HOW TO DO AWAY WITH COERCION IN THE LAW

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ABSTRACT

The idea of coercion, along with its close synonyms, is conspicuously relied upon in many and diverse legal contexts. There is, however, no reasonably determinate legal understanding of the idea of coercion, either in general, or in any particular legal context. Pursuing the idea of coercion turns out to be vain and affirmatively distracting, but, fortunately, entirely unnecessary as well. This Article develops these themes.

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INTRODUCTION

The idea of coercion pervades the law.[1] It is said that "[c]oercion impacts contracts, unconstitutional conditions, plea bargains, duties to obey the law, medical ethics, and duress."[2] But the idea of coercion oddly seems to straddle everyday language and the realm of semi-technical terms. The philosophers tell us that there are many distinct kinds of definitions of any given term.[3] A 'definition' of coercion can thus itself mean different things. If we begin with Black's Law Dictionary, we find that to 'coerce' is to "compel by force or threat."[4] A bit more elaborately, the Oxford English Dictionary seeks to define coercion in terms of "constraint, restraint; compulsion; the application of force to control the action of a voluntary agent."[5]

At a popular level, the idea of coercion may suggest what is called a 'Hobson's Choice.' Legendarily, a Hobson's Choice from among Hobson's stable of rental horses was no real choice at all, other than to seek a horse elsewhere. Either one accepted the first horse available from among Hobson's horses, or one did without.[6] It was, essentially, a take-it-or-leave-it proposition.[7]

These vague understandings, however, do not begin to suggest the complications that are faced when attempting to account for coercion's meanings and roles in legal contexts. The most important of such complications, and their implications, are explored below.[8] Ultimately, we should recognize that pursuing a reasonably determinate idea of coercion in the law, whatever the context, is vain, distracting, and unnecessary. There is no reasonably popular idea of coercion, in general or as contextualized, that performs any genuinely useful descriptive or normative work. Thankfully,

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1. *See* Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951, 953 (2018). More broadly, "coercion is a concept of central importance for moral, political, and legal philosophy." Denis G. Arnold, *Coercion and Moral Responsibility*, 38 AM. PHIL. Q. 53, 53 (2001).

2. Ferzan, *supra* note 1 (footnotes omitted).

3. *See* Anil Gupta, *Definitions*, STAN. ENCYC. OF PHIL. (Apr. 10, 2008), https://plato.stanford.edu/entries/definitions (last visited Dec. 1, 2021).

4. *Coerce*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* United States v. Elliott, No. 19-2113, 2020 WL 6746990, at *4 (6th Cir. Nov. 17, 2020) (noted in the sentencing guideline "crime of violence").

5. OXFORD ENGLISH DICTIONARY (2022), https://www.oed.com/view/Entry/35725?redirectedFrom=coercion#eid (last visited Oct. 9, 2022).

6. *See generally* Gary Martin, *Hobson's Choice*, THE PHRASE FINDER, www.phrases.org.uk/meanings/hobsons-choice.html (last visited Dec. 1, 2021).

7. *See id.* In the case law, a parolee's choice between being imprisoned and renouncing his apparently sincere religious beliefs has been described as a 'Hobson's Choice.' *See* Janny v. Gamez, 8 F.4th 883, 907 (10th Cir. 2021).

8. *See infra* Sections II–IX.

the idea of coercion in legal contexts is, dispensable.

The importance of exploring the complications of coercion's meanings and roles in the legal context is suggested by the sheer range of legal contexts in which the idea of coercion and its close synonyms appear to play a crucial role. The illustrative contexts above[9] could be broadly supplemented, as few significant areas of the law do not appear to depend, at crucial points, on the idea of coercion.

Thus, coercion seems important in Sherman Antitrust Act contexts involving boycotts, intimidation, or coercion;[10] in the prohibition of intimidation, threats, or coercion in public accommodation cases;[11] in the statutory relationships between automobile retailers and their suppliers;[12] in the context of buying or coercing election votes;[13] in the context of feared retaliation by controlling shareholders against minority shareholders;[14] in a range of contractually compelled arbitration contexts;[15] with respect to the treatment of immigrants and undocumented workers;[16] and even in Thirteenth Amendment cases of involuntary servitude.[17]

As significant as these particular coercion contexts are, they do not begin to encompass the most frequently encountered contexts of arguable legal coercion. We shall address these more salient contexts below.[18] Ultimately, the idea of coercion in the law proves unnecessary, and in the meantime, distracts from what really matters to us in the legal realm.

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9. Ferzan, *supra* note 1, at 953.

10. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 534 (1978) (citing the Sherman Act at 15 U.S.C. § 1013(b) (1976)).

11. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 248 (1954) (prohibiting coercive interference with any relevant right or privilege).

12. *See* George Lussier Enters. v. Subaru of New England, Inc., 393 F.3d 36, 42–43 (1st Cir. 2004) (citing the relevant statute at 15 U.S.C. § 1221(e)).

13. *See* Rideout v. Gardner, 838 F.3d 65, 70–72 (1st Cir. 2016) (referring to both the buying and selling of votes, at whatever price, and to the phenomenon of "voter coercion," presumably via the exchange of money for votes).

14. *See* Tornetta v. Musk, 250 A.3d 793, 808 (Del. Ch. 2019) (no voter ratification is recognized if the vote was inequitable or impermissibly coercive).

15. For a sense of this evolving area of the law, see Solomon v. CARite Corp., No. 20-1020, 2020 WL 6867186, at *4-5 (6th Cir. Nov. 23, 2020); EEOC v. Luce, 345 F.3d 742 (9th Cir. 2003) (Civil Rights Act of 1991 permits agreements mandating arbitration of Title VII claims as a condition of employment). *But cf.* Susan Antilla, *The End of Forced Arbitration?*, THE AMERICAN PROJECT, https://prospect.org/justice/end-of-forced-arbitration/ (last visited Dec. 1, 2021) (referring to reduced support for "take-it-or-leave-it arbitration agreements").

16. *See, e.g.*, Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1558 (2015) (distinguishing "free labor" from "illegitimate coerced labor").

17. *See* United States v. Kozminski, 487 U.S. 931, 944 (1988) (recognizing involuntary servitude under the Thirteenth Amendment that is "enforced by the use or threatened use of physical or legal coercion" and thus drawing an intriguing distinction between physical coercion and legal coercion, however that distinction might ultimately be drawn).

18. *See infra* Sections II–IX.

II. COERCION AS A DISTINCT AND PARTICULAR CRIME

Consider, to begin with, that 'coercion' often names a distinctive crime.[19] Coercion can also designate the character of a crime, as in the offenses of felony coercion[20] and theft by coercion.[21] At least in some contexts and for some purposes, the crime of 'felony coercion' is not categorized, rightly or wrongly, as a "crime of violence" for purposes of the United States Sentencing Guidelines, as we see in the cases below. Thus, for example, the Nevada Supreme Court has adopted a broad understanding of what coercion can involve in the felony coercion context. Nevada law holds that coercion can take the form of the threatened use of physical force against an object such as a telephone,[22] as opposed to the use of physical force against the person being coerced, against some other person related to the coercer, against an innocent stranger, or against some distinctively valuable or irreplaceable item of real or personal property.

The prospect of coercion through a credible threat to damage one's phone illustrates the problem of selecting a "proper baseline" when determining if coercion, however defined, is (sufficiently) present in a given context. Suppose under some range of circumstances, that a would-be coercer credibly threatens to break one's phone if one does not comply with the coercer's demand, and likely will not break the coercees's phone if the coercee (sufficiently) complies.

We might then picture a threatened phone-breaking scenario in which complying with the would-be coercer's demand would require the coercee's murder of innocent persons. Here, the idea of a proper baseline level of resistance, fortitude, and other resources and capacities on the part of the coercee would suggest that one who complies with the instruction to murder the innocents, lest their phone be destroyed by the 'coercing' party, cannot normally claim that their will was overcome by the threat of a broken phone, and was therefore coerced.

