dawson, *supra* note 23, at 289.

"economic duress" has been used to reference the type of coercion inflicted by a strong market participant on a weaker contracting partner. Similarly uncontested is the understanding that economic duress does not have to exhibit itself through explicit extortion or threats. But the question remains: Where does legitimate hard bargaining end and where does illegal duress begin?

In searching for an answer to this basic question, the defining perspective in duress jurisprudence has been, by and large, that of the threatened party. If this party is pressured to agree because she has "no reasonable alternative," the law permits her to invalidate her promise. Under this "no reasonable alternative" criterion, if the threatened party were unable to find substitute performance elsewhere or if, in the event of a threat to breach, her remedies for breach would have been inadequate, her assent is presumed to be coerced.[78]

Our analysis suggests that this criterion for duress, centered on the threatened party, is misguided. A threatened party lacking reasonable alternatives would want the option to secure performance through concession. Ironically, duress doctrine, seeking to provide ex-post protection to a coerced party, deprives this party of the option to concede, thereby undoing the only ex-ante protection the party has.

When the threat—to walk away from a deal or to breach an existing contract—is credible, the only realistic choices for the threatened party are to acquiesce or to reject the threatening party's demand and suffer the consequences. When the threatened party has no reasonable alternatives, she does not want to suffer the consequences; she prefers to surrender. The only way she can secure the desired performance is by committing to an enforceable concession. But, under current duress doctrine she can't. Because the law deems the surrendered concession coercive and thus voidable, precisely when no reasonable alternatives were available, it renders such a commitment impossible. Anticipating that the concession would be revoked ex-post, a party armed with a credible threat would not bother to threaten non-performance; he would simply breach and walk away. Thus, when the threat is credible, it is in the interest of the threatened party that her concession be enforced. Only when the threat is not credible, can the threatened party benefit from ex-post nullification without compromising her ex-ante interests. The enforceability of contractual concessions should thus be determined

[78] Restatement (Second) of Contracts § 175 ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim"). Restatement (Second) of Contracts § 175 cmt b, Ill. 5: "A, who has contracted to sell goods to B, makes an improper threat to refuse to deliver the goods to B unless B modifies the contract to increase the price. B attempts to buy substitute goods elsewhere but is unable to do so. Being in urgent need of the goods, he makes the modification. [...] B has no reasonable alternative, A's threat amounts to duress, and the modification is voidable by B." *See also* WILLISTON ON CONTRACTS §7.37 at 603 (4th ed. 1992) (under the Restatement, "the only justification for enforcement of the modified undertaking seems to be the apparent voluntariness of the promisor in freely uttering his new promise".)

first and foremost by the credibility criterion, not by the "no reasonable alternatives" test.

To illustrate this critique of the existing duress doctrine, as well as the central importance of credibility analysis, consider the case-book favorite *Austin v. Loral*.[79] In that case, a supplier of sophisticated technological parts threatened to withhold delivery unless the buyer acquiesced to significant price increases. The buyer, who had urgent need for the supplied parts in order to keep up his own obligation to a client, acquiesced, secured timely delivery, and then asked the court to invalidate the price modification on the grounds of duress. The Appeals Court was split on the question of whether the buyer had "no reasonable alternatives," with a slim majority holding that, due to the absence of substitute performance and the inadequacy of remedies in this case, the buyer was under duress and the modification was unenforceable. The dissent found that the 'no reasonable alternatives' test was not satisfied in this case. Both the majority and the dissent agreed, however, on the methodology, namely that enforcement should depend strictly on the issue of the threatened party's alternatives. It must be shown that "the threatened party could not obtain the goods from another source and that the ordinary remedy of an action for breach of contract would not be adequate."[80]

Neither the majority nor the dissent examined, in this case, the credibility issue, on which the decision should have, ideally, turned. For if the supplier had a credible threat to cease delivery—had Austin preferred to breach and pay damages over performance under the original price—parties in the buyer's position would generally be hurt by the doctrine that grants them ex-post relief: They would be deprived of the option to modify the contract and would likely face breach. While it is not clear one-way or another, there are indications in the case report that the supplier's threat to cease delivery was credible. The supplier did suffer a cost increase and appeared serious in its threat/warning that delivery would be halted.[81] Thus, if indeed the threat was credible, the buyer—or a party who similarly lacks reasonable alternatives—would be worse off under the court's decision not to enforce the modified agreement.

To determine whether a threat was credible, courts have to compare the threatening party's payoff from carrying out the threat and ceasing delivery to his payoff from retracting his threat and

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[79] Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533 (NY 1971). This case appears in many casebooks, *e.g.*, FULLER AND EISENBERG, *supra* note 31, at 122.

[80] 272 N.E.2d, at 535.

[81] The supplier claimed, and the majority in the lower court confirmed, that it suffered a significant cost increase. *See* Austin Instrument v. Loral Corp., 316 N.Y.S.2d 528, 530 (1970). Further, it is reported that following its modification demand but prior to the buyer's acquiescence, the supplier indeed ceased delivery. *See* 272 N.E.2d, at 534. It might still be argued that the supplier, a solvent company, would have been able to afford a fully compensatory expectation remedy. It is clear, however, that the answers to these issues did not appear relevant to the judges in deciding whether to enforce the modification.

dealing under less favorable terms. In *Austin v. Loral*, for example, courts would have to look at the supplier's cost of performance, versus the cost to him from breaching the original contract, namely, what portion of the loss (to the buyer) would the supplier effectively bear, given doctrinal limitation on recovery, solvency constraints, delay in execution of judgments, discounts due to settlements, and the like. The greater is his cost to perform, the more credible his threat to breach. Conversely, the greater his legal responsibility and practical ability to pay damages for breach, the less likely is it that a rational supplier would choose to breach in the event that his threat is rejected or that a modification cannot be enforced.

While it is impossible to conclude whether Loral's threat was credible in the circumstances reported in that case, the type of credibility analysis that the court never made (and, we believe, may have mandated the opposite outcome from the one actually reached) can nevertheless be illustrated in a uniquely similar context. As it turns out, Loral, the very same party who was the recipient of the threat to breach in the *Austin v. Loral* case, is currently involved in an identical dispute, this time as the threatening party. Just as Austin did to Loral, Loral is now threatening to withhold delivery of sophisticated manufactured goods (this time, a weather observation satellite) unless the buyer (this time, the Japanese air traffic control agency) agrees to pay $30M more than the original agreed-upon price of $136M. It is reported in the press that "Loral has threatened to indefinitely hold up delivery of the spacecraft unless the customer agrees to concessions."[82] As in the *Austin* case, the buyer in the current dispute is in urgent need for supply, which, if delayed, could "impede safety and efficiency upgrades of air traffic management over the Pacific Region."[83] While it is not clear yet whether the buyer intends to surrender and agree to the price modification (and whether the price modification will be challenged once delivery is rendered), the two Loral cases have a striking similarity: the supplier threatens to delay delivery to a buyer that cannot afford to wait, demanding price increases of 20-25%.

