"FREEDOM" AND "COERCION"— VIRTUE WORDS AND VICE WORDS

PETER WESTEN*

Professor Westen takes as his subject certain terms of moral discourse that recur throughout Western thought—terms that he calls "virtue words" and "vice words." These terms possess two paradoxical features. Each term is a single concept with a single meaning, and yet, each lends itself to diverse and contradictory conceptions. Moreover, each term conveys normative judgments without, however, being defined as expressing such judgments. The conjunction of these two features renders virtue words and vice words rhetorically treacherous and requires careful analysis, especially in legal debate. In this piece, Professor Westen carefully unpacks two such words, "freedom" and "coercion," and in the process illustrates how virtue words and vice words operate.

[I]t is characteristic not only of the use of legal concepts, but also of many concepts in other disciplines and in ordinary life, that we may have adequate mastery of them for the purpose of their day-to-day use; and yet they may still require elucidation; for we are puzzled when we try to understand our own conceptual apparatus. We may know how to use these concepts, but we cannot say how or describe how we do this in ways which are intelligible to others and indeed to ourselves. We know, and yet do not fully understand . . . much in the way perhaps that a man may know his way about a familiar town by rote without being able to draw a map of it or explain to others how he finds his way about the town.¹

H.L.A. Hart

* Professor of Law, University of Michigan. B.A. 1964, Harvard University; J.D. 1968, University of California, Berkeley. This is an extended version of an address I delivered as the Brainerd Currie Memorial Lecture at the Duke University School of Law on January 17, 1985. I would like to thank the faculty and students at Duke for their hospitality and encouragement, and members of the Legal Theory Workshop at the Northwestern Law School for giving me the benefit of their comments on an early stage of the project in February, 1984. I am especially grateful to my colleagues Fred Schauer and Christina Whitman for commenting on an earlier draft, and to Lee Brooks for his invaluable research assistance.

1. Hart, *Analytic Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 964 (1957).

Much has changed since young Thomas Jefferson took up his quill pen in the winter of 1781 and wrote by candlelight about "freedom" and "coercion." More has changed since Plato lauded freedom and derogated coercion two thousand years earlier.² The material changes in the way we live are obvious. The normative changes in what we value—in what we regard as good and evil, right and wrong—are equally dramatic: the abolition of chattel slavery, the disestablishment of religion, the end of indentured servitude, the demise of monarchy, the prohibition of torture and blood sanctions, the banning of child labor, the emancipation of women, the prevalence of birth control and premarital sexual relations, and the advent of universal adult suffrage, free public education, social security and no-fault divorce—all in the past two hundred years.

Yet despite these tidal transformations in our conceptions of good and evil, one thing remains the same: We use much the same language to *express* our conceptions of good and evil today as Jefferson and Plato used in their times. We value very different things than they did, but we use the same words to express our respective values: "virtue," "happiness," "respect," "fidelity," "knowledge," "courage," "consent," "neutrality," "beauty," "order," "security," "honor," "tolerance," "consistency," "rationality," "property," "freedom," "contract," "equality," "fraternity." By the same token, we condemn different things than they did, but we use the same words to express our condemnation: "tyranny," "vice," "misery," "disrespect," "expropriation," "infidelity," "cowardice," "involuntariness," "intolerance," "prejudice," "ignorance," "anarchy," "shame," "inequality," "arbitrariness," "license," "insecurity," "coercion."

I should like to focus here on what I believe to be a large subset of these recurring terms of moral discourse, a category which I shall call "virtue words" and "vice words."³ Virtue words and vice words possess

2. See T. JEFFERSON, *Notes on the State of Virginia*, in 3 THE WRITINGS OF THOMAS JEFFERSON 1781-1784, at 85, 262-65 (P. Ford ed. 1894) (discussing "civil freedom" and "coercion of the laws"); cf. T. JEFFERSON, *A Bill for Establishing Religious Freedom*, in 2 THE PAPERS OF THOMAS JEFFERSON 1777 TO 1779, at 545 (J. Boyd ed. 1950) (contrasting a "free" mind with "coercions" on the mind); Plato, *Laws VIII* 832, in 5 DIALOGUES OF PLATO 400-01 (B. Jowett trans. 2d ed. 1875); Plato, *Lysis* 207e-210c, in THE COLLECTED DIALOGUES OF PLATO 150-53 (E. Hamilton & H. Cairns ed. 1961) [hereinafter cited as COLLECTED DIALOGUES]. But compare A. WHITEHEAD, ADVENTURES OF IDEAS 64-65, 86 (1933) (describing Plato's writings as one prolonged apology for freedom) with Plato, *Republic VIII*, at 556e-564b, in COLLECTED DIALOGUES, *supra*, at 785-92 (criticizing democracies for their excessive love of liberty). For Greek and Roman views of freedom, see H. BETZ, PAUL'S CONCEPT OF FREEDOM IN THE CONTEXT OF HELLENISTIC DISCUSSIONS ABOUT THE POSSIBILITIES OF HUMAN FREEDOM (1977) (published by Center for Hermeneutical Studies).

3. I take the phrase "virtue word" from James Pennock. Pennock, *Coercion: An Overview*, in NOMOS XIV: COERCION 2 (J. Pennock & J. Chapman ed. 1972) (" 'Liberty' is a 'virtue word.' ") [hereinafter cited as Pennock]. I may, however, be using it in a more specialized sense than he does.

two features that are both distinctive and paradoxical.

First, like the Greek god Proteus, each has the capacity to retain its own essential identity while assuming a variety of distinct and even contradictory forms. Virtue words and vice words possess what is sometimes called "open texture"⁴—the quality of being less than fully specified and hence of being capable of further specification. They are what Ronald Dworkin calls "concepts" as opposed to "conceptions": A "concept" is sufficiently specific to have a single "meaning" and at the same time sufficiently generic to encompass a multitude of "competing conceptions."⁵

To illustrate this first common feature of virtue and vice words, consider the word "equality." Political philosophers from Aristotle to Karl Marx have expressed their views of distributive justice in the language of equality.⁶ Aristotle and Marx shared a concept of equality—the concept that likes should be treated alike.⁷ But they had different views of what makes human beings alike in a relevant way, and, hence, they had different conceptions of equality. Aristotle believed that all people are alike in

As an antonym for "virtue word," I use "vice word"—something Pennock might call a "swear-word." *Id.* at 10. For more colorful terms, see M. CRANSTON, *FREEDOM: A NEW ANALYSIS* 16 (1953). Cranston writes:

"Freedom" and "liberty" are examples of what philosophers of the vernacular call *hurrah*-words. To say "I am free from debts" is to say "I am free from debts, hurrah!" Correspondingly, "lack" might be called an *alas*-word. To say "I lack Spanish" is to say "I am without Spanish, alas!" Each sentence announces the facts and at the same time expresses your feelings about the facts, your attitude toward them. . . . "License" is a pejorative word or what is sometimes called a "*boo*-word."

4. See H.L.A. HART, *THE CONCEPT OF LAW* 124 (1961). Hart takes the expression "open texture" from Frederick Waismann, *Verifiability*, 19 *PROC. ARISTOTELIAN SOC'Y* 119, 123 (Supp. Vol. 1945). It appears, however, that Hart uses the phrase differently than Waismann does. Hart seems to use "open texture" to refer to certain "general" terms that, being "general," are necessarily vague and indeterminate, as if there were other specific empirical terms that are not indeterminate. See HART, *supra*, at 124; cf. J. ELY, *DEMOCRACY AND DISTRUST* 13 (1980) (contrasting "open-textured" terms with "specific" terms in the Constitution). Waismann, on the other hand, uses the term "open texture" to refer to an irreducible feature of all empirical descriptions. See Waismann, *supra*, at 124-26. I am indebted to my colleague, Fred Schauer, for clarifying this distinction. See Schauer, *Authority and Indeterminacy*, in *NOMOS XXVIII: AUTHORITY* (J. Pennock & J. Chapman eds. 1986) (forthcoming).

5. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-35 (1977); cf. 1 M. ADLER, *THE IDEA OF FREEDOM* 606 (1958) (contrasting "families of conceptions" of freedom with "conceptions" of freedom, and contrasting "determinables" with "determinations").

6. ARISTOTLE, *ETHICS* [NICHOMACHEAN] V, at 1130b8-1131b14, 1134a23-1134b8 (J. Thomson trans. 1953); K. Marx, *Critique of the Gotha Programme*, in 2 *SELECTED WORKS* 554, 564-67 (1962) (criticizing the "bourgeois" notion of treating people equally by distributing "to each according to his labor," as opposed to the communist notion of treating people equally by distributing "to each according to his needs"); cf. Plato, *Laws VI*, at 757b-c, in *COLLECTED DIALOGUES*, *supra* note 2, at 1337 (arguing that true equality means to each according to his moral character).

7. The principle of equality that "likes should be treated alike," which Aristotle adopted from Plato, has been accepted as a self-evident axiom of political philosophy ever since. See Westen, *The Empty Idea of Equality*, 95 *HARV. L. REV.* 537, 542-43 & nn.17-20 (1982).

deserving to be rewarded for their moral virtues and thus believed that equal treatment meant rewarding people in proportion to their moral virtues.⁸ Marx believed that all people are alike in having economic needs that should be fulfilled and thus believed that equal treatment meant according benefits to people in proportion to their "needs."⁹ Marx and Aristotle both agreed on what "equality" means, and both used it correctly; yet what equality means is sufficiently protean¹⁰ that they could use it to express distinct and morally inconsistent views of distributive justice.

The second paradoxical feature possessed by virtue words and vice words is that they tend to convey normative judgments without being *defined* as expressing normative judgments. Virtue words and vice words thereby differ both from words that are entirely descriptive, on the one hand, and from words that are defined to be normative, on the other hand. To illustrate, consider the difference between the word "federal," on the one hand, and the words "justice" and "duress," on the other. "Federal" is a descriptive, normatively neutral word. A federal government is a mixed government consisting both of a national authority and of independent member-state authorities.¹¹ The word "federal" denominates such governments without either endorsing them or condemning them. A federal government, by virtue of being federal, is itself neither good nor bad.

"Justice" and "duress," in contrast, are normative by definition. They are "value concepts,"¹² concepts that are defined as the expressions of normative judgments. Denominating a particular distribution as "just" endorses the distribution, because "just" distributions are defined

8. See *supra* note 6; cf. Benn, *Equality, Moral and Social*, in 3 *ENCYCLOPEDIA OF PHILOSOPHY* 38, 39 (1967).

9. See Oppenheim, *The Concept of Equality*, in 5 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 102, 106 (1968); see also S. LAKOFF, *EQUALITY IN POLITICAL PHILOSOPHY* 225-33 (1964).

10. See Schaar, *Equality of Opportunity, And Beyond*, in *NOMOS IX: EQUALITY* 228, 228 (J. Pennock & J. Chapman eds. 1967) ("Equality is a protean word.").

11. History suggests that the framers of the Constitution distinguished between "national" and "federal." They used "national" to refer to a central government that draws its structure and authority not from constituent states, but in an undifferentiated manner from the people of the nation as a whole; they used "federal" to refer to a central government that draws its structure and authority exclusively from the authority of constituent states. See Diamond, *The Federalist On Federalism: "Neither a National nor a Federal Constitution, But a Composition of Both,"* 86 *YALE L.J.* 1273, 1277-82 (1977). In these terms, the central government created by the Constitution is a "mixture" of "national" and "federal" authority; some institutions of the central government—the House of Representatives, for example—draw their authority from the people of the country as a whole, while others—the Senate, for example—draw their authority from the constituent states. See *id.* at 1277-78.

12. Somerville, *Toward a Consistent Definition of Freedom and its Relation to Value*, in *NOMOS IV: LIBERTY* 289, 290 (C. Friedrich ed. 1962).

as normatively right and proper.¹³ Similarly, denominating *A*'s conduct toward *B* as "duress" in some sense condemns *A*'s conduct, because "duress" is defined as a normatively illegitimate compulsion.¹⁴ It is paradoxical to speak negatively of justice or to speak positively of duress,¹⁵ because the relationship between justice and legitimacy, and between duress and illegitimacy, is not contingent. It is lexical. "Justice" and "duress" are what may be termed "lexically normative" words.

Virtue words and vice words share something in common both with descriptive terms like "federal" and with lexically normative terms like "justice" and "duress." Like descriptive words, virtue words and vice words are defined without reference to anterior normative judgments; like lexically normative words, they tend to express normative judgments. The virtue word "equality" and its correlative vice word "inequality" are good illustrations. To say that a particular rule treats people "equally," or treats them as "equals," or aims toward "equality," is generally to praise or endorse the rule; to say that a rule treats people "unequally" or creates "inequalities" is generally to condemn the rule.¹⁶

Nevertheless, although statements of equality and inequality tend to be normative, the words "equality" and "inequality" are not themselves defined to be normative. It is contradictory to talk about wrongful justice or rightful duress, since justice and duress are respectively defined as right and wrong. But it is not contradictory to talk about wrongful equality or rightful inequality. One does not misuse language when one condemns equality or praises inequality, because while statements of equality and inequality tend to be statements of good and bad, and right and wrong, respectively, the relationship between equality and virtue and inequality and vice is not lexical. It is contingent.

13. See Somerville, *supra* note 12, at 290: "[C]oncepts like justice . . . are, by their very nature, value concepts. It is impossible to define them consistently, in light of what they stand for in speech and action, except in terms of moral rightness and wrongness." But cf. A. WHITE, RIGHTS 115-32 (1984) (distinguishing "claims" from "rights").

14. Duress is "[a]ny wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition." BALLENTINE'S LAW DICTIONARY 383 (3d ed. 1969); see also RESTATEMENT OF CONTRACTS § 492(b) (1932) ("Duress in the Restatement of this Subject means . . . any wrongful threat."); C. FRIED, CONTRACT AS PROMISE 92 (1981) (duress defined as "improper pressure").

15. One can quite sensibly condemn *legal* rights (i.e., claims that are justified in law) by asserting that they are morally unjustified, and one can quite sensibly praise legal standards of duress (i.e., compulsions that are illicit at law) by asserting that they are morally desirable. It is contradictory, however, to condemn rights or commend duress within given systems of law or morals, because "rights" and "duress" are defined as things that are normatively justified and unjustified, respectively, within given systems of law or morals.

16. Kristol, *Equality as an Ideal*, in 5 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 108, 110 (1968) (equality is an "ideal" that puts "every inequality on the defensive").

These two features of virtue words and vice words—that they are both protean and nonlexically normative—combine to give virtue words and vice words great rhetorical force. Because they are protean, they are versatile. They are vehicles through which people can express their most deeply-held moral beliefs, without the necessity of making those beliefs morally consistent. Moreover, because virtue words and vice words tend to be normative, they tend to persuade. They tend to tilt or point moral discourse in the direction the speaker wishes it to go, whether the speaker happens to be endorsing a particular position or condemning it. Finally, because they are nonlexically normative, they tend to persuade without being completely conclusory. They point moral discourse in the direction the speaker wishes it to go without enabling his opponent to say that he has simply defined away the issue. Thus, the virtue word “equality” has great rhetorical force because regardless of the particular normative position one wishes to advocate, one can nearly always state it in the language of equality; and having done so, one puts one’s opponent on the defensive without enabling him to say that one is simply begging the normative question.

Unfortunately, these same two features of virtue words and vice words also create paradoxes. How can a word be protean? How can a word always mean the same thing, and yet also mean different and contradictory things? How can single concepts generate morally contradictory conceptions? How, too, can given words that are not *defined* as signifying things that are good or bad nevertheless always *tend to signify* things that are good or bad even across cultures that have different and contradictory values?

I should like to examine these paradoxes in the hope of understanding the singular rhetorical force of virtue words and vice words. I shall do so by analyzing two of them in detail: “freedom” and “coercion.” Freedom is a virtue word because it is both protean and nonlexically normative. Freedom is protean because it is a single, generic concept that can simultaneously encompass many different and morally contradictory conceptions.¹⁷ Thus, both sides to the antislavery dispute in

17. As Isaiah Berlin has said, freedom is a “protean word” that is “so porous that there is little interpretation that it seems able to resist.” I. BERLIN, *FOUR ESSAYS IN LIBERTY* 121 (1969); see also M. CRANSTON, *supra* note 3, at 9 (“The state of affairs [one person] sees as servitude, [another] calls freedom, and that which the [latter] sees as servitude, the [former] calls freedom. There is a quarrel here in which the opposing principles are both given the same name.”); *id.* at 12 (people use the word “freedom” to express “contrary principles”); Doppelt, *Conflicting Social Paradigms of Human Freedom and the Problem of Justification*, 27 *INQUIRY* 51, 53 (1984) (arguing that while the philosophers John Rawls and Robert Nozick and modern democratic socialist theorists all base their theories of distributive justice on the idea of freedom, they expound “incompatible” models of distributive justice because they have different “conceptions of freedom”).

America could state their positions in the language of "freedom"—one side advocating constitutional freedom from chattel slavery, the other side advocating freedom from northern abolitionism.¹⁸ Both sides to "captive audience" debates today state their positions in the language of freedom—one side demanding freedom of speech, the other side demanding freedom of thought.¹⁹ Both sides use the word "freedom," and both use it correctly, but they use it to mean morally inconsistent things. "Freedom" is also nonlexically normative; that is, it tends to be laudatory²⁰ without being so defined. Freedom is generally assumed to be something right and good.²¹ Nonetheless, there is nothing contradictory about "bad" or "undesirable" or "harmful"²² freedoms.

The word "coercion" has the same two features as "freedom," except that it tends to express moral condemnation rather than moral praise. Like freedom, coercion is a single concept that is sufficiently open-textured to encompass a range of diverse and mutually inconsistent norms. Thus, both sides to the dispute in America over concerted union activity stated their positions in the language of "coercion"; one side complained about coercion by labor unions, the other side about coercion

18. See W. COOPER, *LIBERTY AND SLAVERY: SOUTHERN POLITICS TO 1860*, at 179, 267-68, 283 (1984).

19. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 96-97 (1949) (Frankfurter, J., concurring) (contrasting "freedom of speech" with "freedom of thought"); C. BAY, *THE STRUCTURE OF FREEDOM* 126 (1958) ("[A]n increase in A's freedom to advertise his merchandise by the use of sound trucks may well mean a reduction in B's freedom to enjoy privacy."). For an enumeration of contemporary conflicts between freedom of speech interests, on the one hand, and other incompatible freedoms on the other hand, see Cass, *The Meaning of Liberty: Notes on Problems Within the Fraternity* 34 (unpublished manuscript on file with the DUKE LAW JOURNAL).

20. See Oppenheim, *Freedom*, in 5 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 554 (1968) (stating that the word "freedom" has a "strong laudatory connotation") [hereinafter cited as Oppenheim, *Freedom*].

21. See M. CRANSTON, *supra* note 3, at 16; see also *id.* at 21 ("[T]he word 'freedom'—like its synonym 'liberty'—has a strong laudatory emotive meaning for English-speaking peoples, whether in political or general use."); L. MACKIN, *THOUGHTS ON FREEDOM: TWO ESSAYS* 12 (1982) ("There is common assent that freedom is good. All persons, in one way or another, admit to this faith."); MacCallum, *Negative and Positive Freedom*, 76 *PHIL. REV.* 312, 313 (1967) (referring to "the favorable attitudes attaching to the notion of freedom"); PENNOCK, *supra* note 3, at 9 ("Other things being equal, it seems to be generally agreed . . . that liberty is good."); White, *Negative Liberty*, 80 *ETHICS* 185, 186-87 (1970) ("[T]he notion of freedom is ordinarily evaluatively loaded."). Perhaps the laudatory connotations of "freedom" and the pejorative connotations of "coercion" explain Ronald Reagan's assertion in the 1984 presidential campaign that the choice between Reagan and Mondale was the choice between "freedom [and] coercion." *N.Y. Times*, July 26, 1984, at A21, col. 1.