Our natural response might thus focus on the would-be coercee's resistance "baseline," which we might well judge in the murder versus

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19. *See, e.g.*, United States v. Powell, No. 09-35525, 2011 WL 2620423, at *2 (9th Cir. July 5, 2011) (citing OR. REV. STAT. § 163.275(1)(a) (2016)); Cortez-Guillen v. Holder, 623 F.3d 933, 935 (9th Cir. 2010) (citing ALASKA STAT. § 11.41.530(a)(1) (2010)).

20. *See, e.g.*, Becerril-Guadarrama v. Sessions, 727 F. App'x 433 (9th Cir. 2018); United States v. Edling, 895 F.3d 1153, 1155 (9th Cir. 2018).

21. *See, e.g.*, *Becerril-Guadarrama*, 727 F. App'x at 433.

22. *See Edling*, 895 F.3d at 1160 (referencing Gramm v. State, No. 72459, 2018 WL 679548, at *2 (Nev. Feb. 1, 2018)). To change the scenario, it has been held in some contexts that coercion may be successfully applied to obtain items of property, as distinct from obtaining a desired death or injury of a person. *See, e.g.*, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 407–08 (2003) (seeking to distinguish coercion from extortion).

phone-breaking scenario to be culpably unsatisfactory. Or if we still want to say that the party in question really was 'coerced,' then coercion in this case may not absolve, or even much mitigate, the coercee's own moral and legal responsibility for the murder of the innocents.

With additional circumstantial detail, however, comes additional indeterminacy, some knotty complications, and further conceptual problems. As merely the first instance of this recurring pattern, consider the Oregon criminal coercion statute at issue in *United States v. Powell*.[23] Under this statute, a person could be convicted of the crime of coercion if he or she

> compels or induces another person to engage in conduct from which the other person has a legal right to abstain or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the [coercive] actor or another will . . . [u]nlawfully cause physical injury [or property damage, etc.] to some person.[24]

Consider some of the problems raised by this language. First, the statute assumes, not without controversy, that coercion can take the form not only of compulsion, or of compelling action or inaction, but of otherwise inducing action or inaction.25 The broad idea of inducing compliance, however, introduces the possibility of 'control' through rewards, through unanticipated and undeserved payments, through large or small benefits, or even through the exercise of logical persuasion. Of course, a 'fear' of some particular outcome must be present as well. But how reasonable, well-grounded, hypersensitive, or irrational is that (genuine) fear allowed to be? What degree of likeliness, subjective or objective, must there be with respect to the carrying out of the threat? What if the would-be coercee is so timid, or so imperceptive, as to lend undue credence to the threat? How severe must the threatened physical injury, or other harm, evidently be? A person might suffer a physical injury in the form of having one's toes trodden upon. Could it make a difference whether the toes to be trod upon are the coercee's, or the coercee's dependent, or some unspecified stranger, perhaps at a later date?

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23. *Powell*, 2011 WL 2620423 at *2.
24. *Id.*
25. *See id.*

Read literally, this statute allows for a possible finding of coercion where the would-be coercer demands that the coercee engage in a mass murder in exchange for an objectively trivial monetary payment, or where the threatened harm in the event of non-compliance could be an objectively minor physical injury to any person.[26] Or where the would-be coercee, in refusing, must accept as punishment the physical injury of a punch to the shoulder, or a punch to the shoulder of some related or unrelated person.[27]

The problems lurking in the criminal coercion statutes could be elaborated indefinitely. But a sense of the overall non-viability of the concept of coercion is better attained through surveying briefly some of the other important legal contexts in which coercion is taken to be essential.

III. COERCION AS A DEFENSE TO A CRIMINAL CHARGE

Coercion can be not only a criminal offense, but also a defense to a criminal charge or grounds for a downward departure in sentencing.[28]

In these cases, a defendant seeks to avoid or minimize criminal liability by showing that their participation in the crime at issue was coerced. But any such claim is immediately rendered problematic if, as is sometimes thought, coercion itself can be a matter of degree.[29]

In one coercion defense case,[30] a gang leader allegedly told the eventual defendant that unless the defendant committed a series of bank robberies, in repayment of money owed to the gang for drugs,[31] the gang leader would arrange for the killing of several of the defendant's close relatives.[32] The court indicated that there can be no coercion defense unless the defendant "had no alternative to submitting to the demand that he commit a crime."[33]

More fully, courts have held that a coercion defense may be warranted only if

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26. *See id.*
27. *See id.*
28. For some related issues, see *Cortez-Guillen*, 623 F.3d at 935.
29. *See* Martin Gunderson, *Threats and Coercion*, 9 CAN. J. PHIL. 247, 248 (1979) (stating that "there are degrees of coercion"). Degrees of coerciveness are also implicit in Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE & METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (Sidney Morgenbesser, et. al., eds., 1969). Certainly, the severity, disagreeableness, probability, and unfairness of a threat can vary as a matter of degree. How the law could even begin to cope with these basic complications is, however, difficult to imagine.
30. United States v. Dunkin, 438 F.3d 778 (7th Cir. 2006).
31. *See id.* at 779.
32. *See id.*
33. *Id.* at 780 (citing United States v. Bailey, 444 U.S. 394, 410 (1980)).

> a defendant establishes (1) an immediate threat of a nature sufficient to induce a well-grounded apprehension of death or serious bodily injury if the offense is not committed and (2) that the threat occurred in a situation in which there was no reasonable opportunity to avoid the danger. A defendant cannot invoke the defense of coercion if there existed an opportunity to avoid the act without threat of harm or a reasonable and legal alternative to the commission of the crime.[34]

The first problem with this approach to a coercion defense is that all its elements might well be met in the case of a defendant who was, and would normally have been, eager to commit the charged crime in the absence of any coercion. The coercion is thus causally unnecessary, and merely guarantees what the defendant would have done anyway.

And then, as in most coercion contexts, these and similar approaches to the defense of coercion underplay the need for what we might again call resistance baselines, or legitimate baseline expectations and requirements, at various points in the analysis. Even if we set aside the possibility that coercion can ever be a matter of degree,[35] much remains to be specified, one way or another.

The coercion defense, more deeply, seems to assume something akin to what we might call an autonomous free agency model of defendant decision making. No such model, however, may describe or apply to a drug-addicted, lower-level gang member who is realistically dependent on the gang.[36] And for any vulnerable defendant, what difference does any legally required immediacy[37] of the threat really make? If a threat is sufficiently credible, and sufficiently costly or risky to avoid, and apparently inevitable at some point in time, what difference should the immediacy or non-immediacy of the threatened action make?

If no genuine offer or reward could ever excuse any crime, we might ask whether the threat in question would have to involve the exertion of force.[38] The category of threats is much broader than, and need not involve

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34. United States v. Morales, 684 F.3d 749, 756 (8th Cir. 2012) (citing United States v. Harper, 466 F.3d 634, 648 (8th Cir. 2006)). This language leaves the court an utterly unspecified time frame in which it is permitted to look back and find a realistic opportunity for the defendant to have avoided vulnerability to coercion. As a result, the inquiry is hopelessly indeterminate.

35. *See* Gunderson, *supra* note 29.

36. Consider, for example, possible variations on the *Dunkin* case circumstances, as noted *supra* in text accompanying notes 30–32.

37. *See supra* text accompanying note 34.

38. As in, say, a threat to dismiss from employment, to disclose confidential information, or to deny a job application or a recommendation in ordinary business contexts.

any recourse to, force.[39] A major loss of status or opportunity or the threat of such loss clearly need not be carried out through force.

Then we must ask whether a "well-grounded"[40] apprehension of harm must mean something like the idea that, at the time, the threatened harm seemed more likely to be carried out than not carried out without the defendant's criminal act. 'Well-grounded' may suggest something like 'more probable than not.' But on the other hand, in another context, the Court has rejected this narrow interpretation.[41]

We may assume that a threat of "death or serious bodily injury"[42] need not be to the defendant or even to anyone known to the defendant. A credible threat to set off a bomb in a populated area could, conceivably, have a coercive effect. More disturbingly, the law's concern for any "reasonable"[43] alternatives to the charged crime does not seem to allow for any comparison between the gravity of the threatened coercive harm and the gravity of the charged criminal offense.