It is quite clear, though, that the current Loral episode is a case of a credible threat to breach. A few months prior to the threat, Loral filed for Bankruptcy under Chapter 11. Reorganization proceedings often accord the bankrupt promisor a shield from contractual obligation, and indeed the Bankruptcy Court, while recognizing the urgency for the buyer, denied the buyer's request for a restraining order that would have forced Loral to abide by the original delivery date.[84] Given Loral's financial woes, it would probably be unable to pay a meaningful remedy for breach or delay, in case the buyer were

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[82] *Loral Bankruptcy Case Faces New Hurdles: Air Traffic Control*, by Andy Pasztor, Wall Street Journal, Oct. 10, 2003, p. B1.
[83] *Delays in Loral Satellite Raise Fears in Japan About Air Safety*, by Andy Pasztor, The Asian Wall Street Journal, Oct. 13, 2003, p. M12.
[84] *Judge Denies Japanese Agencies' Request Against Loral*, by Ellen Sheng, Dow Jones News Service, Oct. 10, 2003.

to seek one. Accordingly, the best the buyer can hope for is delivery under a new, higher price. If the law of contracts were to make the new price void per duress, Loral is highly likely to use the bankruptcy shield and drop the contract altogether.

Generally, in assessing the credibility of the threat to breach, the main parameters are the pecuniary consequences to the threatening party of either carrying out the threat or retracting it. If it is more costly to perform an existing contract than to breach it and pay damages, the threat to breach is credible. But credibility may also arise from non-pecuniary costs. That is, even if it is more costly to breach from a purely economic perspective, a threat to breach may be credible when other, non-pecuniary costs are taken into account. To illustrate, consider the classic case of *Alaska Packers v. Domenico*.[85] A group of seamen aboard a fishing vessel went on strike in mid sea, threatening to jeopardize the short fishing season. Unable to find substitute workers, their employer agreed to increase their wage. At the end of the season, the employer refused to pay the modified wage and the Court of Appeals allowed him to invalidate the modification, on the grounds of coercion, pointing out that the wage increase was extracted at a time in which the threatened employer was most vulnerable, having no adequate remedies or substitutes. Indeed, many commentators in the hundred years since have branded this case as the prototype gun-to-the-head case, suggesting that the seamen's threat was opportunistic and non-credible.[86] According to this conventional view, had the employer rejected their demand, the seamen would have been better off returning to work than breaching the contract and losing the entire season's worth of wages.

But the seamen's threat to strike may have been credible, even if "irrational." According to one published account of the background of this case, the seamen realized that their employer misled them, that they were going to earn significantly less than they expected, in a harsher work environment.[87] It might well be that the seamen were willing to forgo the small wage they would earn, in order to avoid what they considered an exploitative and unfair compensation. True, from a strictly pecuniary point of view, the seamen surely realized that they were better off working for the low wage than striking and getting no wage at all. But the pecuniary calculus is surely not the only motivating factor. In general, a party whose share in the surplus is reduced in a manner that violates his notions of fairness and self dignity may have a credible threat to breach, even if his absolute

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[85] 117 F. 99 (9th Cir. 1902).

[86] *See, e.g.*, Posner, *supra* note 72, at 423-24 ("[I]n *Alaska Packers'* the likelihood of termination was much less [than in *Goebel v. Linn*] since the threat to terminate was not a response to external conditions genuinely impairing the [fishermen's] ability to honor the contract but merely a strategic ploy designed to exploit a monopoly position."); MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 70, 72 (4th ed. 2001)(the seaman's threat was opportunistic).

[87] Debora L. Threedy, *A Fish Story: Alaska Packers v. Domenico*, 2000 UTAH L. REV. 185.

pecuniary payoff from performance is still positive and greater than his pecuniary payoff from breach.[88] If these fairness concerns are sufficiently strong they can render a party's seemingly non-credible threat credible indeed, thus justifying enforcement of the coerced deal. The point here is not that these particular fairness concerns are necessarily prevalent, but that threats may be motivated—and may be rendered credible—by emotional drives as much as by pecuniary interests. Concessions extracted by credible threats should be enforced, regardless of how "rational" is the motivation that generates the credibility.

B. Unconscionability

The doctrine of unconscionability in contract law regulates two facets of the bargain. Under what is commonly termed 'procedural unconscionability' the law enables a party who was muscled into a bad agreement to void her consent. The type of procedures that are unconscionable include ones that give rise to claims of coercion and unfair surprise, and—being the "common law cousins" of duress[89]—we will not discuss them any further. The second prong of the doctrine of unconscionability is known as 'substantive unconscionability'—standards of minimal equity in the division of the contractual surplus which, if violated, permit courts to replace the oppressive terms with more reasonable ones.[90] Substantive unconscionability allows courts to tinker with the contract's provisions, such as price or credit terms, in order to make them less one-sided, even if the process of bargaining did not involve threats or procedural flaws that indicate coercion.

Legal intervention in substantively unconscionable terms is often justified from an ex-post perspective: the weak party would surely be better off once she is relieved from a particularly unfavorable term.[91] But justifications for the doctrine are also stated in ex-ante terms: strong parties should be discouraged from including such terms in the contract. Under the unconscionability doctrine, so the argument goes, the strong party—often described as a 'monopolist'—would be unable to fully exploit his bargaining power, and would therefore settle for less one-sided terms.[92]

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[88] See Bar-Gill & Ben-Shahar, *supra* note 11.

[89] JAMES J. WHITE & ROBERT SUMMERS, 1 UNIFORM COMMERCIAL CODE 214 (4th ed. 1995)

[90] Under UCC §2-302, if a term is unconscionable courts may refuse to enforce it or the entire contract, but may also limit the application of the unconscionable term, by reducing excessive prices.

[91] The standard examples in Contracts Casebooks involve door-to-door sales, in which home appliances are sold to uneducated consumers at prices far and above market standards. *See, e.g.*, Toker v. Westerman, 274 A.2d 78 (N.J. 1970).

[92] *See* Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 750 (1982) ("in some transactions occurring off competitive markets a party might not be deterred from contracting by the prospect of a reduction in price.")

