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PROMISING UNDER DURESS

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ABSTRACT. In her chapter “Duress and Moral Progress”, Seana Shiffrin offers a novel perspective on coerced promises. According to the dominant view, these promises confer no right to performance on the coercer and do not create new reasons for the victim. Shiffrin accepts that these promises fail to confer rights, but disagrees that they never alter the victim’s moral profile. She argues that they do at least where promises are ‘initiated’ by the victim, rather than ‘dictated’ by the coercer. The initiation of a promise, albeit in far from ideal circumstances, opens the door, Shiffrin claims, to valuable opportunities for moral progress. In this response, I argue that Shiffrin makes a misstep by not rejecting the dominant view altogether. I suggest that the older Hobbesian picture, according to which coerced promises do confer rights, is supported by our moral and legal practices. Furthermore, it makes moral progress more likely.

I. THE DOMINANT VIEW

In her chapter ‘Duress and Moral Progress’, Seana Shiffrin offers a novel perspective on the moral significance of promises made under duress or coercion.¹ These are cases in which the coercer extracts a promise from her victim by making a threat that deliberately and illegitimately reduces the victim’s options. So, for example, the mugger’s victim promises to hand over his wedding ring in response to her threat that she will kill him if he doesn’t.² The focus of

¹ Seana V. Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (New Jersey: Princeton University Press, 2014), ch. 2.

² *ibid.*, pp. 49, 52.

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Shiffrin's chapter is on the moral impact of these promises, i.e., whether they change the victim's reasons for action.

One might wonder whether this topic is of only academic or theoretical relevance. Surely, in most cases the coercer will just ask the victim to hand over his gold ring, rather than *promise* to hand it over? In the context of a garden-variety mugging that is probably true. But there are contexts in which a promise is precisely what the coercer seeks. Shiffrin discusses hostage negotiations for example. More mundanely, disputes arising from contract renegotiations where one of the parties has threatened to breach the original agreement unless new terms are agreed to are a staple of undergraduate contract law courses and textbooks. We have all heard of the builder who, having ripped out the old kitchen, asks the homeowner for more money on pain of downing tools if the homeowner doesn't agree. In the past, these cases have caused considerable controversy, implicating a variety of important contract law doctrines, including consideration, economic duress, and frustration.³ So the morality of these cases has potentially very important practical implications.

According to the dominant view, these promises are not morally binding, because they do not give the coercer or promisee any moral right to performance. This is because the use of coercion taints the moral quality of the interaction between the parties. So, for example, Judith Jarvis Thomson argues that the coercer has no right to promissory performance because she procured the promise by unfairly reducing the victim's options. For Thomson, the fact that the coercer is at fault for constraining the victim's available alternatives to making the promise explains why she has no right or claim to performance of the promise.⁴ In such cases, Thomson says the coercer's claim is 'stillborn, forfeit from conception'.⁵ David Owens argues that such promises are invalid because coercion contradicts the very purpose of a binding promise, which is to serve an authority interest of the promisee to control the behaviour of another without resorting to force or coercion.⁶ Eric Chwang too focuses on the idea

³ See, for example, *Williams v. Roffey Bros. and Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1.

⁴ Judith J. Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 310–314.

⁵ *ibid.*, p. 351.

⁶ David Owens, 'Duress, Deception, and the Validity of a Promise', *Mind* 116(462) (2007): pp. 293–315, 312.

that coerced promises are self-contradictory. According to Chwang, the purpose of promise is to empower the promisor to create duties freely and on his own, and that purpose would be undercut if coerced promises created moral obligations.⁷ In her chapter, Shiffrin acknowledges the credibility of the dominant view and assumes the truth of the proposition that promising under duress confers no right to performance on the coercer.