In this respect, the law of coercion as a criminal defense ignores what we might call proportionality, if not simply the public well-being. Without adopting any distinctive approach to proportionalism in the law,[44] the question arises as to whether the severity and the probability of the threatened retaliatory harm should ever be balanced against the gravity of the crime for which coercion is claimed as a defense.

Suppose there is a credible threat to kill a close relative of the defendant, at the time and place of the coercer's choosing. In some cultural contexts, but hardly all, the would-be coercee could obtain the effective intervention of the local police. Here, we briefly assume away the major problem of the time frame within which someone could reasonably avoid being later coerced. In other contexts, though, any such course would be realistically

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39. While some statutes refer to 'danger,' see the authorities cited *supra* note 34, other cases explicitly require a threat of 'force.' *See, e.g.*, United States v. Gonzales, 407 F.3d 118, 122 (2d Cir. 2005).

40. *See supra* text accompanying note 34.

41. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 430–31 (1987) ("[O]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.").

42. Interestingly, 'coercion' in the context of a sentencing reduction, rather than a complete defense, does not require a showing a threat of physical injury. Mere substantial damage to property may also suffice. *See, e.g.*, United States v. Cotto, 347 F.3d 441, 445 (2d Cir. 2003); United States v. Sachdev, 279 F.3d 25, 28 (1st Cir. 2002). Why property damage can be coercive in one context but not in another is left judicially unexplored. Ironically, while property damage may be coercive for sentencing reduction purposes, "economic hardship and financial hardship," however severe, cannot be construed as coercive for sentencing reduction purposes. *See id.* For this there is also no obvious explanation. *See id.*

43. *See supra* text accompanying note 34.

44. *See generally*, *e.g.*, PROPORTIONALITY AND THE RULE OF LAW (Grant Huscroft et al., eds., 2014); FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING (Cambridge Univ. Press 2018).

unavailable. In the latter cases, what should we say if the assumedly coerced crime is relatively trivial in comparison with the credibly threatened retaliatory harm?

Perhaps the crime at issue is a matter of driving a vehicle containing marijuana from point A to point B. We may assume that if the coercee does not undertake this illegal assignment, someone else will. Why shouldn't the gravity of the defendant's crime, or lack thereof, be considered in coercion defense cases?

And if lack of gravity of the criminal harm can be relevant, why not then revisit the very nature of the threatened harm? Why can't a coercion defense be predicated not only on a threat of death or serious bodily harm, but on a credible threat to destroy the defendant's livelihood, or home, or cause similar harm to a relative?

More fundamentally, why couldn't the degree of certainty that the threat will be carried out be traded off against the severity of a coercive threat? Why can't the near certainty of a moderately severe physical injury be of greater coercive effect than a merely even chance at a somewhat more severe physical injury?

Finally, the requirement that the defendant have "had no alternative to submitting to the demand that he commit a crime"[45] amounts to a mere rhetorical gesture, or a mere metaphor, rather than a legal rule. Whether the criminal defendant had an alternative to committing the offense in question will ordinarily depend, among other contestable judgments, on the time frame that the court chooses to think most relevant.

Generally, the narrower the judicially chosen time frame, the less the opportunity to avoid submission to coercive influence. Having no advance notice of a credible threat constricts one's options. But having ample notice may, at least in some cases, permit an effective escape from any realistic threat of coercion. All else equal, the greater the advance notice, the less we may be willing to conclude that the coercee "had no alternative to submitting,"[46] and that the coercee bears at least some moral and causal responsibility for her plight.[47] But the known, or knowable, criminal or violent character of one's associates may play some role as well. And not all such initial criminal associations seem entirely voluntary.

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45. *Dunkin*, 438 F.3d at 780 (citing *Bailey*, 444 U.S. at 410).

46. *Id.*; *see also* United States v. Sharron, 986 F.3d 810, 814 (8th Cir. 2021).

47. Consider, relatedly, the requirement that a coercion defense claimant has "not recklessly or negligently placed himself in a situation making it probable that he would be forced to commit a crime." *Sharron*, 986 F.3d at 814. A voluntary choice to seek membership in a hierarchically organized criminal group could presumably undermine a claim of later coercion. One might reasonably anticipate being later subjected to coercion.

More fundamentally, though, the idea of having no alternative but to submit to coercion must implicitly build in one set or another of assumptions about moral baselines, capacities, expected fortitude, reasonableness, costs, freedom, and commitment. It may seem false to claim that coerced persons have no choice, and no alternative, but to submit. Consider, for example, the responses to coercive threats imposed upon, say, Joan of Arc,[48] Thomas Becket,[49] or Thomas More.[50]

As literarily portrayed, Joan of Arc, Thomas Becket, and Thomas More seem clearly subjected to exceptionally severe coercion—or at least, to attempted coercion. That is, part of the conceptual problem is the relation between attempted and successful coercion. Does genuine 'coercion' imply success in coercing? Can there be genuine but failed, or unsuccessful, coercion where the target of coercion fails to act as the coercer intended? And as well, can there be coercion where the would-be coercer intends not that the coercee actually perform some specified act, but instead, that the coercee either perform that act, or else suffer some serious injury?

At a minimum, it is clear that as depicted, it cannot be said that Joan of Arc, Thomas Becket, and Thomas More had no choice but to comply with their coercers' wishes. Plainly, they did not comply, and in that sense are not coerced into acting as their coercers wished. Interestingly, though, Joan, Becket, and More also do not seem free in the standard liberal sense of selecting from among a range of reasonable options.[51]

It might be closer to the literary truth to say instead that while Joan, Becket, and More did indeed have, in a sense, no real choice in how to respond to their coercers, their no real choice amounted to a mandate not to comply with their coercers. They had no choice but to defy their coercer's wishes.

Consider, first, Joan's dialogue with her interrogators, as depicted by George Bernard Shaw. Joan's interrogators ask whether Joan's voices "command you not to submit yourself to the Church Militant?" Joan replies that "my voices do not tell me to disobey the Church, but God must be served first." To this, the interrogators respond, "you, and not the Church, are to be the judge?" To which Joan replies, simply, "What other judgment can I

48. As fictionally depicted in BERNARD SHAW, ST. JOAN (Penguin Books 2003) (1924).

49. *See* THE LIVES OF THOMAS BECKET (Michael Staunton trans., Manchester Univ. Press 2001) (1988), and again fictionally, T.S. ELIOT, MURDER IN THE CATHEDRAL (1935).

50. As fictionally depicted in ROBERT BOLT, A MAN FOR ALL SEASONS (1990) (1960).

51. *See generally* JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., 1974) (1859). Note, interestingly, that some leading theorists of coercion hold that coercion must, by definition, be successful and that failed coercion involves no coercion. *See, e.g.*, Michael D. Bayles, *A Concept of Coercion*, *in* NOMOS XIV: COERCION 16, 17 (J. Roland Pennock & John W. Chapman eds., 2007) (1972).

judge by but my own?"[52]

We may well wish to say that Joan, under the threat of imminent execution by burning, has little choice. But to the extent that she either exercises her choice, or has no real choice, it is not to comply, but instead to refuse to comply with the wishes of her would-be coercers.

Confronted by his imminent murder, Thomas Becket declares that "I am not moved by threats, nor are your swords more ready to strike than my soul is ready for martyrdom."[53] Or on Eliot's telling, "[i]t is out of time that my decision is taken, if you call that decision to which my whole being gives consent."[54]

Lastly, Thomas More, facing the threat of execution absent his recanting, perceives the choice to be not between life and death, but between truth, fidelity, and conscience on the one hand, and eternal damnation on the other.[55] Thomas More, as well, perceives himself as having no real choice but to refuse to comply with his coercers. The popular, and legal, understanding, of coercion thus continues to unravel.