While substantive unconscionability cases are ones in which explicit coercive threats are absent, the credibility-of-threats framework developed in this Article applies nonetheless. The question is whether the implicit threat by the strong party, which perhaps was never voiced in the actual deal formation, to refrain from dealing unless the unconscionable term is included, was credible. Take the monopolist example. Surely, the monopolist never bothered to "threaten" the consumer; but the take-it-or-leave-it format of bargaining is equivalent to a threat: "accept my terms, or no deal."[93] If the threat is credible, namely, if the strong party would prefer to forgo the entire deal if it had to settle for a smaller (yet positive) profit, ex-post legal intervention would deprive the weak party of the opportunity—bleak as it might be—to transact. Unless paternalistic motives are involved, it would be difficult to justify this intervention as protective of the weak party.[94]

On the other hand, consider the infamous door-to-door sales cases, where consumers routinely pay up to fifteen times the maximum retail price.[95] While the substantive unconscionability analysis in these cases is often accompanied by sharp criticism of the deceptive tactics used by the door-to-door salesman, connoting procedural unconscionability, at least some courts have been willing to strike down contracts based on "price unconscionability" per se.[96] Credibility analysis supports such price-based review. The extreme disparity between the price charged in the door-to-door sale and the much lower price charged for an identical product in an accessible market supports a presumption that the seller would not have walked

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[93] Interestingly, a similar "accept my terms, or no deal" situation pertains also in a perfectly competitive market. *Cf.* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 262-63 (1974); TREBILCOCK, *supra* note 50, at 79.

[94] This does not mean, of course, that other policy responses, such as antitrust regulation, should not be employed to limit the incidence of monopoly. Moreover, the distinction between endogenous and exogenous credibility may underlie the differential attitude towards take-it-or-leave-it proposals in monopolistic versus competitive markets. Specifically, ex-post intervention may be justified if the credibility of the monopolist's threat is endogenous. It may well be the case that the monopolist would not have a credible threat in a one-shot game with a single consumer: a lower profit margin on this consumer would be preferable to losing the transaction altogether. The credibility of the monopolist's threat not to deal derives from its desire to establish a reputation for not caving in. Otherwise, it will end up losing its monopolistic power vis-à-vis all consumers. The credibility of the monopolist's threat is, therefore, endogenous. A legal regime that refuses to enforce monopolistic prices defeats the reputation-building strategy. As argued above, in endogenous credibility cases ex-post relief may well be justified. *See supra* Section I.E.

[95] *See, e.g.*, *Vacuum Cleaners*, 58 CONSUMER REPORTS 67, 72 ("[The price of cleaners sold door-to-door] can be 5, 10, even 15 times that of other machines of similar cleaning abilities.")

[96] *See, e.g.*, Kugler v. Romain, 279 A.2d 640, 654 (S. Ct. N.J. 1971) (Since "the price unconscionability rendered the sales contract invalid as to all consumers who executed it," class-wide relief was granted, extending to unnamed plaintiffs/consumers.)

away from the deal, even if forced to accept a significantly lower price.[97]

Finally, courts have faced similar trade-offs in the rent-to-own cases, in which consumers again end up paying high mark-ups for conventional appliances. Here, too, courts have faced deals that manifest no procedural flaw, only substantively inflated prices. Often the legal approach to these contracts focused on the consumer's perspective—how much higher is the contract price relative to the market price. Yet, the consumer cannot be protected without accounting for the seller's perspective. Here, the risk that the consumer would default, return the item, or inflict repair costs on the lessor/seller should be accounted for in determining whether the price is excessive, or else consumers might be deprived the accessibility that this market niche provides.[98]

C. Bankruptcy Law and the Necessity of Payment Doctrine

The financial hardship suffered by the threatening party, specifically bankruptcy or the prospect of bankruptcy, can increase the credibility of his threats by limiting the possible adverse consequences from carrying-out the threat. In particular, if bankruptcy reduces the threatening party's exposure to breach remedies, the threat to breach may become credible.

Financial hardship and bankruptcy, however, can affect credibility analysis also when encountered by the *threatened* party. Consider the following typical case. A supply contract is signed between a retailer and a supplier. After the supplier performs his part of the deal, but before the retailer completed payment on the contract the retailer files for bankruptcy. At this stage, the retailer's debt to the supplier joins the retailer's other debts, and under the "equality of treatment" principle,[99] the supplier can expect to receive only a small portion of the contract price (or nothing at all, if the retailer has substantial higher-priority debt).

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[97] *See also* Eisenberg, *supra* note 92, at 781-85 (arguing against the exploitation of consumers' "price-ignorance," specifically in door-to-door sales.)

[98] *See* Remco Enterprises Inc. v. Houston, 677 P.2d 567 (1984) (holding that a markup of 108% on a TV set is not unreasonable given the credit risk, the absence of a down payment, the option to return and the benefit of repair services.) *See also* MACAULAY ET. AL., CONTRACTS: LAW IN ACTION 714-716 (2d ed. 2003) (describing litigation over rent-to-own contracts in Wisconsin and reporting that as a result of case decisions, the leading supplier in this market ceased its business in the state.)

[99] 11 COLLIER ON BANKRUPTCY § 1122.03 (Rev. 15th ed. 1996); Young v. Higbee Co., 324 U.S. 204, 210 (1945).

Now assume that the retailer opts for reorganization, rather than liquidation.[100] Also assume that in order to continue running her business and to maintain the lifeline of supply the retailer must enter into a new contract with the supplier. But the supplier threatens to walk-away and withhold the critical supplies unless the retailer pays her pre-petition debt in full. If the supplier's threat is credible, and the going concern value of the debtor is greater than the liquidation value, then strict adherence to the "equality of treatment" principle will only harm the retailer's other creditors.

Indeed, already in 1882, the Supreme Court carved out an exception to the "equality of treatment" principle—the "necessity of payment" doctrine.[101] In explaining the "necessity of payment" exception, the Court explicitly refers to the benefits from allowing the debtor to succumb to the supplier's demands. However, being uncomfortable with what it perceived as rewarding blackmail, the Court limited the scope of the "necessity of payment" doctrine to cases, such as the 1882 railroad case in which the doctrine originated, where the public interest requires the survival of the debtor's business.[102]

Despite this "public interest" or railroad limitation, bankruptcy courts and district courts have used the "necessity of payment" doctrine to authorize payment of pre-petition debts, when they have found that a failure to do so would impede the debtor's efforts to reorganize.[103] Of course, failure to allow payment of pre-petition debts would only obstruct the reorganization objective when the supplier's threat to withhold delivery is credible. The central role of credibility analysis has been recognized by at least some courts. For example, in the recent CoServ case, the bankruptcy court introduced a three-part test of necessity that closely tracks the credibility question.[104] Under this test, it must be shown that unless the debtor surrenders and pays the debt to the supplier, it risks the loss of economic advantage that is disproportionately higher than the supplier's claim, and that there is no other way to deal with the

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[100] Namely, the retailer chooses to invoke Chapter 11, rather than Chapter 7 of the Bankruptcy Code.

