

# BEYOND LIBERTY: TOWARD A HISTORY AND THEORY OF ECONOMIC COERCION

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*The concept of economic coercion—that a relationship or transaction can be economically exploited for the benefit of some over others—is elaborated at the intersection of economic theory and economic realities, moral and political understandings of freedom, jurisprudence and the lived application of the law to facts. As a category of criminal and civil wrong, it has been directly and indirectly adjudicated in a breathtaking array of contexts of private and public ordering. Theories of economic coercion are decisive in drawing the line between what constitutes labor market competition and forced labor, which federal programs constitutionally encourage state action and which unconstitutionally commandeer it, and whether theft of natural resources violates international criminal law. But what informs legal theories and conceptualizations of economic coercion? How are economic theories and theories of freedom written into the law through assessments of economic coercion? How is economic coercive “force” understood? Despite the central significance of the category of economic coercion in the judicial regulation of society, no single scholarly account provides a comprehensive assessment of the evolution and scope of the concept in law. Nor have contemporary theorists of economic rights adequately dealt with it.*

*Attempting the first broad, theoretical overview of its kind, this Article draws from the strengths and limitations of three competing philosophical and legal accounts of economic coercion in order to elaborate a more robust conceptualization of economic coercion, but also to integrate economic coercion claims within the broader evolution and theorization of economic rights. Part I evaluates philosophical theories of coercion in public and private law to hone a minimal set of requirements for a theory of economic coercion. Part II then evaluates legal accounts of coercion—specifically, the extensive analysis of mutual coercion in the Legal Realist tradition—to supplement those requirements and elaborate a model for incorporating background conditions and distributional concerns. After outlining the strengths and deficiencies of these existing accounts, Part III turns to a third framework for conceptualizing economic coercion within the international economic rights tradition. It highlights its strengths in attending to systemic economic coercion and establishing a framework for protecting economic rights as well as its limitations in enforcing those rights through the progressive realization model. Drawing from each of these accounts, Part IV proposes that rights against economic coercion be viewed as relational and distributional rights critical to the enforcement of*

*economic rights protections. It argues for the benefits of integrating economic coercion claims so understood within an economic rights framework, moving beyond both liberty-focused and progressive realization models of coercion towards a model of benchmarking protections from coercion in horizontal, or private law, adjudication.*

## INTRODUCTION

The concept of economic coercion—that a relationship or transaction can be economically exploited for the benefit of some over others—is elaborated at the intersection of economic theory and economic realities, moral and political understandings of freedom, jurisprudence and the lived application of the law to facts. As a category of criminal and civil regulation, it has been directly and indirectly adjudicated in a breathtaking array of contexts of private and public ordering, from determining whether a contractual agreement was the result of duress, to deciding whether dominant firms in the telecommunications industry must divest, to assessing whether investments violate economic sanctions against foreign regimes. Theories of economic coercion are decisive in drawing the line between what constitutes labor market competition and forced labor, which federal programs constitutionally encourage state action and which unconstitutionally commandeer it, and whether theft of natural resources violates international criminal law.<sup>1</sup>

But what informs legal theories and conceptualizations of economic coercion? How are economic theories and theories of freedom written into the law through assessments of economic coercion? How is economic coercive “force” understood? Despite the central significance of the category of economic coercion in the judicial regulation of society, legal, historical and philosophical scholarship has yet to provide a comprehensive account of the evolution and scope of the concept in law. Nor have contemporary theorists of economic rights in international human rights law adequately dealt with it. While the concept of coercion itself has

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1. JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING THE PILLAGE OF NATURAL RESOURCES (2011) (surveying doctrines of corporate liability for pillage). See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001) (examining the constitutionality of conditioning government benefits on waiver of constitutional rights through the concept of coercion).

received intermittent and focused attention in the legal and philosophical literature, a full exploration of the meaning and function of *economic* coercion in social ordering has not yet been historically or conceptually examined across the contemporary legal landscape to understand the systemic role it has played and continues to play in regulating human relationships and resource allocation.

This Article argues that the economic and intellectual foundations that inform and define economic coercion as a legal concept and process are a critical component of the study of economic rights, and as such, legal scholarship must analyze the conceptual framework that grounds economic coercion's use and utility. Theories of economic coercion can neither be historicized nor remain relevant for future adjudication and integration into economic rights law without a critical understanding of the jurisprudence on economic coercion as well as the intellectual history, economic theory and realities informing judicial interpretation of facts and law. While the Article draws on philosophical and legal investigations into the idea of coercion, it opposes the dominant analytic philosophical method of formulating hypotheses about coercion "at various levels of generality and subjecting them to confirmation or disconfirmation by the intuitive moral credibility of their various substantive consequences, as well as by their coherence in explaining those consequences."<sup>2</sup> It also opposes accounts of economic coercion that concentrate exclusively on liberty interests at the expense of distributional concerns and policy. Instead, it argues for situating economic coercion claims in the thick of competing and historically-specific liberty and welfare interests, and framing the economic rights claims that underlay them *relationally* in the context of distributional concerns. Further, it argues for a layered understanding of economic coercion, one that documents battles in the courts to define and redefine economic relationships based on competing understandings of economic causation, legal and ethical conceptions of liberty, and political philosophical notions of individual and collective power. An overarching evaluation of

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2. Thomas Nagel, *Foreword* to ROBERT NOZICK, ANARCHY, STATE AND UTOPIA xii (2d ed. 2013). See also ANTHONY CHASE, LAW AND HISTORY: THE EVOLUTION OF THE AMERICAN LEGAL SYSTEM (1999); Pierre Schlag, *Rights in the Postmodern Condition*, in LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 263–84 (Austin Sarat & Thomas R. Kearns, eds., 1996).

economic coercion across substantive areas of law is needed to reveal the long tradition of “constitutive commitments” to economic rights in U.S. and international law and enable the carving out of a much-needed evaluative model for integrating economic coercion into economic rights jurisprudence.<sup>3</sup>

This Article explores the parameters of legal and philosophical understandings of economic coercion under three models. Part I evaluates philosophical theories of coercion in public and private law. It argues that while these accounts fail to thoroughly conceptualize or elaborate the *economic* nature of coercion in public and private law, they suggest a minimal set of requirements for a theory of economic coercion. Part II then evaluates legal accounts of coercion—specifically, the extensive analysis of mutual coercion in the Legal Realist tradition—to supplement those requirements and elaborate a model for incorporating background conditions. After outlining the strengths and deficiencies of these existing accounts, Part III turns to a third framework for conceptualizing economic coercion within the international economic rights tradition. It

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3. For “constitutive commitments,” see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION* 61–62 (2004) for a discussion of rights lacking constitutional status but are “widely accepted and cannot be eliminated without a fundamental change in social understanding.” While no scholarly accounts link U.S. economic coercion claim adjudication with the evolution of economic rights within the human rights tradition, scholars have taken varying positions on the U.S.’s commitment to such rights. *See, e.g.*, Abdullahi A. An-Na’Im, *Conclusion in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 428–29 (A. An-Na’Im ed. 1995) (inclusion of economic, social, and cultural rights in Universal Declaration was because “Third World countries . . . insisted on . . . recognition of individual economic and social rights”); ANTONIO CASSESE, *HUMAN RIGHTS IN A CHANGING WORLD* 35 (1994) (Western nations agreed to incorporate economic rights into Universal Declaration only in “second stage”); Jack Donnelly, *The West and Economic Rights*, in *ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT AND POLICY ISSUES* 37–45 (Shareen Hertel & Lanse Minkler, eds., 2007) (arguing against “myth of Western opposition” to economic rights by tracing Western role in development of Universal Declaration and International Covenant on Economic, Social and Cultural Rights); GARETH STEDMAN JONES, *AN END TO POVERTY?: A HISTORICAL DEBATE* (2004) (providing intellectual history of Western theorizations of poverty); DANIEL WHELN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* 11–31 (2010) (pointing to Roosevelt’s “Economic Bill of Rights” and American Law Institute’s Statement of Essential Human Rights as important sources for Universal Declaration); Sally-Anne Way, *The ‘Myth’ and Mystery of US History on Economic, Social, and Cultural Rights*, 36 *HUM. RTS. Q.* 869 (2014) (documenting U.S. support of economic rights during drafting of Universal Declaration of Human Rights).

highlights its strengths in attending to systemic economic coercion and establishing a framework for protecting economic rights, even in the context of private law, but assesses its limitations in evaluating those rights through the progressive realization model. Drawing from each of these accounts, Part IV proposes that rights against economic coercion be viewed as relational, distributional rights critical to the enforcement of economic rights protections. It argues for the benefits of integrating economic coercion claims so understood within an economic rights framework, moving beyond the progressive realization model and towards a model of benchmarking protections from coercion in horizontal, or private law, adjudication, requiring the application of proportionality and reasonableness limitations to analysis of such claims as well as compliance with anti-discrimination principles, equity, and the general welfare. It finally proposes a broader historical assessment of economic coercion claims across substantive areas of law to gauge compliance with such obligations.

#### I. THE DEVELOPMENT OF PHILOSOPHICAL ACCOUNTS OF COERCION

The term “coercion” derives from the Latin *com-*, “together,” and *arcere*, “to shut up, restrain”: *coercere*, to shut, restrain, or confine together.<sup>4</sup> According to the Oxford English Dictionary, the first record of its modern use, *cohercen*, was in 1475.<sup>5</sup> Throughout its documented history, it has described the application of force to control not just the conduct of others, but also their physical bodies, thought, and ideas.<sup>6</sup> While the word has a strong tradition of use in

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4. “Coerce, v.,” OED ONLINE (Oxford University Press, Dec. 2015), available at <http://www.oed.com/view/Entry/35716?redirectedFrom=coerce&>.

5. *Id.* It was used to describe how the Duke of Exeter was “*coherced to take the Bastyle for her deffence*” “alle the comyns of [Paris] . . . rebelled ayenst” him. THE BOKE OF NOBLESSE: ADDRESSED TO KING EDWARD THE FOURTH ON HIS INVASION OF FRANCE 69 (1860).

6. See *Coercion*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (documenting 1537 usage in INSTITUTE OF A CHRISTIAN MAN L V B (“Noo man may kyl, or use suche bodily cohercion, but onely princis”); 1600 usage by RICHARD HOOKER, OF LAWES ECCL. POLITIE VIII, iii, §4 (“To fly to the civil magistrate for coercion of those that will not otherwise be reformed”); 1651 usage by THOMAS HOBBS, LEVIATHAN III, xlii, 270 (“Winning men to obedience, not by Coercion, and Punishing; but by Perswasion”); 1859 usage by JOHN STUART MILL, ON LIBERTY i., 21 (“The moral coercion of public opinion”)).

the context of moral principle and religious belief, particularly in the rise of theories of individual autonomy in the freedom of conscience movement in seventeenth century England,<sup>7</sup> it first took on an explicitly political dimension in Thomas Hobbes' *Leviathan*, replacing self-governance by private conscience with the sovereign as the "coercive power."<sup>8</sup> These early modern and modern usages, despite their disparate contexts, cohere around a common concept: coercion was a force being applied, whether on the body or mind, to confine *together*, to insist that there be a definition of *relation* between one person or thing and another, or between one external entity and the confined group of the nation.<sup>9</sup>

#### A. *Philosophical Accounts of Coercion Through the Nineteenth Century*

Philosophical exploration of coercion through the nineteenth century primarily concentrated on the coercive power of the state and civil institutions, such as public opinion or the market. This exploration has attended in only limited ways to economic coercion specifically, providing no history or overarching theory to define or understand economic coercion.<sup>10</sup> Still, by more broadly theorizing the intersection of coercion and the law, the accounts provide a core set of criteria for understanding state- and market-level coercion.

Coercion was primarily theorized as a problem of public law within the exclusive purview of the state, used as a tool for compelling or restraining conduct.<sup>11</sup> Beginning with Thomas

7. See RICHARD SORABJI, *MORAL CONSCIENCE THROUGH THE AGES: FIFTH CENTURY BCE TO THE PRESENT* 127–166 (2014).

8. THOMAS HOBBS, *LEVIATHAN* 84–85 (Edwin Curley ed., Hackett 1994) (1651). "[T]he bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power; which in the condition of mere nature, where all men are equal, and judges of the justness of their own fears, cannot possibly be supposed." *Id.* at 89. "[B]efore the names of just and unjust can have place, there must be some coercive power to compel men equally to the performance of their covenants . . ." *Id.*

9. See *Coercion*, OXFORD ENGLISH DICTIONARY, *supra* note 6.

10. See, e.g., David Zimmerman, *Coercive Wage Offers*, 10:2 PHIL. & PUB. AFF. 121 (1981).

11. See generally THOMAS AQUINAS, *SUMMA THEOLOGICA* Q. 96, art. 5 at 1020–21 (Fathers of the English Dominican Province trans., 1947), at I–II, "Treatise on Law"; JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 13–14 (Wilfrid E. Rumble ed., Cambridge University Press 1995) (1832); JEREMY BENTHAM, *Of*

Aquinas, law was viewed as a means of using “force and fear” to hold back those “found to be depraved, and prone to vice, and not easily amenable to words” so that they would “desist from evil-doing, and leave others in peace,” becoming “habituated in this way” and “virtuous.”<sup>12</sup> Coercion thus served to explain and justify early notions of sovereignty and the social utility of public law: Aquinas argued that the law’s coercive function must be “vested in the whole people or in some public personage” rather than in private parties.<sup>13</sup> Thomas Hobbes understood coercive power as synonymous with the state, both in the state’s formation and in its function of making and preserving justice:

[W]here there is no coercive Power erected, that is, where there is no Commonwealth, there is no Propriety; all men having Right to all things: Therefore where there is no Commonwealth, there nothing is Unjust. So that the nature of Justice, consists in keeping of valid Covenants: but the Validity of Covenants begins not but with the Constitution of a Civil Power, sufficient to compel men to keep them: And then it is also that Propriety begins.<sup>14</sup>

For Hobbes, coercion served to secure justice by creating a commonwealth bound by enforcement of a network of rights. John Locke, more wary of the state’s monopoly on force, still viewed political power as “a Right of making Laws, with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the

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*Laws In General*, in THE COLLECTED WORKS OF JEREMY BENTHAM 1–2 (H.L.A. Hart ed., 1970); H.L.A. HART, THE CONCEPT OF LAW (Paul Craig ed., 3d ed. 2012); Hobbes, *supra* note 8; IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., Cambridge University Press, 1996) (1797); HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., 2009); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988); J.R. LUCAS, THE PRINCIPLES OF POLITICS (1966); JOHN STUART MILL, ON LIBERTY 13–14 (Stefan Collini ed., 1989) (1851); NAGEL, *Foreword* to NOZICK, ANARCHY, *supra* note 2; Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440–72 (Sidney Morgenbesser, et al. eds., 1969), reprinted in ROBERT NOZICK, SOCRATIC PUZZLES 15–44 (1997); JOHN RAWLS, THEORY OF JUSTICE (1999).

12. AQUINAS, SUMMA, *supra* note 11, at Q. 95, art. 1.

13. *Id.* at Q. 90, art. 3.

14. HOBBS, *supra* note 8, at ch. 15, *Of Other Laws of Nature*.

Community, in the execution of such Laws, . . . and all this only for the Publick Good.”<sup>15</sup> He understood coercive arrangements, such as state enforcement of private property rights, as warranted so long as “there is enough, and as good left in common for others.”<sup>16</sup> The law’s coercive power was thus a mechanism for ensuring compliance, but also a means of protecting “the commons.” Immanuel Kant more explicitly described coercion as a tool used by the law to ensure respect of others’ rights, justifying state power in its ability to require the defense of equal freedom of all subjects.<sup>17</sup> Jeremy Bentham also upheld law as coercive sovereign command, backed by threats of force, to punish legal breaches.<sup>18</sup>

These accounts have in common a view of coercion as a justificatory mechanism for explaining when and why the state may properly deploy force to protect individual liberties and the collective good. Coercion was framed in the exclusive context of public law. John Stuart Mill, however, shifted the tradition’s focus by pointing to the ability of civil institutions, such as marriage, private contracts, labor relations, to coerce with the same level of influence as with state power.<sup>19</sup> Mill viewed coercion as ranging from the “physical force” of the state to the “moral coercion of public opinion.”<sup>20</sup> For him, state coercion may be “warranted . . . in interfering with the liberty of action of any of [mankind’s] number” through a principle of “self-protection.”<sup>21</sup> But his more expansive understanding dramatically rearranged the contexts in which coercion could be examined. This understanding replaced the dominant view of coercion with a nearly infinite set of horizontal vectors where individuals deploy civil society institutions, public opinion, and the law to restrain others’ liberty.