IV. COERCIVE JURY INSTRUCTIONS

Even if the idea of coercion could be sufficiently clarified to genuinely contribute to the law of criminal defense, that progress would be unlikely to transfer to other areas of the law that emphasize the concept of coercion. Consider, for example, the question of alleged judicial coercion of jury verdicts.[56] Here, the Supreme Court has recognized that coercive judicial intervention into jury deliberation is "an event difficult to discern in concrete situations."[57] At a hopelessly metaphorical level, the fear is that coercion, as distinct from the judge's merely issuing proper jury instructions, may involve "prying individual jurors loose from beliefs they honestly have."[58]

The problem is that the force of a cogently reasoned argument from a

52. SHAW, *supra* note 48, sc. VI, at 136.
53. THE LIVES OF THOMAS BECKET, *supra* note 49, at 198.
54. ELIOT, *supra* note 49, at 74.
55. *See* BOLT, *supra* note 50, act II, at 132.
56. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231, 247–49 (1988) (Marshall, J., dissenting); United States v. Driscoll, 984 F.3d 103, 110–14 (D.C. Cir. 2021); United States v. Banks, 982 F.3d 1098, 1102–03 (7th Cir. 2020); Wofford v. Woods, 969 F.3d 685, 695–96 (6th Cir. 2020); People v. Black, 490 P.3d 891, 895–96 (Colo. App. 2020); State v. Taylor, 829 S.E.2d 723, 727–28 (2019).
57. *Lowenfield*, 484 U.S. at 247.
58. *Driscoll*, 984 F.3d at 111 (citing United States v. Thomas, 449 F.2d 1177, 1182 (D.C. Cir. 1971)).

fellow jury deliberator might be equally effective as an allegedly coercive jury instruction in prying loose a juror's honestly held belief.[59] After all, a judge's mere expression of "hope that you [collectively] can arrive at a verdict"[60] has been thought to raise the specter of coercion.[61] From credible immediate threats of death or serious bodily injury to, now, a mere expression of judicial 'hope,' the idea of coercion has clearly come quite some distance. As well, the alleged juror coercion by the judge may be entirely unintentional, and thus perhaps not coercion at all.[62]

What we might call the degree of threat severity problem is evoked by claims that "[i]mpermissible coercion occurs 'when jurors surrender their honest opinions for the mere purpose of returning a verdict.'"[63] In many contexts, we surrender our honest opinions, even on important matters, under little duress, and for only a minimal payoff. The existence of any meaningful threat, let alone a threat of any real severity, may be absent.

Consider, for example, a political poll taker who asks us, anonymously, about our preference as between Candidate A and Candidate B. Our honest, indeed fervent, preference is in fact for Candidate A. But we anticipate that the poll taker's response to our honest preference might involve a brief, dismissive or contemptuous glance. So, we surrender our honest opinion in order to avoid the possibility of such a response.

Now, it is technically possible, on some theories, to conclude that we have been coerced regardless of whether that was the poll taker's intent. Certainly, juror coercion cases often set aside any concern for "the subjective intent of the judge."[64] But if we decide jury coercion cases in the orthodox fashion, we must in that context dismiss the strict limitation to threats of death or serious bodily injury mandated in some other coercion contexts,[65] with no obvious judicial explanation. The real penalty for resisting judicial pressure to reach a verdict is, after all, typically minimal.

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59. *See id.*

60. *Taylor*, 829 S.E.2d at 727 (citing State v. Williams, 690 S.E.2d 62, 68 n.7 (S.C. 2010)).

61. *See id.*

62. The theorists continue to debate whether coercion can be unintended. *See, e.g.*, Bayles, *supra* note 51, at 19–20; Gunderson, *supra* note 29, at 248, 257; Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39, 40 (2000) (an unintended coercive effect). The courts also sometimes recognize unintended, as distinct from intended, coercion. *See* Nolan v. CNB, 656 F.3d 71, 78 (1st Cir. 2011); Bally v. Ne. Univ., 532 N.E.2d 49, 52 (Mass. 1989); Redgrave v. BSO, Inc., 502 N.E.2d 1375 (Mass. 1987) (on the possibility of a coerced coercer).

63. *Banks*, 982 F.3d at 1102 (quoting United States v. Williams, 819 F.3d 1026, 1030 (7th Cir. 2016)); *see also Black*, 490 P.3d at 895 (focusing on requiring "a juror to surrender his conscientious convictions to secure an agreement") (citation omitted).

64. *Banks*, 982 F.3d at 1102.

65. *See supra* notes 34, 42, and accompanying text.

Apart from declaring the judge's intent irrelevant,[66] the cases have not been especially helpful in pinning down the circumstances in which juror coercion by judicial instruction occurs. The courts, we are informed, are to "assess the risk of juror coercion based on the totality of the circumstances from the juror's perspective."[67] But while we are to focus on the juror's perspective, we are also told that the coercion inquiry is "objective,"[68] and that the subjective state of mind of the juror is irrelevant.[69] The problem, though, both with how much "pressure"[70] a juror feels, and with how much "pressure" an atheist teenager may feel at a public-school religious ceremony[71] is often partly subjective, and certainly, irreducible to any definitional formula.

The alternative, we might begin to suggest, is for courts to cease chasing after, or relying on, some idea of coercion in these contexts, and instead, focus more directly on the most significant underlying factors in the case, including the actual costs, if any, to dissenting, or potentially dissenting, jurors from prolonging the trial, as well as our sense of whether the jury's ultimate verdict is reasonably responsive to the evidence presented.

V. COERCED SEARCHES AND SEIZURES

The definitional problems only multiply when we turn our attention to the rule that coercive searches and seizures,[72] and certainly, coerced criminal confessions,[73] are generally impermissible. Consent to an investigative search, it is said, must not be "the product of duress or coercion."[74] This language may suggest that duress and coercion, in this or other contexts, are not essentially synonyms. But if they are not synonyms, presumably they

66. *See supra* note 64 and accompanying text.
67. *Banks*, 982 F.3d at 1102.
68 *Id.*
69 *Id.* (citing United States v. Blitch, 622 F.3d 658, 668 (7th Cir. 2010)).
70 *Id.* at 1104.
71. *See infra* Section VIII.
72. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 227-28 (1973); United States v. Guillen, 995 F.3d 1095, 1108 (10th Cir. 2021); United States v. Magallon, 984 F.3d 1263, 1280–81 (8th Cir. 2021); United States v. Quezada-Lara, 831 F. App'x 371, 378-380 (10th Cir. 2020).
73. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 170 (1986); Haynes v. State, 373 U.S. 513 (1963); Reck v. Pate, 367 U.S. 433, 434 (1961); Leyra v. Denno, 347 U.S. 556, 558 (1954); Thomas v. State, 356 U.S. 390, 393-401 (1958); Hill v. Shoop, 11 F.4th 373, 425–26 (6th Cir. 2021); United States v. Fein, 846 F. App'x 765, 770 (6th Cir. 2021) (unpublished opinion); Balbuena v. Sullivan, 970 F.3d 1176, 1185-86 (9th Cir. 2020); Dassey v. Dittmann, 877 F.3d 297, 304 (7th Cir. 2017); United States v. Taylor, 752 F.3d 254, 263 (2d Cir. 2014); United States v. Jackson, 608 F.3d 100, 102–03 (1st Cir. 2010); United States v. Haswood, 350 F.3d 1024, 1029 (9th Cir. 2003); Martinez v. City of Oxnard, 270 F.3d 852, 856–57 (9th Cir. 2001).
74. *Guillen*, 995 F.3d at 1104.

overlap to at least some degree. If they overlap, however, where does one end and the other begin? Pairing 'duress' and 'coercion' does not shed much light on the meaning of either, but rather merely generates additional uncertainties.

Compounding the complications is the Court's recognition, in the coerced consent to search cases, that the coercion can be subtle as well as crude,[75] overt or covert,[76] and either explicit or implicit.[77] In this way, the potential axes of definition and application proliferate. Thus, while coerced consent to a search may stem from "physical mistreatment,"[78] the possibilities for coercion do not end there. What are taken to amount to 'coercive tactics' may involve not merely threats, but also "promises, inducement, deception, trickery, or an aggressive tone."[79]

The point, certainly, is not that any of these judicial assertions are mistaken as a matter of legal or public policy. Rather, the point is that the courts blithely ignore the complications that are inherent in their unexplained and undefended choices as to what should count as coercion. Presumably not all threats, including of the most trivial sort, count as coercive, or as excessively or unconstitutionally coercive. So which sorts of threats, in this or any other context, should count as illegally coercive?