[101] Miltenberger v. Logansport Railway Company, 106 U.S. 286 (1882).

[102] 106 U.S. at 312.

[103] *See* Donald S. Bernstein, *Post-Petition Payment of Pre-Petition Debt in Corporate Reorganization Cases* (unpublished manuscript, on file with authors); Thomas J. Salerno, *"The Mouse that Roared" or "Hell Hath No Fury Like a Critical Vendor Scorned,"* ABI Journal (June 2003). Section 105 of the Code and the broad equitable powers that it bestows upon the courts, are often invoked as authority for allowing the payment of pre-petition debts.

[104] *See* In re CoServ L.L.C., 273 B.R. 487, 498-99 (Bankr. N.D. Tex. 2002).

supplier other than by payment of the claim.[105] It is only when the threat of the supplier is credible that the CoServ test of no-other-way-to-deal-with-the-supplier would be fulfilled. Accordingly, the CoServ approach is consistent with the credibility criterion.

While the lower courts have been willing to extend the reach of the "necessity of payment doctrine," the few Circuit courts that have considered the issue in the post-Code period have been much more restrictive. For example, in 1983, the Ninth Circuit, reluctant to compromise the "equality of treatment" principle, refused to authorize the payment of pre-petition debt. Thus, following the pre-Code Supreme Court precedent, the appellate court limited the "necessity of payment" doctrine to railroad cases.[106] In that case, however, as the lower court recognized, all indications suggested that the suppliers' threats were credible. The bankrupt trucking company, in order to stay in business, needed fuel and truck parts. The suppliers—some of them discount sellers—refused to continue supply unless pre-petition debts were paid and all new business was conducted in cash.[107] Indeed, the creditors' fears, which gave rise to their threats to cease supply, were not unfounded: the debtor eventually shut down operation and liquidated. In all likelihood, but for the payment of the pre-petition debt, the creditors would not have given the debtor a chance to reorganize. By restricting the scope of the "necessity of payment" doctrine and the credibility-of-threat analysis that this doctrine implies, the Ninth Circuit constrained the ability of financially troubled firms to enter new transactions and avoid liquidation.[108]

Recently, the Seventh Circuit issued an important decision addressing both the application and scope of the "necessity of payment" doctrine.[109] The Seventh Circuit found that, in theory, the Bankruptcy Code can be interpreted to allow for general application of the "necessity of payment" doctrine, beyond the railroad context.[110] Substantively, the Seventh Circuit explicitly recognizing the key role

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[105] *Id.*

[106] In re B&W Enterprises, 713 F.2d 534 (9th Cir. 1983).

[107] In re B&W Enterprises, Inc., 19 B.R. 421 (Bankr. D. Idaho 1982) (Recognizing that creditors refused to extend further credit and placed all services and goods provided on a "cash only" basis.)

[108] The Sixth Circuit, in a case decided in the same year as B&W, expressed a similar view. While not referring explicitly to the "necessity of payment" doctrine, the appellate court held (in dicta) that the bankruptcy court could not authorize the payment of pre-petition debts. *See* In re Crowe & Associates, 713 F.2d 211, 216 (6th Cir. 1983).

[109] In re Kmart Corp., 2004 U.S. App. LEXIS 3397 (7th Cir., Feb. 24, 2004).

[110] Specifically, the Seventh Circuit invoked 11 U.S.C. § 363(b)(1): "The trustee [or debtor in possession], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."

of credibility analysis: "the debtor must *prove*… that, but for immediate full payment [of the pre-petition debt], vendors *would* cease dealing."[111] Applying this rule of law to the Kmart facts, the court found that no evidence was presented to support a claim that "any firm would have ceased doing business with Kmart if not paid for pre-petition deliveries."[112]

While more receptive to the credibility test, the recent decision by the Seventh Circuit makes clear that generally vendors would not be expected to have a credible threat not to deal, as long as payment for future deliveries is guaranteed: "To abjure new profits because of old debts would be to commit the sunk-cost fallacy; well-managed businesses are unlikely to do this."[113] In many cases, insisting on the payment of pre-petition debts may indeed be "irrational." The appellate court presumes the existence of only rational, profit-maximizing vendors, and thus concludes that credibility is unlikely. But not all vendors are necessarily rational, and we have seen that credibility can be based on "irrational" motives.[114] Moreover, while profit-maximization implies non-credibility in many cases, there are other cases, where a rational, profit-maximizing vendor with a cash flow problem may credibly insist on the payment of pre-petition debts.

Credibility analysis suggests that the resistance of the Ninth and Sixth Circuits to the "necessity of payment" doctrine will often result in harm to the very creditors that these courts seek to protect. The Seventh Circuit, on the other hand, has exhibited a more complete appreciation for the implications of credible coercion. Still, the apparent inclination of the Seventh Circuit toward a broad no-credibility presumption runs the risk of practically eliminating the "necessity of payment" doctrine, to the detriment of all creditors.

D. Plea Bargains

Plea bargains are a unique species of contract that raises frequent concerns of coercion.[115] A defendant who is given a choice between pleading and facing a jury trial that might result in a more severe punishment often chooses to plea, a choice that many view as

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[111] In re Kmart Corp., 2004 U.S. App. LEXIS 3397, at *1-2 (7th Cir., Feb. 24, 2004).
[112] *Id*. at *18-9.
[113] *Id*. at *17.
[114] *See supra* Section III.A.
[115] The view that a plea bargain is a species of contract, and that standard defenses such as contractual duress can be invoked is not novel. See, e.g., *Santobello v. New York*; Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909 (1992).

coerced.[116] In fact, the defendant's confession through a plea bargain has been compared to the medieval European practice of extracting confessions through torture.[117] The threat to prosecute, similar to the threat to torture, "makes it terribly costly for an accused to claim his right […]. There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive."[118]

In applying the credibility methodology to this setting, the assessment of a plea bargain ought to begin by asking whether the prosecutor's threat to proceed with the case all the way through a jury trial (if the defendant rejects the plea bargain) is credible. If the threat is credible, then the plea bargain itself is the only effective way for the accused to avoid an even worse alternative—trial. If courts were to strike down this plea bargain as coercive, or if society were to eliminate the practice of plea bargains altogether, as some commentators concerned with the problem of coercion proposed,[119] defendants—having been freed from the coercive torture-like process—would not necessarily be better off. Whenever the threat to prosecute would have been credible excluding plea bargains would result in jury trials, with a potential for sanctions far exceeding the plea bargained sanctions, to the detriment of the accused. To those defendants that face a significant possibility that the prosecutor will pursue the charge, plea bargains represent desirable insurance.[120] It is only when the threat to prosecute is not credible that a plea bargain can potentially harm the accused.

