Mistaking unfairness for coercion:
Coercion, consent and the ethics of market exchange

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RADICALLY INCOMPLETE DRAFT

1. Introduction: "capitalist acts between consenting adults"

The case for consensual exchange by informed adults is both (classically) liberal and Paretian. Consensual exchange meets liberal goals because voluntary choice is an exercise in personal autonomy, valuable for its own sake. Consensual exchange also advances, instrumentally, the goals of the Paretian, as it is more likely than coerced exchange to promote the well being of all transactors. And, because market exchanges are consensual (uncompensated external costs to one side), while state exchanges are compelled, partisans of consent regard market exchanges as socially good, while more strictly scrutinizing state action.

The critiques of this construct, speaking broadly, come in weak and strong forms. The weak critique says "yes, but." Yes, consent characterizes market choices, and, yes, coercion characterizes state choices, but the consent characteristic of markets is possible only *because* the state coerces. Even classical liberals, such as Frederick Hayek (1967), acknowledge that free markets rest upon a coercive legal foundation – a foundation that establishes and protects legal rights to person, to property and to contract.

The strong critique, which is the subject of this essay, denies that valid consent characterizes market exchange in the first place. Recent versions of the strong critique are found, for example, in Serena Olsaretti (2004), Fabienne Peter (2004), and Michael Sandel (1998).[1] All argue that the freedom to choose among alternatives is not sufficient to establish valid consent. In particular, they claim that the choices of the economically necessitous are not fully consensual. Both Peter, who says that "[t]he quality of the alternatives matters for coercion" (2004: 10), and Sandel argue that even freely choosing poor transactors are coerced by economic necessity. Olsaretti argues that poor transactors, those without what she calls "acceptable alternatives," are not coerced as such, but neither are their choices fully voluntary.

This essay takes issue with these critics' central claim that the size of a transactor's choice set is sufficient to show coercion. Consider two transactors, A, the alleged coercer, and B, the alleged coercee. I will argue, following Wertheimer (1987), that coercion cannot be read

[1] Sandel, a philosopher outside the liberal tradition, denies that consent establishes legitimacy. He advocates a "move to a realm beyond consent," wherein communitarian values trump consensual choice. Olsaretti and Peter do not dispute the virtues of consent per se. Their quarrel is with the claim that market exchange is consensual.

off the structural properties of B's choice set alone. Coercion, rather, concerns *how* B's choice set comes to be delimited. Second, this essay will argue that, in the context of exchange, background conditions, such as B's poverty, are relevant for coercion only insofar as A (intentionally) *causes* B's choice set to be smaller.

The strong critique's overly expansive conception of coercion also works to elide an important distinction, that between coercive exchange, which unambiguously makes B worse off, and non-coercive but unfair exchange, which can make B better off. The key question here: is it ethically worse for A to neglect B (not trade) or for A to exploit B in mutually beneficial fashion? (Wertheimer 1996/87 or perhaps the 2003 *Exploitation* cite).

The thrust of this essay's objections to the strong critique is that we gain no theoretical advantage by confusing what is unfair – B is unjustly poor, but not coerced – with what is unfree -- B is coerced by A. Worse, when one mistakes unfairness for coercion, one can be mislead into banning consensual trade between A and B, which serves only to make B worse off, exacerbating the unfairness that has been misdiagnosed as coercion.[2]

Lastly, mistaking unfairness for coercion also begs an important ethical question: on whom should the social burden of remedying unfair background conditions rightly fall? If there is an argument that justifies making A, who wishes only to trade with B, bear the social burden of remedying the unfairness of B's pre-trade situation, that argument must be made, not assumed. In the absence of A having market power, it is not clear why the social burden of redistribution should fall upon those who happen to trade with the poor (Trebilcock1997: 98).

2. Threats or offers: coercion in the context of exchange

Mutual gains from trade (systematically) obtain only when trade is fully consensual. Coercion precludes voluntary trade, so exchange-rooted theories of coercion, beginning especially with Robert Nozick (1969), have focused upon distinguishing voluntary from coerced exchange. One of Nozick's innovations was to distinguish non-coercive proposals, what he called offers, from coercive proposals, what he called threats. If A, a gunman, proposes that B hand over $100 otherwise A will harm B, A's proposal is coercive, a threat. If A, a masseur, proposes that B pay $100 for a massage, otherwise A will not provide the massage, A's proposal is non-coercive, an offer.