Is it true that in this context, genuine promises, apart from threats, can be coercive? There is a massive and unresolved professional debate over whether genuine offers can be coercive.[80] Is it simply obvious, as well, that 'inducements'[81] can coerce consent? If so, where should we look for any relevant dividing line between coercive and non-coercive inducements to consent to a search? When does the vague category of 'trickery'[82] amount to coercion? And are courts typically well-placed, and sufficiently well-

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75. *Schneckloth*, 412 U.S. at 228.

76. *Id.*

77. *Id.*

78. *Quezada-Lara*, 831 F. App'x at 380 (citing United States v. Warwick, 928 F.3d 939, 945 (10th Cir. 2019)).

79. *Id.*

80. For the idea of coercive promises, see NLRB v. Regional Home Care Serv's, Inc., 237 F.3d 62, 68 (1st Cir. 2001). For a sense of the chronic dispute over whether genuine offers can qualify as coercive, see, for example, FREEDOM: A PHILOSOPHICAL ANTHOLOGY 252 (Ian Carter et. al., eds., Blackwell Publ'g 2007); Lawrence A. Alexander, *Zimmerman on Coercive Wage Offers*, 12 PHIL. & PUB. AFF. 160 (1983); Bayles, *supra* note 51, at 17; Robert Stevens, *Coercive Offers*, 66 AUSTRALASIAN J. PHIL. 83, 83 (1988) (threats as not necessary for coercion though "there is little agreement about what coercion is"); David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981). For the further complicated combination of a threat and an offer as a so-called 'throffer,' see Hillel Steiner, *Individual Liberty*, 75 PROC. OF THE ARISTOTELIAN SOC'Y 33, 39 (1974). Classically on this point, see Nozick, *supra* note 29.

81. *Quezada-Lara*, 831 F. App'x at 380 (citing *Warwick*, 928 F.3d at 945).

82. *Id.*

trained across the relevant disciplines, to determine when the 'tone'[83] of a police inquiry has become 'aggressive,'[84] and indeed so aggressive in tone as to amount to an unconstitutional coercion of a consent to search?

Rather than address the problems generated by their reliance on the idea of coercion, the courts instead appeal to dubious metaphysics and to vague metaphor. Thus, in the alleged coerced consent to search cases, the courts simply declare that "[t]he ultimate question is whether the individual's will has been overborne and his capacity for self-determination critically impaired, such that his consent to search must have been involuntary."[85]

But coerced consent to a search is not really like an involuntary muscle twitch, or like having one's arm moved by the direct application of physical force. Self-determination means one thing to Immanuel Kant,[86] and something radically different to contemporary materialists.[87]

The idea of having one's will 'overborne,'[88] or overpowered, implies something vaguely like losing a metaphysical wrestling match, if not the inevitable outcome of a sheerly mechanical and mindless process. As the physicist Carlo Rovelli has asked, "What does it mean, our being free to make decisions, if our behavior does nothing but follow the predetermined laws of nature?"[89] What if one had no prior fixed will in the matter at all, until one was confronted by a coercive threat? When the courts define coercion in terms of having one's will 'overborne,' it in effect comes with the disturbing qualification: 'whatever that means, if anything.'

But let us assume that coercion as an 'overborne' will has some determinate meaning and reflects some morally or legally relevant underlying process in the world. In this case, focusing on an overborne will still seems controversial. On the one hand, not even the most credible, severe, and immediate threats were able to overturn the wills of Joan of Arc,

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83. *Id.*

84. *Id.*

85. *Magallon*, 984 F.3d at 1280–81 (quoting United States v. Johnson, 956 F.3d 510, 516 (8th Cir. 2020)) (in turn quoting United States v. Vinton, 631 F.3d 476, 482 (8th Cir. 2011)).

86. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 78 (T.K. Abbott trans., 2d ed., 1900) (1785) ("The will is a kind of causality belonging to living beings in so far as they are rational, and freedom would be this property of such causality that it can be efficient, independently on foreign causes determining it; just as physical necessity is the property that the causality of all irrational beings has of being determined to activity by the influence of foreign causes.").

87. *See, e.g.*, FRANCIS CRICK, THE ASTONISHING HYPOTHESIS 3 (1994) (the Kantian person as ultimately reducible to "a vast assembly of nerve cells and their associated molecules"); DANIEL C. DENNETT, FREEDOM EVOLVES 2–3 (2003) ("mindless robots").

88. *See supra* note 85.

89. CARLO ROVELLI, SEVEN BRIEF LESSONS ON PHYSICS 72 (Simon Carnell & Erica Segre trans., 2016).

Thomas Becket, or Thomas More.[90] But it is unclear, at best, that their respective burning at the stake, deliberate murder, and judicial execution do not embody coercion that is above and beyond merely failed attempts at coercion.

More commonly, though, there is the opposite problem of a will that appears to have been coercively overborne with a degree of ease that some observers would find troubling. The threshold problem is discerning whether the party claiming to have been coerced was actually at all opposed to performing the coerced action. Suppose I am credibly threatened with serious immediate harm unless I finish my last bite of banana cream pie. Assume that I had formed a will either to do so, or to not do so. Perhaps I now comply under coercion. But there may be no evidence for any claim that in doing so, my pre-existing will to do so was overborne, rather than merely strengthened.[91]

However, suppose my pre-existing will was to not finish the pie. Perhaps I am running late. Or I am breaking my diet. Or I am troubled by thoughts of gluttony. Or, most importantly, an emergency has arisen. A would-be coercer who happens to be my friend, demands, contrary to my will, that I instead finish the pie. But this would-be coercer-friend does not threaten grievous harm. The credible threat is instead that the would-be coercer-friend will judge me to be an uncooperative and unfriendly person if I fail to comply.

At this point, I still genuinely do not want to finish the pie. Responding immediately to the emergency is what I would, all else equal, prefer to do. But because of who I genuinely am, given my genetic makeup and my life-experiences, I find that my will to immediately respond to the emergency has, in fact, been overborne by my coercer-friend's threat of serious disapproval, and of a downgrading in our relationship.

Suppose, though, that my will can somehow be judicially established to either have been overborne, or not overborne, as the case law mandates.[92] And that the court finds, based on whatever it considers to be the weight of the relevant evidence, that my will to immediately attend to the emergency was indeed overborne by the mildly coercive threat of a diminished reputation and social relationship. My will was overborne by what we might take, on some scale of what is expected or normal, to be an 'objectively' mild

90. *See supra* notes 48–55 and accompanying text.

91. Of course, I might resent this threat, and in a rare instance, set aside my preexisting preference to finish the pie for the sake of my new, higher priority desire to defy my presumed coercer.

92. *See Reck*, 367 U.S. at 440; Chambers v. Florida, 309 U.S. 227, 240 (1940); *Magallon*, 984 F.3d at 1280–81; United States v. Luck, 852 F.3d 615, 622 (6th Cir. 2017); United States v. Binford, 818 F.3d 261, 271 (6th Cir. 2016).

or moderately coercive threat. My will was indeed overborne by a coercive threat, but only because I was, compared to some selected resistance baseline, relatively weak-willed.

On the court's own theory of coercion as it stands, my will, which was exceptionally weak, on this occasion or more generally as well, was overborne by an alien influence that would not have overborne the will of many other persons in similar circumstances. Setting aside the other relevant problems, courts must somehow decide whether my overborne will should suffice to establish coercion in a situation where a more normal will, or some supposedly appropriately firm will, would not have been overborne.[93]

How the courts would establish a baseline, or some minimally sufficient degree of firmness of will, in various contexts, is left to hopeless speculation. Courts may not wish to be bound by the capabilities of some statistically average person, and may wish to require either more, or less, for a viable coercion defense. The courts would then have to confront the question of whether to apply different standards for various categories of both vulnerable persons and for persons in specific circumstances of unusual vulnerability.

