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## Reconceiving Coercion-Based Criminal Defenses

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## RECONCEIVING COERCION-BASED CRIMINAL DEFENSES

STEPHEN R. GALOOB & ERIN SHELEY\*

*Coercing someone is sometimes wrong and sometimes a crime. People subject to coercion are sometimes eligible for criminal defenses, such as duress. How, exactly, does coercion operate in such contexts? Among legal scholars, the predominant understanding of coercion is the “wrongful pressure” model, which states that coercion exists when the coercer wrongfully threatens the target and, as a result of this threat, the target is pressured to act in accordance with the coercer’s threat.*

*Some tokens of coercion do not fit neatly within existing legal categories or the wrongful pressure model of coercion. For example, coercive control is a psychological phenomenon of interpersonal abuse in which one person pervasively regulates the choices of another. Coercive control is sometimes carried out through violence or threats of violence but often through ostensibly non-violent forms of degradation (such as humiliation and isolation). Coercive control is often evinced in abusive intimate relationships, including in human trafficking.*

*People subject to coercive control are undeniably coerced. Yet the wrongful pressure model cannot adequately explain why. Those subject to coercive control are ineligible for coercion-based criminal defenses, such as duress and affirmative defenses for victims of human trafficking, in part because of the inadequacy of the wrongful pressure model.*

*This Article articulates and defends an alternative understanding of coercion that, after philosopher Scott Anderson’s theory of the same name, we call the “enforcement approach” to coercion. According to the*

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*enforcement approach, coercion involves the coercer's using power to determine what the target will or will not do. The enforcement approach is superior to the wrongful pressure approach as an explanation for what makes coercion wrong and why being subject to coercion should provide a defense to criminal liability.*

*Furthermore, the enforcement approach better explains how coercion operates pervasively, such as in coercive control contexts. The enforcement approach also invites a broader rethinking of coercion-based criminal defenses. The enforcement approach grounds a model of criminal defense for those subject to coercive control that would supplement existing defenses.*

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## INTRODUCTION

“G.M.” met “D.S.” in 1989 while visiting New York from her native Dominican Republic.<sup>1</sup> Hoping to make enough money to send back to her children, she stayed in the United States and married D.S. in 1994.<sup>2</sup> After they married, D.S. undertook a pattern of physical, emotional, and financial abuse that led G.M. to return to the Dominican Republic. D.S. coaxed G.M.’s her return with promises of helping her find work and changing her immigration status.<sup>3</sup> Hoping to provide a better life for her children, G.M. relented.<sup>4</sup>

The life she returned to was hell. D.S. beat G.M. so badly that she was scarred and disfigured.<sup>5</sup> D.S. raped G.M. and imprisoned her for weekends at a time.<sup>6</sup> In the words of a New York criminal court, D.S. “exercised complete control over [G.M.], physically and psychologically,” tracking her every move and preventing her from leaving the room or the apartment without him.<sup>7</sup> D.S. would drop G.M. off and pick her up from work, waiting in the car outside to make certain she did not elude him.<sup>8</sup> At one point, G.M. escaped from D.S. and returned to the Dominican Republic with her children.<sup>9</sup> After D.S. tracked her down yet again, he threatened to harm a close family friend if she did not return to New York.<sup>10</sup> According to G.M., she “just went back to the nightmare [she] was living. The beatings were even worse because [D.S.] was angry that [she] went to the Dominican Republic.”<sup>11</sup>

G.M. was undeniably wronged and harmed by D.S and by the state’s failure to intervene in this pattern of abuse. Yet G.M. (rather than D.S.) was the defendant in the criminal proceedings from which these details arise. At D.S.’s command, G.M. engaged in illegal activities including sex work and purchasing crack cocaine for D.S. to minimize his risk of arrest.<sup>12</sup> Police arrested G.M. six times between 1997 and 1998: twice for prostitution, twice for criminal trespass, and twice for criminal possession of a controlled

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<sup>1</sup> *People v. G.M.*, 922 N.Y.S.2d 761, 762 (Crim. Ct. 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 763.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 762–63.

substance.<sup>13</sup> Ultimately, she pleaded guilty to all charges and received “two non-criminal convictions for disorderly conduct, a violation, and four class B misdemeanor convictions.”<sup>14</sup>

G.M. is a survivor of human trafficking, the crime of using force, fraud, or coercion to lure a victim and force them into either labor or sexual exploitation.<sup>15</sup> G.M.’s case also exemplifies a psychological phenomenon known as coercive control, “the micro-regulation” of someone’s everyday behaviors, including the way they dress, perform chores, parent, interact with friends, or perform sexually.<sup>16</sup> Coercive control involves a totalizing influence of a coercer over the target’s life. It is a form of domination that arises not only from violence and threats, but also through more indirect means such as humiliation, isolation, and seizure of physical or financial

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<sup>13</sup> *Id.* at 762.

<sup>14</sup> *Id.*

<sup>15</sup> 22 U.S.C. § 7102; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319.

<sup>16</sup> See EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 5* (2007). Stark’s ground-breaking work on coercive control dealt with female victims of male domestic abuse, and studies suggest women are more likely than men to be victims of domestic abuse. See U.S. DEP’T OF JUST., *NON-FATAL DOMESTIC VIOLENCE 2003-2012 1* (2014), <https://www.bjs.gov/content/pub/pdf/ndv0312.pdf> [<https://perma.cc/DXA5-7U97>] (suggesting that seventy-six percent of domestic violence is committed against women). However, female-on-male domestic abuse occurs as well and may even be underreported. Rob Whitley, *Domestic Violence Against Men: No Laughing Matter*, PSYCH. TODAY (Nov. 19, 2019), <https://www.psychologytoday.com/us/blog/talking-about-men/201911/domestic-violence-against-men-no-laughing-matter> [<https://perma.cc/7NY7-7KD3>] (collecting international data suggesting that domestic violence against men is far more widespread than the reported cases suggest). Evidence also indicates that LGBTQ-identifying people are even more likely to be the victims of domestic violence than straight-identifying people: the American Centers for Disease Control and Prevention (CDC) has found that from a sample of 16,000 U.S. adults, 26% of homosexual men, 37.3% of bisexual men, and 29% of heterosexual men had been a victim of interpersonal violence, compared to 43.8% of lesbian women, 61.1% of bisexual women, and 35% of heterosexual women. AM. CTRS. FOR DISEASE CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 1–2 (2010), [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_sofindings.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf) [<https://perma.cc/QR78-CRAW>]. Finally, fifty-four percent of trans-identifying people report experiencing intimate partner abuse, including physical harm and coercive control. NAT’L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 TRANSGENDER SURVEY: EXECUTIVE SUMMARY 13* (2016), <https://www.transequality.org/sites/default/files/docs/usts/Executive%20Summary%20-%20FINAL%201.6.17.pdf> [<https://perma.cc/Q9H2-89YT>]. Thus, while this Article discusses coercive control in the male-on-female context due to the available sociological literature, our argument about coercion applies to all coercively controlling relationships regardless of the genders and sexualities of the parties involved.

resources.<sup>17</sup> Human traffickers frequently utilize coercive control to keep their victims powerless and compliant.<sup>18</sup>

A broad literature critiques domestic abuse's status under traditional criminal law that primarily only covers transactional events like assaults or threats to commit them as crimes.<sup>19</sup> This transactional approach neglects the programmatic nature of domestic abuse, including its purely psychological components.<sup>20</sup> Scholars pay less attention to the legal situation of those subject to coercive control who are charged with crimes.

In most U.S. jurisdictions, a defendant in G.M.'s position might have two possible legal defenses. First, in some jurisdictions, the defendant might plead an affirmative defense available for those subject to human trafficking.<sup>21</sup> Such laws vary widely, and certain limitations disqualify many human trafficking survivors. For example, most U.S. jurisdictions limit the human trafficking affirmative defense to specific crimes, often to crimes related to sex work.<sup>22</sup> Had New York's current human trafficking affirmative defense applied at the time of G.M.'s arrests, it would have reached only G.M.'s two prostitution charges and not her drug possession or trespassing charges.<sup>23</sup> Yet, this result seems anomalous because each of these charges arose out of the same coercive control scheme.

Another potential defense is duress. At common law, the duress defense arose where a defendant's criminal activity was the result of another person's unlawful threat to cause death or grievous bodily harm to the defendant or a third person.<sup>24</sup> G.M. faced many threats of bodily harm to herself and her

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<sup>17</sup> See Vanessa Bettinson, *Aligning Partial Defences to Murder with the Offence of Coercive or Controlling Behaviour*, 83 J. CRIM. L. 71, 74 (2019) (summarizing coercive control as "reflecting extreme examples of accepted male behaviours such as the control of financial resources; the use of credible threats which may or may not involve threats of physical violence; a victim feeling in need of the dominator; damaged psychological well-being of the victim and a high risk of suicide.").

<sup>18</sup> See Michelle Contreras & Melissa Farley, *Human Trafficking: Not an Isolated Issue*, in SURVIVING SEXUAL VIOLENCE: A GUIDE TO RECOVERY AND EMPOWERMENT 22, 22 (Thelma Bryant-Davis ed., 2011).

<sup>19</sup> See Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962 (2004).

<sup>20</sup> See *id.* at 972; Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1134 (2009).

<sup>21</sup> Matthew Myatt, *The "Victim-Perpetrator" Dilemma: The Role of State Safe Harbor Laws in Creating a Presumption of Coercion for Human Trafficking Victims*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 555, 588–89 (2019).

<sup>22</sup> *Id.* at 590.

<sup>23</sup> *People v. G.M.*, 922 N.Y.S.2d 761, 765–66 (Crim. Ct. 2011).

<sup>24</sup> See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1339 (1988).

children.<sup>25</sup> Yet it is unclear from the opinion in *G.M.* whether each (or any) of her charged crimes was a direct response to a specific threat from D.S. Moreover, G.M. would have needed to show that D.S.'s threatened harm was imminent and that her fear of that threatened harm was well-grounded in order to prevail on a duress defense. Some case law denies that threatened harm is immediate if the defendant has an opportunity to engage in delay tactics,<sup>26</sup> as G.M. conceivably did. For example, D.S.'s threats regarding G.M.'s children would likely fail to ground a duress defense under this standard because they were far away in the Dominican Republic and thus unlikely to have been considered in immediate danger.<sup>27</sup> Therefore, the duress defense would seem inapplicable to G.M.'s case because the triggering conditions of duress are not realized. Yet the rationale for the duress defense seems at least as strong in G.M.'s case as in a case of criminal wrongdoing conducted in acquiescence to a specific, imminent threat.

There are deeper challenges to applying coercion-based defenses such as duress and human trafficking to cases like G.M.'s. These problems stem from the notion of coercion that underlies much contemporary thinking about criminal law. The most prominent understanding of coercion applicable in criminal law would deny that G.M. was actually coerced by D.S. Call this predominant view the wrongful pressure approach to coercion.<sup>28</sup> On this approach, coercion exists when a coercer's threat causes the target to

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<sup>25</sup> See *G.M.*, 922 N.Y.S.2d at 762–63.

<sup>26</sup> See, e.g., *Subramaniam v. Pub. Prosecutor* [1956] 1 WLR 965, 972 (PC) (appeal taken from Malay.).

<sup>27</sup> See, e.g., *People v. Coffman*, 96 P.3d 30, 105–06 (Cal. 2004) (finding a trial court's refusal to instruct jury on duress defense was proper where threat involved danger to defendant's child who was living in another state at the time of the threat).

<sup>28</sup> Among legal scholars, Mitchell Berman has been the most prominent expositor of the "wrongful pressure" view. See Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 88 (2002) [hereinafter Berman, *Normative Functions*] ("[T]he issue [in defining wrongful] is whether [the coercer] threatens to violate a normative obligation for the purpose of inducing another to engage in (or abstain from) a specific action. This is (prima facie) wrongful because it puts wrongful pressure on [the target's] freedom to do otherwise."); Mitchell Berman, *Blackmail*, in THE OXFORD HANDBOOK ON THE PHILOSOPHY OF THE CRIMINAL LAW 37, 62 (John Deigh & David Dolinko eds., 2011) [hereinafter Berman, *Blackmail*] ("Roughly, coercion is the wrong of interfering with a person's freedom by putting improper pressure on his range of alternatives."); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1292 (2013) ("To a first approximation, coercion is the wrong of exerting *wrongful* pressure on a subject to do as the coercer wishes. And the usual way in which one puts wrongful pressure on a target's choices is by threatening to wrong him if he does not comply with the threatener's 'demand' or 'condition.'") (citations omitted). See also *infra* note 141 (discussing the wrongful pressure model of coercion).

experience psychological pressure and that threat violates the target's normative expectations. A coercion-based defense arises only if the coercer's threat generates a feeling of pressure in the target sufficient to overbear or significantly impair the target's will and the target has a good reason to feel this pressure as a result of the coercer's threat. As explained in more detail below, it is unclear that all (or any) of these conditions would have been recognized in G.M.'s case.

As G.M.'s case illustrates, the wrongful pressure approach is problematic as an account of coercion and a basis for coercion-based defenses.<sup>29</sup> This model's focus on threats and reasonableness is insensitive to background power dynamics between parties. It also misconstrues the objectionable features of coercion and fails to capture the phenomenology of coercion.

Establishing an adequate affirmative defense for coercive control contexts like G.M.'s case invites reexamination of the wrongful pressure model of coercion. Recent work challenges the prevailing understanding of what coercion is, why it is objectionable, and how coercion should bear on the legal liability of those who are coerced.<sup>30</sup> Drawing from this literature, this Article proposes an alternative model called the enforcement approach to coercion after philosopher Scott Anderson's theory of the same name.<sup>31</sup> On the enforcement approach, coercion is a function of the coercer using power to determine what the target will or will not do. The enforcement approach provides a more plausible understanding of the wrongdoing in coercive control cases and a clearer explanation for why those subject to coercive control should be provided a defense against criminal liability. This approach supports a generalized defense for victims of coercive control that is broader than the duress defense.

This Article has five substantive parts. Part I describes the phenomenon of coercive control and applies this concept to human trafficking. Part II explains the justification for and challenges of tailoring affirmative defenses to coercive control contexts. Tailoring an affirmative defense for coercive control contexts raises deeper questions about what coercion is and why coercion is wrong. Part III identifies the standard "wrongful pressure" approach to coercion in law and explains why this approach misfires in coercive control contexts. Part IV articulates and defends an alternative account of coercion-based defenses built on the enforcement approach. The

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<sup>29</sup> See discussion *infra*, Section III(B); Berman, *Coercion, Compulsion, and the Medicaid Expansion*, *supra* note 28, at 1292.

<sup>30</sup> Scott A. Anderson, *The Enforcement Approach to Coercion*, 5 J. ETHICS & SOC. PHIL. 1, 1–2 (2010).

<sup>31</sup> *Id.* at 1.

enforcement approach should supplant the wrongful pressure approach as the predominant way of conceiving of coercion in the realm of criminal defenses. Part V proposes a model defense for coercive control that should supplement existing coercion-based defenses.

## I. THE COERCIVENESS OF COERCIVE CONTROL: A GENERAL OVERVIEW

Coercive control is a distinct form of interpersonal abuse. Part I first describes the phenomenon and discusses existing and proposed criminal offenses targeting coercive control, then considers human trafficking as an example of coercive control.

### A. COERCIVE CONTROL DEFINED

Coercive control describes a programmatic form of interpersonal abuse. According to Professor Evan Stark, “the main means used to establish control is the micro-regulation of everyday behaviors associated with stereotypical female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually.”<sup>32</sup> Coercive control arises from an ongoing pattern of interactions intended to establish the controller’s power and subordination over the victim.<sup>33</sup> Although coercive control may include physical violence or threats of violence, it also involves forms of domination such as isolation, humiliation, or the control of physical or financial resources.<sup>34</sup>

Given this complex dynamic, traditional criminal law tools and defenses are inadequate responses to coercive control. Professor Deborah Tuerkheimer points out that the “transaction-bound” model of crime—in which the law treats a criminal action as a discrete, cognizable offense—misses the reality of domestic abuse as “an ongoing pattern of conduct occurring within a relationship characterized by power and control.”<sup>35</sup> The harms of coercive control manifest over time as “psychological trauma, making victims vulnerable as the trauma overrides the ability to control their lives and experience feelings of helplessness and terror.”<sup>36</sup> The physical and

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<sup>32</sup> See STARK, *supra* note 16, at 5. While Professor Stark’s work focused specifically on male-on-female abuse, the ample evidence of interpersonal abuse between all genders means that our treatment of coercion in this Article is not limited by the genders of the parties.

<sup>33</sup> See, e.g., *id.* at 4 (collecting the cases Professor Stark encountered in thirty years as an advocate, counselor, and forensic social worker to conclude that most abuse victims are compelled to seek help due to patterns of coercive behavior, not domestic violence).

<sup>34</sup> See Bettinson, *supra* note 17, at 74.

<sup>35</sup> See Tuerkheimer, *supra* note 19, at 960–61, 972.

<sup>36</sup> Bettinson, *supra* note 17, at 73.

psychological abuse involved in coercive control not only harms the victim but also correlates with a myriad of psychological as well as physiological effects such as arthritis, chronic pain, migraine and other frequent headaches, stammering, sexually-transmitted infections, and chronic pelvic pain.<sup>37</sup>

Those subject to coercive control suffer from the loss of personal autonomy that is comparable to the harms imposed by kidnapping.<sup>38</sup> According to Professor Stark, coercive control involves conduct intended to undermine another person's autonomy, freedom, and integrity.<sup>39</sup> Professors Vanessa Bettinson and Charlotte Bishop state that "[w]hereas many criminal offenses protect individuals against 'the reduction of options,' domestic abuse involves not only the options of the victim being reduced, but also the options that remain being subject to unwarranted and arbitrary control by another person."<sup>40</sup> The aim of even non-violent coercive control is for an abuser indefinitely to dictate all aspects of the coercively controlled person's life.<sup>41</sup> The presence of coercive control also predicts more serious physical violence. A National Institute for Justice study found that partners who exercised control over their partner's daily activities were more than five times more likely eventually to kill them.<sup>42</sup>

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<sup>37</sup> Ann L. Coker, Paige H. Smith, Lesa Bethea, Melissa R. King & Robert E. McKeown, *Physical Health Consequences of Physical and Psychological Intimate Partner Violence*, 9 ARCHIVES FAM. MED. 451, 456 (2000) ("We found that psychological violence was associated with many of the same health outcomes as was physical IPV"). Victims of coercive control are also at a greater risk of suicide. See RUTH AITKEN & VANESSA E. MUNRO, DOMESTIC ABUSE AND SUICIDE: EXPLORING THE LINKS WITH REFUGEE'S CLIENT BASE AND WORK FORCE 11 (2018), <http://wrap.warwick.ac.uk/103609/> [<https://perma.cc/RCW4-YRWR>].

<sup>38</sup> See, e.g., Cheryl Hanna, *The Paradox of Progress: Translating Evan Stark's Coercive Control into Legal Doctrine for Abused Women*, 15 VIOLENCE AGAINST WOMEN 1458, 1460 (2009).

<sup>39</sup> See STARK, *supra* note 16, at 389–90.

<sup>40</sup> Vanessa Bettinson & Charlotte Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?*, 66 N. IR. LEGAL Q. 179, 183 (2015).

<sup>41</sup> See Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 743 (2005); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 10 (2007); Victor Tadros, *The Distinctiveness of Domestic Abuse: A Freedom Based Account*, 65 LA. L. REV. 989, 999 (2004); Donald G. Dutton & Sally Painter, *Emotional Attachments in Abusive Relationships: A Test of Traumatic Bonding Through Theory*, 8 VIOLENCE & VICTIMS 105, 107 (1993).

