Credible Coercion

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The ideal of individual freedom and autonomy requires that society provide relief against coercion. In the law, this requirement is often translated into rules that operate "post-coercion" to undo the legal consequences of acts and promises extracted under duress. This Article argues that these ex post antiduress measures, rather than helping the coerced party, might in fact hurt her. When coercion is credible—when a credible threat to inflict an even worse outcome underlies the surrender of the coerced party—ex post relief will only induce the strong party to execute the threatened outcome ex ante, without offering the choice to surrender, depriving the coerced party of the opportunity to escape the worse outcome. Antiduress relief can be helpful to the coerced party only when the threat that led to her surrender was not credible, or when the making of threats can be deterred in the first place. The credibility methodology developed in this Article is shown to be a prerequisite (or an important complement) to any normative theory of coercion. The Article explores the implications of credible coercion analysis for existing philosophical conceptions of coercion, and applies its lessons in different legal contexts, ranging from contractual duress and unconscionability to plea bargains, constitutional conditions, and bankruptcy.

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I. Introduction

To achieve the ideal of individual freedom and autonomy, society must provide relief against coercion. This Article argues that the legal measures against wrongful coercion are more limited than has previously been thought. It provides a skeptical view: When individuals are coerced into taking actions or making promises, some of the traditional antiduress measures may not do much to redress their misfortune. In fact, it might often be better for these coerced individuals if such antiduress measures were not applied at all.

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

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

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

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

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

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

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

The concept of credible coercion runs against deeply rooted intuitions concerning the power of the law to alleviate the effects of duress. In a variety of contexts, most commonly in contractual settings, legal policy is founded on the premise that ex post antiduress measures, such as invalidation of coerced promises and acts, can help the threatened party.[2] The premise is all the more prevalent with respect to agreements that implicate fundamental rights, such as plea bargains or agreements to surrender a constitutional right.[3] The thesis developed in this Article provides reason to be skeptical of such antiduress rules. It suggests that whenever the act or promise was induced by credible coercion, antiduress measures will actually hurt the threatened party.

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

2. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").

3. *See infra* subparts IV(D) & (E).

between noncoercive proposals which are referred to as "offers" and coercive proposals which are referred to as "threats."[4]

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

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

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

II. The Concept of Credible Coercion

A. Credible Threats

The genesis of any isolated act of coercion is usually a threat. The coerced party succumbs to a particular painful course of action—promise, act, omission—because it will help the party avoid an even more adverse

4. *See, e.g.*, Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE AND METHOD 440, 458 (Sidney Morgenbesser et al. eds., 1969) (distinguishing between coercive threats and noncoercive offers); *see also* CHARLES FRIED, CONTRACT AS PROMISE 95–99 (1981) (discussing the threat-offer distinction); ALAN WERTHEIMER, COERCION 204–06 (1987) (same); Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 570–89 (same).

consequence, which has been threatened. Deeming no other way to avert the threatened consequence, the coerced party surrenders and chooses that which the threatening party demanded.[5]

Fearing that the threat would be carried out, the threatened party takes an action that she would otherwise prefer to avoid. Focusing on the perspective of the threatened party, most accounts of coercion look at the voluntariness of the action. According to the prevalent inquiry, it is important to know what other alternatives were available to the surrendering party, why she found herself unable to withstand the threat, and whether she readily committed the requested act or had done so under "protest." The freedom of the surrendering party's will is the key.[6]

While most philosophical and legal characterizations of coercion follow this line of inquiry and focus on the situation of the threatened party, this Article proposes a different methodology. In determining whether relief should be granted to the coerced party, the focus should be on the motivation of the *threatening party*.[7] The single decisive factor in determining whether remedies should be granted is whether the threat was credible—was the threatening party ready and willing to carry out the threat in the event that the threatened party did not acquiesce, or was he merely bluffing?

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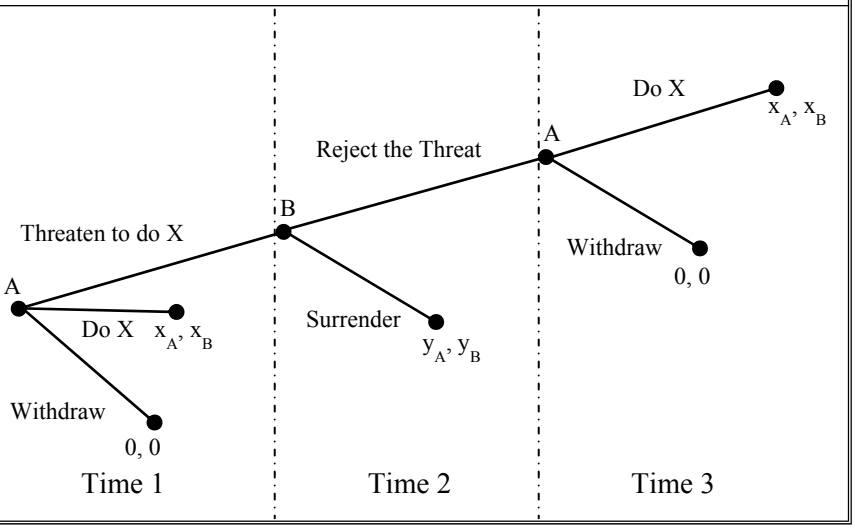
5. The term "threat" is used here in a looser sense than the one employed with greater rigor in much of the coercion literature. In this Article, a threat is a factual characterization of a statement that has the structure, "commit a requested act or else some adverse outcome will be imposed." In the literature, by contrast, such statements are usually labeled "proposals," and the term "threats" is a normative characterization of a subset of proposals that are concluded to be coercive. Proposals that are regarded as noncoercive are usually labeled "offers." Put differently, in this Article threats are the starting point—the things that need to be analyzed to determine whether they are coercive; whereas in the literature, threats are often the conclusion of the analysis. *See, e.g.*, FRIED, *supra* note 4, at 98–99 ("[A] promise procured by a threat to do wrong to the promisor, a threat to violate his rights, is without moral force. It is such threats that constitute the legal category of duress."); WERTHEIMER, *supra* note 4, at 204 ("When are proposals coercive? The intuitive answer is that threats are coercive whereas offers are not . . . ."); Nozick, *supra* note 4, at 458 ("I have claimed that normally a person is not coerced into performing an action if he performs it because someone has offered him something to do it, though normally he is coerced into performing an action if he does so because of a threat that has been made against his not doing so."); Westen, *supra* note 4, at 573 (defining coercion as "the structuring of an agent's choices by means of threats and burdens").

6. The centrality of this freedom-of-will test in determining the existence of coercion is a recognized feature of the doctrine of duress in contract law. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."); Robert A. Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 880 (1979) ("[T]he issue of free assent is at the core . . . .").

7. This is not to say that the philosophical literature has ignored the perspective of the threatening party. For example, Mitchell Berman explicitly distinguishes coercion claims focusing on the responsibility, or lack thereof, of the threatened party and coercion claims focusing on the blameworthiness of the threatening party. *See* Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 48 (2002). The novelty of our approach is in (1) highlighting the credibility, rather than the wrongfulness, of the threatening party's behavior and (2) demonstrating that the legal responsibility of the threatened party should depend on the credibility of the threatening party's threat.

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

FIGURE I



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

To illustrate, consider the following examples.

Example 1: *Contract Modification*. *A*, who has contracted to sell goods to *B*, makes an improper threat to refuse to deliver the goods to *B* unless *B* modifies the contract to increase the price. *B* attempts to buy substitute goods elsewhere but is unable to do so. Being in urgent need of the goods, he makes the modification.[8]

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

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

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

8. RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b, illus. 5 (1981) (describing a common scenario dealt with by the doctrines of duress and modification).

Time 1 and get x_A, than make a threat that can only induce a revocable surrender or a payoff of, at most, 0.

Example 2: *The Usury Case*.[9] In a time of war and instability, *A*, a rich individual, offers to loan money to *B*, a poor individual, who cannot secure funds elsewhere. For the immediate loan of $25, *B* promises to pay $2,000 at a later period, after the end of the war.

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

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

One major credibility-affecting factor is the legal repercussions of executing the threat. In many contexts, the threatened outcome will violate a legal norm and will, thus, entail a legal sanction. If *A* threatens to kill *B* unless *B* gives *A* all of his money, then the execution of this threat will entail a severe criminal sanction. In Example 1, where *A* threatens to breach his contract with *B* unless *B* concedes to a price modification, the execution of the threat will invoke contractual remedies for breach of the initial contract. Generally speaking, when a substantial sanction can be expected to follow the execution of a threat, the credibility of this threat will be reduced.

Importantly, credibility is determined by the effective sanction that the threatening party expects to bear, not by some theoretical legal sanction that the threatened party is hypothetically entitled to invoke. Thus, in the contract-modification example, the seller's threat would more likely be credible if an economic downturn had rendered the seller incapable of paying damages. This judgment-proof problem is a key factor affecting the credibility of a threat to breach a contract as well as the credibility of any other threat to inflict an illegal outcome. If the principal means of deterring threats is a monetary fine imposed for the execution of the threat, the

9. This example is based on *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. Civ. App.—El Paso 1949, no writ).

capacity of an insolvent threatening party to pay this fine will determine the credibility of the threat. Beyond insolvency, the power of legal sanctions to reduce credibility is weakened by a host of other factors. First, there is normally a significant delay between the benefit derived from the execution of the threat and the legal sanction, a delay caused by back-logged courts. Second, even if legal sanctions take the form of delay-free, out-of-court settlements, as is often the case, settlement amounts may be lower than the expected judgment at trial, further qualifying the credibility-reducing power of the legal sanction.[10]

While formal legal sanctions are of central importance, they are by no means the only, and in some cases not even the most important, credibility-affecting factor. Social norms and extra legal sanctions also affect the payoff attached to an executed threat. For instance, if *A* threatens to breach a contract unless *B* agrees to a price modification, *A* might be subject to nonlegal sanctions in the form of trade reduction by third parties and reputational harm, which may, even in the absence of legal liability, render the threat noncredible.[11]

Reputational concerns may also work to bolster a threat's credibility. A threat that would be costly to execute (due to, say, high legal sanctions) or that would induce an act generating a relatively minor benefit to the threatening party, may nevertheless be credible once repeat-play dynamics and reputation-building concerns are taken into account. Consider a party, *A*, who engages in repeat contractual interactions. *A* may benefit from establishing a reputation for carrying out his threats—a reputation that would allow *A* to intimidate future negotiation counterparts and to extract better terms in each contractual transaction. When *A* threatens to walk away from a profitable deal unless *B* concedes a price which makes the deal even more profitable for *A*, the threat might seem noncredible. After all, carrying out such a threat would mean forgoing the profit from the deal. But, if walking away from the deal is part of a reputation-building (or a reputation-maintenance) strategy, vis-à-vis *B* or third parties, which ensures that future bargainers will view *A*'s threat as credible, then walking away can suddenly become a profit-increasing strategy. The immediate loss in forgoing the present transaction must now be balanced against the expected stream of

10. For a detailed analysis of these factors, see Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, 33 J. LEGAL STUD. 391, 419–22 (2004).

11. Reputation effects may be sensitive to the specific circumstances leading to the breach of contract. If, for example, *A*'s request for modification of the original contract was based on an unexpected cost increase, which according to industry norms justifies a modification of the initial agreement, then *A* may be able to breach without suffering any reputational penalty. For a thorough account of reputation sanctions, see Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1746–88 (2001).

improved terms that *A*, equipped with a more intimidating reputation, would be able to secure. Often the latter benefit will dominate the former cost, making the threat to walk away credible.[12]

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

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

Nonpecuniary costs and benefits may also play an important role in determining the benchmark payoff. In the contract modification example, if the seller had no way of anticipating or preventing the cost increase, and if, absent a modification, this cost increase would leave the seller with a loss while the buyer makes a nice profit, the seller may deem the deal to be unfair. Performance of the unmodified contract may thus impose on the seller not only pecuniary costs but also nonpecuniary costs arising from the experience of being treated unfairly. Consequently, the seller may be willing

12. In particular, the long-term reputation benefit will dominate the short-term cost when the threatening party's discount rate is low, that is, if he is patient enough to sacrifice some immediate profit for future profits. *See generally* DREW FUDENBERG & JEAN TIROLE, GAME THEORY 367–95 (1991).

to carry out a threat, even in the presence of significant legal sanctions, to avoid the emotional burden of dealing under unfair terms. Such nonpecuniary costs may well tip the credibility scale from noncredible to credible.[13]

B. Coercion and Credibility

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

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

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

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

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13. *See* Oren Bar-Gill & Omri Ben-Shahar, *Threatening an "Irrational" Breach of Contract*, 11 SUP. CT. ECON. REV. 143 (2004) (supplementing the standard economic account of the breach-or-perform decision with an analysis of how "fairness" concerns affect threat credibility). For a general discussion of the effect of fairness concerns on negotiation strategies, see, for example, Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, *in* BARRIERS TO CONFLICT RESOLUTION 86 (Kenneth J. Arrow et al. eds., 1995); Matthew Rabin, *Incorporating Fairness Into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993).

The preceding discussion assumes complete information, at least with respect to the credibility dimension. Namely, it assumes that *B* can distinguish a credible threat from a noncredible bluff. While this assumption will likely hold true in some cases, there are other cases when it is not apparent whether or not the threat is credible. Even in these cases, though, the benchmark insight discussed above holds true: Only a threat that is *perceived* to be credible has the power to coerce. *B* will surrender to a threat only if *B* perceives a great enough risk that the threat is credible. In this asymmetric information environment, however, a bluff can be mistaken for a credible threat and can induce surrender. It is only in these situations—noncredible threats that were perceived to be credible and succeeded to coerce—that the law can help the coerced party by stepping in and nullifying the consequences of the coercion. We discuss this fundamental claim in the next section.

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

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

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

Consider Example 2, the usury case, under the assumption that *A* credibly threatens not to provide the $25 loan unless *B* promises to repay $2,000 after the war. Since *A*'s threat is credible, and *B* is in dire need of the $25 loan, *B* will make the promise. It is conventionally suggested that the

law should deny enforcement of *B*'s coerced promise, and thus undo the adverse consequences of *A*'s coercive conduct.[14] This relief policy would often take the form of reducing *B*'s obligation below the coercive $2,000.[15] However, when *A*'s threat is credible, such an ex post remedy would not only fail to help the coerced party, *B*, but it would, in fact, hurt her. The credibility of *A*'s threat implies that, absent a guarantee of receiving $2,000 after the war, *A* would not provide the loan. But, if the law is not expected to enforce *B*'s promise to repay $2,000, *B* cannot effectively guarantee the $2,000 repayment. The result is that *A* would not provide the loan at all. *B* would surely have preferred a less expensive loan, but when *A*'s threat is credible, *A* will not provide a cheaper loan. Given this constraint, *B* may prefer the expensive loan over no loan at all. The law's refusal to enforce the expensive, coercive loan would not provide *B* with a less expensive loan; it would leave *B* with no loan at all.

To further illustrate the harm of the ex post antiduress remedy, consider the following hypothetical suggested by Robert Nozick.[16]

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

Surely, a slave's existence is one of continuous coercion, and, in discussing his wellbeing and freedom of choice, it would be odd to isolate a single instance of coercion. Still, isolating this particular event can help us distinguish the ways in which legal policy can, and the ways in which it cannot, help the coerced party.[17] Put differently, the question raised by this hypothetical is whether the choice accorded to *B* in and of itself deepened his duress. Our argument is the following: If *A*'s threat to continue beating *B* unless *B* performs *Y* is credible, *B*'s interest (evidenced by his choice to perform *Y*) is to avoid the beating, even at the cost of performing the requested act. If *B* can invoke an anticoercion relief policy to undo his acquiescence, nullify his act *Y*, or get any form of remedy for it, he would be deprived of the opportunity to escape the beating. That is, *B* does *not* have a third alternative, the "ideal" one, of avoiding both the beating and the obligation to commit *Y*. If *B* were to have the law on his side, granting him relief from his coerced acquiescence, *A* would anticipate that *B* would be

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14. *See, e.g.*, FRIED, *supra* note 4, at 109–11 (criticizing the ruling in *Batsakis v. Demotsis* as unjustly enforcing a "promise[] extracted under duress").

