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A Realistic Proposal for the Contract Duress Doctrine

Grace M. Giesel

A REALISTIC PROPOSAL FOR THE CONTRACT DURESS DOCTRINE

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Fifty-seven years ago, the noted contracts scholar John P. Dawson stated:

> [T]he modern American law of duress reflects the convergence of several lines of growth, originally moving from sources quite distinct. The symptom of this convergence has been an increasing interplay and transfer of ideas. Its result has certainly not

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> been a coherent body of doctrine, unified around some central proposition; on the contrary, the conflict and confusion in results of decided cases seems greater than ever before.[2]

Dawson's conclusion about "conflict and confusion" of results in actual cases remains true today. Commentators over the decades since Dawson's statement have repeated the finding.[3] Yet, the courts have not found a path out of the dark forest. Even after the passage of half a century since Dawson's observations, the duress doctrine remains largely unusable, though courts frequently attempt to use it.[4] The time has come for a coherent and usable duress doctrine based on clear principles.

I. INTRODUCTION

The word "duress" historically has referred to two very different situations. In one situation, a party's manifestation of assent is the product of physical compulsion. A physically or mentally stronger party places another's hand on the pen and guides the other party's signature. In such a situation, the conduct of signing the document is not the intentional act of the contracting party; it is nonvolitional. Thus, the law does not view such conduct as an effective manifestation of consent. No contract is formed because, truly, the conduct is not the product of the actor's will. Any ostensible contract is void.[5] Such nonvolitional

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[2] John P. Dawson, *Economic Duress—An Essay in Perspective,* 45 MICH. L. REV. 253, 288 (1947).

[3] *See* Note, *Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis,* 53 IOWA L. REV. 892, 892 (1968) ("The limits of the doctrine, however, are not clear, and the courts have not used consistent standards for a finding of duress."). *See also* Julie Kostritsky, *Stepping Out of the Morass of Duress Cases: A Suggested Policy Guide,* 53 ALBANY L. REV. 583, 589 (1989) ("the current law of duress is wholly unsatisfactory"); Hamish Stewart, *A Formal Approach to Contractual Duress,* 47 U. TORONTO L.J. 175 (1997); Sian E. Provost, Note, *A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law,* 73 TEX. L. REV. 629 (1995); Daniel Tan, Case and Legislative Comment, *Grounds of Economic Duress—Further Clarification or Further Confusion,* 2001 SINGAPORE J. LEGAL STUD. 268.

[4] *See, e.g.,* Traystman, Coric & Keramidas v. Daigle, 855 A.2d 996 (Conn. Ct. App. 2004); 1266 Apartment Corp. v. New Horizon Deli, Inc., 847 A.2d 9 (N.J. Super. Ct. 2004); Adams v. Adams, 848 A.2d 991 (Pa. Super. Ct. 2004).

[5] *See* RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981). The illustration in the *Restatement* is quite helpful. Illustration one states:

> A presents to B, who is physically weaker than A, a written contract prepared for B's signature and demands that B sign it. B refuses. A grasps B's hand and compels B by physical force to write his name. B's signature is not effective as a manifestation of his assent, and there is no contract.

See also ALAN WERTHEIMER, COERCION 30 (Princeton University Press 1987) (this situation is "nonvolitional duress"). In Fairbanks v. Snow, 13 N.E. 596 (Mass. 1887), Justice Holmes discussed this form of duress, stating:

situations are obviously rare. This type of duress is helpful as a contrast to the second basic duress situation, which does not involve a complete constraint of will.

The focus of this Article is on the second basic duress situation, the paradigm for almost every modern duress claim.[6] In this situation the manifestation of assent is indeed the product of the bargainer's body and mind. The decision to assent, however, is the product of a threat by the other party. So a mother agrees to pay money so that her son will not be hurt, as the other party to the agreement has promised. Or a mother agrees to pay money so her son will not be terminated from his job. With this form of duress, the resulting contract is not void, but rather, has historically been viewed as voidable.[7] While courts have often described this form of duress as a situation in which the assenter acts without free will,[8] many commentators have noted that there may be no situation in which the assenter acts with any greater degree of free will.[9] In the examples above, the choices are, in fact, those of the mother, not those of someone else imposed on her.[10] This situation of constrained choice, regardless of

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> No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; and if the signature and delivery had not been her acts, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not.

Id. at 598.

The criminal law, too, recognizes that the act is not the act of the person signing. There is no criminal liability in such a setting. *See* MODEL PENAL CODE § 2.09 (1962), quoted in note 42 *infra.*

6 *See* WERTHEIMER, *supra* note 5, at 30 ("Virtually all contract duress cases are of [this type].").

7 *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981). Section 175 states in part: "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."

