

COERCION

Alan Wertheimer

PRINCETON UNIVERSITY PRESS
PRINCETON, NEW JERSEY

CONTENTS

| | |
|---|------|
| PREFACE | xi |
| ACKNOWLEDGMENTS | xiii |
| ONE. INTRODUCTION | 3 |
| The Problem | 3 |
| Basic Issues | 5 |
| From Philosophy to Law | 10 |
| Plan of the Book | 15 |
| <i>Part One: Law</i> | |
| TWO. CONTRACTS | 19 |
| A Sample of Cases | 23 |
| Preliminary Observations | 28 |
| The Current View: The <i>Restatement of Contracts</i> | 29 |
| The Choice Prong | 31 |
| The Proposal Prong | 38 |
| The Voluntariness Problem | 46 |
| Economic Analysis of Duress | 48 |
| Duress, Fairness, and Autonomy | 50 |
| Conclusions and Questions | 53 |
| THREE. TORTS: ASSUMED RISK AND INFORMED CONSENT | 54 |
| Assumed Risk | 55 |
| Informed Consent | 62 |
| FOUR. MARRIAGE, ADOPTION, AND WILLS | 71 |
| Marriage | 71 |
| Adoption | 77 |
| Wills | 84 |
| Finding Duress and Holding Duress | 88 |
| FIVE. BLACKMAIL AND COERCIVE SPEECH | 90 |
| Theories of Blackmail | 92 |
| Immoral Proposals and Immoral Actions | 102 |

CONTENTS

| | |
|--|-----|
| SIX. CONFESSIONS AND SEARCHES | 104 |
| Confessions | 104 |
| Searches | 114 |
| Conclusion | 118 |
| SEVEN. PLEA BARGAINING | 122 |
| The Practice of Plea Bargaining | 122 |
| The Coercion Claim | 125 |
| A Brief Constitutional History | 129 |
| The Supreme Court's Theory of Coercion | 133 |
| Applying the Two-Pronged Theory | 135 |
| Immoral Plea Bargaining | 139 |
| Conclusion | 142 |
| EIGHT. DURESS AND NECESSITY AS DEFENSES IN THE CRIMINAL LAW | 144 |
| Some Traditional Views | 146 |
| Necessity | 150 |
| Duress | 152 |
| Two Special Situations | 158 |
| The Theory of Duress as a Defense | 161 |
| Justification or Excuse? | 165 |
| NINE. COERCION AND THE LAW: CONCLUSION | 170 |
| <i>Part Two: Philosophy</i> | |
| TEN. THE LANGUAGE OF COERCION | 179 |
| From Law to Philosophy | 179 |
| Coercion and Contextualism | 181 |
| Coercion as Contextual | 184 |
| Conclusion | 189 |
| ELEVEN. NO CHOICE | 192 |
| Distance | 192 |
| Choosing Choice | 195 |
| Valence | 197 |
| Conclusion | 201 |
| TWELVE. COERCIVE PROPOSALS: I | 202 |
| Threats and Offers | 204 |
| Moral and Nonmoral Baselines | 206 |

CONTENTS

| | |
|---|-----|
| A Right Answer? | 211 |
| Multiple Baselines and the Two-Pronged Theory | 214 |
| Setting the Moral Baseline | 217 |
| THIRTEEN. COERCIVE PROPOSALS: II | 222 |
| Unreasonable Incentives | 222 |
| Exploitation | 225 |
| Exploitation + Unacceptability = Coercion? | 229 |
| Hard Choices | 233 |
| Hard Choices and Agreements | 234 |
| FOURTEEN. MORALITY, INTENTIONALITY, AND FREEDOM | 242 |
| Objections to a Moralized Theory | 242 |
| Zimmerman's Alternative | 244 |
| Cohen and Nozick | 251 |
| Objections to a Moralized Theory Reconsidered | 255 |
| Constraints on Freedom | 258 |
| Coercion, Intentionality, and Freedom | 263 |
| FIFTEEN. FROM COERCIVE PROPOSALS TO COERCION | 267 |
| Coercion, Excuse, and Justification | 269 |
| The Choice Prong as Moralized | 272 |
| Two- and Three-Party Cases | 274 |
| Coercion, Responsibility, and Policy | 281 |
| SIXTEEN. COERCION AND VOLUNTARINESS | 287 |
| The Problem | 287 |
| Motivations | 290 |
| Preferences | 294 |
| Hierarchical Preferences | 297 |
| Proposals from an Original Position | 299 |
| Morality and Voluntariness | 301 |
| Conclusion | 304 |
| SEVENTEEN. CONCLUSION | 307 |
| INDEX | 311 |