15. Indeed, the trial court in *Bataskis v. Demotsis* reduced the promisor's obligation from $2,000 to $750. 226 S.W.2d 673, 674 (Tex. Civ. App.—El Paso 1949). On appeal, however, the $2,000 obligation was reinstated, not on the basis of credibility analysis, but on the basis of the court's reluctance to scrutinize the adequacy of consideration. *Id.* at 675.

16. Nozick, *supra* note 4, at 450.

17. We understand Nozick's interest in the slave example to be similarly sterile, using this extreme scenario to flesh out defining characteristics of coercion. *See* Nozick, *supra* note 4, at 450.

likely to seek this relief to undo his act *Y* and *A* would not offer the deal in the first place. Saying that *A* makes a credible threat means that if *A* expects *B* to undo his acquiescence, *A* would simply proceed to apply the beating. *B*'s interest is not served by allowing him to invoke such ex post relief measures.[18]

Another way to restate this argument is to note the tension between *B*'s ex post and ex ante interest. Ex post, after performing *Y* and inducing *A* to refrain from beating him—that is, after getting his side of the "bargain"—*B* prefers to undo the act *Y*. He can now enjoy the best of both worlds: No beating, no *Y*. Ex ante, however, his situation is not as bright, because *A* still has control over the set of choices available to *B*. Thus, ex ante *B* does not have the ability to enjoy both worlds: He must choose one of them or else—if *A*'s threat is credible—end up with "beating" being chosen for him. The only way *B* can avoid this result is by making the surrendered act nonrelievable.

The reason that the ex post anticoercion measures are futile is that they do not address the source of the slave's problem. It is not the threat "*Y*-in-exchange-for-no-beating" that manifests, or is responsible for the coercion; rather, it is the initial unequal allocation of power, the relative starting points of the "negotiation," that is coercive. The expectation of daily beatings is the manifestation of coercion, not the proposal of an arm's length "bargain." A social policy of undoing the deal, which does not purport to address the unequal starting points that gave rise to this deal in the first place, is futile in helping the slave.

D. Noncredible Threats

When coercion arises from a credible threat, an ex post remedy is not much help to the threatened party. However, coercion may also arise from a threat that is not credible—a bluff—which is mistakenly perceived to be credible by the threatened party. In Example 3, the traveler who surrenders to the highwayman at gunpoint may doubt the credibility of the threat to pull the trigger, but as long as the traveler perceives at least some chance that the threat is credible—that it will be carried out if he rejects it—he might be coerced to turn over his money.

In these situations, an ex post remedy can help the coerced party. If a court can confirm that the threat was not credible, it can undo the consequences of the coercion and provide a meaningful remedy. Unlike credible threats, in the case of bluffs the anticipation of this ex post intervention would not induce the threatening party to carry out his threat ex ante, but rather to refrain from making it in the first place. He would realize

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18. This is not an argument that society cannot help coerced parties such as slaves. It is merely an argument that ex post relief of the coerced act would not be of much help. *See infra* subpart II(F) for the discussion of other policies that could be effective in combating coercion.

that he cannot secure any advantage by coercion and would, thus, prefer not to make the threat. Stated differently, if noncredibility is known to be verifiable ex post, the threatened party's imperfect information at the time of the threat is immaterial from an incentive point of view. Under a regime that undoes the consequences of noncredible coercion, the threatened party effectively postpones her decision whether to surrender until the court makes the accurate observation of whether the threat was credible.

Hence, when threats are noncredible, courts can effectively undo the consequences of coercion. However, it should also be clear that the more apt courts are in evaluating credibility, the greater the incidence of credible coercion that they will face and that they will correctly decide not to nullify. The reason for this counterintuitive claim is the following: If courts are expected to accurately verify the credibility of threats and nullify the consequences of noncredible threats, parties will not bother to make threats that are not credible. Thus, those cases in which surrender occurs, and that eventually reach courts, are much more likely to involve credible threats.

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

Example 5: *Penny Black*. One stamp collector offers another a "Penny Black" at a steep price, knowing that the buyer needs just this stamp to complete a set.[19]

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

19. FRIED, *supra* note 4, at 95.

which intervention, in the form of ex post relief, is not likely to advance the underlying normative principle. The credibility inquiry supplements—or, more precisely, it is preliminary to—the substantive weighing of the consequences; it does not substitute for it. It is a necessary but not sufficient component of legal policy.

E. Credibility-Enhancing Investments

We have thus far assumed that a threat is either credible or noncredible, as an exogenous matter. In many cases this assumption is perfectly valid. A party may inadvertently arrive at a situation where he is in a position to make a credible threat. Consider again Example 1, in which a supplier threatens to breach a supply contract unless the buyer acquiesces to a price modification.[20] Contract law often considers this price modification to be coercive and unenforceable. Specifically, after describing this example, the Restatement of Contracts instructs that since "B has no reasonable alternative, A's threat amounts to duress, and the modification is voidable by B."[21] But consider *A*'s position. In many situations, *A*'s "improper threat to refuse to deliver"[22] is associated with a cost increase and other adverse market shifts which *A* suffered after the original contract was signed. *A*, who at this stage might be on the brink of bankruptcy, could be making a credible threat to breach. If he did not anticipate the market shift and if he had no influence on its occurrence, his threat is "exogenously credible." Its credibility is exogenous—independent of the legal rules of duress—because it is a result of factors that the threatening party had no hand in creating, nor an incentive to create. The threat to breach would remain credible even if he knew for certain that the resulting modification is unenforceable.

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

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

Blackmail is a typical act of coercion. It might also be an act of credible coercion: now that *A* possesses the harmful information, it is costless for him to publish it, and he might benefit from doing so by gaining an intimidating reputation, even if he has already failed to extract hush money. Yet the credibility of *A*'s threat is a result of his decision to acquire the harmful information in the first place. If the law were to invalidate the deal and force *A* to return the money paid to him, parties like *A* might find it less profitable

20. This example was based on RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b, illus. 5 (1981), which describes a common scenario dealt with by the doctrines of duress and modification.

21. *Id.*

22. *Id.*

to invest in acquiring the harmful information ex ante. When the information was acquired deliberately, credibility is endogenous—it is a result of factors that the threatening party created—and legal measures for ex post relief can serve *B*'s interest.[23] Stated differently, if the acquisition of information is deliberate, *A*'s enterprise of gathering libelous information for the purpose of blackmail can be deterred if the law were to deprive *A* of the gains from this information.

In the case of exogenous credibility, given the existence of a credible threat, we have shown that in order to serve the wellbeing of the coerced party the law should enforce the coerced promise and refuse to otherwise nullify coerced acts. This prescription must now be qualified. When the threatening party can take initial actions and investments that are intended to enhance the credibility of his subsequent threats—such that would enable him to effectively extract a coerced act or promise—the law may be able to deter such actions by nullifying the coerced act or promise. That is, if courts can differentiate their treatment of coerced acts, and selectively validate only those that are a result of exogenous, inadvertent credibility (like in the contract-modification case), while invalidating coerced acts that are extracted by "manufactured" credibility, the incentives to invest in credibility-enhancing actions will diminish. Credibility that is endogenous—that may or may not emerge depending on the legal policy towards the gains that it achieves—can effectively be uprooted by standard ex post anticoercion remedies.[24]

In fact, many cases that at first appear to exhibit exogenous credibility may in fact arise from deliberate acts or choices without which there would have been no credible threat. These are cases in which the threatening party deliberately assumes a certain role or places himself in a certain position that later allows for the generation of credible threats. The highwayman case, Example 3, is such a case. Whether the highwayman's threat to kill the traveler is credible may seem to depend merely on the surrounding circumstances, such as the failing law enforcement. But, from a broader perspective, it is the actor's deliberate choice to become a highwayman who holds up travelers that puts him in a position to take advantage of these circumstances and make credible threats. Likewise, in Example 1, the supplier's threat to breach, although coming in the aftermath of an exogenous cost increase, is credible also because the supplier initially agreed to charge a price only slightly above his anticipated cost. If the supplier knows that a

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23. Fried similarly argues against enforcement of *B*'s coerced promise on the basis of the endogenous credibility perspective. FRIED, *supra* note 4, at 102. "In condemning blackmail we exclude the use of property (including property in one's effort [i.e. the effort of gathering the harmful information]) for the general purpose of harming others; we exclude investments in the *harmful* potential of things, effort, or talent." *Id.*

24. *Cf.* Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 927 (7th Cir. 1983) ("Such promises are made unenforceable in order to discourage threats by making them less profitable.").

price modification would not be enforceable, he would initially charge a higher price, reducing the chance that any future cost increase would give him a credible threat to breach.

Finally, consider the case in which the supplier's cost increase is not exogenous (as in the case of a market shift), but rather a result of a business decision he made. For example, the cost increase may be due to higher than expected input costs because the supplier decided to produce the input in-house, rather than use subcontractors. After the realization of this cost increase, the supplier indeed has a credible threat to breach and may extract a modification. But if the modification were unenforceable, the supplier would realize, at the time of selecting his inputs, that he would not be able to roll the costs of higher inputs onto the buyer, and would instead choose the cheaper inputs. In terms of credibility, while the supplier's threat given the choice of inputs may be credible, his hypothetical threat evaluated at the time of input choice, is not. Namely, if the supplier knew that the modification would be unenforceable, he would not incur the high cost and would perform the original contract.

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

F. Credibility-Reducing Policies

The credibility criterion might prescribe policies that are in sharp contrast to those derived from other normative criteria. In fact, Part III of the Article will be devoted to exploring this possible tension between the credibility criterion and other normative criteria and to defending the proposed primacy of the credibility criterion. Thus, our analysis would reach a junction in which coercion could be both credible and immoral. It is there that our skeptical argument is most relevant, suggesting that the intuitive inclination of judges to "do something" to combat coercion may lead to counterproductive measures.

This argument does not mean, however, that society should encourage the coercive act, or even accept it as a moral necessity. True, given the credibility of the threat, the coerced party is better off with a choice to surrender, and this choice ought to be enforceable for it to exist. But to the extent that a negative moral judgment concerning the threat as a coercive act remains, society can utilize other institutions—criminal sanctions, nonlegal sanctions, or remedies for breach—to directly influence the credibility of the threat and, thus, its incidence. When the carrying out of a threat ("your

money or your life") is subject to criminal sanctions, its credibility diminishes. If other threats ("pay me more or I will breach the agreement") are subject to summarily enforced fully-compensatory remedies or to heavy nonlegal sanctions by future traders, their credibility similarly diminishes.

Our analysis suggests that coercion can be prevented, and the welfare of the threatened party improved, if society were to utilize credibility-reducing policies. Policies that reduce the payoff to the threatening party if he chooses to carry out the threat are a primary means of reducing the credibility of the threat. Note, however, that these policies are different than ones aimed at reducing the payoff to the threatening party in the event that the threat was successful. Such postsurrender penalties do not affect the credibility of the threat and, as argued above, would only induce parties with credible threats to carry out their intentions without bothering to make the threat. Credibility-diminishing policies should target the threatening party's hypothetical payoffs in the event that the threat fails, thus affecting his choice between carrying out his threat versus retracting it.

To combat the highwayman problem in Example 3, the optimal policy is not to allow victims to sue for restitution of their robbed possessions, but rather to increase the likelihood of apprehending murderers and bringing them to justice as well as to increase the sanction for murder. If a highwayman expects to suffer severe criminal penalties, the threat to shoot, that might otherwise be credible, would become noncredible and the highwayman will be deterred from making it in the first place. If, instead, the highwayman expects to be liable in restitution, he will only be induced to carry out his credible threat.

In contract law, the credibility of the coercive threat can be reduced by various policies. A common type of threat, captured by Example 1, is to breach an already existing contract unless the threatened party agrees to modify the terms. The more severe the remedies that the threatening party expects to bear in case of breach, the less credible his threat. It should be recognized, however, that a high damage measure, while clearly a useful device for diminishing credibility, might not fully deter threats to breach. If the aggrieved party cannot readily collect such damages, due to litigation and collection costs or to insolvency of the threatening party, remedies for breach would not deter the threatening party from carrying out his threat and the credibility of his threat would remain undiminished.[25]

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25. The contract-modification example suggests another type of anticoercion policy: Reducing the vulnerability of potential threat victims. Increasing the damages for breach of contract not only reduces the likelihood of a credible threat to breach, but also reduces the likelihood that the threatened party would succumb to the threat, even if the threat is credible. While in this example, increasing the damages for breach of contract reduces both credibility and vulnerability, in principle, vulnerability-reducing policies can be pursued independently of credibility-reducing policies. For instance, increasing the accuracy of the trial system may reduce the vulnerability of

Credibility-reducing policies are not always available and are rarely perfect. Whenever coercion arises from fundamental inequality between the parties' starting points (as in the slave example and, perhaps, in the usury example), credibility-reducing measures involve a much greater social effort than merely sanctioning the threatening party. If a lender monopolizes the capital market and extracts usurious interest rates, sanctioning him for setting such rates or for failing to make cheaper credit available might not help potential borrowers much. Such policies do nothing to resolve the underlying market structure that gave rise to the unequal bargaining positions and gave opportunity for one party to make credible threats. Short of price regulation or complete scrutiny of the content of allocations, there is not much that legal policy can do. As Professor Leff recognized, while we might have the urge to leave it for the parties to set their terms but impose fairness-oriented constraints, "*we cannot have both at the same time.*"[26] So while the main lesson of credibility analysis is in marking the limits of social intervention, the agenda it sets is constructive. It channels society's urge to help coerced parties towards more effective efforts.

III. Credible Coercion Versus Other Principles of Coercion

A. The "Inevitability" of the Credibility Criterion

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

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

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innocent defendants to plea-inducing threats without reducing the credibility of the prosecutor's threat to proceed to trial. *See infra* subpart IV(D) for a more detailed discussion of plea bargains.

26. Arthur Allen Leff, *Thomist Unconscionability*, 4 CAN. BUS. L.J. 424, 428 (1979).

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

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

B. The Credibility Principle Versus the "Involuntariness" Criterion

Most legal and normative accounts of coercion focus on the voluntariness of the act or promise that was undertaken in the shadow of a threat. If the act or promise was voluntary—if other, reasonable courses of action were open to the threatened party—there is no coercion. Conversely, if the act or promise was involuntary, then it was coerced, leading to the conclusion that the consequences—moral and legal—of the coerced act or promise should be nullified.[27]

We argue that, for the purpose of granting relief to the party under pressure, voluntariness analysis is incomplete if it is not informed by credibility analysis. Technically, the threatened party's choice is always voluntary. Even the traveler who surrenders all his money to the gun-pointing highwayman is acting voluntarily in choosing the better course of action.[28] Involuntariness, then, must stand for a normative judgment concerning the restrictions put on the choice set that the party faces. If all choices are bad, so goes the involuntariness test, choosing one over another

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27. *See supra* note 6 and accompanying text.

28. As Charles Fried puts it: "If a promisor knows what he is doing, if he fully appreciates the alternatives and chooses among them, how can it ever be correct to say that his was not a free choice?" FRIED, *supra* note 4, at 94; *see also* John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 239 (1942) ("[F]reedom is simply the opportunity to . . . choose one of two courses, neither of which is entirely satisfactory"); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 267 (1947) (recognizing that "the more unpleasant the alternative, the more real the consent to a course which would avoid it"); Robert Lee Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603, 616–17 (1943) (noting that "unlawful duress may be found even when the victim has made a reasonable and deliberate choice to avoid a threat"); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 477–78 (1980) (stating that it is possible to characterize acts prompted by physical threats as voluntary, in that "after considering the alternatives, [the actor has] concluded that [his] self-interest is best served" by performing the act demanded by the threatening party).

does not represent free, voluntary action. Some other alternative, a better one, should have been made available to the coerced party for the choice to be voluntary in a meaningful, rights-oriented sense. But while an "other alternative" might ideally exist, it is the credibility test that determines whether it is feasible—whether it pragmatically exists. If the threat is credible, then it rules out, as a descriptive matter, the threatened party's more favorable choices, leaving her with a choice between only two alternatives: to undertake the demanded act or promise, or to suffer the consequences of the carried-out threat.