The dominant view has displaced the older and now much-maligned Hobbesian take on these cases. For Thomas Hobbes, even when a promise was coerced, the coercer had a right to the promised performance. That right changed the moral profile of the victim by giving him a duty to perform.⁸ The Hobbesian view is compatible with saying that the duty to perform is only *pro tanto*, and can be defeated or overridden by the very fact that coercion had been used to procure the promise. Nevertheless, and contrary to the now dominant picture, on the Hobbesian view the duty exerts genuine (not just *prima facie*) normative weight in favour of performance, calling for justification or excuse in the event of non-performance.⁹ This was a product of Hobbes' view that action motivated by fear was nonetheless fully voluntary. For Thomson, as for many people today, such a view is 'hard to swallow', and 'excessively respectful' of the promises made in these contexts.¹⁰ The Hobbesian view is distasteful for several reasons. It seems to unduly stretch our ordinary understanding of voluntary action; it may well encourage future acts of coercion, by rewarding coercers with valid claims to performance;¹¹ and it seems to strike at the heart of the liberal commitment to the values of personal autonomy and non-domination of self by others.¹²

In her chapter, Shiffrin rejects the Hobbesian picture. She accepts that coerced promises do not confer rights or claims to performance

⁷ Eric Chwang, 'On Coerced Promises', in H. Sheinman (ed.), *Promises and Agreements: Philosophical Essays* (Oxford: Oxford University Press, 2011), pp. 156–82, 158–159.

⁸ Thomas Hobbes, *Leviathan*, Richard Tuck (ed.), (Cambridge: Cambridge University Press, 1991), ch. 14.

⁹ Shelly Kagan distinguished *pro tanto* and *prima facie* reasons in *The Limits of Morality* (Oxford: Oxford University Press, 1989), p. 17: 'a *prima facie* reason appears to be a reason, but may actually not be a reason at all... In contrast, a *pro tanto* reason is a genuine reason – with actual weight – but it may not be a *decisive* one in various cases'.

¹⁰ Thomson, *The Realm of Rights* (n 4, above), pp. 310–311.

¹¹ Gregory S. Kavka, *Hobbesian Moral and Political Theory* (New Jersey: Princeton University Press, 1986), p. 396.

¹² John Deigh, 'Promises Under Fire', *Ethics* 112(3) (2002): pp. 483–506, 487–488.

on the coercer. Nevertheless, her rejection of the Hobbesian view does not lead her into a full embrace of the dominant perspective. Instead, she steers an interesting and novel course. Although she accepts the dominant view that promises in these contexts don't give the coercer any moral right to performance, that does not mean, she argues, that they don't change the victim's reasons for action. In other words, she rejects what both the dominant and Hobbesian views seem to assume: that the promise will only change the victim's reasons for action if it confers a claim to performance on the coercer. To show how the victim's reasons can be prized apart from the coercer's right, she makes an insightful distinction between two types of case where coerced promises are made.

II. COERCED PROMISES AND MORAL PROGRESS

Shiffrin argues that the dominant view is unsatisfactory because it focuses on the issue from the point of view of the coercer. From that perspective, there is no right to performance. However, looking at things from the coercer's point of view may miss salient features of these situations. In particular, the fact that the coercer has no right to performance does not mean that the promise has no moral significance for the victim.¹³

Shiffrin argues that it does in at least one case. She distinguishes two types of case where promises are made under coercion. First, 'dictated' cases, in which the promise is directed or scripted by the coercer. So, for example, the coercer demands that the victim promise to hand over his gold ring, and he agrees to this demand. Second, there are 'initiated' cases, in which the victim plays a creative role in making the promise. So, rather than acceding to the coercer's demand that he promise to give her the ring, the victim explains that the ring has sentimental value, and offers the coercer money instead. Shiffrin argues that although in both cases the coercer's wrongdoing disqualifies her from having a right to performance, in the initiated case, the promise may have special value for the victim that justifies its leaving a moral trace.¹⁴ It binds the victim, even though the coercer has no right to expect performance,

¹³ Shiffrin, *Speech Matters* (n 1, above), p. 57.

¹⁴ *ibid.*, p. 50.

and no entitlement to enlist the help of others to secure performance.