8 *See, e.g.,* Goode v. Burke Town Plaza, Inc., 436 S.E.2d 450, 452 (Va. 1993) (duress exists "when a defendant commits a wrongful act sufficient to prevent a plaintiff from exercising his free will, thereby coercing the plaintiff's consent"). *See also infra* section IV.C. (discussing the courts' treatment of the free will concept).

9 *See, e.g.,* John Dalzell, *Duress by Economic Pressure I,* 20 N.C. L. REV. 237, 238 (1942). *See also* CHARLES FRIED, CONTRACT AS PROMISE 94 (1981); Dawson, *supra* note 2, at 267.

10 *See, e.g.,* WERTHEIMER, *supra* note 5, at 33-35; P.S. Atiyah, *Economic Distress and the 'Overborne Will'*, 98 L.Q. REV. 197 (1982); Dalzell, *supra* note 9, at 238-40; Robert L. Hale, *Bargaining, Duress and Economic Liberty,* 43 COLUM. L. REV. 603 (1943)[hereinafter *Bargaining*]; Robert L. Hale, *Coercion and Distribution in a Supposedly Noncoercive State,* 38 POL. SCI. Q. 470, 476-77 (1923) [hereinafter *Coercion*]; Edwin W. Patterson, *Compulsory Contracts in the Crystal Ball,* 43 COLUM. L. REV. 731, 741-42 (1943).

See also Union Pac. R. v. Public Serv. Com'n, 248 U.S. 67, 70, 39 S. Ct. 24, 63 L. Ed. 131 (1918). Justice Holmes stated: "It always is for the interest of a party under duress to choose the lesser of

whether the threat is one of physical violence or, rather, economic consequence,[11] is the typical modern duress paradigm. It is a situation in which "the agent is confronted with unwanted alternatives, but is quite capable of making rational choices among them."[12] In discussing the example of a highwayman, Professor Morris Cohen noted that there is "freedom to accept the terms offered or else take the consequences."[13] Cohen continued that "such choice is surely the very opposite of what men value as freedom."[14]

The problem in recent times, with regard to this second form of duress, has been in determining in which situation the doctrine renders a contract unenforceable. In other words, what is legally cognizable duress for purposes of contract law? More important, what should duress be for the purposes of contract law?

The snapshot of the duress doctrine today is bothersome. Over and over again modern day courts struggle with defining the parameters of the doctrine.[15] These courts state illogical or nonsensical tests for application of the doctrine and then apply the tests conclusorily or with implausible or impossible explanation of rationale.[16] Not surprisingly, the courts manifest a complete inability or unwillingness to apply the doctrine to the facts in any sort of reasoned way.[17]

The result is a complete failure of the duress doctrine. First, courts rarely find duress or even make a decision in favor of finding duress.[18] In addi-

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two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

[11] Situations of economic violence or physical violence should be analyzed in the same manner. *See* Dalzell, *supra* note 9, at 237. A few cases appear to distinguish between duress and economic duress. *See, e.g.*, Mathias v. Jacobs, 167 F. Supp. 2d 606 (S.D.N.Y. 2001); Golden v. McDermott, Will & Emery, 702 N.E.2d 581 (Ill. App. Ct. 1998).

[12] WERTHEIMER, *supra* note 5, at 9. *See also* Herbert Fingarette, *Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence and Excusable Prison Escape*, 42 WASH. & LEE L. REV. 65, 74 (1985) (distinguishing constrained choice from "sheer mindless panic"); Michael Philips, *Are Coerced Agreements Involuntary?*, 3 LAW & PHILOSOPHY 133 (1984).

[13] Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 569 (1933).

[14] *Id.*

[15] *See also* Note, *supra* note 3, at 892 ("The limits of the doctrine, however, are not clear, and the courts have not used consistent standards for a finding of duress.").

[16] *See infra* section IV.C. (discussing various "free will" tests applied by courts). *See also infra* section V.D. (discussing the problematic treatment of the threat requirement of duress).

[17] *See* Kostritsky, *supra* note 3, at 592 ("confusion prevails in duress law; consequently courts cannot reach consistently sound results"); Note, *supra* note 3, at 896 ("These discrepancies in decisional factors employed, together with the ambiguity of the common free will test, have contributed to lack of predictability, inaccurate use of precedents, confusion between the functions of judge and jury, and timidity in the extension of the duress doctrine.").

[18] Many appellate decisions are reviews of grants of summary judgment motions. Courts rarely find the summary judgment grant improper, a finding that would be in favor of duress while

tion, the decisions of the courts are extraordinarily valueless as precedent; they provide virtually no instruction as to application of the doctrine.