22. Somerville, *supra* note 12, at 297 ("[I]f freedom were by definition good (like justice . . .), that which is not good, or harmful, could not properly be called freedom."); see also L. MACKIN, *supra* note 21, at 40 ("Freedom is morally neutral."); Cook, *Coercion and Social Change*, in *NOMOS XIV: COERCION*, *supra* note 3, at 122 ("All freedom is not good and all limitation is not bad, either intrinsically or extrinsically. Some restraints are simply inconveniences and minor irritations, others are good, and still others, evil.").

from the market place.²³ Both sides to the current dispute over religious groups' access to public school facilities complain about coercion, the one complaining about the coerciveness of religion in schools, the other about the coerciveness of a secular state that keeps religion out of schools.²⁴ Both sides use the word "coercion," and they use it correctly, but they use it to advance normatively inconsistent positions. Coercion also tends to be normative without being defined as such. Like duress, coercion is generally derogatory.²⁵ Yet unlike duress, which is illicit because defined as being illicit, coercion is not always illicit. There is nothing contradictory about the notion of justified or legitimate coercion.²⁶

I shall try to show in the sections that follow that the words "freedom" and "coercion" derive much of their rhetorical force not from shared notions of good and evil, but from accidents of language. I also believe, but shall not attempt to demonstrate here, that the features that give freedom and coercion their rhetorical force ultimately drive other virtue words and vice words.

23. See Thornton, *Strikes*, in PROCEEDINGS OF THE THIRTEENTH ANNUAL MEETING OF THE BAR ASSOCIATION OF TENNESSEE 67, 69 (1894). Compare *Farmers Loan & Trust Co. v. Northern Pac. R.R.*, 60 F. 803, 819 (E.D. Wis. 1894) (describing concerted labor strikes as "coercion") with Tarlton, *Some Reflections on the Relations of Capital and Labor*, in PROCEEDINGS OF THE THIRTEENTH ANNUAL BANQUET OF THE TEXAS BAR ASSOCIATION 51, 55 (1894) (describing the marketplace as "coerc[ive]"). See also Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 473 (1923) ("[I]t is the law of property which coerces people into working for factory owners—though, as we shall see shortly, the workers can as a rule exert sufficient counter-coercion to limit materially the governing power of the owners.").

24. Compare N.Y. Times, July 29, 1984, § 4, at E1 (critics of bill giving religious groups "equal access" to school facilities complaining it could "lead to the coercion of peer-conscious teenagers") with 130 CONG. REC. S6651 (daily ed. June 6, 1984) (statement of Sen. Denton that existing laws coerce schools into denying access to religious groups).

25. See C. BAY, *supra* note 19, at 94 (coercion as "the supreme political evil"); Cook, *supra* note 22, at 107 ("Coercion is not a pretty word. Unlike such honorific terms as freedom, liberty, order, democracy, and justice, coercion does not evoke pleasant thoughts, beautiful images, celebrated memories, or cheerful anticipations."); *id.* at 142 ("We have tended to think of coercion in negative terms."); Gunderson, *Threats and Coercion*, 9 CAN. J. PHIL. 247, 247 (1979) ("There is nearly universal agreement that coercion is an evil."); Haksar, *Coercive Proposals [Rawls and Gandhi]*, 4 POL. THEORY 65, 78 (1976) ("[C]oercion is often used pejoratively."); Hale, *supra* note 23, at 471 ("[T]he word 'coercion' frequently seems to carry with it the stigma of impropriety."); Pennock, *supra* note 3, at 9 ("Other things being equal, it seems to be generally agreed that coercion is bad."); see also 2 OXFORD ENGLISH DICTIONARY 587 (J. Murray ed. 1893) ("[T]he word [coercion] has . . . a bad flavour," and, hence, "it is now usually avoided by those who approve the action in question.").

26. See Cook, *supra* note 22, at 126 ("Coercion of the human will is intrinsically neither good nor evil.").

I. FREEDOM

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. . . . The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as his *liberator*, while the wolf denounces him for the same act, as the destroyer of liberty. . . . Plainly, the sheep and the wolf are not agreed upon a definition of the word liberty. . . .²⁷

Abraham Lincoln

Every society has its own conceptions of freedom based on its own values. The freedoms of one society may contradict freedoms of another, just as laissez-faire conceptions of freedom of contract contradict welfare state conceptions of freedom from fourteen-hour days.²⁸ Yet all conceptions of freedom, whatever their content, are based on a single, "generic"²⁹ concept of freedom. What, then, is the "core meaning"³⁰ of freedom that underlies all particular conceptions of freedom? What is the "root meaning of the term freedom, the irreducible common denominator of meaning implicit in all its linguistic usages"?³¹

27. 7 A. LINCOLN, THE WRITINGS OF ABRAHAM LINCOLN 121 (A. Lapsley ed. 1906). I shall use "liberty" as a synonym for "freedom," unless I explicitly indicate otherwise, e.g., *infra* text accompanying note 138.

28. Cf. D. FOSDICK, WHAT IS LIBERTY? 147 (1939) ("So the liberty of ten million workers to organize their own unions is made possible by a law which [limits the liberty of] a few thousand employers [to] dismis[s] laborers solely on the grounds of union activity.").

29. M. ADLER, *supra* note 5, at 604 (referring to the "generic meaning or general understanding of freedom"); see also *id.* at 601 (task consists "in constructing from . . . diverse conceptions [of freedom] that which is common to all of them and which, therefore, identifies the *freedom* they [are] all treating") (emphasis added). But see D. FOSDICK, *supra* note 28, at x ("It is not the intention of this book to maintain that liberty will ever have a single, universally accepted meaning."); B. GIBBS, FREEDOM AND LIBERATION 9 (1976) ("[T]here is no single correct concept of freedom."); F. HAYEK, THE CONSTITUTION OF LIBERTY 18-19 (1960):

[T]o suggest that there is a common element in [all statements of liberty] which allows us to speak of the effect that [an exchange of one liberty for another] has on liberty is sheer obscurantism, the crudest kind of philosophical realism, which assumes that, because we describe these conditions with the same word, there must also be a common element in them.

See also MacIver, *The Meaning of Liberty and its Perversions*, in FREEDOM, ITS MEANING 279 (R. Anshen ed. 1940) (Freedom "signifies an immediate datum, something that cannot be analyzed into components or reduced to simpler elements.").

30. D. FOSDICK, *supra* note 28, at 7 (referring to the "persistent core meaning" of liberty).

31. Somerville, *supra* note 12, at 292-93. I do not mean to say that all statements of "freedom" must have a common meaning merely because they all use the same word. I recognize the fallacy of assuming that all uses of a given term are necessarily predicated on the presence of "common qualities" among the things to which they refer. See H.L.A. HART, *supra* note 4, at 15, 234. Rather, I believe that all statements of "freedom" have a core meaning, not because they *must*, but because ordinary usage shows that they *do*. The same is true of statements of "equality." There is nothing in logic or language that requires all uses of the term "equality" to reflect a shared meaning. Nevertheless, it happens to be the case that all usages of "equality" *do* reflect a shared meaning. See

With other students of freedom, I take as a starting point Gerald MacCallum's influential article, *Negative and Positive Freedom*.³² MacCallum challenged the conventional wisdom of his time about freedom. The conventional wisdom originated in Sir Isaiah Berlin's famous Inaugural Lecture at Oxford in 1958, *Two Concepts of Liberty*.³³ Berlin argued that "freedom" is a word that masks two very different "concepts," which he called "negative" freedom and "positive" freedom. Negative freedom is freedom *from*; it is the "absence of obstacles to possible choices and activities—absence of obstructions on roads along which a man can decide to walk."³⁴ Most of the freedoms in the Bill of Rights are negative freedoms; they merely prohibit the state from interfering with or preventing a person's attaining what he wishes to pursue on his own. Positive freedom, on the other hand, is not freedom *from*, but freedom *to*; it ensures that a person actually attains certain goals. As Virginia Held puts it:

Negative liberty or freedom is freedom *from*: freedom from interference, from being pushed around, restricted, locked up. We are free in the negative sense if we are free *from* being arrested for speaking our minds, being attacked as we walk in the street, being forcibly prevented from meeting with others. Positive freedom, in contrast, is being free *to do* various things. . . . [W]e are free in the positive sense when we are guided by our better, rational selves rather than by our passions, free *to do* what we ought to do.³⁵

MacCallum was not the first to question the distinction between negative and positive freedom,³⁶ but he was the most effective. More-

Westen, *The Meaning of Equality in Law, Science, Math and Morals: A Reply*, 81 MICH. L. REV. 604, 605-23 (1983) (To say two or more persons or things are "equal" means that they have each been measured by a common standard and found to be identical as measured by that standard.).

32. MacCallum, *supra* note 21. MacCallum's thesis has been accepted by some of the most influential students of ethics. See, e.g., J. FEINBERG, SOCIAL PHILOSOPHY 4-17, 16 n.15 (1973); V. HELD, RIGHTS AND GOODS 127 (1984) [hereinafter cited as V. HELD, RIGHTS]; J. RAWLS, A THEORY OF JUSTICE 202 n.4 (1971).

33. I. BERLIN, *supra* note 17.

34. *Id.* at xxxix; see also Taylor, *What's Wrong With Negative Liberty*, in THE IDEA OF FREEDOM 175, 178 (A. Ryan ed. 1979) (Negative freedom is "the basic intuition . . . that freedom is a matter of being able to do something or other, of not having obstacles in one's way, rather than being a capacity that we have to realise.").

35. V. HELD, RIGHTS, *supra* note 32, at 124-25. For further analysis of the distinction between negative and positive freedom, see S. BENN & R. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 248 (1965); L. CROCKER, POSITIVE LIBERTY 1-5 (1980); J. FEINBERG, *supra* note 32, at 12-14; Loenen, *The Concept of Freedom in Berlin and Others: An Attempt at Clarification*, 10 J. VALUE INQUIRY 279 (1976); McCloskey, *A Critique of the Ideals of Liberty*, 74 MIND 483 (1965); Parent, *Some Recent Work on the Concept of Liberty*, 11 AM. PHIL. Q. 149, 149-50 (1974); Taylor, *supra* note 34, at 175-93; White, *supra* note 21, at 185-96.

36. See B. BOSANQUET, THE PHILOSOPHICAL THEORY OF THE STATE 128 (1951) ("The higher sense of liberty, like the lower, involves freedom *from* some things as well as freedom *to* others.") (emphasis in original); F. BRADLEY, ETHICAL STUDIES 57 (2d ed. 1927) ("[Freedom] is not merely

over, by demonstrating that the distinction between freedom *from* and freedom *to* is untenable, MacCallum helps us now identify a distinction between freedoms that *is* significant.

MacCallum challenged the distinction between negative and positive freedom by demonstrating that all statements of freedom, including statements of negative and positive freedom alike, consist of three implicit terms: an agent or class of agents, *X*, that possesses the stated freedom; a constraint or a set of constraints, *Y*, that inhibits agent *X* from doing or being something *X* may wish to do or be; and the goal, *Z*, that constraint *Y* inhibits agent *X* from doing or being if he so chooses.³⁷ The concept of freedom is a generic relationship among *X*, *Y*, and *Z*: It is the relationship *of* an agent, *X*, *from* a constraint *Y*, *to do* or *be* a goal, *Z*, that the agent may desire.³⁸ To transmute the concept of freedom into specific conceptions of freedom, such as freedom of speech or freedom of contract, one must specify particular agents, particular constraints, and particular goals in place of the open-ended variables *X*, *Y*, and *Z*. Thus, a "free agent" in baseball is a professional ballplayer who is unrestrained by contractual obligations to his former team to play with any team that wishes to engage him; a freedman is a former slave who is unrestrained by chattel slavery to work for whomever he chooses; freedom of speech under the Constitution is a relationship in which persons in the United

negative—it is also positive, and negative only so far as, and because, it is positive."); F. OPPENHEIM, DIMENSIONS OF FREEDOM 112 (1961) [hereinafter cited as F. OPPENHEIM, DIMENSIONS]:

Since social freedom is a relation between actors, I cannot subscribe to the familiar distinction between "freedom from" and "freedom to." . . . Social freedom is by definition both "freedom from" and "freedom to": freedom from being constrained by somebody to do something (or restrained from doing it or punished either for doing or for not doing it).

See also Somerville, *supra* note 12, at 294 (Every statement of "freedom to" presupposes "freedom from.").

37. MacCallum, *supra* note 21, at 314. For discussion of MacCallum's thesis, see Baldwin, *MacCallum and the Two Concepts of Freedom*, 26 *RATIO* 125 (1984); Gould, *Freedom: Triadic or Tripartite?*, 58 *THE MODERN SCHOOLMAN* 47 (1980).

38. Some commentators have argued that rather than defining freedom as the relationship of an agent to something that he *may* desire to do, one should define freedom as the relationship of an agent to something he *does* desire. See Dworkin, *Acting Freely*, 4 *NOUS* 367, 383 (1970). Indeed, Isaiah Berlin took just this position until 1969, when he repudiated it in the preface to an edition of his Inaugural Lecture, "Two Concepts of Liberty." See I. BERLIN, *supra* note 17, at xxxviii. The trouble with this definition, as Berlin himself came to recognize, is that it would mean that one can "increase freedom as effectively by *eliminating* desires as by *satisfying* them." *Id.* (emphasis added). It seems more consistent with usage, therefore, to define "freedom" as the relationship of an agent to something he may desire to do or be if he so chooses. See *id.* at xxxix ("The sense of freedom, in which I use this term, entails not simply the absence of frustration (which may be obtained by killing desires), but the absence of obstacles to possible choices and activities—absence of obstructions on roads along which a man can decide to walk."); see also J. FEINBERG, *supra* note 32, at 5-7; Day, *Threats, Offers, Law, Opinion, and Liberty*, 14 *AM. PHIL. Q.* 257, 260 (1977). Benn and Weinstein may be correct, however, that we do not speak of a person being free *from* something that he could not conceivably wish to be rid of, or free *to do* something that he could not conceivably wish to do. See Benn & Weinstein, *Being Free to Act, and Being a Free Man*, 80 *MIND* 194, 195 (1971).

States are unrestrained by civil or criminal sanctions to express themselves in words or symbols, unless compelling state interests justify otherwise.

Specific conceptions of freedom inevitably differ from and contradict one another, but all conceptions of freedom are specifications of a common "concept of freedom."³⁹ (Indeed, it is precisely because all conceptions of freedom reflect a common concept of freedom that they are all conceptions of "freedom" rather than, for example, conceptions of "equality" or "justice.")⁴⁰ They are all instances in which an agent, *X*, is unrestrained by a constraint, *Y*, to do or be a goal, *Z*, if *X* so chooses.

But what of the person who is freed from a particular constraint, *Y*, but remains incapable of doing or being *Z*? What about the poor person in America who is freed from travel restrictions to Cuba but still cannot afford to buy a ticket? Would we say that removing the travel restriction "frees" him to go to Cuba even though he still cannot go, or would we say that he is only free to go to Cuba if he can go there whenever he wishes? The answer depends on the particular conception of freedom one has in mind. If in speaking of "freedom" one means to refer to the removal of travel restrictions, one can truthfully say that the removal of such restrictions "frees" Americans to visit Cuba, including Americans who are otherwise too poor or too frightened or too busy to go. By that conception, their "freedom" to visit Cuba is perfectly consistent with their inability to do so.⁴¹ On the other hand, if in speaking of "freedom" one means to refer to the removal of all financial, psychological, and social barriers to their visiting Cuba, then they are not "free" until all such barriers are removed. In the latter conception, their freedom to visit Cuba coincides with the ability to visit Cuba whenever they choose.⁴²

39. See MacCallum, *supra* note 21, at 320, 327. One should not assume that because "freedom" means that "an agent *X* is unhindered by a constraint *Y* to do or be something, *Z*, that he may desire," that "unfreedom" therefore means that "an agent *X* is hindered by a constraint *Y* from doing or being something, *Z*, that he may desire"; the concept of "unfreedom" may include only a subset of all constraints. For the argument that when we speak of "unfreedom," we are referring to a subset of all constraints, see Benn & Weinstein, *Freedom as the Non-Restriction of Options: A Rejoinder*, 83 MIND 435 (1974); White, *supra* note 21, at 188-96.

40. See I. BERLIN, *supra* note 17, at 125 ("Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience.").

41. See M. CRANSTON, *supra* note 3, at 27 ("Truly there is little point in 'being free to' unless we 'have the power to', but it certainly does not follow from this that the one is identical with the other."); J. FEINBERG, *supra* note 32, at 10; Gert, *Coercion and Freedom*, in NOMOS XIV: COERCION, *supra* note 3, at 38 ("I allow not only that a man may have the voluntary ability to do *x* but not be free to do it, but also that a man may be free to do *x* even though he does not have the voluntary ability to do it.").

42. To say that people are "free to visit Cuba whenever they choose" is not the same as saying that they are free from *all* constraints in visiting Cuba; they are still constrained by whatever forces and circumstances structure their *choosing* to go to Cuba. Indeed, if "complete" or "absolute" free-

Although the two conceptions of freedom differ in that one entails the removal of more constraints than the other, both qualify as "freedoms" because both consist of relationships in which an agent, *X*, is unrestrained by *Y* to do or be *Z*.

MacCallum's analysis of freedom yields two benefits. First, it bridges the distinction between negative and positive freedom by demonstrating that every freedom is both a freedom *from* and a freedom *to*—freedom *from* some particular constraint or constraints *to do* or *to be* some particular thing. The difference between negative and positive freedom is not between two "concepts" of freedom as Isaiah Berlin asserted, but between different specifications of the constraints from which agents are free to pursue their goals. Negative freedoms are relationships in which an agent is free from direct constraints imposed by the state or by individual third persons; positive freedoms are relationships in which an agent is free from self-imposed constraints or constraints indirectly imposed by social institutions.⁴³ Both are relationships in which a specific agent or set of agents, *X*, is free from a specific constraint, or set of constraints, *Y*, to do or be a specific goal or set of goals, *Z*, if *X* so chooses.

dom is defined as a relationship in which *X* is free from *all* constraints to do or be *Z*, it is hard to imagine anyone's being absolutely or completely free from all constraints in doing or being anything. See B. CARDOZO, *THE GROWTH OF THE LAW* 61 (1924) ("Complete freedom—unfettered and undirected—there never is."); L. MACKIN, *supra* note 21, at 5 ("[A] human can never know immunity to all restrictions. . . . [T]he experience of total freedom is impossible."); C. WELLMAN, *A THEORY OF RIGHTS* 200 (1985) ("Complete freedom, if it even makes sense to speak of a condition where every individual is subject to no hindrances or restraints upon his or her actions, is impossible in practice either within any society or in a state of nature."); Loenen, *supra* note 35, at 284 ("There is a sense in which it may be said that everyone is always unfree to a certain degree, or, alternatively, that everyone is always unfree to a corresponding degree."); Weinstein, *Coercion, Space, and the Modes of Human Domination*, in *NOMOS XIV: COERCION*, *supra* note 3, at 63 ("At any moment of human existence neither restraint nor release is absent, though attention may be fixed more on one of the conditions than on the other. It is perhaps impossible even to conceive of a situation in which restraint played no part."). The meaningful question, therefore, is not whether *X* is or should be free from all constraints to do or be *Z*, but *which* restraint he is or should be free from to do or be *Z*. See Belaief, *Freedom and Liberty*, 13 J. VALUE INQUIRY 127, 129 (1979) ("The condition of negative liberty . . . must be understood as the absence of *some* restraints, the presence of others. . . . Since in a social community restraints will always be present the critical question is the nature of the restraints, not the mere fact of their existence.").