VI. COERCED CONFESSIONS

All of these unresolved problems are reflected as well in the many cases of allegedly coerced, or improperly coerced, criminal confession cases. The courts have held that the confession "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."[94] The inquiry again, in this context, is whether the allegedly coerced defendant's will was 'overborne.'[95]

The judicial inquiry into whether the defendant's will was overborne or 'broken' is to be determined "only by an examination of all the attendant circumstances."[96] More elaborately, "a coercive interrogation exists when the totality of the circumstances shows that the officer's tactics undermined the suspect's ability to exercise his free will, rendering his statements involuntary."[97] Among the considerations potentially relevant to coercion,

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93. For a sense of the problems in attempting to distinguish inquiries into an objectively normal will, or else a reasonably and appropriately firm will, from a subjective but quite real will that is overborne, see R. George Wright, *Objective and Subjective Tests in the Law*, 16 U. N.H. L. REV. 121 (2017).

94. Colorado v. Connelly, 479 U.S. 157, 170 (1986); Thomas v. Arizona, 356 U.S. 390, 393 (1958) (concluding that "petitioner's confession was the expression of free choice") (citation omitted).

95. *See Reck*, 367 U.S. at 440; *Chambers*, 309 U.S. at 240 (referring to acts that "broke" the defendant's will); *Luck*, 852 F.3d at 622; *Binford*, 818 F.3d at 271.

96. *See Chambers*, 309 U.S. at 240.

97. *Haynes*, 373 U.S. at 513; Leyra v. Denno, 347 U.S. 556, 558 (1954). Unfortunately, some leading coercion theorists have suggested that coercion actually requires that the coerced response be

or to involuntariness, may be youth or maturity;[98] intelligence;[99] advice as to constitutional rights;[100] the length of detention;[101] repetition or prolongation of the interrogation;[102] deprivation of sleep or food;[103] and any improper questions or suggestions.[104] But it has been said that not all ploys to mislead or lull a suspect into a false sense of security are coercive.[105] Nor is the recitation of possible sentences said to be coercive.[106]

These and other concrete and particularized inquiries may well be useful in fairly adjudicating cases. The crucial point, though, is that their adjudicative usefulness does not lie, even in part, in shedding light on whether anyone's free will was overborne, or broken, or otherwise metaphorically affected. The judicial inquiry into the overbearing of will is at best a distraction. Even more crucially, any judicial attempt in this or any other context to adopt a definition of 'coercion' is similarly useless, ill-conceived, contestable, and distracting.

At best, efforts to define the idea of coercion in any legal context contribute nothing to the sound resolution of the case. The problem is not that the concept of coercion is itself sufficiently determinate, but that the meaning of coercion varies significantly across legal contexts. However, contextualism of meaning[107] is not the problem. Rather the problem is that 'coercion,' regardless of context, provides no useful adjudicative guidance. The hunt for a satisfactory definition of 'coercion,' in general or in some specific context, should be abandoned as unnecessary.

At the level of concrete and particular judicial inquiry, however, nothing much need to change. Merely, for example, in the confession cases, we may still look to considerations such as youth, immaturity, intelligence, advice as to rights, and the length or conditions of detention.[108] That may be entirely defensible. But we should not then take account of any such

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voluntary, and not involuntary. *See, e.g.*, Bayles, *supra* note 51, at 16–17.

98. Tobias v. Artegga, 996 F.3d 571, 581 (9th Cir. 2021) (citation omitted).

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id*. at 581–82.

105. *See* Hill v. Shoup, 11 F.4th 373, 425–26 (6th Cir. 2021) (quoting Illinois v. Perkins, 496 U.S. 292, 297 (1990)); Balbuena v. Sullivan, 970 F.3d 1176, 1185 (9th Cir. 2020) ("[P]olice deception alone . . . does not render a confession involuntary.") (citation omitted).

106. *Balbuena*, 970 F.3d at 1185; *Haswood*, 350 F.3d at 1029.

107. *See generally* CONTEXTUALISM IN PHILOSOPHY: KNOWLEDGE, MEANING, AND TRUTH (Gerhard Preyer & Georg Peter eds., 2005); MARK TIMMONS, MORALITY WITHOUT FOUNDATIONS: A DEFENSE OF ETHICAL CONTEXTUALISM (1999); Patrick Rysiew, *Epistemic Contextualism*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/contextualism-epistemology (last visited Dec. 1, 2021).

108. *See supra* notes 98–104 and accompanying text.

circumstances in order to answer further dubious metaphysical questions as to whether someone's will was, or was not, overborne, or to try to take account of such circumstances in an attempt to determine whether something as contested and ethereal as 'coercion' was present.

The judicial inquiry into the criminal confession context, and all other contexts, can thus be simplified. We can still consider matters such as youth and immaturity, intelligence, and so forth, but not as a preliminary step in some further attempt to detect the presence of 'coercion.' Rather, these and other more concrete considerations may instead directly bear on the crucial question of whether the suspect's Fourth or Fifth Amendment rights were violated by the police conduct at issue. Put simply, do we, or do we not, wish to validate whatever techniques the police used, under the circumstances, to obtain the confession at issue? Does the technique in question tend to do more harm than good? This inquiry will investigate the above concrete considerations, as well as our concerns for the accuracy of the confession, for basic personal dignity, and for the value of civil liberty. The intervening mystification of chasing metaphysical metaphors, and then the practically useless idea of coercion, can and should be bypassed.

VII. COERCIVE SEXUAL MISCONDUCT

By way of further illustration, consider the range of criminal sexual misconduct cases, across many specific contexts. Quite unsurprisingly, there is no consensus "on how to define, operationalize, and study verbal sexual coercion"[109] in particular. And there is again, no point in trying to determine whether some set of circumstances falls within the hopelessly indeterminate and contested bounds of the concept of 'coercion.' There is no available definition of coercion that tells us when a verbal conversation involving psychological pressure or manipulation reaches the level of (undue) coercion.[110]

Or consider the problem from the other direction. Suppose we stipulate that coercion requires some more or less specific threat.[111] And suppose that the threat must be of serious bodily restraint or harm, perhaps to the coercee, or to anyone else.[112] And suppose further that the threatened harm must be

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109. Brandie Pugh & Patricia Becker, *Exploring Definitions and Prevalence of Verbal Sexual Coercion and Its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses*, 8 BEHAV. SCI. 69, 69 (2018). See also, in the context of 'reluctance' to engage in sex, Sarah Conly, *Seduction, Rape, and Coercion*, 115 ETHICS 96, 101 (2004) ("Here, too, there is controversy about what (if any) kind of emotional pressure should count as coercive.").

110. *See* Conly, *supra* note 109, at 101.

111. *See, e.g.*, text accompanying *supra* note 34.

112. *See, e.g.*, *id.*

more or less imminent, as opposed to later coercion with greater certainty and unavoidability.[113] Of course, each of these stipulations will inevitably be controversial. But each of these stipulations also has at least some support in the law, in one context or another.[114] The crucial problem is that each of these stipulations as to the meaning of coercion could lead to disastrous judicial outcomes in non-consensual sex cases.

Criminal sexual conduct may take place under arguably coercive circumstances that involve no specific 'threat.'[115] As well, criminal sexual conduct, even if we choose to call it coercive, might involve a physical threat not to any person, but to property, to someone's finances, or to someone's career.[116] And whether we think a distinctively coercive threat must be imminent or not, common sense informs us that a credible threat of harm, even in the remote future, can suffice for criminal sexual conduct. In all these respects, familiar understandings of what is required for 'coercion' may simply mislead the courts. A focus on coercion may not only be of no value, but positively harmful in arriving at a just resolution of the case. Courts should instead directly and concretely look to, for example, the physical and psychological safety of all affected parties. Courts might look at the circumstances at bar and ask concrete questions to determine the ultimate question of whether the law can tolerate the behaviors of the persons involved, given the broader consequences at stake.

VIII. COERCION AND THE ESTABLISHMENT CLAUSE

Attempts to deploy the idea of coercion in the First Amendment area have typically been useless, if not jurisprudentially damaging. Of late, the Establishment Clause cases have amounted in substantial measure to a politicized tug-of-war over the meaning of coercion, or over the meaning of coercion in some most relevant sense.[117] For the moment, the key Establishment Clause cases pursuing the idea of coercion are *Lee v. Weisman*[118] and *Santa Fe Independent School District v. Doe*.[119]

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113. *See, e.g.*, *id.*

114. *See supra* notes 111–13.