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

Example 7: *Williams v. Walker-Thomas Furniture Co.*[29] Williams, a low-income mother of seven children, regularly purchased furniture and home appliances from a seller on installment credit. The seller, the only retailer for such items in the neighborhood, required buyers to secure the debt with the following provision: Until the buyer brought her total unpaid balance on every single item to zero, the seller could repossess any and every item purchased in the store in the past. When Williams missed a payment, the seller sought to invoke this repossession provision.[30]

The case was decided on the basis of the unconscionability doctrine, involving reasoning that resounded with the involuntariness analysis.[31] The majority—and many commentators since—raised the possibility that Williams's acquiescence to the harsh terms was not voluntary.[32] Williams should have had a choice to make purchases not subject to such coercive, or unconscionable, terms. Credibility analysis, however, teaches us that such choice is probably not feasible. If the seller's implicit threat, "sign these terms or else I will not sell to you" is credible, Williams does not have available to her the "better choice" of purchasing the same items without harsh credit terms.[33]

Leading commentators often overlook this constraint. Charles Fried, for example, argued that the court should have enforced the contract in Example 7.[34] Fried dismissed the involuntariness argument by observing that "any consumer facing a perfectly competitive market for some necessity or set of necessities has no real choice but to pay the market price; just as the

29. 350 F.2d 445 (D.C. Cir. 1965).

30. *Id.* at 447–48.

31. *Id.* at 448–50.

32. *Id.*

33. For an analysis of cross-collateral provisions, such as the one in the *Williams* case, see Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 306–08 (1975).

34. FRIED, *supra* note 4, at 103–09.

producers have no real choice but to accept that price."[35] At first, it seems that Fried is engaging in what looks like a credibility analysis. He recognizes the possibility that "the far greater frequency of default made high prices and harsh credit terms a necessity for doing business with an often nearly destitute clientele."[36] But, the subsequent discussion makes clear that Fried does not appreciate the centrality of the credibility principle. Fried does not limit enforcement of these harsh contracts to cases where less harsh terms would force the seller to refrain from selling or to charge higher prices or interest rates. His claim is much broader: Walker-Thomas, the retailer, has no duty of fairness to his poor customers.[37]

Credibility analysis is neutral with respect to such normative judgments. It merely suggests that if the retailer's threat not to sell for a lower price, or with less harsh credit terms, is credible, then nonenforcement will not provide the consumer with more favorable terms. However, if the retailer would have made a profit even with a less stringent contract, such that his threat not to deal is not credible, then, and only then, can there be a debate whether other values justify nonenforcement. In the case of the Walker-Thomas retail store, the evidence is mixed. On the one hand, many of the items repossessed by the store had almost zero resale value.[38] This fact suggests that the cross-collateral provision was not all that valuable to the seller. On the other hand, some of the repossessed goods did have nontrivial resale value.[39] Importantly, these items had significant subjective value to the buyers, making the prospect of default (and the resulting repossession of the items) costly and quite unpleasant to the buyers, thus reducing the likelihood of default. Thus, from the seller's perspective at the time of the sale, the credit provision was a cost-reducing measure, and seemingly a much needed one. Economic indicators surveyed by the FTC showed that profit margins for low-income market retailers were lower than those enjoyed by similar retailers in other demographic areas.[40] The costs of loan collection

35. *Id.* at 104.

36. *Id.* at 105; *see also* Epstein, *supra* note 33, at 308–15 (discussing the economic and social backgrounds justifying harsh contract terms).

37. FRIED, *supra* note 4, at 106 ("But there is no reason why the retailer or employer should assume more of a burden in this regard than, say, a Beverly Hills plastic surgeon with ten times their income, just because the surgeon never has occasion to deal with the poor and unemployed.").

38. *See* Pierce E. Dostert, *Appellate Restatement of Unconscionability: Civil Legal Aid at Work*, 54 A.B.A. J. 1183, 1183 n.1 (1968) (describing the items appearing in the writ of seizure, including items of minimal resale value such as one apron set, two (presumably toy) guns, and shower curtains).

39. *See id.* (including in the list of seized items a portable typewriter, a washing machine, and a stereo).

40. *See* U.S. Federal Trade Commission, Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers (1968), *excerpts reprinted in* LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 67–69 (7th ed. 2001) (discussing the results of a study which found lower profit margins for low-income market retailers as compared with general market retailers).

and other labor and marketing costs for low-income neighborhood retailers reduced profits significantly below normal, such that any tinkering with the terms against the seller would drive it, in the long term, to shut down its business. Credibility here is exogenous: It is not the product of market manipulation by the seller but rather a reflection of an environment in which the business of selling in low-income markets is costly. Accordingly, unconscionability standards applied by courts will only reduce, not increase, buyers' choices.[41]

To be sure, credibility analysis does not suggest that the unconscionability doctrine is useless. In cases where the seller does not have a credible threat, namely, where the seller would still profit under a less one-sided contract, unconscionability doctrine may provide consumers with a meaningful remedy.[42] We merely propose that the pro-consumer case can be made more effective if it is required to clear the credibility hurdle.

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

Recognizing the weakness of the voluntariness principle, philosophers and legal scholars have proposed a methodology of evaluating the threatened party's choice set against some normative baseline.[43] By most accounts, this normative baseline represents, or at the very least includes, a conception of basic rights—moral or legal—with which a liberal society should endow

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41. A reduction of buyers' choices may be justified on paternalistic grounds. Buyers who, as a result of inadequate education or poor social standing, are unable to make sensible choices concerning their consumption can be made better off by additional constraints on their choice set. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (citing lack of education and inability to understand the contract as indicators of unconscionability); Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 572 (1982) (describing paternalism as one motive animating ground rules in contractual agreements). For an alternative, nonpaternalistic justification for reducing buyers' choices, see Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract*, 24 J. LEGAL STUD. 283, 285 (1995) (arguing that paternalism and other conventional contract explanations do not adequately justify restrictions on freedom of contract but that such restrictions are justified because they deter the socially costly behavior of taking excessive credit risks).

42. In particular, where the seller enjoys monopoly power, it is more likely that a threat not to deal under less one-sided terms is not credible. *Cf.* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960) (invalidating a disclaimer of warranty coordinated by what the court perceived to be a cartel of auto manufacturers). Similarly, in cases in which sellers exploit consumer ignorance and weakness of will, such as in door-to-door sales, prices may be set far above the normal profit level. *See, e.g.*, Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 268 (N.Y. 1969) (relieving the buyer from the contractual obligation to pay the full price for a freezer unit).

43. Some writers have argued that a morally-neutral baseline can be defined. *See, e.g.*, David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 131–38 (1981). The comparison with the credibility principle is largely independent of whether the baseline is rights-based or morally-neutral.

every individual.[44] If *B* has a right to be free from situation *X*, then his agreement to do *Y* in order to be freed from the threat of having *X* inflicted on her must result from, or, it is the definition of, coercion.[45]

To compare the credibility principle with this moral baseline approach to coercion, consider again Example 4, Robert Nozick's slave case.[46] For the purpose of legal intervention, the question is whether the law should accord the slave, who does *Y* to avoid the daily beating, the remedy of a release from the act. According to the rights-based approach, the slave has a fundamental right to not be beaten up. This is, according to Nozick, the "(morally) expected course of events."[47] Hence, a deal in which the slave has to pay dearly in order to secure this right is coercive and ought to be undone. While recognizing that the slave is subject to coercion and that he is entitled to be free from beating, we argue above that nullifying the coerced deal will only reduce the slave's wellbeing.[48] If the slave-owner has a credible threat to continue with the daily beating, the slave would benefit from the option to undertake a less painful act or promise and escape the beating. Credibility analysis teaches that providing an ex post remedy to the coerced slave strips away this valuable option.

True, a rights-based approach can do what credibility analysis cannot: It can identify an incidence of coercion and can distinguish types of pressure by using criteria of moral legitimacy. A rights-based approach can tell us what may, and what may not, be extracted from an individual. However, even equipped with the right-based understanding of which deal is illegitimate, only credibility analysis can identify whether an ex post remedy would be effective. The slave example demonstrates the tension between the two approaches. Whereas rights-based theorists would conclude that the coerced slave should be released from contractual accountability, we think otherwise. Whereas Nozick argues that "the slave himself would prefer the morally

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44. *See, e.g.*, Alan Wertheimer, *An Interdisciplinary Examination of Coercion, Exploitation, and the Law: Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 892, 903 (1997) (arguing that coercion must be defined from a normative standpoint and is unavoidably based on several moral claims); Sian E. Provost, Note, *A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law*, 73 TEXAS L. REV. 629, 639 (1995) (arguing that a proper definition of coercion ought to depend on threats made in violation of another's legal rights).

45. *See* FRIED, *supra* note 4, at 97 (defining coercion as the proposal of a wrong to the object of the proposal); *see also* JOEL FEINBERG, HARM TO SELF 189 (1986) (stating that acts of consent are involuntary when an actor is forced to perform an act, regardless of personal preferences in the matter); WERTHEIMER, *supra* note 4, at 203 (claiming that coercion occurs when an actor does something because of another agent's threat); Nozick, *supra* note 4, at 447 (distinguishing threats, which make the consequences of one's "action worse than they would have been in the normal and expected course of events," from offers, which make the "consequences better"); Westen, *supra* note 4, at 576 (defining a threat as a conditional promise to leave the recipient in a worse condition under a normative baseline).

46. Nozick, *supra* note 4, at 450.

47. *Id.*

48. *See supra* subpart II(C).

expected . . . course of events" to determine whether his promise is enforceable,[49] we are confident that a slave facing a credible threat would actually prefer otherwise.

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

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

Credibility analysis reaches policy conclusions that differ from other normative analyses because it frames a different dilemma. Under a rights-based approach, for example, the outcome of the coercion is compared to the threatened party's situation prior to the coercion in the "morally expected course of events."[50] If, as a result of the threat, the threatened party's position becomes worse relative to this pre-threat baseline, the threat is coercive. Our analysis suggests that the correct baseline (for the purpose of granting an effective remedy) is not the position of the threatened party prior to the threat, but rather the position that she would be in if she were to reject the threat. This hypothetical future position takes the existence of a threat to be part of the unfortunate but relevant reality in which the dilemma has to be resolved.[51] Only by comparison to this hypothetical future position can we

49. Nozick, *supra* note 4, at 451.

50. *Id.* at 450. Nozick considers also a nonmoral baseline defined by "the normal course of events." *Id.*

51. Our post-threat baseline can be contrasted with other non-normative baselines developed in the literature. For example, Westen considers a compound nuanced definition of the baseline that

tell whether surrendering to the threat hurts or improves the threatened party's wellbeing.

Given the potential discrepancy between the credibility analysis and the moral analysis of threats, what is the hierarchy between credibility and morality? Fried, for example, who, for the purpose of granting remedies against contractual duress, embraces a rights-based normative criterion, acknowledges that some baseline must be provided to assess whether a proposal adds to or reduces the options available to its recipient.[52] Fried admits that a conception of coercion divorced from any normative baseline could be preferable.[53] In his analysis, however, Fried cannot come up with such a morally "neutral" baseline, and thus considers it necessary to set up a normative baseline.[54]

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

The credibility test, utilizing as a baseline the situation that would have occurred if the threat were turned down, should also be contrasted with another morally-neutral baseline that focuses on the threatened party's

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combines a version of the Nozickian moral baseline (the position in which the proposer *ought* to leave the recipient) with a descriptive baseline (what the recipient expects his position, absent the threat, to be). *See* Westen, *supra* note 4, at 576, 581. Even Westen's descriptive baseline, however, is "pre-threat" in the sense that it compares the position of the threatened party to what she expected it to be if no threat were ever made.

52. FRIED, *supra* note 4, at 96.

53. *Id.* at 96 ("It would be nice if the benchmark for determining whether a proposal worsens the situation or not could be a purely factual one."); *see also* WERTHEIMER, *supra* note 4, at 8 ("[I]t must be said that an empirical theory would be more attractive—if it turned out to be true.").

54. FRIED, *supra* note 4, at 97. Similarly, Nozick finds the nonmoral "normal course of events" baseline inadequate (at least in certain cases), and resorts to a moral baseline ("the morally expected course of events"). Nozick, *supra* note 4, at 450.

expectations at the prethreat stage.[55] This prethreat descriptive baseline may indeed be necessary to determine if a proposal is coercive. But it is not sufficient in determining whether a remedy can effectively be granted. Consider Example 1, the contract-modification example. At the prethreat stage, the buyer probably expects the seller to perform the original contract. Given this expectation, the resulting concession made by the buyer puts him in a worse position. Accordingly, the prethreat descriptive baseline would deem a threat to breach coercive. In contrast, our post-threat descriptive baseline compares the resulting concession made by the buyer to the outcome that would have occurred had the buyer rejected the threat. According to this baseline, and regardless of the buyer's prethreat expectations, she would prefer enforcement of the possibly coerced modification whenever the seller's threat to breach was credible. To be sure, credibility analysis leaves much room for a normative inquiry, even in pragmatic, policy-oriented contexts. While we argue that whenever a threat is credible the deal should be enforced, we do not argue that whenever a threat is not credible, the deal should not be enforced. Many deals are reached, and many acts are performed, as a result of pressure and threats that are not credible. However, not all of them should be subject to social intervention—not all of them represent coercion. A normative theory, accompanied by a prethreat normative or descriptive baseline, is necessary to determine which among these noncredible threats are coercive.

D. The Credibility Criterion Versus Substantive Justice Approaches

A different approach to coercion focuses on the substantive fairness of the interaction. In particular, as applied in the contractual context, this approach views a threat as coercive if it results in a one-sided transaction. This substantive justice criterion has multiple theoretical underpinnings. For instance, it has been argued that according to Hegelian principles of autonomy the free and equal personality of the two parties to a contract mandates equivalence in exchange.[56] Alternatively, the substantive justice criterion has been traced back to Aristotelian corrective justice, which—designed to maintain the preexisting distribution of wealth—requires equality of the values exchanged in the transaction.[57] In a market-based economy, market

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55. *See* Zimmerman, *supra* note 43, at 131 (suggesting that "we retain the normally expected course of events as the relevant pre-proposal situation in *all* cases"); Westen, *supra* note 4, at 581 ("[T]he 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.").

56. Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1192–94, 1196 (1989).

57. *See* James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1604–05 (1981) (discussing various interpretations of the Aristotelian concept of "equality in exchange").

prices are said to provide one benchmark for equality of exchange.[58] Accordingly, coercion is manifested when one party exploits superior bargaining power to dictate terms that deviate from the prevalent market terms of exchange (if a market exists), or the hypothetical market terms (if a market does not exist).

From the credibility perspective, grounding coercion on theories of equivalence or equality in exchange is overinclusive. It is overinclusive because a deal that violates exchange equality would be deemed coercive and unenforceable even if the advantaged party's threat to walk away was credible. Gordley, an advocate of the equality-in-exchange conception, recognizes the possibility that the advantaged party would not be willing to exchange at the market price.[59] But what is at stake in such a case, Gordley believes, is mainly the advantaged party's autonomy.[60] If the court reforms the contractual price and reverts it to the market price, the advantaged party is deprived of his autonomy to transact under his individually favored terms.[61] Our analysis suggests, however, that in the case of a party not willing to exchange at the market price—the party who makes a threat to walk away unless a more favorable price is accepted—more than ex post autonomy deprivation is at stake. The advantaged party's ex ante conduct is also likely to be affected. Anticipating that his advantage will be stripped away, the advantaged party will walk away from the contract.[62]

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

In a similar vein, when markets are thin or nonexistent and, thus, cannot provide a pragmatic benchmark of equality-of-exchange, other factors must

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58. *Id.*

59. *Id*. at 1619.

60. *Id.* at 1619–20.