Coercion received its most expansive conceptualization as a force of social ordering outside the confines of state power in Marx’s

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15. LOCKE, *supra* note 11, at Book II, “Of Civil Government,” ch. 1, § 3.

16. *Id.* at ch. 5, § 27.

17. KANT, *supra* note 11, at 20–26.

18. BENTHAM, *supra* note 11, at 1–2. *See generally* MILL, ON LIBERTY, *supra* note 11, at 13.

19. Scott Anderson, *Coercion*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY §1.3 (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/archives/Sum2015/entries/coercion>.

20. MILL, ON LIBERTY, *supra* note 11, at ch. 1.

21. *Id.*

analysis of the coercive laws of competition.<sup>22</sup> While Marx did not fully expound these coercive laws, he understood them as systemic in capitalist production, establishing and reinforcing surplus value gains to the capitalist at the expense of the social value of labor and the cheapened commodity.<sup>23</sup> Coercive laws did this by forcing the capitalist to consistently increase labor productivity<sup>24</sup> following capital's acquisition of command over labor:

Capital developed within the production process until it acquired command over labour . . . . The capitalist, who is capital personified, now takes care that the worker does his work regularly and with the proper degree of intensity . . . . [But] capital also developed into a coercive relation, and this compels the working class to do more work than would be required by the narrow circle of its own needs.<sup>25</sup>

Capital coerces labor as the originary coercive relation, but the capitalist is himself not immune from systemic coercion under the coercive laws of competition in capitalist production. Where the capitalist introduces a superior technology that doubles a worker's productivity,

[t]his extra surplus-value vanishes as soon as the new method of production is generalized, for then the difference between the individual value of the cheapened commodity and its social value vanishes. The law of the determination of value by labour time makes itself felt to the individual capitalist who applies the new method of production by compelling him to sell his goods under their social value; this same law, acting as a coercive law of competition, forces his competitors to adopt the new method.<sup>26</sup>

For Marx, the coercive laws of competition are systemic: "Under free competition, the immanent laws of capitalist production confront the

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22. KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 343–418, 430–38 (Ben Fowkes trans., Penguin Books 1990) (1867).

23. *Id.* at 436–37.

24. *Id.*

25. *Id.* at 424–25.

26. *Id.*

individual capitalist as a coercive force external to him.”<sup>27</sup> Marx thus imagines a system of thoroughgoing coercion, effectuating a philosophical reversal from describing coercion as state command of the law to describing it in terms of laws of pervasive *economic* command.

*B. Coercion and the Law in Modern Analytic Philosophy*

From the turn of the century, philosophical scholarship in the American tradition developed conflicting accounts of coercion, some viewing the law as fundamentally coercive, while others challenged that view as ignoring the normative or experiential aspects of the law’s operation.<sup>28</sup> The field further fractured as political realists and others argued that geopolitical pressures and economic power eviscerate the “law” as a formal, state-enforced system governing conduct, placing in the law’s stead descriptions, justifications, and condemnations of “non-legal” coercion.<sup>29</sup> Still, most accounts have concentrated on the study of coercion in one of two ways. They have focused on either contesting the inherent power of law as coercive (macro-analysis) or investigating when specific conduct may be deemed coercive (micro-analysis), roughly a public and private law divide. The first set focus on how the law, understood through the lens of coercion, “purports to govern conduct.”<sup>30</sup> This has involved evaluating the role of coercion in defining what “the law” is. Micro-

27. *Id.* at 381. For further elaborations of coercion in Marx, see Jeffrey Reiman, *Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen*, 16 PHIL. & PUB. AFF. 3 (1987).

28. Grant Lamond, *Coercion and the Nature of Law*, 7 LEGAL THEORY 35, 36–37, 54–55 (2001); Ekow Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1195–96 (2008).

29. *See, e.g.*, E.H. CARR, *THE TWENTY YEARS’ CRISIS, 1919–939: AN INTRODUCTION TO STUDY INTERNATIONAL RELATIONS* (2001); GEORGE F. KENNAN, *REALITIES OF AMERICAN FOREIGN POLICY* (1951); ROBERT O. KEOHANE & JOSEPH NYE, *POWER AND INDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977); HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1954); REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY OF ETHICS AND POLITICS* (1932); KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979). *See also* JACK DONNELLY, *REALISM AND INTERNATIONAL RELATIONS* (2000); EVGENY PASHUKANIS, *PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW* (Piers Beirne & Robert Sharlet, trans., Peter B. Maggs ed., 1980).

30. JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 72 n.12 (2003).

analytic accounts, on the other hand, have concentrated on what rights an individual may have in the face of specific instances of conduct deemed coercive to best complete the formula: X coerces Y into doing or not doing A if and only if . . . . None of these accounts have taken as their subject whether the law has evolved a coherent understanding of economic coercion, or even coercion itself, across substantive areas of adjudication, nor have they adequately accounted for the historical context informing such adjudications.<sup>31</sup>

### 1. Coercion and Public Law

John Austin's "command theory" of law—identifying the law with its coercive power to back its commands with force—dominated philosophical theories of law in the Anglo-American tradition until the mid-twentieth century.<sup>32</sup> Beginning in the 1950s, his exclusive definition of legal duties and obligations in terms of state-sanctioned threats came under attack in favor of legal positivist accounts of law: "[I]t is because a rule is regarded as obligatory that a measure of coercion may be attached to it: it is not obligatory because there is coercion."<sup>33</sup> John Rawls was an exception by not radically departing

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31. David Zimmerman interjected his analysis of economic coercion in the context of wage offers, but his "amoral" account took no notice of juridical adjudications of economic coercion claims. See Zimmerman, *Coercive Wage Offers*, *supra* note 10, at 122. See also Lawrence A. Alexander, *Zimmerman on Coercive Wage Offers*, PHIL. & PUB. AFF. 12, no. 2, 160-64 (1983); David Zimmerman, *More on Coercive Wage Offers: A Reply to Alexander*, PHIL. & PUB. AFF. 12, no. 2, 165-71 (1983). It is important to point out here that modern and contemporary economic theory, particularly in the context of labor markets, have proposed models for how to think about economic coercion, but "[d]espite the historical importance of coercion, the literature on coercive labor markets is limited." Daron Acemoglu & Alexander Wolitzky, *The Economics of Labor Coercion*, 79 ECONOMETRICA 555, 559 (2011). Even those accounts, however, posit a narrow definition of coercion for the purposes of modeling incentives and efficiencies that may result from its use absent external regulation. See *id.* at 555-60, 570.

32. See Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 589-90 (2010). See generally JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 311-20, 357-64 (R. Campbell ed., 5th ed. 1885 [1861]); JOHN AUSTIN, PROVINCE OF JURISPRUDENCE, *supra* note 11, at 21-25.

33. A.L. GOODHART, ENGLISH LAW AND THE MORAL LAW 17 (1953). In addition to Hart's objections discussed herein, see Joseph Raz, "The Claims of Law," in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 28, 29-31 (1979); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); JOSEPH RAZ, PRACTICAL REASON AND NORMS

from Austin's view,<sup>34</sup> but Rawls concentrated on the legitimation of political power and stated that

our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.<sup>35</sup>

H.L.A. Hart's 1961 *Concept of Law* advanced a legal positivist rejection of "command theory" in favor of an empirical, Weberian view of law's authority as fundamentally social (the "social fact" thesis).<sup>36</sup> For Hart, law rested on custom, with a bifurcated system of primary and secondary rules: the primary rules govern conduct, and the secondary rules allow the creation, modification, or rejection of primary rules.<sup>37</sup> Hart's "rule of recognition" was a key secondary rule that differentiated norms recognized as having the *authority* of law from social rules that lacked this recognition and lacked the force of law.<sup>38</sup> He rejected the command theory's failure to explain the internal aspect, the "critical reflective attitude," of following rules and stated, "[I]f a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary cooperation, thus creating *authority*, the coercive power of law and government cannot be established."<sup>39</sup> In his 1964 *The Morality of Law*, Lon Fuller also rejected Austin's "command theory" in favor of viewing law as "the enterprise of subjecting human conduct to the governance of rules."<sup>40</sup> Fuller explicitly

139 (1975); Hans Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 AM. J. JURIS. 71 (1976).

34. JOHN RAWLS, *POLITICAL LIBERALISM* 136 (1996 [1993]).

35. *Id.* at 137.

36. *See generally* HART, *supra* note 11, at 20-25, 79-99, 249-50.

37. *See generally id.*

38. *Id.* at 94-110, 246-268, 292-95. In this notion, Hart was influenced by Kelsen's idea of the "*Grundnorm*," or "basic norm," which forms the underlying basis for a legal system that is accepted by a minimum number of people in a community as authoritative, as the "ought" element of established normative relations. *See* KELSEN, *supra* note 11, at 73-77.

39. HART, *supra* note 11, at 27-33, 48, 88-91, 196. *See also* H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963); EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 123 (1953).

40. LON FULLER, *THE MORALITY OF LAW* 106 (2d ed. 1969 [1964]).

rejected “treating the use or potential use of force as the identifying characteristic of law,” viewing such identification as a “fatal abstraction” “from the purposive activity necessary to create and maintain a system of legal rules.”<sup>41</sup> Ronald Dworkin’s legal interpretivism dealt another blow. Dworkin rejected both Austin’s “command theory” and Hart’s legal positivism, arguing that “jurisprudential issues are at their core issues of moral principle, not legal fact or strategy.”<sup>42</sup> Dworkin decoupled the government’s power to coerce from legality, viewing law as a constraint informed by moral principles that justify the enforcement of rights and obligations.<sup>43</sup> Norms and institutional history do not constitute law but act as an “ingredient” of judicial decision-making “because institutional history is part of the background that any plausible judgment about the rights of an individual must accommodate,” but “[p]olitical rights are creatures of both history and morality.”<sup>44</sup>

## 2. Coercion and Private Law

Like Dworkin, Robert Nozick viewed the morality of individual rights as a constraint on the coercive power of government,<sup>45</sup> and in 1969, he developed a new framework for evaluating coercion at the micro-level, between an individual coercer and coercee.<sup>46</sup> Nozick argued that there were six necessary and sufficient conditions for the proposition “P coerces Q” to be true:

- 1) P aims to keep Q from choosing to perform action A;
- 2) P communicates a claim to Q;
- 3) P’s claim indicates that if Q performs A, then P will bring about some consequence that would make Q’s A-ing less desirable to Q than Q’s not A-ing;
- 4) P’s claim is credible to Q;
- 5) Q does not do A;

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41. *Id.* at 108, 110, 115.

42. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 7 (1977).

43. *See* RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 5–6 (2011); RONALD DWORKIN, *LAW’S EMPIRE* 119–20 (1986).

44. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 42, at 87.

45. *See* H.L.A. Hart, *Between Utility and Rights*, in *THE IDEA OF FREEDOM: ESSAYS IN HONOR OF ISAIAH BERLIN* 86 (A. Ryan ed., 1979).

46. Nozick, *supra* note 11, at 441–45.

- 6) Part of Q's reason for not doing A is to lessen the likelihood that P will bring about the consequence announced in (3).<sup>47</sup>

For Nozick, coercion was explicitly dependent on the coercee's decision to take or not take an action based on a morally-neutral baseline and required successful prevention of performance of that action (a "success condition").<sup>48</sup> It also required reference to facts of the coercee's psychology, such as how the coercee was internally affected by the coercion, rather than the coercer's means or the conditions required for the coercer's success.<sup>49</sup> Finally, Nozick identified coercion exclusively with threats that involved only indirect uses of force.<sup>50</sup> Forceful or violent conduct, background conditions, or the mere existence of asymmetrical power relationships did not fit within the coercive model. In fact, in *Anarchy, State and Utopia*, Nozick argued that "circumstances" that limit alternatives are not coercive, that only specific interpersonal threats can be coercive.<sup>51</sup> His account was a dramatic narrowing of the concept of coercion from prior accounts where the element of direct force was a necessary condition for coercion.<sup>52</sup>

Nozick's essay triggered a flurry of articles, the "Coercion Debates," focusing on coercion through the 1970s and 1980s.<sup>53</sup> Most

47. *Id.*

48. Nozick, *supra* note 11, at 441–45.

49. See Scott Anderson, *How Did There Come to be Two Kinds of Coercion?*, in COERCION AND THE STATE 17–30 (David Reidy & Walter Riker, eds., 2008).

50. Nozick, *supra* note 11, at 458–65.

51. See Nagel, *Foreword* to NOZICK, ANARCHY, *supra* note 2, at 262–62. See also ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 49 (1981).

52. See, e.g., KELSEN, *supra* note 11, at 34.

53. See Anderson, *supra* note 19, at Sec. 2.1, "Nozick and a New Approach to Coercion." See also in chronological order as the Debates unfolded: NOMOS XIV: COERCION (Roland J. Pennock & John W. Chapman, eds., 1972); Harry Frankfurt, *Coercion and Moral Responsibility*, in THE IMPORTANCE OF WHAT WE CARE ABOUT (1988 [1973]); Nagel, *Foreword* to NOZICK, ANARCHY, *supra* note 2; Michael D. Bayle, *Coercive Offers and Public Benefits*, in 55 THE PERSONALIST 139 (1974); Daniel Lyons, *Welcome Threats and Coercive Offers*, 50 PHIL. 425 (1975); Oberdiek, *supra* note 33; Vinit Haksar, *Coercive Proposals*, 4 POL. THEORY 65 (1976); Theodore Benditt, *Threats and Offers*, in 58 THE PERSONALIST 382 (1979); Martin Gunderson, *Threats and Coercion*, 9 CAN. J. OF PHIL. 247 (1979); H.J. McCloskey, *Coercion: Its Nature and Significance*, 18 S. J. OF PHIL. 335 (1980); Cheyney C. Ryan, *The Normative Concept of Coercion*, 89 MIND 481 (1980); Zimmerman, *Coercive Wage*

explicitly or implicitly adopted Nozick's framework but were divided on whether empirical or moralized theories best explained coercion, concentrating on three sets of issues: how narrowly or broadly the baseline situation should be viewed, whether a morally-neutral baseline was possible, and whether baseline accounts were useful at all for theorizing coercion.<sup>54</sup> Under the empirical view, coercion claims were understood to be value-free and resolvable without resorting to moral principles. Determining whether conduct was coercive depended only on an analysis of facts: whether the coercee would be better or worse off by accepting the coercer's proposal, whether the coercee was psychologically pressured, whether "reasonable alternatives" existed, and whether reasonable persons would accept or reject a given proposal.<sup>55</sup> Moralized theories of coercion, on the other hand, contended that any coercion determination required assessment of core moral issues: whether a coercer had the *right* to make his proposal, whether the coercee ought to resist the proposal, and whether the coercee should be entitled to recover if she succumbs to the proposal.<sup>56</sup> For moral theorists, the coercive encounter could not be so designated without "principles," or "standard[s] . . . , not because [they] will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."<sup>57</sup>

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*Offers*, *supra* note 10; Mark Fowler, *Coercion and Practical Reason*, 8 SOC. THEORY AND PRAC. 329 (1982); Michael Gorr, *Toward a Theory of Coercion*, 16 CAN. J. OF PHIL. 383 (1986).

54. WERTHEIMER, *supra* note 45, at 7; Zimmerman, *Coercive Wage Offers*, *supra* note 10, at 126. See also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1448 n.142 (1989) ("Virtually all philosophical commentators writing in Nozick's wake agree with the basic premise of his article: that coercive proposals ('threats,' in Nozick's terminology), unlike noncoercive proposals ('offers,' in Nozick's terminology), involve a departure from some baseline of 'the normal or natural or expected course of events' that makes the recipient worse off. . . . They disagree, however, about how to define the appropriate baseline. The debated baselines fall roughly into two categories: descriptive and moral.") *Id.* (citations omitted).

55. WERTHEIMER, *supra* note 45, at 7. See also JOEL FEINBERG, *HARM TO SELF* 219 (1986); Frankfurt, *supra* note 53, at 26-46.