43. I qualify the distinction between negative and positive freedom because, as Lawrence Crocker notes, Isaiah Berlin's writing is so ambiguous that "many people have come away from 'Two Concepts [of Liberty]' not entirely clear as to what the two concepts are." L. CROCKER, *supra* note 35, at 4. Nevertheless, it appears that by negative freedom Berlin means "the absence of human interference," and that by positive freedom he means the absence of both self-imposed and institutional constraints. See *id.* at 3. Thus, the welfare mother who cannot afford to travel to Corfu has negative freedom to visit Corfu, but not positive freedom to visit Corfu. *Id.* at 4. For further effort to identify the distinction Berlin means to draw, see V. HELD, *RIGHTS*, *supra* note 32, at 124-26; MacCallum, *supra* note 21, at 320-21 & n.6; see also authorities cited *supra* note 24.

Second, by demonstrating that all freedoms consist of three terms, MacCallum makes it possible for us to classify freedoms in more useful ways. Thus, one can distinguish statements of freedom regarding *inanimate* agents—for example, “The water in John’s house is free of plumbing obstructions to circulate throughout the house”—from statements of freedom regarding *purposeful* agents—for example, “John is free from passport restrictions to travel to Cuba.”⁴⁴ One can also distinguish between freedoms from *manmade* constraints—for example, “John is free from zoning restrictions to build his house as high as he wishes”—and freedoms from the absence of *natural* constraints—for example, “John is free from earthquake risks to build his house as high as he wishes.”⁴⁵ One can distinguish between freedom from *intentional* human constraints—for example, “John is free from curfew regulations to remain outside after dark”—and freedom from *nonintentional* human constraints—for example, “John will be free to leave his room as soon as his sister, who accidentally locked him in, realizes her mistake.”⁴⁶

For present purposes, however, the significant distinction is between descriptive freedoms and prescriptive freedoms. All statements of freedom fall into one of these two categories, depending on which of the two relationships is asserted to obtain between agent *X* and constraint *Y*. *Descriptive* freedoms are relationships in which *X* is unconstrained by *Y* to pursue *Z*, without regard to whether *X* also *ought to be* unconstrained by *Y* to pursue *Z*. This is the relationship to which the dictionary refers when it defines “freedom” as the “state of not being . . . constrained by . . . circumstances in one’s . . . actions.”⁴⁷ It is the relationship we have in mind when we say, “The air is free from pollen for the third day in a row,” or “Anesthesia frees women from the pain of childbirth,” or “The movie theater lets children in free of charge,” or “The death of

44. Interestingly, although MacCallum faults commentators for arbitrarily defining the concept of “freedom” to encompass only the particular class of agents whom they mean to specify in their conceptions of freedom, he himself defines the “concept” of freedom to encompass only purposeful agents, and not inanimate agents. See MacCallum, *supra* note 21, at 314-15. To him, then, the statement “The water is free of plumbing instructions to circulate throughout the house” does not qualify as a statement of freedom. I would prefer to say that it is a statement of freedom, but that it does not fall within a subclass of conceptions of freedom involving purposeful agents. See A WHITE, *supra* note 13, at 137 (“There is no good reason to suppose that ‘free’ is used differently of people and of things . . .”); Fuller, *Freedom—a Suggested Analysis*, 68 HARV. L. REV. 1305, 130 (1955) (freedoms can be possessed by inanimate as well as animate agents).

45. See, e.g., Miller, *Constraints on Freedom*, 94 ETHICS 66, 68 (1983) (“We use the notion of freedom . . . in the subclass of cases where the presence of an obstacle can be attributed to the action of another human being.”).

46. See Parent, *supra* note 35, at 158-59 (discussing V.D.P. Dryer’s view that “freedom” refers only to the absence of *intentional* constraints on an agent’s action).

47. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 906 (P. Gove ed. 1971) (first definition of “freedom”).

John's father frees John to live with Leshe without feeling guilty." We are making descriptive statements from which nothing prescriptive necessarily follows. One cannot conclude from the description that *X* is unrestrained by *Y* to pursue *Z*, that *X ought to be* free from *Y* to pursue *Z*.⁴⁸ It is descriptive freedom that Lorin Mackin has in mind when he states, "Freedom is morally neutral."⁴⁹

The other category of freedoms entails a relationship between *X* and *Y* that is *prescriptive*. When we speak of "freedom" in the prescriptive sense, we mean that *X* stands in a relationship to *Y* and *Z* such that he is *and ought to be* unconstrained by *Y* to pursue *Z*.⁵⁰ It is that relationship to which the dictionary refers when it defines "freedom" as a "right."⁵¹ It is that relationship we have in mind when we say that freedom is the absence of "unjust,"⁵² "arbitrary,"⁵³ "unreasonable,"⁵⁴ or "despotic"⁵⁵ constraints; and when we say that freedom "consists only in the power of

48. See Somerville, *supra* note 12, at 299 ("Since freedom is the absence of something, it is, in itself, amoral—as absence might be good, bad, or indifferent depending upon the specific thing and the specific situation from which it is absent."); Steiner, *Individual Liberty*, 75 PROC. ARISTOTELIAN SOC'Y 33, 35 (1974-75) ("To ask whether an individual is free to do *A*, is not to ask a moral question. It is, rather, to ask a factual question the answer to which is logically prior to any moral question about his doing *A*.").

49. L. MACKIN, *supra* note 21, at 40; see also R. DWORKIN, *supra* note 5, at 267 (descriptive "liberty," being "the absence of constraints placed by a government upon what a man may do if he wants to," is itself "neutral"); C. WELLMAN, *supra* note 42, at 163 ("Liberty, in general and in the abstract, has no special moral status."); Oppenheim, "Constraints on Freedom" as a Descriptive Concept, 95 ETHICS 305 (1985) (arguing that freedom is a purely "descriptive" concept).

50. Let us for a moment indulge in a somewhat abstract analysis of the meaning of the phrase "is free from." *X*, we say, is free from *Y*. What is asserted? We are saying that a something, *X*, is not subject to the influence of . . . something called *Y*. . . . Do we assert or imply anything else? Yes, in ordinary usage we also clearly imply that it is a good thing that *X* should be free from *Y*.

Fuller, *supra* note 44, at 1305.

51. WEBSTER'S THIRD NEW WORLD DICTIONARY 906 (P. Gove ed. 1971) (second definition of "freedom").

52. H. MULLER, ISSUES OF FREEDOM 6 (1960) ("Freedom is restricted only when the constraints appear to be arbitrary—unaccustomed, unnecessary, unreasonable, or unjust."); cf. F. HAYEK, *supra* note 29, at 144 (defining "freedom" as meaning "no more than that coercion and violence, fraud and deception, be prevented"); R. NOZICK, ANARCHY, STATE AND UTOPIA 262-64 (1974) (arguing that *A*'s marrying *B*, thereby frustrating *C*'s wish to marry *B*, does not abridge *C*'s freedom because *A* has a right to marry *B*); T. PARKER, THE SLAVE POWER 250 (1907):

This is what I call the American idea This idea demands . . . a democracy, that is, a government of all the people, by all the people, for all the people; of course, a government after the principles of eternal justice, the unchanging law of God; for shortness's sake, I will call it the idea of freedom.

53. Chicago, B. & O.R.R. v. McGuire, 219 U.S. 549, 567 (1911) (freedom is the absence of "arbitrary restraint").

54. Gert, *supra* note 41, at 32 ("A man acts freely if and only if he . . . does not [act] because of any unreasonable incentives. A man who acts voluntarily, but only because of some unreasonable incentives, does not act freely.").

55. 4 OXFORD ENGLISH DICTIONARY 524 (1901) (freedom is "exemption from arbitrary [or] despotic . . . control").

doing what we ought to will";⁵⁶ and when we say that "bad" freedoms are not "real" freedoms;⁵⁷ and when we say that freedom is the "right"⁵⁸ to do certain things; or when we say that "freedom is an ethical category";⁵⁹ and when we say that freedom is "necessarily good."⁶⁰

It is also a prescriptive relationship that we mean when we speak of "constitutional" or other "legal" freedoms. When we speak of the first amendment "freedom of speech," for example, we not only mean that a certain class of agents *is* unconstrained by civil and criminal sanctions to talk politics, but also that these agents *should be* unconstrained by civil and criminal sanctions to talk politics. Indeed, it is precisely because such agents *should be* unconstrained by *Y* to pursue *Z* that we have structured the law so that they *are* unconstrained by *Y* to pursue *Z*.

This division of freedoms into the two categories of descriptive and prescriptive freedoms⁶¹ is significant for several reasons. First, since de-

56. 1 MONTESQUIEU, *THE SPIRIT OF LAWS* 150 (T. Nugent trans. 1900) ("[L]iberty can consist only in the power of doing what we ought to will."); see also M. MACKLEM, *LIBERTY AND THE HOLY CITY: THE IDEA OF FREEDOM IN ENGLISH HISTORY* 86, 178 (1978) (discussing John Milton's view that "liberty" is "free[dom] to do what is right," and "never free[dom] to do what is wrong").

57. See T. Green, *Lecture on Liberal Legislation and Freedom of Contract*, in 3 *WORKS OF THOMAS HILL GREEN* 365, 371 (R. Nettleship ed. 1888) (defining "true freedom" as the "capacity of doing . . . something worth doing"); Pennock, *supra* note 3, at 7-8 (referring to commentators who "say . . . that 'bad' liberty is not really liberty").

58. See F. OPPENHEIM, *DIMENSIONS*, *supra* note 36, at 8 (" 'Freedom' itself is a laudatory word, and its definition is usually made up of terms which, in turn, have valuational connotations."); Oppenheim, *Freedom*, *supra* note 20, at 558 ("[D]efinitions of freedom often include ethical words, such as 'right,' 'ought,' or 'virtue.'"). But see F. OPPENHEIM, *DIMENSIONS*, *supra* note 36, at 211 (advocating a descriptive definition of "freedom" containing nonvaluational terms).

59. F. KNIGHT, *FREEDOM AND REFORM* 13 (1947) ("[F]reedom is itself an ethical category and cannot possibly furnish an objective criterion for moral judgments of legislative policy."); Miller, *Reply to Oppenheim*, 95 *ETHICS* 310 (1985) ("The view that the idea of freedom has no built-in evaluation force seems to me incredible."); Ryan, *The Normative Concept of Coercion*, 89 *MIND* 481, 482 (1980).

60. Somerville, *supra* note 12, at 289 ("Most of those who write on the subject of freedom seem to imagine that freedom, as such, like justice . . . must be classed as necessarily good rather than as something that can be evil, or amoral, as well as good."); cf. F. BERGMANN, *ON BEING FREE* 1 (1977) ("Our culture has a schizophrenic view of freedom. Two schools of thought concerning liberty are simultaneously alive in it For the first school it is axiomatic that freedom is wonderful.").

W.B. Gallie has argued that certain concepts that are "appraisive" (in the sense that they inherently "signif[y] or accredi[t] some kind of valued achievement") are "essentially contestable" (in the sense that they are subject to disputes which are "genuine" and, yet, are "not resolvable by argument of any kind"). See Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC'Y* 167, 169, 171 (1955-56). On the question whether "freedom" is an essentially contested concept in Gallie's terms, see Swanton, *On the "Essential Contestedness" of Political Concepts*, 95 *ETHICS* 811, 816, 818-19, 824 (1985).

61. Oppenheim, *Freedom*, *supra* note 20, at 554-55:

Descriptive definitions of "freedom" designate empirically specifiable states of affairs and can therefore be accepted by anyone, regardless of his normative views on liberty. "Free-

scriptive and prescriptive freedoms are subsets of the concept of freedom, both fully qualify as "freedoms." Both are relationships of an agent, from a constraint, to do or be a goal. A descriptive freedom is just as genuine a freedom as a prescriptive freedom.⁶²

Second, because some statements of freedoms are descriptive rather than prescriptive, and because one cannot infer an "ought" from an "is," one cannot say that freedom itself is always or is likely to be good. Some descriptive freedoms are good; some are bad; some are neither. It all depends on *who* is free from *what* constraints to pursue *which* goals.⁶³ Every descriptive freedom negates a contrary descriptive freedom. Every law that creates a freedom also negates a freedom. Every law that grants freedom to one class of persons necessarily denies freedom to another class of persons.⁶⁴ One cannot regard the former freedom as good with-

dom" in a valuational sense is used to commend rather than describe; it therefore means different things to writers committed to different ethical standards.

For more on the division of "freedom" into descriptive freedom and prescriptive freedom, see M. CRANSTON, *supra* note 3, at 21 ("The word 'freedom'—like its synonym 'liberty'—has a strong laudatory emotive meaning for English-speaking peoples, whether in political or general use. But what of its descriptive meaning?"); J. FEINBERG, *supra* note 32, at 17-18 (distinguishing between "sociological" freedom and "juridical" freedom); A. WHITE, *supra* note 13, at 138 & n.13 (contrasting "descriptive" with "persuasive" definitions of "liberty"); *id.* at 141 (contrasting "analytic" with "evaluative" freedoms); McCloskey, *supra* note 35, at 486-91 (distinguishing liberty as "non-interference unqualified" from liberty as "non-interference with rights").

62. The fact that given examples of negative freedom . . . — say the freedom of parents or schoolmasters to determine the education of children, of employers to exploit or dismiss their workers, of slave owners to dispose of their slaves, or the torturer to inflict pain on his victims—may, in many cases, be wholly undesirable, and should in any sane or decent society be curtailed or suppressed, does not render them genuine freedoms any the less; nor does that fact justify us in so reformulating the definition of freedom that it is always represented as something good without qualification.

I. BERLIN, *supra* note 17, at lvi-lvii.

63. All freedom is not good and all limitation is not bad, either intrinsically or extrinsically. Some restraints are simply inconveniences and minor irritations, others are good, and still others, evil. It all depends on which freedoms are at stake.

Cook, *supra* note 22, at 122; see also R. DWORKIN, *supra* note 5, at 267 ("This conception of liberty [as the absence of constraints] is neutral. . . . It diminishes a man's liberty when we prevent him from talking or making love as he wishes, but it also diminishes his liberty when we prevent him from murdering or defaming others."); L. MACKIN, *supra* note 21, at 40; A. WHITE, *supra* note 13, at 141 ("It is also too extreme to hold that what something is free from is necessarily a defect or that what he or it is free to do is a merit."); see also *supra* note 49 and authorities cited therein.

64. J. Dewey, *Liberty and Social Control*, in PROBLEMS OF MEN 113 (1946) ("[W]herever there is liberty at one place there is restraint at some other place. The system of liberties that exist[sic] at any time is always the system of restraints or controls that exist at that time. No one can do anything except in relations [sic] to what others can do and cannot do."); see also I. BERLIN, *supra* note 17, at lvi ("One freedom may abort another; one freedom may obstruct or fail to create conditions which make other freedoms possible, or a larger degree of freedom, or freedom for more persons, possible; positive and negative freedom may collide."); Somerville, *supra* note 12, at 300 ("Above all, let us candidly acknowledge that the issue is never between freedom and nonfreedom, but always between freedom from one thing and freedom from another."); see also *supra* note 42 and authorities cited therein. For a discussion of whether it is meaningful to describe one descriptive freedom as "greater" than its converse, see L. MACKIN, *supra* note 21, at 53 (It is said that "we limit freedom

out regarding the latter freedom as evil.⁶⁵

Finally, because descriptive freedoms and prescriptive freedoms constitute all cases of freedom, every statement of freedom states either an "is" without regard to "ought to be" or an "is *and* ought to be." To speak of "freedom," therefore, is either to say something neutral—that is, something that cannot be inferred to be either good or bad—or to say that something ought to be. It is never to say that something ought *not* to be. To be sure, one can say that a particular descriptive freedom is undesirable, or that a particular prescriptive freedom is unsound, or that a particular agent ought not to be free from *Y* to pursue *Z*. But in order to convey that a particular freedom is unjust or unsound, one must say so *expressly*, because the word "freedom," unlike the word "license,"⁶⁶ does not itself ever say that "*X* ought *not* to be free from *Y* to do or be *Z*." Freedom declares itself to be good whenever it takes the form of a prescription. It never declares itself to be bad, whether it takes the form of a prescription or description. As between good and evil, freedom itself can only be good.

II. COERCION

In concept, dimensions, and the realities of phenomena, coercion is indeed laden with ambiguity, complexity, and elusive ingredients.⁶⁷

Samuel Dubois Cook

Coercion is related to freedom; a person who is coerced is not free.⁶⁸ Coercion and freedom are more than the converse of one another, however; an agent can lose freedom without being coerced, and he can gain

that we may make greater freedom possible. . . . As literal statements, these are nonsense. . . . We exchange one freedom not for one that is objectively greater but for one that we want more, one for which our wish is larger. It is greater only in its being more desired."); Oppenheim, *Freedom*, *supra* note 120, at 557 ("Strictly speaking, it is not meaningful to say that there is 'more' freedom in one *society* than in another; but it is possible to define degrees of social freedom in the sense that one *actor* has greater freedom in a certain respect than another.").

65. "Among all conceivable political and social systems which may be valued by anyone, there is none which does not include relations of both unfreedom and freedom. And since many relations between actors can be characterized either way, it is not rationally possible to value one aspect without the other." F. OPPENHEIM, *DIMENSIONS*, *supra* note 36, at 225.

66. See L. MACKIN, *supra* note 21, at 4 ("A person who charges license is complaining . . . of a freedom that should not be tolerated."). For John Locke's distinction between liberty and license, see J. LOCKE, *TWO TREATISES OF GOVERNMENT* 121-28 (1690); cf. M. CRANSTON, *supra* note 3, at 16 ("'License' is a pejorative word.").

67. Cook, *supra* note 22, at 115.

68. "In a sense, freedom and coercion are antithetical relations or realities: freedom entails the absence of coercion, and coercion involves the absence of freedom." Cook, *supra* note 22, at 126; see also F. HAYEK, *supra* note 29, at 11 ("We are concerned in this book with that condition of men in which coercion by others is reduced as much as is possible in society. This state we shall describe throughout as a state of liberty or freedom.").

freedom without having been coerced.⁶⁹ Nevertheless, to formulate a working definition of "coercion," we shall start with our definition of freedom and then modify it until we arrive at a formulation that corresponds with how we use "coercion" in ordinary moral discourse.⁷⁰

A. *The Core Elements of Coercion.*

Freedom, as we have seen,⁷¹ is the relationship in which an agent, *X*, is unrestrained by a constraint, *Y*, to do or be a goal, *Z*, if he so chooses. A coerced agent is not a free agent. As an illustration, consider Frederick Douglass, the famous ex-slave who spent half his life in slavery in Maryland before he escaped north to become an abolitionist speaker, writer, and adviser of presidents.⁷² As a slave, Frederick Douglass was coerced by the institution of slavery into working for his master and, thus coerced, was not free to work for anyone else. It might be thought, therefore, that

- (1) coercion is a constraint, *Y*, the presence of which precludes an agent, *X*, from pursuing goal *Z*.

Coercion cannot be (1), however, because we speak of coercion not by reference to what it precludes an agent *from* doing, but by what it constrains an agent *to* do.⁷³ We do not say, "Frederick Douglass was coerced by slavery *from* working for anyone other than his master." We say Frederick Douglass was coerced by slavery *to* do something, something that is the negation of what he would have done in the absence of coercion. This suggests that

- (2) coercion is a constraint, *Y*, on an agent, *X*, to do something *other than Z*, that is, to do *not-Z*.