<sup>42</sup> Jacquelyn C. Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn R. Block, Doris Campbell, Mary Ann Curry, Faye Gary, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich & Susan A. Wilt, *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT'L INST. OF JUST. J. 14, 17 (2003). See also Neil Websdale, *Assessing*

## B. COERCIVE CONTROL AS CRIMINAL OFFENSE

Coercive control is not a crime in any U.S. jurisdiction, although it has been criminalized in England, France, Scotland, and Ireland.<sup>43</sup> The U.K.'s passage of Serious Crime Act 2015 § 76 criminalizes coercive or controlling behavior in an intimate or family relationship.<sup>44</sup> Section 76 states:

- (1) A person (A) commits an offence if—
  - a. A repeatedly or continuously engages in behavior towards another person (B) that is controlling or coercive,
  - b. At the time of the behavior, A and B are personally connected,
  - c. The behavior has a serious effect on B, and
  - d. A knows or ought to know that the behavior will have a serious effect on B<sup>45</sup>

If adopted in the United States, this statute would likely violate due process on grounds of vagueness and overbreadth.<sup>46</sup> Previously, one of us has proposed a statutory approach to criminalizing coercive control would avoid such problems by modeling the extant structure of criminal fraud, which focuses on the *scienter* of the defendant rather than the effects on the victim.<sup>47</sup> On this proposal, a person would be guilty of criminal coercive control if they:

*Risk in Domestic Violence Cases*, in *ENCYCLOPEDIA OF DOMESTIC VIOLENCE* 38, 40 (Nicky Ali Jackson ed., 2007) (citing “obsessive possessiveness or morbid jealousy” as a factor “the research literature consistently identifies . . . as central to intimate partner homicide”); *Signs of Abuse*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/signs-of-abuse> [<https://perma.cc/T53L-TM77>] (identifying numerous non-violent controlling behaviors as “warning signs” of violence).

<sup>43</sup> Serious Crime Act 2015, c. 9, § 76 (UK), <https://www.legislation.gov.uk/ukpga/2015/9/section/76> [<https://perma.cc/RBP9-TJ5A>]; Domestic Abuse (Scotland) Act 2018, (ASP 5) § 1, <https://www.legislation.gov.uk/asp/2018/5/contents> [<https://perma.cc/Y4VX-9QMA>]; Domestic Violence Act 2018 (Act No. 6/2018) (Ir.), <https://www.irishstatutebook.ie/eli/2018/act/6/enacted/en/html?q=domestic+violence+act+&years=2018> [<https://perma.cc/K37F-XXA7>]; Loi 2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants [Law 2010-769 of July 9, 2010, on Violence Against Women, Violence Between Spouses, and the Effects of These Types of Violence on Children], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE]*, July 10, 2010, p. 0158.

<sup>44</sup> Serious Crime Act, *supra* note 43.

<sup>45</sup> *Id.*

<sup>46</sup> Erin Sheley, *Criminalizing Coercive Control Within the Limits of Due Process*, 70 *DUKE L.J.* 1321, 1338–41 (2021).

<sup>47</sup> *Id.* at 1379.

- a.) Continuously engage in a coercive pattern of behavior over a substantial period of time with the intent to deprive another person of their autonomy to make decisions and engage in conduct to which they otherwise have the right; and
- b.) The two parties are spouses, intimate partners, or family members; and
- c.) The pattern of behavior causes or creates a risk of non-trivial economic, physical, mental, or emotional harm to the coerced party.<sup>48</sup>

The requirement of a pattern of behavior is intentionally broad because coercive control—and domestic abuse generally—is diachronic (i.e., extended in time) rather than “transaction-bound.”<sup>49</sup> Furthermore, the requirement of a “pattern” functions similarly to the requirement of an “agreement” in the offense of criminal conspiracy: it transforms otherwise legal behavior (an isolated controlling act in the one and an individual’s private thought of committing a crime in the other) into a cognizable offense.<sup>50</sup>

In the *G.M.* case, for example, D.S.’s conduct would easily constitute a pattern of behavior. From at least 1994 until 2005, D.S. engaged in a series of related acts, both legal (picking G.M. up from work, flying to the Dominican Republic to beg her to return) and illegal (imprisonment, rape, and assault).<sup>51</sup> The “intent to deprive” element of the proposed statute is equivalent to the “intent to defraud” element of criminal fraud: a purpose of using coercive behavior to extract unearned obedience from his victim in exchange for nothing but more threats.<sup>52</sup> For example, G.M. testified that, after she made her most significant assertion of self-will, “the beatings were even worse because D.S. was angry that I went to the Dominican Republic.”<sup>53</sup> D.S.’s pattern of behavior supports the inference that D.S. intended to commandeer G.M.’s authority to decide what to do for herself.

### C. HUMAN TRAFFICKING AS COERCIVE CONTROL

Human traffickers use force, fraud, or coercion to force a target into either labor or sexual exploitation.<sup>54</sup> Human traffickers routinely engage in psychological and physical abuse, including coercive control, in order to elicit cooperation from their victims. For example, in addition to violence and threats of violence, traffickers may also assert economic and legal

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<sup>48</sup> *Id.* at 1386.

<sup>49</sup> See Tuerkheimer, *supra* note 19, at 972.

<sup>50</sup> Sheley, *supra* note 46, at 1387.

<sup>51</sup> *People v. G.M.*, 922 N.Y.S.2d 761, 761–63 (Crim. Ct. 2011).

<sup>52</sup> Sheley, *supra* note 46, at 1389.

<sup>53</sup> *G.M.*, 922 N.Y.S.2d at 763.

<sup>54</sup> See 22 U.S.C. § 7102; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319.

pressures premised on the illegality of sex work.<sup>55</sup> Human traffickers identify targets based on personal or social characteristics such as psychological or emotional vulnerability, economic hardship, lack of a social safety net, and experience of natural disasters or political instability.<sup>56</sup> Furthermore, traffickers often isolate victims, induce exhaustion, and interfere with their perceived or real ability to escape.<sup>57</sup> These forms of abuse result in long-term psychological trauma,<sup>58</sup> often so significant that victims fear revealing themselves or asking for help.<sup>59</sup> Instead, the interaction between a trafficking victim and a trafficker can result in “trauma bonding,” in which the target perceives a threat to their physical and psychological survival at the hands of their trafficker.<sup>60</sup>

Trauma bonding exemplifies the pattern of interactions in coercively controlling relationships from which the abused party feels helpless to escape.<sup>61</sup> A trafficked person may eventually feel helpless and respond to any ostensible show of “help” or “kindness” from their trafficker with gratitude and attachment in order to survive.<sup>62</sup> A trafficked person’s social and economic circumstances, including lack of housing and employment, may also contribute to the trafficked person’s sense of trust and loyalty toward a trafficker and thus increase the likelihood of trauma bonding.<sup>63</sup>

The *G.M.* case exemplifies human trafficking. G.M. entered the United States on a tourist visa and began her relationship with D.S. voluntarily.<sup>51</sup> However, over time D.S. forced G.M. to engage in commercial sex work and make other efforts to sustain his substance abuse disorder.<sup>52</sup> This pattern qualifies as a form of “severe trafficking in persons” under U.S. law.<sup>53</sup> While human trafficking is often associated with the transportation of victims across

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<sup>55</sup> Michelle Contreras & Melissa Farley, *Human Trafficking: Not an Isolated Issue*, in *SURVIVING SEXUAL VIOLENCE: A GUIDE TO RECOVERY AND EMPOWERMENT* 22 (Thelma Bryant-Davis ed., 2011).

<sup>56</sup> *What is Human Trafficking?*, U.S. DEP’T OF HOMELAND SEC., <http://www.dhs.gov/blue-campaign/what-human-trafficking> [<https://perma.cc/KLM8-2CNH>].

<sup>57</sup> U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 10 (20th ed. 2020).

<sup>58</sup> See Christine Stark & Carol Hodgson, *Sister Oppressions: A Comparison of Wife Battering and Prostitution*, 2 *J. TRAUMA PRAC.* 17, 25 (2004); Melissa Ugarte, Laura Zarate & Michelle Farley, *Prostitution and Trafficking of Women and Children from Mexico to the United States*, 2 *J. TRAUMA PRAC.* 147, 158 (2004).

<sup>59</sup> *What is Human Trafficking?*, *supra* note 56.

<sup>60</sup> U.S. DEP’T OF STATE, *supra* note 57, at 20.

<sup>61</sup> See Sherry Gaba, *Trauma Bonding, Codependency, and Narcissistic Abuse*, *PSYCH. TODAY* (May 29, 2019), <https://www.psychologytoday.com/us/blog/addiction-and-recovery/201905/trauma-bonding-codependency-and-narcissistic-abuse> [<https://perma.cc/DQ87-XGKS>].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

international lines, G.M.'s case shows that trafficking can also occur intranationally.

Human trafficking has attracted widespread bipartisan concern.<sup>64</sup> The federal Trafficking Victims Protection Act (TVPA) was signed into law by President Clinton and carried on by Presidents Bush, Obama, and Trump.<sup>65</sup> All fifty states now have parallel legislation that criminally prohibits human trafficking.<sup>66</sup> Some state law definitions of the human trafficking offense are so broad as to encompass nearly all commercial sex, while others include conduct that would otherwise be classified as domestic violence or sexual assault.<sup>67</sup> Despite the consensus around the objectionableness of human trafficking, there is no consensus about the best definition of the offense and who should be classified as human trafficking victims.<sup>68</sup> Some feminist scholars have argued that all sex workers should qualify as victims of human trafficking,<sup>69</sup> while others argue for a more limited human trafficking definition which excludes more consensual or autonomous forms of sex work.<sup>70</sup> Disagreements about whether someone has in fact been subjected to “force,” “fraud,” or “coercion” can make the difference between legal recognition of them as a victim or perpetrator of human trafficking.<sup>71</sup>

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<sup>64</sup> See Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CALIF. L. REV. 379, 388 (2020).

<sup>65</sup> *Id.*

<sup>66</sup> U.S. DEP'T OF STATE, *supra* note 57, at 20.

<sup>67</sup> Dahlstrom, *supra* note 64, at 415–20.

<sup>68</sup> *Id.* at 391–92. See also Dina Francesca Haynes, *The Celebritization of Human Trafficking*, 653 ANNALS AM. ACAD. POL. & SOC. SCI. 25, 30 (2014) (“There are . . . conflicting viewpoints about many aspects of human trafficking. There are disagreements as to the extent of the problem, the definition of trafficking, who the victims are, how best to support them, and how to combat trafficking more generally. Statistical data on human trafficking are wildly inconsistent and lack rigorous empirical support.”).

<sup>69</sup> See Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 610, 615 (2014).

<sup>70</sup> See PRABHA KOTISWARAN, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA 10 (2011). In a survey of state anti-trafficking enforcement, Professor Jennifer Chacón found that in states such as Texas, Georgia, and Arizona, where the political rhetoric behind anti-trafficking legislation turns on immigration control, non-citizen trafficking victims were afraid of the anti-immigrant state laws and law enforcement generally and therefore did not seek help “even as narratives of their victimization have been used to justify increased funding and focus on antitrafficking initiatives.” Jennifer M. Chacón, *Human Trafficking, Immigration Regulation, and Sub-federal Criminalization*, 20 NEW CRIM. L. REV. 96, 128 (2017).

<sup>71</sup> Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 215 (2015).

Whatever its formal definition, human trafficking is only one context in which abusers rely on coercive control. As trends in the U.K. and Europe toward criminalization demonstrate, coercive control is a pervasive social problem affecting women and others in a range of interpersonal contexts, including the domestic. The next Part will turn to a secondary problem arising from coercive control: those subject to coercive control who commit criminal offenses while under the control of an abuser.

## II. COERCIVE CONTROL AND COERCION-BASED AFFIRMATIVE DEFENSES

Those who are trafficked to perform sex work exist in a nebulous state of quasi-criminality due to the illegality of sex work and the tendency of sex work to accompany other criminal offenses. This plight points to a broader conceptual problem with appraising the legal liability of those who commit crimes while subject to coercive control. This Part considers two possible legal defenses available to victims of coercive control who commit crimes: duress and human trafficking affirmative defenses. Section A contends that the duress defense, as canonically formulated, is inadequate to address human trafficking cases such as G.M.'s. Section B argues that the vast majority of human trafficking affirmative defenses are inadequate for similar reasons. Both of these inadequacies stem from the basic notion of coercion that underlies coercion-based defenses.

### A. DURESS AND COERCIVE CONTROL

Someone who commits crimes while being coercively controlled might plead duress as a defense to criminal liability. Yet, the duress defense as canonically formulated in U.S. law systematically misfires in coercive control contexts.

The duress defense has been subject to a number of formulations, not all of which are consistent with each other.<sup>72</sup> We stipulate the following definition of duress:

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<sup>72</sup> See, e.g., Dressler, *supra* note 24, at 1335 (“D will be acquitted of an offense other than murder on the basis of duress if he pleads and proves that: (1) C unlawfully threatened imminently to kill or grievously injure him or another person; and (2) he was not at fault in exposing himself to the threat.”); 1 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 9.7 (3d ed. 2020) (“A person’s unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defense of duress (sometimes called compulsion or coercion) to the crime in question unless that crime consists of intentionally killing an innocent third person.”); Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 254 (1995) (“The core requirements for claiming the defense are

**Canonical duress:** the target of coercion has a defense against criminal liability for acting in a particular way (X'ing) if and only if:

- (1) target believes for a good reason that the coercer will act in a certain way (Y'ing) that would set back significant interests of target or another person unless target X's (the "*coercion model*");
- (2) the coercion referenced in (1) arises from coercer's threat of Y'ing (the "*nexus requirement*")<sup>73</sup>;
- (3) the harm referenced in coercer's threat of Y'ing is sufficiently immediate (the "*immediacy requirement*");
- (4) target has no reasonable way of avoiding the harm referenced in coercer's threat of Y'ing except through X'ing (the "*necessity requirement*");
- (5) X'ing is not the crime of murder (the "*offense restriction*")<sup>74</sup>;
- (6) target is not responsible for creating the conditions under which coercer's threat of Y'ing arises (the "*actio libera restriction*")<sup>75</sup>

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generally accepted as the following: (1) The defendant must have no reasonable opportunity to escape from the coercive situation. (2) The defendant must be threatened with significant harm-death or serious bodily injury. (3) The threatened harm must be illegal. (4) The threat must be of imminent harm. (5) The defendant must not have placed herself voluntarily in a situation in which she could expect to be subject to coercion, as is the case when a person joins a violent criminal organization. The two requirements which appear to have marginal status are as follows: (6) Duress must not be pleaded as a defense to murder. (7) The defendant must have been acting on a specific command from the coercer.”).

<sup>73</sup> See, e.g., Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—and Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 847 (2003) (“[D]uress is defined as either consisting of or including threats that are purposefully coercive . . . . This . . . feature is significant because purposefully coercive threats do more than bring pressure to bear upon bystanders. They also dictate to bystanders what their aggressors exact as exclusive avenues of escape.”).

<sup>74</sup> See, e.g., Steven J. Mulroy, *The Duress Defense’s Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 174 (2006); Joshua Dressler, *Duress*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 269, 270 (John Deigh & David Dolinko eds., 2011) (noting that the “traditional duress defense” is “unavailable in murder prosecutions”) (citations omitted).

<sup>75</sup> Susan Dimock, *Actio Libera in Causa*, 7 CRIM. L. & PHIL. 549, 552 (2013) (noting that the *actio libera in causa* doctrine states that “defendants should not be able to rely upon defences, the conditions of which they have culpably created”); Vera Bergelson, *Duress Is No Excuse*, 15 OHIO ST. J. CRIM. L. 395, 404 (2017) (“Duress requires “clean hands,” namely, the lack of the subjective fault on the part of the actor in finding himself in the coercive situation.”); Dressler, *supra* note 24, at 1341 (“[D]uress probably may not be pleaded by one who is at fault for placing himself in the coercive situation.”) (citations omitted); MODEL PENAL CODE § 2.09(2) (AM. L. INST. 1985) (“The defense [of lesser evils] . . . is unavailable if the actor recklessly placed himself in a situation in which it

Conditions (2)–(6) are the triggering conditions of duress—that is, the conditions in addition to the existence of coercion that must be satisfied in order for a defendant to be eligible to assert a duress defense. Most legal theorizing about duress posits a principled connection between the defense’s triggering conditions and its underlying model of coercion. For example, Professor Claire Finkelstein posits a normative theory of duress as available for conduct that constitutes “the best course of action under the circumstances.”<sup>76</sup> In light of this theory, Professor Finkelstein argues that the necessity and immediacy requirements and the *actio libera* restriction of duress can “be explained as features of the situation that bear on whether the actor’s behavior was understandable under the circumstances.”<sup>77</sup> Likewise, Professor Joshua Dressler posits that a successful defense of duress is premised on the normative conclusion that the target of coercion “lacked a fair opportunity to avoid acting unlawfully.”<sup>78</sup> On Professor Dressler’s argument, the triggering conditions of the defense (such as the requirement of an unlawful threat to imminently cause death or grievous bodily harm to the defendant or some third person)<sup>79</sup> and the target’s lack of fault for being in a coercive situation<sup>80</sup> serve to establish that the coerced actor has “attained or reflected society’s legitimate expectations of moral strength.”<sup>81</sup> On both of these theories, an account of how coercion works helps to explain and is, in turn, explained by the conditions under which the duress defense may be asserted. Triggering conditions, then, make sense only in light of an underlying model of coercion.

To illustrate the connection between the model of coercion and the triggering conditions, consider a “textbook case”<sup>82</sup> of duress, *State v. Toscano*.<sup>83</sup> Joseph Toscano, a chiropractor, owed a gambling debt to Richard Leonardo, a gangster.<sup>84</sup> Richard’s brother William contacted Toscano and asked for “a favor,” namely, that Toscano create a fraudulent injury report

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was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.”).

<sup>76</sup> See Finkelstein, *supra* note 72, at 271.

<sup>77</sup> *Id.* at 272.

<sup>78</sup> Dressler, *supra* note 24, at 1365.

<sup>79</sup> *Id.* at 1339.

<sup>80</sup> *Id.* at 1341.

<sup>81</sup> *Id.* at 1334.

<sup>82</sup> Kyron Huigens, *Duress is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303, 304 (2004).

<sup>83</sup> 378 A.2d 755 (N.J. 1977).

<sup>84</sup> *Id.* at 758.

for a confederate of William's that would be submitted to an insurer.<sup>85</sup> "You're going to make this bill out for me," William Leonardo told Toscano.<sup>86</sup> "Remember, you just moved into a place that has a very dark entrance and you [live] there with your wife . . . . You and your wife are going to jump at shadows when you leave that dark entrance."<sup>87</sup> Toscano signed the fraudulent report and was later indicted for conspiracy and a host of other crimes related to William Leonardo's scheme.<sup>88</sup> The trial court precluded Toscano from arguing a duress defense on the grounds that William Leonardo's statement to Toscano could not constitute a "'present, imminent and impending' threat of harm."<sup>89</sup> On appeal, the court reversed Toscano's conviction because it found that Leonardo's alleged statement sufficed to satisfy Toscano's burden of production to raise the duress defense.<sup>90</sup>

*Toscano* exemplifies each aspect of canonical duress. The *Toscano* court posits a specific model of coercion in its finding that Toscano was eligible to assert the defense if and only if William Leonardo's threat of harming Toscano or his wife induced in Toscano a "reasonable fear"<sup>91</sup> that Leonardo would bring about such harm. (In the terminology introduced below,<sup>92</sup> the *Toscano* court thereby utilizes the "wrongful pressure" model of coercion.) The *Toscano* court also applies an implicit nexus requirement: Toscano is required to establish that any experience of coercion arose out of William Leonardo's threat, rather than a more general menace arising out of Leonardo's reputation as a gangster.<sup>93</sup> Much of the analysis in the *Toscano* opinion concerns the articulation of the immediacy requirement—specifically whether immediacy could be judged as a matter of law from an "objective" perspective or whether immediacy is a question of fact that must be relativized to the defendant's circumstances.<sup>94</sup> This reasonableness inquiry also informs the *Toscano* court's articulation of the necessity requirement: Toscano's capitulation to William Leonardo's proposal would

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 759.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 765.