115. *See* United States v. Fernandez-Cusco, 447 F.3d 382, 387 (5th Cir. 2006).

116. *But see, e.g.*, the coercion analysis, requiring physical restraint or harm, in United States v. Williams, 5 F.4th 1295, 1303 (11th Cir. 2021); United States v. Todd, 627 F.3d 329, 333 (9th Cir. 2010); *see also* State v. Thompson, 792 P.2d 1103, 1104 (Mont. 1990) (statutorily insufficient threat to prevent victim's high school graduation in the future), *overruled on other grounds by* State v. Spreadbury, 257 P.3d 392, 394 (Mont. 2011). The threatened harm in *Thompson* was also not physical in nature.

117. For background, and a quite mild critique, in this area, see R. George Wright, *Why a Coercion Test Is of No Value in Establishment Clause Cases*, 41 CUMB. L. REV. 193 (2011).

118. 505 U.S. 577 (1992).

119. 530 U.S. 290 (2000).

The judicial effort to utilize the idea of coercion in this area gets off to a slow start by attempting to define the idea of coercion by referring, repetitively, to the very idea of coercion itself.[120] Thus, the Establishment Clause coercion test "seeks to determine whether the government has applied coercive pressure on an individual to support or participate in religion."[121] Whatever the merits of this analysis, it tells us little about how to recognize coercion.

In *Lee*, the Court concluded that a public school had "in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student."[122] And in *Santa Fe*, the Court declared that the students' choice between attending a high school football game, in one capacity or another, and not being subjected to "personally offensive religious rituals is in no practical sense an easy one."[123]

The Court in *Santa Fe* observed that "[t]o assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme.'"[124] The Court noted that "what to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[125]

Whether the Court reached the right constitutional result in these cases is beside the point. The problem is, instead, that both the majority and the dissenters in these cases arbitrarily borrow mere fragments of opposing possible theories of coercion. The Courts thereby lose focus on the more important questions of whether particular parties are, in effect, being stigmatized, ignored, insulted, or treated unequally, whether through any form of supposed coercion or not, along with any other constitutionally relevant substantive considerations.

Thus, the Court in *Santa Fe* seems to suggest that there may be something relevant to coercion, or its absence, in the cultural status of high school football.[126] Perhaps the idea is that less socially prominent

120. *See, e.g.*, Knudtson v. County of Trempealeau, 982 F.3d 519, 525 (7th Cir. 2020); Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 850 (7th Cir. 2012) (en banc).

121. *Knudtson*, 982 F.3d at 525 (quoting *Elmbrook*, 687 F.3d at 850).

122. *Lee*, 505 U.S. at 598.

123. *Santa Fe*, 530 U.S. at 312.

124. *Id.* at 311 (quoting *Lee*, 505 U.S. at 595).

125. *Id.* at 312 (quoting *Lee*, 505 U.S. at 592).

126. *Id.* at 312.

extracurricular activities might involve less coercive potential. Would a prayer at the start of a high school golf match be less coercive for student spectators, or not coercive at all? Are degrees of coerciveness relevant?

Or perhaps the idea is that high school football games are events that high school students have "a truly genuine desire"[127] to attend. We can certainly imagine a threat that is coercive because the coercer would be frustrating the coercee's truly genuine desire. But would a sensible theory of coercion treat all threatened frustrations of all truly genuine desires as coercive? A young student, or a fully mature adult, might have a truly genuine desire for pizza after the game. Whether a threatened denial of pizza under those circumstances should count, invariably or even typically, as coercive is doubtful.

As well, recall that the coercion theorists are chronically divided on whether coercion must, by definition, be intentional.[128] The *Santa Fe* case seems to suggest that coercion can be present without any intent to coerce, if some reasonable persons could perceive an intent to coerce.[129] But *Santa Fe* also seems to suggest that the perception must refer to an intent to "enforce a religious orthodoxy."[130] And it is unclear that inviting a brief, single-occasion prayer by a representative of a local minority or unfamiliar religion[131] could reasonably be perceived as an attempt to enforce a religious orthodoxy.

By contrast, the dissenters in these Establishment Clause cases seem to argue that coercion, however otherwise defined, may well be permissible in the Establishment Clause context, as long as a particular and distinctive kind of coercion is not present. That is, the only constitutionally objectionable form of coercion in the Establishment Clause cases involves "coercion of religious orthodoxy [or] financial support by force of law and threat of penalty."[132] This conclusion is evidently reached not on the basis of any independent current theory of coercion, let alone any belief that one theory of coercion is better on the merits than another, but on the basis of an historical approach to the Establishment Clause.[133] Perhaps the framers and

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127. *Id.* at 311. For the sense that age or maturity may matter in this context, see *Knudtson*, 982 F.3d at 526–27 (citing Chaudhuri v. State, 130 F.3d 232, 238–39 (6th Cir. 1997)).

128. *See* sources cited *supra* note 62.

129. *See supra* note 125 and accompanying text.

130. *Id.*

131. As, evidently, in the *Lee* case itself.

132. Town of Greece v. Galloway, 572 U.S. 565, 604, 608 (2014) (Thomas, J., with Scalia, J., concurring in part and concurring in the judgment). *See also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S 1, 45, 52 (2004) (Thomas, J., concurring in the judgment); *Lee*, 505 U.S. at 640 (Scalia, J., dissenting).

133. *See* sources cited *supra* note 132. For discussion of the idea of coercion in the related context

ratifiers of the Establishment Clause really did intend our current reliance on the then-and-forever hopeless idea of coercion. But that would, ironically, amount to an argument against an historically focused interpretation of the Establishment Clause.

IX. COERCION AND THE CONGRESSIONAL SPENDING CLAUSE

Thus far, we have considered the legal use of the idea of coercion across a wide range of individual rights. As it happens, the courts have attempted to rely on the idea of coercion in the congressional Spending Clause area as well. It is fair to say that the Spending Clause cases manifest the problems of indeterminacy and distraction that we have seen elsewhere. The courts are again better off setting aside any attempt to pin down and utilize a concept of coercion, and instead, focus on substantive considerations that seem most relevant to arriving at a fair and appropriate outcome. In particular, courts should focus on the values and limits of governmental institutional hierarchy, national unity, policy diversity, universal rights, decentralization, and experimentation in a federal system, rather than hopelessly chasing some idea of coercion.

Part of the problem in the Spending Clause area is the Court's inclination to try to apply the airiest metaphysical concepts to largely abstract or imprecisely defined entities such as a state. The classic case of *Steward Machine Company v. Davis*[134] starts down this road. In this case, Alabama objected on Spending Clause grounds to a federal tax and credit system intended to address Depression-Era levels of unemployment and resulting poverty.[135]

The Court in *Steward Machine* sought to distinguish the congressional coercion of states, as states, from Congress's providing an inducement,[136] a motive for compliance,[137] an impediment,[138] or a temptation.[139] The law in general was said to presume not determinism,[140] but "freedom of the will."[141] And the Court concluded that in its decision to opt in or out of the

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of the Free Exercise of religion, see, for example, Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2256 (2020) (distinguishing 'direct' from 'indirect' coercion); California Parents for the Equalization of Educ. Materials v. Torlakson, 973 F.3d 1010, 1019 (9th Cir. 2020).