69. See Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 440 (S. Morgenbesser, P. Suppes & M. White eds. 1969) ("Though coercion is intimately connected with liberty . . . it does not exhaust the range of nonliberty or unfreedom."); Pennock, *supra* note 3, at 9 ("[C]oercion is one way but not the only way of decreasing freedom."); Wilson, *Ryan on Coercion*, 91 MIND 257, 257 (1982) ("[L]iberty comprises the absence of many other things besides coercion.").

70. Cf. Ryan, *supra* note 59, at 481. I am deeply indebted—both for the method of unpacking the concept of coercion and for the substance of the unpacked concept—to Robert Nozick's seminal essay, *Coercion*, *supra* note 69, particularly for the discussion in Part II-A of this article. Nozick's article has rightly been described as the "locus classicus" for the definition of coercion. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1353 n.220 (1984). Although I agree with Nozick much more often than not, we come to different conclusions on whether "coercion" implies a *successful* threatening, see *infra* note 79; on the nature of the *descriptive* baseline that distinguishes descriptively coercive proposals from descriptively non-coercive proposals, see *infra* note 119, and on the nature of the *normative* baseline that distinguishes normatively coercive proposals from normatively noncoercive proposals, see *infra* note 130.

71. See *supra* notes 37-38 and accompanying text.

72. See F. DOUGLASS, MY BONDAGE AND FREEDOM (1855).

73. See Lyons, *The Last Word on Coercive Offers*. . . (?), 1983 PHIL. RESEARCH ARCHIVES 393, 398 (1983) ("[I]t sounds odd . . . to say 'P coerced Q not to do x.'").

Coercion cannot be (2) either, though, because we speak of coercion not by stating what it constrains an agent *not* to do, but by a *specification* of what it constrains an agent to do. We do not say, "Frederick Douglass was constrained by slavery to do something *other* than work for the employer of his choice." We say, "Frederick Douglass was constrained by slavery to work for his master."⁷⁴ So perhaps

(3) coercion is a constraint, Y , on agent X to do something specific other than Z , that is, to do Z_1 .

(3) is an improvement over (1) and (2). Yet it is still overinclusive, because it defines coercion without regard to the *source* of the constraint. A constraint is not "coercive" unless it is brought to bear on an agent X *by another agent*. We do not say, "Frederick Douglass was coerced by the sun into wearing a hat," or, "He was coerced by a thunderstorm into taking shelter." We might say Frederick Douglass was "forced" by a thunderstorm to take shelter, or "compelled" by the sun to wear a hat, or "coerced" by his master to wear a hat; but we would not say he was "coerced" by natural causes to take shelter or wear a hat, because coercion presupposes a human coercer:

Coercion is an interpersonal relation in which one person affects the behavior of another. This characteristic distinguishes coercion from force, "making," compulsion, constraint, and restraint. Physical conditions may force, compel, or make a person act in a manner in which he would not have chosen without the conditions, but they cannot coerce him.⁷⁵

Maybe then

(4) coercion is a constraint, Y , that one agent, X_1 , brings to bear on another agent, X , to do Z_1 .

Still, a constraint that X_1 brings to bear on X is not "coercion" unless X_1 *knows* he is bringing the constraint to bear on X .⁷⁶ If Frederick Douglass's master goes pheasant shooting in the fields without knowing that Douglass is working there and by unwittingly shooting in Douglass's direction causes Douglass to take shelter, we might say that the master has "caused" Douglass to take shelter, or has "forced" Douglass to take shelter, but we would not say he has "coerced" Douglass into taking shelter because the master did not know he was bringing the constraint to bear on Douglass. This suggests

74. See F. HAYEK, *supra* note 29, at 16-17 (" '[C]oercion' emphasizes [people's] being made to do particular things.") (emphasis added).

75. Bayles, *A Concept of Coercion*, in NOMOS XIV: COERCION, *supra* note 3, at 19; see also L. CROCKER, *supra* note 35, at 15; Weinstein, *Coercion, Space and the Modes of Human Domination*, in NOMOS XIV: COERCION, *supra* note 3, at 64 (coercion is an interpersonal relationship).

76. See I. BERLIN, *supra* note 17, at 122 ("[C]oercion implies the deliberate interference of other human beings within the area in which I could otherwise act.").

- (5) coercion is a constraint, Y , that X_I brings to bear on X to do Z_I , where X_I knows he is bringing Y to bear on X .

Again, however, it is not enough to constitute coercion that X_I knowingly bring a constraint to bear on X to do Z_I . Assume that Frederick Douglass's master wishes to shoot pheasant in the fields where he knows Douglass is working, but he does not wish Douglass to quit working; he takes care, therefore, to shoot over Douglass's head with the wish and the expectation that Douglass will continue working; Douglass, becoming afraid that he will be shot, quits working. We might say in that event that by knowingly shooting over Douglass's head, the master has "caused" Douglas to quit working, but we would not say that Douglass's master has coerced him into quitting work. To constitute coercion, X_I must not only knowingly bring a constraint to bear on X to do Z_I , but he must bring it to bear *for the purpose* or *with the expectation* of causing X to do Z_I . "Coercion occurs when one man's actions are made to serve another man's will, not for his own but for the other's purpose."⁷⁷ So perhaps

- (6) coercion is the constraint that X_I knowingly brings to bear on X in order that X do Z_I .

If the definitions of coercion proposed thus far have been too broad, (6) is too narrow. It is not necessary that X_I actually bring a constraint to bear on X ; it suffices that X_I *promises* to bring a constraint to bear on X in the event X refuses to do Z_I .⁷⁸ Assume that Frederick Douglass's master promises to shoot Douglass unless Douglass takes shelter; Douglass does not wait for his master to start shooting, but immediately takes shelter. Even though Douglass's master now finds it unnecessary to start shooting, we would still say that he has coerced Douglass into taking shelter because he has promised to start shooting unless Douglass takes shelter. This suggests that

77. F. HAYEK, *supra* note 29, at 133; see also L. CROCKER, *supra* note 35, at 17 ("[T]here is a strict use of 'coercion' which requires the intent to influence behavior."); N. MACCORMICK, *LEGAL RIGHT AND SOCIAL DEMOCRACY* 235 (1982) ("To be one who coerces is to act purposively."); Bayles, *supra* note 75, at 21 ("Dispositional coercion is thus distinguished from mere threats by an agent's intent that a victim act in a specific manner.").

Nozick argues, persuasively, I believe, that X_I need not *wish* that X do Z_I , so long as it is X_I 's purpose to make Z_I a more eligible course of action for X than it would otherwise be. See Nozick, *supra* note 69, at 442. But see Pennock, *supra* note 3, at 3 (arguing that X_I may "coerce" X to do Z_I without either knowing or intending to constrain X to do Z_I).

78. To say that X_I "knowingly" brings a "conditional promise" to bear on X does not mean that X_I must actually intend to carry out his promise of constraint if X does not do Z_I . It suffices if in making the conditional promise, X_I knows that X believes that X_I will carry out his promise. See Gunderson, *supra* note 25, at 253 (X_I need not intend to deliver on his threat, so long as he intends X to believe that X_I will deliver on the threat); Haksar, *supra* note 25, at 71 (irrelevant for purposes of coercion that X_I is actually bluffing, so long as he knowingly leads X to believe he is not bluffing).

(7) coercion is the constraint or promise of a constraint that X_1 knowingly brings to bear on X in order that X do Z_1 .

Now it is sometimes said that coercion implies success, that is, that coercion refers only to constraints that actually succeed in causing X to do Z_1 , not to constraints that in one way or another fall short of causing X to do Z_1 .⁷⁹ I think this qualification is mistaken. Consider the issue at two distinct points in time. Assume, first, that X_1 is conditionally threatening X with force under circumstances in which X has not yet decided how to respond. Assume, for example, that Frederick Douglass's master is threatening to shoot Douglass unless Douglass jumps into a stream by the count of five, and that Douglass has not yet decided what he is going to do. Even though the master's threat has not yet succeeded (and, indeed, may never succeed) we would still say that Douglass's master "is coercing" Douglass, and that Douglass's master is subjecting Douglass to "coercion." Now assume that X has resisted X_1 's threat and suffered the consequences. For example, Frederick Douglass resists his master's threat, refuses to jump by the count of five, and is shot in the leg as a consequence. Wouldn't we say in retrospect that the master's threat was "coercive," and that, while the master counted from one to five, Douglass was being "coerced" and subjected to "coercion"? Wouldn't we punish Douglass's master for his threat in a jurisdiction that punishes "coercion"?⁸⁰ To be sure, we would not say that Douglass was "coerced into" jumping, or was "coerced to" jump. But that is not because the master's threat was not "coercive," or because Douglass was not being "coerced," or because coercion that fails is not "coercion." It is because of the separate thing we mean when we combine the verb "coerce" with the prepositions "into" or "to." To coerce a person is to subject him to coercive constraint, regardless of whether the constraint achieves its purpose; to coerce a person "into" jumping, or to coerce him "to" jump, is to subject him to a coercive constraint to which he yields.

79. Nozick argues that a constraint is not "coercion" unless X actually does Z_1 . See Nozick, *supra* note 69, at 441; see also Bayles, *supra* note 75, at 19 ("'[C]oercion' is . . . an achievement word; it denotes success."); Gunderson, *supra* note 25, at 256 ("[T]he sort of threats that figure in coercion are successful threats."); Held, *Coercion and Coercive Offers*, in NOMOS XIV: COERCION, *supra* note 3, at 51 ("[F]orce may be used coercively without coercion resulting from it if the person being forced to do something has sufficient power of his own to repel or overpower the force being exerted against him. A person has been coerced only if he has done something against his will.") [hereinafter cited as Held, *Coercion*]; McCloskey, *Coercion: Its Nature and Significance*, 18 S. J. PHIL. 335, 344 (1980) ("[B]y definition, coercion must be successful.").

80. See MODEL PENAL CODE § 212.5 (1962):

[A] person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to: (a) commit any criminal offense; or (b) accuse anyone of a criminal offense; or (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (d) take or withhold action as an official, or cause an official to take or withhold action.

Thus, it is not that "coercion," "coercive," and "coerce" imply success; it is that "coerce *into*" implies success.⁸¹

Although proposal (7) correctly omits any reference to success, it remains incomplete. It implies that an agent X can be "coerced" into doing Z_I even where X wishes all along to do Z_I . Yet, that is not the way we speak of "coercion." Assume, for example, that Frederick Douglass's master, not realizing that Frederick Douglass loves and wishes to marry a fellow slave, Clara, threatens to shoot Douglass unless he marries Clara by Sunday; Douglass, delighted at the prospect of marrying Clara, does so. We might say in that event that Douglass's master "wishes" to coerce Douglass, or "tries" to coerce him; but we would not say that the master actually has coerced Douglass into marrying Clara, because "[a] person has been coerced only if he has done something against his will."⁸² So

(8) coercion is a constraint or a promise of constraint, Y , that X_I knowingly brings to bear on X in order that X do Z_I , where doing Z_I is against X 's will.

Ordinarily, however, we do not say that X_I "coerces" X into doing Z_I against X 's will, unless X_I knows that he is causing X to do Z_I against X 's will.⁸³ Frederick Douglass's master, believing that Douglass wishes to marry Clara and believing that Douglass will welcome the demand that he marry Clara, tells Douglass that he will shoot him on Monday if Douglass does not marry Clara on Sunday. Douglass, having changed his mind about wishing to marry Clara but not wishing to tell his master, marries her anyway for fear of being shot. We might perhaps say in that event that Douglass's master has "forced" Douglass into marrying Clara, but we would not say that he "coerced" Douglass into marrying Clara or that Douglass has been "coerced" into marrying her, because the master

81. See Oberdiek, *The Role of Sanctions in Coercion In Understanding Law and Legal Systems*, 21 AM. J. JURISPRUDENCE 71, 80 (1976) ("[O]ne can be coerced without giving in to the coercion. . . . [Those who argue the contrary focus] exclusively on the locution of being coerced *into* something, a locution which does indeed entail that one does that which one is coerced into doing."); cf. Frankfurt, *Coercion and Moral Responsibility*, in ESSAYS ON FREEDOM OF ACTION 75 (T. Honderich ed. 1973) ("Superfluous and ineffective offers and threats are, of course, threats and offers none the less.").

82. Held, *Coercion*, *supra* note 79, at 51.

83. See N. MACCORMICK, *supra* note 77, at 235 ("To be one who coerces is to act purposively; it is to act with a view to bringing about certain things or submissions by another person, the method adopted being a serious attempt at the exclusion of real choice on the other person's part."); Weinstein, *supra* note 75, at 66 (describing coercion as the "means to the realization of another's plan"); Wertheimer, *Political Coercion and Political Obligation*, in NOMOS XIV: COERCION, *supra* note 3, at 222 ("[C]oercion implies social conflict, 'since one actor is compelled to subordinate his wishes to those of another.'"); see also Dworkin, *supra* note 38, at 383 ("[C]oercion is . . . a way of getting someone to do what he doesn't want to do.").

did not know that Douglass was marrying her against his will. This suggests that coercion is

- (9) a constraint or a promise of constraint, Y , that X_1 knowingly brings to bear on X in order that X do Z_1 against X 's will.

(9) may be correct as far as it goes, but it contains an ambiguity that renders it misleading. One can constrain a person to do something "against his will" in two distinct senses.⁸⁴ On the one hand, one can constrain X to do Z_1 "against his will" by physically forcing X to do Z_1 against X 's wishes and without an exercise of will on X 's part.⁸⁵ Assume, for example, that Frederick Douglass's master creeps up behind Douglass and, knowing that Douglass is afraid of water, suddenly pushes Douglass into the river. We could sensibly say in that event that Douglass has entered the water "against his will" because he has entered the water against his wishes and without an exercise of will on his part. (Notice, however, that the "absence of will" alone does not suffice to render the event "against his will" unless the event is also against his wishes; if Douglass very much wanted to jump but, too scared to do so on his own, hoped someone would push him, we would *not* say that he entered the water "against his will.")⁸⁶ On the other hand, one can constrain X to do Z_1 "against his will" by so structuring the relative consequences of X 's doing Z_1 as opposed to not doing Z_1 as to cause X to choose to do something, Z_1 , that he *would not otherwise choose* to do.⁸⁷

84. See Philips, *Are Coerced Agreements Involuntary?*, 3 LAW & PHIL. 133, 134 (1984) (referring to a "confusion between . . . two senses of 'acting against one's will'").

85. I say that a person does an act "without an exercise of will on his part" in the same sense that Aristotle says that a person can do an act "involuntarily":

[A]ctions are regarded as involuntary when they are performed under compulsion. . . . An act is compulsory when it has an external origin of such a kind that the agent or patient contributes nothing to it; e.g., if a voyager were to be conveyed somewhere by the wind or by men who had him in their power.

ARISTOTLE, *ETHICS* [NICHOMACHEAN] III, at 1109b30-1110a16 (J. Thomson trans. 1976). See also Held, *supra* note 79, at 53-54 (discussing the usefulness of saying a person *does* something that occurs without an exercise of will on his part). For the argument that all "actions" are the products of "will" and, hence, that a person cannot be said to "act" without an "exercise of will" on his part, see F. OPPENHEIM, *DIMENSIONS*, *supra* note 36, at 16 ("Nor do we consider purely involuntary behavior as action. The sleepwalker or the prisoner who is being pushed into the cell moves but does not act, since his movements are not caused by his own—conscious or unconscious—decision to perform the movements he makes."); J. PLAMENATZ, *CONSENT, FREEDOM, AND POLITICAL OBLIGATION* 110 (1968) ("It is, of course, quite clear that all action is necessarily voluntary, since it is never possible for a man to do what he does not wish.").

86. See Gunderson, *supra* note 25, at 248-49.

87. Aristotle uses the word "involuntary" in two ways. In addition to using "involuntary" to refer to cases in which a person acts without an exercise of will on his part, see *supra* note 85, Aristotle uses "involuntary" to refer to cases in which a person's choices are so structured as to cause him to do something that he would not otherwise do. See ARISTOTLE, *ETHICS*, *supra* note 85, at 1109b30-1110b7 (describing as "involuntary" a case in which a seafarer jettisons cargo in bad weather in order to save his own life and the lives of others in the boat); see also N. CARE & C.

Assume, for example, that Frederick Douglass, having been emancipated from slavery, contracts to work for wages for six days a week, excepting Sundays. After several weeks, his new employer announces that unless Douglass works in the fields the following Sunday, his new employer will seize and whip him. Douglass, having considered his options, reluctantly decides to work on Sunday, because although he would have preferred to rest on Sunday and not be whipped, he would rather work than be whipped. We might well say in that event that even though Douglass's working on Sunday required an act of will on his part, it was an act of will that was "against" his will because it was something that Douglass would not otherwise have chosen to do.

The foregoing distinction between *unwilled* and *willed* actions "against one's will" is significant for purposes of coercion because we do not ordinarily use "coercion" to refer to constraints of the first kind—constraints resulting in unwilled actions against one's wishes. Thus, if Frederick Douglass's master pushes him into a stream without an exercise of will on Frederick Douglass's part and against Douglass's wishes, we could say that Douglass has been "forced" into the water but not that he has been "coerced" into jumping into the water. To say a person has been "coerced" into doing something presupposes an act of will on his part.⁸⁸ To say that *X*, "coerced" *X* into doing something means that *X*

LANDESMAN, READINGS IN THE THEORY OF ACTION xx-xxi (1968) (describing the case in which a person hands over his money to a thief who is threatening his life as an action that is "not voluntary"); Bayles, *supra* note 75, at 18 (discussing two senses of "voluntary": one meaning "in response to an exercise of will"; the other meaning "in response to one's unfettered wishes").

88. McCloskey, *supra* note 79, at 336 ("Coercion and force need to be distinguished . . . because when one is coerced, one still acts."); Oberdiek, *supra* note 81, at 81 ("Although coerced behavior is unfree, it is nonetheless voluntary: coercion never results in involuntary behavior."). Michael Bayles argues that there are two kinds of coercion: (1) "dispositional" coercion, which does presuppose an act of will on *X*'s part; and (2) "occurrent" coercion, which does not involve an exercise of will on *X*'s part. Thus he maintains that *X*, "coerces" *X* into shooting a gun by claspings *X*'s hand and forcing *X*'s finger to squeeze the trigger of the gun. Bayles, *supra* note 75, at 17-18; accord N. MACCORMICK, *supra* note 77, at 232-33; Frankfurt, *supra* note 81, at 65 ("A person is sometimes said to have been coerced even when he has performed no action at all. Suppose that one man applies intense pressure to another man's wrist, forcing him to drop the knife in his hand. In this case, which involves what may be called 'physical coercion', the victim is not made to act."); Gunderson, *supra* note 25, at 248 n.3 (victim of coercion may undergo motion without acting); Held, *Coercion*, *supra* note 79, at 53 (action is not necessarily voluntary). Although I recognize that the latter commentators share Bayles's view that "occurrent coercion" is a true instance of coercion, I believe that in ordinary usage, "coercion" presupposes an act of will on *X*'s part. See Oberdiek, *supra* note 81, at 82:

I would hold, for example, that a man who drops a knife because pressure applied to his wrist causes his hand to open involuntarily has not been coerced into dropping the knife. Of course, it will not always be clear whether the pressure forces one's hand to open or whether fear of further pain coerces one into opening one's hand.