The image of an innocent accused who nevertheless pleads guilty is surely an important element underlying the often hostile view towards the plea bargain institution. But even here the source of the coercion is not the proposal to plea per se. The problem is that the criminal justice system cannot ascertain guilt/innocence perfectly. Consider the benchmark case of a perfect adjudication system. In such an ideal system, a prosecutor would never be able to extract a guilty plea from an innocent defendant. Knowing that she will be exonerated at trial, the defendant would not concede to even a nominal sanction imposed via plea bargain.[121] An analogy to the contract modification

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[116] *See, e.g.*, Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 99 (1976) (current system of plea agreements is coercive because it deprives defendants from exercising their constitutional guaranteed right to a jury trial.)

[117] John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

[118] *Id.*, at 12-13.

[119] *See, generally*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

[120] This argument is well recognized in the plea bargaining literature. For its most comprehensive treatment, *see* Scott & Stuntz, *supra* note 115, at 1913-17; Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

[121] This claim would require some qualification if the innocent defendant would need to incur some private non-refundable costs to establish her innocence, even in a perfect system. In such a case, to the extent that prosecutors cannot perfectly

case is informative. If a buyer expects to receive perfect compensatory damages in case the seller breaches the initial contract, the seller would not be able to extract any price-increasing modification by threatening a breach of contract. Even if the seller's threat to breach is credible, the buyer would rather suffer breach and recover damages. The question of credibility becomes operative only when the threatened party expects imperfect legal protection of her entitlement—that is, imperfect remedies in the contract modification case, or imperfect verification of innocence in the plea bargain case.

In an imperfect system even an innocent defendant might enter into a plea agreement in order to avoid the risk of conviction and a higher sanction at trial. When the prosecutor's threat to proceed to trial is credible, the plea bargain option is beneficial to the defendant. If the defendant could ascertain the credibility of the prosecutor's threat, only such beneficial plea bargains would be made. Unfortunately, it is often difficult for the defendant to ascertain whether the prosecutor truly intends to follow through on the charges.

Perhaps the court can assist the defendant by verifying credibility ex post, and enforcing plea bargains if and only if the prosecutor's threat to proceed to trial was credible. This is different from what courts are currently asked to do, which is to determine whether the plea was entered voluntarily.[122] It is also different from many of the "safeguards" that other commentators proposed, which also focus on the defendant's freedom of choice, such as the access to capable legal counsel.[123] Under the credibility criterion, it is not the defendant's frame of mind that courts would have to scrutinize, but the prosecution's perception about the strength of its case.

This prescription poses, of course, a practical problem. In order to assess the perceived strength of the case and the credibility of the prosecutor's threat to proceed to trial, courts would have to adjudicate at least the very same issues that the institution of plea bargains intended to spare them, and perhaps more. To identify the cases in which the prosecutor has a credible threat—the only cases in which the plea bargain should be admitted—courts would have to determine whether, in the absence of a plea, the prosecutor would have pursued the charges. Since a prosecutor's subjective intent often cannot be verified, courts would have to assume that the prosecutor would have proceeded only if conviction were a likely outcome. But that would require the court to determine the merits of the prosecutor's case using all evidence available to the prosecution, while utilizing the same procedural safeguards that the jury trial

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ascertain innocence prior to a trial and therefore might file charges against innocent defendants, an innocent defendant would accept a plea bargain so long as the burden of the sanction does not exceed her defense costs.

[122] Fed. R. Crim. P. 11(d) requires courts to determine that the plea is voluntary and "not the result of force or threats or of promises apart from a plea agreement".

[123] *See* Conrad G. Brunk, *The Problem of Voluntariness and Coercion In the Negotiated Plea*, 13 L. & SOC. REV. 527, 549 (1979). It should be noted, however, that certain procedural safeguards can assist the defendant in forming a more accurate assessment of the credibility of the prosecutor's threat. *See infra*.

would have utilized. This is the only examination that would inform the court whether the threat to go to trial was credible and whether the plea bargain ought to be enforced. But if this were what courts had to do when facing a plea bargain, the institution of plea bargains would lose its main advantage, of being a cheap substitute to courtroom adjudication.[124]

The intolerable burden that a credibility inquiry would impose on the courts is amplified by the observation that defendants and their attorneys often do not have the necessary information to assess the credibility of the prosecutorial threat to try the case, evidenced by the fact that almost all defendants plea.[125] Consequently, courts would regularly be called to make the credibility assessment.

In some cases, courts would be able to identify non-credible threats. Indeed, courts do recognize the strategic motivations that may drive prosecutors. It is possible, the Supreme Court explained, for "the aggressive prosecutor to bring the greater charge initially in every case, and only thereafter to bargain. The consequences to the accused would still be adverse, for then he would bargain against a greater charge."[126] To the extent that plea bargains struck under such manipulative charges can be singled out and given different treatment, defendants' coercion can be alleviated. The Supreme Court, however, believes this singling out task to be unattainable.[127]

Moreover, if courts were charged with determining the credibility of the prosecutor's threat, their job would be further complicated by the fact that the prosecutor's decision whether to go to trial or drop the case is motivated, not solely by the absolute merits of the case at hand, but also by the relative merits, as compared to other concurrent cases. For budgetary and other political concerns, prosecutors have to concede the relatively weaker cases to make time for stronger ones. The more defendants a prosecutor simultaneously charges, the less credible is the threat to try each one of the individual cases. The problem is that courts are not accustomed to weighing "relative culpability," if only because factors bearing on this issue (evidence on concurrent cases and their comparative strength) is never presented and is surely inadmissible.

Further complications arise from the fact that the credibility of the prosecutor's threat may be linked to other (concurrent and future)

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[124] Scott & Stuntz, *supra* note 115, at 1935.

[125] *See, e.g.*, Albert W. Alchuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975).