Consider the several differences between the threat of gunman A and the offer of masseur A. The gunman's threat delimits B's choice alternatives, whereas the masseur's offer expands B's choice alternatives. The gunman's proposal threatens harm; the masseur's proposal promises benefit. When B surrenders his wallet to gunman A, B's choice to surrender his wallet rather than his safety is not voluntary. B's choice may be prudential, even volitional (*qua* an act of will), but it is not voluntary.[3] B does not give valid consent to gunman A. Whereas, when B accepts A's offer of a massage, B's choice *is* voluntary – B gives valid consent. B can decline to accept the masseur's offer (exit is possible), whereas B cannot decline the gunman's (credible) threat – the gunman blocks B's exit.

Alan Wertheimer's (1987) learned survey, perhaps the most fully elaborated theory of coercion, distinguishes coercive proposals (threats) from non-coercive proposals (offers) as follows: "In general, A coerces B to do X only if A threatens to make B worse off with reference to some baseline condition if B chooses not do X."[4] On this view, A does not coerce B unless A proposes to worsen B's situation should B reject A's proposal (cite). But, worsen relative to what baseline?

Coercion theorists have different views of the correct baseline: some argue for an expectations or statistical baseline – coercive proposals are those that make B worse off relative to what B reasonably or normally expects. A moralized baseline, in contrast, says B is coerced only when A worsens B's situation by violating B's moral (and likely also legal) rights.[5]

Statistical and moralized baselines ordinarily point in the same direction. The gunman's

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[2] Commodification theorist Margaret Jane Radin (1996) calls this problem the "double-bind."

[3] Gunman A places B in a choice situation – B's money or B's life – that is against B's will. B would prefer not to receive A's proposal. Masseur A places B in a choice situation -- B's money or no massage – that is not against B's will. B can prefer to receive masseur A's proposal

[4] For the purposes of this paper, I set aside the distinction between coercive proposals (which A makes) and coercion (what happens to B upon acquiescing to A's threat). That is, I make the simplifying assumption throughout that A's threats are always sufficiently credible such that B always acquiesces. In practice, of course, this assumption will not always be true. Nozick (1969), for example, says that if B does not acquiesce, a coercive proposal does not lead to coercion. Wertheimer's (1987) "two pronged" approach likewise distinguishes A's proposal from B's choice, though he acknowledges that the proposal does most of the analytical work.

[5] The statistical- and moralized-baseline terminology is due to Feinberg (1986 CHECK). Peter's (2004) discussion is also helpful.

proposal – pay me $100 or I will harm you -- compels B's entry into a transaction that violates both B's reasonable expectation of safety in his person and also B's right to safety in his person. The masseur's proposal – pay me $100 or I will not give you a massage – does not violate B's reasonable expectation nor does it violate a moral entitlement held by B. So both statistical and moralized baselines judge the gunman's proposal coercive and the masseur's proposal non-coercive.

But, in some stylized settings, statistical and moralized baselines can reach divergent judgments about the same situation, as Nozick's (1969: 450) well-known example of the slave illustrates. A, who beats his slave B daily, proposes one morning to spare B the usual beating, provided B does X. Since A's proposal is effectively "do X or I will beat you," a moralized baseline judges A's proposal a threat, thus coercive. But viewed from a statistical baseline, what B expects (a beating), A's proposal can be seen as an offer – it proposes to make B better off.

The ambiguity arises from the fact that the status quo, in which B is beaten daily, is, at once, expected, in the sense of predicted, but it is also not what is morally expected. Nozick suggests that when statistical and moral baselines diverge, we should use the baseline B prefers. In the case of the slave, B prefers a moral baseline: which judges slave owner A's proposal a threat, and which says B should not be beaten even if he does not do X.

This essay adopts a moralized baseline approach (as do Nozick, Wertheimer and Peter) in order to better focus on our two questions: whether the quality of B's choice alternatives is sufficient for coercion, and to what extent valid consent must be conditional upon background conditions.

Two things follow from adopting a moralized baseline. The first is that adopting a moralized baseline tends to embed and explain the view that coercion is intrinsically wrong.[6] A second consequence is that a moralized baseline will be conditional upon the moral theory being employed. Unavoidably, different moral theories can produce different moral baselines.[7]

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[6] The OED's definition of "coercion" notes that coercion "has a bad flavour," and that the term "is now usually avoided by those who approve the action in question."

[7] Statistical baselines, it should be noted, will also vary: there are different ways of making predictions and forming expectations. And, what is more, what agents expect can be different from what they should expect. Wertheimer distinguishes what he calls a phenomenological

And, especially in life-threatening situations, specifying the appropriate moral baseline can be complicated (Wertheimer 1987). To see this, consider the case of the Bad Samaritan.