56. *Id.*

57. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 42, at 23. See also Sullivan, *Unconstitutional Conditions*, *supra* note 54, at 1428 ("[A]ny useful conception of coercion is irreducibly normative. Without a theory of autonomy,

David Zimmerman was the sole participant in the Coercion Debates who discussed economic coercion.<sup>58</sup> His analysis focuses on wage offers and is firmly positioned within the dominant frameworks of the Debates. He explicitly situates himself on the empirical side of the empirical-moralist divide, assumes the baseline approach as the best heuristic for distinguishing coercion from non-coercion, concentrates exclusively on offers over conduct, and relies on common sense intuitions over other sources of knowledge (history, economics, sociology, etc.) to ground his baseline-shifting definition.<sup>59</sup> Rejecting Nozick's assumption of a morally-neutral baseline,<sup>60</sup> he argues that offers are only coercive if the coerced "would prefer to move from the normally expected pre-proposal situation to the proposal situation *but he would strongly prefer even more to move from the actual pre-proposal situation to some alternative pre-proposal situation.*"<sup>61</sup> Thus, for the coercer's offer to be genuinely coercive, "it must be the case that [the coercer] *actively prevents [the coerced] from being in the alternative pre-proposal situation [the coerced] strongly prefers.*"<sup>62</sup> Zimmerman limits the range of alternative pre-proposal situations by imposing a "feasibility condition" requiring those alternatives be "historically, economically, [and] technologically" possible.<sup>63</sup> He then contends that "[w]hether capitalist wage offers are coercive or not depends on whether an alternative pre-proposal situation is feasible *which is sufficiently better* than the terms of the actual wage offer *and* which capitalists prevent workers from having."<sup>64</sup>

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utility, fairness, or desert, one cannot tell when choice has been wrongfully constrained."). *Id.* at 1443 ("[Coercion] necessarily embodies a conclusion about the wrongfulness of a proposal, not merely the degree of constraint it imposes on choice.").

58. See generally Zimmerman, *Coercive Wage Offers*, *supra* note 10.

59. *Id.* at 123 ("I argue . . . that coercion is not an essentially moral concept. . . ."); 123–24 ("the phenomenon of 'coercive offers' can be accommodated without any assumptions about prior rights and wrongs."); 131 ("In developing a completely non-moral account of coercion, the main task is to accommodate intuitions about the coerciveness of proposals. . .").

60. *Id.* at 126.

61. *Id.* at 132.

62. *Id.* at 133.

63. *Id.* at 132.

64. *Id.* at 140.

While it does not focus on economic coercion per se, Alan Wertheimer's seminal 1987 work, *Coercion*, is the first and only development of a theory of coercion on the basis of what "underlies judicial decisions across [a] full range" of substantive legal contexts, such as contracts, torts, family law, trusts and estates, free speech and criminal law.<sup>65</sup> Wertheimer aligns himself with moral (as opposed to empirical) accounts of coercion and accepts Nozick and others' view that coercion is limited to specific instances of coercive threats.<sup>66</sup> After reviewing a selection of cases, Wertheimer extracts a two-pronged test for determining such a threat: "A coerces B to do X if and only if (1) A's proposal creates a choice situation for B such that B has no reasonable alternative but to do X and (2) it is *wrong* for A to make such a proposal to B."<sup>67</sup> Wertheimer refers to the first condition as the "choice prong" and the second as the "proposal prong."<sup>68</sup> He argues that, because the law fundamentally relies on whether it is wrong for A to make certain proposals to B, "the law adopts a moralized or normative approach to coercion."<sup>69</sup> Coercion claims are thus contextual, lacking a single set of required truth conditions for their validity.<sup>70</sup> Wertheimer adopts a baseline approach, but his baseline-setting is modified to the extent that choosing which alternatives, if any, are available once a proposal is made is entirely dependent on normative judgments: "the required baseline will be determined by the moral force the coercion claim is meant to support. . . . I do not see any general theoretical motivation for saying that there is or must be a unique and proper way for setting B's baseline."<sup>71</sup> But Wertheimer does ground the moral baseline on a theory of rights: "the structure of coercion discourse presupposes that A and B have certain obligations and rights which establish a background against which A's proposals are understood."<sup>72</sup> Wertheimer identifies the moral baseline with rights that he claims that "[a] theory which denied that B has any rights would . . . also have to deny any fundamental moral importance to

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65. See WERTHEIMER, *supra* note 45, at xii, 15, 19–178.

66. *Id.* at 6, 173, 184, 212.

67. *Id.* at 172 (emphasis in original).

68. *Id.* at 172–73.

69. *Id.*

70. *Id.* at 184–88.

71. *Id.* at 201–12.

72. *Id.* at 217.

coercion.”<sup>73</sup> Rights are critical for Wertheimer’s account because his exclusive focus is on which coercion claims generate “responsibility-affecting contexts.”<sup>74</sup>

### *C. Limitations of Philosophical Accounts*

The philosophical literature provides an essential background for elaborating a broader theory of economic coercion. After first detailing limitations of these accounts for such a theory, this Section will extrapolate a set of key requirements that they suggest for laying that theory’s groundwork.

#### 1. Philosophical Accounts of Public Law and A Theory of Economic Coercion

While focusing on whether law can be saved from a reductionist description as coercive command, recent philosophical thought on coercion has concentrated on answering public law questions. It either ignored or has been ill-equipped to offer a full account of economic coercion. First, discussions focused exclusively on public law cannot alone account for *all* economic transactions and relationships that are coercive, and, further, are either indifferent to or explicitly not concerned with coercive economic relations within the administration of a system of law or justice. For example, Rawls’ account of the maximum equal liberty principle as “defin[ing] the end of social justice” is compatible with “[t]he inability to take advantage of one’s rights and opportunities as a result of poverty and ignorance, and a lack of means generally,” because, in his view, poverty does not put a constraint on one’s liberty, but only reduces the “worth of liberty.”<sup>75</sup> Other principles of justice valuing arrangements of economic inequalities to everyone’s best advantage concern *fairness* rather than liberty constraints. This invites the larger question: how satisfying are accounts of freedom and coercion that do not provide mechanisms for evaluating whether economic

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73. *Id.* at 218.

74. *Id.* at 6, 307.

75. See RAWLS, *supra* note 11, at 179. See also Norman Daniels, “Equal Liberty and Unequal Worth of Liberty,” in *READING RAWLS* 253–81 (Norman Daniels ed. 1976); WERTHEIMER, *supra* note 45, at 5.

inequality can restrict freedoms and create coercive relationships, independently of whether or not that inequality is just?

Second, while legal positivist and legal interpretivist accounts detach the law from an exclusively coercive function, their approaches are insufficient to account for economic facts and relationships that generate duties and norms that have coercive force or impose liberty constraints relevant for determining what the law is or should be. Rules of recognition and moral principles may inform how individuals and judges evaluate economic relationships as coercive, but they do not explain how economic coercion itself can be determinative of the law, or individual and collective rights. Nor can they provide an adequate account of what substantively informs, from a historical perspective, the core components of an economic coercion claim: what the breadth and scope of the economic field is conceived to be, how economic actors are understood to impact each other or the economy, and what theories of economic rights or duties inform understandings of economic freedom and freedom more broadly.

## 2. Philosophical Accounts of Private Law and A Theory of Economic Coercion

Philosophical accounts of coercion in private law or at the level of individuals has also not attended to the particularities of coercion's operation in an economic setting. While rare accounts such as Zimmerman's concentrate on coercion in the context of wage offers, it raises more questions than it answers. Like other Coercion Debates theorists, Zimmerman accepts Nozick's focus on the coercee's subjective state as the site of coercion, ignoring the difficult question of whether those suffering from psychological impairments could be victims of coercion. Even if Zimmerman were to concede in his baseline analysis that an alternative pre-proposal situation could be generated by a "reasonable observer" rather than by the coercee's subjective preferences, it would be impossible to determine which alternatives are "strongly preferable" without relying on some moral or empirical criterion of what would satisfy the reasonable observer's (hitherto unexamined) conception of a less coercive alternative situation. Further, his account fails to elaborate what the conditions of imposing the reasonable observer's preferred alternatives on the coercee would be and what the criteria would be for determining whether an alternative situation is or is not historically possible.

Even if Zimmerman were to justify some form of benign paternalism, accepting the role of a reasonable observer at all would challenge the very premise of the baseline framework he, Nozick and others apply to assess coercion. It would reveal its fundamental arbitrariness: how do we ever know where to draw the baseline? How far ought we go back from the proposal or pre-proposal situation to ascertain when someone was “free” of coercion and/or what created the proposal situation in the first place? How many alternative situations ought one consider, and what primary rules or background values ought to be used to choose one baseline over another? In the realm of wage offers, there may be a more empirical basis for determining whether one wage is “sufficiently better” than others, but even wage offers are not as simple as they seem. Zimmerman assumes wage offers are a one-to-one transaction exchanging labor for money, but valuing wages itself depends on a number of factors outside the immediate coercion situation: how we value labor, how we define the labor market, the worker’s own valuation of his or her work over time, and so on.

While Wertheimer’s approach incorporates a broader context into its assessment of coercion claims, it has a number of limitations. First, the “context” he deems determinative of coercion claims is very narrow. Wertheimer provides no justification for why the relevant “context” ought be limited to normative judgments rather than material conditions. Further, Wertheimer abstracts a theory of coercion from judicial decisions assuming that their historical, socio-economic context in no way impacts how coercion claims are interpreted or decided.<sup>76</sup> And in his review of substantive law, Wertheimer ignores areas critical to understanding economic coercion claims: labor law, human rights law, and trade law, to name a few.

Second, Wertheimer fails to justify his assumption that rights are dispositive of coercion claims, and that without rights, there would be no “fundamental moral importance” to coercion claims.<sup>77</sup> If rights just *are* normative judgments for Wertheimer, then the claim that coercion, which is dependent on normative judgments, is unimportant outside a rights-based system is circular. Additionally,

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76. *Id.* at xii (“Unashamedly, I move from state to federal law and back again, from lower appellate courts to the highest court in the land, and back and forth in time.”).

77. *See id.* at 217–18.

coercion claim adjudication can itself be rights-creating where no prior right was recognized. In fact, coercion claims are often used to test whether a right *ought* to exist where no right was previously recognized, and if so, its scope. It cannot be the case that the existence of the right is itself what generates the moral importance of the coercion claim. Moreover, Wertheimer's duty-based account cannot account for systemic coercion claims.<sup>78</sup>

Finally, to the extent Wertheimer discusses economic coercion, he assumes, without justification, that moral determinations exist independently of economic theory or analysis. For example, discussing the economic compulsion to accept a job and specific compulsions generated from fear of being fired, Wertheimer argues that neither

rest on an *unrealistic* economic theory, or, indeed, on any (empirical) economic theory. To defend [a] distinction [between them], . . . [o]ne need only claim that employers have legal or moral responsibilities to their employees that differ from their responsibilities to others. This is a moral view, not an economic theory . . . it need not presuppose any particular view about economic mobility and labor supply.<sup>79</sup>

Wertheimer here puts the cart before the horse. He assumes that it is the existence of a legal or moral duty that determines whether or not coercion exists, but the very existence of the duty stems from a common law or statutory institutionalization of responsibilities *after* deciding that certain economic relationships as opposed to others require state regulation. Views of "economic mobility" and "labor supply" are inseparable from and often determinative of the boundaries of the marketplace and where lines of duty should be drawn between actors in that marketplace. Without a theory and analysis of how economic conditions are understood, the imposition of a duty between, for example, a franchise employer and a franchise employee as opposed to a multinational corporate employer and a franchise employee, is wholly arbitrary.

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78. Wertheimer recognizes this, but does not reject the possibility of systemic exploitation: "I ignore *systemic* or *technical* accounts of exploitation, although I do not want to deny that some such account is possible." *Id.* at 226 n. 20.

79. *Id.* at 59.

### 3. Extrapolating Minimum Requirements For A Theory of Economic Coercion

Despite its limitations in elaborating a theory of economic coercion, we can extract a number of core, foundational requirements for such a theory. First, for a theory of economic coercion to match the robust public law accounts of coercion, it must account for the effects of the exercise of state power on individual autonomy, both as it applies to individual conduct and to individual virtue. It must also explain the mechanism through which the economic coercive power of the state may or may not serve as a justification for sovereignty, the social utility of law, and the enforcement of a network of economic rights. Further, it must account for the positivist and interpretivist dimension of the law that serves as a condition for the state's economic coercive power, linking the purposive activity of constructing or refusing to construct real legal protections for the liberty interests implicated by economic coercion.

However, in being able to encompass the private law dimensions of economic coercion, an exhaustive theory must recognize horizontal- and market-based relationships that restrain economic liberties, touching on direct and indirect uses of force. In doing so, it must accommodate both the empirical and moral dimensions of economic coercion. In accommodating the moral dimension of economic coercion claims, it must be attentive to the formative role of history, normative values, and institutions in identifying and incorporating constraints on economic coercive power. Given the complex determinants of economic relationships and their intersection with state-granted rights and socio-political values, a proper account of economic coercion must expand out from the baseline of the "proposal" or "choice situation" into the broader historical, economic, and ideational context. It must be informed by the regulatory context at play, not only within the narrow context that makes coercive offers or conduct colorable under a particular area of substantive law, but also within a broader, background understanding of what makes economic coercion actionable across substantive areas of law. The nature and legal status of economic coercion has neither been sufficiently explored nor evaluated as a legal category across substantive areas of law. Except in the context

of labor law,<sup>80</sup> scholarship has almost exclusively explored it as a theoretical rather than historical concept in the individual substantive areas of taxation,<sup>81</sup> international sanctions,<sup>82</sup> and contracts.<sup>83</sup> A full theorization of the value of economic coercion as a regulating concept requires taking an overarching view of how the law has historically credited, justified, or rejected claims of economic coercion and whether it has evolved a coherent view of how to adjudicate such claims in the broad array of contexts in which they are adjudicated.

Finally, a proper theory of economic coercion must begin by assessing the position of the coercer in addition to the coerced.<sup>84</sup> It is

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80. See, e.g., ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY (2001); Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103 (2001).

81. See, e.g., AGUSTÍN JOSÉ MENÉNDEZ, JUSTIFYING TAXES: SOME ELEMENTS FOR A GENERAL THEORY OF DEMOCRATIC TAX LAW (2001); JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (1994); RAZ, MORALITY OF FREEDOM, *supra* note 33, at 45; Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHILOSOPHY AND PUBLIC AFFAIRS, 257, 276–78 (2001).

82. See BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME (1988); DILEMMAS OF ECONOMIC COERCION: SANCTIONS IN WORLD POLITICS (Miroslav Nincic & Peter Wallensteen, eds., 1983); VALENTIN L. KRUSTEV, BARGAINING AND ECONOMIC COERCION: THE USE AND EFFECTIVENESS OF SANCTIONS (2008); Derek W. Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1 (1972); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1 (2001); Daniel W. Drezner, *The Hidden Hand of Economic Coercion*, 57 INT'L ORG. 643 (2003); Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 A.J.I.L. 405 (1985); Kenneth R. Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U. L. REV. 323 (1981); Richard D. Porotsky, *Economic Coercion and the General Assembly*, 28 VAND. J. TRANSNAT'L L. 901 (1995).

83. Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717 (2005). See P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); CHARLES FRIED, CONTRACT AS PROMISE (1981); Wertheimer, *supra* note 45, at 19–53; P.S. Atiyah, *Economic Duress and the “Overborne Will”*, 98 L.Q. REV. 197 (1982); Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45 (2002); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

84. For an early, important coercer-focused account, see Joan McGregor, *Bargaining Advantages and Coercion in the Market*, 14 PHILOSOPHY RESEARCH

relational and has distributive implications. It must incorporate the normative judgments, ethical judgments, and the material conditions into the analysis of the “choice situation.” In other words, a proper account of economic coercion must expand beyond interpersonal proposals to consider the strength and validity of systemic coercion claims and provide “thick descriptions” of those claims.<sup>85</sup> Additionally, it must analyze not only the end result of a coercion claim—the “success requirement”—but also, the processes through which economic choices are constrained even before the constrained party is presented with a “proposal.” In other words, it must be both procedural and substantive, and must touch on both liberty interests and welfare interests.

## II. THE DEVELOPMENT OF LEGAL ACCOUNTS OF COERCION

To both overcome the limitations presented by the above philosophical accounts as well as to develop the core requirements of a theory of economic coercion, this Section explores the development of theories of economic coercion in the law. As recent scholars recognize, “[d]espite 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.”<sup>86</sup> However, Legal Realist accounts of mutual coercion provide as close a model practicable for integrating the public and private law dimensions of economic coercion and providing an account of

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ARCHIVES 23 (1988–89). See also Bar-Gill & Ben-Shahar, *supra* note 83, at 717 (focusing on the motivations of the threatening party); WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 391 (1941) (rejecting distinction between circumstantial pressures and direct threats as writing into law an economic theory “increasingly foreign to any realities”).