Because the courts have not had the benefit of the guidance a clearly articulated standard provides, they have been forced to render analysis-free, result-oriented decisions. In addition, the result courts have often chosen, a finding of no duress and thus enforcement of the contract,[19] is an example of double-dipping at the well of freedom of contract public policy. Not only has the value of the freedom of contract been weighed in defining the parameters of the duress doctrine narrowly, but also the courts have given weight to the freedom of contract when evaluating the particular facts of each case.[20] Thus, the test for the existence of duress reflects the policy balance between fairness and the freedom of contract and then the courts apply the test to the particular facts of particular cases with special deference to the public policy of freedom of contract.

Upon evaluation of this state of affairs, two conclusions are possible: that the duress doctrine should be eliminated or that the doctrine should be made workable. The premise of this Article is that the duress doctrine can serve the valuable goal of protecting the concept of voluntary action in entering into bargains. Contract theorists of all stripes value this concept. No doctrine can ensure perfect voluntariness, but the duress doctrine can be a tool to condemn situations in which choice is particularly egregiously constrained. The doctrine and the courts applying it must not be expected to do too much, however, nor can the doctrine's application be too complex. So what steps can be taken to assist the survival and vitality of the duress doctrine?

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not actually a finding of duress.

19 *See, e.g.*, Rochester Ford Sales, Inc. v. Ford Motor Co., 287 F.3d 32 (1st Cir. 2002); VKK Corp. v. Nat'l Football League, 244 F.3d 114 (2d Cir. 2001); Prof'l Serv. Network, Inc. v. Am. Alliance Holding Co., 238 F.3d 897 (7th Cir. 2001); Rissman v. Rissman, 213 F.3d 381 (7th Cir. 2000); Bennett v. Coors Brewing Co., 187 F.3d 1221 (10th Cir. 1999); Gibson v. Wal-Mart Stores Inc., 181 F.3d 1163 (10th Cir. 1999); Strickland Tower Maint., Inc. v. AT & T Communications, Inc., 128 F.3d 1422 (10th Cir. 1997); Reimonenq v. Foti, 72 F.3d 472 (5th Cir. 1996); McCallum Highlands, Ltd. v. Washington Capital Indus., Inc., 66 F.3d 89 (5th Cir. 1995).

Of published state cases in the years 1996 to 2003 inclusive, duress was an issue in eighty-eight. *See infra* section IV.A. In only nine of these cases did the court decide the matter in favor of the duress claim. *See* Inter-Tel, Inc. v. Bank of Am., 985 P.2d 596 (Ariz. 1999); Krantz v. BT Visual Images, L.L.C., 89 Cal. App. 4th 164, (Cal. Ct. App. 2001); Vail/Arrowhead, Inc. v. Dist. Court, 954 P.2d 608 (Colo. 1998); Bath v. Hi-Tech Int'l, Inc., 704 So. 2d 292 (La. Ct. App. 1997); Young v. Anne Arundel County, 807 A.2d 651 (Md. Ct. App. 2002); *In re* Estate of Hollett, 834 A.2d 348 (N.H. 2003); Blumenthal v. Tener, 642 N.Y.S.2d 26 (N.Y. App. Div. 1996); Radford v. Keith, 584 S.E.2d 815 (N.C. Ct. App. 2003), *aff'd*, 591 S.E.2d 519 (N.C. 2004); *In re* Adoption of B.T.D., 68 P.3d 1021 (Utah Ct. App. 2003). In only two of these cases did a court affirm a finding of duress. *See* Bath v. Hi-Tech Int'l, Inc., 704 So. 2d 292 (La. Ct. App. 1997); Radford v. Keith, 584 S.E.2d 815 (N.C. Ct. App. 2003), *aff'd*, 591 S.E.2d 519 (N.C. 2004).

20 *See infra* section IV.B. (discussing the effect of the freedom of contract).

First, any test for duress stated in terms of the existence of free will must be scrapped in favor of a "no reasonable alternative" test.[21] The question should not be whether the threatened party exercised free will, but rather whether that party had any reasonable alternative to the path urged by the other party. As mentioned above, courts have long been willing to apply the duress doctrine to constrained choice situations. Those situations, however, involve the exercise of free will, albeit constrained free will. It is impossible to grasp how a court can use an absolute test for the presence or absence of free will and yet find duress in such a fettered free will situation. Even so, courts have used the zero-sum analysis of the absence or presence of free will.[22] In addition, such a test is incredibly vague. How does one determine the presence of free will? Perhaps a situation exhibits more or less free will but a complete absence of free will is difficult to determine. As one might imagine, explanatory analysis is usually absent from courts' free will determinations. Free will analysis should be abandoned because it provides an environment that, in effect, encourages courts to make result-oriented decisions. The notion of "no reasonable alternative" better captures the idea of constrained choice and is a standard courts have the ability to apply once courts understand the idea of reasonableness in context.[23]