A, the Bad Samaritan, finds B, wealthy and dying of thirst in a remote desert, and proposes to sell to B a life-saving quantity of water for $10,000. B accepts. Is A's proposal coercive? It depends upon the moral baseline. A strong libertarian might argue that A does not coerce B, because B's rights have not been violated – B has no right to A's water. And, the exchange makes B unambiguously better off, a costly rescue being vastly better than none. A key difference: unlike the gunman, who creates his victim's predicament, the Bad Samaritan did not create thirsty B's predicament, even as he proposes to exploit it.[8]

An alternative view, however, argues that, in situations of imminent peril, A is morally obligated to rescue B at reasonable cost. In life-threatening situations, an exception is made, such that A has the situation-specific right to privately take B's water, with reasonable compensation. In legal terms, A's property rights to the water change upon his arrival on the scene: *ex ante*, A can exclude others from the water, *ex post*, he cannot. If our moral baseline says that thirsty B is morally entitled to the water, then A's proposal to withhold the water becomes coercive – A threatens to make B worse off by taking something that rightly belongs to B (and offering to sell it back to her). Thus do different moral baselines lead to different judgments of the Bad Samaritan's proposal -- the strong libertarian judges it an offer; those who assert an affirmative duty to rescue judge it a threat.

3. Coercion takes two: coercion requires a coercer (and a coercee)

Can B be coerced even when A does not threaten to make B worse off should B reject A's trade proposal? Peter (2004: 3) says yes, invoking commercial organ sales: "the impoverished person's choice to sell a kidney is not entirely free." Sandel (1998) characterizes a

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baseline, what B actually expects, from the statistical baseline, what B should reasonably expect. (See also Anderson 2006).

[8] Nozick (459) suggests that B, given a choice between the pre-offer status quo and Gunman A's proposal (threat), B would choose the pre-offer status quo, keeping his money and his life. But Thirsty B, in contrast, would prefer Bad Samaritan A's proposal to the pre-proposal status quo. Though Thirsty B, like Gunman A's victim, is also choosing the lesser of two evils -- her money or her life – Thirsty B's pre-proposal status quo entails the greater of two evils – death.

"peasant" who sells his kidney as "being coerced by economic necessity." When kidney-seller B is very poor, goes the argument, B is coerced, because B's choice to sell reveals or perhaps even demonstrates a lack of "acceptable" choice alternatives.

The temptation to say that economic necessity coerces is understandable, in the sense of being reconstructable. Both coercion and poverty refer to situations of delimited alternatives. Both coercion and poverty engage our moral concern. And, the same colloquialism, "having no choice," is used to describe the situations of both the gunman's victim and the impoverished seller of a kidney. But coercion and necessity delimit choice alternatives in distinct ways.

The difference turns on the question of *how* B's choice alternatives came to be delimited. Necessity is the circumstance of B's having limited choice; whereas coercion names a process by which A deliberately causes B's choice to be limited, and, moreover, causes B's choice to be limited wrongfully. Coercion creates necessity, for that is how it works, but it is possible to be necessitous without being coerced, as would be the case with Thirsty B were there no rescuer, Bad Samaritan or other.

Sandel's terminology – he says economic necessity coerces -- is thus misleading, for he does not mean that Poor B is coerced simply by the circumstance of being poor, which is a background condition. Poor B is coerced, for Sandel, only *upon interacting* with buyer A. For, if no willing buyer shows up, Poor B is not coerced, but remains economically necessitous.

If Poor B is not coerced by economic necessity, then who is coercing him? The implication is that A, a gravely ill kidney patient, coerces poor B. But kidney patient A has not caused B's poverty.[9] Nor does A threaten to make B worse off should B refuse A's proposal. Indeed, A lacks any market power whatsoever: every year, thousands of kidney patients die or become too ill for transplant while waiting in the transplant queue.

But set to one side the implausibility of these implications. The present point is that, even for critics of commodification like Sandel, there cannot be coercion without an interaction. And to say that coercion requires an interaction is to say that coercion requires a coercer.

[9] Zimmerman's (1981) conceit imagines that A *does*, in fact, make B poor, by kidnapping B to a remote island, and forcibly preventing B from leaving the island. When A later proposes that impecunious B work for subsistence wages, Zimmerman calls this a coercive offer. It seems to me that the work of coercion lies less in A's proposal than in A's kidnapping and forcible detainment of B – that is, in A having caused B's necessity pre-proposal.