85. “Thick description” is a concept developed by Clifford Geertz to incorporate context into anthropological descriptions of facts, data, or ritual—“interworked systems of construable signs.” Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 3–32 (1973). “Thick description” was a methodological challenge to mere “fact” description because such description “obscure[s] most of what we need to comprehend a particular event, ritual, custom, idea, or whatever is insinuated as background information before the thing itself is directly examined.” *Id.* at 9. The ethnographer’s task, according to Geertz, is to describe the “multiplicity of complex conceptual structures, many of them superimposed upon or knotted into one another, which are at once strange, irregular, and inexplicit.” *Id.* at 10.

86. Bar-Gill & Ben-Shahar, *Credible Coercion*, *supra* note 83, at 779.

economic coercion that illuminates its systemic dimension. By drawing from these accounts, this Section elucidates a flexible model for delineating such a theory.

*A. Legal Realism: Understanding and Mapping Coercion*

Far from limiting evaluations of economic coercion to individual encounters, U.S. Supreme Court decisions have taken it on in the most expansive contexts. In the early twentieth century, the Court was tasked with regulating the rise of and access to an emerging national economy. In a series of decisions, the Court considered the validity of the use of state protectionist measures against corporations seeking to expand across states. In those decisions, the Court struck down state taxes and charter fees levied against out-of-state corporations as unconstitutional.<sup>87</sup> Writing for the Court, Justice Harlan invalidated the exactions at issue as “illegally burdening interstate commerce and imposing a tax on property beyond the jurisdiction of the State.”<sup>88</sup>

On the basis of those decisions, Justice Holmes developed a theory of economic “implied duress.”<sup>89</sup> In *Atchison v. O'Connor*, he struck down as unconstitutional a Colorado tax levied on capital stock of companies conducting business in the state.<sup>90</sup> The take-it-or-leave-it element of the Colorado law required every corporation that failed to pay the tax to “forfeit[] its right to do business within the State until the tax is paid” and to “pay a penalty of ten per cent” every six months of default.<sup>91</sup> The Court found that such “payment was made under duress” since companies would suffer “serious” consequences in its subsequent business, and would be penalized throughout its contestation of the tax.<sup>92</sup> Justice Holmes went

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87. See *Ludwig v. Western Union Telegraph Co.*, 216 U.S. 146 (1910); *Pullman Co. v. Kansas*, 216 U.S. 56 (1910); *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910). The unconstitutionality of the state taxes was based on the negative implications of the Commerce Clause as well as violative of then-prevailing doctrines of substantive due process. For commentary, see Sullivan, *Unconstitutional Conditions*, *supra* note 54, at 1430, n.48.

88. *Ludwig*, 216 U.S. at 163.

89. *Union Pacific R. Co. v. Public Service Comm'n*, 248 U.S. 67 (1918); *Atchison v. O'Connor*, 223 U.S. 280 (1912).

90. *Atchison*, 223 U.S. at 285.

91. *Id.* at 286.

92. *Id.* at 286–87.

further to lament courts' slowness, stating that courts were "a little too slow to recognize[ing] the implied duress under which payment is made."<sup>93</sup>

In a subsequent decision, *Union Pacific Railroad v. Public Service Commission of Missouri*, Justice Holmes further developed the concept of "implied duress."<sup>94</sup> There, the Missouri Public Service Commission ("PSC") charged an out-of-state railroad company a substantial fee when it applied for a certificate authorizing the issue of bonds secured by a mortgage on the company's entire line.<sup>95</sup> Missouri law had prohibited bond issuance without PSC authority, imposed severe penalties for such issue, and would make bonds unmarketable if certification were refused.<sup>96</sup> Plaintiff Union Pacific Railroad had applied for certification in all States its line passed through, and when forced to pay a large fee to the PSC, paid but challenged the charge as unconstitutional.<sup>97</sup> After the Missouri Supreme Court upheld the charge, the railroad appealed to the U.S. Supreme Court.<sup>98</sup> Justice Holmes easily found the charge unconstitutional, challenging the Missouri Supreme Court's reasoning.<sup>99</sup> That court, Justice Holmes stated, avoided the issue of unconstitutional conditions "by holding that the application to the Commission was *voluntary*."<sup>100</sup> Justice Holmes, however, insisted that the availability of choice did not invalidate the duress: "It always is for the interest of the party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."<sup>101</sup>

Thus, in the context of unconstitutional conditions, Justice Holmes outlined the courts' duty to investigate underlying or "implied" mechanisms by which larger, collective actors like the State exert economic force on corporations even when those corporations have choices facially available. He drew from legal defenses circumscribed for use in contract law to regulate access to

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93. *Id.* at 286.

94. 248 U.S. 67.

95. *Id.*

96. *Id.* at 68.

97. *Id.*

98. *Id.* at 69.

99. *Id.* at 69–70.

100. *Id.* at 69 (emphasis added).

101. *Id.* at 70.

the national economy. This “scaling up” of contract principles implicitly assumes that economic forces at work in singular transactions subject to contract law are comparable to those operating at the level of the national economy.<sup>102</sup>

Justice Holmes’ refusal to view “choice” as a decontextualized, fixed concept rather than as determined by context was an early invitation to investigate the meaning of legal terms through factual analysis: “The life of the law has not been logic: it has been experience.”<sup>103</sup> In that same decade, scholars of the Legal Realist school began the arduous task of testing the function of legal concepts in context, and by 1935, Felix Cohen marked Legal Realism’s victories against the “transcendental nonsense” of nineteenth century formalist and idealist jurisprudence:

Llewellyn has filed an involuntary petition in bankruptcy against the concept Title, Oliphant against the concept Contract, Haines, Brown, T. R. Powell, Finkelstein, and Cushman against Due Process, Police Power, and similar charm-words of constitutional law, Hale, Richberg, Bonbright, and others against the concept of Fair Value in rate regulation, Cook and Yntema against the concept of Vested Rights in conflict of laws. Each of these men has tried to expose the confusions of current legal thinking engendered by these concepts and to reformulate the problems in his field in terms which show the concrete relevance of legal decisions to social facts.<sup>104</sup>

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102. This is striking in light of Holmes’ earlier dissent in *Lochner v. New York*, 198 U.S. 45 (1905), where he excoriated the Court for deciding the constitutionality of a New York law setting maximum working hours for bakers based on “an economic theory which a large part of the country does not entertain. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.” *Id.* at 75 (Holmes, J., dissenting).

103. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881). *See generally* AMERICAN LEGAL REALISM 3 (William W. Fisher III, Morton J. Horwitz, & Thomas A. Reed, eds., 1993); NEIL DUXBURY, *PATTERNS IN AMERICAN JURISPRUDENCE* 33–48 (1995); BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 15 (2001); GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977); NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 9, 171–72 (1997).

104. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 823 (1935) (internal citations omitted).

For Llewellyn, Oliphant, Hale, and the rest of the Legal Realists, nothing less than the thorough realization of core freedoms—“equal opportunity” and “preserving the equal rights of others”—was at stake in unraveling the jurisprudential sophistries in which American law was thought to be entangled.<sup>105</sup>

For Robert Hale, one of the most critical legal concepts to unravel was coercion. Through a series of articles culminating in his 1952 *Freedom Through Law*, Hale developed a theory of mutual coercion to reveal how the “constitutionally protected sphere of economic life . . . was constituted by a regime of property and contract rights that were neither spontaneously occurring nor self-defining, but were rather the positive creation of the state.”<sup>106</sup> Hale distinguished between two conceptions of freedom: voluntary freedom, or a form of complete autonomy with no limitations on choice or behavior, and volitional freedom, the choice between available alternatives in a world limited by circumstances created by others.<sup>107</sup> Hale’s theory of coercion posited that social actors had mutual coercive capacity limited only by the total coercive capacity of others.<sup>108</sup> Coercion was the impact of the behavior of others, as individuals or in the aggregate, that transformed voluntary to

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105. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38.3 POL. SCI. Q. 470, 470 (1923). See also Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 469 (1988).

106. FRIED, *supra* note 103, at 2–3. See generally the following Robert Hale publications: FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952); LEGAL FACTORS IN ECONOMIC SOCIETY (1st ed. 1935, 2 vols.; 2d ed. 1937, 3 vols.; 3d ed. 1940, 2 vols.; 4th ed. 1946; 5th ed. 1947); *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. (1943); *Coercion and Distribution*, *supra* note 105; *Economics and Law*, in THE SOCIAL SCIENCES AND THEIR INTERRELATION (W.F. Ogburn & A. Goldenweiser, eds., 1927); *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 COLUM. L. REV. (1935); *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEG. REV. 155 (1925); *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920); *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209 (1922); *Some Phases of the Minimum Wage: Discussion*, 7 AM. ECON. REV. 279 (1917).

107. Hale, *Law Making*, *supra* note 106, at 455. See also LEGAL FACTORS, *supra* note 106, at 594.

108. See Warren Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 279 (1973).

volitional freedom.<sup>109</sup> For Hale, coercion did not involve moral judgment, but rather social facts determinative of the impact or control of one individual or set of actors on others' choices.<sup>110</sup> Thus, all volitional freedom, or benefits accrued in society, were "subsidized by very appreciable sacrifices imposed on other people,"<sup>111</sup> part of an "interplay of coercive capacities through 'compulsions and counter-compulsions' of relative withholding power and the reciprocal imposition of conditions."<sup>112</sup> Power for Hale was the ability to alter one's legal relations or position to one's advantage.<sup>113</sup>

Rather than isolating the coercive encounter to individualized acts, Hale expanded the context of coercion to the entire economy and to the sphere of public government as creating the legal bases for a system of mutual coercion: a "ubiquity of externalities."<sup>114</sup> Hale originated the concept of "private government" to explain how the acquisition and exercise of private rights in a market economy governed resource allocation and income distribution. He understood "governance" broadly—finding government "[w]herever we find some men compelling other men to obey them"—and concentrated on "the all-pervading role of privately instituted government in the economic sphere."<sup>115</sup> Private government was indistinguishable from public government to the extent that it had the same constraining effect on volitional freedom.<sup>116</sup> The power that pervaded private government

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109. Robert Hale, *Robert Lee Hale Papers, 1912–1958*, Rare Book & Manuscript Library, Columbia University, Folders 39–26 at 2 & 585 at 6 & 69–1 (quoted in Samuels, *Economy*, *supra* note 106, at 288–289). See also Samuels, *supra* note 108, at 277.

110. Hale, *Law Making*, *supra* note 106, at 476.

111. *Hale Papers*, *supra* note 109, Folders 93–1 at 5–6 (quoted in Samuels, *Economy*, *supra* note 108, at 287).

112. Samuels, *Economy*, *supra* note 108, at 291 (quoting *Hale Papers*, *supra* note 109, Folder 93–1 at 29).

113. *Id.* at 274–75.

114. *Id.* at 286.

115. *Hale Papers*, *supra* note 109, Folder 79–1 at 2 & 93–1 at 33 (quoted in Samuels, *Economy*, *supra* note 108, at 296).

116. Hale, *Coercion and Distribution*, *supra* note 105, at 471; Hale, *Law Making*, *supra* note 106, at 453; Hale, LEGAL FACTORS, *supra* note 106, at 555. In this, Hale echoes Brandeis' dissent in *Truax v. Corrigan*, 257 U.S. 312, 368 (1921) (Brandeis, J., dissenting), where he argued that the employer used the Sherman Act to prevent worker boycotts "to endow [their] property with active militant power, which would

operated through the economy as “a network of coercive pressures and counter-pressures of varying strength, each pressure consisting . . . either of the power to lock or to unlock the bars which the law erects against the non-owners of each piece of property, or else of the power to withhold or not to withhold labor.”<sup>117</sup> One’s bargaining power was reduced to a form of private tax showing the payment one was willing to make to overcome the economic pressure exercised by another’s ability to withhold payment in any given transaction.<sup>118</sup> Thus, power was constituted through control over private property rights, and because there was unequal property rights distribution, there was an asymmetry in the exercise of mutual coercion, resulting in the embodiment of economic inequalities “in unequal legal rights.”<sup>119</sup> For that reason, “[t]here is no equality before the law, there never has been, and it is difficult to conceive how there could be.”<sup>120</sup>

Private government alone did not solidify power asymmetries. Economic processes for Hale were inseparable from legal processes. Hale viewed the structure and outcomes of mutual coercion as a product of government action where the government “controll[ed] the exercise of conflicting economic liberties through upholding or restricting the use of economic pressures,” and he sought to investigate “the effect of actual or possible legal arrangements on the various interests . . . .”<sup>121</sup> For Hale,

Whatever policies the law pursues in deciding how land shall originally pass into private ownership . . . will have a determining effect on the future course of private

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make it dominant over men. In other words, that under the guise of protecting property rights, the employer was seeking sovereign power.”

117. Hale, *Economics and Law*, *supra* note 106, at 138; *Hale Papers*, *supra* note 109, Folder 93-1 at 28 & 59-1 at 3 (quoted in Samuels, *Economy*, *supra* note 108, at 305).

118. See HALE, FREEDOM THROUGH LAW, *supra* note 106, at 8-9, 17-19, 30-31, 129-31; Hale, *Rate Making*, *supra* note 106, at 214.

119. See Hale, *Rate Making*, *supra* note 106, at 212, 214; Hale, *Coercion and Distribution*, *supra* note 105, at 488; HALE, FREEDOM THROUGH LAW, *supra* note 106, at 12. See generally Hale, *Labor Legislation*, *supra* note 106.

120. Hale, *Labor Legislation*, *supra* note 106, at 157.

121. Hale, *Economics and Law*, *supra* note 106, at 131. See also Thomas Irwin Emerson, *Book Review: Robert L. Hale*, FREEDOM THROUGH LAW (1952), 13 LAW. GUILD REV. 139, 139 (1953).

bargaining. . . . In enforcing contract and property rights the state is restricting the liberty of those who have incurred contractual obligations and of nonowners. . . . It is just as much governmental action when the conditions are formulated by a private owner, to whom the state, in the routine enforcement of property rights, has delegated the power to formulate them.<sup>122</sup>

The classic example Hale cited for the principle that government was always structuring economic liberties by favoring one party over another was the Supreme Court's decision in *Miller v. Schoene*.<sup>123</sup> In *Schoene*, the Court considered whether a Virginia law allowing the destruction of cedar trees afflicted with disease violated the Due Process Clause of the Fourteenth Amendment where the disease did not harm plaintiff's cedar trees but did destroy the fruit of apple orchards that the defendant, a state entomologist, sought to preserve.<sup>124</sup> Justice Stone held that Virginia "did not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another" since

the state was under the necessity of making a choice between the preservation of one class of property and that of the other *wherever* both existed in dangerous proximity. It would have been none the less of a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go unchecked.<sup>125</sup>

For Hale, making such choices was ubiquitous.<sup>126</sup> The Court's reasoning was "equally applicable to the protection of one form of individual liberty against destruction at the hands of persons exercising a conflicting liberty."<sup>127</sup>

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122. HALE, FREEDOM THROUGH LAW, *supra* note 106, at 380.

123. 276 U.S. 272 (1928).

124. *Id.*

125. *Id.* at 279–80.

126. *Hale Papers*, *supra* note 109, Folder 93–5 at 7 (*quoted in* Samuels, *Economy*, *supra* note 108, at 353–54). *See also id.* 83–1 at 1 & 80–4 at 22–23; Hale, *Force and the State*, *supra* note 106, at 200–01.