61. *Id.*

62. Gordley recognizes that a reasonable solution is to "enforce the contract at the price closest to the market price at which it is certain that the advantaged party would still have agreed to exchange." *Id.* at 1620. However, he restricts this solution to a narrow set of circumstances and favors a rule requiring the advantaged party to choose between a court-adjusted price or a rescission of the contract in its entirety. *Id.*

be invoked. Gordley proposes that in such situations a party should be entitled to a price equal to "his costs plus whatever additional amount is necessary to ensure [that] he would willingly have contracted."[63] Thus, for example, in the famous case of the rescuing ship that salvaged the sinking ship's cargo for a huge profit,[64] the rescuer's fee can be trimmed to equal its costs plus some bonus.[65] This ex post adjustment of the "price" is justified on equality grounds: The rescuer has no legitimate claim to the rescued property and thus his fee should not be measured by the property's value. But it is also consistent with—and in fact it is tailored to satisfy—the incentive-compatibility constraint.

All in all, although the two criteria may merge, the substantive equality criterion is nevertheless the one most sharply in conflict with the credibility criterion. Under this approach, the decision whether to grant the disadvantaged party relief depends on measuring how badly she is hurt by the contractual terms, and whether or why she was unable to protect herself. The perspective of the advantaged party—how his behavior would be affected by reformation of the contractual terms—is overlooked. Put differently, the substantive equality approach addresses a distributive concern: Who is entitled to the benefits of the exchange? It is only a coincidence if this inquiry reaches the same conclusion as the incentive-oriented credibility criterion.[66]

E. The Credibility Criterion Versus other Economic Approaches to Duress

The economic analysis of law has also proposed various criteria to identify a coercive interaction. A prominent economic justification for the duress doctrine focuses on ex post allocative inefficiency. According to this view, the confidence that we would otherwise have, that voluntary choices increase the wellbeing of actors, is rebutted when the behavior results from duress. Thus, duress is a potential source of inefficient allocation: it threatens the applicability of Paretian concepts of welfare that are central to any economic theory of intersubjective interaction.[67] In the contractual context, duress undermines the allocative efficiency guaranteed by voluntary exchange.[68]

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63. *Id.* at 1622.

64. Post v. Jones, 60 U.S. 150, 158–60 (1856).

65. *See infra* subpart IV(G).

66. For the view that the two perspectives rarely coincide, see Leff, *supra* note 26, at 428.

67. *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 78 (1993) ("For any theory of contract based on . . . Paretian concepts of welfare, the question of what constitutes voluntary consent to a transaction is of crucial importance.").

68. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 94 (3d ed. 2000) (explaining that allocative efficiency dictates that "the law should *allocate property rights to the party who values them the most*" and that involuntary exchange may coerce one party to sell a good for less than its value to him or her).

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

But the pragmatic difference between our approach and the ex post efficiency approach is most conspicuous when coercive deals are ex post inefficient but ex ante credible. Namely, even if the threat not to deal is credible, it might nevertheless lead to a transaction that violates Pareto efficiency—one that involves a loss of welfare to the threatened party, relative to the prethreat benchmark. According to the ex post allocative view prevalent in law-and-economics, such a transaction should be invalidated.[69] According to the ex ante credibility-oriented view, in contrast, the transaction should be enforced. The reason for this discrepancy, we know by now, is that the ex post view utilizes a false benchmark. Under the ex post view, the consequences for the threatened party are measured vis-à-vis his prethreat wellbeing.[70] Indeed, the threatened party may be worse off relative to his prethreat position. Under the credibility approach, the appropriate benchmark is not this prethreat position but rather the post-threat hypothetical position. If the threat is credible, the threatened party's welfare is *improved* relative to what it would be had the threat been carried out.[71]

Another insight from the existing economic analysis of duress concerns "rent-seeking costs." It recognizes that if coercive threats were legal, parties would be driven to spend resources on precautions that would protect them against such threats, or on finding opportunities to make coercive threats.[72]

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69. *See id.* at 270 (emphasizing the risk of allocative inefficiency when exchange is involuntary as a reason not to enforce coerced promises).

70. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 115 (6th ed. 2003) ("We know that this class of contracts is nonoptimal because ex ante—that is, before the threat is made—if you asked the [threatened parties] of this world whether they would 'consider' themselves better off if extortion flourished, they would say no."); TREBILCOCK, *supra* note 67, at 84 (arguing that according to the "literal Paretian principle," there is no coercion whenever the specific transaction renders "both parties to it better off, in terms of their subjective assessment of their own welfare, relative to how they would have perceived their welfare had they not encountered each other").

71. This analysis asks whether, in the specific circumstance in which the threat was made, the threatened party's wellbeing would be advanced by antiduress measures. A similar ex ante view was proposed by Anthony Kronman. Kronman proposes that coercion be judged by a modified Paretian principle. Kronman, *supra* note 28, at 487–88. Kronman's approach goes beyond the specific interaction, asking whether the welfare of most people subject to this type of threat is likely, in the long run, to be increased by nullifying the act or promise. *See id.* If we interpret Kronman's "type of threat" in line with our approach, distinguishing between the credible type and the noncredible type, we obtain a rough equivalence between the two approaches. Kronman's approach is different than ours whenever a threat of the "credible type" turns out to be noncredible in a specific context, and vice versa.

72. *See* COOTER & ULEN, *supra* note 68, at 262 (illustrating that "even unexecuted threats cause waste by inducing their victims to invest in defense"); F. H. Buckley, *Three Theories of Substantive*

Nullifying the consequences of the threat would discourage the making of threats and thus reduce the need to invest in private anticoercion measures. This ex ante approach is an integral part of our endogenous credibility analysis.[73] Credibility can be the product of investments by both the threatening party and the threatened party.[74] But credibility can also be the result of exogenous factors. Applying duress rules without accounting for these two sources of credibility, while discouraging wasteful investments in threats, can also deprive threatened parties of the power they would want to have to acquiesce to exogenously credible threats.[75]

The fear of being exposed to subsequent threats might lead to ex ante distortions beyond the wasteful investment in precaution. For example, in the contract modification context, the prospect of subsequent threats leading to modification of the initial contract might prevent the parties from implementing the efficient allocation of risks in the initial contract.[76] Anticipated modifications might also discourage value-enhancing reliance investments.[77] While these distortions can be potentially significant, we demonstrated elsewhere that their magnitude is actually—and counterintuitively—decreased under a regime that is founded on the credibility criterion.[78] When threats are credible, the only choice from a legal policy perspective is whether to enforce the coerced-into terms or to provide remedies for breach of the original terms. There is no third alternative of enforcing the original contract. Between the two feasible choices, breach is generally more detrimental than modification in terms of its effect on risk

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Fairness, 19 HOFSTRA L. REV. 33, 37 (1990) ("Both parties may take precautions to increase or lessen the probability of the unfair contract."); *see also* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 336 (2004) (illustrating the potentially adverse result of allowing rescuers at sea to charge exorbitantly for their services and noting that individuals would take excessive precautions to avoid such costs, which is an inefficient and socially undesirable result).

73. *See supra* subpart II(E).

74. *See* POSNER, *supra* note 70, at 115 ("[E]nforcement of such threatening offers would lower the net social product by channeling resources into the making of threats and into efforts to protect against them."); *see also* Buckley, *supra* note 72, at 37 ("The potential 'winners' will seek to increase the probability of gains throughout the [unfair] contract," while "the potential 'losers' will wish to minimize the likelihood of finding themselves obliged to enter into the contract."); SHAVELL, *supra* note 72, at 335 (providing the example of someone directing an inexperienced sailor towards a dangerous area and then offering to come to his rescue, but only for a high price).

75. *Cf.* SHAVELL, *supra* note 72, at 335–37 (distinguishing between "induced duress" and "naturally occurring duress").

76. *See* Varouj A. Aivazian et al., *The Law of Contract Modifications: The Uncertain Quest for a Bench Mark of Enforceability*, 22 OSGOODE HALL L.J. 173, 175 (1984) ("[A]llowing recontracting may facilitate the reallocation of initially efficiently assigned risks.").

77. This is the well known holdup problem. *See, e.g.*, OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE 31–32 (1995) (arguing that the possibility of renegotiation leads to reduced investment).

78. Bar-Gill & Ben-Shahar, *supra* note 10, at 413.

allocation and on reliance decisions.[79] Since remedies for breach are less valuable to the threatened party than the modified terms, which we can confidently infer from the fact that the threatened party opted to accept the modified terms rather than seek remedies for breach, antiduress policy that effectively deprives the threatened party from the option of accepting a modification and limits her to breach remedies has the effect of imposing on her a lower contingent payoff. This lower contingent payoff implies an inferior outcome both in terms of risk allocation and in terms of reliance investment.

Finally, an economic argument has been made that "hard" bargaining can lead to an inefficient breakdown in negotiations, and that setting aside such bargains can enhance efficiency by discouraging hard bargaining strategies.[80] To the extent that this approach equates "hard" bargaining strategies with noncredible bluffs, it is perfectly consistent with our credibility analysis.[81] However, if the definition of hard bargaining includes the making of credible threats, we have shown that setting aside the resulting contract would not achieve the desired goal of encouraging successful negotiations. Hard bargaining would indeed be deterred. The alternative would not be "easy" bargaining but rather no bargaining at all.

F. The Prevalence of Credibility Analysis

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

Outside economic theory, philosophers have recognized the importance of credibility in determining the existence of coercion. Joseph Raz, for example, recognizes that coercion cannot occur unless the threatened party perceives the threat to be credible and includes credibility as one of the necessary conditions of a coercive proposal.[82] Others simply assume credibility, either explicitly or implicitly.[83]

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79. *See id.* at 412–17 (arguing that from an ex ante perspective the prospect of breach is generally more detrimental than the prospect of modification).

80. *See* Buckley, *supra* note 72, at 49–50 ("[C]ourts may . . . enforce cooperative norms by leaning against the enforcement of hard bargains.").

81. *See supra* subpart II(D).

82. *See* Joseph Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, *in* VII MIDWEST STUDIES IN PHILOSOPHY 89, 108 (Peter French et al. eds., 1982) (explaining that a condition for coercion is that the threatened party believes that it is likely that the threatening party will bring about the threatened outcome if the threatened party does not acquiesce).

83. *See, e.g.*, Harry G. Frankfurt, *Coercion and Moral Responsibility*, *in* ESSAYS ON FREEDOM OF ACTION 66 (Ted Honderich ed., 1973) (assuming that everyone involved "has sufficient reason

Moreover, philosophers have recognized the relationship between credibility and the wellbeing of the threatened party. Robert Nozick, for example, makes a fundamental distinction between "threats," which are coercive, and "warnings," which are not.[84] When a party warns another—makes a credible statement about something that he will do if the other party does not perform the requested act—he is not acting in a coercive manner. In Nozick's example, when an employer warns the employees that he will shut down the factory if they unionize, and when it is true that the employer's preference would be to shut down (to avoid losing money), the employer's action is not a threat and should not be deemed coercive.[85] Indeed, Nozick clarifies that the factor that makes the statement a warning rather than a coercive threat is its credibility: The fact that the employer truly prefers to close down the factory if the employees unionize.[86] If the employer's preferences were different—if he were merely bluffing in saying that he would shut down—his action would be deemed a coercive threat.[87]

Surely, Nozick did not intend to suggest that anytime an intimidating statement is credible it is not coercive. The highwayman who tells the innocent traveler that he will shoot him unless the traveler hands over all his money could be making a truthful report of his "preferences." If his intentions are truly such that he would prefer to shoot the traveler who does not surrender—that is, if it is credible—should his act be deemed merely a warning, and thus noncoercive? What Nozick recognized, in drawing a distinction between threats and warnings, is the need to pay attention to the credibility of the intimidation. A credible statement should not be treated the same as a noncredible one. In Nozick's framework, warnings, unlike threats, are informative: They help their recipients take superior, however unhappy, courses of action.[88] But this is precisely what distinguishes credible coercion in our analysis: It provides its recipient a choice to avert an even worse outcome.

Furthermore, in distinguishing between coercive threats and noncoercive warnings, Nozick implicitly recognized the difference between what we called exogenous versus endogenous credibility. Nozick considers an example in which the employer prefers to stay in business even if the union wins, but nevertheless threatens his employees that he will go out of business and "*[commits] himself beforehand, for strategic reasons*" to this

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to believe that the proposals in question will be carried out if their conditions are fulfilled"); WERTHEIMER, *supra* note 4, at 203 ("I shall assume that all proposals are credible and clear . . . .").

84. *See* Nozick, *supra* note 4, at 453–58.

85. *Id.* at 456.

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

87. *Id.* at 455.

88. *Id.*

course of action.[89] In this case, when the employees have to choose whether or not to unionize, the threat to go out of business is already credible, given the employer's commitment to it. But it is credible only because it is not sanctioned. If society were to view this behavior by the employer as coercive—as Nozick suggests—and grant the employees a remedy, it can deter the employer from engaging in such prior commitments and from making the threat in the first place. Endogenous credibility can be remedied by antiduress measures.

Charles Fried has also recognized the importance of credibility. In discussing *Williams v. Walker-Thomas Furniture Co.* (Example 7), Fried emphasized the need to consider circumstances beyond the apparent harshness of the contract. Suppose, Fried argued, "that the far greater frequency of default made high prices and harsh credit terms a necessity for doing business with an often nearly destitute clientele."[90] Under such circumstances, Fried refuses to condemn the retailer, who "[is] offering [the] supposed 'victims' further options, enlarging their opportunities."[91] Thus, Fried recognizes that when backed by a credible threat not to deal, seemingly harsh contracts in fact enhance the wellbeing of the threatened party.

In the economically-oriented contracts literature, the importance of a threat's credibility has long been recognized. Specifically, in the context of contract modification, Jason Johnston and Alan Schwartz have each argued that the enforceability of a contract modification should be conditioned upon proof of a change of circumstances that would render the threat to breach, absent a modification, credible.[92] Credibility analysis has even begun to find its way to court rulings. Some courts have adopted the changed circumstances test, although generally without recognizing the relationship between this test and the credibility criterion.[93] In a few rare cases, the credibility

89. *Id.* at 454–55 (emphasis added).

90. FRIED, *supra* note 4, at 105.

91. *Id.*

92. *See* Jason Scott Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335, 339–40 (1993) (supporting the "changed circumstances" test); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 308–13 (1992) (arguing that modifications should be enforced when new information is revealed ex post); *see also* Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 422–23 (1977) (arguing that modifications should be enforced when circumstances have changed); Daniel A. Graham & Ellen R. Peirce, *Contract Modification: An Economic Analysis of the Hold-Up Game*, LAW & CONTEMP. PROBS., Winter 1983, at 9, 19–20 (1989) (discussing the Restatement's position that "unanticipated" events and situations may permit contract modification, even in the absence of consideration).

93. *See, e.g.*, Angel v. Murray, 322 A.2d 630, 636 (R.I. 1974) ("The modern trend appears to recognize the necessity that courts should enforce agreements modifying contracts when unexpected or unanticipated difficulties arise . . . ."). The U.C.C. comments state the test as follows:

> [T]he extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith . . . . The test of 'good faith' between merchants or as against merchants . . . may in some situations require an objectively demonstrable

rationale, while not explicitly invoked, underlies the decision.[94] Yet, unfortunately, courts by and large fail to apply credibility analysis in contractual duress cases.[95]

While the credibility criterion has significantly informed previous discussions of coercion, it was not—as far as we can tell—elevated to the role that it merits. Many, including economists, have argued that the credibility of the threat is an important condition for enforcement of contracts, but they went on to argue that additional conditions concerning the threatened party's volition must also be met.[96] The analysis in this Article differs in that it accords the credibility criterion a more prominent role: Credibility of the threat is a *sufficient* condition for the law to refrain from intervening via antiduress relief.

IV. Policy Implications

A. Contractual Duress[97]

The negotiation of a transaction, or of its modification, often involves threats by one party to refrain from dealing, or to breach, unless a particular provision, strongly favorable to the threatening party, is accepted. For centuries, contract law has been searching for a unifying principle that will

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> reason for seeking a modification. But such matters as a market shift, which makes performance come to involve a loss, may provide such a reason . . . .

U.C.C. § 2-209 cmt. 2 (2003). Similarly, the *Restatement (Second) of Contracts* provides perhaps the clearest recitation of the test. RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981) ("A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . . .").