Coercion, then, describes a relation between a coercer and a coercee. It also requires a coercer with agency. One would not say, for example, “gravity coerced me.”[10] Gravity limits B’s alternatives – B would like to fly unaided but cannot – but gravity’s constraining effects we do not regard as coercive, since proposals to violate B’s moral rights are not sensibly ascribed to natural forces. Gravity limits B’s alternatives non-coercively.[11]

The difference between non-coercive constraints and coercion is what Nozick pressed in *Anarchy, State and Utopia*, where he argued that “a person’s actions are voluntary [depending] on what it is that limits his alternatives” (1974: 272). Consider B, a cancer patient who must choose between experimental surgery and death. The law requires that Cancer Patient B give informed medical consent to A, her surgeon. If Cancer Patient B consents to surgery, we do not say she was coerced, even though she is severely necessitous, with choices that are even more delimited than the impoverished man considering selling a kidney.[12]

Why is it we do not regard the cancer patient’s choice of surgery as coerced? In part, it is because her predicament was caused by misfortune, and not by a person, still less by a person acting wrongfully.[13] Some hard choices are nothing more “a sad fact about the human condition rather than any unjust disadvantage brought about by the wrongful actions of others” (cited in Wertheimer 1987: 234). The examples of gravity and illness suggest that transacting under necessity is not sufficient for coercion. They also show that when we focus solely upon the size of B’s choice set, we jettison ethically relevant information, namely, the process by which B comes to have limited choice.

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[10] The same logic of agency applies to coercee, B: one would not say that A, upon building levees, coerced the Mississippi River.

[11] Nearly all coercion theorists reject the idea that natural forces can coerce. But not all. See Rhodes 2001.

[12] This point and the example are due to Wertheimer (1987: 233).

[13] Ronald Dworkin refers to this kind of misfortune as “brute bad luck,” which he distinguishes from “option luck”: “Option luck is a matter of how deliberate and calculated gambles turn out—whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined. Brute luck is a matter of how risks fall out that are not in that sense deliberate gambles” (1981, p. 293).

Coercion also seems to require intent.[14] A threat to worsen B's situation cannot be made accidentally; there must be a deliberate attempt by A to subject B to A's will. It is clear that A can accidentally limit B's alternatives. If A inadvertently falls asleep while double-parked, and blocks B's car, A constrains B's choice, and perhaps does so negligently. We might even say that double-parking A forced B. But it seems peculiar to say that double-parking A has coerced B. A has not threatened B, compelling B to choose between being blocked and some worse alternative. Indeed A has made no proposal to B of any kind. We do not speak of accidental coercion. There is a difference, with respect to coercion, between being adversely but inadvertently affected by another, and being adversely subject to the will of another.[15] This difference the law recognizes when it distinguishes accidental harms (torts) from intentional harms (crimes). Both torts and crimes are wrongful, but in different ways and degrees.

On this moralized account of coercion, coercion is both harmful and wrongful. When A coerces B, A makes B worse off and violates B's moral rights. Coercion is, moreover, transactional, personal, and intentional. B cannot be coerced unless B interacts with some coercer A. And coercers are persons, not natural forces such as gravity or disease, nor circumstances, such as economic necessity, at least insofar as A does not cause B's economic necessity. Finally, coercion also requires that A intentionally make B do something that B would not have chosen in the absence of A's threat.

4. Do prices coerce?

In markets, millions of interconnected choices affect B's set of feasible alternatives. These many choices, at every moment, reduce (or expand) B's opportunity set – via pecuniary externalities. When A develops a taste for cappuccino, say, her new demand increases the price of cappuccinos and their complements, and reduces the price of substitutes like tea. If a cappuccino drinker, B is (infinitesimally) worse off; if a tea drinker, B is (infinitesimally) better off. So impersonal market forces clearly can and do affect B's opportunities (for bad and good); price effects change B's budget constraint.

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[14] The importance of intention to coercion is developed in David Miller *Constraints on Freedom.* On the relationship between A's intention and coercion, see Wertheimer 1987: 242-266.

But should we regard such movements in B's budget constraint as coercive? I think not, for several reasons. First, A and B don't transact. A makes no proposal to B at all, threatening or otherwise. Second, A's effect upon B is unintentional. A's purchase of a cappuccino does not intend to harm (or aid) cappuccino drinker B; indeed, indeed A likely does not know B.

Third, price effects are a consequence of economic scarcity, the (as yet) incorrigible background condition wherein aggregate human wants exceed available economic resources. Peter (2004) quotes Paul Samuelson, who, in a debate with George Stigler, said, "the price system is, and ought to be, a method of coercion." Peter (2004: 2) reads Samuelson's quote as support for her view that the "market . . . relies on coercion."