127. *Id.*

The central questions became, given that *any* state action intervenes in social relations pervaded by coercion, who was allowed to choose, and what choices ought be made?<sup>128</sup> Hale condemned *laissez-faire* economic theory and anarchism equally in that the former neglected “the effects of artificial (meaning artifactual) coercive restraints partly grounded in government itself,”<sup>129</sup> and the latter neglected liberty constraints that came from concentrations of private power.<sup>130</sup> Hale found liberatory potential in a kind of Viconian self-reflexivity: since law and economics “were not given, but were rather what man, through his multifarious institutions of choice, had made them,”<sup>131</sup> they could be evaluated and changed through alternative choices. For Hale, those changes would ideally result in a structural rearrangement of legal rights, which would restructure the balance of volitional freedom, to create a net enlargement of liberties:

[I]t is a fallacy to assume that every attempt by the state to control and to revise the economic results of bargaining involves a net curtailment of individual liberty. It may or may not do so. If the liberty of those whom it restrains is less vital than the liberty which those persons would themselves restrain, then state intervention may spell a net gain in individual liberty.<sup>132</sup>

Hale did not specify what he meant by “vital,” but his democratic vision was one in which the economy and the state as a social system was responsive to collective needs: “[t]he *equality* which we value demands that our government and its laws serve the interests of all classes of persons, rather than subordinating the liberties of some to

128. Hale, *Coercion and Distribution*, *supra* note 105, at 1; Hale, *Force and the State*, *supra* note 106, at 199.

129. Samuels, *Economy*, *supra* note 108, at 326 (citing *Hale Papers*, *supra* note 109, Folder 39–26 at 2 & 90–4 at 1–2).

130. See, e.g., Hale, *Political and Economic Review*, 9 A.B.A.J. 179 (1923) (“Perfect freedom from restraint by the official government is attainable only under anarchy; and under anarchy, we might be even less free than now from restraint imposed by non-governmental groups and individuals.”).

131. Samuels, *Economy*, *supra* note 108, at 351.

132. HALE, FREEDOM THROUGH LAW, *supra* note 106, at 4. See also Hale, *Force and the State*, *supra* note 106, at 200.

the interests of others.”<sup>133</sup> This would not amount to more government interference but rather to “a change in the form of our present incidence of paternalism.”<sup>134</sup> Primarily, Hale viewed the necessary modifications as occurring within the system of private property allocation, allowing individuals to “more equally” bear the work and share the fruits of that work.<sup>135</sup>

### *B. Limitations of the Legal Realist Paradigm*

The Legal Realists’ work presents at least three significant challenges to philosophical accounts of coercion. First, it redirects how and where we should look for coercion. By embedding mutual coercion in private and public institutional arrangements, it demands an assessment not of whether conduct is coercive, but given that it is, what *degree* of coercion is tolerable. Second, it presents a profound critique of how coercion should be analyzed. It rejects a baseline approach as, at best, insufficient, both because there is no escape from the operations of mutual coercion and because baselines could, at best, only trace back to an arbitrary point that would ignore the “artifactual” accrual of power that preceded a given choice situation. Further, the Legal Realist approach strives to understand the entirety of judicial decision-making as independent attempts to restructure the system of mutual coercion. Instead of looking for a formal coherence to those decisions, it tries instead to describe and evaluate their social results on the “net enlargement” of liberties. Finally, it prescribes a novel remedy. By making the law *itself* responsible, while also situating coercive power in choices made by private actors, it dramatically complicates individual coercer culpability from the private law philosophical accounts. For example, circumstances deemed coercive under non-Legal Realist models, like a hold-up by a robber where the victim must choose their money or their life, become indistinguishable from circumstances in which an employer threatens to prevent an employee’s access to the job site. In both contexts, the benefits accrued through the coercer’s exercise of volitional freedom result in constraints on the coerced. The Legal

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133. *Hale Papers*, *supra* note 109, Folder 58–4 at 3 (quoted in Samuels, *Economy*, *supra* note 108, at 362).

134. *Id.* at 56–2 at 4 (quoted in Samuels, *Economy*, *supra* note 108, at 362).

135. Robert Hale, *Some Phases of the Minimum Wage: Discussion*, 7 AM. ECON. REV. 279, 280 (1917).

Realist model offers a focus on what rights are at stake across the system to level the playing field between the coercer and coerced. Because the focus is on how a system of mutual coercion has allocated volitional freedoms, attention is no longer on individual culpability.

Yet, there are at least four limitations to the Legal Realist approach as outlined by Hale. First, it restricts its view to a very traditional understanding of legal rights, specifically, property and contract rights, without looking to broader sets of legal rights, norms, and practices that institutionalize power asymmetries. Second, as Hale himself argues, the Legal Realist approach involves no moral judgment. It gives marginal, if any, attention to the history of ideas, the role of moral valuation, and the forces of material conditions on thought that inform our very understanding of “volitional freedom.” It certainly fails to substantively evaluate what kinds of liberty interests ought be favored over others. Third, and relatedly, Hale’s utilitarian focus on the net enlargement of liberties, without some moral basis for evaluating the exercise of coercive power itself, could justify instances of forced labor so long as, overall, net liberties are expanded. But unless those goals—the net enlargement of liberties (or its contemporary counterpart, Kaldor-Hicks efficiencies)—are self-justifying, their value as rules for social ordering must rely on external moral or political justification. Because a robust account of economic coercion requires a broader historical analysis of its evolution as well as a principled basis for determining how it should be analyzed and remedied, it is not enough to assume that such goals are self-explanatory. Rather, an account must contend with competing social and moral values inherent in our analysis of which liberty infringements are tolerable and which are not. Finally, Hale’s analysis does not address how economic coercion works within the global economy, which presents significant new challenges for contending with transnational and international institutions of economic and political power.

### III. INTERNATIONAL LEGAL ACCOUNTS OF ECONOMIC COERCION

A third model for both theorizing and granting protections against economic coercion can be elucidated from the international humanitarian and human rights traditions. The standards developed within those traditions form the foundation for conceptualizing the intersection of economic coercion and economic

rights. The economic rights framework is the ideal framework for conceptualizing and implementing protections from economic coercion for a number of reasons. First, it offers a unified language for framing economic liberties deprivations when they are committed at the hands of public and private actors, both at the systemic level and at the level of individual deprivations. Second, the structures and tools of international legal institutions provide a fruitful avenue for both protecting against economic coercion and providing a thicker, value-based justification for the regulation of economic coercion. Third, economic coercion occurs transnationally and within the international sphere, and it is undoubtedly the subject of concern beyond the sphere of domestic jurisdictions. Finally, the relational and distributive nature of economic coercion claims can serve as a key corrective to the “progressive realization” model of protecting economic rights. Institutionalized primarily through the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its legacy documents, economic rights within the human rights tradition have been understood as only capable of protection “to the maximum of [the State Party’s] available resources” and through progressive realization.<sup>136</sup> In fact, at the domestic, transnational, and international level, regardless of capacity and infrastructure, economic rights are being enforced and protected *all the time already* in the form of economic coercion claims, and it is just a matter of evaluating whether that enforcement complies with human rights law. Mapping economic coercion claims within overlapping jurisdictions and systems of rights can serve as a basis for measuring, evaluating, and challenging structural inequality.

Before exploring these points further, I first provide an overview of how coercion has been understood and proscribed under international law.<sup>137</sup>

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136. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 December 1966, 993 U.N.T.S. 3, Art. 2(1) (entered into force 3 January 1976) [hereinafter ICESCR].

137. This overview does not address international human rights proscriptions against coercion in non-economic contexts. For example, the UN Convention Against Torture (CAT) defines “torture” to include “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing him or a third person, . . . when such pain and suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.” CONVENTION AGAINST

A. *Regulating Systemic Economic Coercion by Public Actors*

International humanitarian law provides a crucial case study for conceptualizing the regulation of systemic economic coercion, and by doing so, offers an important supplement to the philosophical and legal accounts already discussed. Specifically, the adjudication of economic coercion claims in the Nuremberg trials provides a foundational model, within the international legal tradition, for incorporating background conditions in the analysis of state economic coercive power. It thus provides a crucial example of how to implement the kind of structural analysis of coercion developed within the Legal Realist tradition in an international setting.

In *United States v. Krauch, et al.* (“*IG Farben*”) and *United States v. Von Weizsaecker, et al.* (“*Ministries Case*”), Nazi German officials were tried and convicted for, among other charges, war crimes and crimes against humanity<sup>138</sup> for participating in the plunder of public

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TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984). The Committee Against Torture has addressed coercion in torture claims involving confinement, coerced confessions, and non-refoulement obligations, to name a few. *See, e.g., Agiza v. Sweden*, U.N. Doc. CAT/C/34/233/2003 (2005). Coercion prohibitions have also been the subject of complaints before the Human Rights Committee under the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR), primarily in regards to: sexual assault (*Herrera Sousa v. Spain*, Comm. 1094/2002, U.N. Doc. A/61/40, Vol. II, at 506 (H.R.C. 2006)); confessions (*S.A. v. Tajikistan*, Comm. 1240/2004, U.N. Doc. CCPR/C.97/D/1240/2004 (H.R.C. 2009)); *Gougnina v. Uzbekistan*, Comm. 1141/2002, U.N. Doc. CCPR/C/92/D/1141/2002 (H.R.C. 2008); *Chikunova v. Uzbekistan*, Comm. 1043/2002, U.N. Doc. CCPR/C/89/D/1043/2002 (H.R.C. 2007); *Deollal v. Guyana*, Comm. 912/2000, U.N. Doc. CCPR/C/82/D/912/2000 (H.R.C. 2004); limiting voters’ rights (*Shechetko v. Belarus*, Comm. 1009/2001, U.N. Doc. CCPR/C/87/D/1009/2001 (H.R.C. 2006); *Svetik v. Belarus*, Comm. 927/2000, U.N. Doc. CCPR/C/81/D/927/2000 (H.R.C. 2004)); reeducation programs for “converting” thought (*Kang v. Korea*, Comm. 878/1999, U.N. Doc. CCPR/C/78/D/878/1999 (H.R.C. 2003)); and religious freedom (*Khan v. Canada*, Comm. 1302/2004, U.N. Doc. CCPR/C/87/D/1302/2004 (H.R.C. (2006) and *Hudoyberganova v. Uzbekistan*, Comm. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (H.R.C. 2004)). Additionally, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, at Art. 12(2), mentions coercion, but only with respect to migrant workers’ rights to freedom of thought, conscience and religion. Since the narrow focus of this Article is on economic coercion, it bypasses this area of law.

138. These were defined under the operative London Charter of the International Military Tribunal Art as follows: “Art. 6(b). WAR CRIMES: namely,

and private property, exploitation, and spoliation of countries under German occupation.<sup>139</sup> The charges were based on violations of the Hague Conventions.<sup>140</sup> The Tribunal originally viewed the existence of military occupation alone as insufficient to find coercion in agreements reached by Nazi officials with private property owners: “The mere presence of the military occupant is not the exclusive indication of the assertion of pressure. . . . [T]here must be a causal connection between the illegal means employed and the result brought about by employing such intimidation.”<sup>141</sup> Nazi officials had a “right of requisition” during a military occupation, but it was “limited to ‘the necessities of the army of occupation,’ must not be out of proportion to the resources of the country, and may not be of such a nature as to involve the inhabitants in the obligation to take part in military operations against their country.”<sup>142</sup> Military occupiers could not appropriate private property “against the will and without the consent of the owner,” but agreements in which “there is *no coercion present*” would not constitute a “violation of the Hague Regulations.”<sup>143</sup>

Yet, in *IG Farben*, the Tribunal shifted its view, finding that *structural* power imbalances could establish coercion violative of the

violations of the laws or customs of war. Such violations shall include, but not be limited to . . . plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; Art. 6(c). CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” United Nations, CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL – ANNEX TO THE AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS (“London Agreement”), 8 Aug. 1945, *available at* <http://avalon.law.yale.edu/imt/imtconst.asp>.

139. *See generally IG Farben*, 8 Trials of War Criminals 1081 (30 July 1948); *Ministries Case*, 14 Trials of War Criminals 314 (11 Apr. 1949).

140. Convention Respecting the Laws and Customs of War on Land (“Hague IV”) & Annex to the Convention: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 Art. 46 (entered into force 26 January 1910) (“Family honour and rights, the lives of persons, and private property . . . must be respected. Private property cannot be confiscated.”). *Id.* at Art. 47 (“Pillage is formally forbidden.”).

141. *Id.* at 1135.

142. *IG Farben* 8, *supra* note 139, at 1134.

143. *Id.* (emphasis added).

Hague Convention even where there were no examples of direct threats ordinarily found in examples of duress. In that case, corporate entity IG Farben and its directors, Nazi Party members and officials, were convicted, *inter alia*, of spoliation and plunder of Polish, Norwegian, and French companies by acquiring controlling interests in plants, factories, and other productive assets following German occupation.<sup>144</sup> The Tribunal relied on its past findings that “the Reich adopted and pursued a general policy of plunder of occupied territories,”

carried out within the framework of the existing economic structure. The local industries were put under German supervision, and the distribution of war materials was rigidly controlled. . . . Raw materials and the finished products alike were confiscated for the needs of the German industry. . . . Defendant Goering had issued a directive giving detailed instructions for the administration of the occupied territories. . . . The Goering order . . . was carried out . . . so that the resources were requisitioned in a manner out of all proportion to the economic resources of the occupied countries, and resulted in famine, inflation, and an active black market.<sup>145</sup>

In relying on these findings, the Tribunal found IG Farben’s actions—exhibited through an “ever-present threat of forceful seizure of the property by the Reich or other similar measures”—were violations of the Hague Conventions.<sup>146</sup>

But there are numerous examples where the Tribunal, despite its earlier positions, found military occupation *on its own* as sufficient to find unlawful coercion. For example, it found that “[t]he power of the military occupant was the ever-present threat” in certain IG Farben transactions, “and was clearly an important, if not a decisive, factor. The result was enrichment of Farben . . . through the medium of the military occupancy at the expense of the former owners.”<sup>147</sup> While establishing precedent for protecting against coercive appropriation of the “economic resources of . . . occupied

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144. *Id.* at 1150.

145. *Id.* at 1138 (internal quotations marks and citations omitted).

146. *Id.* at 1139.

147. *Id.*

countries”<sup>148</sup> based on legal analysis of the “compulsion and coercion present”<sup>149</sup> in agreements to acquire private property, the Tribunal did not clearly demarcate the coercive effects of the mere presence of a military occupying power from other conduct amounting to acquisitions against an owner’s will. Most of the facts pertaining to Farben’s acquisitions concerned the type of conduct that would illicit civil liability or corruption charges in peacetime, but in the context of wartime were found “coercive.”<sup>150</sup> The corporate conduct included increasing stock capitalization in shareholder meetings without shareholders from the occupied country being present<sup>151</sup> and using relationships with the occupying authority to prevent license issuance and the flow of raw materials.<sup>152</sup>

In the *Ministries Case*, a number of Nazi officials were indicted for committing war crimes and crimes against humanity by participating in the plunder of public and private property, exploitation, and spoliation of countries under German occupation.<sup>153</sup> As in *IG Farben*, the Tribunal was concerned with the “economic program of the Reich” in controlling occupied territory.<sup>154</sup> The case concerned the acquisition of a bank, steel plants, and various private properties through: coercing owners to decrease shares in companies and issue new shares in favor of Nazi owners; obtaining consent for sale from Gestapo-held owners; and a combination of conduct, including banking controls and policies, “Aryanization tactics, and other police-state measures.”<sup>155</sup> In some instances, the evidence of coercion consisted of “the use of threats and concentration camps and Aryanization of [Jewish] holdings” in banks.<sup>156</sup> In other cases, such explicit threats were not necessary for establishing coercion. For example, the Tribunal found “ample credible evidence in the record to satisfy beyond reasonable doubt that [certain] acquisitions were accomplished in no small measure through coercive measures,” indicating “that the holders of the invaded shares did not have much choice but to sell” to Reich

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148. *Id.* at 1138.

149. *Id.* at 1146, 1149.

150. *Id.* at 1145–46.

151. *Id.* at 1144–45.

152. *Id.* at 1147.

153. *Ministries Case*, *supra* note 139, at 679–793.

154. *Id.* at 749.

155. *Id.* at 773, 777–78.

156. *Id.* at 773, 777.

Ministry officials.<sup>157</sup> The evidence supporting this finding was testimony by a former bank official:

Q. Did Mr. Kehrl [the Nazi official] in any of these conferences use duress, or threaten you, or make any attempt to induce you in any way to do anything you did not want to do?

A. I can answer that question with yes. Mr. Kehrl did have us do various things which we did not want to do, and which we would never have done without his suggestion. It was not necessary for Mr. Kehrl to threaten us personally. We were quite aware of who Mr. Kehrl was, and Mr. Kehrl never made any secret of it. For example, when, immediately after 15 March, he came to Prague and said that he had to take over armament concerns for Goering, we realized what was going on; in our position such suggestions were orders of the Reich authorities, the Reich government, and all the power of the Third Reich.<sup>158</sup>

Further, in the context of the German acquisition of control of steel plants, the Tribunal found the following evidence sufficient:

Kehrl participated in and directed . . . the taking over of actual control and custody of the . . . plants, pending the so-called negotiations for their purchase, inasmuch as he caused to be appointed a German, Henke, to take over the operation of [the plants], on the flimsy pretext that the managers in charge could not operate it properly. Obviously this . . . was done for the benefit of the German economy. If it were to be claimed that this was done only to preserve public order and safety, we find irrefutable contradiction thereto in the thinly disguised and coercive steps taken to acquire the plant through the ostensible buying of control.<sup>159</sup>

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157. *Id.* at 756.