Second, duress should be defined to regulate situations of constrained choice, not situations in deficiencies of decision-making capability that might best be considered with the doctrine of undue influence.[24] In short, duress and undue influence are separate doctrines and maintaining the division of doctrines can maximize clarity of analysis and thus clarity of court decisions. In addition, the doctrines should be kept separate to deal with different situations. The classic duress situation has been and ought to be one in which the actor fully comprehends the alternatives, carefully considers the alternatives, and selects one alternative. Situations of limited decisional capacity or flawed decisional capacity are not duress and should be irrelevant to duress. Courts should not use the duress doctrine to police undue influence on decision-making ability; the doctrine of undue influence serves that purpose.

While a blending of the two doctrines may be attractive, ostensibly as a method of obtaining a seamless web of fairness, much is lost with a combination. Duress and undue influence address two separate sorts of contracting im-

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21 *See* discussion in section IV.B. & section V.A. *infra*.

22 *See infra* section IV.C.

23 *See, e.g.*, Krantz v. BT Visual Images, L.L.C., 89 Cal. App. 4th 164 (Cal. Ct. App. 2001); Nobel v. White, 783 A.2d 1145 (Conn. App. Ct. 2001); Dunes Hospitality, L.L.C. v. Country Kitchen Int'l, Inc., 623 N.W.2d 484 (S.D. 2001); Andreini v. Hultgren, 860 P.2d 916 (Utah 1993); Berardi v. Meadowbrook Mall Co., 572 S.E.2d 900 (W. Va. 2002). *See generally* discussion in section V.A. *infra*.

24 *See infra* section V.B. (discussing the inappropriateness of undue influence factors in a duress analysis).

perfections. When the two doctrines are combined, situations that would have fit the traditional duress doctrine—situations of truly constrained choice—fail to prove the case of unenforceability if undue influence factors are absent. In a Venn diagram of traditional duress situations and traditional undue duress situations, each doctrine is a circle with only slight overlap. The parts of the two circles not overlapping represent the situations that may no longer be unenforceable if the doctrines are combined,[25] and thus aggregate fairness is reduced.[26]

Third, duress is obviously a fairness doctrine. Yet, the duress doctrine must not be used to directly regulate the substantive fairness of a deal.[27] Historically, the doctrine has had a process focus. The notion has been that certain bargains are flawed because of unfair constraints on the decision maker. To survive, the doctrine must remain process focused. While process fairness has the side effect of regulating the substantive fairness of bargains,[28] duress should not be defined or applied with the goal of regulating the substantive fairness of the bargain.[29] Much of the contract theory of the twentieth century has suggested that substantive fairness analysis would be an improvement on the duress doctrine.[30] This scholarship coincided with the legal realist or modernist

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[25] So, for example, no duress could exist in the case of Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533 (N.Y. 1971), because the case does not involve a threatened party with a limited capacity to reach a decision. Rather, the threatened party was a corporation and the threat involved business dealings. Yet, the New York Court of Appeals found duress. In contrast, the case of Silsbee v. Webber, 50 N.E. 555 (Mass. 1898), might present facts suggesting limited capacity to reach a decision and also constrained choice. *See* further discussion of these cases in section II. *infra.*

[26] *See, e.g., In re* Marriage of Baltins, 212 Cal. App. 3d 66 (Cal. Ct. App. 1989). *See also* discussion in Section V.B. *infra.*

[27] *See infra* section V.C. (discussing the inappropriateness of a substantive fairness analysis in duress).

[28] The great philosopher Hobbes wrote that a voluntary contract could not be unfair by definition. *See* THOMAS HOBBES, LEVIATHAN Chapter 15 (1660). Wertheimer believes that a voluntary contract can, indeed, be substantively unfair.

While it may be difficult to establish the independent value of goods and services, it may be said that "right you are as right you think you are" is no more valid here than anywhere else. An unfair exchange may, for example, result from market imperfections or from one's desire to show affection for the other party. Thus, just as a coerced agreement can be fair (with respect to the value exchanged), a voluntary agreement can be unfair. *See* WERTHEIMER, *supra* note 5, at 22. *See also* Dawson, *supra* note 2, at 285-87 (duress is usually a situation of unequal exchange and often a situation involving unequal bargaining position).

[29] *See* John P. Dawson, *Duress Through Civil Litigation: I,* 45 MICH. L. REV. 571, 598 (1947) (suggesting that the fairness of the result of the bargain can and should be relevant); Hale, *Bargaining, supra* note 10 (espousing the position that control of the bargaining power of the strong might produce more of the commodity of freedom of contract for the weak and that this result might be beneficial to all).