<sup>92</sup> See *infra* notes 141–44 and accompanying text.

<sup>93</sup> *Toscano*, 378 A.2d at 761 ("A 'generalized fear of retaliation' by an accomplice, unrelated to any specific threat, is also insufficient.") (citations omitted).

<sup>94</sup> The *Toscano* court, following the Model Penal Code, articulates immediacy in terms of whether a "person of reasonable firmness in [the defendant's] situation" would have been "unable to resist" the threatener's threat. *Id.* at 765.

not ground a duress defense if the jury found that Toscano neglected other, non-criminal responses, such as reporting Leonardo's threat and scheme to the police.<sup>95</sup> The court in *Toscano* acknowledges the offense restriction by delimiting duress to crimes "other than murder."<sup>96</sup> It implicitly acknowledges the *actio libera* restriction by noting that the duress defense might not be available if Toscano's capitulation was motivated by a desire to satisfy his gambling debts to Richard Leonardo rather than out of "fear[]" for his wife's and his own bodily safety."<sup>97</sup>

However well-suited it is in cases of transactional coercion such as *Toscano*, the duress defense is ill-suited to apply in coercive control contexts for several reasons. First, the nexus requirement is inappropriate because coercive control often does not involve specific threats. The logic of coercive control is that the coercer creates an environment in which the target is subject to pervasive coercion.<sup>98</sup> In many coercive control contexts, specific threats by the coercer become unnecessary because the target has internalized and anticipates the coercer's commands and desires.<sup>99</sup>

For example, although the *G.M.* opinion references numerous threats by D.S. toward G.M.,<sup>100</sup> the opinion does not tie specific threats by D.S. to distinct criminal offenses by G.M. Doing so would adopt what Professor Tuerkheimer calls the "transaction-bound model" of crime<sup>101</sup> and would understate the insidiousness of the pervasive and temporally-extended coercion to which D.S. subjected G.M. The coercion applied to G.M. was not simply the function of each of the discrete transactions in which G.M.'s autonomy was disrupted by D.S.'s conditional proposals (e.g., "Obtain the drugs on this occasion or else I will beat you again"). Rather, the coercive controller's pattern of isolation and abuse creates an environment in which such a proposal is unnecessary because the target has already anticipated the harsh treatment from the coercer and incorporated the coercer's wishes into their practical deliberations. Thus, the strength of G.M.'s defense against criminal liability should not depend on tying specific criminal activity by G.M. to a specific threat by D.S.

Second, the immediacy requirement is inapt in coercive control contexts. There is a debate about whether immediacy should be assessed subjectively from the standpoint of the target, objectively from the standpoint

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 757.

<sup>98</sup> See, e.g., MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 141 (2003).

<sup>99</sup> See, e.g., *People v. G.M.*, 922 N.Y.S.2d 761, 762–63 (Crim. Ct. 2011).

<sup>100</sup> *Id.*

<sup>101</sup> See Tuerkheimer, *supra* note 19, at 972.

of the reasonable person, or under a mixed set of objective and subjective criteria.<sup>102</sup> Yet, regardless of how immediacy is formulated, the requirement is insensitive to the prospect that a coercive controller can alter a target's environment such that the target construes possible harm as omnipresent. The coercively controlled person's altered sense of immediacy can be the product of deliberate efforts by the coercer.<sup>103</sup> For example, a study by the Polaris Project found that fifteen percent of trafficking victims surveyed had their drug use exploited or induced by their traffickers, in some cases to the point of being recruited directly out of rehab centers.<sup>104</sup> A substance abuse disorder can alter a target's understanding of what is possible due to physically changing the areas of the brain responsible for judgment, decision-making, learning, memory, and behavior control.<sup>105</sup> Likewise, in *G.M.*, the court recounts that D.S. threatened to harm G.M.'s children in the Dominican Republic if she did not perform criminal activities in New York.<sup>106</sup> Such remote threats would almost certainly fail to satisfy the imminence requirement of common law duress<sup>107</sup> and would likely fail under the looser "person of reasonable firmness" standard of the Model Penal Code.<sup>108</sup> Yet D.S.'s systematic abuse and deprivation of G.M. might well have obviated the distinction between immediate and non-immediate reaches of D.S.'s power. The immediacy requirement, then, malfunctions when the target's perceptions of possibility distorted by the efforts of the coercer.

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<sup>102</sup> See, e.g., Bergelson, *supra* note 75, at 405 ("Duress . . . is largely based on an objective standard. Naturally, to be able to claim duress, the defendant has to feel threatened. But even this subjective element is severely curtailed by the limitation placed on the kind of threat that may be claimed as the cause of this feeling: the threat has to be of physical harm to a person."); Finkelstein, *supra* note 72, at 266 ("Both the academic literature on duress and the statutory codifications of the defense contain expressions of . . . [a] rationale . . . that is subjective or psychological: an individual who performs an action out of fear for his life may lack the ability to conform his behavior to the law.").

<sup>103</sup> POLARIS PROJECT, HUMAN TRAFFICKING AND THE OPIOID CRISIS 1 (2019), <https://polarisproject.org/wp-content/uploads/2019/10/Human-Trafficking-and-the-Opioid-Crisis.pdf> [<https://perma.cc/KCX7-FLL8>].

<sup>104</sup> *Id.*

<sup>105</sup> See, e.g., Joanna S. Fowler, Nora D. Volkow, Cheryl A. Kassed & Linda Chang, *Imaging the Addicted Human Brain*, 3 SCI. PRACT. PERSP. 4, 4–16 (2007).

<sup>106</sup> *People v. G.M.*, 922 N.Y.S.2d 761, 762 (Crim. Ct. 2011).

<sup>107</sup> See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 298 (6th ed. 2012) (detailing that the common law formulation of duress requires that "deadly force threatened must be imminent," which requires that "the threatened harm will occur immediately, unless the actor complies").

<sup>108</sup> See MODEL PENAL CODE § 2.09 explanatory note (AM. L. INST. 1985) ("[T]he defense [of duress] is not established simply by the fact that the defendant was coerced; he must have been coerced in circumstances under which a personal of reasonable firmness in his situation would likewise have been unable to resist").

Third, the necessity requirement is unjustified in coercive control contexts. The necessity requirement asks whether the target had options for evading the coercer's threatened harm other than engaging in criminally prohibited activity. However, the standard way of assessing the target's options implicitly involves a synchronic assessment of the target's options—that is, an assessment of the target's options at the time of the proposal in isolation from historical context and futurity. Yet coercive control implicates a diachronic impact of the coercer on the target.

Histories of interaction between the coercer and the target may distort the target's understanding of their options at present and into the future. In many such cases, a target perceives objectively viable options (e.g., leaving the abuser, seeking help from government service providers) as unavailable at a particular moment because of efforts by the coercer to influence the target's appraisal of those options.<sup>109</sup> Such distortions evince coercion. Yet, under the necessity requirement, they would disqualify the coercively controlled person from asserting a duress defense.

Thus, the canonical notion of duress is suitable to analyzing cases like *Toscano* but unsuitable to analyzing coercive control cases like *G.M.* The former realizes the triggering conditions of duress, while the latter do not. This asymmetry is troubling regardless of one's ultimate conclusion about the legal significance of coercive control. The coercion in *G.M.* seems at least as objectionable (and at least as strong a basis for a defense) as the coercion in *Toscano*. The difference in the legal status of these cases is an artifact of the triggering conditions of canonical duress. This asymmetry is especially objectionable where the deliberate, sustained efforts of the coercer make it the case that the triggering conditions of duress are not satisfied.

## B. HUMAN TRAFFICKING AFFIRMATIVE DEFENSES

Perhaps the difficulties raised by the asymmetrical treatment of cases like *Toscano* and *G.M.* can be resolved by applying a more fine-grained alternative to duress, such as the human trafficking affirmative defense recognized in many U.S. jurisdictions.<sup>110</sup> Human trafficking affirmative defenses typically relax the triggering conditions of duress and expand the offense restriction by broadening the range of offenses for which an affirmative defense is inapplicable.<sup>111</sup> Under the typical state human trafficking affirmative defense, the defendant bears at least the burden of

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<sup>109</sup> See Chacón, *supra* note 70, at 128.

<sup>110</sup> Meghan Hilborn, *How Oklahoma's Human Trafficking Victim Defense Is Poised to Be the Boldest Stand Against Human Trafficking in the Country*, 54 TULSA L. REV. 457, 463–64 (2018).

<sup>111</sup> *Id.* at 475–76.

production for establishing their status as a victim of human trafficking.<sup>112</sup> Once established, the defendant may plead an affirmative defense without establishing that the trafficker specifically threatened them regarding the commission of a specific crime, that this threat was processed as immediate, and that the only way for the defendant to avoid the trafficker's coercion was to commit the crime (each of which are prerequisites to asserting canonical duress).<sup>113</sup>

Most affirmative defenses for human trafficking are more tightly constrained than the duress defense. Recall that canonical duress is categorically precluded for those charged with homicide, although even this restriction is contested.<sup>114</sup> By contrast, most human trafficking affirmative defenses are inapplicable for a broader range of criminal offenses. A recent survey of state human trafficking affirmative defense statutes found that

[o]ut of the thirty-seven states that afford victims an affirmative defense, over seventy percent only allow a victim to raise the defense to a charge of prostitution or prostitution-related offenses. Comparatively, Colorado, Mississippi, and New Jersey only allow the affirmative defense to a charge of human trafficking, presumably protecting the 'bottom girl.' Only five states, around thirteen percent, lack a crime limitation in [their] affirmative defense[s].<sup>115</sup>

Several human trafficking affirmative defenses in U.S. jurisdictions also impose a nexus requirement—that is, an “element of the defense that would connect the victim’s alleged criminal act to the human trafficking.”<sup>116</sup> While the nexus requirement of duress requires that the target’s criminally prohibited action be the product of coercion experienced by the target as a response to the coercer’s threat, the nexus requirement in most human trafficking affirmative defenses allows for a looser connection between the coercive situation and criminally prohibited action.<sup>117</sup> For example,

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<sup>112</sup> See, e.g., *In re M.D.*, 181 Cal. Rptr. 3d 761, 767–68 (Ct. App. 2014) (finding that the juvenile court properly assigned the burden of proof on a minor charged with intent to commit prostitution to establish that she was a victim of human trafficking under California’s human trafficking affirmative defense statute); *State ex rel M.J.*, 160 So. 3d 1040, 1053 (La. Ct. App. 2015) (finding that the state had no burden to prove that defendant in delinquency proceedings was not a victim of sex trafficking under Louisiana law).

<sup>113</sup> See Hilborn, *supra* note 110, at 470.

<sup>114</sup> See, e.g., DRESSLER, *supra* note 107, at 287–88 (summarizing debates over whether duress should be a defense to murder).

<sup>115</sup> See Hilborn, *supra* note 110, at 476 (citations omitted).

<sup>116</sup> *Id.* at 471; see also *id.* at 476 (“Nearly half of the thirty-seven states with [human trafficking] affirmative defenses create a tight nexus between the victim’s conduct and the fact that the victim was trafficked by utilizing language ‘as a result of’ or ‘as a direct result of.’”) (citations omitted).

<sup>117</sup> *Id.* at 477.

Wyoming's human trafficking affirmative defense states that the criminal act for which the affirmative defense is sought must be committed "as a direct result of, or incident to, being a victim of human trafficking."<sup>118</sup>

Consider how the offense restriction and nexus requirement might operate in *G.M.* According to the opinion, D.S. coerced G.M. to perform commercial sex acts.<sup>119</sup> New York's *vacatur* statute allows human trafficking victims to vacate convictions for prostitution-related offenses—specifically prostitution and loitering for the purpose of engaging in a prostitution-related offense—if the charges were “the result of” a defendant’s “having been a victim of sex trafficking” under New York law.<sup>120</sup> G.M.’s trespassing charges presumably arose as part of engaging in commercial sex work, although the opinion does not explicitly say so. These charges would arguably satisfy both the offense restriction and the nexus requirement because they directly arose from D.S.’s coercion of G.M. to engage in sex work. Yet, as the court in *G.M.* noted, D.S. also forced G.M. to buy drugs for him “because D.S. feared getting arrested himself.”<sup>121</sup> It is not clear that these drug charges were the result of D.S.’s trafficking of G.M. To be sure, the *G.M.* opinion references such a connection based on a presumption in New York’s *vacatur* statute “that [a] defendant’s participation in [offenses other than commercial sex work] was a result of having been a victim of sex trafficking or trafficking in persons.”<sup>122</sup> Yet the prosecutors in *G.M.* contended that only G.M.’s prostitution-related crimes were directly connected to human trafficking.<sup>123</sup> Indeed, a prosecutor could argue that D.S. forced G.M. to participate in two separate schemes, one involving procuring drug money through sex work and the other involving acquiring drugs. However, because the second scheme existed independently of the first, it is plausible that G.M.’s acquisition of drugs did not satisfy the nexus requirement. Nevertheless, G.M.’s offenses do not satisfy the statutory offense restriction. Therefore, G.M. would fail to

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<sup>118</sup> *Id.* at 476; *see also* WIS. STAT. § 939.46(1m) (LEXIS through Act 188 of 2021–22 Legis. Sess.) (“A victim [of human trafficking] has an affirmative defense for any offense committed as a direct result of the violation of [Wisconsin’s criminal prohibition on human trafficking].”).

<sup>119</sup> *People v. G.M.*, 922 N.Y.S.2d 761, 765 (Crim. Ct. 2011) (“[T]he defendant has provided a very compelling narrative of the circumstances surrounding all of her arrests, demonstrating that they were the product of years of brutal physical, psychological and sexual violence by her husband, which resulted in having been trafficked by him.”).

<sup>120</sup> *See* N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney, Westlaw through L.2021, Ch. 833).

<sup>121</sup> 922 N.Y.S.2d at 762–63.

<sup>122</sup> *Id.* at 765 (citing N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2010)).

<sup>123</sup> *Id.* at 764 (“The People are exercising discretion in this particular case, the People are not looking to expand the [vacatur] statute. The defendant was convicted of four crimes and two violations, only two of the crimes are covered by [the vacatur] statute.”).

satisfy the then-applicable version of New York's human trafficking affirmative defense regarding at least some (and perhaps all) of her charged offenses.

Among U.S. states, only Oklahoma's human trafficking statute arguably imposes neither an offense restriction nor a nexus requirement.<sup>124</sup> Oklahoma's statute provides "an affirmative defense to prosecution for a criminal offense that, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking."<sup>125</sup> The statute's text also contains no offense restriction, so it applies to prosecutions for any criminal offense. Without a nexus requirement, once the defendant's status as a victim of human trafficking has been established, there is no further inquiry into whether any crime committed was the "direct result" of human trafficking. Oklahoma's statute also creates distinct procedural rights for victims of human trafficking, including that they are "[n]ot to be jailed, fined, or otherwise penalized due to having been trafficked,"<sup>126</sup> that they must receive "prompt medical care, mental health care, food, and other assistance, as necessary,"<sup>127</sup> and that they may bring a civil action against anyone who engaged in the human trafficking.<sup>128</sup>

Under Oklahoma's affirmative defense, G.M. would have been entitled to a defense against criminal liability for any crime that occurred "during the time that" she was a victim of human trafficking,<sup>129</sup> rather than merely those criminal charges related to sex work. Upon establishing that G.M. had been forced into engaging in commercial sex, she would have been classified as a

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<sup>124</sup> See Hilborn, *supra* note 111, at 475–76 ("Based on a survey of states' human-trafficking statutes, Oklahoma's is the most expansive in the nation [because] Oklahoma is the only state that lacks both a crime limitation and a nexus requirement.") (emphasis omitted). To be sure, this interpretation of Oklahoma's human trafficking affirmative defense described here has not been definitively recognized by any Oklahoma court, although the legal parameters of the affirmative defense have been incorporated into Oklahoma's model criminal jury instructions. See OKLA. CT. OF CRIM. APP., OKLAHOMA UNIFORM JURY INSTRUCTIONS CRIMINAL § 8-61 (2d ed. 2017) ("The defendant has raised the defense that he/she was a victim of human trafficking during the time of the alleged offense. It is the burden of the State to prove beyond a reasonable doubt that the defendant was not a victim of human trafficking during the time of the alleged offense. If you find that the state has failed to satisfy its burden of proof beyond a reasonable doubt, then the defendant must be found not guilty."). That said, there are no reported cases of defendants applying or interpreting this statute. Therefore, despite the plain implications of Oklahoma's statute, it is possible that Oklahoma courts do not actually adopt the interpretation of the Oklahoma human trafficking affirmative defense offered here.

<sup>125</sup> OKLA. STAT. tit. 21, § 748(D) (Westlaw through 1st Reg. Sess. of 58th Leg. (2021)).

<sup>126</sup> *Id.* § 748.2(A)(3).

<sup>127</sup> *Id.* § 748.2(A)(4).

<sup>128</sup> *Id.* § 748.2(B).

<sup>129</sup> *Id.* § 748(D); OKLA. CT. OF CRIM. APP., *supra* note 124.

“victim of human trafficking”<sup>130</sup> and would have been entitled to a suite of procedural rights not afforded to other criminal defendants.<sup>131</sup>

Oklahoma’s human trafficking affirmative defense is the best existing legal recognition of the scope and nature of human control and its relationship to a victim’s criminal behavior. Other states could and should benefit from this example and expand their own human trafficking statutes similarly. Nonetheless, human trafficking statutes are, by definition, context-specific. The criminal law should, ideally, embody a consistent account of coercion as a defense to criminal liability.

The duress defense misfires in coercive control contexts. Coercive control scenarios do not realize the triggering conditions of canonical duress. Yet many coercive control cases involve at least as objectionable forms of coercion as do cases in which duress is available. The triggering conditions of duress cannot easily be modified without raising questions about the notion of coercion that underlies the duress defense. Human trafficking affirmative defenses more plausibly apply to coercive control contexts. Such defenses relax some of the triggering conditions of canonical duress while tightening others. Yet defending the nexus requirements and offense restrictions in most human trafficking statutes also implicates fundamental questions about coercion. Therefore, justifying an affirmative defense for those subject to coercive control requires examining and perhaps rethinking the basic understanding of coercion that underlies coercion-based criminal defenses. The next two Parts undertake these tasks.

### III. COERCION-BASED DEFENSES AND THE WRONGFUL PRESSURE APPROACH TO COERCION

This Part first describes the wrongful pressure approach to coercion, the predominant way of understanding coercion in U.S. law, then identifies several problems with the wrongful pressure approach that motivate the alternative account discussed in Part IV.

#### A. THE WRONGFUL PRESSURE APPROACH TO COERCION

Aside from duress, coercion arises in a variety of legal domains. For example, coercion might vitiate consent in a contract negotiation.<sup>132</sup> Federal

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<sup>130</sup> § 748(D).