See also Feinberg, *Coercive Exploitation*, in R. SARTORIUS, PATERNALISM 201, 202 (1983) (asserting that coercion always involves (or presupposes) an act of will on *X*'s part); Fried, *supra* note 14, at 95 n.* (asserting that coercion refers only to willed actions); Nozick, *supra* note 69, at 441-43 (asserting

chose to do something that, but for the constraint or promise of constraint X_1 brought to bear on him, X would not have chosen to do.⁸⁹

Although the physical forcing of X to do Z_1 without an exercise of will on X 's part is not coercive, a physical forcing can be coercive if it causes X to choose to do something he would not otherwise choose to do. Assume that instead of pushing Frederick Douglass into the water, his master threatens to push him unless Douglass jumps by the count of ten; the master commences counting, "One, two, three . . . ten." Seeing that Douglass has not jumped, his master starts to push him; Douglass resists at first, eventually tires, and, deciding that he would rather get it all over with than continue to be pushed, jumps. We would surely say in that event that Douglass's master has "coerced" him into jumping. In contrast, we would not say so if Douglass continues to resist until his master pushes him into the water without an exercise of will on Douglass's part.⁹⁰ The difference between the two cases is not the difference between a promise of force and an application of force but between a promise or application of force that results in *willed* action on X 's part that he would not otherwise have willed, on the one hand, and an application of force that results in an *unwilled* act on X 's part, on the other.⁹¹

that coercion operates by means of "threats" being brought to bear on a person's decisionmaking); Philips, *supra* note 84, at 133-34 ("A coerced agent is presented with unwanted, unpleasant alternatives, but is free to choose and act upon the least obnoxious of them. He is a victim of imposed conditions of choice, but still he may choose. His act is an expression of his will in his situation."); *cf.* Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67, 70 (1918) (per Holmes, J.) ("[T]he fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."). *But cf.* RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981) ("duress" defined to include cases in which conduct is "physically compelled").

89. See F. HAYEK, *supra* note 29, at 133 ("[C]oercion implies, however, that I still choose but that my mind is made someone else's tool, because the alternatives before me have been so manipulated that the conduct that the coercer wants me to choose becomes for me the least painful one."); Bayles, *supra* note 75, at 19 (arguing that coercion presupposes that the coerced person "would have chosen differently had he not been threatened").

90. See *supra* note 88. Some statements by commentators that appear to be contrary are in reality ambiguous. J.R. Lucas, for example, has said that "imprisonment is the paradigm form of coercion." J. LUCAS, *THE PRINCIPLES OF POLITICS* 60 (1966). Lucas may be right, depending on what he envisages as the purpose of imprisonment. If X_1 imprisons X in order to cause X to testify in court, or to pay his debts, or to sign over a deed, the imprisonment is coercive, because it is a constraint that X_1 knowingly brings to bear on X in order that X do something he would not otherwise do. But if X_1 imprisons X in order to keep X confined until trial, the imprisonment is not coercive, because it is not intended to cause X to do anything that involves an act of will on his part. See Oberdiek, *supra* note 81, at 82 ("I disagree with Lucas when he says that 'imprisonment is the paradigm form of coercion'; at best only the fear of imprisonment provides a paradigm, as actual imprisonment is normally beyond one's control").

91. It is sometimes said that coercion consists not in an application of force, but in a conditional promise or "threat" of force. See Gert, *supra* note 41, at 32-33 ("Coercion in the narrow sense is the result of a threat of evil that provides an unreasonable incentive, in the wide sense it is the result of any threat of evil."); Nozick, *supra* note 69, at 441 ("[P]erson P coerces person Q into not doing act A if and only if . . . P threatens to do something if Q does A."). Gert and Nozick are

This suggests that we reformulate our definition of coercion as

- (10) a constraint or promise of a constraint, Y , that X_I knowingly brings to bear on X in order that X choose to do something, Z_I , that X would not otherwise choose to do.

A constraint that causes a person to choose to do something, Z_I , that he would not otherwise choose to do is not coercive, however, if he *wishes* to be constrained to do that thing. Assume, for example, that Frederick Douglass wishes to jump into a stream but knows that he is too timid to do so on his own. So he asks his master to promise to push him in unless he jumps in by himself by the count of ten. Douglass's master agrees and starts counting, "One, two . . .," causing Douglass to jump into the stream. We could say in that event that Douglass's master has caused Douglass to choose to do something Douglass would not otherwise have chosen to do; but we would not say that Douglass's master has "coerced" Douglass into jumping into the stream, because Douglass *wished* to be constrained into jumping into the stream.⁹² This implies that coercion is

- (11) a constraint or promise of a constraint, Y , that X_I knowingly brings to bear on X in order that X choose to do something, Z_I , that X would not otherwise choose to do and that X does not wish to be constrained to do.

right if they mean that an application of force by itself is not coercive unless it is applied for the purpose of causing a person to do something he would not otherwise do—that is, unless it is accompanied by a conditional promise that the force will be withdrawn if X does X_I 's bidding. It is wrong, however, to say that coercion always consists *only* of a conditional promise or "threat" of force—unaccompanied by any direct application of force. Coercion sometimes consists of a direct application of force accompanied by a conditional promise or threat that the force will continue unless X does X_I 's bidding.

92. See Held, *Coercion*, *supra* note 79, at 54:

The legal system threatens that if a person commits murder he will be subject to a very high penalty. If he has no desire or intention to commit murder this threat may be quite welcome to him, and in a moment of passion he may even hail the restraint it provides.

Notice the difference between saying that a constraint on X to do Z_I is not coercive if X "wishes to be constrained to do Z_I ," on the one hand, and saying that a constraint on X to do Z_I is not coercive if X "wishes to be *so constrained* to do Z_I ," on the other hand. The former statement is true; a particular constraint is not coercive if X is so eager (though inhibited) to do Z_I that he welcomes *any* constraint to do Z_I . The latter statement is false; a particular constraint, Y , may be coercive if it is so attractive to X that it causes him to do Z_I , not because of the attractiveness of Z_I , but because of the appeal of the *particular* constraint Y —that is, because he wishes to be *so* constrained to do Z_I . Assume, for example, that X_I sees X in a river and proposes to save X if X quitclaims all of X 's property in the world to X_I . X is sufficiently reluctant to quitclaim his property to X_I that he would ordinarily object to any constraint X_I might bring to bear on him for that purpose; he is so anxious to be pulled from the water, though, that he welcomes the particular constraint that X_I is bringing to bear on him under the circumstances. The constraint is nevertheless coercive; although X wishes to be subjected to that *particular* constraint under the circumstances, he is sufficiently reluctant to quitclaim his property to X_I that there are many constraints to which he would *not* wish to be subjected.

Our proposed definitions of coercion have focused thus far on the coercing agent, X_1 , rather than on the coerced agent, X . Nonetheless, statements of coercion express as much about X 's state of mind as they say about X_1 's state of mind. A constraint or promise of constraint "that X_1 knowingly brings to bear on X in order that X do something that X would not otherwise do and that X does not wish to be constrained to do" is not coercive, unless X *knows* that X_1 is bringing the constraint to bear on him for that purpose. Assume, again, that Frederick Douglass's master, knowing that Douglass will not otherwise take shelter, starts shooting over Douglass's head in order to force Douglass to lie down in the fields. What would we say if Douglass suddenly becomes deaf shortly before the master starts shooting and lies down without hearing the shooting? Or if Douglass hears the shooting but mistakes the sound for natural thunder, rather than manmade gunfire? Or if Douglass erroneously believes that his master is unaware that he is in the fields? Or if Douglass knows that his master is aware of his whereabouts but mistakenly thinks his master is trying to do him a favor by giving him an excuse to quit working and lie on the ground? We would say, I think, that while Douglass's master has attempted to coerce Douglass into lying down, Douglass has not been coerced into lying down, because Douglass did not *know* that his master was bringing force to bear on him in order that he lie down in the fields against his wishes.⁹³ It appears, then, that coercion is

- (12) the constraint or promise of constraint, Y , that X_1 knowingly brings to bear on X in order that X choose to do something, Z_1 , that X would not otherwise do and that X does not wish to be constrained to do, where X knows that X_1 is bringing or promising to bring Y to bear on him for that purpose.

Something is still lacking, though. To constitute "coercion," it is not enough that X_1 *intend* to constrain X 's desired choices for purposes of which X is aware. It is also necessary that the constraint that X_1 brings to bear on X , or conditionally promises to bring to bear on X , *actually* constrain X 's desired choices. Assume, for example, that Frederick Douglass, having been emancipated from slavery and achieved renown as a public speaker, is approached by an admirer who threatens to scuff Douglass's shoes or sneer at Douglass disapprovingly unless Douglass delivers a speech on abolition; assume, too, that Douglass is sufficiently indifferent to scuffed shoes and sneering that the prospect of being scuffed or sneered at has no bearing on his decision. In that event we would not call the admirer's threat "coercive." Although the admirer delivers the threat with the appropriate state of mind for purposes of

93. See Nozick, *supra* note 69, at 441.

coercion, and although Douglass is aware of the admirer's state of mind, the threat does not have the effect of rendering the course of action the admirer desires Douglass to take any more "eligible"⁹⁴ in Douglass's eyes than it would otherwise be. The threat is not coercive because it does not supply Douglass with a "reason" for doing the admirer's bidding.⁹⁵

In sum, coercion is "an interpersonal relation requiring a complex intention by the agent."⁹⁶ It is

(13) a constraint or promise of constraint, Y , that X_1 knowingly brings to bear on X in order that X choose to do something, Z_1 , that X would not otherwise do and that X does not wish to be constrained to do, where X knows that X_1 is bringing or promising to bring Y to bear on him for that purpose, and where the constraint renders X 's doing Z_1 more eligible to X than it would otherwise be.

B. *Offers and Threats, Benefits and Burdens.*

We have thus far identified the essential elements of coercion without addressing what most commentators regard as the principal problem of coercion: identifying the particular kinds of constraints or promised

94. In nearly all these cases the first actor's words or deeds constitute at least part of the second actor's *reasons* for doing the act in question; and in all cases but those of disinterested advice and the grosser forms of incitement by non-rational means, the reason is of a special kind; for it entails that the first actor should by his words or deeds have done something to render some course of action more *eligible* in the eyes of the second actor than it would otherwise have been. This element is most obvious in the cases where one person induces another to act by bribes, threats, or offers of reward.

H. HART & A. HONORE, CAUSATION IN THE LAW 50 (1959) (emphasis in original).

95. *Id.* Some commentators have argued that it is not enough that a constraint give X a reason for doing Z_1 ; it is also necessary that the reason be particularly strong, if not irresistible. See, e.g., Frankfurt, *supra* note 81, at 77 (proposal coercive only if it "appeals to desires or motives which are beyond the victim's ability to control"); *id.* at 80 (proposal coercive only "when the person who receives it is moved into compliance by a desire which is . . . irresistible"); HELD, *Coercion, supra* note 79, at 59 (distinguishing "between coercion that is subject to resistance, and coercion that is not"); Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 124 (1981) (proposal coercive only if the utility of X 's doing Z_1 is "considerably greater" than the utility of his not doing Z_1). I believe that the foregoing commentators are confusing the question whether a proposal is "coercive" with the separate question whether the person being coerced is to be *excused* from responsibility for doing or promising to do Z_1 . It may make sense to require as a condition for exculpation that X be exposed to a particularly strong reason for doing Z_1 . See, e.g., Frankfurt, *supra* note 81, at 76 (basing his discussion on the assumption that a person is not "coerced" unless he "cannot properly be held *morally responsible at all* for what he has been coerced into doing") (emphasis in original). But I believe that in ordinary usage a proposal is "coercive" if it gives X any reason that he did not previously have for doing Z_1 . Cf. Haksar, *supra* note 25, at 68:

For a proposal to be a coercive threat or a coercive offer, it is necessary (though not sufficient) that the declared unilateral plan should make the proposal more eligible than it would otherwise have been; it should provide the recipient with a reason, though not necessarily an irresistible reason, for accepting the proposal. In other words the declared unilateral plan should make the recipient more vulnerable or less invulnerable to the proposer's wishes than he otherwise would have been.

96. Bayles, *supra* note 75, at 19.

constraints that constitute coercion.⁹⁷ Everyone agrees that not all constraints or promises of constraint are coercive. They disagree, however, about what distinguishes coercive constraints from noncoercive constraints. Some distinguish between "threats," "penalties," and "burdens," on the one hand, and "offers," "rewards," and "benefits," on the other; the former are coercive, they say, while the latter are not. Others reject the distinction, arguing that offers, rewards, and benefits can indeed be coercive.

To illustrate, assume that Frederick Douglass, having been emancipated from slavery and having gained respect and financial security for life from sales of his autobiography, is approached by an admirer who wishes him to write a second volume of memoirs. Douglass, tired of writing and preferring to devote his time to public speaking, flatly refuses. The admirer responds with a proposal: If Douglass writes a second volume, the admirer promises that he will found a chair of political science in Douglass's name at a university of Douglass's choice. Douglass, who would not otherwise have written a second volume, agrees to do so in return for the prestige and satisfaction he stands to gain. Everyone would agree, I think, that while the admirer can be said to have "induced" or "bribed" Douglass into writing a second volume, he cannot be said to have "coerced" Douglass into writing it. Moreover, most people would also say, I suspect, that the admirer induced Douglass to write the second volume by "offering" him a "benefit" rather than by "threatening" him with a "burden." Still, people are likely to differ regarding the relationship between the noncoerciveness of the admirer's proposal and its being an "offer" of a "benefit." Some would contend that offers and benefits can be coercive—as, for example, when a person offers a drowning swimmer the benefit of rescue in return for all the swimmer's life's savings.⁹⁸ Others would say that offers and benefits are

97. See *infra* notes 98-99 and authorities cited therein.

98. See, e.g., C. BAY, *supra* note 19, at 93 (arguing that while it may seem counter to common sense to call inducements coercive, "it is in the interest of clear thinking to admit that they can be, if strong enough"); Benditt, *Threats and Offers*, 58 PERSONALIST 382, 382 (1977) ("[O]ffers can be coercive."); Cook, *supra* note 22, at 119 (coercion may take the form of a "system of rewards"); Frankfurt, *supra* note 81, at 80 ("An offer is coercive . . . when the person who receives it is moved into compliance by a desire which is . . . irresistible."); Haksar, *supra* note 25, at 67 ("Coercive proposals can be divided into two kinds: coercive threats and coercive offers."); Held, *Coercion*, *supra* note 79, at 54 ("To restrict the applicability of the concept of coercion . . . to the use of threats only . . . would be to exempt the practitioners of other forms of coercion from a wide range of appropriate judgments."); McIntosh, *Coercion and International Politics: A Theoretical Analysis*, in NOMOS XIV: COERCION, *supra* note 3, at 247 (coercion "may be the performance of service or the refusal to perform a service"); Vandevier, *Coercion, Seduction, and Rights*, 58 PERSONALIST 374, 378 (1977) ("We may not only be beneficiaries of offers but maleficiaries as well; it is not a mistake to speak of 'coercive offers' in such contexts.").

never coercive.⁹⁹

I believe that this dispute whether offers and benefits can be coercive is essentially a semantic dispute. By "semantic," however, I do not mean that the underlying words are Alice-in-Wonderland terms that one can stipulate to mean whatever one wishes.¹⁰⁰ The concepts of "benefit" and "burden," "offer" and "threat," like the concept of "freedom," have core meanings that everyone understands and accepts. The problem is that the core meanings of "benefit" and "burden," and "offer" and "threat," like that of "freedom," contain a variable that must be specified to give them content in particular settings. By identifying and specifying the variable that underlies them, we can not only resolve the dispute over whether offers are coercive, but also identify the feature that renders "coercion" a vice word.

There are three steps to identifying and specifying the variable that underlies the distinction between benefits and burdens. The first step is to recognize the correlation that exists between the verbs "offer" and "threaten," on the one hand, and the nouns "benefit" and "burden," on the other hand. The two verbs are not used interchangeably with the two nouns. We do not speak (except ironically) of "threatening" a person with a "benefit," or of "offering" a person a "burden."¹⁰¹ We speak, rather, of "threatening" a person with a "burden," and of "offering" him a "benefit." Why? Because the two verbs and two nouns align with one another in lexical sets. One "threatens" a person when one conditionally

99. See, e.g., Bayles, *Coercive Offers and Public Benefits*, 55 PERSONALIST 139, 139 (1974) ("The aims of this paper are . . . to defend the claim of the standard analysis that offers are not coercive."); Bayles, *supra* note 75, at 17 ("[C]oercion usually involves a threat of harm and never involves a promise of benefit."); Day, *supra* note 38, at 259 ("threats" curtail liberty; "offers" do not); Gert, *supra* note 41, at 47 (distinguishing coercion and enticement); Wertheimer, *supra* note 83, at 222 ("A coerces B when B complies to avoid being made worse off; A induces B when B complies in order to become better off."). Nozick appears to contradict himself on whether offers are coercive. On the one hand, he suggests that they are not. See Nozick, *supra* note 69, at 447 ("Offers of inducements, incentives, rewards, bribes, consideration, remuneration, recompense, payment do not normally constitute threats, and the person who accepts them is not normally coerced."). On the other hand, he defines as "coercive" any proposal by X_j that leaves X worse off than X would have been in the normal or expected course of events, *see id.* at 447, 450 (term "expected" is meant "to shift between or straddle *predicted* and *morally required*"); he defines as an "offer" any proposal that is not "unwelcome" to the recipient, *see id.* at 449, 461. As Nozick defines the terms "coercion" and "offer," if X_j makes X a proposal that X "welcomes" because the proposal leaves X better off than he otherwise expects to be, while also leaving X worse off than X morally expects X_j ought to leave him, the proposal is a "coercive offer." See Lyons, *Welcome Threats and Coercive Offers*, 50 PHILOSOPHY 425, 434 (1975).

100. Cf. Farnsworth, *infra* note 102, at 332-33 (suggesting that the difference between "threats" and "offers" is purely semantic, in the sense that the same proposition can always be stated either as a threat or as an offer).

101. See Bayles, *supra* note 75, at 22-23 ("To speak of promising harms or threatening benefits is usually ironic.").

promises to impose a burden on him; one "offers" him something when one conditionally promises him a benefit.¹⁰² Similarly, a "burden" is that with which one threatens a person; a "benefit" is that which one offers him.¹⁰³ The reason we can talk about offers and threats without making explicit reference to benefits and burdens is that benefits and burdens are, implicit, respectively, in the language of offers and threats.

The second step is to recognize that "benefit" and "burden," like "improvement" and "deterioration," are relative terms. They all refer to a change in an agent's condition, a change from some stipulated starting point to a new condition that is better or worse, respectively, from the agent's point of view. One must have a stipulated starting point, or "baseline,"¹⁰⁴ from which to measure these changes in condition. An "improvement" is a change from a stipulated baseline to a better condition, a "deterioration" a change to a worse one. A "benefit," in turn, is something that improves an agent's condition from his point of view; a "burden" is something that worsens it. Thus, the concepts of benefit and burden contain a fixed element and a variable: the fixed element is that benefits and burdens are things that, respectively, *improve* or *worsen* an agent's condition from his point of view; the variable is the stipulated *baseline* from which the improvement or deterioration is measured.

102. See Bayles, *supra* note 75, at 22 ("[P]roperly speaking one cannot threaten to reward someone."); *id.* at 23 ("[T]hreats refer to harms, not benefits."); Frankfurt, *supra* note 81, at 67 ("The most fundamental difference between threats and offers . . . is this: a threat holds out to its recipient the danger of incurring a penalty, while an offer holds out to him the possibility of gaining a benefit.").