158. *Id.* at 756–57.

159. *Id.* at 759.

Thus, in the *Ministries Case*, as with *IG Farben*, findings of widespread economic coercion depended not just on direct personal threats, but on broader assessments of structural relationships.

These judgments provide both a precedent and a model for theorizing and evaluating economic coercion claims at the structural level. First, in assessing whether unlawful economic coercion occurred, the Tribunal looked to the empirical economic benefit it provided the coercing power beyond the necessities of the military occupation. Yet, while the Tribunal was facially neutral to the military occupiers' right to requisition within the bounds of the Hague Conventions, it nevertheless allowed the structural relationship the occupation elicited serve as a basis *in and of itself* for finding unlawful conduct. Thus, while evidence of involuntary consent was usually necessary—whether of explicit physical threats (the exercise of “police-state measures” like confinements) as well as implicit threats and indirect conduct (mere identifications of one's position within the military occupying power's hierarchy)—the Tribunal allowed for an inference of coercion even where no physical force was exerted, explicit threats were made, and evidence pointed to voluntary agreements.

### *B. Regulating Individual Economic Coercion by Public and Private Actors*

While the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both establish an economic rights framework and a core set of obligations that implicate economic coercion, neither explicitly prohibits economic coercion.<sup>160</sup> Yet, the equality and liberty principles established in those and other human rights instruments provide a basis for delineating protections from such coercion. This and the following Section delineate a foundation and basis for expanding the narrow role economic coercion plays in contemporary economic rights protections and debates in human rights law.

The UDHR establishes “rights and freedoms” so “every individual and every organ of society” may “strive . . . to promote

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160. See generally United Nations General Assembly (UNGA), UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217A, UN GAOR, 3rd Sess., 1st Plen. Mtg., UN Doc. A/810 (12 December 1948) [hereinafter “UDHR” or “Declaration”]; ICESCR, *supra* note 136.

respect [there]for,” “and by progressive measures,” “to secure their universal and effective recognition and observance.”<sup>161</sup> The Declaration declares that all human beings “are born free and equal in dignity and rights” (Art. 1) and grants “[e]veryone . . . entitle[ment] to all the rights and freedoms set forth [therein] without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Art. 2). Everyone is granted “the right to life, liberty and security of person” (Art. 3) and slavery and the slave trade are prohibited “in all their forms” (Art. 4). All people are declared equal before the law, are entitled to equal protection along with rights to effective remedies before an independent and impartial tribunal (Arts. 6–8, 10), and have the right to own property “alone as well as in association with others. No one shall be arbitrarily deprived of his property” (Art. 17). Freedom of thought and opinion are guaranteed along with rights to conscience, religion, expression, peaceful assembly and association (Arts. 18–20). Explicit economic rights under the UDHR include rights to: social security and the realization of “the economic, social and cultural rights indispensable for his dignity and the free development of his personality” (Art. 22); to work, free choice of employment, just and favorable conditions of work and protection against unemployment (Art. 23); equal pay for equal work (*id.*); just and favorable remuneration “ensuring himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection” (*id.*); to form and join trade unions “for the protection of his interests” (*id.*); and to “rest and leisure, including reasonable limitation of working hours and periodic holidays with pay” (Art. 24). Finally, the UDHR lists rights to standards of living for adequate health and well-being, including the rights to: food, clothing, housing, medical care, necessary social services, security, education, and participation in the cultural life of the community (Arts. 25–27). In the exercise of these rights, “everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society” (Art. 29(2)).

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161. UDHR, *supra* note 160, at Preamble, ¶ 8.

The UDHR thus establishes a framework for procedural and substantive rights, as well as principles for their enforcement and/or limitation. Protection against economic coercion is consistent with the substantive rights and obligations the UDHR establishes and the principles it establishes for their interpretation. For example, freedom from coercion is protected through the rights granted to freedom of thought and conscience, and individual rights to be free from the coercive power of the State are recognized in rights to access and proper procedures before a court of law, without discrimination (Art. 2). Substantive economic rights are also granted and any limitation on those rights is regulated by civil and political rights, principles of equity, and the requirement that any such limitation be “solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meting the just requirements of morality, public order and the general welfare in a democratic society” (Art. 29). Thus, to the extent any economic rights to property, social security or work are limited, the limitation must accord due respect to the rights of others and balancing against the general welfare.

The ICESCR follows the language and individual rights model of the UDHR almost exactly, but expands the scope of protections with regard to coercion. First, it establishes guidelines for interpreting and applying the obligations set out in therein:

Art. 2(1): Each State Party . . . undertakes steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Art. 4: States Parties . . . recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.<sup>162</sup>

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162. *Id.* at Art. 2(1), 4.

Additionally, the Covenant instructs that nothing therein “shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources” (Art. 25).

Like the UDHR, the ICESCR establishes principles of non-discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Art. 2(2)) and ensures equal rights between men and women (Art. 3). Part III grants almost identical economic rights as those under the UDHR but provides more explicit detail to those rights: to work, “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts” (Art. 6); to just and favorable conditions of work (including fair wages, equal pay for equal work, decent remuneration, safe and healthy working conditions, equal opportunities for promotion, and periods of rest and leisure (Art. 7); to join trade unions and strike (Art. 8); to social security and social insurance (Art. 9); and to an adequate standard of living for individuals and their families (Art. 11). By not only granting economic rights but also securing a right to improve one’s economic circumstances, the ICESCR more concretely establishes a progressive ideal of economic betterment. Also, as in the UDHR, limitations on economic rights are allowed only to the extent they are not discriminatory, they are in accordance with law compatible with the Covenant’s terms, and they exist “solely for the purpose of promoting the general welfare in a democratic society” (Arts. 1–5).

Despite the foundational nature of economic coercion claims at Nuremberg and the rights and principles established in the UDHR and ICESCR, the ICESCR’s treaty-monitoring body, the UN Committee on Economic, Social and Cultural Rights (hereinafter, “CESCR”), has rarely addressed coercion directly.<sup>163</sup> A keyword search in the Committee’s jurisprudence database returns no opinions referencing “coercion,”<sup>164</sup> and it is referenced in only two

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163. For the Optional Protocol’s complaint mechanism, see Optional Protocol to the ICESCR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force 23 March 1976), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>.

164. *Jurisprudence*, United Nations Hum. Rights Off. of the High Commissioner, <http://juris.ohchr.org>.

General Comments on health care and gender equality. General Comment No. 14, “The Right to the Highest Attainable Standard of Health” (2000), clarifies States Parties’ obligations as including the obligation to “refrain from . . . applying coercive medical treatments”<sup>165</sup> and clarifies that States are obligated to “prevent third parties from coercing women to undergo traditional practices, e.g., female genital mutilation . . . .”<sup>166</sup> General Comment No. 16 on “The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights” clarifies that Article 10 of the ICESCR requires States Parties “to ensure that . . . boys and girls should be protected equally from practices that promote child marriage, marriage by proxy, or coercion.”<sup>167</sup> Coercion is not mentioned in any other General Comment, including the CESCR’s 2005 General Comment No. 18 on the Right to Work. And while the cited references could conceivably touch on aspects of economic

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165. Comm. on Econ., Soc. and Cultural Rights, Gen. Comment No. 14, *The Right to the Highest Attainable Standard of Health*, 22d sess., at 10, U.N. Doc. E/C.12/2000/4 (2000), reprinted in Compilation of Gen. Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 85 ¶ 34, U.N. Doc. HRI/GEN/1/Rev.6 (2003) [hereinafter CESCR, Gen. Comment No. 14] (emphasis added).

166. CESCR, Gen. Comment No. 14, *supra* note 165, at ¶ 35 (emphasis added). Prior to the General Comments, the Convention for the Elimination of Discrimination Against Women [hereinafter CEDAW] issued General Recommendation 19 on Violence Against Women, which referenced coercion in a similar but broader context in relation to gender-based violence. CEDAW, Gen. Recommendation 19, at 1, U.N. Doc. A/47/38 (1993). The Committee clarified that “[t]he definition of discrimination” in the treaty included “gender-based violence,” such as “acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.” The Recommendation also targeted “[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision,” noting that, “[t]he abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women’s health at risk and impair their ability to participate in family life and public life on a basis of equality.” CESCR, Gen. Comment No. 14, *supra* note 165, at 243 ¶¶ 6, 11, and 23 (2003) (emphases added).

167. Comm. on Econ., Soc. and Cultural Rights, Gen. Comment No. 16, *The Equal Right of Men and Women to the Enjoyment of All Economic, Social, and Cultural Rights* at 7, ¶ 27, U.N. Doc. E/C.12/2005/3 (2005) [hereinafter CESCR, Gen. Comment No. 16] (emphasis added).

coercion—for example, economic rights associated with marriage—they do not target economic coercion *per se*.

The limited attention to coercion in other sources of international law concentrates on its prohibition in the workers' rights and trafficking contexts. Still, even the Conventions of the International Labor Organization (ILO) rarely mention coercion. None but one of the ILO's Fundamental Conventions mention it—the Abolition of Forced Labour Convention of 1967 (No. 105)—one of two core Conventions prohibiting forced labor.<sup>168</sup> But even then, the reference to coercion indicates more concern for *ideological* than economic coercion: “Each Member . . . which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour—(a) as a means of *political coercion* or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system.”<sup>169</sup> Coercion, economic or otherwise, is not even mentioned in the ILO's formative Declaration on Fundamental Principles and Rights at Work, which memorializes four “core labor standards”: freedom of association, from forced labor, from child labor, and non-discrimination in employment.<sup>170</sup> However, the ILO has discussed

168. ILO Convention No. 105 Concerning the Abolition of Forced Labour, adopted June 25, 1957, S. Treaty Doc. No. 102–3, 320 U.N.T.S. 291 at Art. 1 [hereinafter Abolition of Forced Labour Convention]. Aside from Convention No. 105, the ILO categorizes its core conventions into the following: the Forced Labour Convention (No. 29) (1930); Freedom of Association and Protection of the Right to Organise Convention (No. 87) (1948); Right to Organise and Collective Bargaining Convention (No. 98) (1949); Equal Remuneration Convention (No. 100) (1951); Discrimination (Employment and Occupation) Convention (No. 111) (1958); Minimum Age Convention (No. 138) (1973); Worst Forms of Child Labour Convention (No. 182) (1999). *Conventions & Recommendations*, ILO, <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

169. Abolition of Forced Labour Convention, *supra* note 168, Art. 1 (emphasis added).

170. ILO Declaration on Fundamental Principles and Rights at Work and its Followup, adopted June 18, 1998, Annex revised June 15, 2010, at 2. Neither “coercion” or related terms are listed in the ILO's “Online ILO Thesaurus,” a self-described “compilation of more than 4,000 terms relating to the world of work . . . in English, French, and Spanish . . . [which] covers labour and employment policy, human resources planning, labour standards, labour administration and labour relations, vocational training, economic and social development, social security, working conditions, wages, occupational safety and health and enterprise

coercion in responding to Direct Requests and making Observations, both with reference to Convention No. 105 and under domestic law of State Members in its Observations and Reports from the ILO's Committee on Freedom of Association (CFA).<sup>171</sup> The CFA has documented, in multiple cases, State Member “anti-coercion” laws limiting trade union activity against employers and third parties.<sup>172</sup>

Where coercion has taken on revived significance is in field of combatting human trafficking. Still, the only extant, legally-binding international human rights instrument with an agreed definition of “human trafficking”—UN Convention Against Transnational Organized Crime—circumscribes its prohibition in the context of organized criminal activity only.<sup>173</sup> In the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “Palermo Protocol”), a supplement to that Convention, States Parties are obligated to criminalize human trafficking, take preventive measures, and provide protection for trafficking victims.<sup>174</sup> The Palermo Protocol defines “trafficking” as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of *coercion*, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the

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promotion.” *ILO Thesaurus*, ILO, <http://www.ilo.org/inform/online-information-resources/terminology/thesaurus/lang--en/index.htm>.

171. ILO NORMLEX database, <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::> (search “coercion” and all derivative terms).

172. For recent examples, *see, e.g.*, Turkish Motor Workers’ Union, Int’l Transp. Workers’ Fed’n & Int’l Trade Union Confederation (Case No. 3098), ILO Rep. on the Comm. of Freedom of Assoc. No. 375, at 532–59, GB.324/INS/6 (June 13, 2015) (in part discussing criminal activity of union leaders who used coercive measures to force membership, thus “violating job and employment freedoms”); Nat’l Union of Workers of Venezuela, et al. (Case No. 3059), Rep. on the Comm. of Freedom of Assoc. No. 375, at 631–65, GB.324/INS/6 (June 13, 2015) (discussing the use of the Bolivarian National Guard to disperse a peaceful trade union protest).

173. Rep. of the Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, U.N. GAOR, 11th sess. Annex I, at 25, UN Doc. A/55/383 (2000); Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, at 4 (2001).

174. *See generally* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, U.N. GAOR, 55th sess., Annex II, at 53, U.N. Doc. A/55/383 (2005) [hereinafter Palermo Protocol] (providing specific articles detailing obligations to fulfill these purposes).

giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>175</sup>

The use of “coercion” in this definition appears to capture non-physical threats or uses of force, including psychological and economic coercion, such as debt bondage.<sup>176</sup> Regional human rights instruments have also prohibited coercion in the context of trafficking.<sup>177</sup>

Notwithstanding the Palermo Protocol and its evidencing a growing attention by the human rights community to coercion, the international human rights framework does little to identify, conceptualize or robustly protect against economic coercion *per se*. Coercion, like exploitation, is a phenomenon that “goes to a large extent unremarked” in international human rights law.<sup>178</sup> Those instruments, monitoring bodies, and even UN Special Rapporteurs tasked with investigating human rights violations have not addressed the problem of economic compulsion within the economic rights framework. There are two core likely reasons for this: (1) a historical reluctance to recognize the justiciability of economic rights claims; and (2) the dominance of the “progressive realization” framework of economic rights.

175. *Id.* at Art. 3(a) (emphasis added).

176. The U.S. Department of State has at least taken this position. See Office to Monitor and Combat Trafficking in Persons, “What is Modern Slavery?”, <http://www.state.gov/j/tip/what/>. See also Bethany Hastie, *Doing Canada’s Dirty Work: A Critical Analysis of Law and Policy to Address Labour Exploitation Trafficking*, in *LABOUR MIGRATION, HUMAN TRAFFICKING AND MULTINATIONAL CORPORATIONS* (Ato Quayson & Antonela Arhin, eds., 2012) (interpreting the Palermo Protocol to apply to economic coercion such as debt bondage).

177. See Council of Europe, CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS CETS No. 197 (entered into force 2008) (using identical definition of “trafficking in human beings” as used in Palermo Protocol, but broadening its scope to prohibit trafficking transnationally *and* within a single country, and targeting not only organized criminal activity but also trafficking by individuals without ties to organized crime). Regional human rights instruments also prohibit coercion in the context of sexual exploitation. See, e.g., AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD, Art. 27: Sexual Exploitation.

178. Susan Marks, *Exploitation as an International Legal Concept*, in *INTERNATIONAL LAW ON THE LEFT* 282 (S. Marks ed. 2008).

*C. Limitations of the International Human Rights Approach to  
Economic Coercion*

From their earliest formulations, economic, social, and cultural rights were viewed as distinct from civil and political rights, at least in part on non-justiciability grounds.<sup>179</sup> The distinction is manifest in the decision to draft separate covenants for civil and political rights on the one hand and economic, social and cultural rights on the other—the ICCPR and ICESCR—on the basis that:

civil and political rights were enforceable, or justiciable, or of an “absolute” character, while economic, social and cultural rights were not or might not be; . . . the former were immediately applicable, while the latter were to be progressively implemented; and . . . generally speaking, the former were rights of the individual “against” the State, . . . while the latter were rights which the State would have to take positive action to promote. Since the nature of the civil and political rights and that of economic, social and cultural rights . . . were different, it was desirable that two separate instruments should be prepared.<sup>180</sup>

Scholarly arguments reinforcing the non-justiciability of socioeconomic rights have been both prescriptive and descriptive. Prescriptively, legitimacy concerns regarding the “unelected branch”

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179. See, e.g., Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695 (1979); Frank Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001); Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462 (2004) (applying justiciability critique to international level); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1824 (2001) (surveying resistance of US constitutional scholarship to welfare rights on justiciability grounds); Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1, 1–3 (2006) (“The concern I have with economic and social rights is . . . we get into a territory that is unmanageable through the judicial process . . . Economic and security matters ought to be questions of public debate.”).