[30] *See, e.g.,* Dawson, supra note 2, at 282-83 (discussing fairness consideration); Dawson, *supra* note 29, at 598 (espousing consideration of the justness of the resulting transaction); Finga-

movement throughout all aspects of contract law.[31] In the best of all possible worlds, perhaps a move to substantive fairness analysis would be optimal. But, unfortunately, the treatment of the duress doctrine in the twentieth century indicates that this is not the best of all possible worlds. Though the *Restatement (Second) of Contracts* states a substantive fairness test,[32] on the whole, the courts have refused to review bargains for fairness.[33] Such is a difficult chore and one with which courts are uncomfortable.[34] Apparently, courts continue to see review of the substance of a contract as an affront to the freedom of contract.[35] Other doctrines, such as unconscionability, allow for substantive bargain regulation.[36] The duress doctrine, however, may be applied more appropriately to traditional duress situations if courts do not view it as a doctrine requiring a substantive review of the deal in question. A requirement of substantive review may scare courts away from the doctrine entirely.

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rette, *supra* note 12, at 71-82 (arguing for a fairness analysis).

[31] *See* Joseph M. Perillo, *Screed for a Film & Pillar of Classical Contract Law: Shuey v. United States*, 71 FORDHAM L. REV. 915 (2002).

[32] *See* RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (1981), which states:

> A threat is improper if the resulting exchange is not on fair terms, and (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or (c) what is threatened is otherwise a use of power for illegitimate ends.

[33] Very few courts have even mentioned the fairness language of the *Restatement*. *See* Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293 (M.D. Ala 1999); American Life Ins. Co. v. Parra, 63 F. Supp. 2d 480 (D. Del. 1999), *aff'd in part, rev'd in part,* 265 F.3d 1054 (3d Cir. 2001) (table); *In re* Marriage of Baltins, 212 Cal. App. 3d 66 (Cal. Ct. App. 1989); Vail/ Arrowhead, Inc. v. Dist. Court, 954 P.2d 608 (Colo. 1998); Eckstein v. Eckstein, 379 A.2d 757 (Md. Ct. App. 1978); Richards v. Allianz Life Ins. Co. of N. America, 62 P.3d 320 (N.M. Ct. App. 2002); Maust v. Bank One Columbus, N.A., 614 N.E.2d 765 (Ohio Ct. App. 1992); Boud v. SDNCO, Inc., 54 P.3d 1131 (Utah 2002); Andreini v. Hultgren, 860 P.2d 916 (Utah 1993); Mach. Hauling, Inc. v. Steel, 384 S.E.2d 139 (W. Va. 1989).

[34] *See* Suwannee Swifty Stores, Inc. v. NationsBank, N.A., 536 S.E.2d 299, 303 (Ga. Ct. App. 2000) (quoting Miller, Stevenson & Steinichen v. Fayette County, 380 S.E.2d 73, 74-75 (Ga. Ct. App. 1989)). "'One may not void a contract on grounds of duress merely because he entered into it with reluctance, the contract is very disadvantageous to him, the bargaining power of the parties was unequal or there was some unfairness in the negotiations preceding the agreement.'"

[35] *See* Dalzell, *supra* note 9, at 237. "One of the most frequently and emphatically declared axioms of contract law is that our courts are not concerned with the equivalence of the consideration given for a promise. But doubts are growing of late years."

[36] *See* U.C. C. § 2-302. Section 2-302 states in part:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Fourth, the duress doctrine, historically, has been a regulator of fairness of the bargaining process and should continue to do so. This is not to say that in all cases of duress, the bargain is substantively unfair. Nor can one say that all bargains from which duress is absent are substantively fair. Yet, absence of fairness in the bargaining process generally indicates absence of substantive fairness and presence of fairness in the bargaining process generally indicates substantive fairness.[37] Thus, bargains in which an actor's choice is constrained unfairly must be the target of the doctrine. Courts should recognize that the bargaining process is fatally flawed if there is constrained choice and the constraint is caused by a threat violative of criminal or tort law, a threat violative of the covenant of good faith and fair dealing in an existing contractual relationship, a threat that is a bad faith use of civil process, or, lastly, a threat to pursue criminal prosecution.[38] Any bargain that is the product of these threats when the threatened party has no reasonable alternative to the plan of the threatener is a product of procedural unfairness.[39]

A duress doctrine that incorporates these four suggestions protects against constrained choice and thus should be favored by theorists who value such choice as a facet of autonomy. Likewise, the doctrine should appeal to consequentialist thinkers who value the parties' relatively unconstrained choice for the benefit that choice renders the market and therefore society in general. While this Article does not embrace a full-fledged substantive fairness analysis, the approach suggested by the Article is an indirect regulator of fairness, especially regarding the inclusion of lack of good faith in a contractual relationship as a category of threats creating unfair constraint on the threatened party. The rule's more obvious edges ought to provide a clearer and more obvious analysis for courts to apply.