94. For example, during periods of economic slowdown, courts realize that if parties are unable to renegotiate terms agreed upon prior to the recession, they are likely to breach and to suffer bankruptcy, leaving the breached-against party without remedy. One recurring scenario, in which such analysis was conducted, involves long-term tenants who, in the face of solvency problems, threatened to abandon the premises midway through the lease unless a price reduction is agreed upon. As one court explained: "A lease which provides for too high a rent may be less valuable to the landlord than one providing for a proper rent. . . . They desired that their tenants should continue in business under circumstances which should afford more assurance of success." Jaffray v. Greenbaum, 20 N.W. 775, 778–79 (Iowa 1884); *see also* Ten Eyck v. Sleeper, 67 N.W. 1026, 1027 (Minn. 1896) (upholding the renegotiation of a hotel rental contract during an unanticipated economic depression). More recently, Judge Posner explained that if a party cannot commit to a modification, the modification would not be offered, with the adverse effect of suffering breach and litigation costs. Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 928 (7th Cir. 1983).

95. *See infra* subpart IV(A).

96. *See* Schwartz, *supra* note 92, at 308–13 (arguing that modifications should be enforced when the paying party lacks access to the market and new information is discovered ex post).

97. This subsection draws on Bar-Gill & Ben-Shahar, *supra* note 10. In the contract modification context, the adverse ex ante implications of the duress doctrine have been at least partially recognized. *See, e.g.*, Johnston, *supra* note 92; Schwartz, *supra* note 92; Posner, *supra* note 92; Graham & Peirce, *supra* note 92. These adverse implications are also considered by Einer Elhauge in an ongoing book project. Communication with Einer Elhauge, Professor of Law, Harvard University (Dec. 2004).

determine when such threats go beyond hard, legitimate bargaining and should be considered improper, rendering the resulting agreement unenforceable on the grounds of duress. Thus far, such a general criterion has failed to emerge.[98]

It is beyond dispute that an improper threat can create duress and justify the rescission of the contract, even if it does not involve the infliction of physical harm (the "gun-to-the-head" case). The term "economic duress" has been used to reference the type of coercion inflicted by a strong market participant on a weaker contracting partner.[99] Similarly uncontested is the understanding that economic duress does not have to exhibit itself through explicit extortion or threats. But the question remains: Where does legitimate hard bargaining end and illegal duress begin?

In searching for an answer to this basic question, the defining perspective in duress jurisprudence has been, by and large, that of the threatened party. If this party is pressured to agree because she has no reasonable alternative, the law permits her to invalidate her promise. Under this "no reasonable alternative" criterion, if the threatened party were unable to find substitute performance elsewhere, or if, in the event of a threat to breach, her remedies for breach would have been inadequate, her assent is presumed to be coerced.[100]

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

When the threat to walk away from a deal or to breach an existing contract is credible, the only realistic choices for the threatened party are to acquiesce or to reject the threatening party's demand and suffer the consequences. When the threatened party has no reasonable alternatives, she does not want to suffer the consequences; she prefers to surrender. The only way she can secure the desired performance is by committing to an enforceable concession. But, under current duress doctrine, she cannot make such a commitment. Because the law deems the surrendered concession

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98. "The history of generalization in this field offers no great encouragement for those who seek to summarize results in a single formula." Dawson, *supra* note 28, at 289.

99. *See, e.g.*, Mark A. Glick et al., *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 399 (2002) (describing "economic duress" as involving severe economic or financial pressure imposed by one party to a contract).

100. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."); *see also* 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7.37 (4th ed. 1992) (explaining that under the Restatement, "[t]he only justification for enforcement of the modified undertaking[] seems to be the apparent voluntariness of the promisor in freely uttering his new promise").

coercive and, thus, voidable, precisely when no reasonable alternatives are available, it renders such a commitment impossible. Anticipating that the concession will be revoked ex post, a party armed with a credible threat will not bother to threaten nonperformance; he will simply breach and walk away. Thus, when the threat is credible, it is in the interest of the threatened party that her concession be enforced. Only when the threat is not credible can the threatened party benefit from ex post nullification without compromising her ex ante interests. The enforceability of contractual concessions should thus be determined first by the credibility criterion, not by the "no reasonable alternatives" test.

To illustrate this critique of the existing duress doctrine, and emphasize the central importance of credibility analysis, consider the casebook favorite *Austin v. Loral*.[101] In that case, a supplier of sophisticated technological parts threatened to withhold delivery unless the buyer acquiesced to significant price increases. The buyer, who had urgent need for the supplied parts to keep up his own obligation to a client, acquiesced, secured timely delivery, and then asked the court to invalidate the price modification on the grounds of duress. The Court of Appeals was split on the question of whether the buyer had "no reasonable alternatives," with a slim majority holding that, due to the absence of substitute performance and the inadequacy of remedies in this case, the buyer was under duress and the modification was unenforceable.[102] The dissent found that the "no reasonable alternatives" test was not satisfied in this case.[103] Both the majority and the dissent agreed, however, on the methodology, namely that enforcement should depend strictly on the issue of the threatened party's alternatives.[104] All of the judges agreed that it must be shown that "the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate."[105]

In *Austin*, neither the majority nor the dissent examined the credibility issue, on which the decision should have, ideally, turned. If the supplier had a credible threat to cease delivery—had Austin preferred to breach and pay damages rather than perform under the original price—parties in the buyer's position would generally be hurt by the doctrine that grants them ex post relief: They would be deprived of the option to modify the contract and would likely face breach. While it is not clear one way or another, there are indications in the case report that the supplier's threat to cease delivery was

101. Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533 (N.Y. 1971). This case appears in many casebooks. *E.g.*, FULLER AND EISENBERG, *supra* note 40, at 122.

102. *Austin Instrument*, 272 N.E.2d at 537.

103. *Id.* at 538.

104. *See id.* at 535 (holding that a modification is voidable if the threatened party faced inadequate alternatives); *id.* at 538 (Bergan, J., dissenting) (focusing on "the availability of alternative suppliers").

105. *Id.* at 535.

credible. The supplier did suffer a cost increase, halted delivery, and appeared serious in its threat to walk away from the contract.[106] Thus, if the threat was indeed credible, the buyer—or a party who similarly lacks reasonable alternatives—would be worse off under the court's decision not to enforce the modified agreement.

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

While it is impossible to conclude whether Loral's threat was credible in the circumstances reported in that case, the type of credibility analysis that the court never made—and which we believe may have mandated the opposite outcome from the one actually reached—can nevertheless be illustrated in a uniquely similar context. As it turns out, Loral, the very same party who was the recipient of the threat to breach in *Austin v. Loral*, was recently involved in an identical dispute—this time as the threatening party. Just as Austin did to Loral, Loral was now threatening to withhold delivery of sophisticated manufactured goods, this time a weather observation satellite, unless the buyer, this time the Japanese air traffic control agency, agreed to pay $30 million more than the original agreed-upon price of $136 million.[107] It was reported in the press that "Loral has threatened to indefinitely hold up delivery of the spacecraft unless the customer agrees to concessions."[108] As in the *Austin* case, the buyer in the recent dispute urgently needed the goods, which, if delayed, could "impede safety and

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

107. Andy Pasztor, *Loral Bankruptcy Case Faces New Hurdles: Air Traffic Control*, WALL ST. J., Oct. 10, 2003, at B2.

108. *Id.*

efficiency upgrades of air traffic management over the Pacific Region."[109] The two Loral cases thus share a striking similarity: The supplier threatened to delay delivery to a buyer that could not afford to wait, demanding price increases of twenty to twenty-five percent.

It seems clear, though, that the recent Loral episode is a case of a credible threat to breach. A few months prior to the threat, Loral filed for Bankruptcy under Chapter 11. Reorganization proceedings often accord the bankrupt promisor a shield from contractual obligation, and indeed the Bankruptcy Court, while recognizing the urgency for the buyer, denied the buyer's request for a restraining order that would have forced Loral to abide by the original delivery date.[110] Given Loral's financial woes, it was probably unable to pay a meaningful remedy for breach or delay if the buyer were to seek one. Accordingly, the best the buyer could hope for was delivery under a new, higher price. If the law of contracts were to make the new price void per duress, Loral was highly likely to use the bankruptcy shield and drop the contract altogether.[111]

Generally, in assessing the credibility of the threat to breach, the main parameters are the pecuniary consequences to the threatening party of either carrying out the threat or retracting it. If it is more costly to perform an existing contract than to breach it and pay damages, the threat to breach is credible. But credibility may also arise from nonpecuniary costs. That is, even if it is more costly to breach from a purely economic perspective, a threat to breach may be credible when other, nonpecuniary costs are taken into account. To illustrate, consider the classic case of *Alaska Packers' Ass'n v. Domenico*.[112] A group of seamen aboard a fishing vessel went on strike while at sea, threatening to jeopardize the short fishing season. Unable to find substitute workers, their employer agreed to increase their wage. At the end of the season, the employer refused to pay the modified wage and the Court of Appeals allowed him to invalidate the modification on the grounds of coercion, pointing out that the wage increase was extracted at a time in which the threatened employer was most vulnerable, and had no adequate remedies or substitutes.[113] Indeed, many commentators in the hundred years

109. Andy Pasztor, *Delays in Loral Satellite Raise Fears in Japan About Air Safety*, ASIAN WALL ST. J., Oct. 13, 2003, at M12.

110. Ellen Sheng, *Judge Denies Japanese Agencies' Request Against Loral*, DOW JONES NEWS SERV., Oct. 10, 2003.

111. Eventually, this case settled out of court, with the Japanese Government waiving all damages against Loral and accepting Loral's demand for a modified and accelerated payment schedule. *See Errata*, AM. LAW., June 2004, at 11. While we do not know whether the settlement incorporated a modified price or the original price, it is clear that the buyer was aware that the original terms cannot be strictly enforced in court, clearly recognizing that Loral's threat to further delay delivery under the shield of bankruptcy law was credible.

112. 117 F. 99 (9th Cir. 1902).

113. *Id.* at 102.

since this case have branded it as the prototype gun-to-the-head case, suggesting that the seamen's threat was opportunistic and noncredible.[114] According to this conventional view, had the employer rejected their demand, the seamen would have been better off returning to work than breaching the contract and losing the entire season's worth of wages.

But the seamen's threat to strike may have been credible, even if "irrational." According to one published account of the background of this case, the seamen realized that their employer misled them because they were going to earn significantly less and work in harsher conditions than they had expected.[115] It might well be that the seamen were willing to forgo the small wage they would earn to avoid what they considered an exploitative and unfair compensation. From a strictly pecuniary point of view, the seamen surely realized that they were better off working for the low wage than striking and getting no wage at all. But the pecuniary calculus is not the only motivating factor. In general, a party whose share in the surplus is reduced in a manner that violates his notions of fairness and self-dignity may have a credible threat to breach, even if his absolute pecuniary payoff from performance is still greater than his pecuniary payoff from breach.[116] If these fairness concerns are sufficiently strong they can render a party's seemingly noncredible threat credible indeed, thus justifying enforcement of the coerced deal. The point here is not that these particular fairness concerns are necessarily prevalent, but that threats may be motivated—and may be rendered credible—by emotional drives as much as by pecuniary interests. Concessions extracted by credible threats should be enforced, regardless of how rational the motivation is that generates the credibility.

B. Unconscionability

The doctrine of unconscionability in contract law regulates two facets of the bargain. Under what is commonly termed "procedural unconscionability" the law enables a party who was muscled into a bad agreement to void her consent.[117] The type of procedures that are unconscionable include those that raise claims of coercion and unfair

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114. *See*, *e.g.*, Posner, *supra* note 92, at 423–24 ("[I]n *Alaska Packers'* the likelihood of termination was much less [than in *Goebel v. Linn*] since the threat to terminate was not a response to external conditions genuinely impairing the [fishermen's] ability to honor the contract but merely a strategic ploy designed to exploit a monopoly position."); MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 70, 72 (4th ed. 2001) (describing the seamen's threat as opportunistic).

115. Debora L. Threedy, *A Fish Story:* Alaska Packers' Association v. Domenico, 2000 UTAH L. REV. 185, 219.

116. *See* Bar-Gill & Ben-Shahar, *supra* note 13, at 162 (arguing that fairness concerns may render threats to breach credible).

117. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 135–36 (4th ed. 1995).

surprise, and—being the "common-law cousins" of duress[118]—we will not discuss them any further. The second prong of the doctrine of unconscionability is known as "substantive unconscionability"—standards of minimal equity in the division of the contractual surplus which, if violated, permit courts to replace the oppressive terms with more reasonable ones.[119] Substantive unconscionability allows courts to tinker with the contract's provisions, such as price or credit terms, in order to make them less one-sided, even if the process of bargaining did not involve threats or procedural flaws that indicate coercion.

Legal intervention in substantively unconscionable terms is often justified from an ex post perspective: The weak party will surely be better off once she is relieved from a particularly unfavorable term.[120] But justifications for the doctrine are also stated in ex ante terms: Strong parties should be discouraged from including such terms in the contract. Under the unconscionability doctrine, so the argument goes, the strong party—often described as a "monopolist"—would be unable to fully exploit his bargaining power, and would therefore settle for less one-sided terms.[121]

While substantive unconscionability cases are ones in which explicit coercive threats are absent, the credibility-of-threats framework developed in this Article applies nonetheless. The question is whether the underlying threat by the strong party, which perhaps was never voiced in the actual deal formation, to refrain from dealing unless the unconscionable term is included, was credible. Take the monopolist example. Surely, the monopolist never bothered to explicitly threaten the consumer, but the take-it-or-leave-it format of bargaining is equivalent to a threat: "Accept my terms, or no deal."[122] If the threat is credible—if the strong party would prefer to forgo the entire deal if it had to settle for a smaller, yet positive, profit—ex post legal intervention would deprive the weak party of the opportunity—bleak as it might be—to transact. Unless paternalistic motives

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118. *Id.* at 137.

119. Under U.C.C. § 2-302, if a term is unconscionable, courts may refuse to enforce it or the entire contract, but may also limit the application of the unconscionable term by reducing excessive prices. U.C.C. § 2-302 (2003).

120. The standard examples in contracts casebooks involve door-to-door sales, in which home appliances are sold to uneducated consumers at prices far above market standards. *See, e.g.*, Toker v. Westerman, 274 A.2d 78, 79 (N.J. 1970) (concerning a refrigerator-freezer sold at a markup of more than one hundred percent of its retail price).

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

122. Interestingly, a similar "accept my terms, or no deal" situation pertains also in a perfectly competitive market. *Cf.* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 263–64 (1974) ("A person's choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted within their rights in a way that did not provide him with a more palatable alternative.").

are involved, it would be difficult to justify this intervention as protective of the weak party.[123]

On the other hand, consider the infamous door-to-door sales cases, where consumers routinely pay up to fifteen times the maximum retail price.[124] While the substantive unconscionability analysis in these cases is often accompanied by sharp criticism of the deceptive tactics used by the door-to-door salesman, connoting procedural unconscionability, at least some courts have been willing to strike down contracts based on price unconscionability per se.[125] Credibility analysis does not modify the conclusions from such price-based review. The extreme disparity between the price charged in the door-to-door sale and the much lower price charged for an identical product in an accessible market supports a presumption that the seller would not have walked away from the deal, even if forced to accept a significantly lower price.[126]

Finally, courts have faced similar trade-offs in the rent-to-own cases, in which consumers again end up paying high markups for conventional appliances. Here, too, courts have faced deals that manifest no procedural flaw, only substantively inflated prices. Often the legal approach to these contracts focuses on the consumer's perspective—how much higher the contract price is relative to the market price.[127] Yet, the consumer cannot be protected without accounting for the seller's perspective. Here, the risk that the consumer would default, return the item, or inflict repair costs on the lessor or seller should be accounted for in determining whether the price is

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

124. *See, e.g.*, *Vacuum Cleaners*, 58 CONSUMER REP., Feb. 1993, at 67, 72 ("[The price of cleaners sold door-to-door] can be 5, 10, even 15 times that of other machines of similar cleaning abilities.").