[126] *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

[127] *Id.*, at footnote. ("prosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage with a defendant […]; this Court, in its approval of the advantages to be gained from plea negotiations, has never openly sanctioned such deliberate overcharging or taken such a cynical view of the bargaining process. […] *Normally, of course, it is impossible to show that this is what the prosecutor is doing, and the courts necessarily have deferred to the prosecutor's exercise of discretion in initial charging decisions*.") (emphasis added). *See also* Scott & Stuntz, *supra* note 115, at 1961-64.

unrelated cases through the prosecutor's reputation concerns. A prosecutor may be credibly vindictive against a specific defendant, if pursuing harsh sanctions against this defendant would help the prosecutor build a reputation for toughness, which in turn would serve him in the course of future plea bargaining and help him secure more stringent pleas.[128] This "reputation-based" credibility, however, is endogenous. If plea bargains were to be selectively enforced, with the underlying credibility of the threat scrutinized, such that plea bargains based on threats that are not credible on their own merits would not be enforced, the reputation-building motivation would vanish.

Prosecutors often bluff; they misrepresent to the accused the factors that bear on the likelihood and severity of conviction, and they are not always candid regarding their intentions to proceed to trial. Given the level of allowable pretrial discovery and the quality of defense counsel, the accused often will not know whether the prosecutor is bluffing.[129] As we have argued above, it is not necessary that threatened parties be able to assess the credibility of the threat, if courts can step in ex-post and verify its credibility. If courts were perfect verifiers of credibility, prosecutors would be deterred from making non-credible threats. The problem, again, is that there is no short-cut for assessing credibility. By and large, in order to determine whether a threat was credible, courts would have to assess the merits of the case.

Our analysis does not provide an easy fix. Unlike commercial contracts disputes, where the issue of the credibility of threats can be assessed without overly burdening the court, the confession contract cannot be selectively enforced on this basis. Nevertheless, the analysis does help in articulating the pros and cons of any plea bargain regime. It suggests that non-enforcement will create winners and losers within the class of pleading defendants, distinguished by the credibility of the prosecutor's threats.

On the prescriptive level, while ex post verification of credibility must be ruled out, certain procedural safeguards can reduce the incidence of non-credible prosecutorial threats. In *Bordenkircher v. Hayes*, the Supreme Court advocated more visible charging practices and restrictions on the prosecution's ability to change the charge.[130] In some situations, relief against non-credible threats may be provided by a procedural requirement that the charges against the defendant should be presented at the beginning of the bargaining process, and that only such set-in-advance indictments can be

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[128] Scott & Stuntz, *supra* note 115, at 1964-65.

[129] David A. Jones, *Negotiation, Ratification, and Rescission of the Guilty Plea Agreement: A Contractual Analysis and Typology*, 17 DUQ. L. REV. 591, 625 (1979); Brunk, *supra* note 123, at 550.

[130] *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 368 ("it is healthful to keep charging practices visible to the general public, so that political bodies can judge whether the policy being followed is a fair one. Visibility is enhanced if the prosecutor is required to lay his cards on the table with an indictment of public record at the beginning of the bargaining process, rather than making use of unrecorded verbal warnings of more serious indictments yet to come".)

pursued. Prosecutors would then be unable to threaten more serious indictments—indictments that they would not in fact pursue—in pressuring defendants to accept a charge-reducing plea bargain. Even this, however, would not be of much help if plea bargaining can be moved to an earlier stage, prior to the indictment.

Also in *Hayes*, Justice Blakmun suggests that the Due Process Clause protects against prosecutorial vindictiveness.[131] The threat of such Due Process ramifications, even if brought to bear only in extreme cases, should have a disciplining effect on prosecutors, and can perhaps serve to curtail the use of non-credible threats. Finally, since ex post verification of credibility by the court is impractical, procedural measures that can facilitate ex ante assessment of credibility by the accused or her attorney should be considered. For instance, enhanced pretrial discovery requirements, and a higher quality of court-appointed defense attorneys would reduce the likelihood of effective non-credible threats. Note that such higher quality defense would not necessarily be more costly. If defendants had the "ammunition" to fend off and turn down non-credible threats, the result would be *fewer* threats ex ante, and *fewer* trials ex post.

Plea bargains can also display coercion of a different type, by the *accused* who negotiates a lenient plea in exchange for information that the police or the prosecutor cannot otherwise acquire. Occasionally, after receiving this information, the prosecutor refuses to honor the agreement and uses the very same information revealed by the accused to charge him with an aggravated crime.[132] Here, too, credibility analysis can be invoked in two layers. It might seem, upon initial reflection, that if the agreement is unenforceable, the accused will have nothing to gain by revealing the information, and thus the prosecutor will be denied the only opportunity to bargain for time-sensitive, potentially life saving, information. That is, if the threat not to reveal information is credible, the resulting pleas ought to be respected by courts or else the information would not be divulged. Upon further reflection, however, it is also likely that the mere enforceability of such agreements would encourage perpetrators to acquire such "bargaining chips" in the first place. That is, the credibility of the perpetrator's threat to remain silent may be endogenous. If the perpetrator knew that such agreements are unenforceable, he would be less likely to engage in acts that give rise to such bargaining opportunities.[133]

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[131] 434 U.S. 357, 367-8 ("Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect".)

[132] *See, e.g.*, Whitehurst v. Kavanagh, 636 N.Y.S. 2d 591 (Sup. 1995); Matter of Schrotenboer v. Soloff, 549 N.E.2d 458 (N.Y. 1989).

[133] *Schrotenboer*, 549 N.E.2d, at 501 (recognizing that enforcement of the plea agreement would reward the perpetrator for "secreting" the abducted children.)

E. Blackmail

The crime of blackmail covers threats to perform an otherwise legal act. In the paradigmatic blackmail case, A threatens to disclose information harmful to B—a disclosure that may otherwise be within A's rights—unless B pays A a specified sum of money (Example 6).[134]

From a credibility perspective, the pivotal question is whether, absent payment by B, A would make good on his threat and disclose the information. Timing is crucial here. After the threat has been made, and assuming that the act of disclosing the information is not in itself illegal, there is little reason for A not to disclose the information; A's threat is credible. At this stage it may well be in B's best interest to strike a deal with A and prevent the disclosure.[135] It might also seem that, if the threat is indeed credible, punishing A for making the threat would only induce A to reveal the information without giving B the chance to offer a bribe.

The criminalization of blackmail, however, operates at the earlier pre-threat stage, in which A acquires the damaging information. By sanctioning the threat itself, the law provides a counter-force to the potential profits from such a threat, thus seeking to discourage the very making of the threat. If a party can be deterred from making the threat, her expected revenues from the damaging information are diminished, potentially discouraging her from spending any resource in acquiring this information in the first place. Thus, in situations in which blackmail arises from a deliberate plan by the blackmailing party to acquire the damaging information for the purpose of extracting bribes, the incentive to make such acquisition will be unambiguously weaker in a regime that punishes blackmail. In these deliberate-acquisition-of-information situations, blackmail credibility is endogenous,[136] and thus anti-blackmail measures are effective. Indeed, this ex ante perspective has been previously invoked in defense of the criminalization of blackmail.[137]

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[134] *See* WAYNE R. LAFANE, CRIMINAL LAW § 20.4 (2003); CHARLES E. TORCIA, 4 WHARTON'S CRIMINAL LAW § 658 (15th ed. 2003) *See also* James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. Rev. 670 (1984). The underlying problem involves the criminalization of speech. *See, e.g.*, Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U.L. REV. 1081 (1983). The First Amendment claim is, at least in some cases, countered by the constitutional right to privacy.