<sup>131</sup> In particular, the right to be “housed in an appropriate shelter as soon as practicable” OKLA. STAT. tit. 21, § 748.2(A)(1) (Westlaw through 1st Reg. Sess. of 58th Leg. (2021)) and the right “[N]ot to be jailed, fined, or otherwise penalized.” § 748.2(A)(3).

<sup>132</sup> See E. Allan Farnsworth, *Coercion in Contract Law*, 5 U. ARK. LITTLE ROCK L. REV. 329, 329 (1982).

labor laws protect workers from the coercive practices of both employers and labor unions.<sup>133</sup> The Fifth Amendment precludes a criminal defendant's coerced confessions from being introduced against them at trial.<sup>134</sup> Debates about coercion also inform many arguments for legal reform. For example, some critics take prosecutorial exploitation of the plea-bargaining process to constitute illegitimate coercion.<sup>135</sup>

In substantive criminal law, coercion is sometimes an element of an offense. For such offenses, establishing the defendant's criminal liability requires the government to prove the defendant coerced a victim in some specific, impermissible way.<sup>136</sup> Examples of such coercion-based offenses include kidnapping,<sup>137</sup> blackmail,<sup>138</sup> extortion,<sup>139</sup> and

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<sup>133</sup> See Michael M. Oswalt, *The Content of Coercion*, 52 U.C. DAVIS L. REV. 1592, 1598–612 (2019).

<sup>134</sup> See *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961).

<sup>135</sup> See, e.g., Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1364–74 (2016); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 13 (1978).

<sup>136</sup> See, e.g., OR. REV. STAT. § 163.275 (2017); N.Y. PENAL LAW § 135.60 (McKinney, Westlaw through L.2021, Ch. 440).

<sup>137</sup> See, e.g., Jason R. Steffen, *Criminalization: A Kantian View*, 12 WASH. U. JURIS. REV. 27, 62 (2019) (contending that “[k]idnapping or otherwise coercing people into actions against their will violates the freedom of movement that is . . . a condition of justice” under Kant’s political philosophy).

<sup>138</sup> The crime of blackmail is popularly understood as the “attempt to trade silence for money.” See Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1817 n.1 (1993); Peter Westen, *Why the Paradox of Blackmail Is So Hard to Resolve*, 9 OHIO ST. J. CRIM. L. 585, 587–88 (2012) (noting that U.S. blackmail statutes differ on “(1) whether the offense is confined to demands for *property*, or whether it also extends to demands that a victim engage in or refrain from *conduct*; (2) whether the offense is confined to threats to disclose incriminating or embarrassing *information*, or whether it also extends to threats to perform other lawful but unwelcome *acts*; (3) whether it contains no exceptions or whether it permits actors to commit the offense under specified circumstances; and (4) whether the offense is denominated ‘blackmail’ or whether (as happens more frequently) it figures as a subset of more general offenses of ‘extortion,’ criminal ‘threats,’ ‘theft,’ ‘larceny,’ or ‘coercion’”) (citations omitted).

<sup>139</sup> The crime of extortion arises where the offender uses the threat of future violence or some other unlawful act to extract something from a victim. See Paul H. Robinson, Michael T. Cahill & Daniel M. Bartels, *Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory*, 89 TEX. L. REV. 291, 293 (2011). At common law, extortion typically involved a demand of property, but in some jurisdictions, it now encompasses demands that the victim perform an act or refrain from performing an act he or she has the right to do. *Id.* at 311–12. Some jurisdictions, and the Model Penal Code, treat this latter category of act/omission-motivated extortion as the separate crime of “coercion.” See, e.g., OR. REV. STAT. § 163.275 (2017); N.Y. PENAL LAW § 135.60 (McKinney, Westlaw through L.2021, Ch. 440). Furthermore, some states treat blackmail

human trafficking.<sup>140</sup>

It is natural to suppose that the concept of coercion varies across legal domains. However, there is significant consensus among commentators about the basic way that coercion operates. Call this consensus view the wrongful pressure model of coercion.<sup>141</sup>

Consider the crimes of extortion and blackmail. In extortion, the extortionist proposes to bring about consequences for the target that are unlawful unless the target acts in a specific way.<sup>142</sup> Blackmail typically involves a blackmailer proposing to bring about consequences for the target that are otherwise legal but nevertheless undesired by the target unless the target acts in a specific way.<sup>143</sup> The paradigmatic extortionist says “your money or your life,” while the paradigmatic blackmailer says “wouldn’t it be

as a form of extortion, with the blackmailing conduct constituting the unlawful act element. See Westen, *supra* note 138, at 590 (citing sources).

<sup>140</sup> Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 416 (2011) (articulating legal notion of “situational coercion” that arises in human trafficking contexts under which trafficked workers “comply with abusive working conditions due to circumstances that render them vulnerable to exploitation, such as lack of legal immigration status and poverty”).

<sup>141</sup> See, e.g., Berman, *Blackmail*, *supra* note 28, at 66 (arguing that blackmail is “a wrongful interference with the victim’s freedom because it puts wrongful pressure on his liberty to do otherwise,” an “understanding of coercion that holds true in any normative system, or across normative domains”); Berman, *Normative Functions*, *supra* note 28, at 53 (noting “broad agreement regarding the nature” of wrongful coercion that “conduct that is designed to induce some person or entity, B, to engage in an action x, and that operates by exerting wrongful pressure on B’s freedom to choose otherwise”); HARRY FRANKFURT, *THE IMPORTANCE OF WHAT WE CARE ABOUT* 41 (1988) (“A coercive threat arouses in its victim a desire—*i.e.*, to avoid the penalty—so powerful that it will move him to perform the required action regardless of whether he wants to perform it or considers that it would be reasonable for him to do so.”); Vinit Haksar, *Coercive Proposals: Rawls and Gandhi*, 4 POL. THEORY 65, 71 (1976) (contending that the moral wrong of coercion is explained by wrongfulness of a “readiness to violate our moral duty” and “either putting unfair or immoral pressure on the recipient or the taking of unfair advantage of the recipient’s vulnerability”); ALAN WERTHEIMER, *COERCION* 173 (1987) (contending that deciding legal responsibility in duress cases requires determining “whether the degree or type of pressure [on the defendant] is the sort that should negate the agent’s responsibility”); Craig L. Carr, *Duress and Criminal Responsibility*, 10 L. & PHIL. 161, 166 (1991) (“In general, to act under duress is to decide upon some course of action while under unwanted and unwarranted pressure.”); Westen & Mangifacio, *supra* note 74, at 847 (coercive threats “bring pressure to bear upon bystanders” and “dictate to bystanders what their aggressors exact as exclusive avenues of escape”).

<sup>142</sup> See Robinson, Cahill & Bartels, *supra* note 140, at 293 (noting that extortion “involves conditional threats to engage in criminal acts”).

<sup>143</sup> See, e.g., Peter Westen, *Why the Paradox of Blackmail is So Hard to Resolve*, 9 OHIO ST. J. CRIM. L. 585, 585–86 (2012); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 671 (1984).

a shame if your secret was revealed?” The coerciveness of the extortionate proposal is at the core of why extortion is morally wrong and appropriately criminalized.<sup>144</sup> Likewise, some contend that the coerciveness of the blackmailer’s proposal is central to explaining why the blackmailer’s actions are morally wrong and appropriately criminalized.<sup>145</sup>

How, exactly, does the extortionist or the blackmailer coerce their target? Most contemporary commentators adopt a suite of presuppositions about how coercion operates derived from the work of the philosophers Robert Nozick and Alan Wertheimer.<sup>146</sup> On this approach, coercion operates “principally as a way in which one agent puts psychological pressure on another to act or not act in some particular way by means of threats that alter the costs and benefits of acting.”<sup>147</sup> The primary theoretical task is to “develop tests to determine which sorts or degrees of pressure will count as coercive and what follows from such a judgment.”<sup>148</sup> The coercer “communicates implicitly or explicitly a conditional proposal, typically involving a threat, against [the target], accompanied by some demand regarding [the target’s] future actions.”<sup>149</sup> The coercer’s proposal is salient to the extent that it is “psychologically potent” for the target—that is, the target regards the coercer’s proposal “as credible, and regards the outcome portended as sufficiently undesirable that action to avoid the outcome is warranted.”<sup>150</sup> In issuing the proposal, the coercer “negatively alters” the “costs and benefits of actions” that would otherwise be open to the target,

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<sup>144</sup> For example, the Hobbs Act criminalizes “obstruct[ing], delay[ing], or affect[ing] commerce” through “extortion,” 18 U.S.C. § 1951(a), and defines “extortion” as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” *Id.* at § 1951(b)(2).

<sup>145</sup> See, e.g., Mitchell Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998) (defending coercion-based account of criminalizing blackmail); Stephen Galoob, *Coercion, Fraud, and What Is Wrong With Blackmail*, 22 LEGAL THEORY 22 (2016) (same). Coercion-based theories of blackmail are controverted. See, e.g., Russell Christopher, *Meta-Blackmail*, 94 GEO. L.J. 739, 769 (2006) (contending that coercion-based accounts of blackmail “have failed to (i) find an individual component which is, or should be, immoral or criminal, and (ii) explicate how independently permissible components have a synergistic or combinatorial effect of impermissibility”); Stuart Green, *Theft by Coercion: Extortion, Blackmail, and Hard Bargaining*, 44 WASHBURN L.J. 553, 580 (2005) (defending an approach under which extortion and blackmail are considered species of theft, rather than criminalizable solely in terms of coercion).

<sup>146</sup> See, e.g., Mitchell Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 45–47 (2002).

<sup>147</sup> Anderson, *supra* note 30, at 3.

<sup>148</sup> *Id.* (citations omitted).

<sup>149</sup> *Id.* at 4.

<sup>150</sup> *Id.*

thereby making some actions “less desirable as choices.”<sup>151</sup> Professor Anderson calls this suite of propositions the *pressure* approach to coercion<sup>152</sup> and contends that “arguably all of the most prominent philosophical analysts in the last 40 years” adopt a pressure-based model of how coercion works.<sup>153</sup>

The pressure approach can be refined in an important way based on the disjunction between so-called “moralized” and “non-moralized” views of coercion. This debate concerns which kinds of communications count as coercive. On a moralized view, a proposal is coercive only if the conduct or consequence proposed would violate a normative expectations—for example, by violating the target’s rights<sup>154</sup> or making the target worse off than they ought to be.<sup>155</sup> On a non-moralized view, by contrast, a proposal can be coercive if the proposed conduct or consequence would merely deviate from normality—that is, what would have happened to the target in the absence of the proposal.<sup>156</sup> The main difference between moralized and non-moralized views is whether normative terms must be used to specify the baseline for determining whether the proposal applies sufficient pressure to the target to render it coercive. Although theorists differ about whether coercion must be moralized or may be non-moralized,<sup>157</sup> a moralized notion

<sup>151</sup> *Id.*

<sup>152</sup> Anderson, *supra* note 30, at 1; see also William A. Edmundson, *Coercion*, in ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 451, 461 (Andrei Marmor ed., 2011) (“A ‘pressure theory’ holds that coercion is at heart a matter of psychological pressure, pure and simple, and that any action that creates or exploits such pressure is pro tanto wrongful.”).

<sup>153</sup> Anderson, *supra* note 30, at 5 n.13 (citations omitted).

<sup>154</sup> See, e.g., WERTHEIMER, *supra* note 141, at 217 (“Generally speaking, the moral baseline approach rests on a theory of rights. To set B’s moral baseline, we need to know what A is morally required to do for B (or not to do to B).”).

<sup>155</sup> See, e.g., Berman, *Normative Functions*, *supra* note 28, at 86 (defining a proposal as wrongfully coercive if “it involves a conditional threat . . . to violate a duty owed to the addressee”).

<sup>156</sup> See, e.g., Peter Westen, *Freedom and Coercion—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 579 (“[F]or the purposes of coercion, the relevant time period for measuring the recipient’s condition is not the instant of the proposal, or a span of time before the proposal, but the period after the proposal. The question is not whether the proposal conditionally promises to leave a recipient worse off than he *is*, or worse off than he *has been*, but whether it conditionally promises to leave him worse off than he otherwise *will be*.”) (citations omitted); Ekow Yankah, *The Force of Law*, 42 U. RICH. L. REV. 1195, 1223–24 (2008) (“[R]egardless of whether the pressure applied is wrongful, pressure that restricts one’s ability to reasonably choose an option is coercive.”).

<sup>157</sup> See Anderson, *supra* note 30, at 17 (identifying advocates of moralized approach as including Alan Wertheimer, Mitchell Berman, Joseph Raz, Cheney Ryan, and Andrew Hetherington and advocates of non-moralized approach as including Harry Frankfurt, Michael Gorr, Joel Feinberg, and David Zimmerman).

of coercion predominates discussions in criminal law.<sup>158</sup> Under such moralized views, the target is only subjected to coercion if the coercer's proposal generated sufficient pressure on the target and the pressure generated by the coercer's proposal violated the target's normative expectations in some way. Therefore, the model of coercion under consideration here is most appropriately called a "wrongful pressure" approach in order to capture the widespread assumption that an essentially moralized notion of coercion operates in criminal law.

Suppose the Malibu sheriff says to Jeffrey Lebowski, "Stay out of Malibu, Lebowski! Stay out of Malibu, deadbeat!"<sup>159</sup> Implicit in this statement is a proposal: if you enter Malibu, then you will be subject to official violence; if you do not enter Malibu, then you will not be subject to official violence. On the wrongful pressure approach, the sheriff's proposal would be coercive only if (a) the sheriff's proposal causes Lebowski to experience pressure to stay out of Malibu; and (b) actually staying out of Malibu would make Lebowski worse off (for example, by violating his right to travel to Malibu). If the first condition is not met, then Lebowski is not coerced regardless of whether the sheriff meant for Lebowski to experience pressure.<sup>160</sup> Therefore, the wrongful pressure approach construes coercion as what philosophers call a "success" term.<sup>161</sup> The target is coerced to the extent that they "alter [their] behavior from the course it was on prior to receiving the proposal" and not coerced if there is no alteration in behavior from the baseline as a result of the coercer's proposal.<sup>162</sup>

If the second condition is not met (for example, if Lebowski were subject to an expulsion order at the time of his exchange with the officer), then the condition referenced in the officer's proposal would not be wrongful. To be sure, the officer's proposal might generate pressure on Lebowski to stay out of town, but on the wrongful pressure model it would not constitute coercion because staying out of Malibu would not worsen Lebowski's

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<sup>158</sup> See, e.g., Stephen Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1613 (1994) (noting that "moralized approach[es]" to coercion "dominate discussion of the problem" of how coercion bears on criminal responsibility).

<sup>159</sup> This example is drawn from Stephen J. White, *On the Moral Objection to Coercion*, 45 PHIL. & PUB. AFFS. 199, 199 (2017). The reference is to *THE BIG LEBOWSKI* (Working Title Films 1998) if you're not into the whole brevity thing.

<sup>160</sup> On the lay distinction between coerciveness and coercion, see, for example, Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39, 52 (2000) (noting that coercion involves a threat that "succeeds in forcing the [target] to comply with whatever is demanded," while the term "'coercive' [is used] more liberally than this" to describe a threat that is "intended to force someone to do something, whether or not it succeeds").

<sup>161</sup> *Id.* at 49–52.

<sup>162</sup> See Anderson, *supra* note 30, at 4.

position by comparison to a normative baseline. Thus, the wrongful pressure approach provides a straightforward explanation of the difference between threats and offers. When the coercer threatens the target, the coercer's proposal generates psychological pressure on the target to act in ways that would worsen the target's position regardless of how the target responds to the proposition. This pressure violates the target's normative expectations. In the case of an offer, by contrast, the proposal would not set back the target's interest, and so does not violate the target's normative expectations.<sup>163</sup>

The wrongful pressure model has been used to explain coercion-based offenses such as blackmail and extortion, as well as the legal significance of coercion in a variety of other contexts.<sup>164</sup> Likewise, the wrongful pressure model is implicit in many statutory definitions of coercion, including federal human trafficking statutes.<sup>165</sup> For example, the Trafficking Victims Protection Act (TVPA) criminalizes the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purposes of a commercial sex act that is accomplished via "force, fraud, or coercion."<sup>166</sup> The TVPA in turn defines "coercion" as including:

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;  
or

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<sup>163</sup> See, e.g., WERTHEIMER, *supra* note 141, at 204 ("A threatens B by proposing to make B worse off relative to some baseline; A makes an offer to B by proposing to make B better off relative to some baseline.").

<sup>164</sup> For example, Kimberly Ferzan utilizes the model to explain how one person's exerting pressure on another might undermine the validity of the latter's consent to sexual relations. Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951, 974 (2018) (arguing that determining the amount of coercion sufficient to undermine consent to sexual relations "is about the kind of threats that are sufficiently restraining and place sufficient pressure that we believe that consent no longer exists," which is "a normative judgment about where the person of ordinary firmness lies"). Steven Smith uses the wrongful pressure model to explain the voidability of contracts entered into under duress. Stephen A. Smith, *Contracting Under Pressure: A Theory of Duress*, 56 CAMBRIDGE L.J. 343, 345–46 (1997) (defending "wrongful pressure" account of contractual duress on which "the concern . . . is with wrongdoing [that] wrongly exert[s] pressure").

<sup>165</sup> See also Christian Lee González Rivera, *The Plight of "Unreasonable" Trafficking Victims: Replacing the Trafficking Victims Protection Act's Reasonable Person Standard for Coercion with a Genuine Belief Standard*, 40 WOMEN'S RTS. L. REP. 272, 373 (2019) (contending that "operative legal framework to evaluate whether the victim was coerced" under the Trafficking Victims Protection Act "resorts to amoralized, objective standard") (emphasis omitted).

<sup>166</sup> 22 U.S.C. § 7102 (2021).

(C) the abuse or threatened abuse of the legal process.<sup>167</sup>

The Code defines “serious harm” as:

[A]ny harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.<sup>168</sup>

Each of the elements of the wrongful pressure approach is realized in the TVPA’s definition of coercion. The TVPA establishes a normative baseline against which to measure coercion—namely, the target’s rights against being harmed, restrained, or subject to abusive legal process. A target’s proposal counts as coercive only if satisfying one of the conditions of the proposal would set back the target in relation to these baselines.<sup>169</sup> On the other hand, a proposal is not coercive if satisfying the target would not set back the target’s interests relative to these baselines. Thus, “engage in sex work or you will be harmed” might constitute human trafficking under a coercion theory, while “engage in sex work and you will be compensated” cannot (at least *prima facie*) constitute coercion. The target’s experience of pressure must be reasonable and it must arise from the proposal itself rather than from some other basis (such as the history of encounter between the coercer and the target or background social relationships, though those factors could be relevant to the “circumstances” under which the target receives the threat). Therefore, a coercer does not engage in coercion under the TVPA (and is therefore not liable for human trafficking) in relation to a target if coercer’s proposal plays no role in target’s engaging in sex work, if satisfaction of coercer’s proposal would not endanger the specific interests described in the statute, or if any pressure to engage in sex work that target experiences is not a direct result of coercer’s proposal.

In addition to explaining how coercion works as an element of a criminal offense, the wrongful pressure model can also explain the availability of the duress defense in cases like *Toscano*. The bodily harm to Toscano referenced in William Leonardo’s proposal is plainly wrongful. Therefore, the main legal question at issue was whether William’s proposal to Toscano generated a sufficient amount of pressure on Toscano to render Toscano eligible for a duress defense. Each of the triggering conditions of duress is relevant to answering this question. Toscano must point to a specific

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<sup>167</sup> 22 U.S.C. § 7102 (2021).

<sup>168</sup> 18 U.S.C. § 1589 (2008).