125. *See, e.g.*, Kugler v. Romain, 279 A.2d 640, 654 (N.J. 1971) (holding that "the price unconscionability rendered the sales contract invalid as to all consumers who executed it").

126. *See* Eisenberg, *supra* note 121, at 781–85 (arguing against the exploitation of consumers' price ignorance, specifically in door-to-door sales).

127. *See, e.g.*, Remco Enters. Inc. v. Houston, 677 P.2d 567, 573 (Kan. Ct. App. 1984) (noting that the retail price, and not the company's wholesale price, is the relevant factor in determining whether a price is unconscionable).

excessive, otherwise consumers might be deprived the accessibility that this market niche provides.[128]

C. Bankruptcy Law and the Necessity of Payment Doctrine

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

Financial hardship and bankruptcy, however, can affect credibility analysis also when encountered by the threatened party. Consider the following typical case. A supply contract is signed between a retailer and a supplier. After the supplier performs his part of the deal, but before the retailer completed payment on the contract the retailer files for bankruptcy. At this stage, the retailer's debt to the supplier joins the retailer's other debts, and under the "equality-of-treatment" principle,[129] the supplier can expect to receive only a small portion of the contract price—or nothing at all, if the retailer has substantial higher-priority debt.

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

Indeed, in 1882, the Supreme Court carved out an exception to the equality-of-treatment principle—the "necessity-of-payment" doctrine.[130] In explaining the necessity-of-payment exception, the Court explicitly refers to the benefits from allowing the debtor to succumb to the supplier's demands. However, being uncomfortable with what it perceived as rewarding blackmail, the Court limited the scope of the necessity-of-payment doctrine

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128. *See id.* (holding that a markup of 108% on a television set is not unreasonable given the credit risk, the absence of a down payment, the option to return, and the benefit of repair services); *see also* 2 MACAULAY ET AL., CONTRACTS: LAW IN ACTION 714–16 (2d ed. 2003) (describing litigation over rent-to-own contracts in Wisconsin and reporting that, as a result of case decisions, the leading supplier in this market ceased its business in the state).

129. 7 COLLIER ON BANKRUPTCY § 1122.03 (Lawrence P. King ed., 15th ed. 1996) ("One of the cardinal principles underlying bankruptcy law is equality of treatment of similarly situated creditors."); Young v. Higbee Co., 324 U.S. 204, 210 (1945) ("[Historically], one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another.").

130. Miltenberger v. Logansport Ry. Co., 106 U.S. 286, 311–12 (1882).

to cases where the public interest requires the survival of the debtor's business.

Despite this public interest limitation, bankruptcy courts and district courts have used the necessity-of-payment doctrine to authorize payment of pre-petition debts when they have found that a failure to do so would impede the debtor's efforts to reorganize.[131] Of course, failure to allow payment of pre-petition debts would only obstruct the reorganization objective when the supplier's threat to withhold delivery is credible. Indeed, the insight emerging from such credibility analysis has been recognized by at least some courts. For example, in the recent *CoServ* case, the bankruptcy court introduced a three-part test of necessity that closely tracks the credibility question.[132] Under this test, it must be shown (1) that unless the debtor surrenders and pays the debt to the supplier, it risks the loss of economic advantage that is disproportionately higher than the supplier's claim, and (2) that there is no other way to deal with the supplier other than by payment of the claim. It is only when the threat of the supplier is credible that the *CoServ* no-other-way-to-deal-with-the-supplier test would be fulfilled. Accordingly, the *CoServ* approach is consistent with the credibility criterion.

While the lower courts have been willing to extend the reach of the necessity-of-payment doctrine, the few circuit courts that have considered the issue in the post-Code period have been much more restrictive. For example, in 1983, the Ninth Circuit, reluctant to compromise the equality-of-treatment principle, refused to authorize the payment of pre-petition debt. Thus, following pre-Code Supreme Court precedent, the appellate court limited the necessity-of-payment doctrine to railroad cases.[133] In that case, however, all indications suggested that the suppliers' threats were credible. The bankrupt trucking company, in order to stay in business, needed fuel and truck parts. The suppliers—some of them discount sellers—refused to continue supply unless pre-petition debts were paid and all new business was conducted in cash. Indeed, the creditors' fears, which gave rise to their threats to cease supply, were not unfounded: The debtor eventually shut down operation and liquidated. In all likelihood, but for the payment of the pre-petition debt, the creditors would not have given the debtor a chance to reorganize. By restricting the scope of the necessity-of-payment doctrine and by failing to

131. Donald S. Bernstein, *Post-Petition Payment of Pre-Petition Debt in Corporate Reorganization Cases* (unpublished manuscript, on file with authors); Thomas J. Salerno, *"The Mouse That Roared" or, "Hell Hath No Fury Like a Critical Vendor Scorned,"* AM. BANKR. INST. J., June 2003, at 28. Section 105 of the Bankruptcy Code and the broad equitable powers that it bestows upon the courts are often invoked as authority for allowing the payment of pre-petition debts. *Id.* (discussing Kmart's reliance on § 105 to convince the court to authorize its pre-petition vendor payments).

132. *See In re* CoServ L.L.C., 273 B.R. 487, 498–99 (Bankr. N.D. Tex. 2002).

133. *In re* B & W Enters., Inc., 713 F.2d 534, 537 (9th Cir. 1983) (recognizing that all creditors required the payment of some pre-petition debt in order to continue credit for parts or to make delivery of fuel).

conduct any other type of credibility-of-threat analysis, the Ninth Circuit constrained the ability of financially troubled firms to enter new transactions and avoid liquidation.[134]

Recently, the Seventh Circuit issued an important decision addressing both the application and scope of the necessity-of-payment doctrine.[135] The court found that, in theory, the Bankruptcy Code can be interpreted to allow for general application of the necessity-of-payment doctrine, beyond the railroad context.[136] It recognized the key role of credibility analysis: "[T]he debtor must *prove* . . . that, but for immediate full payment [of the pre-petition debt], vendors *would* cease dealing."[137] Applying this rule of law to the facts of the case, the court found that no evidence was presented to support a claim that "any firm would have ceased doing business with Kmart if not paid for pre-petition deliveries."[138]

While more receptive to the credibility test, the recent decision by the Seventh Circuit makes clear that generally vendors would not be expected to have a credible threat not to deal, as long as payment for future deliveries is guaranteed: "To abjure new profits because of old debts would be to commit the sunk-cost fallacy; well-managed businesses are unlikely to do this."[139] In many cases, insisting on the payment of pre-petition debts may indeed be irrational. The appellate court presumes the existence of profit-maximizing vendors for whom unpaid balances are "sunk costs," and thus concludes that credibility is unlikely. But not all vendors are ready to rationally overlook sunk costs, and we have argued that credibility can be based on irrational motives.[140] Moreover, while profit-maximization implies noncredibility in many cases, there are other cases, where a rational, profit-maximizing vendor with a cash flow problem may credibly insist on the payment of pre-petition debts.

Credibility analysis suggests that the resistance of the Ninth and Sixth Circuits to the necessity-of-payment doctrine will often result in harm to the very creditors that these courts seek to protect. The Seventh Circuit, on the other hand, has exhibited a more complete appreciation for the implications of credible coercion. Still, the apparent inclination of the Seventh Circuit toward a broad noncredibility presumption runs the risk of practically

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

135. *In re* Kmart Corp., 359 F.3d 866 (7th Cir. 2004).

136. Specifically, the court invoked 11 U.S.C. § 363(b)(1): "The trustee [or debtor in possession], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." *Id.* at 872.

137. *Id.* at 868.

138. *Id.* at 874.

139. *Id.* at 873.

140. *See supra* subpart IV(A).

eliminating the necessity-of-payment doctrine, to the detriment of all creditors.

D. Plea Bargains

Plea bargains are a unique species of contract that raises frequent concerns of coercion.[141] A defendant who is given a choice between pleading or facing a jury trial that might result in a more severe punishment often chooses to plea, a choice that many view as coerced.[142] In fact, a defendant's confession through a plea bargain has been compared to the medieval European practice of extracting confessions through torture.[143] The threat to prosecute, similar to the threat to torture,

> make[s] it terribly costly for an accused to claim his right . . . . There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.[144]

In applying the credibility methodology to this setting, the assessment of a plea bargain ought to begin by asking whether the prosecutor's threat to proceed with the case all the way through a jury trial if the defendant rejects the plea bargain is credible. If the threat is credible, then the plea bargain itself is the only effective way for the accused to avoid an even worse alternative—trial. If courts were to strike down this plea bargain as coercive, or if society were to eliminate the practice of plea bargains altogether, as some commentators concerned with the problem of coercion have proposed,[145] defendants—having been freed from the coercive torture-like process—would not necessarily be better off. Whenever the threat to prosecute is credible, excluding plea bargains would result in jury trials, with potential for sanctions far exceeding the plea bargained sanctions, to the detriment of the accused. To those defendants facing a significant possibility that the prosecutor will pursue the charge, plea bargains represent desirable

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141. The view that a plea bargain is a species of contract, and that standard defenses such as contractual duress can be invoked, is not novel. *See, e.g.*, Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1917 (1992) (arguing that it is plausible to presume the enforceability of plea bargains because that presumption flows logically from the norm of expanded contractual choice).

142. *See, e.g.*, Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 99 (1976) (arguing that the current system of plea agreements is coercive because it deprives defendants of their constitutionally guaranteed right to a jury trial).

143. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–19 (1978).

144. *Id.* at 12–13.

145. *See generally* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 (1981) (arguing that "plea bargaining remains an inherently unfair and irrational process"); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037–38 (1984) (supporting the proposition that both formal and informal types of plea bargaining should be restricted or eliminated).

insurance.[146] It is only when the threat to prosecute is not credible that a plea bargain can potentially harm the accused.

The image of an innocent accused, who nevertheless pleads guilty, is surely an important element underlying the often hostile view towards the plea bargain institution.[147] But, even here, the source of the coercion is not the proposal to plea per se. The problem is that the criminal justice system cannot ascertain guilt or innocence perfectly.[148]

Consider the benchmark case of a perfect adjudication system. In such an ideal system, a prosecutor would never be able to extract a guilty plea from an innocent defendant. Knowing that she will be exonerated at trial, the defendant would not concede to even a nominal sanction imposed via plea bargain.[149] An analogy to the contract modification case is informative. If a buyer expects to receive perfect compensatory damages in case the seller breaches the initial contract, the seller would not be able to extract any price-increasing modification by threatening a breach of contract. Even if the seller's threat to breach is credible, the buyer would rather suffer breach and recover damages. The question of credibility becomes operative only when the threatened party expects imperfect legal protection of her entitlement—that is, imperfect remedies in the contract modification case, or imperfect verification of innocence in the plea bargain case.

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

Perhaps the court can assist the defendant by verifying credibility ex post and enforcing plea bargains if, and only if, the prosecutor's threat to proceed to trial were credible. This is different from what courts are currently asked to do, which is to determine whether the plea was entered

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146. This argument is well recognized in the plea bargaining literature. For its most comprehensive treatment, see Scott & Stuntz, *supra* note 141, at 1913–17 (explaining that through plea bargaining the defendant insures himself against the risk of receiving the maximum sentence at trial); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983) (arguing that plea bargaining is a desirable feature of criminal procedure for both prosecutors and defendants).

147. *See, e.g.*, Easterbrook, *supra* note 146, at 319–20 (noting that commentators have criticized courts for upholding the pleas of defendants who continue to protest their innocence).

148. *Id.* at 320 ("If there is injustice here, the source is not the plea bargain. It is, rather, that innocent people may be found guilty at trial.").

149. This claim requires some qualification if the innocent defendant would need to incur some private nonrefundable costs to establish her innocence, even in a perfect system. In such a case, to the extent that prosecutors cannot perfectly ascertain innocence prior to a trial and therefore might file charges against innocent defendants, an innocent defendant would accept a plea bargain so long as the burden of the sanction does not exceed her defense costs.

voluntarily.[150] It is also different from many of the safeguards that other commentators have proposed, which also focus on the defendant's freedom of choice, such as the access to capable legal counsel.[151] Under the credibility criterion, it is not the defendant's frame of mind that courts would have to scrutinize, but the prosecution's perception about the strength of its case.

This prescription poses, of course, a practical problem. In order to assess the perceived strength of the case and the credibility of the prosecutor's threat to proceed to trial, courts would have to adjudicate the very same issues that the institution of plea bargains intended to spare them, and perhaps more. To identify the cases in which the prosecutor has a credible threat—the cases in which the plea bargain should be admitted—courts would have to determine whether, in the absence of a plea, the prosecutor would have pursued the charges. Since a prosecutor's subjective intent often cannot be verified, courts would have to assume that the prosecutor would have proceeded only if conviction were a likely outcome. But that would require the court to determine the merits of the prosecutor's case using all evidence available to the prosecution, while utilizing the same procedural safeguards that the jury trial would have utilized. This is the only examination that would inform the court whether the threat to go to trial was credible and whether the plea bargain ought to be enforced. But if this were what courts had to do when facing a plea bargain, the institution of plea bargains would lose its main advantage of being a cheap substitute to courtroom adjudication.[152]

The intolerable burden that a credibility inquiry would impose on the courts is amplified by the observation that defendants and their attorneys often do not have the necessary information to assess the credibility of the prosecutorial threat to try the case, evidenced by the fact that almost all defendants plea.[153] Consequently, courts would regularly be called upon to make the credibility assessment.

In some cases, courts would be able to identify noncredible threats. Indeed, courts do recognize the strategic motivations that may drive

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150. Federal Rule requires courts to determine that the plea is voluntary and "did not result from force, threats, or promises (other than promises in a plea agreement)." FED. R. CRIM. P. 11(b)(2).

151. *See* Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC'Y REV. 527, 549 (1979) (noting that the information provided by counsel helps to safeguard the voluntariness of the plea bargain by giving defendant the ability to assess accurately the consequences of pleading guilty or not guilty). It should be noted, however, that certain procedural safeguards can assist the defendant in forming a more accurate assessment of the credibility of the prosecutor's threat. *See infra* note 159.

152. *See* Scott & Stuntz, *supra* note 141, at 1935 (noting that avoiding trial costs is the main advantage of plea bargaining).

153. *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206 (1975) (citing statistics from 1970 which showed that 96% of all New York City convictions resulted from guilty pleas).

prosecutors. It is possible, the Supreme Court explained, for "the aggressive prosecutor to bring the greater charge initially in every case, and only thereafter to bargain. The consequences to the accused would still be adverse, for then he would bargain against a greater charge."[154] To the extent that plea bargains struck under such manipulative charges can be singled out and given different treatment, coercion of defendants can be alleviated. The Supreme Court, however, believes this singling out task to be unattainable.[155]

Moreover, if courts were charged with determining the credibility of the prosecutor's threat, their job would be further complicated by the fact that the prosecutor's decision to go to trial or drop the case would be motivated, not solely by the absolute merits of the case at hand, but also by the relative merits as compared to other concurrent cases. For budgetary and other political concerns, prosecutors have to concede the relatively weaker cases to make time for stronger ones.[156] The more defendants a prosecutor simultaneously charges, the less credible is the threat to try each one of the individual cases. The problem is that courts are not accustomed to weighing relative culpability, if only because factors bearing on this issue—such as evidence on concurrent cases and their comparative strength—are never presented and are surely inadmissible.

Further complications arise from the fact that the credibility of the prosecutor's threat may be linked to other concurrent and future unrelated cases through the prosecutor's reputational concerns. A prosecutor may be credibly vindictive against a specific defendant if pursuing harsh sanctions against this defendant would help the prosecutor build a reputation for toughness, which in turn would serve him in the course of future plea bargaining and help him secure more stringent pleas.[157] This reputation-based credibility, however, is endogenous. If plea bargains were to be selectively enforced, with the underlying credibility of the threat scrutinized such that plea bargains based on threats that are not credible on their own merits would not be enforced, the reputation-building motivation would vanish.

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154. Bordenkircher v. Hayes, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting).