The key difference between the two cases, Shiffrin argues, does not rest in the content of what is agreed, but rather the role the victim plays in determining that content.¹⁵ Shiffrin says that there is value in having the power to make initiated promises of this kind.

Prudentially and most obviously, it provides the victim with a method of escaping the situation, which is potentially better or less risky than the alternatives, i.e., running away, self-defence or capitulation. The efficacy of the device, though, depends on whether the promise genuinely obligates the victim. Otherwise the coercer would have no reason to accept it.¹⁶

Of more significance to Shiffrin, though, is that the device of the initiated promise not only enables escape, but it does so in a morally desirable way by enabling the victim to exert creative agency to craft a reasoned resolution to the conflict.¹⁷ In this way, these far from ideal circumstances actually present the victim with an opportunity for 'moral progress' by showing skill in navigating difficult (and potentially treacherous) moral terrain, and in attempting to lift the interaction onto a healthier, more respectful, footing: 'Thereby, it moves both parties closer toward the regulative ideal through an imperfect, fledgling form of persuasion and directness, rather than through brute force'.¹⁸ This is for Shiffrin a 'writ-small' illustration of the more general and pervasive duty to achieve moral progress in circumstances not of our own making.¹⁹

The element of negotiation in the initiated case and the shared agency that brings about the final resolution means that the conflict is resolved through the coercer recognising and responding to the victim's interests, as the victim perceives them to be. By initiating the promise, the victim asserts his own agency, and in doing so invites the coercer back into the moral community. The agreement that is the outcome of shared agency begins to repair the relational damage done by his coercion. By keeping his promise, the victim expresses his continuing faith in the coercer's humanity, as someone

¹⁵ *ibid.*, pp. 53–54.

¹⁶ *ibid.*, p. 58.

¹⁷ *ibid.*, pp. 58–59.

¹⁸ *ibid.*, pp. 59–60.

¹⁹ *ibid.*, p. 59.

worthy of respect, in spite of her wrongdoing.²⁰ This cycle of initiating a promise, reaching agreement with the coercer and then keeping his word, creates the seedlings of a relationship of trust and respect. So, Shiffrin says: 'The negotiated process introduces elements of what appropriate moral relations would look like into a situation where they are lacking'.²¹

Shiffrin's presentation of the negotiated case is characteristically alive to moral complexity. By shifting focus from the value of the promise to the coercer, and onto the value of it for the victim, Shiffrin brings to light the importance of the initiated cases and the values that they instantiate. However, even accepting these arguments, I have some doubts about how much of a difference the initiation of a promise makes to the victim's moral profile. These doubts are related to Shiffrin's background assumption that the dominant view is correct to say that coerced promises confer no rights or moral powers on the coercer.

III. FIGHTING THE TIDE

As I have said, Shiffrin finds plausible and assumes the truth of the dominant view's claim that coerced promises confer no right to performance on the coercer. She rejects then the older Hobbesian picture of these cases. As I have said, many people nowadays find Hobbes' claim that even coerced promises are binding distasteful.

In my view, many of the worries that people have about the Hobbesian view, for example, that it unjustly enriches the coercer, that it is illiberal and so on, are overblown. They seem much less worrisome once we recognise that the Hobbesian claim is compatible with the view that the right transferred to the coercer is not absolute but *defeasible*, i.e., it may be overridden, *all things considered*, by more weighty considerations, such as the fact that coercion was used to procure it.²² In other words, the fact of coercion might provide the victim with a justification or excuse for breach.

It is beyond the scope of this paper to argue fully for this view. However, and against the tide, I want to gesture towards its plau-

²⁰ *ibid.*, pp. 61–62, 71, 73–75.

²¹ *ibid.*, p. 62.

²² Margaret Gilbert, 'Agreements, Coercion, and Obligation', *Ethics* 103(4) (1993): pp. 679–706, 697–698, 702.

sibility by highlighting how it explains some basic aspects of our moral and legal practices, which in contrast seem to jar with the dominant view.