Section II of this Article sets out the basic outline of the duress doctrine as it exists today. Section III discusses the approach of the *Restatement (First) of Contracts*[40] and the *Restatement (Second) of Contracts*.[41] Section IV discusses how the courts have treated the doctrine, especially in recent years, in terms of ultimate result reached. In addition, this section critically evaluates tests applied and analytical frameworks used by the courts. In Section V the Article discusses the four suggested improvements to the duress doctrine: (1) that a "no reasonable alternative" test be applied in place of a free will test; (2)

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37 *See* WERTHEIMER, *supra* note 5, at 22. Hobbes said that all voluntary contracts are in fact fair. *See* HOBBES, *supra* note 28.

38 *See infra* section V.D.2. (discussing the proper parameters of the threat requirement).

39 *See* WERTHEIMER, *supra* note 5, at 21 ("While we would expect that a legitimate process would tend to produce legitimate results, process and result capture different dimensions of the morality of agreements."). *See also* Anthony Kronman, *Contract Law and Distributive Justice,* 89 YALE L.J. 472 (1980).

40 *See* RESTATEMENT (FIRST) OF CONTRACTS §§ 492-494 (1932).

41 *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 174-76 (1981).

that the duress doctrine not be confused with or melded with the undue influence doctrine; (3) that the duress doctrine not be used to directly police substantive fairness; and (4) that courts recognize duress when the situation involves not only "no reasonable alternative," but also a threat violative of criminal or tort law, a violation of the covenant of good faith and fair dealing in an existing contractual relationship, a bad faith use of civil process, or a threat to pursue criminal prosecution. Section VI concludes that these changes should serve to save and improve the duress doctrine.

II. A BRIEF HISTORY OF THE DOCTRINE

Contractual duress at an early time did not suffer the identity crisis it now faces. The doctrine paralleled the criminal doctrine of duress, at least with regard to the type of activities that could be the basis of the constraint.[42] A party could avoid a contractual obligation on the basis of duress only if the constraint on that party's decision-making was in the form of a fear of death or serious bodily harm or actual imprisonment.[43] A contract entered into at gunpoint was a contract voidable on the basis of duress. But, as Blackstone stated,

> A fear of battery ... is no duress; neither is the fear of having one's house burned, or one's goods taken away or destroyed, because in these cases, should the threat be performed, a man may

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[42] Duress in criminal law has traditionally required:

> (1) The defendant must have no reasonable opportunity to escape from the coercive situation.
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> (2) The defendant must be threatened with significant harm—death or serious bodily injury.
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> (3) The threatened harm must be illegal.
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> (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.

Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law,* 37 ARIZ. L. REV. 251, 254 (1995). The criminal law has seen some liberalization of the duress defense as a result of the effect of the *Model Penal Code*. Section 2.09 of the *Model Penal Code* states, in part:

> It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

MODEL PENAL CODE § 2.09 (1962). *See also* State v. Toscano, 378 A.2d 755 (N.J. 1977) (evaluating the traditional approach in light of the *Model Penal Code* approach). *See generally* WAYNE R. LAFAVE, CRIMINAL LAW § 9.7 (4th Ed. 2003).

[43] *See also* Note, *supra* note 3, at 893 (discussing the history of duress). *See generally* Dawson, *supra* note 2, at 254-62 (providing a detailed history of the common law of duress).

> have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life or limb.[44]

The first recognition that the duress doctrine could apply in situations of economic threat came in the form of situations that became known as "duress of goods" cases. In a classic "duress of goods" case, a bargainer threatens to withhold delivery of goods to the owner of the goods unless the owner agrees to a demand. The demand is usually a payment of money.[45] As early as 1732, an English court recognized the situation as one in which the duress doctrine applied.[46] In that case a lender of money refused to release to the owner the property pledged as collateral for the loan unless the owner of the property agreed to pay an illegal rate of interest.[47] The court noted that the owner might need the goods immediately and that "an action of trover would not do his business."[48] American courts readily accepted the application of the duress doctrine to the "duress of goods" scenario.[49]

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[44] 1 BLACKSTONE'S COMMENTARIES 131, *quoted in* JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 9.2, at 316 (5th Ed. 2003). For an early case in the United States stating a restrictive view of duress, see McDonald v. Carlton, 1 N.M. 172 (1857). In a case involving a soldier who reenlisted to get out of jail and then claimed that the reenlistment was flawed because of duress, the court stated that duress was "'actual or threatened violence or restraint of a man's person, contrary to law ... sufficient to overcome the mind of a person of ordinary firmness." *Id.* at 176-77. At least one modern Indiana court has an extremely restrictive view of duress. In a case involving a court-approved custody agreement, a mother claimed that the agreement should be set aside because it was the product of duress. The court found no evidence of duress, stating, "'there must be an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract or discharge one.'" *In re* Paternity of K.R.H., 784 N.E.2d 985, 990 (Ind. Ct. App. 2003) (quoting Rutter v. Excel Indus., Inc., 438 N.E.2d 1030, 1031 (Ind. Ct. App. 1982)).