<sup>169</sup> That said, given the broad definition of harm under 18 U.S.C. § 1589 almost any conceivable form of interest setback could satisfy this criterion.

threat by William; non-threats (such as William's generalized reputation for violence) cannot constitute coercion and therefore cannot ground a duress defense. Toscano must establish a baseline expectation that was violated by William's proposal—in this case, his rights not to fill out fraudulent reports (i.e., his interest in complying with the law) and not to be harmed or have his spouse harmed. Toscano must also establish that William's proposal was efficacious in bringing about a specific psychological state in Toscano and that this reaction was based on relatively sound reasoning by Toscano. Thus, on the wrongful pressure model, the triggering conditions of duress explain how a proposal might count as a token of coercion. If these triggering conditions are satisfied, then the target might be coerced and therefore eligible for a duress defense. If they are not satisfied (perhaps because the target does not experience the proposal as generating pressure to act in a specific way, or carrying out the proposal would not violate the target's normative expectations), then the target is not coerced and therefore is ineligible for a duress defense.

#### B. PROBLEMS WITH THE WRONGFUL PRESSURE APPROACH TO COERCION

Despite its ubiquity, there are several significant problems with the wrongful pressure model as an account of coercion generally and as applied to coercive control contexts in particular. First, the wrongful pressure model is either inconsistent or unprincipled in its treatment of background power relations between the coercer and the target. The wrongful pressure model allows background considerations to bear on some inquiries, for example whether the coercer's proposal counts as a threat in the first place<sup>170</sup> and whether a particular threat is credible.<sup>171</sup> Yet the wrongful pressure approach also holds that coercion can arise *only* from the coercer's threat;<sup>172</sup>

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<sup>170</sup> See *United States v. Kozminski*, 487 U.S. 931, 948 (1988) (noting the possibility that “threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude”); *Wonnum v. State*, 942 A.2d 569, 574 (Del. 2007) (“[A] ‘threat’ can also mean an implied threat the genuineness of which can be reinforced by earlier conduct.”).

<sup>171</sup> As Professor Anderson notes, the wrongful pressure model allows that the credibility of a threat depends on “a set of dynamic, relational facts relevant to judging the power differential between the threatener and threatened, and thus will include considerations of the threatened party's own powers, desires and intentions.” See Anderson, *supra* note 30, at 19.

<sup>172</sup> See, e.g., Kim, *supra* note 140, at 429–30, 434–36 (describing how “no reasonable alternative” framework, which requires that a coercer make specific threats that are “wrongfully intended to make the coercee worse off if the coercer's demand is denied” thus “leav[ing] a coercee with no reasonable alternative but to comply with the wishes

background considerations are insufficient to establish coercion and irrelevant in the absence of an individuated threat.<sup>173</sup> This restriction misfires in coercive control contexts where a pervasive pattern of coercion can obviate the need for a coercer to threaten a target. Indeed, from the perspective of a coercer, one benefit of creating a pervasively coercive relationship is that the target will internalize the coercer's will such that the coercer need not specifically threaten them in order to control them.

To illustrate this point, consider two variations on the G.M. case:

**GM1:** D.S. instantiates a pattern of systematic degradation and abuse through which G.M. understands reliably that D.S. wishes G.M. to engage in sex work, to criminally trespass, and to acquire controlled dangerous substances whenever he desires drugs. One day, D.S. says to no one in particular, "It sure would be nice if I had some drugs this evening." Solely as a result of her understanding of D.S.'s desire for drugs, G.M. engages in sex work, criminal trespassing, and the acquisition of controlled dangerous substances.

**GM2:** D.S. instantiates the same pattern of deprivation and abuse as in GM1 and also issues a proposal to G.M. that [either you engage sex work, criminally trespass, and acquire controlled dangerous substances or else I will hurt your children]. Based solely on her understanding of D.S.'s proposal, G.M. engages in sex work, criminal trespassing, and the acquisition of controlled dangerous substances.

GM2 involves a threat while GM1 does not. Yet GM1 involves at least as much coercion as GM2. However, on the wrongful pressure approach, the coercer in GM2 would face liability for establishing episodic control over G.M. via threatening while the coercer in GM1 would escape liability for accomplishing exactly the same level of control without resorting to threatening. This arrangement is implausible because the threat in GM2 is not the sole (or even most meaningful) source of coercion. Likewise, G.M. could likely successfully assert a duress defense in GM2 but likely not in GM1. This result also seems objectionable. On the wrongful pressure approach, background considerations related to the D.S.-G.M. relationship bear on some parts of the inquiry (for example, how a reasonable person in

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of the coercer," was adopted as the legal test for involuntary servitude). Professor Kim proposes an alternative, "situational coercion" framework under which the "nature of [the] power relationship and whether it entails the dependence of the weaker party on the stronger party" is sufficient to ground a claim of coercion. *Id.* at 461–62.

<sup>173</sup> *Id.*

G.M.'s position might have interpreted D.S.'s musings), but not on others (e.g., whether G.M. was subjected to sufficient coercion in GM1). This inconsistency is unjustified in coercive control contexts where background conditions in a relationship obviate the need for specific threats. The wrongful pressure view, then, attributes inconsistent and inadequate significance to background considerations for determining whether coercion exists.

Second, the wrongful pressure approach fails to capture important features of what makes coercion objectionable and under what conditions being subject to coercion should provide someone with a criminal defense. The wrongful pressure approach construes coercion in terms of pressure. If a proposal exerts pressure on the target, then it may be coercive. If it exerts no such pressure, then it is not coercive. Yet someone can be coerced without experiencing pressure. In coercive control contexts, for example, the target might not experience pressure from the coercer's proposal. Likewise, the connection between the existence of coercion and an impacted action can be more oblique as pervasive coercion blurs the distinction between what the coercer wants and what the target wants.<sup>174</sup> The implication that there is no coercion if the coercer's proposal does not prompt the target to experience pressure is especially objectionable when the target's lack of pressure is itself attributable to efforts by the coercer.

To illustrate this point, consider two more hypothetical variations on G.M.'s case.

**GM3:** One day, D.S. says to no one in particular, "It sure would be nice if I had some drugs this evening." As a result of a pattern of systematic degradation and abuse by D.S., G.M. experiences pressure to engage in sex work, criminally trespass, and acquire controlled dangerous substances upon hearing D.S.'s statement and, as a result of this pressure, engages in a pattern of sex work, criminally trespassing, and acquiring controlled dangerous substances.

**GM4:** One day, D.S. says to no one in particular, "It sure would be nice if I had some drugs this evening." As a result of a pattern of systematic degradation and abuse by D.S., G.M. incorporates D.S.'s goals into her own deliberative set upon hearing D.S.'s statement. G.M. understands that engaging in a pattern of sex work, criminally trespassing, and acquiring controlled dangerous substances is the best way to realize the

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<sup>174</sup> See Kim, *supra* note 140, at 465–67.

goal of obtaining drugs for D.S. that evening and, solely as a result of this understanding, engages in these criminally prohibited activities.

GM4 involves at least the same objectionably coercive features as GM3. Indeed, the alienation of the target in GM4 arguably reflects a *greater* degree of coercion than in GM3. Yet, on the wrongful pressure model, only GM3 could count as an instance of coercion since only in that case is D.S.'s desire experienced by G.M. as an "alien" will or imposition.<sup>175</sup> If both GM3 and GM4 involve at least the same objectionably coercive features, then a target can be coerced even though they do not experience pressure.

The explanatory inadequacy here arises from defining coercion in terms of pressure. Coercion involves exercises of power. Pressure is often, but not always, an indication of an objectionable power relationship. Put differently, the coercer's control over the target (reflected in the coercer's ability to generate alterations to the target's course of action "at will" and the coercer's "willingness to do so")<sup>176</sup> is both the most objectionable feature of coercive relationships and the primary basis for providing the target with an affirmative defense to criminal liability. The pressure experienced by the target is sometimes a lagging or imperfect indicator of the coercer's exercise of power. If power and pressure go together, then analyzing coercion as a matter of the target's experience of pressure seems sensible as a proxy. However, where power and pressure come apart, it is important to be precise about what matters. Coercion is just as objectionable (and just as strong a basis for a defense) if the coercer's control over the target is effectuated without the target's experiencing pressure.

Third, the wrongful pressure model appraises coercion in connection with a baseline. A proposal regarding engaging in a specific activity is coercive if the target's engaging in that activity would set back their interests relative to a baseline. Likewise, a proposal is not coercive if the target's engaging in that activity would leave the target at least as well in relation to the baseline.<sup>177</sup> The latter are offers rather than threats. Yet it is possible for

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<sup>175</sup> See, e.g., PHILIP PETTIT, *Republican Freedom: Three Axioms, Four Theorems*, in *REPUBLICANISM AND POLITICAL THEORY* 102, 102 (Cecile Laborde & John Maynor eds., 2008) (articulating republican conception of freedom as non-domination that defines "liberty as the absence of alien or alienating control on the part of other persons").

<sup>176</sup> Anderson, *supra* note 30, at 22.

<sup>177</sup> *Id.* at 5–6; see also Scott Altman, *Divorcing Threats and Offers*, 15 L. & PHIL. 209, 211 (1996) (proposing "multiple baselines" approach to coercion that utilizes both moralized and non-moralized baselines); WERTHEIMER, *supra* note 141, at 212 (defending essentially moralized notion of baselines); Michael Gorr, *Toward a Theory of Coercion*, 16 CAN. J. PHIL. 383, 398–99 (1986) (positing a theory of coercive baselines under which the target's preferences are a "controlling factor in *all* cases," not merely in cases where

A to coerce B even when it is impossible to establish a baseline against which to assess A's proposal. The invocation of a baseline assumes that coercion is a synchronic or transactional phenomenon,<sup>178</sup> with the coerciveness of an imposition appraised against a non-coercive comparator. This assumption is unwarranted where coercion is better understood as a diachronic phenomenon—that is, where coercion is more temporally extended and necessarily interacts with past and future events.

For example, the wrongful pressure model misfires where the remoteness or unintelligibility of a non-coercive baseline precludes or distorts comparisons. To illustrate, consider two further hypothetical variations on G.M.'s case:

**GM5:** The facts of G.M.'s actual case applies. However, had G.M. stayed in the Dominican Republic and not returned to the United States with D.S., G.M. would *not* have been subject to comparable pressure to engage in sex work, criminally trespass, and acquire controlled dangerous substances as she experienced from D.S. in the actual case.

**GM6:** The facts of G.M.'s actual case apply. However, had G.M. stayed in the Dominican Republic and not returned to the United States with D.S., G.M. would have been subject to comparable pressure, from some other party, to engage in sex work, criminally trespass, and acquire controlled dangerous substances as she experienced from D.S. in the actual case.

GM6 involves at least as much coercion as GM5. Imagining a world in which G.M. had not been coerced by D.S. is irrelevant to concluding that D.S. coerced G.M. However, the wrongful pressure model reaches the opposite conclusion because it bases the question of whether G.M. was coerced by D.S. largely on considerations related to how G.M.'s life would have gone in alternative scenarios (such as a world in which G.M. had never met D.S. or one in which he had not abused and deprived her). On a straightforward interpretation of the wrongful pressure model, only GM5 could count as an instance of coercion because only in this scenario would D.S.'s threats set

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moral and normal expectations diverge); David Zimmerman, *Taking Liberties: The Perils of "Moralizing" Freedom and Coercion in Social Theory and Practice*, 28 SOC. THEORY & PRAC. 577, 577 (2002) (arguing that moralization of baselines is "a bad practice in any social or political morality that purports to take liberty and coercion as normatively basic, because it renders these features of social and political institutions and practices strictly derivative").

<sup>178</sup> See Tuerkheimer, *supra* note 19, at 972.

back G.M.'s interests compared to what would have happened otherwise or what was happening before. Put differently, the wrongful pressure approach would dictate that G.M. was not harmed by D.S.'s efforts in GM6 because she would have been subject to similar pressure to engage in unlawful activities regardless of whether D.S. threatened her. This result is paradoxical because it implies that oppressed people cannot be coerced.

The wrongful pressure model is the standard way of conceptualizing coercion in criminal law. Yet this model is explanatorily inadequate.<sup>179</sup> It misconstrues why coercion is wrong and why being subject to coercion should provide someone with a defense to liability. The wrongful pressure model misfires in coercive control contexts because it overattributes significance to certain considerations (in particular, the specification of a baseline and the psychological experience of the target), while implausibly denying the significance of other considerations (such as the background relationship between the putative coercer and the target) that seem obviously relevant.

Improving the wrongful pressure model requires an account of coercion to explain core cases, to consistently explain the relevance of background considerations, and to explain why considerations such as the target's experience of pressure or the degree to which a proposal deviates from a baseline matters in some but not all instances of coercion. Such a proposal would establish the fundamental link between coercion and power. The next Part articulates and defends such a model.

#### IV. COERCION-BASED DEFENSES: AN ALTERNATIVE APPROACH

This Part develops an alternative model of coercion in criminal law based on what Professor Scott Anderson has called the "enforcement approach" to coercion. Section A describes the enforcement approach and establishes why the enforcement approach is superior to the wrongful pressure approach. Section B extends the enforcement approach to coercion-based defenses.

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<sup>179</sup> To be sure, the wrongful pressure model does not arrive at the incorrect answer in every case. Indeed, the model correctly identifies some paradigmatic cases of coercion. For example, in *Toscano*, the wrongful pressure model allows the conclusion that Toscano was subject to coercion after he was threatened by William Lombard, but not before. *State v. Toscano*, 378 A.2d 755, 758–59 (N.J. 1977). The wrongful pressure model also rules out some paradigmatic cases of non-coercion, such as why ineffectual threats do not establish coercion or ground a coercion-based defense. *Id.*

## A. THE ENFORCEMENT APPROACH AND COERCION

What Professor Anderson calls the enforcement approach to coercion states that

“[C]oercion is best understood as one agent’s employing power suited to determine, through enforceable constraints, what another agent will or (more usually) will not do, where the sense of enforceability here is exemplified by the use of force, violence and threats thereof to constrain, disable, harm, or undermine an agent’s ability to act.<sup>180</sup>

While the wrongful pressure approach posits that the coercer’s primary role is to communicate a threat, the enforcement approach construes the coercer as either creating or leveraging a power differential over the putative target.<sup>181</sup> The coercer’s willingness and ability to draw upon these relational powers over the target makes coercion possible.<sup>182</sup> The effect of a coercer’s deployment of power over a target is to change the target’s practical necessities, for example by “immediately foreclos[ing]” some “possibilities for action” or to make it “practically necessary” for the target to “avoid the situation” that the coercer proposes to bring about or to “exit the situation once it has been brought about.”<sup>183</sup> Moreover, the alterations to the target’s practical necessities are robust across changes in the world, a phenomenon that Professor Gideon Yaffe calls “tracking.”<sup>184</sup> On the enforcement approach, coercion reflects a specific “kind of power that some agents have over others by being able to obstruct, disable or undermine broadly the latter’s ability to act, ‘willy nilly.’”<sup>185</sup>

On the enforcement approach, the paradigmatic instance of coercion is “grabbing, manacling and imprisoning a person to prevent him from acting.”<sup>186</sup> According to Professor Anderson, core cases of coercion

<sup>180</sup> Anderson, *supra* note 30, at 6. Professor Anderson’s use of the term “enforcement approach” is synonymous with what, elsewhere, he calls the “stopping power” approach to coercion—that is, the idea that coercion “encompass[es] uses of force, threats of force and violence, and other enforcement techniques based on the willingness and ability of some to create and/or employ stopping power against others.” See Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 127 PHIL. & PUB. AFFS. 50, 78 (2016).

<sup>181</sup> Anderson, *supra* note 30, at 7.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Gideon Yaffe, *Indoctrination, Coercion and Freedom of Will*, 67 PHIL. & PHENOM. RES. 335, 346–47 (2003).

<sup>185</sup> Anderson, *supra* note 30, at 8.

<sup>186</sup> *Id.* at 6; see also *id.* at 8 (“Imprisonment is the paradigm form of coercion . . . . Even if it were not regarded as a penalty, it would still be effective in frustrating the efforts of the recalcitrant to prevent a judicial decision being implemented.”) (citing J.R. LUCAS, *THE PRINCIPLES OF POLITICS* 60 (1966)).

encompass police utilizing their powers to arrest and jail suspects; the law's ability to inhibit certain behaviors by criminalizing them, or its ability to enforce contracts and civil laws through police powers; robbers and Mafiosi who utilize similar powers for less noble goals; and men who use violence or intimations of violence to impose themselves sexually on women or other men. Other cases may be counted as coercion according to their likeliness to these kinds of examples.<sup>187</sup>

The coerciveness of proposals is a function of how closely they resemble or draw from these paradigmatic forms of using powers to disable or constrain the target.<sup>188</sup> On the enforcement approach, coercion does not arise in every situation that someone holds power to alter another person. Rather, determining whether an exercise of power constitutes coercion “depends on what use the stronger party makes of his strength and whether that use [of power] generates (or threatens to generate) significant incapacity on the part of the weaker party.”<sup>189</sup>

The enforcement approach differs from the wrongful pressure approach in several ways. The wrongful pressure approach sees the wrong-making feature of coercion as essentially connected with harm—the state of affairs contemplated in the coercer's proposal would set back the target's interests in comparison with a baseline. The wrongful pressure approach sees coercion as a success term: if the target does not experience pressure as a result of the proposal, then the proposal is not an instance of coercion. By contrast, the enforcement approach construes the wrong-making feature in coercion as a specific kind of domination that might be called usurpation.<sup>190</sup> In making a

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<sup>187</sup> Anderson, *supra* note 30, at 7; *see also id.* at 9 (noting that on the enforcement approach, “the principal mode of coercion is *prevention*; inducement to perform specific acts typically follows on the ability to prevent many or even all other acts”).

<sup>188</sup> *Id.* at 7.

<sup>189</sup> *Id.* at 12.

<sup>190</sup> Examples of views that construe coercion in terms of usurpation, rather than wrongful pressure, include ARTHUR RIPSTEIN, *FORCE AND FREEDOM* 43–44 (2009) (“I usurp your powers if I exercise them for my own purposes, or get you to exercise them for my purposes. If I use force of fraud to get you to do something for me that you would not otherwise do, I wrong you, even if the cost I impose on you is small. I have used you and in so doing made your choice subject to mine, and deprived you of the ability to decide what to do.”) (emphasis omitted); Japa Pallikkathayil, *The Possibility of Choice: Three Accounts of the Problem with Coercion*, 11 *PHIL. IMPRINT* 1, 17 (2011) (defending “impaired normative authority” account of the wrongfulness of coercion, under which “contingency announcements that violate the [target’s] moral-veto conception of power over the proceedings make impossible the exercise of [the target’s] normative discretionary powers more generally, not simply the power to consent”); Grant Lamond, *Coercion, Threats, and the Puzzle of Blackmail*, in *HARM AND CULPABILITY* 215, 237 (A. P. Simester & A. T.H. Smith eds., 1996) (noting that coercion via forced choice arises out of infringing the “control that the [target] enjoys over some sphere”); James R. Shaw, *The Morality of Blackmail*, 40 *PHIL. & PUB. AFF.* 165, 167–68 (2012) (articulating an account of “basic coercion” according to which coercive impositions wrong the target by

coercive proposal, the coercer works to commandeer the target's decisional power. Coercion is wrongful when this usurpation is unjustified.<sup>191</sup> For example, if Lebowski has a right to decide whether to be in Malibu, then the sheriff's proposal is wrongfully coercive to the extent that it aims to take control over Lebowski's authority to decide whether to be in Malibu. The connection between coercion and usurpation illustrates the inchoate nature of coercion. In general, an action constitutes usurpation at the time that the usurper attempts to seize power, regardless of whether this attempt actually succeeds.<sup>192</sup> Likewise, on the enforcement approach, coercion is a form of wielding power.<sup>193</sup> An actor with relational power over a target wields that power via making a proposal, regardless of whether the target complies with the proposal.