A. Morality

As I have said, one of the objections to the Hobbesian picture is that it unrealistically stretches the concept of voluntary action by claiming that we are morally responsible for promises we make under duress. Notice though that outside of the promissory context, we have no trouble attributing responsibility for actions performed under duress. This is so even in cases where there is no justification for the duress. Take this example from Thomson: ‘The Mafia tell the surgeon that they will kill five unless the surgeon cuts a young man up and kills him’.²³ On some views of coercion, the pressure in such a case is regarded as so psychologically overbearing that it cannot be said that the victim has exercised a genuine choice.²⁴ However, it does not seem a stretch to say that the surgeon who accedes to such a threat might be acting intentionally and rationally. As Margaret Gilbert says, it is just not ‘plausible to suppose that everyone becomes so unnerved in the face of coercion that they are incapable of making up their minds at all, that they are, so to speak, rendered witless’.²⁵ Indeed, I suspect most people would say that if the surgeon cuts up the young man he is doing something wrong.²⁶

²³ Thomson, *The Realm of Rights* (n 4, above): p. 278, and see Shiffrin, *Speech Matters* (n 1, above), pp. 48–49.

²⁴ Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, new edn., 1986), chs. 23–24; Harry G. Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge: Cambridge University Press, 1988), ch. 3.

²⁵ Gilbert, ‘Agreements, Coercion, and Obligation’, (n 22, above): p. 685; Scott Anderson, ‘Coercion’, *The Stanford Encyclopedia of Philosophy* (2015): pp. 1–40, 21. <<https://plato.stanford.edu/archives/sum2015/entries/coercion/>> accessed 12 January 2017. See similarly in the contractual context the rejection of the ‘overborne will’ theory of duress: *Crescendo Management Pty. Ltd. v. Westpac Banking Corp.* (1988) 19 N.S.W.L.R. 40, 45–46: ‘the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action’ (McHugh J.A.); *Dimskal Shipping Co. S.A. v. International Transport Workers Federation (The Evia Luck (No. 2))* [1992] 2 A.C. 152, 166 (Lord Goff); Patrick S. Atiyah, ‘Economic Duress and the Overborne Will’, *Law Quarterly Review* 98(197) (1982): pp. 197–202; Peter Birks ‘The Travails of Duress’, *Lloyd’s Maritime and Commercial Law Quarterly* [1990]: pp. 342–351; Jack Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Oxford: Oxford University Press, 1991), pp. 113–17.

²⁶ Thomson, *The Realm of Rights* (n 4, above), p. 278. The same view has prevailed in how the defence of duress is interpreted in criminal law. See *Lynch v. D.P.P. of Northern Ireland* [1975] A.C. 653. The Law Lords unanimously rejected the claim that duress vitiates the will. Lord Simon said that duress does not destroy the will, but rather ‘deflects’ it (p. 695).

In the promissory context, there are specific examples of cases in which it seems clear that there is moral responsibility for making a promise under duress. John Deigh has argued that promises to surrender in war are of this kind. Here the promise to put down one's arms and submit to the enemy is made under coercion, given that the alternative is to face destruction. Nevertheless, there is no doubt it is binding.²⁷ Take as another example promises parents make to their children under threat of misbehaviour. So, a teenager says to his parent: 'Promise me I can have the car on Sunday night, or I will never talk to you again!'. Parents often regret acceding to these demands, and when these sorts of interactions become routine they often reflect unhealthy dynamics in these relationships. Nevertheless, these regrets just go to show that these promises matter normatively. The fact that they were coerced does not mean that they are empty of any rational pull.

Defenders of the dominant view have attempted to explain these cases away by claiming that they are not what they appear. So, for example, Chwang argues that surrender cases are better understood as examples of coerced action rather than coerced promise, or perhaps as examples of morally legitimate offers rather than illegitimate threats.²⁸ These rationalisations are perfectly plausible, but it seems unclear why they are necessary when there are simpler more transparent explanations easily available.