[45] *See* Dalzell, *supra* note 9, at 241. *See also* Dawson, *supra* note 2, at 255-56 (discussing the "duress of goods" cases and noting that the objective in these cases was "ensuring the freedom of the individual will").

[46] Astley v. Reynolds, 2 Strange 915, 93 Eng. Rep. 939 (K.B. 1732). *See also* Dalzell, *supra* note 9, at 241. Dalzell notes that the doctrine may have existed even earlier and discusses Summer v. Ferryman, 11 Mod. 201, 88 Eng. Rep. 989 (Q.B. 1709), in this regard. *See generally* Dawson, *supra* note 2, at 255-56 (noting that the objective in these cases was "ensuring the freedom of the individual will").

[47] *Astley,* 2 Strange 915, 93 Eng. Rep. 939 (K.B. 1732).

[48] *Id.*

[49] *See, e.g.,* Chamberlain v. Reed, 13 Me. 357 (1836); Quinnett v. Washington, 10 Mo. 53 (1846); Sasportas v. Jennings, 1 Bay 470 (S.C. 1795). Cadwell v. Higginbottham, 151 P. 315 (N.M. 1915). *See generally* Note, *supra* note 3, at 893 (discussing the development of the recognition of "duress of goods"). *See* Dalzell, *supra* note 9, at 241-42 (discussing acceptance of the "duress of goods" notion by American courts).

In the 1800s another setting in which courts were willing to apply the duress doctrine emerged.[50] These cases involved common carriers[51] or public utilities such as electricity companies,[52] gas companies,[53] and water companies.[54] These companies would refuse service unless the customer would agree to pay a fee in excess of established rates.[55] Courts viewed such conduct as duress.[56] Though courts did not inquire into alternative sources of the commodity or service, there was generally no need to do so because these carriers and utilities wielded monopoly power.[57] Interestingly, these decisions were in furtherance of a new goal in contract law: remedying the economic disparity of the contractors.[58]

Gradually, courts enlarged the situations in which the duress doctrine might apply, recognizing that all sorts of economic pressure might create a problematic contract. An example of this expansion is the case of *Austin Instrument,*

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[50] *See* Dalzell, *supra* note 9, at 243-46; Dawson, *supra* note 2, at 258.

[51] *See, e.g.,* California Adjustment Co. v. Atchison, T. & S.F. Ry., 175 P. 682 (Cal. 1918); The Chicago & Alton R.R. v. Chicago, Vermillion & Wilmington Coal Co., 79 Ill. 121 (1875); McGregor v. Erie Ry., 35 N.J.L. 89 (1871); Peters, Ricker & Co. v. R.R., 42 Ohio St. 275 (1884).

[52] *See, e.g.,* Manhattan Milling Co v. Manhattan Gas & Elec. Co., 225 P. 86 (Kan. 1924); City of Boston v. Edison Elec. Illuminating Co., 136 N.E. 113 (Mass. 1922); Piedmont Power & Light Co. v. L. Banks Holt Mfg. Co., 111 S.E. 623 (N.C. 1922).

[53] *See, e.g.,* Indiana Natural & Illuminating Gas Co. v. Anthony, 58 N.E. 868 (Ind. Ct. App. 1900); New Orleans Gaslight & Banking Co. v. Paulding, 12 Rob. 378 (La. 1845); City of Saginaw v. Consumers Power Co., 8 N.W.2d 149 (Mich. 1943).

[54] *See, e.g.,* City of Chicago v. Northwestern Mut. Life Ins. Co., 75 N.E. 803 (Ill. 1905); B. & B. Amusement Enters. Inc v. City of Boston, 8 N.E.2d 788 (Mass. 1937); Barnes Laundry Co. v. City of Pittsburgh, 109 A. 535 (Pa. 1920).

[55] *See, e.g.,* Newland v. Buncombe Turnpike Co., 26 N.C. 372 (1844) (excessive tolls charged for use of turnpike). See also Parker v. Great Western Ry., 7 Man. & G. 253, 135 Eng. Rep. 107 (C.P. 1844) (carrier refused to receive goods for shipment unless excessive fees were paid).