Thus, on the enforcement approach, coercion is not a success term. Someone with relational power over a target can coerce that target by making a coercive proposal even though the target experiences no "overt pressure to do" as the coercer proposes.<sup>194</sup> This analysis gives rise to a third major difference between the two approaches: while the wrongful pressure view assesses coercion primarily from the target's perspective, the enforcement approach assesses coercion primarily from the coercer's perspective.<sup>195</sup>

To embrace the enforcement approach is not to deny that coercion can *ever* work as the wrongful pressure account posits. Rather, the enforcement approach provides a more fundamental explanation of cases that the wrongful pressure approach appears to explain correctly. In Professor Anderson's words, where the wrongful pressure approach succeeds, it does so only because "it tacitly assumes that coercion works in the way the enforcement approach depicts explicitly."<sup>196</sup>

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interfering with the target's authority to deliberate about what to do); White, *supra* note 159, at 230 ("Coercion is an affront to a person's autonomy in that its use fails to respect that person's right to make up his own mind about whether to pursue a certain option, given his circumstances and the alternatives available to him.").

<sup>191</sup> Exercises of power that are morally acceptable constitute morally acceptable coercion. Thanks to Scott Anderson for highlighting the need for this clarification.

<sup>192</sup> See, e.g., A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY* 156–59 (1993) (interpreting John Locke's theory of legitimate action to note that officials who act or plan to breach the trust of their office "forfeit the power the people had put into their hands"); Gabriel S. Mendlow, *Thoughts, Crimes, and Thought Crimes*, 118 MICH. L. REV. 841, 848–50 (2019) (discussing the Treason Act of 1351, which defined treason in terms of "compassing the death of the king").

<sup>193</sup> See Anderson, *supra* note 30, at 9.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 9–10.

<sup>196</sup> *Id.* at 2.

For example, the wrongful pressure approach appears to explain the *Toscano* case. William Leonardo's credible threat to Toscano was coercive because, after the threat was issued, Toscano felt pressured to participate in Leonardo's scheme.<sup>197</sup> However, the credibility of Leonardo's threat was a function of the background power relations between the reputed gangster and the chiropractor. If Leonardo lacked the power to inflict violence on Toscano and his family, then Leonardo's conduct would not have been an instance of coercion. Likewise, if Leonardo had not invoked this power differential via his proposition to Toscano, then Leonardo's action would not have been an instance of coercion. To the extent that the pressure experienced by Toscano matters, it matters as part of Leonardo's effort to change Toscano's practical necessities, to commandeer Toscano's decision about what to do.

While the enforcement approach and the wrongful pressure approach overlap in identifying some instances of wrongful coercion, the enforcement approach is still superior. Threats and other coercive proposals are common tactics for those who seek to exercise control over others. Despite this overlap, the enforcement approach is superior to the wrongful pressure approach because the latter misfires in categories of cases that exhibit coercion but do not, on their face, resemble an arms-length paradigm of coercion through coercive threats. In such cases, the coercer exercises his or her agency to usurp the decisional authority of the target. However, the control sought (and, perhaps, obtained) by the coercer is not tied to any specific proposal, and the target does not necessarily experience the coercer's efforts as an alien imposition. Coercive control cases, including many human trafficking cases, illustrate how one person can coerce another without threats and without the target feeling pressure.

The enforcement approach improves on the wrongful pressure approach in all three ways identified above in Part III Section B. First, the enforcement approach provides a principled and consistent explanation of how background considerations matter to establishing coercion. The enforcement approach allows for the possibility of normatively (and legally) significant coercion that is not triggered by an explicit or implicit threat. On the enforcement approach, wrongful coercion is an abuse of power. Such an abuse can arise from the coercer's explicit threat, such as "Stay out of Malibu, Lebowski!" An implicit threat can also count as a utilization of power, such as William Leonardo invoking the fact that Toscano had "just moved into a place that has a very dark entrance and [lived] there" with his wife as part of his proposal for Toscano to join in the fraudulent scheme.<sup>198</sup> In both types of

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<sup>197</sup> *State v. Toscano*, 378 A.2d 755, 758 (N.J. 1977).

<sup>198</sup> *Id.*

cases, the coercer communicates to the target a willingness to utilize physical force to “constrain or disable” the target in order to change the target’s practical deliberation regarding doing as the coercer wishes.<sup>199</sup>

However, one can inappropriately exercise power over another in the absence of threats or specific proposals. For example, in interpersonal relationships characterized by coercive control, the target’s practical possibilities might be constrained regardless of whether the coercer issues an explicit or implicit threat. To illustrate this point, recall the distinction between hypothetical cases GM1 (in which D.S. instantiates a pattern of coercive control but does not threaten G.M.) and GM2 (in which D.S. instantiates coercive control and threatens G.M.).<sup>200</sup> On the wrongful pressure approach, GM1 does not involve coercion because D.S. did not threaten G.M. On the enforcement approach, D.S.’s coercive control could work to commandeer G.M.’s authority to decide what to do. Given the dynamics of their relationship, issuing an explicit or implicit threat by D.S. would be superfluous. When applied to coercive control contexts, then, the enforcement approach allows for coercion without an individuated connection between a coercive threat and a target’s action.

Second, the enforcement approach better captures the phenomenology of coercion—in particular, the possibility of an oblique connection between a coercive imposition and a target’s action. As Professor Anderson puts it, the enforcement approach allows for an understanding of coercion “without delving into particular facts about an individual’s weighing of specific alterations to their costs and benefits of acting.”<sup>201</sup> Someone can be imprisoned regardless of whether they feel that they are imprisoned. Therefore, the enforcement approach can identify coercion in cases where the coercer has taken steps to commandeer the target’s right and power to decide what to do and deploys that power on a specific occasion, even if the target is insensitive to the coercer’s usurpation or deployment.

As such, the enforcement approach can explain how coercion arises just in GM3 (where D.S. does not threaten G.M., but G.M. feels pressure to engage in sex work, trespass, and acquire controlled dangerous substances) as well as in GM4 (where G.M. does not feel any such pressure but rather takes on D.S.’s goals as her own).<sup>202</sup> On the wrongful pressure approach, GM4 could not count as an instance of coercion because G.M. does not experience D.S.’s proposal as an alien imposition. Yet, on the enforcement

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<sup>199</sup> See Anderson, *supra* note 30, at 12.

<sup>200</sup> See *supra* p. 301.

<sup>201</sup> *Id.* at 24.

<sup>202</sup> See *supra* p. 302-03.

approach, D.S.'s proposal could be considered a token of coercion based on the background of degradation and domination in their relationship. What matters for determining the existence of coercion is D.S.'s attempt to appropriate G.M.'s decisional authority, rather than G.M.'s experience of that attempted appropriation.

Third, the enforcement approach eliminates the need to invoke baselines when determining the existence of coercion. As noted above, the wrongful pressure approach classifies a proposal as coercive only if making of the proposal (or carrying it out) would worsen the target's situation in comparison with a baseline.<sup>203</sup> By contrast, the enforcement approach can identify coercion solely by assessing the coercer's usurpation of the target's rights or powers and willingness to utilize this usurped power.<sup>204</sup> Therefore, a proposal can coerce a target even if it improves the target's position or the target would have been subject to similar infringements by others in the absence of the coercer's proposal.

The enforcement approach can explain how coercion can arise in a rough and unjust world. The wrongful pressure approach links coercion to harm: a proposal can only coerce if the making and/or carrying out of the proposal would render the target worse off. Yet in the GM6 scenario, D.S.'s proposal would not render G.M. worse off because she would be subject to equally powerful pressure to engage in illegal activity if D.S. had never made his proposal. This conclusion is puzzling because GM6 involves at least as much coercion as GM5 (in which G.M. would not have been subject to equivalent pressure to engage in illegal activity in the absence of D.S.'s proposal). The enforcement approach can resolve this puzzle. Both cases evince coercion because both involve D.S.'s creating a power differential with G.M. over time and leveraging that power differential to alter what G.M. regards as practically necessary (e.g., returning to the United States and engaging in illegal activities). What matters to identifying coercion is D.S.'s attempt to usurp G.M.'s authority to make decisions about what to do, rather than whether this usurpation makes G.M. worse off than she would have been otherwise.

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<sup>203</sup> See Anderson, *supra* note 30, at 5–6.

<sup>204</sup> *Id.* at 22 (“[T]hreats render particular acts or omissions less choice-worthy by increasing their relative costs. But is such an alteration in costs necessary or sufficient to explain the coerciveness of coercive threats . . . ? No: such alterations should be recognized as epiphenomenal, rather than constitutive of coercion. What does the work instead is the coercer’s ability (i.e., power) to generate such alterations at will, and his willingness to do so.”).

## B. THE ENFORCEMENT APPROACH AND COERCION-BASED DEFENSES

Professor Anderson's writing on the enforcement approach aims primarily to explicate what coercion is and why coercion might be wrong, rather than to explain how being subject to coercion could provide a defense to moral responsibility or criminal liability for a coerced action.<sup>205</sup> However, the enforcement approach provides a foundation for coercion-based defenses. Elaborating this point requires extending Professor Anderson's insights about the enforcement approach to answer these slightly different normative and legal questions.

Recall that, on the enforcement approach, coercion is not a success term—a target is subject to coercion when the coercer employs “power suited to determine, through enforceable constraints, what [the target] will or (more usually) will not do.”<sup>206</sup> A target is coerced at the moment that the coercer “draw[s] upon the distinctive powers needed for coercion” in order to “constrain or alter the activities” of the target or others.<sup>207</sup> However, a different standard must apply for asserting a coercion-based defense. Here, coercion *should* be considered a success term. Otherwise, a coercer's unsuccessful attempt to usurp the target's decisional authority might nevertheless ground a coercion-based defense for the target. Moreover, coercion-based defenses arising in criminal law implicate a specific and important interest of the target: namely, the interest in complying with the law. Establishing a coercion-based defense should require not only showing that the coercer engaged in wrongful coercion, but also that the coercer actually exercised control over the target's decision regarding obeying the law.

Just as the enforcement approach and wrongful pressure approach overlap in identifying cases of wrongful coercion, they can also converge in their verdicts about coercion-based defenses. Even so, the two approaches identify different considerations as normatively salient. Consider again the *Toscano* example. Under the wrongful pressure approach, Toscano would be eligible for a duress defense if (a) William Leonardo threatened him and his wife with serious bodily harm for Toscano's non-participation in the scheme, (b) Toscano believed that Leonardo's threat was genuine (which would have given him good reason to participate in the billing fraud scheme), and (c) Toscano felt pressure to participate in the scheme because of the threat.

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<sup>205</sup> *Id.* at 30 (“[T]he enforcement approach could not, without supplementation, explain whether and how coercion affects responsibility for coerced acts.”).

<sup>206</sup> *Id.* at 6.

<sup>207</sup> *See id.* at 7.

Similarly, the enforcement approach could support the conclusion that Toscano was subject to coercion sufficient to ground a duress defense. Toscano had a right to decide not to participate in an illegal billing fraud scheme and a strong interest in not doing so. Leonardo's threat to Toscano sought to change Toscano's deliberative situation, thereby coopting Toscano's authority to decide what to do and undermining Toscano's interest in obeying the law. Toscano's eligibility for a duress defense would turn on whether Leonardo succeeded in this effort to usurp Toscano's decisional authority, and Leonardo's reputation for violence would be highly relevant to this inquiry.

On both approaches, Toscano would be ineligible to raise a duress defense solely based on Leonardo's reputation for violence. On the wrongful pressure approach, someone's reputation for violence does not constitute a threat and so cannot trigger a duress defense. Under the enforcement approach, someone's reputation for violence does not count as an invocation of power, and so cannot by itself constitute wrongful coercion. Likewise, neither approach would allow Toscano to assert a duress defense if he had thought that Leonardo's proposal was a joke. On the wrongful pressure approach, if Toscano had understood Leonardo to be joking, then the proposal would not have generated sufficient pressure on Toscano to count as coercion. On the enforcement approach, Leonardo's efforts would not have succeeded in changing Toscano's deliberative situation if Toscano had understood them as a joke, regardless of whether Leonardo had intended to effectuate such a change. (In such a scenario, the enforcement approach might support the conclusion that Leonardo coerced Toscano and that Toscano is ineligible for a coercion-based defense.)

Despite this overlap, the enforcement approach to coercion-based defenses differs from the wrongful pressure approach in at least two important ways. First, while the wrongful pressure approach requires that a coercion-based defense be triggered by the coercer's threat, the enforcement approach allows for triggering via any efforts of the coercer to invoke power over the target or exploit a power differential, regardless of whether these efforts take the propositional form of an explicit or implicit threat.<sup>208</sup> Importantly, the enforcement approach can allow for a coercion-based defense to be triggered by pervasive methods of indoctrination such as "brainwashing," since these efforts function similarly to coercive threats.<sup>209</sup> Thus, on the enforcement approach, Toscano could have been eligible for a

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<sup>208</sup> See Anderson, *supra* note 30, at 1.

<sup>209</sup> See Yaffe, *supra* note 184, at 341, 343 (positing an account of manipulation under which "the best explanation for the freedom-undermining force of both" indoctrination and coercion involves robustly producing a "pattern of response to reasons" in the target).

coercion-based defense if William Leonardo had merely *requested* that Toscano commit billing fraud but avoided implicitly threatening Toscano and his wife. Such a request by Leonardo might count as leveraging his reputation for violence in order to commandeer Toscano's decision whether to commit billing fraud, thereby wrongfully coercing Toscano.

Second, the enforcement approach would posit different conditions for asserting a coercion-based defense than the wrongful pressure approach. Recall that, on the wrongful pressure approach, coercion succeeds when a coercer's threat exerts sufficient pressure on the target to act in ways that would worsen the target's situation. Legal standards vary in their definition of legally sufficient pressure. In many jurisdictions only unlawful threats to cause "grievous bodily (life-threatening) harm" can satisfy this standard,<sup>210</sup> while under the Model Penal Code's formulation the question is whether "a person of reasonable firmness . . . would have been unable to resist" the threat.<sup>211</sup> On either approach, if the harm threatened is less salient (for example, if the threat concerns an "economic or reputational injury" or concerns "physical harm to property"<sup>212</sup>), then the target is ineligible for a coercion-based defense because the threat generated legally insufficient pressure to ground a coercion-based defense.

The enforcement approach utilizes different standards. First, a target's eligibility for a coercion-based defense requires a coercive imposition by the coercer, although this imposition need not take the form of an explicit or implicit threat. Consider what distinguishes the coercer's attempt to usurp the target's decisional authority (e.g., "Do X if you know what's good for you!") from an advisor's providing decision-relevant information to an advisee (e.g., "Do X; it would be really good for you!"). Although both types of impositions might involve a change to the advisee's practical situation, the advisee unquestionably retains decision-making authority while the target might not.<sup>213</sup>

Second, eligibility for a coercion-based defense also requires that the coercer succeed in usurping the target's decisional authority. Success along these lines can be defined in a number of ways. Professor Anderson articulates it in terms of the coercer's ability to "obstruct, disable or undermine broadly the [target's] ability to act, 'willy nilly.'"<sup>214</sup> If, in the wake

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<sup>210</sup> See DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 107, at 271.

<sup>211</sup> See MODEL PENAL CODE, *supra* note 75, § 2.09(1).

<sup>212</sup> See DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 107, at 271.

<sup>213</sup> To use Professor Yaffe's terminology, the coercer's efforts track the target's actions by foreclosing mechanisms to responding to reasons in closely related worlds, while the advisor's efforts do not. See Yaffe, *supra* note 184, at 344–45.

<sup>214</sup> See Anderson, *supra* note 30, at 8.

of a coercive imposition, a coercer has both sought and acquired this power, then the usurpation would be successful. Another (perhaps complementary) definition of successful coercion can be formulated in terms of what Christopher McCammon calls “impositional power,” or the power of a coercer to impose their will on the target, with “rational assurance that their chances of successfully imposing that will” on the target “are high.”<sup>215</sup> Successful coercion might also be specified in terms of the coercer’s taking advantage of the target’s vulnerability<sup>216</sup> or the target’s subordination to the coercer.<sup>217</sup>

Rather than resolve these debates about the nature of successful coercion, this Article stipulates the following criteria: for the purposes of determining eligibility for a coercion-based defense, usurpation succeeds when a coercer acquires a robust power to compel the target’s decision about what to do by changing the target’s reasons to act as the coercer wishes.<sup>218</sup> Some tokens of coercion attempt to change the target’s practical situation but fail to do so. For example, in the wake of a coercive imposition, the coercer might seek but fall short of acquiring power to give the target reason to act as the coercer wants. Likewise, an imposition might change the target’s reasons to act without doing so robustly—that is, fully determinatively of the target’s range of actions. Consider Professor Gideon Yaffe’s distinction between a ship carrying heavy cargo that will not survive a storm ahead from a ship carrying the same cargo that is threatened by pirates. Although both the storm and the pirates might impose pressure on the ship’s captain to ditch the cargo, the impetus provided by the pirates is robust in a way that the impetus provided by the storm is not.<sup>219</sup> As Professor Yaffe puts it, “the storm doesn’t care if we hold the cargo and allow for the sinking of the ship rather than throw the cargo overboard, while, standardly at least, pirates prefer the latter option to the former.”<sup>220</sup> If either the efficacy or robustness element is

<sup>215</sup> Christopher McCammon, *Domination: A Rethinking*, 125 ETHICS 1028, 1041 (2015). Professor McCammon adds that domination includes both “impositional power” and “deliberative isolation,” such that the coercer is not accountable to anyone else for how they exercise power over the target. *Id.* at 1046.

<sup>216</sup> See, e.g., Saba Bazargan, *Moral Coercion*, 14 PHIL. IMPRINT 1, 6–9 (2014) (arguing that the wrongfulness of coercion is explained, in part, by aim-hacking, or leveraging the target’s aims and goals as a means of furthering the coercer’s ends).

<sup>217</sup> See, e.g., Niko Kolodny, *What Makes Threats Wrong?*, 58 ANALYTIC PHIL. 87, 109 (2017) (“[T]he objection to being under the power of others is rooted in a broader concern not to be subordinate to others within a social hierarchy, or the human equivalent of a pecking order . . .”).

<sup>218</sup> This standard essentially grafts Professor Yaffe’s notion of “tracking” onto Professor Anderson’s enforcement approach.

<sup>219</sup> Yaffe, *supra* note 185, at 355.

<sup>220</sup> *Id.*

unsatisfied, then the target is ineligible for a coercion-based defense despite having been coerced.

The enforcement approach to coercion-based defenses involves normative as well as empirical criteria. In the wake of a coercive imposition, a target's eligibility to assert a coercion-based defense can turn not only on whether the target has in fact relinquished robust decisional authority but also on a normative assessment of any such relinquishment. In other words, the enforcement approach could allow that a target who has wrongfully relinquished decisional authority to a coercer is ineligible to assert a coercion-based defense. Without fully resolving deeper debates about coercion and autonomy, it seems possible to derive at least some generic standards of normative assessment for the enforcement approach. For example, eligibility for a coercion-based defense would likely vary based on the target's interest in retaining authority to make specific kinds of decision. Given such variations in interest strength, a coercer's imposition might usurp a target's authority to make decisions regarding less important considerations while failing (or, more accurately, failing to provide sufficient reason) to usurp the target's authority to decide more important kinds of questions. To the extent that there is a strong generic interest in law compliance, the enforcement approach would allow for a heightened standard for determining when a coercer has acquired power over a target decisional authority regarding obeying the law and, therefore, whether a target is eligible for a coercion-based defense.