I should emphasize that while the word "threaten" can be used either *unconditionally* (e.g., "Judging by those thunder clouds, I think there is a threat of rain.") or *conditionally* (e.g., "The highwayman threatened to shoot me unless I handed over my purse."), see Gunderson, *supra* note 25, at 256 ("Threats can be conditional or unconditional."), I am using "threats" and "offers" to mean conditional offers of burdens and benefits, respectively. See Farnsworth, *Coercion In Contract Law*, 5 U. ARK. LITTLE ROCK L.J. 329, 332 (1982) (some kinds of threats are "conditional"; a "conditional threat" is a "conditional promise").

103. I use the word "burden" in this article as a synonym for what others sometimes refer to as a "penalty" or "sanction"; I use "benefit" as a synonym for what others sometimes refer to as a "reward" or "inducement" or "bribe." I recognize, of course, that there are meaningful distinctions between "benefits," "rewards," "inducements," and "bribes"; and between "burdens," "sanctions," and "penalties"; I do not believe, however, that the distinctions signify for purposes of this discussion.

104. Wertheimer, *supra* note 83, at 223 ("[T]o distinguish between making a person 'better off' and 'worse off' . . . [implies] a 'baseline.'"); see also Frankfurt, *supra* note 81, at 68 (referring to the "baseline" for distinguishing threats from offers); Kreimer, *supra* note 70, at 1352 (referring to a "baseline" for distinguishing "liberty-expanding offers" from "liberty-reducing threats"); Zimmerman, *supra* note 95, at 122 n.3 (referring to the "baseline" for distinguishing coercive from noncoercive proposals); cf. Steiner, *supra* note 48, at 38 (Distinguishing threats from offers "presupposes a conception of 'normalcy' into which the threatening or offering action is taken to be an extrinsic intrusion.").

It follows, therefore, that just as one cannot talk about improvement without asking, "Improvement from what?," one cannot talk about a benefit without asking, "Benefit relative to what?" A benefit to an agent by one characterization of his condition may be a burden by reference to another measure. Assume, for example, that an admirer of the newly emancipated Frederick Douglass announces on Monday that the following month he will give Douglass a gift of \$1000 to express his admiration. On Wednesday, the admirer changes his mind; he now declares that he will give Douglass \$1000 the following month if and only if Douglass delivers a sermon on the subject of abolition. How, then, do we describe the admirer's modified proposal? Is he offering Douglass a "benefit" by promising to give Douglass \$1000 for delivering a sermon? Or is he threatening Douglass with a "burden" by promising to deny him \$1000 for not delivering a sermon? The answer obviously depends upon the baseline from which one measures the proposed change. If one stipulates Douglass's condition on the preceding Sunday as the baseline, the Wednesday proposal is an offer of a benefit. If, on the other hand, one stipulates Douglass's condition on Tuesday as the baseline, the Wednesday proposal is the threat of a burden. The Wednesday proposal can thus be characterized accurately as either a threat or an offer, depending on which baseline one stipulates.¹⁰⁵

The third and final step is to identify the baseline, if any, that distinguishes benefits from burdens for purposes of distinguishing coercive proposals from noncoercive ones. This last step is both difficult and important. It is difficult because commentators have thus far failed to identify any single baseline that adequately distinguishes benefits from burdens (and, hence, offers from threats) for purposes of coercion. It is important because if such a condition can be identified, then "coercion" can indeed be defined as the structuring of an agent's choices by means of threats and burdens.

One particular argument can be raised and dismissed at the outset. It is sometimes said that the distinction between benefits and burdens is meaningless because a resourceful advocate can characterize *any* structured choice as either a benefit or a burden, depending on whether he favors or opposes the choice.¹⁰⁶ The common example of the highwayman who puts the traveler to the choice of "your money or your life"

105. Cf. Steiner, *supra* note 35, at 37:

[It is an] obvious truth that what counts as a threatening intervention to some individuals may often count as an offer to others. Attaching the intervening consequence, of accommodation in a gaol cell, to the action of sleeping on a park bench at night, may well constitute an offer to vagrants while at the same time, constituting a threat to other members of the public.

106. See Held, *Coercion*, *supra* note 79, at 55-56:

illustrates this argument in the context of an apparent burden. From the traveler's standpoint, the proposal is the threat of a burden: Measured by the baseline of the traveler's possessing both his money and his life, the change in condition that the highwayman conditionally promises the traveler in order to cause the latter to do the highwayman's bidding—i.e., taking the traveler's life—worsens the traveler's condition from the traveler's point of view. From the highwayman's standpoint, however, the proposal can be characterized as a benefit: Measured by the baseline of what the highwayman promises to bring about in order to cause the traveler to do the highwayman's bidding—i.e., death—the change the highwayman is conditionally promising the traveler—i.e., sparing the traveler's life—improves the traveler's condition from the highwayman's point of view.

This argument about the meaninglessness of the distinction between benefits and burdens also can be applied to structured choices in the context of apparent benefits. Assume, for example, that a coachman offers a traveler \$1000 in exchange for the traveler's watch. From the coachman's standpoint, the proposal is the offer of a benefit: Measured by the baseline of the traveler's not possessing \$1000, the coachman is conditionally promising to improve the traveler's condition. From the traveler's standpoint, however, the proposal can be defined as a threat of a burden: Measured by the baseline of what the coachman is promising the traveler to cause him to do the coachman's bidding—i.e., to give \$1000—the change the coachman is conditionally promising—i.e., to withhold \$1000—worsens the traveler's condition from the traveler's point of view.

The foregoing argument about the emptiness of the distinction between benefits and burdens, although commonplace,¹⁰⁷ is a non sequitur.

[T]here seems to be a way in which threats and offers can be translated into one another. . . . Other things being equal, an arrangement is not substantially more, or less, coercive if it is described as "If you don't join the union, you cannot get the job," rather than as in "If you join the union, you can get the job."

107. See, e.g., C. BAY, *supra* note 19, at 89 (whether something is a "punishment" or a "reward" depends "on which side of the coin is looked at"); Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 659 (1981) ("If the concepts of reward and penalty are relative—if the concepts derive their meaning only from each other—the assertion that some defendants are rewarded [by plea bargaining] and none penalized is simply schizophrenic."); Coffee, "Twisting Slowly in the Wind": *A Search for Constitutional Limits on Coercion of the Criminal Defendant*, 1980 SUP. CT. REV. 211, 220 (referring to "metaphysical distinctions between leniency and penalties"); *id.* at 235 ("Conceptually, the 'benefit' does not exist apart from the threat."); *id.* at 251 ("The defendant facing the plea/trial decision is facing an essentially either/or decision, and in this binary context, the credit and a penalty are too reciprocally related to pretend that crediting one who pleads guilty is not equivalent to penalizing him for going to trial."); Farnsworth, *supra* note 102, at 332-33 (suggesting that the difference between threats and offers is entirely semantic, in that the same proposition can be stated either as a threat or as an offer); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1163 (1969) ("But burdens and benefits can also be seen as two

The examples do not show that the language of benefits and burdens is meaningless. To the contrary, they show what we already know about benefits and burdens: that the terms "benefit" and "burden" retain their core meanings in every setting in which they appear; that benefits and burdens are always things that change an agent from a stipulated baseline to an improved or a worsened condition, respectively, from the agent's point of view; that the language of benefits and burdens presupposes the stipulation of baselines; and that something that is a benefit by reference to one baseline may be a burden by reference to another.

Nor do the examples show that the distinction between offers and threats—and, hence, between benefits and burdens—serves no purpose in defining coercion. To be sure, the examples show that the distinction serves no purpose so long as advocates are allowed to stipulate baselines in any way they wish. The examples also show that *some* sets of baselines do not satisfactorily distinguish threats from offers for purposes of coercion. They do not show, however, and cannot show, that *all* baselines are useless in distinguishing threats from offers for purposes of coercion.

I believe that there is a set of baselines that successfully distinguishes burdens from benefits and threats from offers for purposes of distinguishing coercive from noncoercive proposals. Commentators have failed thus far to identify the set because they have assumed that the choice was between either identifying a single baseline for all statements of coercion¹⁰⁸ or leaving it to advocates to choose baselines willy-nilly.¹⁰⁹ I believe there is a third alternative. I believe that what distinguishes threats from offers for purposes of coercion is not a single baseline, and not an open range of baselines, but a set of two distinct baselines. Indeed, it is the combination of the two particular baselines that renders "coercion" a vice word.

We can identify the two baselines by analyzing standard statements of coercion. It has long been said, from Plato to H.L.A. Hart, that legal

sides of the same coin: to tax *A* and not *B*, is to give *B* a benefit relative to the burden imposed on *A*; to give welfare payments to *A* and not to *B*, burdens *B* in the negative sense of denying him the benefit given to *A*.").

108. Compare Dworkin, *Compulsion and Moral Concepts*, 78 *ETHICS* 227 (1968) (advocating a purely descriptive baseline for distinguishing coercive from noncoercive proposals) with Ryan, *supra* note 59, at 482 (advocating a purely normative baseline for distinguishing coercive from noncoercive proposals). See also Zimmerman, *supra* note 95, at 127 (arguing that "considerations of explanatory simplicity" militate against the adoption of a "two-baseline" account of coercion).

109. See Held, *Coercion*, *supra* note 79, at 56 ("Using [Gert's] own examples, it would seem that avoiding the evil of sinking could be easily redescribed as seeking the good of staying afloat, gaining the good of possessing more money could as well be described as avoiding the evil of having too little, and so on.").

systems—indeed all laws—are coercive.¹¹⁰ Hart, building on the work of Austin and Bentham, defines “law” as a system of “coercive orders,” and “coercive orders” as “orders backed by threats.”¹¹¹ In what way is a statute a threat—one, for example, that makes it “murder” punishable by life imprisonment to commit homicide with malice aforethought? By what baseline is the latter threat measured?

One possible approach is to use a normative standard,¹¹² defining the baseline as the worst position in which the proponent of a proposal *ought* to leave the recipient of the proposal as a consequence of the recipient's refusing to do the proponent's bidding. By that measure, a “threat” is a conditional promise to leave the recipient worse off than he ought to be left under the circumstances. The advantage of a normative baseline is that it can explain why coercive proposals are commonly regarded as evil: If coercive proposals are threats, and a threat is a conditional promise of a burden, and a burden is anything that leaves a recipient worse off than he ought to be for refusing to do the proponent's bidding, then it follows that coercive proposals are evil because they promise to leave recipients worse off than they ought to be left for having refused to do the proponent's bidding. Measured by a normative base-

110. See Plato, *Laws VIII* 832, in 5 *DIALOGUES OF PLATO*, *supra* note 2, at 400-01; see also J. BENTHAM, *OF LAWS IN GENERAL* 54 (H. Hart ed. 1970) (“A law by which nobody is bound, a law by which nobody is coerced . . . all these phrases which come to the same thing would be so many contradictions in terms.”); H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 29 (1945) (“[A]ll the norms of a legal order are coercive norms.”); H. LASKI, *THE STATE IN THEORY AND PRACTICE* 53 (1935) (“[T]he state is an organization exercising the coercive power for social good.”); I. M. WEBER, *ECONOMY AND SOCIETY* 34 (G. Roth & C. Wittich ed. 1978) (“An order will be called . . . law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation.”); Alschuler, *supra* note 107, at 705 (“[T]he central purpose of the [criminal justice] system is coercion.”); McCloskey, *supra* note 79, at 343 (“The criminal law is a system of coercive threats backed by sanctions.”). But cf. N. MACCORMICK, *supra* note 77, at 232-46 (denying that legal systems are inherently coercive); Ryan, *supra* note 59, at 481, 487 (arguing that in “ordinary moral discourse” we do not say that a person who is deterred from breaking the law by fear of legal reprisals is thereby “coerced” into complying with the society's norm).

111. H.L.A. HART, *supra* note 4, at 19-20, 236-37.

112. See, e.g., C. FRIED, *supra* note 14, at 97 (“[W]e cannot escape using some normative criterion to distinguish offers from threats. . . . A proposal is . . . coercive if it proposes a wrong to the object of the proposal.”); F. KNIGHT, *supra* note 59, at 15 (“[F]reedom and coercion are ethical categories.”); Haksar, *supra* note 25, at 69 (“[I]t seems to me for a proposal to be coercive, it is necessary that the proposal should involve a wrong to the recipient.”); *id.* at 74 (advocating “a normative account” of coercion); Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 84 (1981) (“[T]rue . . . coercion results when one's rights are violated by others.”); Oberdiek, *supra* note 81, at 80 (“Coercion is a *moral* notion. That is, like deception, wantonness, bribery, and countless other concepts, coercion embodies a moral assessment: *in so far as* an act or an institution is coercive, it is morally unjustified and therefore stands in need of a moral defense or excuse.”) (emphasis in original); Ryan, *supra* note 59, at 487-88 (proposal coercive if it threatens *X* with something that *X* is validly empowered to do and that does not violate anyone's individual rights).

line, coercive proposals are immoral because they are *defined* to be immoral.¹¹³

Unfortunately, using a normative baseline to measure threats does not identify all instances of coercion, since not all coercive proposals are evil.¹¹⁴ Consider the case at hand: laws against murder. We commonly say that law structures an actor's choices by means of coercion and that murder statutes coerce actors into refraining from homicide by threatening them with criminal punishment.¹¹⁵ Yet we do not thereby mean that all laws are immoral, or that murder statutes in particular leave persons worse off than they ought to be. It seems, then, that coercive proposals cannot be defined as "threats to leave a recipient worse off than he ought to be left under the circumstances."

Another possibility is to define the baseline as the condition the recipient would prefer under the circumstances. Defined in terms of preference, a threat is a conditional promise to leave its recipient worse off

113. See Ryan, *supra* note 59, at 494-95:

The true force of the claim "coercion is wrong" is that people should not be interfered with in those activities which do not threaten other's rights [the latter being Ryan's definition of "coercion"]. Like the claim about stealing, this is sensible and useful advice, despite the fact that it too is a tautology of sorts (since rights largely define the realm of permissible behaviour). If one regards coercion as a neutral concept, like "speaking" or "walking," it is something of a mystery why there should be a *presumption* against coercion, as many philosophers have insisted. The link with individual rights shows how this presumption (like the presumption against theft) is, as it were, built into the concept itself.

(emphasis in original).

114. See Dworkin, *supra* note 108, at 228:

A consequence of this [normative] view [of coercion] is that it cannot be sensible to discuss the rightness or wrongness of the use of coercion. Since a process will be called coercive only if we have already made a prior judgment about the wrongness of the process, it follows automatically that coercion is always wrong just as, according to some philosophers, it is a logical truth that murder is always wrong because murder is defined as wrongful killing. I think that, although this is more plausible in connection with "murder," even here it is incorrect. In any case it is certainly not true that we have settled the question of the justification of coercion when we decide to apply the term to a given situation.

(footnote omitted). See also Cook, *supra* note 25, at 112-13 ("In both positive and negative forms, coercion is essential to freedom, order, justice, and public welfare Legitimately institutionalized and utilized, [coercion] . . . is a unique agent of human freedom and the enlargement and enrichment of human experience. . . . Creatively used, coercion can be a great equalizer and liberator in the affairs of men. Perhaps what is needed is this: enlistment of coercion in the service not of an insensitive, oppressive, and socially and morally blind *status quo* but of the weak, poor, oppressed, disinherited, and despised."); McCloskey, *supra* note 79, at 347 ("It is morally impossible to accurately generalize in these matters about all coercion. . . . Some coercion bears importantly on the degree of responsibility and on blameworthiness; some bears not at all. Some coercion provides grounds for exoneration, some for mitigation, some makes no moral difference at all to the moral agent's accountability."); Wertheimer, *supra* note 83, at 223 ("I do not find the locution, 'legitimate coercion,' to be contradictory."); Wilson, *supra* note 69, at 263 ("I can still see no reason for thinking that the meaning of 'coercion' has something to do with the rights and wrongs of situations rather than simply with the overcoming of resistance by force."); Zimmerman, *supra* note 95, at 127 ("[T]here are powerful reasons for preferring a morally neutral account of coercion.").

115. See *supra* note 95.

than he would prefer.¹¹⁶ This second approach has the virtue of explaining why a murder statute is coercive. A person wishing to commit murder would prefer to be in a position of being able to commit murder without suffering any penalty. By that baseline, a murder statute is a threat because it promises to penalize him for committing murder. Unfortunately, taking the recipient's preferences as a baseline has an obvious disadvantage: It precludes us from using the distinction between "threats" and "offers" to distinguish between coercive and noncoercive proposals, because it tends to treat every proposal as a threat. Assume, for example, that the state wishes to structure the choices of a person who has been released on parole in order to dissuade him from committing murder. The state can structure his choices by proposing either to revoke his parole and recommit him to prison if he commits murder, or, alternatively, to pay him \$10,000 for not committing murder. We would ordinarily say, I believe, that the first is a threat to coerce him into obeying the law, and the second a noncoercive offer to induce him to obey the law. Nonetheless, by defining threats by reference to the recipient's preferences for purposes of identifying coercive proposals, we may be forced to call both coercive. For if his preference consists of both committing murder and receiving \$10,000, a proposal to deny him \$10,000 if he commits murder is a threat because it promises to leave him worse off than his stipulated baseline.

A third possibility remains, one that avoids the twin dangers of defining threats solely in normative terms or defining them by reference to the recipient's preferences. One can define threats temporally, by reference to the recipient's condition at "the instant [in time] before [the proponent makes] the proposal."¹¹⁷ By that measure, a threat is a

116. In *Coercive Wage Offers*, *supra* note 95, at 133, David Zimmerman argues that a proposal is coercive if it leaves a recipient worse off than any alternative preproposal situation that (1) the recipient strongly prefers, and (2) the proponent is actively preventing the recipient from enjoying. For a trenchant criticism of Zimmerman's argument, and for Zimmerman's reply, see Alexander, *Zimmerman on Coercive Wage Offers*, 12 PHIL. & PUB. AFF. 160 (1983); Zimmerman, *More on Coercive Wage Offers: A Reply to Alexander*, 12 PHIL. & PUB. AFF. 165 (1983).

117. C. FRIED, *supra* note 14, at 96; *see also* Bayles, *supra* note 76, at 141 ("There are at least two features which logically distinguish threats and offers. First, one compares the desirability of the decision-maker's choice situation before and after a proposal has been made to him. If the proposal makes it more desirable, an offer has been made. If the proposal makes it less desirable, a threat has been made."); Day, *supra* note 38, at 259 (defining the recipient's position at the time of the proposal as the baseline for distinguishing threats from offers); Held, *Coercion*, *supra* note 79, at 56 (discussing the possibility, which Held ultimately rejects, of defining coercive proposals as proposals that "threaten a person with being worse off than he is already"); Kreimer, *supra* note 70, at 1359 (defining the recipient's "history" as the "baseline" for distinguishing threats from offers for purposes of coercion); *cf.* Vandever, *supra* note 98, at 375 ("It is clear that one standard of reference in determining whether a harm or a benefit is promised is the actual *level of well-being prior* to the proposal.") (emphasis in original).

conditional promise to leave a recipient worse off than he was immediately before the proposal; an offer is a conditional promise to leave him better off than he was immediately before the proposal. This third baseline is more promising than the two discussed above. Nevertheless, it must be modified in three essential ways.