But why does Samuelson call a price system coercive? I read Samuelson as suggesting that economic scarcity, not a price system per se, entails coercion. His next two sentences are: "Nature is not so bountiful as to give each of us all the goods he desires. We have to be coerced out of such a situation by the nature of things" (1966: yy). Coercion, in the sense Samuelson employs here, is the name he gives to the consequences of scarcity, whatever allocational mechanism prevails, be it a price system, queuing, bureaucratic planning, merit, or nepotism.

It is because of scarcity, not markets per se, that when A acquires a cappuccino fewer cappuccinos are available for the rest that want them. If a cappuccino were instead allocated to A by central planners, this would be no more and no less coercive in Samuelson's broad sense.[16] Coercion theorists who emphasize the purely structural properties of B's choice set are naturally drawn to consider price effects upon B's scope for choice. But if prices are coercive in Samuelson's sense, then so too are all other mechanisms for allocating scarce economic resources.

In all events, I think "coercion" is the wrong word to describe the consequences of economic scarcity. It would be odd to argue that B is morally entitled to be free of scarcity, a "right" that would be impossible to enforce universally, and which implies a moral baseline that says B is coerced when he does not have his every desire met. It seems no more plausible to argue that B reasonably expects to have his every desire met.

[15] The double-parking example is due to Wertheimer (200x).

[16] I read Warren Samuels (199x) as making an argument along these lines – that coercion arising from scarcity is a given, and the details regarding *who* gets coerced are decided institutionally, how, in particular, society assigns property rights.

Moreover, I see no theoretical advantage to a conception of coercion so expansive that it applies to all choice under scarcity. There are, in fact, two dangers. First, to call all choice made under scarcity coercive renders the concept of coercion essentially vacuous. Second, such an expansive definition risks imputing a specious moral equivalence to the institutional alternatives for economic allocation under scarcity.[17] For if scarcity is a given, the real ethical action lies in evaluating and comparing the alternative institutional means of allocation. This is why Samuelson says a price system *ought* to "coerce." Something has to, Samuelson argued, and he believed that a price system, warts and all, was superior to the alternatives.

5. What is morally worse: exploitation or neglect?

Just because an exchange is non-coercive does not mean that it is fair. Consider mutually beneficial exploitation, a trade where A takes advantage of B's situation in order to receive disproportionate benefit to himself, even as B also benefits from the exchange (Zwolinski 2008: 15).[18] B consents, but B pays more than he would have under better circumstances.

Imagine that A, following a destructive hurricane, drives into the emergency area and sells ice for $10 per bag. The usual pre-disaster price was $1. B willingly pays $10 to A, and is better off thereby. Assume further that, as with the Bad Samaritan case, A is a monopolist. But unlike the Bad Samaritan case, B's life is not in danger, and there are many potential customers.

So long as A has no affirmative moral duty to sell ice to B for below the current market-clearing price of $10, A has not coerced B. But many people, and most American state legislatures, regard A's behavior as nonetheless wrongful, as indicted by the familiar epithet of "price gouger," on grounds that A exploits B. So while B consents to $10 ice, and is better off

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[17] Deirdre McCloskey (1996: 15) adduces a further objection to treating price effects as coercive. Since nearly all exchanges in market societies have price effects, to treat them as coercive would be to license "universal coercion by the state." If all economic choices are deemed coercive, there is, McCloskey argues, "no stopping point in the slippery slope to thoroughgoing coercion by the state."

[18] Mutually beneficial exploitation means only that both A, the exploiter, and B, the exploitee, gain from their exchange (Wertheimer 2001)

with $10 ice than with no ice, price-gouging legislation deems the price wrong.[19]

Yet, even if Price Gouger A has behaved wrongfully, it is not clear that the alternatives – not selling ice to B, or attempting to regulate the price of ice – are ethically better. This rejoinder is what Wertheimer calls the "non-worseness claim." The non-worseness claim maintains that it cannot be morally worse for A to interact with B than not to interact with B if: (1) A has the right not to interact with B; (2) the interaction is better for B than non-interaction; (3) B consents to the interaction; (4) such interaction has no negative effects on others (Wertheimer1986: 289). Economists render the non-worseness claim as: in the absence of (unpriced) external costs, a consensual Pareto-improving trade cannot be morally worse than no trade.

Consider the first alternative to price gouging, neglect, or no exchange. We judge price gougers guilty of exploitation, even though their actions bring *some* benefit to victims in a disaster area. Most of us, on the other hand, do *nothing* to benefit disaster victims, but we don't judge ourselves as acting as wrongly as the price gougers (Zwolinski 2008). These judgments are, facially at least, inconsistent.