Although the enforcement approach bases eligibility for a coercion-based defense on a normative evaluation of the target, this evaluation is essentially comparative and less exacting than the evaluation licensed under the wrongful pressure view. The latter asks whether a reasonable person in the target's position would have succumbed to the pressure; the target is not coerced (and thus ineligible for a coercion-based defense) if they fail to live up to this standard. On the enforcement approach, by contrast, the target is ineligible for a coercion-based defense if the coercer's usurpation would have failed to coopt the target's decisional authority regarding an interest less significant than the interest in law compliance. How a reasonable person in the target's position might have responded is irrelevant to this inquiry.

Consider how the view advanced here might apply in G.M.'s case and the hypothetical variations introduced above. D.S.'s systematic deprivation and abuse of G.M. constituted wrongful coercion. D.S. aimed to take control over G.M.'s ability to make decisions for herself, including decisions related to obeying criminal prohibitions on sex work, trespass, and drug

possession.<sup>221</sup> In light of D.S.'s coercion, G.M.'s eligibility for a coercion-based defense to criminal liability would turn on whether D.S.'s efforts succeeded. This question is in part an empirical one. If D.S. succeeded in taking control of G.M.'s practical deliberation, then G.M. would take herself to have compelling practical reason to do what D.S. commanded or merely wished to be done solely because of what D.S. commanded or wished, regardless of whether G.M. otherwise would have compelling reason not to act in those ways (for example, because they were prohibited by law). G.M.'s eligibility for a coercion-based defense would turn on a further normative evaluation regarding whether D.S.'s imposition succeeded (or would have) in coopting G.M.'s interests in matters less weighty than law compliance.

The enforcement approach would ask three empirical questions regarding G.M.'s eligibility for a coercion-based defense. First, one might deny G.M. a coercion-based defense to charges of prostitution, criminal trespass, and drug possession by denying that D.S.'s impositions were sufficient to constitute wrongful coercion. This is a question of fact: perhaps D.S. attempted to take control over D.M.'s practical deliberation but failed to achieve this control.

Second, one might also deny that D.S.'s efforts took control over G.M.'s practical authority in a robust way. Perhaps G.M. had an antecedent goal of acting precisely the way that D.S. demanded or wished. If so, then D.S.'s impositions, although successful in generating conforming behavior, did not leave G.M. subject to D.S. in the way that a coercion-based defense requires.

Third, perhaps D.S. succeeded in obtaining control over G.M.'s decisional interests regarding law compliance but not over less important interests. If so, then G.M. would be ineligible for a coercion-based defense because D.S.'s control was not sufficiently robust.

However, if D.S. succeeded in controlling D.S.'s practical deliberation and exercised this control robustly, then G.M. should be eligible for a coercion-based defense to charges of prostitution, criminal trespassing, and possession of drugs. Moreover, this defense would apply in all of the variants of G.M.'s case described above. In other words, G.M.'s eligibility would not depend on whether D.S. specifically threatened her (as in GM2) or not (as in GM1), whether G.M. felt pressure to do as D.S. threatened (as in GM3) or not (as in GM4), or whether G.M. would otherwise have been subject to similar external pressure to commit these crimes (as in GM6) or not (as in GM5).

The enforcement approach is superior to the wrongful pressure approach as an account of how coercion operates and why coercion is wrong.

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<sup>221</sup> See *People v. G.M.*, 922 N.Y.S.2d 761, 762 (Crim. Ct. 2011).

The enforcement approach focuses attention on the powers and intentions of the coercer, rather than on the psychological situation of the target. Coercion is an attempt by the coercer to usurp decision-making power of the target, rather than the coercer's successful effort to exert pressure over the target. While prior elaborations of the enforcement approach have primarily addressed the issue of what makes coercion wrong, our analysis extends the enforcement approach to the topic of coercion-based defenses. A defendant should be entitled to a coercion-based defense when the coercer has usurped the target's decisional authority—that is, when the coercer has usurped control over the target's decision about what to do.

#### V. THE ENFORCEMENT APPROACH: IMPLICATIONS FOR COERCION-BASED DEFENSES

This Part describes some practical implications of the enforcement approach. Section A proposes a model affirmative defense to criminal liability that is triggered by coercive control while Section B explains how this model defense differs from the traditional coercion-based defenses, which would remain on the books even if states adopted the proposed defense.

##### A. A MODEL AFFIRMATIVE DEFENSE FOR COERCIVE CONTROL

What follows is a model affirmative defense for coercively controlled persons. This defense assumes that the jurisdiction has adopted the criminal offense of coercive control described above in Part I Section B.<sup>222</sup>

- (1) A criminal Defendant shall have an affirmative defense to an offense when:
- a.) over a substantial period of time, another person engaged in a pattern of coercive control<sup>223</sup> over the Defendant that usurped the Defendant's decision making; OR
  - b.) another person exploited a position of power over the Defendant, for which the Defendant is not at fault, that usurped the Defendant's decision making; AND
  - c.) in committing the offense, the Defendant acted at the direction of the third party or within the ambit of the third party's coercive control; AND

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<sup>222</sup> See *supra*.

<sup>223</sup> The definition of "coercive control" in the model defense should appear in a separate statute making coercive control a criminal offense. We advocate and describe such an offense in Section I(B). See discussion *supra*.

- d.) the seriousness of the Defendant's offense does not significantly exceed the degree of control exercised by the third party.

This coercive control affirmative defense would supplement, rather than supplant, other coercion-based defenses such as duress and human trafficking affirmative defenses. Moreover, this defense is freestanding of the coercive controller's liability. A defendant may assert the proposed coercive control defense even if the coercive controller is not charged with any criminal offense. This proposal does not revise the burden of proof aspects of affirmative defenses. The same allocation of the burden of persuasion and standard of proof should apply to the coercive control affirmative defense as applied to other affirmative defenses in a jurisdiction.

Examining some of the key terms of this model affirmative defense can both elaborate what the defense means and explain how it connects with the enforcement approach to coercion.<sup>224</sup>

**Pattern.** The "pattern" requirement captures the diachronic nature of coercive control. While coercive controllers may engage in individual acts of physical violence or threats against their victims, coercive control can persist even when the abuser does not directly interact with the target. This model defense does not enumerate a comprehensive list of behaviors that constitute coercive control. Rather, whether a pattern of conduct constitutes coercive control is a question for the factfinder.<sup>225</sup> This fact sensitivity entails that, in the *G.M.* case, D.S.'s history of abuse against G.M. provides grounds for attributing coercive significance to details (such as the threat to harm G.M.'s close friend even though G.M. was in another country) that would not constitute legally sufficient coercion in the absence of such a history.

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<sup>224</sup> While the model defense is deeply connected to the enforcement approach to coercion in the ways described below, it also seems possible to justify the model defense based on some version of the wrongful pressure approach. In reviewing a draft of this article, several readers suggested a revised version of the wrongful pressure approach that might support the model defense. First, the wrongful pressure approach might invoke the notion of implicit threats to allow a coercer's invocation or exploitation of a historical pattern of domination of the target. Moreover, a broader range of experiences by the target (including purely normative violations) might count as pressure. We think that most advocates of the wrongful pressure approach would reject these revisions. In any event, these revisions would move the wrongful pressure approach closer to the enforcement approach (for example, by defining coercion largely from the perspective of the coercer). Moreover, the intelligibility of these potential revisions suggest that it is possible to ground the model defense, or something like it, on a model of coercion as wrongful pressure.

<sup>225</sup> See Sheley, *supra* note 46, at 1391. It seems entirely possible (and, indeed, consistent with legality considerations) that the definition of coercion for the coercive control defense could be broader than the definition for the offense of coercive control.

Likewise, the requirement that coercive control take place over a “substantial period of time” limits the defense only to temporally extended instances of coercion. More synchronic instances of coercion can be dealt with under other coercion-based defenses, such as duress. Longevity is fundamental to coercive control, however, because the trauma bond between a target and an abusive party occurs after a grooming process involving “a mixture of reward . . . and punishment . . . freedom and bondage, acceptance and degradation . . . .”<sup>226</sup> The inquiry here is meant to invoke the “pattern of racketeering activity” element of the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>227</sup> The Organized Crime Control Act (1970), which includes RICO, provides that “criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.”<sup>228</sup> The Supreme Court characterized this requirement as a “relationship” element and held that the statute further requires a “continuity” element, “referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with threat of repetition.”<sup>229</sup> The model defense’s “substantial period of time” requirement would raise a similar inquiry, one that can be answered by examining an abuser’s temporally extended efforts to assert control over the defendant.

These “pattern” and “substantial period of time” elements distinguish the coercive control affirmative defense from canonical duress. For example, although the *Toscano* case is a clear example of canonical duress, *Toscano* would not straightforwardly satisfy the elements for our model defense against conspiracy charges. Based on the court’s opinion, William Leonardo’s coercion of *Toscano* arose from a discrete threat rather than a temporarily extended effort to exert control.<sup>230</sup> However, *Toscano* might be eligible for our model affirmative defense if it were established that Leonardo exerted more pervasive or programmatic forms of control over *Toscano* prior to the formation of the conspiracy.

**Position of Power.** The “position of power” basis for the defense recognizes that some parties may coerce others simply by exploiting asymmetric power relations arising out of otherwise-legitimate roles. Roles

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<sup>226</sup> Joan A. Reid, *Doors Wide Shut: Barriers to the Successful Delivery of Victim Services for Domestically Trafficked Minors in a Southern U.S. Metropolitan Area*, 20 *WOMEN & CRIM. JUST.* 147, 158 (2010).

<sup>227</sup> 18 U.S.C. § 1962(c).

<sup>228</sup> 18 U.S.C. § 3575(e).

<sup>229</sup> *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240–42 (1989).

<sup>230</sup> *See State v. Toscano*, 378 A.2d 755, 758 (N.J. 1977).

that seem ripe for this kind of leveraging include prison guards, police officers, teachers, and employers. Leveraging arises when one party exploits a power asymmetry for their own purposes.<sup>231</sup> The “position of power” and “pattern” requirements are disjunctive: establishing eligibility for a coercive control affirmative defense under the “position of power” route does not require showing a pattern or extended period of interaction between the coercer and the target. The proviso that the extant position of power not be attributable to the defendant’s choice forecloses the defense applying in cases where the Defendant’s criminal activity was an aspect of a prior choice to enter into a power relation with a third party that the defendant knew or intended would involve criminal activity.<sup>232</sup>

***Usurp the Defendant’s Decision Making.*** This aspect of the model defense most explicitly invokes the enforcement approach to coercion discussed in Part III. On Professor Anderson’s logic, coercion is not a “success” term—whether an imposition counts as coercion is assessed entirely from the perspective of the coercer, rather than from the perspective of the target (as under the wrongful pressure approach). However, under our extension of Professor Anderson’s logic, a target is eligible for a coercion-based defense only if the coercer succeeds in robustly commandeering the decision-making capacity of the target. The term “usurpation” indicates the

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<sup>231</sup> See Aleksandra Cislak, Adrian Dominik Wojcik & Natalia Frankowska, *Power Corrupts but Control Does Not: What Stands Behind the Effects of Holding High Positions*, 44 PERSONALITY & SOC. PSYCH. BULLETIN 944, 945 (2018).

<sup>232</sup> That said, the model defense does not amount to a “tracing” account of moral responsibility. Under tracing account, an agent can be attributed responsibility for an action at T2 despite failing to satisfy the responsibility attribution criteria for that action, as long as the agent satisfies the responsibility attribution criteria for an action at T1 that is connected to T2. See Craig Agule, *Resisting Tracing’s Siren Song*, 10 J. ETHICS & SOC. PHIL. 1, 1 (2016). On tracing accounts, the agent’s responsibility for the action at T1 grounds their responsibility for the action at T2. For example, on a tracing account G.M. would not be eligible for a coercion-based defense for her offenses (regardless of whether she satisfied the responsibility attribution criteria for those offenses) if (a) her commission of those offenses was connected to her decision to engage in a relationship with D.S.; and (b) G.M.’s decision to engage in a relationship with D.S. satisfied the appropriate criteria of responsibility. Under the model defense, by contrast, historical facts about the agent’s decisions are only relevant to the question of whether the agent’s decisional authority was usurped in the first place. On a tracing model, historical facts ground responsibility for a present action, while on the proposed defense historical facts only provide evidence about whether the coercer’s actions commandeered the target’s decisional authority. To illustrate, under the model defense, G.M. would not be eligible for a coercive control defense if G.M. entered the relationship with D.S. in order to facilitate her engaging in drug-related criminal activities. However, unlike on a tracing account, G.M. could be eligible for a coercive control defense even if her entering the relationship with D.S. satisfied the appropriate criteria of responsibility. Thanks to Craig Agule for suggesting the need for this clarification.

success condition applicable to coercion-based defenses that does not necessarily apply to coercion-based offenses. Usurpation is both a factual and a normative inquiry. A coercer usurps a target's decisional authority when the coercer in fact acquires a robust power to compel the target's decision about what to do via changing the target's reasons to act as the coercer wishes. This condition is not satisfied if the coercer does not actually acquire power over the target (for example, in the case of rebuffed threats), or if the coercer's power over the target does not change the target's reasons to act as the coercer wishes (e.g., in cases of advice), or if the power over the target is not robust (i.e., in which the coercer lacks the capacity to "track" the target's reasons for action across a range of possible worlds).

From an evidentiary perspective, the question of whether a particular pattern evinces a usurpation of the target's decision-making capacity may turn on both lay and expert testimony. While evidentiary rules generally prevent psychiatric experts from testifying as to a *defendant's* state of mind, as an ultimate issue reserved for the factfinder,<sup>233</sup> such rules do not prevent an appropriately qualified expert from testifying about the intent suggested by the observable behavior of a non-party, or at least to the intention behind and symptoms of coercive control generally. An expert could further testify to the sorts of behaviors abusers commonly engage in that evince these intentions, and external signs that they have been successful, in order for the jury to compare them with the facts of the case.

The likely role of such testimony in resolving the issue of usurpation parallels the role of experts in establishing the insanity defense. Indeed, the similarity between proving coercion-based and insanity defenses is evinced by the commentary to Section 2.09 of the Model Penal Code (MPC), which notes that the duress defense could apply to circumstances of "brainwashing," or the "process by which an individual's capacity to act of his own volition is impaired" through "physical and emotional assaults upon the individual, occasional rewards for responding to directions, a demand for renunciation of past values, and reeducation (indoctrination) to the new ideas of the brainwasher."<sup>234</sup> The MPC commentary contends that this "brainwashing" variety of the duress defense would be established in exactly the way that duress via threats of physical force would be established.<sup>235</sup>

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<sup>233</sup> See, e.g., FED. R. EVID. 704.

<sup>234</sup> See MODEL PENAL CODE § 2.09, *supra* note 75, at 376 n.40.

<sup>235</sup> *Id.* at 376–77 ("First, suppose that by the continued use of unlawful force, persons effectively break down the personality of the actor, rendering him submissive to whatever suggestions they make. They then, using neither force nor threat of force on that occasion, suggest that he perform a criminal act; and the actor does what they suggest. The 'brainwashed' actor would not be barred from claiming the defense of duress, since he

While, overall, the MPC's theory of duress reflects the wrongful pressure approach, the "brainwashing" variety of duress contemplated by the MPC captures the diachronic nature of coercive control by positing a state of mind in which the defendant does not experience pressure from the coercer because of a prolonged state of subordination. The MPC also allows that the "effects of such brainwashing efforts upon a defendant might be severe enough to give rise to other defenses to a charge of crime, such as insanity."<sup>236</sup> This allowance suggests that expert testimony could help establish the phenomenon of brainwashing in the same ways that expert testimony could be relevant to establish the phenomenon of insanity: under the MPC, expert testimony can be relevant to establishing the "volitional" prong of the insanity defense, and expert testimony seems just as relevant to establishing whether a coercer's impositions have usurped a target's decision-making capacities.<sup>237</sup> That said, expert testimony would not be the only means by which a defendant could make out this element. The target's testimony and that of lay witnesses who observed the coercive controller's conduct could be sufficient to satisfy the usurpation element.

***At the Direction or Within the Ambit of the Third Party's Coercive Control.*** An obvious objection to our model affirmative defense is that it risks diminishing the target's agency. On this objection (which resembles objections raised to "battered woman syndrome" defenses),<sup>238</sup> the model defense might indicate that to be subject to coercive control in some aspects of one's life is to have one's agency compromised generally. If so, then the model defense might have the perverse effect of compounding a target's degradation.

To forestall this objection, the model defense will only be available to criminal actions that are either at the direction of the coercive controller or within the ambit of the coercive control. This "direction or ambit" proviso is

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may assert that he was 'coerced' to perform the act by the use of unlawful force on his person. He might also argue that he is responding to earlier threats to use unlawful force that have rendered him submissive to those who made the threats because he still subconsciously fears they will be carried out.").

<sup>236</sup> *Id.* at 376 n.40.

<sup>237</sup> To be sure, the Model Penal Code's reasoning is not directly apposite to our point, since the MPC explicitly adopts the wrongful pressure approach to coercion in its formulation of the duress defense (including the "brainwashing" variety of duress). Rather, our point is that the MPC's parallel between the process of establishing duress and that of establishing insanity is likely to hold for our proposed coercive control affirmative defense.

<sup>238</sup> See, e.g., Anne Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 5 (1994); Sharon Angella Allard, *Rethinking Battered Woman Syndrome*, 1 UCLA WOMEN'S L.J. 191, 193 (1991).

a type of nexus requirement, albeit one that is considerably broader than the test applicable in canonical duress (i.e., that pressure to act in a particular way arise out of the coercer's threat)<sup>239</sup> or in many human trafficking duress statutes that apply only to crimes committed "as a direct result of" being human trafficked.<sup>240</sup> Unlike for canonical duress, the defendant need not show a specific connection between their criminal activity and a threat from a coercer in order to be eligible for the coercive control affirmative defense. Such a showing would be sufficient, but not necessary, to establish the coercive control defense. The "direction or ambit" test would allow coercion to be inferred from the entirety of the relationship between the coercer and the target, rather than solely from the relations in effect at the time of the threat.

Likewise, the "direction or ambit" test is broader than the "direct result" test since a criminal action can be within the ambit of coercive control without being the direct result of coercive control. Consider a version of G.M. in which her first client of the day fails to show up at the appointed location while D.S. is waiting outside in the car, expecting her to return with a certain amount of money. G.M. steals the wallet of her second client in order to return with the amount of money D.S. had anticipated. While G.M.'s effort would not qualify for the affirmative defense under the "direction" prong because D.S. did not command G.M. to steal the wallet, it would fall within the "ambit" of D.S.'s control.<sup>241</sup>

The "direction or ambit" proviso is analogous to the rule of vicarious liability for participants in a conspiracy that "any conspirator in a continuing conspiracy is responsible for the illegal acts committed by his cohorts in furtherance of the conspiracy, within the scope of the conspiracy, and reasonably foreseeable by the conspirators as a necessary or natural consequence of the unlawful agreement."<sup>242</sup> Just as the scope of the offense of conspiracy is defined by the joint intentions of the parties, the scope of the coercive control affirmative defense is a function of the coercer's intentions.

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<sup>239</sup> See *supra* note 116 and accompanying text.

<sup>240</sup> See *supra* note 118 and accompanying text.