One might argue that these examples are beside the point. At most, they suggest that the victim may be responsible for his promise even when it is made under duress, but that leaves the central claim of the dominant view intact: The coercer's wrongdoing disqualifies her claim or right to performance. That may well be true, but there are other reasons to doubt the central claim. So, for example, when we make a promise under duress, our everyday vocabulary suggests that we have nevertheless made a promise. I don't deny though that there may be legitimate debate about whether these really are promises (as Chwang argues about surrender 'promises'), or that even if they are rightly regarded to be promises, they necessarily have the normative implica-

²⁷ John Deigh, 'Promises Under Fire', *Ethics* 112(3) (2002): pp. 483–506, 489.

²⁸ Chwang, 'On Coerced Promises', (n 7, above): p. 165. On the distinction between offers and threats see Robert Nozick, 'Coercion', in S. Morgenbesser, P. Suppes, and M. White (eds.), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (New York: St. Martin's Press, 1969), pp. 440–472, 447.

tions that ‘ordinary’ promises typically have, i.e., they create genuine rights and duties. Rather, my claim is merely that given that we normally use the language of promising in such cases, the most natural explanation seems to be that we have made a genuine promise, and given that in many of these cases, the promises made seem to impose genuine duties on the promisor and confer genuine rights on the promisee—as we see in the surrender case and the parent’s promise to the teenager—again, the most natural explanation is that it is the promise itself that has changed the normative profile of the parties involved.

None of this of course settles the issue of whether these duress cases involve genuine promises or promises that have the normative implications that ordinary promises normally have, i.e., they confer rights, create duties, and so forth. However, it does mean that the burden is on the dominant view to show that our usage here is misguided or confused. So, the claim might be that the promise is only *prima facie*; it looks like we have promised but in fact we have not.²⁹ Or alternatively the dominant view needs to show that although we do make a promise, it is normatively inert, i.e., devoid of its normal or routine moral consequences.

There is of course nothing illegitimate about these moves, and indeed they may end up uncovering the truth, but there is a risk, too, that these rationalisations begin to pile up and obfuscate the reality. So, for example, as Shiffrin discusses, we tend to think in initiated cases at least that the coercer can waive her right to performance. However, the existence of that power only makes sense if the coercer has the right to demand performance. Shiffrin says the existence of a power to waive in this context is a chimera. Instead, the coercer merely goes through the motions of ‘waiver’ to indicate that she is no longer interested in performance. At least where the victim had a positive stance towards performance, this makes performance redundant.³⁰ The explanation is ingenious, but again it is unclear why it is necessary, when our pre-theoretical understanding explains the phenomenon much more easily and naturally; in a way that goes with the grain of our ordinary moral experience.³¹

²⁹ Gilbert, ‘Agreements, Coercion, and Obligation’, (n 22, above): p. 684, 686.

³⁰ Shiffrin, *Speech Matters* (n 1, above), p. 66.

³¹ My point here is in keeping with the philosophical method that John Rawls famously called ‘reflective equilibrium’ which attempts to strike a balance between theoretical rationalisations and considered judgments about a moral practice or phenomenon. John Rawls, *A Theory of Justice* (revd edn Oxford: Oxford University Press, 1999), pp. 18–19.

B. Law

Our legal practices diverge from the dominant view too. According to the doctrine of duress in contract law, a contract procured through coercion is not ‘void’, but only ‘voidable’.³² Despite her use of coercion, the coercer has every right to insist on performance unless the victim chooses to rescind or set aside the agreement.³³ If the power to rescind is not exercised, the coercer’s right to performance stands.³⁴

The coercer’s legal right to contractual performance sits uneasily with the central claim of the dominant view, i.e., that the use of coercion prevents the creation of such a right. This is either because the psychological pressure exerted on the victim impairs his will to make a promise, with the result that no promise is made (the ‘no promise’ view).³⁵ Or, as Owens has argued, the duress, although not preventing the victim from exercising his will, does nevertheless invalidate the promise made (the ‘no *valid* promise’ view).³⁶ On either view, no right to performance is created. In the absence of such a right, the victim has no duty to perform, and there is no breach of duty or need to justify ‘breach’ when performance is withheld.