134. 301 U.S. 548 (1937).
135. *See id.* at 587–91.
136. *See id.* at 590.
137. *See id.* at 589.
138. *See id.*
139. *See id.* at 589–90; *see also* South Dakota v. Dole, 483 U.S. 203, 211 (1987).
140. *See Steward Machine Co*., 301 U.S. at 590.
141. *Id.*

system, Alabama was acting not "under the strain of a persuasion equivalent to undue influence,"[142] but "of her unfettered will."[143]

The Court has continued to rely on this odd metaphysics of the volition of states as states. Thus, Chief Justice Roberts declares that "[t]he legitimacy of Congress's exercise of the spending power . . . 'rests on whether the state voluntarily . . . accepts the terms of the 'contract.'"[144] However, the question of voluntariness is deeply fraught. Incentives for state acquiescence are legally permissible.[145] But the congressional exercise of a "power akin to undue influence" is not.[146] An inducement is said to violate constitutional limits "when pressure turns into compulsion."[147] Whether the improper coercive effect on the state is exerted directly or indirectly is irrelevant.[148]

Concisely put, the Spending Clause cases accept, in general, the congressional application of 'pressure on the will' of the partly abstract and collective entity of the state. But when that pressure on the will is somehow thought to reach a point[149] of compulsion, coercion, or undue influence, the bounds of the Spending Clause are said to be transgressed.

The problem, though, is that the point at which pressure becomes coercion is not just unobservable, but exceptionally vague and broadly contestable.[150] It is thus entirely unsurprising that, despite the Court's forays into this area over the years, the "cases have provided little guidance for determining when the line between encouragement and coercion is crossed."[151] "The boundary between incentive and coercion has never been made clear."[152] Instead, "the cursory statements in *Steward Machine* and *Dole* mark the extent of the Supreme Court's discussion of a coercion theory."[153]

The proper conclusion, though, is not that the courts genuinely could

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142. *Id.*

143. *Id.* This language is quoted by Chief Justice Roberts in NFIB v. Sebelius, 567 U.S. 519, 579 (2012); *see also* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205, 221, 223 (Scalia, J., with Thomas, J., dissenting) (stating that "[n]ot every disadvantage is a coercion").

144. *Sebelius*, 567 U.S. at 577 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

145. *See id.* at 577.

146. *Id.* (quoting *Steward Machine Co*., 301 U.S. at 590).

147. *Id.* at 577-78 (quoting *Steward Machine Co.*, 301 U.S. at 590).

148. *See id.* at 578.

149. For a sense of the impossibility of drawing any such distinctive and non-arbitrary line, see Dominic Hyde & Diana Raffman, *Sorites Paradox*, Stan. Encyc. of Phil. (Mar. 26, 2018), https://plato.stanford.edu/entries/sorites-paradox/.

150. *See id.*

151. West Virginia v. HHS, 289 F.3d 281, 289–90 (4th Cir. 2002).

152. Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000).

153. *Id.* at 1201.

and should have done a better job of indicating where coercion begins in the Spending Clause area. The sheer murkiness and indeterminacies of the idea of coercion rule out any such possibility. The courts should, as in all other contexts in which the idea of coercion has been relied upon, embark instead in a more productive direction. In particular, the courts should ensure that the hopeless indeterminacies of 'coercion' do not distract from a judicial focus on the value and the costs of federalism in this context, including, perhaps, any relevant universal moral imperatives, national unity, trust and distrust, diversification of risk, encouraging responsible experimentation, and sheer preference maximization.[154]

X. CONCLUSION

A survey of the law's pointless, and indeed distracting, preoccupation with the limitless indeterminacies of 'coercion' could go on indefinitely.[155] Perhaps the most essential problem with the law's attempt to rely on the idea of coercion, though, can be briefly summarized. The idea of coercion does not merely vary by context. Rather, there is no reasonably determinate conception of coercion that performs any genuinely useful role in any important legal context.

On some theories, 'coercion' is a matter of something like 'overbearing,' 'overcoming,' or 'overriding' the preexisting will of the coerced party. But we have seen the deficiencies of any such approach.[156] One might attempt to remedy these defects by specifying that the outcome that the potential coercee faces for non-compliance must be 'substantially' less attractive, less desirable, or less acceptable to the potential coercee than

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154. For a discussion on this point, see, for example, Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 MINN. L. REV. 1 (2016); Mark Tushnet et al., *Federalism*, OXFORD HANDBOOKS ONLINE (Oct. 15, 2015), www.oxford.handbooks.com/view/10.1093; Mark Tushnet, *Federalism and Liberalism*, 4 CARDOZO J. INT'L & COMP. L. 329 (1996). More broadly, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

155. At the most fundamental level, one could inquire into whether the law, in itself, or a legal system, must necessarily be coercive. For a sampling of such contemporary excursions, see KENNETH EINAR HIMMA, COERCION AND THE NATURE OF LAW (2020); FREDERICK SCHAUER, THE FORCE OF LAW (2015); Robert C. Hughes, *Law and Coercion*, 8 PHIL. COMPASS 231, 231 (2013) ("Among philosophers of law . . . there is no consensus that coercion is central to the nature of law."); Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39, 39 (2000) ("many philosophers, anthropologists, and sociologists have regarded coerciveness as one of the key features of law"); Neil McCormick, *Coercion and Law*, *in* LEGAL RIGHT AND SOCIAL DEMOCRACY 232, 232 (1984) (rejecting "the widely held view that law . . . is essentially coercive"); Lucas Miotto, *Law and Coercion: Some Clarification*, 34 RATIO JURIS 74, 74 (2021) (noting the relevant ambiguities and confusions); Christopher W. Morris, *State Coercion and Force*, 29 SOC. PHIL. & POL'Y 28, 33 (2012) ("we should not understand coercion or force to be part of the concept of the state"); Arthur Ripstein, *Authority and Coercion*, 32 PHIL. & PUB. AFF. 2, 2 (2004) (stating that "the state's claim to authority is inseparable from the rationale for coercion").

156. *See supra* Section V.

the outcome in the absence of any such threat.[157] This approach can be modified, if we like, to cover instances of coercive offers, if there are any.[158]

The problems of determining whether one possible outcome is sufficiently less 'attractive' as to count as genuinely coercive are, however, obvious. Attempting to determine the supposed coercee's actual subjective value assessments of alternative outcomes, and then determining that some threshold of 'coerciveness' has been thereby exceeded, is essentially arbitrary. But judicially substituting the value assessments of a supposedly 'normal' or 'objective' person merely adds a different form of broad judicial arbitrariness. The courts certainly can choose whatever line they wish in order to separate mere undesirability of a threatened outcome from coercive undesirability, but the idea of coercion itself cannot help the courts establish any such hopelessly subjective line.

The coercion theorist might, finally, focus on defining coercion in terms of something like the rights at stake, the requirements of justice and fairness, and the legitimate entitlement, or lack thereof, of the parties to act as they did.[159] These ideas would then feed into the further question of whether coercion, or excessive coercion, was present. On this final possible approach to coercion, the case outcomes would, in this sense, be indirectly driven by our best and most relevant understandings of what rights, justice, and fairness require.

The problem, however, is that the idea of coercion is not doing useful work under such an approach. Such a 'coercion' theory merely invites us to independently apply our best views as to questions of rights, justice, and fairness under the circumstances. A case outcome is defensible only because justice was done, and not because some functionally unnecessary coercion theory permitted us to independently figure out what justice required.

Recognizing the essential uselessness of the idea of coercion in the law is, however, an occasion not for regret but for mild celebration. Of course, many cases in all of the legal areas surveyed above will still be difficult. But not unnecessarily difficult, and not unnecessarily complex and confused. The courts no longer need distract themselves with attempting to sort through

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157. *See, e.g.*, Scott A. Anderson, *The Coercer's Role in Coercion*, 19 AM. J. BIOETHICS 39, 39 (2019); Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 718 (2005); Grand Lamond, *Coercion*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 642, 644 (Dennis Patterson 2d. ed. 2010) (stating that "having Y occur must be distinctly more unacceptable to the recipient than doing X").

158. *See supra* note 80 and accompanying text.

159. *See, e.g.*, Michael Garnett, *Coercion: The Wrong and the Bad*, 128 ETHICS 545, 545 (2018); Cheyney C. Ryan, *The Normative Concept of Coercion*, 89 MIND 481, 482 (1980); Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 892 (1997) ("I am squarely in the camp that maintains that the best account of coercion is normative.").

alternative, and often mutually incompatible, versions of the idea of coercion. Instead, the courts, in whatever context, can and should focus directly on whatever independently defined specific constitutional requirements, statutory policies, underlying public purposes, and any other judicially relevant considerations bear upon the case.