[135] *See* Richard Epstein, *Blackmail, Inc.* 50 U. CHI. L. REV. 553, 558 (1983). *See also* WERTHEIMER, *supra* note 3, at 93.

[136] An extreme form of which is Epstein's Blackmail, Inc., a corporation specializing in blackmail. *See* Epstein, *supra* note 135.

[137] *See*, *e.g.*, FRIED, *supra* note 3, at 102; Jeffrie Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 162 (1980) (arguing that the prohibition against blackmail is designed to limit incentives for the invasion of privacy); Ronald H. Coase, *Blackmail (The 1987 McCorkle Lecture)*, 74 VA. L. REV. 655, 674 (1988) (arguing that the prohibition against blackmail can prevent wasteful "expenditure of resources in the collection of information, which on payment of blackmail, will be suppressed.") *See also* NOZICK, *supra* note 93, at 85 ("[A blackmailer's] victims

The legal strategy of criminalization of the threat differs from that employed by the credibility-reducing policies described in Section I.F. In the blackmail case, the law will not sanction the threatened action itself, only the making of the threat—the demand to be bribed. Both legal strategies, however, serve the same underlying goal—discouraging the creation of credible threats.

But what if blackmail credibility is exogenous? Imagine, for example, a scenario in which during the course of friendship or partnership, one party becomes privy to compromising information concerning the other party (*e.g.*, tax evasion, marital infidelity, illicit hobby, etc.). Eventually, the relationship disintegrates, replaced by sentiments of resentment. Now, the informed party is threatening to disclose the embarrassing information, and will indeed gain enough vengeful satisfaction from such disclosure that only a substantial sum of hush money can induce him to keep quiet. In such cases, criminalizing blackmail only hurts the threatened party, who may no longer be able to prevent the disclosure of harmful information. If blackmailing threats are punished indiscriminately, threatened parties would gain from the deterrence of the deliberate type of blackmails but would lose from their reduced ability to avoid the blackmail that utilizes incidentally acquired information.

F. Duty to Help

A party, A, who is in a desperate need for help enters into a contract with another party, B, wherein B provides the needed help, but over-charges for it. Should the law enforce such a contract? Consider the following example.

> Example 8: *The Tug Case*. A ship becomes disabled in mid-sea. A tug comes alongside the ship, and the captain of the tug offers to save the ship in exchange for 99 percent of the value of the ship's cargo. The owner of the ship agrees. Should he be held to the contract? [138]

Prior analysis of circumstances akin to *The Tug Case* in the legal and philosophical literatures focuses on the duty to help and its

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would be as well off if the blackmailer did not exist at all.") In its basic formulation, this defense of the prohibition against blackmail justifies only the criminalization of blackmail that is based on deliberate investments to uncover harmful information; and it cannot explain the current scope of prohibition, which extends to threats based on inadvertently acquired information. *See* Lindgren, *supra* note 134, at 689-94 (distinguishing between entrepreneurial and opportunistic blackmail). However, even with inadvertently acquired information, some investment is required to leverage the information into blackmail, and the law may well be justified in seeking to discourage such investments. *See* Coase, *id*, at 674.

[138] This, or similar examples are discussed in POSNER, *supra* note 52, at 117; FRIED, *supra* note 3, at 109-111; TREBILCOCK, *supra* note 50, at 87-90.

implications.[139] For example, Fried concedes that a duty to help can override the principle of "contract as promise," arguing that cases such as *The Tug Case* fall under the domain of the duress doctrine.[140] Nozick, considering an example similar to *The Tug Case*, argues that since the normal and expected (i.e. morally required) course of events is for the tug to rescue the ship, namely since there is a moral duty to help, the tug captain is making a coercive threat not to save, rather than a non-coercive offer to save.[141]

This approach is probably harmless in *The Tug Case*, where the tug's threat—to "sail away" unless the owner of the ship promises to pay 99 percent of the cargo's value—appears non-credible. Generally, however, reliance on duress or duty to help reasoning, rather than on credibility analysis, might be misleading, and consequently detrimental to potential rescuees. To the extent that salvage contracts might be nullified when the threat not to rescue was credible the duress methodology will only hurt the very party it is attempting to help.

Admiralty law exhibits a remarkable sensitivity to implicit credibility considerations. While admiralty courts have the power to strike down salvage contracts specifying exorbitant prices, this power is tempered by a nuanced understanding of the potentially detrimental ex ante effects that might result from the exercise of such power.[142] First and foremost, when maritime law strikes down a salvage contract, it does not leave the salvor empty-handed. Rather it guarantees the salvor a "reasonable fee" equal to the (risk adjusted) cost of performing the salvage activity plus a bonus.[143] The doctrinal guidelines determining the magnitude of this "reasonable fee" eliminate the potential credibility of the salvor's threat to sail away. In particular, admiralty courts, in measuring the salvor's cost of performance, do not look only to the actual cost of salvage. They also consider the salvor's alternative costs—the value of the salvor's time and profits that could have been made elsewhere.[144] This accurately

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[139] FRIED, *supra* note 3, at 109-111; CHARLES FRIED, WRIGHT AND WRONG ch. 7; Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFFS. 230 (1980) (reviewing the literature, and criticizing the argument that the Bad Samaritan's omission is the cause of harm); Francis Bolen, *The Moral Duty to Aid Others as the Basis of Tort Liability*, 47 U. PA. L. REV. 217 (1908) (arguing for a duty to rescue); A. M. Honoré, *Law, Morals, and Rescue*, in THE GOOD SAMARITAN AND THE LAW 238-242 (Ratcliffe ed. 1966) (same).

[140] FRIED, *supra* note 3, at 109-111 ("those promises were exacted under duress").

[141] Nozick, *supra* note 3, at 449-50.

[142] *See* GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY 579 (2nd ed., 1975); The Elfrida, 172 U.S. 186 (1898) (citing cases and summarizing the admiralty rule).

[143] *See* GILMORE & BLACK, *supra* note 142, at 579. *See also* FRIED, *supra* note 3, at 109-111; Post v. Jones, 60 U.S. 150 (1856) (Under circumstances similar to those presented in *The Tug Case*, the Supreme Court refused to enforce the contract, limiting the rescuers to the normally allowed fee for salvage, which the Court terms "liberal recompense".)