The trouble is that the existence of the right to performance is necessary to explain voidability. Contract cases typically involve agreements or conditional promises.³⁷ Take the following hypothetical example. Jill threatens to kill Jack unless he promises to sell his gold ring to her for £100 (far below its market price). As a result, Jack reluctantly agrees. Legally, Jack now has a duty to sell the ring. That duty stands unless and until Jack exercises his right to rescind

³² *Lynch v. D.P.P. of Northern Ireland* [1975] A.C. 653, 695; *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* [1979] Q.B. 705; *Pao On v. Lau Yiu Long* [1980] A.C. 614; *Universe Tankships of Monrovia v. International Transport Workers’ Federation* (“*The Universe Sentinel*”) [1983] 1 A.C. 366, 400 (Lord Scarman).

³³ *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* [1979] Q.B. 705; *Pao On v. Lau Yiu Long* [1980] A.C. 614.

³⁴ I rely here and in what follows on arguments about the nature of voidability I developed elsewhere with George Letsas in the context of a discussion of the doctrine of undue influence. George Letsas and Prince Saprai, ‘Foundationalism About Contract Law: A Sceptical View’, available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211283> accessed 29 January 2019.

³⁵ An analysis of contractual duress along these lines was mooted (but ultimately rejected) by Stephen A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004), pp. 316–340.

³⁶ Owens, ‘Duress, Deception and the Validity of a Promise’, (n 6, above): p. 294.

³⁷ For an analysis of agreements as conditional promises, see Joseph Raz, ‘On the Nature of Rights’, *Mind* 93(370) (1984): pp. 194–214, 203.

for duress. There is an asymmetry here with Jill's rights. She cannot rely on the duress to set the contract aside. Furthermore, should Jack decide not to rescind, this potentially has important legal effects on third parties. So, for example, under a voidable (as opposed to void) contract, good title will pass should Jill sell the ring to a good-faith purchaser.³⁸

The asymmetry between the parties and these legal effects are inexplicable if we adopt the dominant view. On that view, Jack's promise to sell Jill the ring is either vitiated (the no-promise view) or invalid (the no-valid-promise view). But, if that is the case, how do we explain Jill's duty to pay? Jill's promise to pay is conditional on Jack validly promising to sell. Unless Jack makes a valid promise, there is no agreement. Jill's promise to pay never gets off the ground, on account of the fact that the condition it sets, that Jack make a valid promise to sell, is never met. On this analysis, Jack has no right to Jill's performance. Furthermore, in the absence of agreement, there is no basis on which to explain third-party legal effects, such as good title passing to a good-faith purchaser of the ring.

In contrast, the Hobbesian view explains the legal position without difficulty. This is because, on this view, Jack, despite Jill's duress, does make a valid promise to sell. So, the condition for Jill's duty to pay is met, and this provides Jill with a legal basis (provided Jack has not rescinded) for transferring title to the ring to good-faith, third-party purchasers. None of this, of course, renders Jill's duress nugatory. Jack may, if he so chooses, rely on it to justify breach of his duty to sell. This moral right manifests itself legally in his power to rescind the contract.

To be clear, my claim is not to deny that promises or contracts might be vitiated or invalidated. So, for example, the will to promise may be compromised due to certain kinds of mistake as to identity, or because of insanity, or intoxication. In other cases, say for example a promise to kill or maim, there may be no defect in the will, but nevertheless the promise is arguably invalid due to the immorality or illegality of what is being proposed.³⁹ Rather, my

³⁸ *Bainbrigge v. Browne* [1881] 18 Ch. D. 188.

³⁹ James E.J. Altham, 'Wicked Promises' in I. Hacking (ed.), *Exercises in Analysis: Essays by Students of Casimir Lewy* (Cambridge: Cambridge University Press, 1985), pp. 1–21. For the contrary view see: John R. Searle, *Rationality in Action* (Cambridge, M.A.: Michigan Institute of Technology Press, 2001), pp. 193–200; David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012), pp. 245–249.

claim is that voidability for duress cannot be understood in these ways. In this context, the better view is that the coerced promise confers a right to performance on the coercer, but that the duty to perform which it gives rise to is *pro tanto* and may be defeated or overridden on account of the coercion. In other words, the coercion used to procure the promise provides the victim with a justification for breach.