155. *Id.* Justice Blackmun criticized the majority in *Bordenkircher*, stating:

> [P]rosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage with a defendant . . . . [T]his Court, in its approval of the advantages to be gained from plea negotiations, has never openly sanctioned such deliberate overcharging or taken such a cynical view of the bargaining process. . . . *Normally, of course, it is impossible to show that this is what the prosecutor is doing, and the courts necessarily have deferred to the prosecutor's exercise of discretion in initial charging decisions*.

Id. (emphasis added).

156. Easterbrook, *supra* note 146, at 295, 299.

157. Scott & Stuntz, *supra* note 141, at 1964–65.

Prosecutors often bluff; they misrepresent to the accused the factors that bear on the likelihood and severity of conviction, and they are not always candid regarding their intentions to proceed to trial. Given the level of allowable pretrial discovery and the quality of defense counsel, the accused often will not know whether the prosecutor is bluffing.[158] As we argue above, it is not necessary that threatened parties be able to assess the credibility of the threat if courts can step in ex post and verify its credibility. If courts were perfect verifiers of credibility, prosecutors would be deterred from making noncredible threats. The problem, again, is that there is no shortcut for assessing credibility. By and large, in order to determine whether a threat is credible, courts would have to assess the merits of the case.

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

On the prescriptive level, while ex post verification of credibility must be ruled out, certain procedural safeguards can reduce the incidence of noncredible prosecutorial threats. In *Bordenkircher v. Hayes*, the Supreme Court advocated more visible charging practices and restrictions on the prosecution's ability to change the charge.[159] In some situations, relief against noncredible threats may be provided by a procedural requirement that the charges against the defendant should be presented at the beginning of the bargaining process and that only such set-in-advance indictments can be pursued. Prosecutors would then be unable to threaten more serious indictments—indictments that they would not in fact pursue—in pressuring defendants to accept a charge-reducing plea bargain. Even this, however, would not be of much help if plea bargaining can be moved to an earlier stage, prior to the indictment.

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158. David A. Jones, *Negotiation, Ratification, and Rescission of the Guilty Plea Agreement: A Contractual Analysis and Typology*, 17 DUQ. L. REV. 591, 625 (1979); Brunk, *supra* note 151, at 550.

159. *Bordenkircher*, 434 U.S. at 368–69 n.2 (1978) (Blackmun, J., dissenting). Justice Blackmun noted:

> [I]t is healthful to keep charging practices visible to the general public, so that political bodies can judge whether the policy being followed is a fair one. Visibility is enhanced if the prosecutor is required to lay his cards on the table with an indictment of public record at the beginning of the bargaining process, rather than making use of unrecorded verbal warnings of more serious indictments yet to come.

Id. at 369 n.2 (Blackmun, J., dissenting).

Also in *Hayes*, Justice Blakmun suggests that the Due Process Clause protects against prosecutorial vindictiveness.[160] The threat of such due process ramifications, even if brought to bear only in extreme cases, should have a disciplining effect on prosecutors, and can perhaps serve to curtail some use of noncredible threats.

Finally, since ex post verification of credibility by the court is impractical, procedural measures that can facilitate ex ante assessment of credibility by the accused or her attorney should be considered. For instance, enhanced pretrial discovery requirements, and a higher quality of court-appointed defense attorneys would reduce the likelihood of effective noncredible threats. Note that such higher quality defense would not necessarily be more costly. If defendants had the "ammunition" to fend off and turn down noncredible threats, the result could be *fewer* threats ex ante, and *fewer* trials ex post.

Plea bargains can also display coercion of a different type, by the accused who negotiates a lenient plea in exchange for information the police or the prosecutor desire but cannot otherwise acquire. Occasionally, after receiving this information, the prosecutor refuses to honor the agreement and uses the very same information revealed by the accused to charge him with an aggravated crime.[161] Here, too, credibility analysis can be invoked in two layers. It might seem, upon initial reflection, that if the agreement is unenforceable, the accused will have nothing to gain by revealing the information, and thus the prosecutor will be denied the only opportunity to bargain for time-sensitive, potentially lifesaving, information. That is, if the threat not to reveal information is credible, the resulting pleas ought to be respected by courts or the information would not be divulged. Upon further reflection, however, it is also likely that the mere enforceability of such agreements would encourage perpetrators to acquire such bargaining chips in the first place. That is, the credibility of the perpetrator's threat to remain silent may be endogenous. If the perpetrator knew that such agreements would be unenforceable, he would be less likely to engage in acts that give rise to such bargaining opportunities.[162]

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160. *Id.* at 367 (Blackmun, J., dissenting) ("Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect.").

161. *See, e.g.*, Whitehurst v. Kavanagh, 638 N.Y.S.2d 591, 592–93 (N.Y. 1995) (indicating that the prosecutor charged the defendant with murder despite an agreement that he would not do so if defendant divulged the location of a kidnapped girl); *In re* Schrotenboer v. Soloff, 549 N.E.2d 458, 458–59 (N.Y. 1989) (indicating that the prosecutor charged the defendant with the felony of custodial interference notwithstanding an agreement to provide the defendant with immunity from prosecution if the children were returned safely).

162. *Schrotenboer*, 549 N.E.2d at 459 (recognizing that enforcement of the plea agreement would reward the perpetrator for "secreting" the abducted children).

E. Unconstitutional Conditions

The doctrine of "unconstitutional conditions" cuts across constitutional law reaching issues as diverse as federalism, takings, and free speech. The doctrine, first fashioned by the *Lochner* Court, holds that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[163]

Consider the following examples.[164] Congress conditions five percent of otherwise allocable federal highway funds on each state raising its minimum drinking age to twenty-one, despite the states' constitutional right to regulate alcohol consumption as they wish.[165] The federal government conditions public broadcasting funds on the recipient station's refraining from editorializing, despite the broad freedom of speech guaranteed by the First Amendment.[166] The government conditions funds for family planning on the recipient clinic's refraining from advocating or counseling abortion, despite the constitutional right declared in *Roe v. Wade*.[167]

Unfortunately, despite its broad application and correspondingly great practical importance, courts and scholars have yet to agree on the theoretical underpinnings of the unconstitutional conditions doctrine.[168] We do not purport to solve the unconstitutional conditions problem here. Nevertheless, we believe the credible coercion theory can shed some light on the appropriate scope of the doctrine.

The typical unconstitutional conditions case involves a threat to withhold a benefit unless the condition is satisfied. This implicates the question of coercion. In fact, coercion analysis has played a key role in the development of the unconstitutional conditions doctrine.[169] The Supreme Court's coercion analysis has largely focused on the perspective of the

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163. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1416 (1989).

164. Plea bargains can also be analyzed through the unconstitutional conditions prism: The defendant is offered a reduced sentence if she agrees to waive her Sixth Amendment right to trial by jury. Plea bargains, however, are a sufficiently unique form of credible coercion; therefore, separate treatment is justified. *See supra* subpart IV(D). A related criminal justice application of the unconstitutional conditions doctrine concerns coerced confessions: The suspect is offered leniency in exchange for a waiver of her Fifth Amendment right against self-incrimination.

165. South Dakota v. Dole, 483 U.S. 203, 210–11 (1987).

166. FCC v. League of Women Voters, 468 U.S. 364, 366 (1984).

167. Rust v. Sullivan, 500 U.S. 173 (1991).

168. *See, e.g.*, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001) ("The persistent challenge, consequently, has been to articulate some coherent or at least intelligible principles or tests by which to determine which offers fall into which category—to explicate, in other words, a theory to support the [unconstitutional conditions] doctrine.").

169. *See* Sullivan, *supra* note 163, at 1419 ("The first approach, which has overwhelmingly dominated the rhetoric of the cases and preoccupied the commentary, locates the harm of rights-pressuring conditions on government benefits in their *coercion* of the beneficiary.").

coerced party: Did the unconstitutional condition excessively restrict the individual's choice?[170] Did the condition impose an improper penalty on an individual choosing to exercise a constitutional right? Did it deter the exercise of the right?[171]

As argued above, focusing on the voluntariness or free choice of the coerced party will only end up hurting that party. A court that is intent on protecting the threatened party must first consider the perspective of the threatening party. Was the government's threat to withhold the benefit credible? But for the conceded condition, would the government prefer to withhold the benefit?

In unconstitutional conditions cases, once the condition-setting legislation or regulation is in place, the government's threat not to provide the benefit if the condition is not fulfilled is generally credible. The credibility of the threat derives from the binding force of the condition-setting legislation (assuming for the moment that this legislation is not unconstitutional), from equality-based prohibition on selective enforcement of this legislation, or, when there is no binding legislation, on the government's reputational concerns.

This does not mean, however, that any waiver of a constitutional right to secure a conditional benefit should be upheld. In the unconstitutional conditions context, the relevant question is not whether the government's explicit, ex post threat to implement a conditional-benefits legislation or regulation is credible. The central question is whether the government's implicit ex ante threat to withhold the benefit entirely, unless it is permitted to set the condition, is credible.

Credibility analysis must therefore look to the earlier condition-setting stage. Absent the ability to impose a condition that would withstand constitutional muster, would the government provide the benefit unconditionally, or rather withhold the benefit entirely? The implied threat, whose credibility must be examined, is the threat to withhold the benefit entirely if the power to condition the benefit is stripped away. Courts should follow this credibility test if they desire to promote the wellbeing of threatened parties. Holding a benefit unconstitutional, when the threat to withhold it is credible, only results in the denial of the benefit altogether.

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170. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987) (holding that by conditioning unemployment benefits on an individual's consent to work on Saturday, contrary to her religious beliefs, the government brought "unlawful coercion to bear on the employee's choice"); Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 593 (1926) (explaining that unconstitutional conditions pose a "choice between the rock and the whirlpool").

171. *See* Sullivan, *supra* note 163, at 1428–43 (describing and criticizing the Court's penalty and deterrence rationales).

Such a holding deprives the threatened party of the choice to concede the constitutional right in return for the more valuable benefit.[172]

While the Court's unconstitutional conditions jurisprudence has focused on the perspective of the threatened party, its doctrinal analysis has not ignored the perspective of the threatening party. In particular, the often-invoked germaneness doctrine can be interpreted as an approximation of the credibility test. The germaneness doctrine holds that germane conditions are permissible, or receive greater deference, while nongermane conditions trigger closer scrutiny.[173] The Court, however, has provided little guidance as to the theoretical basis for the germaneness test, and the absence of such a theoretical basis has resulted in inconsistent applications of the test.[174]

The credibility principle provides a theoretical basis for the germaneness doctrine. A germane condition is more likely to indicate a credible threat: If the government cannot constitutionally condition the benefit on the condition, it is more likely to withhold the benefit entirely. On the other hand, if the condition is nongermane, the government would likely choose unconditional provision over unconditional nonprovision of the benefit.

Credibility analysis promises to add certainty and discipline to what Kathleen Sullivan characterizes as "the extreme malleability of the concept of germaneness."[175] It also responds to Sullivan's critique that individual rights and interests can be equally burdened by germane as well as nongermane conditions. If germaneness indicates credibility, then upholding germane conditions promotes individuals' wellbeing. The same cannot be said about nongermane conditions.

Beyond the germaneness doctrine, one of the common arguments in unconstitutional conditions cases, championed by, among others, Justice Holmes, is that the greater power to deny the benefit entirely implies the lesser power to provide the benefit conditionally.[176] The greater-includes-the-lesser argument, as it has become known, requires the categorical rejection of the unconstitutional conditions doctrine and has been justly

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172. Alternatively, recognizing the credibility of the state's threat at the stage when the condition-setting legislation or regulation is already in place, the analysis can proceed in terms of the state's ex ante incentives to create credible threats. A broader application of the unconstitutional conditions doctrine can thus be justified as a means to prevent the government from creating credible threats.

173. *See* Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 348–52 (1935) (discussing several cases that illustrate the Court's likelihood to be influenced "by its views as to whether or not the condition is germane to the purpose for which the government might normally impose the burden without conditions").

174. *See* Sullivan, *supra* note 163, at 1457–76 (describing the germaneness debate in the cases and exploring different theoretical underpinnings for the germaneness test).

175. *Id.* at 1474.

176. *See, e.g.*, W. Union Tel. Co. v. Kansas, 216 U.S. 1, 53 (1909) (Holmes, J., dissenting) ("Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way.").

discredited. In particular, Richard Epstein has argued that "the power of *selective* [provision of a benefit] is the greater power, while the all-or-nothing choice [to provide the benefit unconditionally or not to provide it at all] is the lesser power."[177] Still, there is a grain of truth in the greater-includes-the-lesser argument. From the perspective of the threatened party, a denial of the benefit entirely imposes a greater burden than the threat to conditionally deny it. Thus, if unconditional denial of the benefit is not merely a power, but rather a credible threat, then stripped of the power to condition the provision of a benefit the government would deny the benefit entirely, imposing greater harm on the recipients. In these situations the greater-includes-the-lesser argument has the pragmatic validity that suggests that the condition should be upheld.

Kreimer, a leading commentator on the coercion of unconstitutional conditions, based his analysis on Nozick's threat-versus-offer distinction, which is centered around the identification of an appropriate baseline against which the proposal can be measured.[178] Kreimer proposed three alternative baselines—history, equality, and prediction—against which the government's proposal should be judged to determine its proper classification as a permissible offer or an unconstitutional threat.[179] The prediction baseline comes close to the factual baseline advocated by the credibility criterion. Consider the following hypothetical suggested by Kreimer:

> Assume that the city is about to build a superhighway, and has available two possible routes. Route 1 runs by the river. Route 2, the technically more desirable of the two, runs directly by the offices of the city newspaper most critical of the mayor; selection of Route 2 would considerably improve the paper's distribution network. The city planners have recommended Route 2. The mayor, however, sensing a chance for a political advantage, announces to the editor of the newspaper that unless the newspapers' stories on city politics become more flattering, the highway will follow Route 1.[180]

Kreimer argues that the prediction baseline is one where the highway follows Route 2 because if the city was constitutionally or otherwise barred

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177. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 31 (1988).

178. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

179. *Id.* at 1353. Kreimer's analysis has been criticized for failing to provide a single, coherent baseline. *See, e.g.*, Epstein, *supra* note 177, at 13. Sullivan takes the more extreme position that coercion analysis is doomed to fail, since the requisite normative baseline is very difficult to derive from post-1937 constitutional jurisprudence. Sullivan, *supra* note 163, at 1443. More recently, Mitchell Berman has argued that the Constitution does provide the necessary baseline against which coercion claims must be judged; he articulates a coercion-based theory of unconstitutional conditions. *See* Berman, *supra* note 168, at 15–18.

180. Kreimer, *supra* note 178, at 1371.

from imposing the flattering stories condition, it would choose Route 2. Accordingly, Kreimer characterizes the mayor's proposal as an unconstitutional threat.[181] Kreimer does not ask what the city would have done if the newspaper rejected its proposal. Rather, he asks what the city would have done if it were prevented from making the proposal in the first place. But as we argue above, this is the appropriate credibility question in the unconstitutional conditions context.[182]

Kreimer's prediction baseline analysis sits well with the credible coercion theory. Kreimer, however, fails to recognize the logical priority of the prediction baseline. For him, this is but one of three baselines that must be considered in distinguishing between permissible offers and unconstitutional threats.[183] Accordingly, if the history or equality baselines would deem the proposal coercive, Kreimer may well consider the condition unconstitutional, even if the prediction baseline points in the opposite direction. By contrast, credible coercion analysis suggests that credibility—or the satisfaction of the prediction baseline—is a sufficient condition for nonintervention.[184]

A prominent consequentialist account of unconstitutional conditions was provided by Richard Epstein.[185] Epstein explicitly invokes a contractual perspective, and explores possible justifications for judicial intervention in the agreement between the state and the recipient of the benefit, specifically monopoly, collective action problems, and externalities. In his view, the unconstitutional conditions doctrine is a "'second best' approach to

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181. *Id.* at 1371–72.

182. In a one-shot game, Kreimer's test is equivalent to the standard credibility test: What would the city have done if the newspaper had rejected its proposal. But the political game is rarely a one-shot game. And, as we discuss above, reputation-based considerations can enhance the credibility of threats made by repeat players. *See supra* subpart II(A). Such reputation-driven credibility is, however, endogenous to the legal regime. A regime that gives no effect to agreements resulting from threats, whose credibility is based solely on reputational considerations, would deter the making of such threats. Indeed, this is one of the cases where we concluded that ex post remedies, or, in the present case, an ex ante prohibition on the imposition of conditions, could be desirable. *See supra* subparts II(A) & (F).