180. Annotations on the Text of the Draft International Covenants on Human Rights, UN Doc. A/2929 (1955), at 7.

deciding matters of economic and social policy have been raised.<sup>181</sup> Descriptively, concerns about the institutional capacity of the courts to properly evaluate and adjudicate such claims are prominent.<sup>182</sup> Setting aside the fact that various national constitutions have explicitly granted protections for economic and social rights, and those rights are adjudicated in domestic courts as a matter of course,<sup>183</sup> what these positions reveal is a predilection towards viewing economic rights as positive, state-granted rights of entitlement rather than as rights that are adjudicated in private law every day. These private law adjudications also constitute state-sanctioned enforcement of economic rights claims with broad distributional effects. While the economic rights framework requires states to “respect, protect, and fulfill” rights under the ICESCR, and those obligations have been extended to private actors, the international legal framework has failed to catch up and assess how State-level adjudication of economic coercion implicates State obligations under international human rights law.

Second, the “progressive realization” model of economic, social and cultural rights has generally bypassed how private law adjudication can violate economic rights and the principles and concerns of non-discrimination, equity, and the general welfare in the context of economic coercion claims. State Party obligations under the ICESCR to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights,”<sup>184</sup> reflect the view that socio-economic rights are

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181. See KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* 133 (2012) (“The concerns of justiciability are based on opposing extremes: the problems of judicial usurpation on the one hand, and judicial abdication on the other.”).

182. *Id.* See also ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 89–90 (2014).

183. For an overview of such adjudications in Denmark, the Netherlands, Spain, Hungary, the UK, Canada, South Africa, India, the Philippines, Argentina, Colombia, and the EU, see *JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS* (F. Coomans ed., 2006).

184. Compare ICESCR, Art. 2(1), *supra* note 136, with Art. 2(1) of the ICCPR, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967). It should be noted that not all human rights instruments adopt a “progressive realization” model in relation to economic, social and cultural rights. The African Charter on Human and Peoples’ Rights, for example, does not set qualifications or limitations on State Party’s obligations allowing for “progressive realization” or respecting a State Party’s

merely “aspirational” as compared to civil and political rights, which are “inalienable and immediately enforceable.”<sup>185</sup> Still, the CESCR has taken aggressive positions on “progressive realization,” requiring “deliberate, concrete, and targeted steps,” and, with a number of Special Rapporteurs,<sup>186</sup> invited attempts to develop indicators and use benchmarks to measure the enjoyment of and improvement on socio-economic rights protections within States Parties’ jurisdictions.<sup>187</sup> Indicators and benchmarks can document improvements in States Parties’ provision of health care or education, but the exclusive focus on advancing State Party provision of a basic social safety net to its citizens ignores broader distributional priorities, implemented and sanctioned by the State, that have already designated and continue to designate economic rights beneficiaries in the context of private law.

Over the past twenty years, States Parties’ obligations under international human rights treaties have evolved to include obligations to “respect, protect and fulfill” human rights.<sup>188</sup> These obligations include injunctions to refrain from interfering with or

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resource constraints. See OAU Doc. CAB/LEG/67/3 rev.5, *reprinted in* 21 I.L.M. 58 Arts. 15, 16 (1982) (entered into force 21 October 1986).

185. See, e.g., Richard Wall, U.S. public delegate to 59th Session of UN Commission on Human Rights, providing U.S. views on Item 10, “Economic, Social and Cultural Rights,” (7 April 2003), *in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (Sally J. Cummins & David P. Stewart, eds., 2003).

186. See, e.g., CESCR, Gen. Comment No. 15, at ¶ 54 (designating adjustable targets for States Parties to achieve each reporting period, or “scoping”); CESCR, Gen. Comment No. 14, *supra* note 165, at ¶ 58 (same); Secretariat of World Conference on Human Rights, REPORT ON OTHER MEETINGS AND ACTIVITIES, at ¶ 153, UN Doc. A/CONF.157/PC/73, 22 (20 April 1993) (special expert meeting concluding that setting indicators must rely on clarifying content of rights and obligations); Special Rapporteur Danilo Turk, REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, ¶ 7, UN Doc. E/CN.4/Sub.2/1990/19 (6 July 1990) (calling for “indicators [to] . . . assist in the development of the ‘core contents’ of some of the less developed rights in th[e] domain [of economic, social and cultural rights]”).

187. See, e.g., Donnelly, *The West and Economic Rights*, *supra* note 3; HUMAN RIGHTS: POLITICS AND PRACTICE (M. Goodhart ed. 2009); Russel Barsh, *Measuring Human Rights: Problems of Methodology and Purpose*, 15 HUM. RTS. Q. 87 (1993); Maria Green, *What We Talk About When We Take About Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RTS. Q. 1062 (2001); AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT’L LAW 253 (2009).

188. See, e.g., Gen. Comment No. 12, at ¶ 15; Asbjorn Eide, *The Right to Food as a Human Right*, UN Doc. E/CN4/Sub.2/1987/23 (1987).

curtailing the enjoyment of rights, protecting individuals and groups against human rights abuses, and taking positive action to facilitate the enjoyment of basic rights.<sup>189</sup> Further, the CESCR, regional human rights tribunals, and various national constitutions have begun to recognize the “horizontal effect” of States Parties’ obligations as applied to private actors.<sup>190</sup> This horizontal application of rights protections “recognises, assigns, enforces and enables observance of private socio-economic obligations” through state protection of economic and social rights.<sup>191</sup> The recognition of horizontality has evolved from the “recognition that the state acts whenever structures of private and public law are enforced[,] indicat[ing] that . . . human rights, which are conventionally understood as protecting individuals from the actions of government, extend to private relationships between individuals.”<sup>192</sup> Thus, the law is evolving to more broadly recognize State Party obligations when state action regulates private conduct in violation of States Parties’ obligations under human rights law.

In sum, while the traditional economic rights framework and protections after Nuremberg have been burdened by non-

189. United Nations Office of the High Commissioner on Human Rights (OHCHR), *What Are Human Rights?*, available at <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>.

190. See, e.g., CESCR, Gen. Comment No. 14, *supra* note 165, at ¶¶ 12, 42, 51 (states obliged to ensure equity of health care services “whether privately or publicly provided” and violate those obligations when they fail “to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others”); Inter-American Court of Human Rights (IACHR): *Case of González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of November 16, 2009, Series C No. 205 (establishing State’s obligations in relation to acts committed by private actors under a due diligence standard), and *Velásquez Rodríguez v. Honduras*, 28 ILM 291 (1989) (establishing States’ “duty to ensure” rights granted in the American Convention of Human Rights as against private actors); European Court of Human Rights (ECHR): *Guerra v Italy*, 19 February 1998, and *Lopez Ostra v, Spain*, 9 December 1994 (finding violations where state authorities failed to regulate private waste treatment plant disposal and factory releases of toxic substances), *Case of X and Y v. The Netherlands* (1985) Series A, vol. 91 (Convention creates State obligations that involve “adoption of measures designed to secure private life even in the sphere of the relations of individuals between themselves”); S. Afr. Const., § 8; *Lüth*, BVerfGE 7, 198 (1958) FCC.

191. Marius Peitense, *Relational Socio-Economic Rights*, 25 S. AFR. J. HUM. RTS. 198, 216 (2009).

192. YOUNG, *supra* note 181, at 179.

justiciability concerns and a focus on “progressive realization,” the law is shifting towards a broader recognition of the role of private law adjudication in evaluating whether States Parties are respecting, protecting, and fulfilling economic rights obligations. It is therefore an opportune time to propose a way forward for incorporating economic coercion claims into the economic rights framework. This Article puts forward two means of doing so. First, the traditional view of economic rights as “positive,” state-granted entitlements must take into account and integrate economic coercion claims as existing and already realized relational rights. Recognizing and protecting such rights is a key component of adapting economic rights enforcement to all state action, including its sanctioning and regulation of private conduct. Further, because the relational rights approach requires judicial analysis of how competing economic interests get resolved relative to broader welfare interests, it allows for a more detailed record of how States Parties are understanding and meeting their obligations under international human rights law. Second, in their evaluation of the enjoyment of economic rights protections, treaty-monitoring bodies, Special Rapporteurs, international human rights experts and scholars should apply the standards of economic rights protection to assess the extent to which economic coercion is regulated and the justifications provided therefore across substantive law areas in which economic coercion claims are being adjudicated. Only by taking a full view of such adjudication can a comprehensive and accurate picture of economic rights enjoyment emerge.

#### IV. THE THEORY AND PRACTICE OF ECONOMIC COERCION PROTECTIONS WITHIN AN ECONOMIC RIGHTS FRAMEWORK

##### A. *A Relational Rights Theory of Economic Coercion*

The coexistence of gains and losses in a coercive environment cannot be understood as a matter of chance or as mere social epiphenomena—coercion claims implicitly and often explicitly concern a *forceful* deprivation of liberty or welfare interests for another’s benefit. The “force” in economic coercion claims requires that the respective rights of coercer and coercee be viewed and sorted *relationally* in the context of distributional concerns. Coercive conduct challenges rights allocations as between a coercer and coercee: if the coercee was coerced to perform acts for the coercer’s benefit, the coercer may not be entitled to the fruits of those acts,

and the proper distribution of rights to those fruits must be allocated based on an understanding of the coercer-coercee *relation*. This relational aspect requires that economic coercion not only be assessed as a liberty interest infringement, but also, in relation to welfare interests that implicate distributional policy. Further, to the extent the economic “force field” places a broader set of actors into play, the relational nature of the rights adjudicated cannot be limited to the coercer and coercee.

Laurence Tribe’s discussion of relational rights is useful here. He defined as “relational” all constitutional rights that “are necessarily inalienable: individuals cannot waive them because individuals are not their sole focus,”<sup>193</sup> and included as one of those rights the “right secured by the thirteenth amendment’s command that ‘slavery’ not ‘exist within the United States.’”<sup>194</sup> These rights were relational because they corresponded to

systemic norms – norms concerned with structuring power relationships to avoid the creation or perpetuation of hierarchy in which some perennially dominate others. Individual rights, which operate as individually held vetoes over government action, are inadequate to vindicate such relationship-focused norms. These norms serve not only to recognize spheres of personal autonomy, but also to replace vertically stratified patterns of power with more horizontal and egalitarian arrangements—between accuser and accused, between governors and governed, between the Union and the States, between those who hold power and those who aspire to it. Indeed, the very process of translating ideas about relationships into purely individualistic values may be destructive of what those ideas seek to capture.<sup>195</sup>

Tribe goes further to prescribe that, “[w]hen such rights are . . . concerned with capacities that persons are unable to exercise

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193. Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 (1985).

194. *Id.* at 335.

195. *Id.* at 332–33. Tribe describes an even broader constitutional basis for relational norms in the structure of the Constitution’s separation and division of powers, and “the need for deliberate diffusion of power to combat the hegemony of any single group or faction.” *Id.* 333 n.14.

without assistance, their systemic and inalienable character gives rise, in turn, to affirmative government duties to facilitate the exercise of such capacities at public expense,” and “to protect such rights from the distortions of a purely private market.”<sup>196</sup> While Tribe argued that the rule of the judiciary “in mandating the government’s performance of its affirmative duty to ensure the relational aims of such rights” was significant, he called on “lawmakers, executive officials, scholars, [and] citizens” to ensure the “*full* protection of these rights” through developing “a constitutional discourse that is not constrained by the often narrow boundaries of judicial capacity and competence.”<sup>197</sup>

While lacking in constitutional stature, rights against economic coercion are equally relational as rights against slavery under the Thirteenth Amendment. They are concerned precisely with the types of power distribution and domination concerns and suffer the same vulnerability to ineffective remedy if understood within a purely individual rights model. That coercion protections implicate distributive concerns as between the government and the private realm, as between rightsholders, and as between rightsholders relative to their receipt of government benefits has been at the core of each of the philosophical, legal, and international human rights accounts offered herein, and economic coercion protections are no less implicated.<sup>198</sup>

Coupled with the below measures for protecting against economic coercion, viewing the right not to be unlawfully subject to economic coercion as a relational right facilitates the development of a theory of economic coercion in accordance with the minimal requirements gleaned from the above accounts. It recognizes that such a theory must account for the exercise of state’s coercive economic power on individual autonomy and explain that exercise in terms of social utility and the enforcement of a network of economic rights. It also enables the recognition of the significance of private law adjudications and horizontal relationships—as well as vertical relationships as between the state and rightsholders—in the workings of economic coercion and implicates both the empirical and

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196. *Id.* at 333–34.

197. *Id.* at 343. For a recent development of this injunction, see Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014).

198. For this tripartite evaluation of distributive concerns resulting from coercion, see Sullivan, *Unconstitutional Conditions*, *supra* note 54, at 1421, 1490–91.

normative or moral components of economic coercion in the justification of any deprivation of protection. To more fully explore the potential value of recognizing a right against economic coercion as a relational economic right, the next Section proposes the benefits of its integration within the economic rights framework and the institutions that secure their protections.

*B. Measuring Protections Against Economic Coercion as an Economic Right*

Borrowing from the Legal Realists, we can describe the field of economic coercion adjudication, across substantive areas of law, as a convergence of competing distributional claims establishing a network of relational rights. Thus, economic coercion claims are the explicit, if often clumsy, attempt by plaintiffs, prosecutors, and others to achieve sovereign, or even international institutional correction for perceived distributive wrongs. The historical and contemporary body of economic coercion claim adjudications can thus be viewed as an already existing system of economic rights jurisprudence ripe for benchmarking and evaluation in any jurisdiction, allowing the tracking of economic rights compliance through tracking where and when judicial bodies have shaped the economic landscape and economic liberties in favor of some over others. The critical project, then, is to integrate the criteria and principles that emerge from these adjudications into *broader* jurisprudence and thought on economic rights.

As already discussed, the progressive realization model has elicited various metrics for measuring rights enjoyment while also recognizing the validity of state resource constraints, the most prominent of which being a “minimalist” approach to economic and social rights. This approach proposes development of “core” rights and “minimum” protections to serve as baselines from which State parties either may not derogate or which must be prioritized above all other economic achievements.<sup>199</sup> This “minimalist” framework has been put forward by the CESCR, as well as human rights scholars eager to establish priorities in the enforcement of economic

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199. See YOUNG, CONSTITUTING RIGHTS, *supra* note 181, at 66–98 (discussing efforts to define “minimum content” of economic rights). See also HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY (1996).

rights protections.<sup>200</sup> The establishment of “core” obligations allows for “organizing principles,” such as principles of availability and accessibility, that can serve to operationalize and build a substantive component to “core” rights within a given domestic jurisdiction.<sup>201</sup>

There have been many critiques of the “minimum core” approach. Those critiques range from a concern that the broader goals of socio-economic rights are compromised by minimalism, to skepticism that a “minimum core” could ever be adequately determined, to its focus on developing countries while ignoring developed countries, further frustrating a democratic deficit in international institutions.<sup>202</sup> From the perspective of economic coercion claims, perhaps the most devastating critique is that “minimalism fails to recognize the defects and contingencies of our inherited political (and economic) institutions.”<sup>203</sup> By focusing exclusively on whether basic levels of subsistence are available to a given national population, the “minimum core” prioritizes substantive achievement over equity, ignoring potential rights violations that may result from discrimination and distributional inequities, and setting an arbitrary “minimum” achievement level relative to existing, but unjustified, resource allocations.

Challenges to “minimalism” have also been directed more broadly to the “progressive realization” model and the reliance on

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200. See CESCR, REPORT ON THE FIFTH SESSION, SUPP. NO. 3, Annex III ¶ 10, UN Doc. E/1991/23 (1991) [hereinafter General Comment No. 3] (focusing on the “minimum essential levels” of food, health, housing and education); MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 131–32 (1995) (minimum core offers conceptual assistance in imposing accountability for retrogressive measures).