To make them consistent one must argue that those who wish to trade with the poor or the otherwise necessitous acquire special moral obligations simply by virtue of interacting (even beneficially) with them, special obligations that do not apply to those who do not interact with (that is, who neglect) the necessitous. Wertheimer (200x) calls this the "interaction principle." The interaction principle says that because, upon interaction, A acquires special moral obligations to B, doing nothing is morally better doing something, but at unfair terms of trade. Those who uphold the interaction principle argue that it is morally better for Price Gouger A to withhold his ice from B than to sell it to B at unfair terms of trade.

I find the interaction principle hard to defend, and few are willing to argue that it is morally better for disaster-area victims to have no ice than to have $10 ice {ff. cite R. Sample??}. Most scholars recognize the moral importance of B's valid consent and B's benefit from exchange, and thus argue not for denying ice to B but for price regulation designed to secure for B a larger share of the joint surplus from exchange.

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[19] Ordinary people regard A's pricing as a form of gouging. When Kahneman et al. (1986) asked Canadian survey respondents whether it was fair or unfair that a hardware store, the day after a snowstorm, raised the price of snow shovels from $10 to $15, 82% of respondents judged the price increase unfair.

This more moderate position also faces difficulties, however. The first is the problem of determining what price fairness requires – an ancient and difficult question. Even if such a question can be answered with precision, a second difficulty then arises: the consequences of enforcing a binding fair-price law are themselves morally problematic, as exemplified by price-gouging legislation.

Price-gouging regulation compels vendors to sell at below market-clearing prices. Say Price Gouger A behaves unlawfully when his price exceeds $2. Viewed from the level of a single transaction, buyer B benefits from the legal price ceiling – B obviously gains more at a price of $2 than at a price of $10. But while a compulsory below-market price may help a given buyer, it does so only at the expense of harming others in the emergency zone (and others in the future).[20]

The first harm to others comes from deterring supply responders from entering the emergency zone. Because high prices signal and induce outside vendors to provide a greater supply of ice (which, over time, will lead to a lower market price), a legal price ceiling will reduce emergency supply by deterring vendors who find it unprofitable to sell at the price ceiling.[21] Secondly, the price ceiling lowers the expected return for local entrepreneurs who would otherwise invest more in generators, etc. to meet ice shortages in the future -- resulting in reduced ice-making capacity for future emergencies.

Finally, even ignoring supply effects, so that the case for price ceilings is strongest, it is still not clear that a price ceiling below market equilibrium is morally best. Imagine convenience store A inside the disaster area with an existing stock of ice. If A sells at the compelled price ceiling of $2, demand will exceed supply, so that A effectively must allocate by queuing, and higher-value users can be crowded out. B_2 lines up early to buy ice to keep his beer cold, while B_3, a diabetic, does not get ice, which she wants to refrigerate her insulin, because she cannot lawfully signal her greater willingness to pay. This is not to argue that, post-disaster, price *must* be the morally best method for allocating scarce resources already present in the emergency

[20] Note the difference with the Bad Samaritan rescue case, where there is only one buyer (bilateral monopoly). The Price Gouger case (ordinary monopoly) requires that we consider the well being not just of A and B, but also all potential Bs.

[21] The legal uncertainty vendors face may lead them to shut down, in which case price-gouging legislation leads to the neglect outcome – no ice rather than expensive ice.

zone, only that it often will be superior to feasible alternatives (Zwolinski 2008), even when allocating an already available existing stock, and that when this is true, anti-gouging price regulation can do more harm than good.[22]

6. Transactional consent and constitutional consent: coercion by agreement?

Even if we agree that coercion is a transactional phenomenon, there remains the question of whether individuals consent to a market order in the large. B can happily and voluntarily buy a cappuccino, without thereby ratifying the price *system* in the large. Consent given at the transactional level does not automatically ramify upward.

Some critics of market justice, such as Daniel Hausman (1992), regard a market order as non-consensual, even coercive. Why? Because, Hausman says, individuals lack alternatives to the market. Says Hausman:

> [I]ndividuals can only be regarded as voluntarily engaged in market relations if they could choose not to be part of market life. Since this is not a real option, the . . . decision to participate in markets seems little more voluntary than . . . [the] decision to hand over [one's] wallet to an armed robber (1992).

This argument is, in fact, a constitutional-level instance of the delimited-choice-amounts-to-coercion claim. Entering the market, Hausman says, is the equivalent of entering a coercive transaction, because individuals have no choice but to enter the market.