In summary, I have tried to show here that law tracks the distinction between factors that vitiate or invalidate promises, and those that defeat them in the distinction it makes between void and voidable contracts. The inability to explain why duress renders a contract voidable rather than void exposes a major weakness in Shiffrin's acceptance of the central tenet of the dominant view, that a promise made under duress confers no right to performance on the coercer.

C. *Should the Coercer Benefit?*

There seems here to be some symmetry between our moral and legal practices, which suggests there is something wrong with the dominant view. At the very least, it is not obvious even in dictated cases that the coercer has no (albeit defeasible) right to performance.

That matters because it lessens the importance or distinctiveness of the initiated cases, which Shiffrin's chapter sheds light on. We might say, these are interesting cases where the victim has *additional* reasons to perform because, for example, of the exercise of shared agency or the element of negotiation, but that nevertheless there is a basic or underlying reason to perform in *all* cases where promises are procured through coercion, which is that the coercer has a (defeasible) right to performance.

An obvious response is to say that I have not done enough here. At best, I have pointed to legal and moral practices which the dominant view seems to struggle with. But this may just mean there is something wrong with the practices, rather than there being anything untoward with the theory. This is a fair point, but as I have said it is beyond the scope of this paper to address it fully here. Rather, my aim has been more modest. By showing that the Hobbesian view is embedded in our moral and legal practices, I have

been suggesting that it may have more going for it than it is often given credit for. There may be a further implication. As Gilbert has argued, if our ordinary moral judgements seem to endorse the Hobbesian view, the burden seems to be on the dominant view to show why the Hobbesian view goes wrong.⁴⁰

The key argument against the Hobbesian view seems to be that it allows the coercer to benefit from his wrongdoing. This not only violates the principle of not letting wrongdoers profit from their own wrongs, but will likely encourage further incidents of coercion in the future. The strategy Shiffrin uses in her chapter of focusing on the victim's own interests to explain why he has a duty to perform in initiated cases may help to ease some of these anxieties.

Shiffrin says the victim's duty to perform is justified in the initiated case, even though it might benefit the coercer, because it provides an avenue of escape and, more deeply, may bring about moral progress by beginning to restore the moral equilibrium between the parties disrupted by the coercer's wrongdoing. There seems though no obvious reason why these same arguments could not be extended to justify conferring a right to performance on the (admittedly undeserving) coercer.

If Shiffrin's sense is right that in the initiated case the imposition of a duty to perform on the victim would make escape more likely, then escape would seem even more likely when the coercer is given the added security of a moral or legal right. The worry that the right would lead to an increase in future acts of coercion is, I suspect, overblown by a failure to acknowledge or appreciate that the Hobbesian view is perfectly compatible with the existence of coercion as a justification for breach. In this way, a balance is struck between the ends of not incentivising future acts of coercion, and on the other hand enabling victims of coercion to escape.⁴¹

As to moral progress, it is hard to see why for Shiffrin this interest justifies imposing a duty to perform on the victim but not the conferral of a right to performance on the coercer. An opportunity is missed here for the victim to recognise the coercer's continuing status (despite his wrongdoing) as a bearer of rights and normative

⁴⁰ Gilbert, 'Agreements, Coercion, and Obligation', (n 22, above): p. 684.