201. See SHUE, BASIC RIGHTS, *supra* note 199, at 160; CESCR, THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH, ¶¶ 33–40, UN Doc. E/CN.4/2004/Add.1 (1 March 2004) (prepared by Special Rapporteur Paul Hunt); CESCR, GENERAL COMMENT NO. 15: THE RIGHT TO WATER (ARTS. 11, 12), UN Doc. E/C.12/2002/11 (20 January 2003), at ¶ 12 [“GENERAL COMMENT NO. 15”]; CESCR, GENERAL COMMENT NO. 14, *supra* note 166, at ¶ 12; CESCR, GENERAL COMMENT NO. 18: THE RIGHT TO WORK (ART. 6), at ¶ 12.

202. See, e.g., Brigit Toebes, *The Right to Health*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK (Asbjorn Eide, Catarina Krause, & Allen Rosas, eds., 2d ed. 2001); CRAVEN, INTERNATIONAL COVENANT, *supra* note 200.

203. YOUNG, CONSTITUTING RIGHTS, *supra* note 181, at 90.

indicators and benchmarks that it engenders.<sup>204</sup> “Progressive realization” assumes that States Parties to human rights instruments begin as a *tabula rasa*, that the allocation of economic rights is yet to occur, and its obligations consist of a progressive, increased provision of entitlements to secure their enjoyment. But, as already discussed, the existing network of allocating and protecting economic interests—whether vertically, through government-granted protections, subsidies, and entitlements, or horizontally, through judicial adjudication of economic disputes—is a system of economic rights that has *already* been realized. Thus, the incorporation of economic coercion claims can critically supplement the economic rights framework to allow evaluation of where substantive economic rights have been compromised and reveal where background principles for interpreting economic rights enforcement (e.g., the interpretive obligations of antidiscrimination, equity, and general welfare balancing established in the ICESCR) are being ignored in economic rights adjudications.

But while the range of economic coercion cases can provide a detailed picture of economic rights enjoyment to benefit a broader picture of compliance with international standards – from the ground up, so to speak – developments in existing economic rights adjudication can also provide guidance and a principled approach to economic coercion adjudication from within international and comparative law frameworks, or “from the top down.” Important developments in international human rights law and the constitutional adjudication of economic rights provide a key model for: (1) making analysis of economic coercion claims across substantive areas of law conform with economic rights adjudication standards; and (2) by doing so, allowing more easy integration of economic coercion claims into economic rights jurisprudence and discourse. Specifically, a “culture of justification” has evolved within economic rights jurisprudence requiring courts to: establish *reasons* for limiting economic rights, utilize proportionality principles, and make broader welfare assessments which can be drawn from to elaborate standards to apply to economic coercion claims.<sup>205</sup> Further,

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204. See, e.g., Rosga & Satterthwaite, *supra* note 187, at 256–58 (highlighting negative consequences of turn to an “accounting culture”).

205. For a discussion of the “culture of justification,” see YOUNG, CONSTITUTING RIGHTS, *supra* note 181, at 99–129. See also Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31 (1994)

this culture of justification has elaborated a structural framework for adjudicating economic rights as *relational* rights, and by doing so, providing a crucial counterpoint to the existing framework grounded in state-granted entitlements that are “progressive realized.”

The ICESCR establishes a foundation for a culture of justification by establishing principles for limiting the enjoyment of economic rights.<sup>206</sup> On this foundation, a range of procedural and legal standards have emerged, from placing burdens of proof on rights-limiting parties to establishing reasonableness and proportionality tests.<sup>207</sup> For example, in applying reasonableness tests to determine whether economic or social rights have been infringed, the South African Constitutional Court has examined:

[T]he nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty bearer . . . and the extent of any threat to fundamental rights should

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(distinguishing “culture of justification” in new South African Constitution from apartheid-style “culture of authority”); Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464, 464–71 (1992).

206. See, e.g., ICESCR, *supra* note 136, Art. 2 (establishing principles of non-retrogression and anti-discrimination), Art. 3 (ensuring equal rights of men and women), Art. 4 (requiring any rights limitation be only as determined by law, compatible with nature of social, economic and cultural rights at issue, and be solely for purpose of promoting general welfare in a democratic society). See also UDHR, *supra* note 160, Art. 29(2).

207. See Gen. Comment No. 14, *supra* note 165, ¶ 28; Amrei Müller, *Limitations to and Derogations from Economic, Social and Cultural Rights*, 9 HUM. RTS. L. REV. 557, 572 (2009). For requiring justification of limitations on reasonableness grounds, see S. Afr. Const. § 36 (1996). See, e.g., *Khosa v. Minister of Social Development*, (6) SA 505 (CC) (2004) (finding legislative restriction on welfare benefits for non-citizen permanent residents violative of right to equality and access to social, applying reasonableness test); *Minister of Health v. Treatment Action Campaign*, (5) SA 721 (CC) (2002) (finding unreasonable and violative of the right to health Government’s refusal to provide antiretroviral drugs to pregnant mothers); *Government of the Republic of South Africa v. Grootboom*, (1) SA 46 (CC) (2001) (applying reasonableness test to find Government infringement of right to housing); *Sobramoney v. Minister of Health, Kwazulu-Natal* (1) SA 765 (CC) (1998) (applying reasonableness test in right to access health care claim).

the duty not be met as well as the intensity of any harm that may result.<sup>208</sup>

In evaluating these factors, “[d]etails of the precise character of the resource constraints . . . in the context of the overall resourcing of the organ of the state will need to be provided.”<sup>209</sup> Further, local knowledge, claimant expectations, and “meaningful engagement”—either through direct “proactive and honest engagement” with claimants or “respectful face-to-face engagement or mediation through a third party”—may influence reasonableness assessments.<sup>210</sup>

In other domestic and regional settings, proportionality limitations have functioned as standards for evaluating rights infringements by weighing any rights limitation with the proportionate aims and means of the infringing conduct.<sup>211</sup> Ordinarily, a two-stage analysis is performed where the court first asks whether an act infringes the scope of a given right, and if it does, finds a—violation and moves to the second step: determining whether the infringement is *justified*.<sup>212</sup> Proportionality analysis offers “transparency to a . . . judicial assessment by revealing to the public all the ingredients of the decision-making calculus.”<sup>213</sup>

It is important to recognize a number of caveats before deriving lessons from these applications for economic coercion adjudication. First, there are genuine institutional competency concerns in having courts make determinations about economic rights when that may best be left to the democratic branches of government. Second, not all, if any, economic coercion claims implicate constitutional rights, and while such claims may implicate economic rights under the

208. *Rail Commuters Action Group v. Transnet Ltd t/a Metrorail*, (2) SA 359 (CC) (2005); *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs*, (4) SA 490 (CC) (2004).

209. *Rail Commuters*, at ¶ 88.

210. See *Grootboom*, at ¶ 87; *Port Elizabeth Municipality v. Various Occupiers*, (1) SA 217, ¶ 39 (CC) (2005).

211. See generally DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159–88 (2004) (discussing how the European rights system as well as domestic jurisdictions – Germany, Canada, India and Israel – apply proportionality tests in assessing violations of constitutional rights).

212. See YOUNG, *CONSTITUTING RIGHTS*, *supra* note 181, at 126 (citation omitted).

213. *Id.* at 129.

ICESCR, the ICESCR neither directly nor explicitly prohibits economic coercion *per se* (even if later instruments do in the contexts of trafficking, gender-based violence, and discrimination).

As to the first concern, courts are *already* making and will continue to make determinations that impact the regulation of economically coercive acts or conduct. Second, reasonableness and proportionality tests are applicable in evaluating economic coercion adjudication because they constitute state action creating, allocating, and deciding between competing economic interests. Since they involve a determination of an economic right, international human rights instruments dictate that the determination comport with principles of anti-discrimination, equity, and consideration of the general welfare. Judicial documentation of a court's justifications and reasoning would better comply with those dictates and provide a better understanding of how courts weigh the broader social costs of their decisions in the sphere of economic coercion, where both liberty and welfare interests are implicated.<sup>214</sup>

Given that, we can glean from the evolution of reasonableness and proportionality tests a more robust set of standards applicable to adjudication of economic coercion across substantive areas of law. Specifically, when economic coercion is at issue, courts can utilize standards laid out in economic rights adjudication to consider the liberty and welfare restraint alleged *relationally*. Following the standard first step in proportionality analysis, courts would assess whether an alleged coercer's conduct infringes the scope of any economic liberty and welfare interests of the coerced. In determining whether or not an infringement has occurred, a court would evaluate not only whether judicial ratification of a coercer's economic right would substantively hinder coerced's rights (property rights, the right to work, to social security, etc.), but also, whether it would hinder the coerced's *access* to those rights. If such an infringement were found, then the burden would be placed on the coercer to *justify* the infringement as "reasonable." Courts would evaluate

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214. See DAVID KELLEY, A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE 22 (1998) ("Liberty rights set conditions on the way in which individuals interact. Those rights say that we cannot harm, coerce, or steal from each other as we go about our business in life, but they do not guarantee that we will succeed in our business. . . . Welfare rights, by contrast, are intended to guarantee success, at least at a minimal level. They are conceived as entitlements to have certain goods, not merely to pursue them.")

reasonableness in conformity with principles of anti-discrimination, equity, and general welfare protection, applying a multi-factor test assessing: the nature of the deprived economic and liberty interest; the social and economic context in which that interest arises; to what extent the coercer's conduct violated the coercee's ability to consent or asset; what it would require of the purported coercer to promote, respect, and fulfill those interests the extent doing so is closely related to the core activities of the coercer; the extent to which failure to promote, respect, and fulfill those interests would harm the coercee; whether the purported coercer meaningfully engaged with the coercee to prevent the infringement; and how a resulting decision would impact general welfare interests.

Rather than merely look at the narrow context of a coercive offer or threat, this broader approach expands the baseline and requires more searching analysis of the context of coercion and its general welfare costs.<sup>215</sup> Such broad evaluations are not unheard of in judicial adjudication of private economic harms, including in the United States. For example, when tasked with assessing whether antitrust defendants have unlawfully acquired or maintained a monopoly, or unlawfully reached certain kinds of unlawful agreements to restrain trade, courts require a balancing of their alleged anticompetitive conduct with any procompetitive benefits

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215. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS, §§ 175–176, comments (b) & (c) (limiting the determination of duress to whether the *coercee* “has a reasonable alternative to succumbing and fails to take advantage of it,” and making the test of inducement subjective); Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7102(3), (5), (6), (9) & (10), 7104 (restricting definitions and analysis of “coercion,” “debt bondage,” “involuntary servitude,” “severe forms of trafficking in persons, and “sex trafficking” to the individual coercee, “threats of serious harm or physical restraint,” schemes “intended to cause” coercee “to believe that failure to perform an act would result in serious harm to or physical restraint against” that coercee, and “abuse or threatened abuse of the legal process” “in order to exert pressure on another person to cause that person to take some action or refrain from taking some action,” even while requiring Executive action to “establish and carry out international initiatives to enhance economic opportunity for potential victims of trafficking as a method to deter trafficking”); National Labor Relations Act, 29 U.S.C. §§ 152, 158 (containing no definition of “coercion,” but making it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights (Section 8(a)(1)) and for a labor organization or its agents “to restrain or coerce employees in the exercise” of their Section 7 rights as well as “to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce” through secondary activity (Sections 8(b)(1) & (4))).

generated by the conduct.<sup>216</sup> The application of the “rule of reason” test evaluates considerable evidence put forward by both parties and requires a wide-ranging analysis of economic effects in the relevant market at issue.<sup>217</sup> The evidence and judicial balancing this test would elicit would not only provide more robust metrics for evaluating the bases of judicial economic rights allocations, but would also allow for a better accounting of wealth transfers through the courts.

In addition to incorporating economic coercion claims into the broader economic rights framework and applying broader proportionality and reasonableness tests to their adjudication, what is critical for a more comprehensive understanding of both the substance of and mechanisms for evaluating economic coercion claims is a more detailed history of economic coercion. By a history of economic coercion I do not mean a catalogue of instances of economic exploitation throughout history, but rather, a history of how economic coercion has been construed and adjudicated both as a means of maintaining or intervening in economic relationships, as well as a means of establishing and policing the conceptual parameters of “economy” and “freedom.” While the Legal Realist project sought to reappropriate concepts central to American substantive law within their respective areas of provenance, economic coercion accounts, whether philosophical, jurisprudential, or historical, ought to document how the concept of economic coercion has been elaborated in diverse areas of substantive law, including criminal law, poverty law, antitrust law, labor law, and trade law.

A historical and legal analysis of case law in various substantive areas of law would serve at least four purposes. First, it would historicize the adjudication of economic coercion to map the contingency of the concept and its dependence on contemporaneous understandings of economy and freedom, offering a window into how economic coercion as a core legal concept was influenced by historical

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216. See, e.g., *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990) (rule of reason analysis is a way of determining “whether . . . anticompetitive effects outweigh . . . precompetitive effects”); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam); 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 1504–1507 (3d ed. 2010).

217. AREEDA & HOVENKAMP, *supra* note 216, at ¶¶ 1504–1507.

realities and shaped, not just judicial ordering, but the social and economic consequences of that ordering. Central questions to explore would be what theories of economy and freedom are being assumed or deployed in adjudicating claims of economic coercion, and what does the law treat as relevant when evaluating whether economic coercion exists and should be sanctioned? Second, tracing the regulation of economic coercion through the courts would reveal a broad tradition of economic rights adjudication and would secure economic coercion claims as a central and determinative component of economic rights jurisprudence. Third, by drawing out the assumptions, background economic realities, and deeper conceptualizations behind theories of economic coercion applied in these various contexts, an overarching assessment would bring these areas of law in direct conversation with one another as a means of better developing a more profound and complex understanding of how the effects of economic coercion on the individual and society is conceived. Fourth, exploring diverse approaches to economic coercion in the law and extrapolating the central values that inform them would inform a more comprehensive theory of economic coercion that would be adaptive and responsive to current economic realities in the context of a globalized economy.

Prospective surveys must not only assess what the law has deemed relevant for evaluating whether economic coercion exists and should be sanctioned, but also, what the law considers evidence of economic coercion, how determinations of economic coercion were and are reliant on contemporaneous economic theories, how those theories informed views of economic forces and the extent to which those forces were conceived to impact rights, and the moral integrity of individuals and communities. For example, in looking at the criminalization of economic coercion, a study could focus on theorizations of economic coercion in the evolution of the prohibition of slavery, forced labor and human trafficking as economic coercion is understood as invasion and displacement. In the context of labor law and the right to work, economic coercion assessments could concentrate on the evolution of the individual to collective labor protections, as well as legal constraints regulating labor's ability to "coerce" employers by placing pressure on non-employers through secondary activity, boycotts, and other mechanisms of influencing the supply chain. In international law, and specifically in trade law, it could highlight how the law has shifted from accounting for economic coercion as a means of influencing state actors to a means

of internalizing, through economic forces, forms of social ordering and non-economic values. By exploring the adjudication of economic coercion in various substantive areas of law, the study of economic rights would benefit from being able to evaluate and compare competing conceptions of economic coercion in order to formulate a more robust prohibition of economic coercion as a regulating legal category, as a necessary component of protecting economic rights, and as a tool for combatting global inequality. At the same time, generality need not be the enemy of the specific: where substantive areas of law have evolved doctrinal rules that best effectuate protections against coercion, deviations from general principles on coercion can be effectuated through the doctrine of “subsidiarity,” which can provide that relief may be sought through doctrine specific to a substantive area of law rather than broader principle.<sup>218</sup>

#### CONCLUSION

This article argues that existing accounts of economic coercion, conceptually and in the law, need significant supplementation and research attention as a historical matter and for the purposes of deeper doctrinal analysis. Core to this larger project is an attempt to understand how processes of determining when and where economic coercion has occurred constitute and reconfigure procedural and substantive rights, while clarifying how the judiciary shapes those rights. If rights, as Amartya Sen has argued, are “pronouncements in social ethics, sustainable by open public reasoning,” it is crucial that those pronouncements be clearly and exhaustively heard within a context most fruitful for framing them.<sup>219</sup> Without an understanding of how such rights are constituted and bestowed relationally, and in the thick context of philosophical and social assumptions about the nature of the economy, freedom, and broader welfare interests, the enjoyment of economic rights cannot properly be measured and assessed.

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218. YOUNG, CONSTITUTING RIGHTS, *supra* note 181, at 123–24 (citation omitted).

219. Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 355–56 (2004).