One reply, made by Milton Friedman, is to deny Hausman's premise. There is always, Friedman argued, an alternative to entering the market, the autarky option. Because individuals can opt to produce rather than to exchange, when they choose to enter the market, they must judge obtaining goods by exchange a better alternative than obtaining them by production (1962: 13). So long as there is an alternative in the form of self-production, Friedman argues, the choice to enter markets is voluntary.

But let us imagine Hausman's premise is correct – the market is the only option. As before, an important question is, how did the market come to be the only option? One possibility is that a market order, historically, has been preferred – the market outcompeted the alternatives.

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[22] The example and the point are due to Zwolinski (2008).

Those who prefer non-market alternatives will exit to them; those who prefer the market will opt to remain. With low-cost exit, a market order should be unobjectionable to liberal theorists.

Of course, in practice, exit is often costly, even impossible. Say C lives in a market society and prefers kibbutz-style communism. If C cannot freely exit or cannot freely enter a jurisdiction that offers kibbutz-style communism, then C's choice is indeed restricted (granting Hausman's premise). But it is not the market that prevents C's exit, it is, rather, legal restrictions of citizenship and immigration. If there is coercion in Hausman's sense, it is the product of law.

This returns us to the weak critique, which says that when the state prevents A from coercing B, the state coerces A. The liberal tradition deems state coercion of A legitimate insofar as it is consensual – when those bound by state coercion have agreed to be so bound. If A consented to a legal order that bars him from coercing B, then state coercion of A to prevent coercion of B, provided it follows legitimate procedures, is legitimate. And when the state bars C from exit, this, too, can be legitimate, insofar as C consented. In the liberal, social-choice schema, constitutional consent ramifies downward.

Thus, to the extent B does give constitutional-level consent to a price system and its workings, B consents to the shrinking of her opportunity set occasioned by A's new taste for cappuccino. Fabinenne Peter, who calls her theory of consent Rawlsian, seems to agree that constitutional consent ramifies downward when she says: "There is no coercion, however, if one does not agree with a labor law . . . but accepts the procedure through which the law has been passed" (2004: 12). Peter says that persons made worse off by legislation are not coerced because they have agreed, presumably at the constitutional level, to abide the outcomes of the political and legal process that produced the unfavorable legislation.

In Rawls' (1971) social contract theory, liberty, distributive justice and the other aspects of what Rawls called the "basic structure of society" are installed at the constitutional level. Should, for example, Rawlsian social contractor B find, once her veil of ignorance has been lifted, that she is, in fact, near the top of the income distribution, paying most of her income in taxes, she is not coerced. Why? Because, though she might, ex post, prefer not to have most of her income redistributed, she has, ex ante, given express consent at the constitutional level, having rationally and voluntarily assented to the Rawlsian principles of justice, and to the tax and transfer system that makes them operational. And, if B's consent to Rawlsian principles of justice is valid, then so too is B's consent to the other aspects of the social contract.

The rub, well known to students of social contract theory, is that not all persons asked to abide constitutional choices (and their consequences) were signatories of the social contract. Their consent is therefore not express; at best it is implied. B's grandson C, for example, did not give express consent to a market system, the principles of justice, or any other features of the social contract B and the other social contractors created. And, if C's exit to other systems is barred, so that C cannot vote with his feet, there is ordinarily is no ready mechanism for establishing his consent (or dissent) to constitutional arrangements.[23]

Hausman says C is coerced. But, if C is coerced, then so too is his sister, D, who prefers a market order, but dislikes the Rawlsian principles of justice. The work of coercion is accomplished here not by the substance of what is socially chosen, but by the absence of express consent by C (and D) at the constitutional level, and the bar on exit, which precludes an inference of implied consent.

As with ordinary transactional coercion, coercion cannot be read off the structural properties of C's choice set. Coercion concerns *how* C's choice set comes to be delimited, that is, how C had no choice but a market order. If it were the case that the market simply outcompeted alternative forms of economic life, so that nobody preferred alternatives, then C is not coerced. But, by hypothesis, C *does* prefer an alternative to the market, but cannot exit to it.