⁴¹ Although it has been argued that legal relief for duress at least where credible threats are made might make escape less likely. See Oren Bar-Gill and Omri Ben-Shahar, 'Credible Coercion', *Texas Law Review* 83(3) (2005): pp. 717–780.

powers. If we embrace the Hobbesian view, not only are these opportunities left on the table, but further opportunities for moral progress are made available. For on this view, a right to performance is conferred on the coercer even in dictated or scripted cases. There are opportunities for mutual recognition, trust, and respect through the making and keeping of even a dictated promise. By promising, the victim invites the coercer to trust him; when the coercer accepts, she reposes trust in him; when he performs, he shows that he can be trusted and expresses his respect for her as an ongoing member of the moral community, a status which he confirms has not been undermined by her wrongdoing.⁴²

I don't deny that there are elements of the initiated case, such as shared agency or the existence of negotiation, which increase the stringency of the duty to perform. Nor am I saying that the existence of the coercer's right to performance entails that *all things considered* the victim should perform; in fact, I think, the existence of coercion more than justifies breach. Rather, my claim is that even in dictated cases, there may be a *pro tanto* duty to perform, which gives the victim the option to pursue the end of moral progress, should he waive his right to breach. Contrary to the claim that the Hobbesian view is illiberal, there is a valuable freedom here for the victim that the defeasibility of the coercer's right preserves. In my view, the interests that Shiffrin appeals to, in order to justify the victim's moral responsibility to perform in the initiated case, lead ineluctably to justifying the coercer's right to performance in both initiated and dictated cases. It is hard to see why Shiffrin slams the brakes so early.

IV. CONCLUSION

Shiffrin's chapter sheds important light on the opportunities that even the most difficult circumstances might have for the pursuit of moral progress. The distinction she makes between initiated and scripted cases of coerced promises is characteristically insightful, novel and interesting. It reveals important normative differences between cases of coerced promises, which have been all-too-casually looked over in the past. And, by focusing on the victim's interests,

⁴² I follow Dori Kimel's account here of the expressive nature of these promissory interactions. See Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart Publishing, 2003), p. 77.

she opens the door to an account of moral responsibility for promising under duress. Overall, my sympathies are with her project. However, she is too quick to dismiss the Hobbesian view. It underpins much of our moral and legal thinking about duress, and the worries that have been expressed about it, for example, that it benefits wrongdoers, is illiberal, and so on, are overblown. They appear much less significant once we recognise that the Hobbesian picture is compatible with coercion's making the coercer's right to performance defeasible, or, in other words, providing the victim with a right to rely on a justification for breach of his promissory duty.

My purpose in this paper has not been to show conclusively that the Hobbesian account provides the best account of promising under duress. Rather, I have attempted to resurrect the Hobbesian picture on the ground that it offers a plausible view, and one worth taking seriously. Nor has it been my aim to show that the dominant view has no answer to some of the problems I have highlighted. So, for example, a proponent of the dominant view might accept that although we might be held responsible for our actions under duress because we have acted intentionally and rationally, this does not mean that promises made under duress are necessarily valid, because to make a promise we must act voluntarily, and this is not the same thing as acting intentionally and rationally. This seems like a plausible response to one of the worries I raise, but it goes beyond the scope of this paper to explore it fully. Rather, my primary purpose has been to show that the Hobbesian view has more going for it than is generally assumed, and that the dominant view of promising under duress has—on account of our existing moral and legal practices—serious hurdles of its own that are often overlooked but that it has to overcome.

Finally, a word about the implications for contract law. Toward the end of the chapter, Shiffrin sounds the following warning:

[W]ere the legal institution of contract to enforce promises made under duress in private suits between coercers and the coerced, it would throw the weight of the community behind the aims of the coercer, even though the moral argument for fidelity does not establish any moral right or claim of the promisee to performance.⁴³

⁴³ Shiffrin, *Speech Matters* (n 1, above), p. 70.

As I have said, I don't necessarily agree that the argument from fidelity doesn't establish a right to performance. Furthermore, the fact that contracts entered into under coercion are voidable reflects, I think, the fact that the law enforces this right, unless of course the victim rescinds for duress. Therefore, I disagree with Shiffrin that the law is necessarily sending out any problematic message when enforcing these agreements. It's not the coercer's aims that the law is necessarily seeking to protect but plausibly those of rational agents, and in particular those who attach particular value or moral salience to the values associated with the making and keeping of promises.

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