<sup>241</sup> By contrast, consider a hypothetical scenario in which a wife subject to a similar pattern of coercive control to that imposed on G.M. by D.S. sneaks away from home for an afternoon to spend time with a friend. After heavy drinking, the wife strikes and kills a pedestrian on the way home. Because the husband, like D.S., explicitly sought to isolate her from other people, restrict her spending, and control her mobility by driving her everywhere, these activities would fall outside the ambit of his control. Thus, on our logic, the coercive control defense would not apply to charges of vehicular manslaughter in this scenario.

<sup>242</sup> James M. Branden, *White Collar Crime: Fourth Survey of Law: Substantive Crimes*, 24 AM. CRIM. L. REV. 459, 485 (1987).

**Proportionality.** The proposed statute requires proportionality between the defendant's offense and the severity of the third party's coercive control. This requirement reflects the notion, discussed above, that eligibility for a coercion-based defense turns on a normative assessment of the target's interest in making certain types of decisions (especially regarding law compliance). Thus, the proportionality requirement resembles the limitations on the duress defense for particular offenses. In particular, duress is not a defense to murder at common law<sup>243</sup> and under the laws of many U.S. states.<sup>244</sup> The proportionality requirement in the coercive control defense is intended to provide greater flexibility for factfinders in cases where the facts show that the defendant's particular conditions at the time of the offense were extreme enough to warrant an excuse even for the most serious crimes.<sup>245</sup> A state could adopt the model coercive control defense but choose to exclude cases of murder or whatever other offenses fall under that state's duress defense in order to harmonize it with existing law.

In jurisdictions with existing proportionality constraints in their duress defenses, the proportionality prong of the coercive control defense could operate in parallel, to harmonize the complementary coercion-based defenses. For example, in jurisdictions where duress is a defense to murder, then coercive control could also be a defense to murder. However, asserting coercive control as a defense to murder would require a stronger level of proof of usurpation of decision-making than would be required to assert coercive control as a defense to less serious offenses.

#### B. DISTINGUISHING COERCIVE CONTROL FROM OTHER COERCION-BASED DEFENSES

The circumstances giving rise to a coercive control defense may overlap with or resemble those in which other coercion-based defenses are appropriate. This section distinguishes and compares the proposed coercive control defense with other coercion-based defenses.

**Duress.** The canonical formulation of the duress defense does not cover all of the circumstances in which coercion should morally excuse a criminal

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<sup>243</sup> See Dressler, *supra* note 24, at 1335.

<sup>244</sup> See LAFAYE, *supra* note 72, § 9.7(b) (concluding that “about half” of contemporary U.S. jurisdictions that have a duress defense “do not allow the defense if the defendant has been charged with murder”).

<sup>245</sup> For the version of this argument in the context of duress, see Mulroy, *supra* note 74, at 175 (“While it may be true in many situations that a person threatened with death ought to have the fortitude to resist killing an innocent third party, can it really be that are never any situations in which a defendant's eventual submission to the threats is understandable enough to allow an excuse under the law?”).

offense. Neither does coercive control cover all situations in which a defense of duress should apply—for example, the paradigmatic situation of the armed robber saying, “do X or I’ll shoot.” Thus, the coercive control and duress defenses would exist in parallel and differ in several significant ways. Many of the most important differences between the duress defense and the model coercive control defense arise out of the latter’s embrace of the enforcement approach to coercion.

First, coercive control has a broader nexus requirement than duress. Where duress requires a showing that a coercer’s *specific threat* precedes and *causes* the defendant’s criminal action,<sup>246</sup> coercive control requires a showing that the coercer has usurped the defendant’s decision-making. Some usurpations are triggered (at least in part) by threats, but not all are. Nor does the coercive control defense require a strict causal relationship between the coercer’s usurpation and the defendant’s action.

Second, while duress requires that the consequence of the coercer’s threat be immediate,<sup>247</sup> the coercive control defense has no strict immediacy requirement. This is due to the diachronic effects of oppression in altering a target’s perceptions of immediacy. For example, D.S. threatening to kill G.M.’s friend, who was in another country at the time of the threat,<sup>248</sup> might well have appeared immediate to G.M. in a way that it would not have appeared to someone who was not subject to long-term coercive control. The immediacy of threatened harm would be relevant, however, to assessing a duress defense where the relationship between the coercer and the target was more attenuated and the threat provided the sole basis for coercion.

Third, duress requires that, as an objective matter, the defendant has no way of avoiding the harm threatened by the coercer.<sup>249</sup> In the coercive control defense, questions of necessity should be determined relative to the particular dynamic of coercive control between the parties. In turn, this accounts for the prevalence of the type of “trauma bonding” in which a victim feels helpless to escape from the control of the coercive controller. Evidence that a trauma bond between the parties has resulted in the defendant perceiving an absence of escape paths is relevant to the usurpation question that is central to the coercive control defense.

***Human Trafficking Affirmative Defenses.*** The coercive control defense would significantly expand the protections afforded to victims of human trafficking under most existing human trafficking statutes in the

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<sup>246</sup> See *supra* notes 72–73 and accompanying text.

<sup>247</sup> See Finkelstein, *supra* note 72, at 254.

<sup>248</sup> *People v. G.M.*, 922 N.Y.S.2d 761, 763 (Crim. Ct. 2011).

<sup>249</sup> See Finkelstein, *supra* note 72, at 254.

United States. As noted above, most human trafficking affirmative defenses contain both an offense restriction (usually limiting the defense to crimes related to sex work) and a narrow nexus requirement (for example, requiring a showing that the offense was the “direct product” of being trafficked).<sup>250</sup> The model coercive control defense would resemble the human trafficking affirmative defense available under Oklahoma law as it would not contain any offense restriction and would have a broad nexus requirement. That said, the coercive control defense would not entirely displace the human trafficking affirmative defense. Certain forms of human trafficking (for example, those involving forced labor) involve episodic threats rather than the diachronic mode of coercion that characterizes coercive control. Likewise, certain forms of coercive control (for example, the kind that might support the inference that the target failed to protect a child from the controller’s abuse and neglect) do not trigger human trafficking statutes because they do not implicate the sex trafficking or labor trafficking elements of liability for human trafficking offenses in most United States jurisdictions.<sup>251</sup> Therefore, the model coercive control defense would supplement, rather than displace, existing human trafficking affirmative defenses.

***Abused Spouse Syndrome.*** The coercive control defense shares some scientific bases with the so-called “abused spouse syndrome” defense (originally the “battered woman syndrome” or “BWS” defense).<sup>252</sup> The BWS defense is a controversial theory of self-defense that justifies (rather than excuses) a defendant’s killing of their attacker or of another person as a “defense of others” defense. At common law, self-defense requires many of the same elements as common law duress: the threat of bodily peril that is imminent and a necessity for the defendant to use force, all measured on a reasonableness standard.<sup>253</sup> The BWS defense does not change those elements but, rather, allows the defendant to argue that circumstances of domestic abuse are relevant to the interpretation of the “imminence” and “reasonableness” elements.<sup>254</sup> Domestic violence survivors experience the kinds of learned helplessness and trauma bonding that arise in connection

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<sup>250</sup> See *supra* notes 114–118 and accompanying text.

<sup>251</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1465 § 112(a)(2); see also Dahlstrom, *supra* note 64, at 415–17 (describing state human trafficking statutes).

<sup>252</sup> See Kit Kinports, *Defending Battered Women’s Self Defense Claims*, 67 OR. L. REV. 393, 396–408 (1988).

<sup>253</sup> See *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973).

<sup>254</sup> See Kinports, *supra* note 252, at 408–22.

with coercive control.<sup>255</sup> The BWS defense allows the defendant to argue that the “necessity” of their use of force and its “reasonableness” should be determined in light of the very real experience of helplessness, and not by whether a “reasonable person” would have felt he had no other alternatives in the situation.<sup>256</sup> Furthermore, the literature on BWS explains how the “cyclical” nature of domestic violence is relevant to whether the “imminence” requirement is met.<sup>257</sup> A long-term victim of domestic violence gains experience predicting when the next violent phase of her abuser’s cycle is about to commence, thus reasonably perceiving it as imminent when someone without her experience would not.<sup>258</sup> The BWS defense (particularly prior to its gender-neutral relabeling) draws criticism from feminist scholars who argue that the defense institutionalized negative stereotypes of women by staging the “reasonable woman” as objectively helpless.<sup>259</sup>

While the BWS defense and the coercive control defense utilize some of the same psychological and sociological concepts, the legal significance of these defenses is distinct. The coercive control defense applies to all crimes committed by the defendant, not merely the killing or harming of the coercer. Furthermore, the BWS defense largely operates on a synchronous model of coercion that is reflected in the wrongful pressure approach. The relevant inquiry in self-defense is what the defendant reasonably *believes* in the moment of the killing. While the BWS defense renders longer-term contextual information about the abusive relationship *relevant* to the in-the-moment inquiry, the test nonetheless turns on whether the defendant *in fact* reasonably apprehended an imminent threat to their person sufficient enough to return with deadly force. By contrast, the coercive control defense rests on an assessment of the defendant’s decision-making in light of a long-term pattern of behavior by the coercer. Likewise, because the coercive control defense rests on an enforcement approach to coercion, the relevant inquiry is framed in terms of usurpation rather than pressure.

Because of these differences in application and fundamentals, the coercive control defense avoids many of the criticisms made against BWS.

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<sup>255</sup> See generally Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525 (1977) (explaining how domestic abuse contributes to a victim’s psychological paralysis).

<sup>256</sup> See Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 463 (2006).

<sup>257</sup> See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 95–96 (1984).

<sup>258</sup> *Id.*

<sup>259</sup> See, e.g., Coughlin, *supra* note 238, at 5; Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self Defense*, 8 HARV. WOMEN’S L.J. 121, 137 (1985).

For example, the coercive control defense does not ask the factfinder to construct a “reasonable person” and then frame the battered spouse as deviating from this standard because of gendered patterns of abuse.<sup>260</sup> Rather, the coercive control defense asks how the conduct of the coercer affected the defendant’s decision-making capacity around relevant spheres of action. The relevant inquiry is not “how do reasonable battered women behave,” so much as “what was the nature of the particular relationship between this coercer and this target?”

**“Marital Coercion” and Other Status-Based Defenses.** The focus on the agency of the coercer distinguishes the proposed coercive control defense from ostensibly related phenomena, such as the defense of “marital coercion” under common law doctrine of coverture. The marital coercion defense held that “for some crimes, married women acting in the presence of their spouses might not be held accountable, based not on a notion of unity but on subordination and coercion.”<sup>261</sup> As described by James Fitzjames Stephen, the doctrine held that

If a married woman commits . . . theft or receives stolen goods . . . in the presence of her husband, she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the circumstances of the case show that in point of fact she was not coerced.<sup>262</sup>

The presumptive application of the marital coercion defense, which was abolished in England in 1925,<sup>263</sup> enacted a “legal subservience” on the

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<sup>260</sup> For an account of the problems with such a narrative see Naomi R. Cahn, *Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398, 1402–03 (1992) (“While its use may empower some women, in the practical reality of the attorney-client relationship and in the courtroom, the reasonable women standard both encourages client passivity and ignores the complexities of the client’s situation. Moreover, the use of separate standards operates to entrench differences between men and women, rather than to establish a standard that transcends issues of sameness and difference.”).

<sup>261</sup> Marisha Caswell, *Coverture and the Criminal Law in England, 1640-1760*, in MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD 88, 88 (Tim Stretton & Krista Kesselring eds., 2013); see also Benjamin Paul, *The Doctrine of Marital Coercion*, 29 TEMP. L.Q. 190, 193 (1956) (noting that majority of U.S. states at the time of writing allow “the woman to assert her coverture and defend [against criminal liability] on the ground of marital coercion”).

<sup>262</sup> JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 105 (1883)

<sup>263</sup> Emily Ireland, *Rebutting the Presumption: Rethinking the Common Law Principle of Marital Coercion in Eighteenth- and Nineteenth-Century England*, 40 J. LEGAL HIST. 21, 43 (2019).

married woman by interpreting her actions as “solely because of her husband’s coercion.”<sup>264</sup>

The marital coercion defense, like the doctrine of coverture more broadly, was a demeaning legal notion.<sup>265</sup> It adopted a normative position about the coerciveness of marriage, in both the deontological and statistical senses of that term—husbands ought to control their wives, and most husbands do.<sup>266</sup> The coercive control defense adopts neither such a deontological nor statistical position about how relationships work.

Consistent with the enforcement approach to coercion, asserting the coercive control defense inquiries into the putative coercer’s actual pattern of control over the target, as well as a normative assessment of the target’s exercise of agency. The animating rationale behind the coercive control defense is not the proposition that wives should be subordinate to their husbands, but rather that no one should demean anyone in the way that the coercive controller demeans the target. To assert a coercive control defense against a coercer is no more demeaning than to assert a criminal complaint for a coercion-based offense such as blackmail, extortion, or kidnapping.

#### CONCLUSION

Duress and other coercion-based defenses are ill-suited to coercive control contexts. This failure stems from the notion of coercion that underlies most contemporary legal thinking about duress, one that construes coercion as a form of wrongfully imposing pressure on a target. The enforcement approach provides an alternative, more plausible model that frames coercion in terms of the coercer’s usurpation of the target’s decisional authority. Adopting the enforcement approach to coercion and extending its logic to coercion-based defenses would give rise to a novel criminal defense for those subject to coercive control, one that resembles the human trafficking affirmative defense that is notionally available in Oklahoma.

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<sup>264</sup> David Rosenberg, *Coverture in Criminal Law: Ancient Defender of Married Women Notes*, 6 U.C. DAVIS L. REV. 83, 83 (1973).

<sup>265</sup> There is reason to doubt whether the marital coercion defense was as demeaning in practice as it appeared on the books. As one historian notes, by the nineteenth century treatise writers in England “recognized a wife may possess agency separate to her spouse, and began to flesh out examples of how a wife may demonstrate independence or power over her husband.” Ireland, *supra* note 263, at 41.

<sup>266</sup> See, e.g., Coughlin, *supra* note 238, at 33–34 (contending that the resilience of the marital coercion doctrine indicates the “strength and longevity of the law’s commitment to the hierarchical nature of the marriage relationship” and reflected recognition by judges that “marriage was the dominant social institution in women’s lives and that the husband, and not any process of the criminal law, had been assigned the leading role in controlling women’s misconduct”).

Addressing coercive control cases requires rethinking the predominant legal notion of coercion. Vindicating the enforcement approach in coercive control contexts might lead to a more widespread rethinking of how coercion matters in criminal law.

However, the rethinking of coercion-based defenses that this Article proposes is compatible with, and perhaps called for by, movements to construe criminal law theory in terms of political philosophy.<sup>267</sup> It is often noted that human trafficking affirmative defenses are appropriate because trafficked persons are victims of crime.<sup>268</sup> Legitimate states claim a monopoly on the use of force.<sup>269</sup> On many theories of political legitimacy, this claim gives rise to a state's duty to protect those subject to its authority from encroachments of others, including coercion.<sup>270</sup> A state that fails to protect those subject to its authority from such private coercion has committed an injustice that can undermine its legitimacy.<sup>271</sup> Just as the notion

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<sup>267</sup> See VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* vii (2018) (“[A]ssociated institutions are . . . subject to the same principles of institutional and political evaluation that apply to public law and political institutions generally”); Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1041 (2014) (“[A] theory of state punishment needs a theory of the state, whether original or borrowed.”). For a broader overview of the position that criminal law is a topic in political philosophy, see Stephen Galoob, *Criminal Law and/as Political Theory*, 55 TULSA L. REV. 203 (2020).

<sup>268</sup> See, e.g., Dempsey, *supra* note 71, at 208 (noting that “criminal law too often punishes victims” of sex trafficking “rather than those who victimize them”); see also OKLA. STAT. tit. 21, § 748.2(a)(2) (Westlaw through 1st Reg. Sess. of 58th Leg. (2021)) (noting that human trafficking victims shall “not be detained in facilities inappropriate to their status as crime victims”).

<sup>269</sup> See, e.g., Hans Kelsen, *The Law as a Specific Social Technique*, 9 U. CHI. L. REV. 75, 81 (1941) (“The individual who, authorized by the legal order, applies the coercive measure (the sanction), acts as an organ of this order, or of the community constituted thereby. And hence one may say that law makes the use of force a monopoly of the community.”); CHRISTOPHER MORRIS, *AN ESSAY ON THE MODERN STATE* 14 (1998) (“In theory . . . states are ‘sovereign’ in their territories, and they claim a monopoly on the use of legitimate force therein. This is held to distinguish states from the Mafia or multinational corporations.”).

<sup>270</sup> See, e.g., ERIN KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY* 174 (2018) (“Law enforcement practices are worthy of our respect and cooperation only when they are reasonably successful at arresting and prosecuting people for committing what are and ought to be crimes, at morally acceptable costs to all parties involved, including defendants.”).

<sup>271</sup> Stephen Galoob & Stephen Winter, *Injustice, Reparation, and Legitimacy*, 5 OXFORD STUD. IN POL. PHIL. 65, 70–71 (2019) (describing the “general delegitimizing effect” of injustices, whereby injustices perpetuated against some groups compromise a state’s right to rule more broadly); Anderson, *supra* note 30, at 29 (“A state that wishes to claim legitimate authority will need to protect individuals from the coercion of others as well as to avoid unjust coercion of its own. If people are not able to depend on state protection against the coercion of others, this has long been thought to reduce or eliminate

of self-defense can be vindicated in terms of the state's failure to provide the defender with protection from an unlawful threat,<sup>272</sup> so too can coercion-based defenses can be justified in terms of the state's failure to protect targets from wrongful or unlawful coercion. Because those subject to coercive control and other coercive threats are survivors of serious wrongs and crimes, providing a broad defense to criminal liability in the wake of coercion can be seen as a requirement of political legitimacy. One prominent understanding of coercion-based defenses, such as duress, is that they are justified where and to the extent that the defendant lacked a fair opportunity to avoid criminal wrongdoing owing to the unfairness of a choice situation.<sup>273</sup> On a political understanding of coercion-based defenses, by contrast, the availability of a duress defense would turn on an assessment of the state's failure to protect the target of coercion and the reasonableness of the target's lawbreaking in the wake of such a failure.

To outline such a political theory of criminal law defenses is not to argue for it. That said, reconceiving coercion along the lines proposed here might invite a broader rethinking of criminal law defenses and criminal law itself.

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the state's authority to command those people, since in effect a new sovereign has taken up reign over them . . .").

<sup>272</sup> See, e.g., John Gardner, *Criminals in Uniform*, in *THE CONSTITUTION OF CRIMINAL LAW* 97, 114 (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzon & Victor Tadros eds., 2013) ("Because of ways in which the rule of law ties their hands, or for other institutional reasons, police officers (and other officers of the law) may be unable to provide very effective protection from [abusers that have responsibilities to protect.] Sometimes that may itself be a failure of duty on the part of the police, calling for strong justification or excuse"); Malcolm Thorburn, *Criminal Law as Public Law*, in *THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 21, 36 (Antony Duff & Stuart P. Green eds., 2011) (contending that characteristic structure of justification defenses such as self-defense and necessity is that "the power invoked by the citizen . . . belongs to the state . . . [I]t is only in situations where the appropriate state official is unavailable to discharge his duties that ordinary citizens are entitled to act").

<sup>273</sup> See, e.g., Dressler, *supra* note 24, at 1365 ("Duress excuses when the available choices are not only hard but also unfair. A person acting under duress is excused, although he possessed the capacity to make the right choice, if he lacked a fair opportunity to . . . avoid acting unlawfully."); MICHAEL MOORE, *PLACING BLAME* 560–61 (1997).