183. Kreimer, *supra* note 178, at 1374–78.

184. Kenneth Simons comes closer to the ideal suggested by the credible coercion theory. Simons proposes that the prediction baseline be the sole yardstick. He concludes that if the government's proposal improves the recipient's position as compared to the predictive baseline, namely when the threat is credible (according to our terminology), it "should receive lesser scrutiny." *See* Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289, 312, 325 (1989). Berman also seems to advocate a predictive baseline: "Taking as given the offeree's refusal to . . . comply with the state's demand, would the state offeror better advance its legitimate and actual interests by withholding the benefit offered or by granting it notwithstanding the offeree's constitutionally protected choice [not to comply]." Berman, *supra* note 168, at 46. Berman emphasizes, however, that this is "not *the* predictive baseline familiar to unconstitutional conditions scholarship." *Id.* The reason is that Berman's baseline is normative, not positive. *See also supra* note 179.

185. Epstein, *supra* note 177.

controlling government discretion."[186] Epstein acknowledges that "[w]hen the government is told that it cannot bargain with individuals, the empirical question arises whether government will deny them a useful benefit altogether, or grant them the benefit without the obnoxious condition."[187] But Epstein does not give this empirical question the normative weight required by the credible coercion theory. In fact, Epstein rejects the coercion approach altogether. Epstein's objective is to limit government discretion, which he believes will promote social welfare in a broad sense; his main concern is not the interest of the threatened party. Epstein is optimistic that, forced to choose between unconditional provision of the benefit and unconditional denial of the benefit, government will often choose the former, but recognizes that this optimism is not always justified.[188]

F. Blackmail

The crime of blackmail covers threats to perform an otherwise legal act. In the paradigmatic blackmail case, *A* threatens to disclose information harmful to *B*—a disclosure that may otherwise be within *A*'s rights—unless *B* pays *A* a specified sum of money (Example 6).[189]

From a credibility perspective, the pivotal question is whether, absent payment by *B*, *A* would make good on his threat and disclose the information. Timing is crucial here. After the threat has been made, and assuming that the act of disclosing the information is not in itself illegal, there is little reason for *A* not to disclose the information; *A*'s threat is credible. At this stage it may well be in *B*'s best interest to strike a deal with *A* and prevent the disclosure.[190] It might also seem that, if the threat is indeed

186. *Id.* at 28.

187. *Id.*

188. *Id.* at 103–04.

189. *See* CHARLES E. TORCIA, 4 WHARTON'S CRIMINAL LAW § 658 (15th ed. 2003) (explaining that "blackmail" is synonymous with "extortion," defined as "the obtaining of money, property, or anything of value by any person, by means of a threat"); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 694–95 (1984) (stating the paradigmatic blackmail case exists where *A* threatens to disclose damaging information about *B* unless *B* pays for its suppression). The underlying problem involves the criminalization of speech. *See generally* Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081 (1984). The First Amendment claim is, at least in some cases, countered by the constitutional right to privacy.

190. *See* Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 558 (1983) (stating that the blackmailed party, in this case *B*, is at a disadvantage if blackmail is illegal because he is "deprived of the choice that the threat would have otherwise given him" and is thus unable to strike a deal and prevent disclosure); s*ee also* WERTHEIMER, *supra* note 4, at 93 (describing how *B*, the "prospective blackmail victim, might prefer to be the object of a blackmail threat" because then *B* will have "the opportunity to purchase his immunity from public scandal"). We assume that *A* can credibly commit not to reinstate the threat after receiving payment from *B* (a commitment that could be based on reputation, or, if blackmail were legal, on enforcement of the blackmail contract). For an analysis of the multiple threats problem, see Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877, 1884–87 (1993).

credible, punishing *A* for making the threat would only induce *A* to reveal the information without giving *B* the chance to offer a bribe.[191]

The criminalization of blackmail, however, operates at the earlier prethreat stage, in which *A* acquires the damaging information. By sanctioning the threat itself, the law provides a counterforce to the potential profits from such a threat, thus seeking to discourage the very making of the threat.[192] If a party can be deterred from making the threat, this party's expected revenues from the damaging information are diminished, potentially discouraging her from spending any resource in acquiring this information in the first place. Thus, in situations in which blackmail arises from a deliberate plan by the blackmailing party to acquire the damaging information for the purpose of extracting hush money, the incentive to make such acquisition will be unambiguously weaker in a regime that punishes blackmail. In these deliberate-acquisition-of-information situations, blackmail credibility is endogenous,[193] and, thus, antiblackmail measures are effective. Indeed, this ex ante perspective has been previously invoked in defense of the criminalization of blackmail.[194]

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191. *But see* Henry E. Smith, *The Harm in Blackmail*, 92 NW. U. L. REV. 861, 903–05 (1998) (arguing that under certain conditions *A* would not reveal the information).

192. But consider the following counterargument: Absent criminalization of blackmail, it might be difficult for *A* to extract money from *B*, since *A* may not be able to commit not to reinstate the threat after *B* pays up. *See* Shavell, *supra* note 190, at 1884–87 (discussing the options of *B* when faced with repeated threats); *see also* Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905, 1928 (1993) (noting that by criminalizing blackmail "[*B*] gains considerable control over disclosure from entering into a bargain with [*A*], because [*A*], by incurring the criminal exposure of a blackmailer, can now sell [*B*] a much higher likelihood of silence").

193. An extreme form of which is Epstein's Blackmail, Inc., a corporation specializing in blackmail. *See* Epstein, *supra* note 190, at 561–66.

194. *See, e.g.*, FRIED, *supra* note 4, at 102 (arguing that the law condemns blackmail because the law does not favor conduct that has the general purpose of harming others); Ronald H. Coase, *Blackmail (The 1987 McCorkle Lecture)*, 74 VA. L. REV. 655, 674 (1988) (arguing that the prohibition against blackmail can prevent wasteful "expenditure of resources in the collection of information which, on payment of blackmail, will be suppressed"); Shavell, *supra* note 190, at 1879–80 (1993) (discussing the ex ante effects of criminalizing blackmail); Jeffrie Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 163–66 (1980) (arguing that the prohibition against blackmail is designed to limit incentives for the invasion of privacy); *see also* NOZICK, *supra* note 122, at 85 ("[A blackmailer's] victims would be as well off if the blackmailer did not exist at all."). In its basic formulation, this defense of the prohibition against blackmail justifies only the criminalization of blackmail that is based on deliberate investments to uncover harmful information; and it cannot explain the current scope of prohibition, which extends to threats based on inadvertently acquired information. *See* Lindgren, *supra* note 189, at 689–94 (distinguishing between entrepreneurial and opportunistic blackmail). However, even with inadvertently acquired information, some investment is required to leverage the information into blackmail, and the law may well be justified in seeking to discourage such investments. *See* Coase, *supra*, at 674 (discussing an example of how a worker accidentally discovered a clergyman engaged in inappropriate behavior for his profession). Also, potential victims might invest in precautions to protect against blackmail or might engage in harmful self-help against the blackmailer, even when the blackmail is based on inadvertently acquired information. Criminalizing blackmail reduces the need for such wasteful investments. *See* Shavell, *supra* note 190, at 1879–80, 1903 (noting this point); Smith, *supra* note 191, at 862–63 (arguing that failure to criminalize blackmail would create

The legal strategy of criminalization of the threat differs from that employed by the credibility-reducing policies described in subpart II(F). In the blackmail case, the law will not sanction the threatened action itself, only the making of the threat—the demand to be bribed. Both legal strategies, however, serve the same underlying goal—discouraging the creation of credible threats.[195]

But what if blackmail credibility is exogenous? Imagine, for example, a scenario in which during the course of friendship or partnership, one party becomes privy to compromising information concerning the other party, for example borderline tax evasion, marital infidelity, or an illicit hobby. Eventually, the relationship disintegrates, replaced by sentiments of resentment. At this point, the informed party threatens to disclose the embarrassing information, and will indeed gain enough vengeful satisfaction from such disclosure that only a substantial sum of hush money can induce him to keep quiet. In such cases, criminalizing blackmail only induces the informed party to disclose the information unconditionally, thus hurting the threatened party, who may no longer be able to prevent the disclosure of harmful information. If blackmailing threats are punished indiscriminately, threatened parties gain from the deterrence of deliberate blackmails but lose from their reduced ability to avoid blackmails that utilize incidentally acquired information.[196]

G. Duty to Help

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

Example 9: *The Tug Case*. A ship becomes disabled while at sea. A tug comes alongside the ship and the captain of the tug offers to save the ship in exchange for ninety-nine percent of the value of the ship's cargo. The owner of the ship agrees. Should he be held to the contract?[197]

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incentives for a blackmail victim to commit crimes to maintain secrecy). For a thoughtful critique of these justifications for the criminalization of blackmail, see Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 799–833 (1998) (proposing to solve the "blackmail puzzle" by formulating a "just punishment" criterion).

195. A third alternative is to refuse enforcement of certain blackmail contracts. *See* Isenbergh, *supra* note 192, at 1925–32 (arguing that this alternative is superior to the criminalization of blackmail).

196. *Cf. id.* (proposing selective enforcement of blackmail contracts only when they are based on adventitiously acquired information).

197. This example, or similar ones, are discussed in POSNER, *supra* note 70, at 117; FRIED, *supra* note 4, at 109–11; TREBILCOCK, *supra* note 67, at 87–90.

Prior analyses of circumstances akin to *The Tug Case* in legal and philosophical literature focus on the duty to help and its implications.[198] For example, Fried concedes that a duty to help can override the principle of "contract as promise," arguing that cases such as *The Tug Case* fall under the domain of the duress doctrine.[199] Nozick, considering an example similar to *The Tug Case*, argues that if people believe the normal and expected (i.e., morally required) course of events is for the tug to rescue the ship, the tug captain is making a coercive threat not to save, rather than a noncoercive offer to save.[200]

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

Admiralty law exhibits a remarkable sensitivity to implicit credibility considerations. While admiralty courts have the power to strike down salvage contracts specifying exorbitant prices, this power is tempered by a nuanced understanding of the potentially detrimental ex ante effects that might result from the exercise of such power.[201] First and foremost, when maritime law strikes down a salvage contract, it does not leave the salvor empty-handed. Rather it guarantees the salvor a "reasonable fee" equal to the risk-adjusted cost of performing the salvage activity plus a bonus.[202] The doctrinal guidelines determining the magnitude of this reasonable fee eliminate the potential credibility of the salvor's threat to sail away. In particular, admiralty courts, in measuring the salvor's cost of performance, do not look only to the actual cost of salvage; they also consider the salvor's

198. *See* FRIED, *supra* note 4, at 109–11 (arguing that liberal individualism includes "a duty to be concerned about and to assist others"); Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980) (reviewing the literature and criticizing the argument that the Bad Samaritan's omission is the cause of harm); Francis H. Bohlen, *The Moral Duty to Aid Others as the Basis of Tort Liability*, 47 U. PA. L. REV. 217 (1908) (arguing for a duty to rescue); Anthony M. Honoré, *Law, Morals, and Rescue*, *in* THE GOOD SAMARITAN AND THE LAW 238–42 (James M. Ratcliffe ed., 1966) (arguing that the law should recognize moral duties owed to others).

199. FRIED, *supra* note 4, at 109–11 ("Those promises were exacted under duress.").

200. Nozick, *supra* note 4, at 449–50.

201. GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 579 (2d ed. 1975); *see, e.g.*, The Elfrida, 172 U.S. 186, 196 (1898) ("We do not think that a salvage contract should be sustained as an exception to the general rule, but rather that it should, *prima facie*, be enforced, and that it belongs to the defendant to establish the exception.").

202. *See* Post v. Jones, 60 U.S. (19 How.) 150 (1856) (holding, under circumstances similar to those presented in *The Tug Case*, that the contract was unenforceable and limiting the rescuers to the normally allowed fee for salvage); *see also* FRIED, *supra* note 4, at 109–11 (supporting the *Post v. Jones* ruling).

alternative costs—the value of the salvor's time and profits that could have been made elsewhere.[203] This accurately broad interpretation of "the cost of performance" strips away the credibility of the salvor's threat and ensures that performing the salvage operation is incentive compatible for the salvor.

The Supreme Court's decision in *Post v. Jones*[204] is illustrative. The facts in *Post* resemble those in Example 8. The cargo of the wrecked whaling ship, *Richmond*, was purchased by another whaling ship.[205] To be sure, the Court, in nullifying the contract between the master of the *Richmond* and its salvors, applied duress reasoning,[206] considered the substantive fairness of the contract,[207] and invoked the salvors' duty to help.[208] But between duress, fairness, and the duty to help, the Court also considers the credibility of the salvors' threat to sail away. In particular, the salvors claimed that but for the profitable terms they secured in return for their effort, they would have preferred to continue with whale hunting.[209] The Court rejects this claim, finding that given the uncertainty and risk involved in catching whales toward the end of the season, the salvors would have taken the *Richmond*'s cargo for the ordinary salvage fee.[210] The Supreme Court's credibility analysis ensured that the invalidation of the contract, and the replacement of the contract price with a lower, court-determined fee, would not discourage salvage in similar situations.

In fact, the concern with providing ample incentives to rescue distressed vessels is a central theme in the admiralty cases. As one court held: "The primary principle upon which salvage awards are allowed at all is the principle of encouraging rescue."[211] This ex ante perspective sits well with the credibility approach advocated in this Article.

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203. *See infra* discussion of *Post*, 60 U.S. (19 How.) at 159–60 (considering actual costs and alternative profits); *The Elfrida*, 172 U.S. at 197 (citing "time and labor" expended as well as "loss of profitable trade" as factors determining the value of the salvage service).

204. *Post*, 60 U.S. (19 How.) at 150.

205. *Id.* at 156.

206. The Court notes that "the master of the Richmond was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission." *Id.* at 159.

207. The Court characterizes the contract as "an unreasonable bargain." *Id.* at 160.

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

209. *Id.* at 159–60.

210. *Id.* at 160.

211. The Donbass, 74 F. Supp. 15, 23 (W.D. Wash. 1947) (basing its decision on the Supreme Court's ruling in *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869)). In *The Blackwall*, the Court stated:

> Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a *quantum meruit*, or as a remuneration PRO OPERE ET LABORE, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.

V. Conclusion

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

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

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

The emphasis on a morally-neutral feasibility analysis may seem objectionable to a reader who, like us, views coercion first and foremost as a normative problem. That reader might wonder why this criterion, with its potential to validate morally-reprehensible coercion, should be endorsed. The answer we provide is that there is no other choice. The reader may choose to ignore the implications of the morally-neutral credibility perspective, but unfortunately this will not make them go away. When

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77 U.S. (10 Wall.) at 14; *see also* Eisenberg, *supra* note 121, at 761 (arguing that recovery "should not only compensate the promisee for all costs, tangible and intangible but should also include a generous bonus to provide a clear incentive for action").

coercion arises from credible threats, advocating a normatively appealing, yet nonfeasible, solution is pointless.

Other readers may find the credibility criterion daunting, as we provide only sparse guidelines on how to implement it. Do courts have the capacity and sophistication to carry out case-by-case adjudication of credibility? The analysis in this Article recognizes areas in which this adjudicative task is probably too burdensome, as in the case of plea bargains. But it also identifies major areas in which the credibility test is implementable and yet regularly overlooked, as in the case of contract modifications. Overall, the host of factors that can make a threat credible, and that should enter the credibility analysis, is so broad as to ignite, again, the temptation to ignore this test and to opt for more practical, implementable approaches.

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

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

We began with a skeptical view regarding the ability of a liberal society to combat coercion. We demonstrated that many common antiduress measures are powerless in aiding coerced parties, and in fact, these measures will often harm coerced parties. Hopefully, what started as a skeptical, critical evaluation ended up providing constructive guidelines for the design of effective anticoercion policies. Credible coercion tells us not only what will not work, but also what will work.