But would Hausman favor ending coercion in his sense by the removal of legal barriers to the free movement of peoples? Rawls did not. In fact, in Rawls' social contract theory, legal barriers to exit and entry are not, in fact, chosen by social contractors, they are imposed by Rawls a priori. Rawls insists that "membership in our society is given, that we would not know what we would have been like had we not belonged to it . . . . Since membership in their society is given, there is no question of the parties comparing the attractions of other societies" (Rawls 1993a: 276). By given, Rawls means unalterable: the basic structure "we enter only by birth and exit only by death" (ibid, pp. 135–6). Indeed, for Rawls, "the question of our entering another society does not arise" (ibid, p. 277). Rawls writes: "Political society is closed: we come to be

[23] Of course, C can voice dissent, to use the second of Hirschman's (19xx) famous troika. But constitutional amendments are, by design, costly to effect, which may be why Hausman argues that B has no "real" choice other than the market, rather than no choice at all.

within it and we do not, and indeed cannot, enter or leave it voluntarily."[24]

{{conclusion here}}

7. What makes market exchange legitimate?

What makes market exchange legitimate? That it's voluntary, hence just? Or that it promotes human welfare than the alternatives? For classical liberals like Nozick, market exchange is voluntary and thus intrinsically good. His defense of free markets is based upon the justness of voluntary exchange, and the opportunities it provides for the exercise of personal autonomy. But for Paretians, consent is valuable largely for instrumental purposes: consensual exchange is the best means for promoting the welfare of individuals.[25] Political economy draws on both the liberal and Paretian traditions.[26]

The Paretian case for the legitimacy of market exchange goes to the argument that choice can be non-voluntary, even when there is no coercion or fraud. Serena Olsaretti (2004), in her critique of free markets, and of Nozick's defense of them, argues that the absence of coercion is necessary but not sufficient for a fully voluntary choice. Consent, on her account, requires more than the absence of coercion and fraud; it also requires that B have "acceptable alternatives" to the choice she made. So, when B chooses without "acceptable" alternatives, she is not coerced, but neither is her choice

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[24] I am indebted to Palmer (200x) for the argument (and quotations) that Rawls' schema allows no exit.

[25] Vilfredo Pareto was, of course, tackling a central challenge to utilitarianism, that utility cannot be measured. If A sells a cappuccino to B for $2, we know that A gets more utility from $2 than from a cappuccino, and that B gets more utility from a cappuccino than from $2. But how much more cannot be determined. The only way to know that this reallocation of economic resources is Pareto-improving is to ensure that all affected parties consented to it. Paretians value consent, because, absent the ability to measure utility, it is consent that establishes mutual gains (information issues to one side). If welfare gains could somehow be established by other means – say, via an Edgeworthian hedonimeter, so that every person's utility gain from a trade would be instantly and costlessly known – then the Paretian (arguably) becomes less interested in consent.

[26] Even economists closely associated with classical liberal tradition, such as Friedman, argue in a Paretian vein. Friedman's classically liberal manifesto, *Capitalism and Freedom* (1962) argues for the intrinsic virtues of economic freedom, but also for its instrumental value:

> The possibility of coordination through voluntary cooperation rests on the elementary – yet frequently denied – proposition that both parties to an economic transaction benefit from it, provided the transaction is *bi-laterally voluntary and informed* (emphasis original, Friedman 1962: 13).

fully voluntary. For Olsaretti, as Timothy Brennan (199x: 115) puts it, “whether a transaction is voluntary is not a property of the transaction itself, but an evaluative statement regarding the opportunities available to the transactors if the exchange does not take place.”

I am not sure that Olsaretti’s version of what “voluntary” choice really requires is any more definitive than is the Nozick version, which says that B’s chooses voluntarily whenever A acts within her rights (Murphy 2007). But, either way, the Paretian case for consensual exchange does not stand or fall with respect to a particular philosophical definition of voluntariness, (as distinct from the Nozick’s classically liberal case, which *does* emphasizes the intrinsic virtues of free choice, and depends more upon voluntariness *qua* voluntariness). The Paretian standard – the absence of coercion and fraud -- may not suffice for Olsaretti’s philosophical standard of voluntariness, but the absence of coercion and fraud *does,* for the Paretian, make it much more likely that B, even with limited alternatives, will be better off when choosing to trade with A.

It also suggests a Paretian test for coercion: Would a (successful) legal ban on trade improve B’s welfare? If yes, there is coercion; if no, there is not coercion, though, of course, there may well be other ethical concerns, such as exploitation. A ban on robbery unambiguously helps the victims of robbery. But it would be perverse to help travelers dying of thirst by banning water sales in the desert.

The Paretian case for market exchange rests not upon the Nozickian view that market exchange, when all act within their rights, is just, but rather upon a pragmatic judgment that market exchange, all things considered, promotes human welfare better than do alternative means for organizing economic life. Timothy Brennan puts the Paretian distinction pithily: “trade is not good because it voluntary. Rather, trade is voluntary because it is good” (1990: yy). In the end, it is an empirical, contingent question as to whether markets are better or worse instruments for promoting human welfare (Shavell and Polinsky, 200x: p. 455).

8. Conclusion goes here

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