First, for purposes of coercion, the relevant time period for measuring the recipient's condition is not the instant *of* the proposal, or a span of time *before* the proposal, but the period *after* the proposal. The question is not whether the proposal conditionally promises to leave a recipient worse off than he *is*,¹¹⁸ or worse off than he *has been*,¹¹⁹ but whether it conditionally promises to leave him worse off than he otherwise *will be*.¹²⁰

Assume, for example, that Frederick Douglass invests the proceeds of his autobiography in a farm that is downstream from a farmer who is legally entitled to use all the stream's water. The stream carries 1200

118. See C. FRIED, *supra* note 14, at 96, 97 (discussing the difficulty of defining the "status quo" at the time the proposal is made).

119. Robert Nozick argues that a proposal is coercive if it leaves a recipient worse off than either "the normal . . . course of events" or the "expected course of events." See Nozick, *supra* note 69, at 447, 450. By "normal course of events," he means the course of events that have regularly occurred in the period preceding the proposal. See *id.* at 447. I think Nozick is correct that proposals are coercive whenever they leave a recipient worse off than the "expected course of events," if he is referring to the recipient's expectations rather than those of third persons. I believe that he is also correct that when the normal course of events coincides with what the recipient expects, proposals that leave a recipient worse off than the normal course of events are coercive; I do not believe he is correct, however, that proposals are coercive simply because they leave a recipient worse off than the normal course of events. The best counter-example to Nozick's is the shop-worn example of the butcher who, having sold ground beef at a certain price for an extended period of time, suddenly raises his price. If Nozick were right that the past course of events provides a baseline for distinguishing coercive from noncoercive proposals, then it would follow that the butcher coerces his customers into paying more money for ground beef by now withholding the sale of ground beef unless they pay the higher price. I doubt that most people would ordinarily call the butcher's proposal coercive. See Frankfurt, *supra* note 81, at 69-71 (using the "butcher" hypothetical to criticize Nozick for using the "normal course of events" as a baseline).

120. To decide whether [proponents] . . . are making threats or offers it is not essential to consider . . . how what they propose to do compares with what they *used* to do. Rather, it is necessary to consider how the courses of events their current proposals envisage compare with what would *now* happen but for their proposed interventions.

. . . .
In order to evaluate a proposal by P to intervene in the course of events that is initiated when Q does A, we need to know whether this intervention by P will leave Q better off or worse off than he would be without it. Measuring the impact of the proposal just requires, therefore, that we compare the course of events when P intervenes according to the terms of his proposal with what will happen if this intervention is subtracted from that course of events. This comparison leaves out of account the terms of any proposal which is cancelled by P's current proposal, and it takes into account the terms of any proposal which is left still intact.

Frankfurt, *supra* note 81, at 69, 70 (emphasis in original). See also Steiner, *supra* note 48, at 39 ("[T]he conception of the norm to be employed for this purpose [of distinguishing threats from offers] is the description of the normal and predictable course of events, [that is,] the course of events which would confront the recipient of the intervention were the intervention not to occur.").

cubic feet of water by Douglass's farm every hour in June; but because of the rainfall and upstream farmer's use, the flow decreases by 200 cubic feet an hour on the first of every month from July through December, and then increases by 200 cubic feet an hour every month from January to June:

<i>Month</i>	<i>Cubic Feet Per Hour</i>
June	1200
July	1000
August	800
September	600
October	400
November	200
December	0
January	200
February	400
March	600
April	800
May	1000
June	1200

On July 1, when the flow is at 1000 cubic feet, the upstream owner promises Douglass that if Douglass delivers a sermon on abolition in August, the upstream owner will direct his foreman in September to give Douglass 200 cubic feet an hour in December, and that otherwise, he will direct his foreman to leave Douglass no water at all in December. The upstream farmer's proposal is not a threat and not coercive; while it conditionally promises Douglass less water in the future than he had in the month preceding the proposal (1200 cubic feet), and less than at the time of the proposal (1000 cubic feet), and less than at the time of the action the farmer desires of Douglass (800 cubic feet), and less than at the time the upstream farmer proposes to act (600 cubic feet), it does not conditionally promise Douglass less water in the future than he would otherwise have in the future (0 cubic feet).

In contrast, now assume that the upstream farmer promises Douglass on January 1 that unless Douglass delivers a sermon on abolition in February, the upstream farmer will direct his foreman in March to give Douglass only 700 cubic feet an hour in May. The farmer's new proposal is a threat and is coercive; while it conditionally promises Douglass more water in the future than he had in the month preceding the proposal (0 cubic feet), and more than at the time of the proposal (200 cubic feet), and more than at the time of the action the farmer desires of Douglass (400 cubic feet), and more than at the time the upstream farmer proposes to act (600 cubic feet), it nevertheless condition-

ally promises Douglass less water in the future than he would otherwise have in the future (1000 cubic feet).

Second, the relevant baseline for distinguishing threats from non-threats for purposes of coercion is not what the recipient's future condition will *actually* otherwise be, but what the recipient *expects* it otherwise will be. Assume, for example, that Douglass buys his farm in January without knowing about the annual water cycle. The upstream owner, knowing Douglass is ignorant of the water cycle, promises Douglass in January that if Douglass delivers a speech on abolition in February, the upstream owner will guarantee him a maximum of 400 cubic feet per hour for the entire year. The proposal is not a threat and not coercive; even though it conditionally promises Douglass less water in the future than he will actually otherwise have, it does not promise him less water in the future than he *believes* he will otherwise have. In contrast, if the upstream owner promises to leave Douglass worse off than both he and Douglass believe Douglass will otherwise be, the proposal is a threat and is coercive, even though everyone else in the community knows that the upstream owner is unwittingly promising to leave Douglass more water than he will actually otherwise have. It thus seems that the baseline that best distinguishes threats from offers for purposes of coercion is an "expectation" baseline: A proposal is coercive if and only if it conditionally promises to leave a recipient worse off than he otherwise expects to be.¹²¹

An expectation baseline has the advantage of explaining most of the paradigmatic cases we have discussed thus far. It explains why murder statutes and legal systems as a whole are coercive. A murder statute conditionally promises to leave an agent not worse off than he ought to be, but worse off than he otherwise expects to be. An expectation baseline also explains why the highwayman's proposal to the traveler is coercive and why the coachman's proposal to the traveler is not. The highwayman's proposal—that the traveler choose between his money and his life—is a threat (and, hence, coercive) because the highwayman conditionally promises to do something (to kill the traveler) that will leave the traveler worse off than he otherwise expects to be. In contrast, the coachman's proposal to the traveler, that he choose between his watch and \$1000, is an offer, because the coachman conditionally promises to do something (i.e., to give the traveler \$1000) that will leave the traveler better off than he otherwise expects to be.

121. See Nozick, *supra* note 69, at 447 (proposal is a threat "if it makes the consequences of Q's action worse than they would have been in the . . . expected course of events"); Zimmerman, *supra* note 95, at 131 ("My suggestion is that we retain a normally expected course of events as the relevant pre-proposal situation in *all* cases.").

To be sure, instead of making either a single promise to leave X worse off for not doing Z_1 than he otherwise expects to be (i.e., a threat) or a single promise to leave him better off for doing Z_1 than he otherwise expects to be (i.e., an offer), a proponent may make a combination of promises to X both to leave him worse off for not doing Z_1 , and to leave him better off for doing Z_1 , than he otherwise expects to be. In that event, the proposal contains both a threat and an offer—or what Hillel Steiner calls a “throffer.”¹²² Assume, for example, that Frederick Douglass’s admirer proposes to give Douglass \$10,000 if Douglass writes a second volume of his autobiography, and to banish Douglass from the lecture circuit if Douglass does not write a second volume. Measured by an expectation baseline, the admirer is “offering” Douglass \$10,000 for writing a second volume, and “threatening” him with ostracism for not writing it. To the extent that Douglass’s admirer thus threatens Douglass for not writing a second volume, he is “coercing” Douglass into writing a second volume.¹²³

We have determined thus far that an expectation baseline for distinguishing threats from offers nicely accounts for most of the proposals that we typically regard as coercive and noncoercive, respectively. Unfortunately, it does not account for all of them. Specifically, it does not explain why we typically regard some proposals as coercive even though they do not conditionally promise to leave their recipients worse off than

122. Steiner, *supra* note 48, at 39; see also Frankfurt, *supra* note 81, at 67 (proposal can “include only an offer, or only a threat, or both at once”).

Alan Gewirth would deny that a given proposal can contain both a threat and an offer, but he does so because he posits a different baseline than I am proposing for distinguishing threats from offers. Rather than ask (as I do) whether *any* of the proponent’s promises, if carried out, would leave a recipient worse off than he otherwise expects to be, Gewirth asks whether *all* of the proponent’s promises, if carried out, leave the recipient worse off than he otherwise expects to be. Thus, a proposal is a “threat,” he says, only if it leaves a recipient worse off regardless of how the recipient chooses to respond to it. A. GEWIRTH, *REASON AND MORALITY* 32-34, 257-58 (1978). The disadvantage of Gewirth’s baseline is that it forces him to characterize proposals like the one *infra* note 123, as “offers” rather than “threats,” even though the recipient yields to them *in part* because they leave him worse off than he otherwise expects to be.

123. I assume, of course, that the threat contained in the “throffer,” see *supra* note 122 and accompanying text, also satisfies the other preconditions for coercion set forth in Part II-A of this article, that is, that the proponent is intentionally bringing the threat to bear on X in order that X do something, Z_1 , that the proponent knows X would not otherwise do or wish to be constrained to do, and that the threat actually renders X ’s option of doing Z_1 more eligible in X ’s eyes than it would otherwise be. Thus, if a proponent, as a joke, states in the form of a “throffer” something he really intends as a pure offer; or if the offer contained in a “throffer” is so attractive to X that the threat also contained in it has no marginal effect on X ’s decisionmaking and, hence, does not render Z_1 more eligible to X than it would otherwise be; or if the offer contained in a “throffer” is not so attractive to X as to render the threat immaterial but the proponent *believes* it renders the threat immaterial—then the threat contained in the “throffer” is not coercive, not because it is not a threat, but because it lacks the other preconditions for coercion set forth in Part II-A. See *supra* note 96 and accompanying text.

they otherwise expect to be. To illustrate, assume that Frederick Douglass's parents are kidnapped from their village on the west coast of Africa and sold into the transatlantic slave trade against their wills. They are resold on their arrival to a slaveholder in Maryland who, just for the sport of it, regularly whips them and their American-born son, Frederick. One day the slaveholder makes Frederick Douglass a proposal: If Douglass works for the slaveholder on Douglass's lawful day of rest,¹²⁴ the slaveholder promises to stop whipping him; but if Douglass does not work on Douglass's lawful day of rest, the slaveholder promises to continue to whip him.¹²⁵ Now most of us would say, I suspect, that the slaveholder's proposal is a threat and that it is coercive—that the slaveholder is using the threat of whippings to coerce Douglass into giving up his lawful day of rest.¹²⁶ Nonetheless, the slaveholder is not conditionally promising to leave Douglass worse off than Douglass otherwise expects to be. Nor is the slaveholder promising to leave Douglass worse off than Douglass actually was, or is, or will be. Yet, if we are right that the slaveholder is “threatening” Douglass, he must be conditionally promising to leave Douglass worse off in his eyes than some stipulated baseline condition—some baseline, presumably, other than simply the condition Douglass prefers to occupy.

What, then, is the baseline we implicitly have in mind when we call the slaveholder's proposal a “threat”? In what respect, by what measure, does the proposal conditionally promise to harm Douglass? Ironically, the proposal promises to harm Douglass by reference to the first baseline we considered and rejected.¹²⁷ It promises to harm Douglass not by leaving Douglass worse off than he otherwise expects to be, but by leaving Douglass worse off than he *ought to be* left for refusing to do the slaveholder's bidding. Thus, the baseline that renders the proposal a threat is not a description of the condition that Douglass actually expects to occupy, but a prescription of the condition he ought to occupy. He ought to occupy a position in which he is not regularly whipped for the sport of

124. Some slave states prohibited slave owners from requiring their slaves to work on the Sabbath. See, e.g., DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA *Slaves, Patrols and Free Persons of Color* § 38 (T. Cobb comp. 1851):

If any person shall on the Lord's day, commonly called Sunday, employ any slave in any work or labor, (work of absolute necessity, and the necessary occasions of the family only excepted,) every person so offending shall forfeit and pay the sum of ten shillings for every slave he, she, or they shall so cause to work or labor.

See also *State v. Williams*, 26 N.C. 400 (1844) (compelling a slave to work on Sunday an offense punishable by pecuniary fine; but in absence of statute, not an indictable offense punishable by imprisonment, since not an offense at common law).

125. I base this hypothetical case on Robert Nozick's much-discussed slavery hypothetical. See Nozick, *supra* note 53, at 450-52.

126. See Zimmerman, *supra* note 95, at 126-27.

127. See *supra* notes 112-15 and accompanying text.

it.¹²⁸ Measured by that baseline, the slaveholder is conditionally promising to leave Douglass decidedly worse off and, hence, is threatening him with a burden rather than offering him a benefit, for purposes of coercion.

The precise content of the prescriptive baseline will vary, of course, from one society to another depending on its standards regarding the worst position in which a proponent ought to leave a recipient for refusing to do the proponent's bidding. A proponent "threatens" for purposes of coercion when he conditionally promises to leave a recipient in a position in which it would be *wrong* by the society's standards for the proponent to leave him for refusing to do the proponent's bidding. That is so whether the proponent is promising to bring about an expected harm that he is always wrong to bring about—e.g., the harm of beating a slave for the sport of it;¹²⁹ whether the proponent is promising to bring about an expected harm that he is not otherwise wrong to bring about, but that he is wrong to bring about in response to the recipient's refusal to do his bidding—e.g., the harm of publishing embarrassing information about the recipient in response to the recipient's refusal to pay blackmail;¹³⁰

128. Most southern states made it a crime for slaveholders physically to mistreat slaves for no reason. See K. STAMPP, *THE PECULIAR INSTITUTION* 219 (1956); see also *State v. Hale*, 9 N.C. 582 (1823) (battery committed on slave without justification an indictable offense). But cf. *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678 (1827) (master could not be punished for cruelty to slave in absence of statute).

129. See *supra* note 126; cf. RESTATEMENT (SECOND) OF CONTRACTS §§ 175(1), 176(1)(a) (1981) (party to contract has defense of "duress" if he can show that his assent to contract was induced by threat of something that is itself a crime or tort); E. FARNSWORTH, *CONTRACTS* 263 (1982) (same).

130. The "blackmail" case illustrates a difference between my prescriptive baseline for defining "threats" and Robert Nozick's prescriptive baseline. Nozick argues that a conditional promise that does not leave a recipient worse off than he otherwise expects to be is a "threat" if and only if it leaves the recipient worse off than the position in which the proponent is otherwise morally obliged to leave him. See Nozick, *supra* note 69, at 449-50. For Nozick, then, a blackmailer whose victim otherwise expects the blackmailer to deliver incriminating information to the police is not making a "threat" by blackmailing him, because the blackmailer is not morally obliged to refrain from delivering the incriminating information to the police. See Nozick, *supra* note 69, at 452. In contrast, I believe that a proposal that does not leave a recipient worse off than he otherwise expects to be is a "threat" if and only if it leaves the recipient worse off than he ought to be left for refusing to do the opponent's bidding. For me, therefore, the blackmailer makes a "threat," because although he otherwise has no legal obligation to withhold information from the police (quite the contrary!), he nevertheless has a legal obligation to refrain from conditioning the transmission of information to the police on the recipient's not paying him blackmail. See Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 998 n.108 (1978) (criticizing Nozick's normative baseline as too restrictive). Interestingly, although Nozick appears to take the position that threats alone are coercive, see Nozick, *supra* note 69, at 447, and although the blackmailer is not making a "threat" by reference to Nozick's two-baseline measure of threats, see *id.*, Nozick says he nevertheless "is strongly tempted to say" that blackmail is coercive. See *id.* at 452. For a persuasive account of why it is wrong for a blackmailer to make a conditional promise to publish embarrassing information even though it is not wrong for him to make an unconditional promise to do so, see Lindgren,

whether the proponent is promising to let the recipient suffer an expected harm that he is always wrong to let the recipient suffer—e.g., the harm of letting a person die whom the proponent has an unconditional duty to save;¹³¹ or whether the proponent is promising to let the recipient suffer an expected harm that he is not otherwise wrong to let the recipient suffer, but that he is wrong to let the recipient suffer in response to the latter's refusal to do his bidding—e.g., the harm of letting a person die whom the proponent has no unconditional duty to save, but whose distress he has a duty not to exploit for his own personal gain.¹³² Such promises are all threats for purposes of coercion, because by hypothesis

Unraveling the Paradox of Blackmail, 84 COLUM. L. REV. 670 (1984); cf. RESTATEMENT (SECOND) OF CONTRACTS §§ 174(1), 176(1)(a) (1981) (party to contract has a defense of "duress" if he can show that assent to the contract was induced by threat of something that, though not itself a crime or tort, is a crime or tort if used as means for obtaining property).

131. Haksar, *supra* note 25, at 69:

[Assume] you meet a stranger in some danger of drowning and propose to him that you will save him if he gives you all his fortune. . . . [Now] if we assume that you have a duty to rescue this stranger, then it would follow that your proposal to rescue him if he gives you his fortune could constitute a coercive threat, for on that assumption, if you carried out your declared unilateral plan not to rescue him, you would be violating your moral duty.

See also Benditt, *supra* note 98, at 382 (proponent who conditionally promises to refrain from relieving recipient of distress that proponent has not brought about but which the proponent has a duty to relieve thereby "threat[ens]" recipient for purposes of coercion); Haksar, *supra* note 25, at 73 ("[I]f a mother tells a child 'you won't get your regular pudding unless you do your homework,' this is not a coercive threat-1 [which, in contrast to a coercive threat-2, violates a moral duty, *id.* at 67-78] unless we assume that she has a duty to give him the pudding, whether or not he does the homework."); Lyons, *supra* note 99, at 436 (proponent's conditional promise to assist recipient if and only if recipient does Z_1 is "coercive" if recipient was entitled to assistance from the proponent without doing Z_1).

132. If you meet a stranger in some danger of drowning and propose to him that you will save him if he gives you all his fortune, you are taking unfair advantage of his vulnerable position. Now assuming that you do not have a moral duty to rescue this man, it follows that your proposal does not constitute a (coercive) threat-1 for if you carried out your declared unilateral plan not to rescue him, you would not be violating your moral duty. Your proposal constitutes what I have called a coercive [threat-2].

Haksar, *supra* note 25, at 69; *id.* at 67-68 (stipulating that "coercive offers . . . can also be called coercive threats-2"); see Benditt, *supra* note 98, at 384 (proponent's conditional promise to assist recipient whom he has no duty to assist is "coercive" if proponent is taking unfair advantage of the recipient's desperate situation); Frankfurt, *supra* note 81, at 71 (conditional promise is "threat" for purposes of coercion if it takes "improper advantage" of recipient's situation). But see Zimmerman, *supra* note 95, at 134-35:

[I]f P throws Q into the water and then offers to save Q . . . only if Q promises to give him his life savings afterwards, the offer is coercive and the promise void. If P just happens upon the scene, sees Q drowning, and offers to rescue him on exactly the same terms, Q's promise is probably just as void, morally speaking anyway, since P's offer is so grossly exploitive. But it does not follow just from this that P has coerced Q.