[144] *See infra* discussion of *Post v. Jones*, 60 U.S. 150 (1856) (consideration of alternative profits); The Elfrida, 172 U.S. 186 (1898) (citing "time and labor

broad interpretation of "the cost of performance" strips away the credibility of the salvor's threat, and ensures that performing the salvage operations is incentive compatible for the salvor.

The Supreme Court's decision in *Post v. Jones*,[145] is illustrative. The facts in *Post* resemble those in Example 8, only that rather than being sold to the captain of a tug, the cargo of the wrecked whaling ship, Richmond, was purchased by another whaling ship. To be sure the Court, in nullifying the contract between the master of the Richmond and its salvors, applies duress reasoning,[146] considers the substantive fairness of the contract,[147] and invokes the salvors' duty to help.[148] But between duress, fairness, and the duty to help, the Court also considers the credibility of the salvors' threat to "sail away." In particular, the salvors claimed that but for the profitable terms they secured in return for their effort they would have preferred to continue with whale hunting. The Court rejects this claim, finding that given the uncertainty and risk involved in catching whales toward the end of the season, the salvors would have taken the Richmond's cargo also for the ordinary salvage fee.[149] The Supreme Court's credibility analysis ensured that the invalidation of the contract, and the replacement of the contract price with a lower, court-determined fee, would not discourage salvage in similar situations.

In fact, the concern with providing ample incentives to rescue distressed vessels is a central theme in the admiralty cases. As one court held: "The primary principle upon which salvage awards are allowed at all is the principle of encouraging rescue."[150] This ex ante perspective sits well with the credibility approach advocated in this Article.

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expended" a well as "loss of profitable trade" as factors determining the value of the salvage service.")

[145] 60 U.S. 150 (1856).

[146] The Court notes that "the master of the Richmond was hopeless, helpless, and passive – where there was no market, no money, no competition – where one party had absolute power, and the other no choice but submission…" *Post v. Jones*, 60 U.S. 150, 159 (1856).

[147] The Court characterizes the contract as "an unreasonable bargain." *Id*. at 160.

[148] "[Courts of admiralty will not] permit the performance of a public duty to be turned into a traffic of profit." *Id*.

[149] *Id*.

[150] *The Donbass*, 74 F. Supp. 15, 23 (W. D. Wa. 1947), based on the Supreme Court's ruling in *The Blackwall*, 77 U.S. 1, 14 (1869) ("Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a quantum meruit, or as a remuneration PRO OPERE ET LABORE, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.") *See also* Eisenberg, *supra* note 92, at 761 (recovery "should not only compensate the promisee for all costs, but should also include a generous bonus to provide a clear incentive for action.")

IV. CONCLUSION

Drawing the line between legitimate proposals and coercive threats is a challenge that underlies legal policy in various areas of social interaction. Despite continuous efforts, legal doctrine has not succeeded in producing a coherent jurisprudence of coercion, and legal scholarship has had little success influencing the course of the law. On the scholarship front, much of the focus of previous theoretical inquiry was on the *entitlement* of the coerced party, characterizing the choices that a free individual should not have to face. At the same time, much of the focus of legal doctrine was on process violations, characterizing the *form* of coercive behavior.

To complement these two traditions, the rights-based theoretical inquiry and the process-oriented legal doctrine, this Article provides a much-needed incentive approach. The main innovation in the Article is in articulating a fundamental criterion for distinguishing threats to which the threatened party is better off surrendering. These are threats that may unfortunately violate, at times, the coercion test underlying the rights-based approach as well as the process restrictions of existing legal doctrine. We called the incidence and outcome of such threats "credible coercion," and we argued that acts or promises induced by credible coercion should be enforced, however discomforting.

This Article is written in the intellectual tradition of the economic approach to law. Even so, the normative premise underlying the analysis is different than the one ordinarily motivating law and economics scholarship, that of overall efficiency. Here, instead, the well being of the *threatened* party was regarded as the sole yardstick by which outcomes ought to be evaluated. Nevertheless, the well being of the *threatening* party, although normatively irrelevant under this framework, did play an important role. Taking into account the interests of the threatening party provided a better understanding of feasibility constraints facing a policy maker who is keen on protecting the coerced party. This understanding led us to suggest that coerced acts and promises should be enforced in a greater set of circumstances than prescribed by other normative approaches.

The emphasis on a morally neutral feasibility analysis may seem objectionable to a reader who, like us, views coercion first and foremost as a normative problem. That reader might wonder why should this criterion, that has the potential to validate morally reprehensible coercion, be endorsed? The answer we provided in the Article is that there is no other choice. The reader may choose to ignore the implications of the morally neutral credibility perspective, but unfortunately this will not make them go away. When coercion arises from credible threats, advocating a normatively appealing yet non-feasible solution is pointless.

Other readers may find the credibility criterion daunting, as we provided only spare guidelines on how to implement it. Do courts

have the capacity and sophistication to carry out case-by-case adjudication of credibility? The analysis in the Article recognized areas in which this adjudicative task is probably too burdensome (e.g., plea bargains). But it also identified major areas in which the credibility test is implementable and yet regularly overlooked (e.g., contract modifications). Overall, the host of factors that can make a threat credible and that should enter the credibility analysis is so broad as to ignite, again, the temptation to ignore this test and to opt for more practical-implementable approaches.

Unfortunately, the enduring, largely unsuccessful efforts, both by judges and by scholars, to come-up with a practical coercion test suggest that implementation problems are not unique to the credibility test. But even if another test carried the promise of easier implementation, the temptation to ignore the credibility test would still be self-defeating. It is possible to base a duress regime on other criteria, perhaps more readily adjudicable criteria. But that would be equivalent to searching for a needle in the wrong haystack, only because that haystack is better lit. The "needle" (here, the well-being of the coerced party) may be hidden in a dimly lit haystack (the credibility test), but that is still the only sensible place to search.

The credibility perspective, however, is not only inevitable, it also carries the promise of effective anti-coercion policy. It teaches that non-credible coercion can be cured. It also opens a perspective into a rich and textured study, some of it mapped in the Article, of how credibility can be affected by legal policy.

We began with a skeptical view regarding the ability of a Liberal society to combat coercion. Indeed, we have shown that many common anti-duress measures are, in fact, powerless in aiding coerced parties. Moreover, we demonstrated that these measures will often harm coerced parties. But what started as a skeptical, critical evaluation ended-up providing constructive guidelines for the design of effective anti-coercion policies. Credible coercion tells us not only what will not work, but also what will.