Notice that in defining "coercion" as "wrongfully exploiting the distress of [another] person," I do not mean to be saying anything about when, if ever, it is wrong to exploit the distress of another. The latter is a substantive moral or legal determination that will differ from one society to another. The point is, rather, that "coercion" simply incorporates by reference whatever moral or legal standards or wrongful exploitation, if any, a society may adopt.

they all promise to leave the recipient worse off than he ought to be left for refusing to do the proponent's bidding.¹³³

Assume, for example, Frederick Douglass accidentally falls into a river and is drowning when the slaveholder's visiting nephew from New York comes by and proposes to save Douglass's life in return for Douglass's working for the nephew on Douglass's lawful day of rest. To the extent that the nephew has either a legal or a moral obligation to save the drowning slave's life, or to the extent he has a moral or legal obligation to save the slave's life once he expresses the willingness to do so in exchange for personal gain, or to the extent he has a moral or legal obligation to refrain from conditioning Douglass's rescue on Douglass's foregoing his day of rest—to that extent, the nephew's proposal is a threat and is coercive, because the nephew is conditionally promising to leave Douglass worse off than he ought to be left for refusing to forego his lawful day of rest. If the nephew has a moral but not a legal obligation to refrain from making the proposal, the proposal is morally, but not legally, a threat. If, on the other hand, the nephew has a legal but not a moral obligation to refrain from making a proposal, the proposal is legally, but not morally, a threat. The proposal is neither morally nor legally a threat if and only if the nephew has neither a legal nor a moral obligation to refrain from conditioning Douglass's rescue on Douglass's foregoing his day of rest; then and only then does the proposal not leave Douglass worse off than he ought to be left for refusing to do the nephew's bidding.

What, then, is the connection between a prescriptive baseline for measuring threats and burdens and the expectation baseline we discussed earlier? Which of the two is the better measure of coercive proposals? The answer, I believe, is that while neither a prescriptive nor an

133. The standard for defining the "wrongfulness" of the proponent's proposal—that is, the standard defining the worst position in which the proponent ought to leave the recipient as a consequence of the recipient's refusal to do the proponent's bidding—will vary depending upon one's *purpose* in determining "wrongfulness." There are at least three very different purposes for determining the wrongfulness of a proponent's proposal and, hence, three different "worst positions" in which a proponent ought to leave a recipient for refusing to do the recipient's bidding: (1) the purpose of holding the proponent X_j responsible to third persons for the harm X imposes on them by doing Z_j , *see, e.g.*, MODEL PENAL CODE § 212.5 (1980) (imposing criminal responsibility on X_j for subjecting X to "criminal coercion"); (2) the purpose of relieving X of responsibility to third persons for the harm he causes them by doing Z_j , *see, e.g.*, W. LAFAVE & A. SCOTT, CRIMINAL LAW 380 (1972) (discussing an accused person's defense of "coercion" to prosecution for harms he imposes on third persons by doing Z_j); (3) the purpose of relieving X of responsibility to X_j for the consequences of doing Z_j , *see, e.g.*, Coffee, *supra* note 107, at 256 (discussing a criminal defendant's right to rescind a "coerced" guilty plea); Farnsworth, *supra* note 102, at 329 (discussing the right of a promisor to rescind a contract entered into under coercion). A proposal that is "coercive" for one purpose may be noncoercive for another. A proposal is coercive in *some* sense if it contains a conditional promise that is "wrongful" for *any* of the three foregoing criminal or civil purposes.

expectation baseline suffices by itself, the two baselines together account for all cases of coercion.¹³⁴ We previously rejected a prescriptive baseline not because it failed to account for any cases of coercion, but because it failed to account for *all* cases of coercion.¹³⁵ Likewise, the expectation baseline accounts for some cases of coercion, but it does not account for all instances in which we speak of "coercion." Neither baseline necessarily encompasses the other. One cannot infer that a promise to leave a person worse off than he otherwise expects to be also promises to leave him worse off than he ought to be left. Nor can one infer that a promise to leave a person worse off than he ought to be left also promises to leave him worse off than he otherwise expects to be. One cannot infer an ought from an is, or an is from an ought.¹³⁶ Together, however, the two definitions appear to encompass all cases of coercion. Coercion consists of conditional promises to leave a person worse off *either* than he otherwise expects to be *or* than he ought to be for refusing to do the proponent's bidding.

We are now in a position to reassess the controversy about whether benefits and offers can be coercive. One side argues that only threats and burdens can be coercive; the other side argues with equal force that offers and benefits can also be coercive. It is no accident that both sides have

134. I am not the first person to suggest multiple baselines for distinguishing threats from offers for purposes of distinguishing coercive proposals from noncoercive ones, nor the first to suggest a two-baseline set consisting of both a descriptive and prescriptive baseline. But I believe I am the first to suggest the particular set of descriptive and prescriptive baselines advanced in this article. Seth Kreimer, for example, suggests a three-baseline measure; his three baselines are all descriptive, however, and are not true baselines, because they do not purport to suffice by themselves to distinguish threats from offers in every instance. See Kreimer, *supra* note 70, at 1358-78. As I do, Daniel Lyons proposes a two-baseline measure consisting of both a descriptive and prescriptive measure, see Lyons, *supra* note 99, at 436, but he proposes a different prescriptive baseline. He believes that a proponent's conditional promise to refrain from relieving a recipient's expected suffering is coercive only if the proponent has a duty to relieve the recipient's suffering, while I believe that the proposal may also be coercive if the proponent is for any reason acting wrongly in conditioning relief on the recipient's doing *Z*₁. See Lyons, *supra* note 73, at 406 (arguing that it is not coercive for employer who would not otherwise hire a woman and otherwise has no duty to hire a woman, to condition hiring her on her submitting to sexual intercourse with him). Robert Nozick also proposes a two-baseline measure, consisting of both a descriptive and prescriptive measure. He differs from me, though, first, in his belief that the "normal" course of events (as opposed to the "expected" course of events) is a descriptive baseline, see *supra* note 119, and, second, in his belief that the appropriate prescriptive baseline is defined by what the proponent has independent duties to do, see *supra* note 130; see also Vandever, *supra* note 98, at 377 (asserting a position that appears to be identical to Nozick's). Harry Frankfurt discusses two baselines for distinguishing "threats" from "offers" that appear very similar to mine, see Frankfurt, *supra* note 81, at 69-71; however, he advocates a very different definition of "coercion." He believes that threats are "coercive" only if they leave a recipient with *no choice* and, thus, relieve him of all moral responsibility. See *id.* at 75. See generally *supra* note 95.

135. See *supra* notes 112-14 and accompanying text.

136. See H. HARE, *THE LANGUAGE OF MORALS* 28-29 (1952).

force, because, ironically, both sides are right and, by the same token, both are wrong. They are both right and both wrong because their dispute is not about coercion, but about language. Their dispute rests not on differing concepts of coercion, or even on differing definitions of threats and offers, but on differing definitions of the baselines by which threats and offers are measured for purposes of coercion.

There is one set of baselines, (A), by which threats and burdens alone are coercive:

(A) either the condition that *X* actually expects to occupy in the absence of *X_I*'s proposal, or the worst condition *X* ought to occupy for refusing to do *X_I*'s bidding.

Measured by baseline (A), a "burden" is anything that leaves *X* worse off than (A)—that is, worse off either than *X* expects to be or than *X* ought to be under the circumstances—and a "benefit" is anything that leaves *X* better off both than he expects to be and than he is entitled to be under the circumstances. It follows that burdens and threats as measured by (A) are coercive, while benefits and offers as measured by (A) are noncoercive. Why does it necessarily follow? Because (A) distinguishes threats from offers by means of the same standard, (A), that, as best we have been able to determine, also distinguishes coercive from noncoercive proposals.

On the other hand, there are at least two other baselines by which benefits and offers may be coercive. Thus, one can stipulate the baseline to be

(B) the condition *X* actually expects to occupy in the absence of *X_I*'s proposal.

Measured by (B), a "burden" is anything that leaves *X* worse off than he otherwise expects to be, and a "benefit" is anything that leaves *X* better off than he otherwise expects to be. It therefore follows that, measured by (B), a proposal that simultaneously promises to leave *X* better off than he otherwise expects to be and, yet, worse off than he ought to be for refusing the proposal, is a "coercive offer": coercive, because it promises to leave *X* worse off than he ought to be for refusing the proposal; an offer, because as measured by (B), it promises to leave *X* better off than he otherwise expects to be.

Alternatively, one can define the baseline to be

(C) the worst condition *X* ought to occupy for refusing to do *X_I*'s bidding.

Measured by (C), a "burden" is anything that leaves *X* worse off than he ought to be under the circumstances; and a benefit is anything that leaves him better off than he is entitled to be. Consequently, a proposal that simultaneously promises to leave *X* better off than he is enti-

tled to be and, yet, worse off than he otherwise expects to be, is a "coercive offer": coercive, because it promises to leave *X* worse off than he otherwise expects to be; an offer, because as measured by (C), it promises to leave him better off than he is entitled to be left for refusing to do the proponent's bidding.

The dispute about whether offers can be coercive thus turns out to rest on a linguistic fallacy. It assumes that all proposals are either threats or offers, but never both. Yet as we have seen, whether a given proposal is a threat or an offer depends entirely on the baseline condition by which it is measured. Coercive proposals may be offers as measured by (B) or (C) and, yet, always remain threats as measured by (A).

We are also in a position now to take the final step in defining coercion. We have thus far defined coercion as consisting of a "constraint" or "promise of a constraint," without specifying any particular kind of constraint. We now know somewhat more about what distinguishes coercive constraints from noncoercive constraints. A coercive constraint is anything that leaves a person worse off either than he otherwise expects to be or than he ought to be for refusing to do the proponent's bidding. Coercion can thus be defined as a

constraint or promise of a constraint, *Y*, that *X*₁ knowingly brings to bear on *X* in order that *X* choose to do something, *Z*₁, that *X* would not otherwise do and that *X* does not wish to be constrained to do—where *X* knows that *X*₁ is bringing or promising to bring *Y* to bear on him for that purpose, where *Y* renders *X*'s doing *Z*₁ more eligible to *X* than *Z*₁ would otherwise be, and where *Y* leaves *X* worse off either than he otherwise expects to be or than he ought to be for refusing to do *X*₁'s bidding.

III. CONCLUSION

We can now return to where we began. We began by posing a series of questions about virtue words and vice words. We then proceeded by way of example to analyze one pair of such words: "freedom" and "coercion." What can we learn about virtue words and vice words from "freedom" and "coercion"? What gives freedom and coercion their protean, open-textured quality? What is it that makes "freedom" sound good and "coercion" sound bad without their being defined as good and bad?

"Freedom" and "coercion" have two features that combine to render them virtue and vice words, respectively: (1) each has a single meaning that consists of one or more variable terms, and (2) each has a descriptive as well as a prescriptive meaning. The first feature, i.e., the feature of having a single meaning that consists of one or more variable terms, gives freedom and coercion their protean, open-ended quality. Take the concept of freedom. Freedom is a single concept, because it

always means one and the same kind of relationship—a relationship in which an agent, or a set of agents, *X*, is unhindered by a constraint, or a set of constraints, *Y*, to pursue a goal, or a set of goals, *Z*, if the agent or agents so choose. Yet the concept of freedom also lends itself to a multitude of diverse conceptions, because its variable terms are relatively unspecified. Freedom obtains whenever *any* agent is unhindered by *any* constraint to pursue *any* goal the agent may choose to pursue. It is no accident, then, that the concept of freedom can encompass so many diverse and even contradictory conceptions of freedom: Freedom is defined that way. Imagine for a moment that the situation were otherwise. Imagine that freedom were defined by reference to a narrower class of agents (say, adult citizens), and a narrower class of constraints (say, legislated constraints), and a narrower range of goals (say, political goals). While the concept of freedom in that event would still encompass more than one conception of freedom, it would encompass many fewer conceptions of freedom than it does now, because its variable terms would be more fully specified. There is an inverse relationship between the degree to which the terms of a concept are specified and the extent to which it is open-textured or “protean”: The more the terms are specified, the less protean the concept; the less the terms are specified, the more protean the concept. Freedom is thus relatively wide-open because its variables are relatively unspecified.¹³⁷

The second feature that freedom and coercion both possess—the feature of both having descriptive as well as prescriptive meanings—explains how they can tend to be normative concepts without being so defined. Freedom and coercion are not defined solely in normative terms, because both possess purely descriptive forms. Thus, we sometimes use “freedom” correctly to refer to a relationship in which *X* is unhindered by *Y* to pursue *Z*, without any regard to whether he also *ought* to be unhindered by *Y* to pursue *Z*; and we sometimes use “coercion” correctly to refer to a constraint that leaves *X* worse off than he otherwise expects to be, without any regard to whether the constraint also leaves *X* worse off than he ought to be left for refusing to do the proponent’s bidding. On the other hand, freedom and coercion cannot be defined solely in descriptive terms, because they both also possess a prescriptive form. Thus, we sometimes use “freedom” correctly to refer to a relationship in which *X* is and ought to be unconstrained by *Y* to pursue *Z*; and we sometimes use “coercion” correctly to refer to a constraint that leaves *X* worse off than he ought to be for refusing to do the proponent’s bidding.

137. See Westen, *On ‘Confusing Ideas’: Reply*, 91 YALE L.J. 1153, 1156 n.7 (1982) (“The less the variable terms of a concept are specified . . . the more the concept is open textured.”).

The difference between freedom and coercion, of course, is that while they both possess a prescriptive form, one form represents a relationship that ought to be, while the other represents a constraint that ought not to be. Accordingly, freedom is sometimes an "is" and sometimes an "is and ought to be," but freedom is never an "is and ought not to be." Coercion is sometimes an "is" and sometimes an "ought not," but never an "ought."

It is the combination of these two features that makes the concepts of freedom and coercion so rhetorically useful—and so rhetorically treacherous. Freedom and coercion are useful because they serve the same purpose in moral discourse that large, all-purpose vessels serve in the field: They can contain and carry a wide diversity of particular contents without altering their nature. Consider the difference in this respect between the words "freedom" and "liberty." The words "freedom" and "liberty" are related; they both refer to a relationship in which an agent *X* is unhindered by a constraint *Y* to do something *Z*. But "liberty" is less versatile and, to that extent, less useful than "freedom," because "liberty" is a subset of all "freedoms." We use "liberty" to refer to a relationship in which a particular class of agents (i.e., purposeful agents) are unhindered by a particular class of constraints (i.e., human constraints) to pursue their goals.¹³⁸ Thus, we say, "The river is free from pollution." We do not say, "The river is liberated from pollution." We talk about "freedom from disease," not about "liberty from disease." It is linguistically useful to have special-purpose words like "liberty" that are tailored to a narrow range of tasks; it is also linguistically useful to have multi-purpose words like "freedom" that can perform many tasks.

The same is true of the relationship between "coercion" and "duress." Coercion and duress are related, because they both involve threats that *X*₁ brings to bear on *X* to do something, *Z*₁, that *X* would not otherwise choose to do. But coercion is broader and, to that extent, more versatile than duress; duress is solely a prescriptive concept encompassing constraints to leave *X* worse off than he ought to be left,¹³⁹ while coercion can encompass either prescriptive or descriptive constraints. Again, it is useful to have special-purpose words like duress that take only a prescriptive form. But it also appears useful to have multipurpose words like freedom and coercion that can express both descriptive and

138. See L. CROCKER, *supra* note 35, at 1 ("[L]iberty [is] the absence of human interference with [an] individual's actions."); A. WHITE, *supra* note 13, at 135 (the word "liberty," unlike the word "freedom," is confined to constraints on animate agents); cf. McCloskey, *supra* note 35, at 495 ("However, concern for liberty as self-determination seems to call for more than elimination of man-made obstacles.").

139. See *supra* note 14.

prescriptive relationships.¹⁴⁰

Unfortunately, the capacity of freedom and coercion to express descriptive as well as prescriptive relationships, though linguistically useful, is also rhetorically treacherous. It causes us to blend the two kinds of relationships unthinkingly. Instead of recognizing that prescriptive freedoms are good because they are defined to be good,¹⁴¹ and that descriptive freedoms themselves are neither good nor bad,¹⁴² we carelessly come to believe that all freedoms are presumptively good.¹⁴³ Instead of remembering that prescriptive coercion is bad because it is defined to be bad,¹⁴⁴ and that descriptive coercion itself is neither good nor bad,¹⁴⁵ we carelessly assume that all coercion is presumptively bad.¹⁴⁶ Rather than demand moral argument in favor of particular freedoms, and moral argument against particular kinds of coercion, we come to believe that freedom is itself something to favor and coercion itself something to oppose.

I do not mean to say that no freedoms are presumptively good, or that no coercions are presumptively bad. I mean, rather, that there is nothing in their being "freedoms" and "coercions" that makes them presumptively good or bad.¹⁴⁷ A person who advocates a particular freedom should give reasons for believing that a particular *X* ought to be unhindered by a particular *Y* to pursue a particular *Z*. Calling it free-

140. For an example of a term in addition to "freedom" and "coercion" that has both a descriptive and prescriptive meaning, see Joel Feinberg's discussion of the word "harm" in J. FEINBERG, *HARM TO OTHERS* 33-35 (1984).

141. Whenever the word "freedom" functions in a laudatory way, referring to those and only those institutions which the speaker holds ought to be established, it follows that freedom, whatever it may be, is good and that it ought to prevail. The statement: "freedom is intrinsically valuable" becomes then analytic, and anybody's value-commitment to liberty will be tautological and vacuous.

F. OPPENHEIM, *DIMENSIONS*, *supra* note 36, at 211.

142. See *supra* note 118 and authorities cited therein.

143. For the proposition that freedoms are presumptively good, see J. FEINBERG, *supra* note 140, at 9.

144. See C. FRIED, *supra* note 14, at 97:

These conundrums should be sufficient to show that we cannot escape using some normative criterion to distinguish offers from threats. And that is a pity since the purpose of the inquiry is itself normative: to identify coercion and thus to determine which promises (and contracts) are not morally (or legally) binding.

145. See Cook, *supra* note 22, at 126 ("Coercion of the human will is intrinsically neither good nor evil.").

146. See Held, *Coercion*, *supra* note 79, at 61:

What has not yet been discussed but can I think rather easily be agreed to, is that although coercion is not *always* wrong (quite obviously: one coerces the small child not to run across the highway, or the murderer to drop his weapon), there is a presumption against it.

See also Wolff, *Is Coercion Ethically Neutral?*, in NOMOS XIV: COERCION, *supra* note 3, at 145-46.

147. See Husak, *The Presumption of Freedom*, 17 NOUS 345, 356-61 (1983) (criticizing the so-called "presumption of freedom"); Ryan, *supra* note 59, at 494-95 (To the extent that "coercion" is a neutral concept, "it is something of a mystery why there should be a *presumption* against coercion.") (emphasis in original).

dom is either a neutral description or a question-begging conclusion; it is not, however, a reason for believing *X* ought to be unrestrained by *Y* to pursue *Z*. Likewise, a person who opposes a particular coercion should give reasons for believing that a particular proposal leaves *X* worse off than *X* ought to be left for refusing to do *X*₁'s bidding. Calling the proposal coercive is either a neutral description or a question-begging conclusion, but it is not a reason for believing that *X*₁ proposes to leave *X* worse off than *X* ought to be left for refusing to do *X*₁'s bidding. The danger with words like freedom and coercion is that by mixing descriptions with prescriptions, they tend to persuade not through the giving of reasons but through tricks of language. They possess rhetorical force not by facilitating argument, but by bypassing it.¹⁴⁸ They are words that lay claim to virtues they do not deserve, and to vices they do not possess.

148. Oppenheim, *Freedom*, *supra* note 20, at 557:

[Some] writers have been inclined to define [freedom] to cover those and only those relationships of *both* social freedom and unfreedom that they happen to value and wish to commend to others. Such persuasive definitions of freedom are useful not as tools of the empirical social sciences but as rhetorical devices; they enable the writer to express his normative views in [their] assertive form.