[56] *See, e.g.,* City of Chicago v. Northwestern Mut. Life Ins. Co., 75 N.E. 803 (Ill. 1905); B. & B. Amusement Enters. Inc v. City of Boston, 8 N.E.2d 788 (Mass. 1937); Panton v. Duluth Gas & Water Co., 52 N.W. 527 (1892); St. Louis Brewing Ass'n v. St. Louis, 37 S.W. 525 (Mo. 1897); Piedmont Power & Light Co. v. L. Banks Holt Mfg. Co., 111 S.E. 623 (N.C. 1922). *See also* Dalzell, *supra* note 9, at 243 ("[w]hen the question has come up as a problem in duress, the courts have been practically unanimous in holding such payments involuntary and recoverable").

[57] *See* Dalzell, *supra* note 9, at 243-46 (discussing the application of the duress doctrine to monopolists). *See also* Dawson, *supra* note 2, at 259 ("Inequality of bargaining power, the inevitable product of state-conferred monopoly, was used to justify this extension of the doctrine of economic duress.").

[58] *See* Dawson, *supra* note 2, at 258-59. Dawson noted, "The economic and political power of the railroads made them the first focal point of the new doctrine." *See also* Dalzell, *supra* note 9, at 244 ("In these decisions the courts talk much of the inequality of the parties as a weighty argument for relief.").

Inc. v. Loral Corp.[59] The United States Navy awarded Loral Corporation a contract to produce radar sets.[60] The contract contained a schedule for delivery, a liquidated damage clause to deal with late deliveries, and a cancellation clause in the event that Loral was unable to perform adequately.[61] Loral selected Austin Instrument to produce twenty-three of the forty precision gear components necessary for Loral to manufacture the radar sets.[62] While Loral was in the midst of performing on this first contract, Loral obtained another radar set contract with the Navy.[63] Loral solicited bids for the supply of the forty parts for the second contract.[64] Austin responded with two demands. Austin stated that it would cease shipment of the parts owed for the first contract (1) if Loral did not agree to use Austin Instrument as the supplier for all forty of the parts on the second contract and (2) if Loral did not agree to price increases on the parts for the first contract.[65] Austin Instrument in fact did stop delivery just as it had promised.[66] Loral sought other suppliers but determined that no other supplier could perform in a time consistent with the demands of Loral's contracts with the Navy.[67] Finally, Loral agreed to Austin Instrument's demands, stating:

> We have feverishly surveyed other sources of supply and find that because of the prevailing military exigencies, were they to start from scratch as would have to be the case, they could not even remotely begin to deliver on time to meet the delivery requirements established by the Government . . . . Accordingly, we are left with no choice or alternative but to meet your conditions.[68]

After the last delivery from Austin Instrument, Loral notified Austin of Loral's intent to recover the amount Loral paid in price increases.[69] Loral then followed up on its statement by filing suit.[70]

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59 272 N.E.2d 533 (N.Y. 1971).

60 *Id.* at 535.

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 272 N.E.2d at 534.

66 *Id.*

67 *Id.*

68 *Id.* at 534-35.

69 *Id.* at 536.

The lower court found no duress,[71] but the Court of Appeals of New York disagreed.[72] The Court began by noting that a contract is voidable on the basis of duress "when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will."[73] The court then accepted that a threat by one party to breach a contract by not delivering the subject of the contract was wrongful.[74] Such a threat could be the basis of a duress claim if there was no other source of supply for the goods and the usual remedy for breach of contract would not be adequate.[75]

The Court then applied these principles to the facts, stating that Austin's threat "deprived Loral of its free will."[76] The Court noted that Loral faced staggering expenses in the form of liquidated damages if its deliveries to the Navy were late, that Loral did a significant amount of business with the Navy and did not want to jeopardize that relationship, and that it was therefore "perfectly reasonable for Loral . . . to consider itself in an emergency, duress situation."[77] Further, Loral adequately demonstrated that it had no other supply of parts for the radar sets and that an action for breach of contract against Austin Instrument would have been an inadequate remedy since Loral would have to obtain parts in a timely manner or face the consequences of failing to perform on the Navy contracts.[78]

This case presents facts far afield from Blackstone's statement of the earlier notion of duress that required a threat of physical force.[79] While the facts are similar to a "duress of goods" case, the *Loral* case is not a traditional "duress of goods" case. Loral was not the owner of the parts at the time that Austin Instrument withheld them. This case is an example of courts' willingness to accept a broader notion of the type of threat that can support a finding of duress.

Another case exhibiting this willingness to expand the situations recognizable as duress is *Silsbee v. Webber*.[80] In *Silsbee,* a woman sought to have a

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70 *Id.*

71 272 N.E.2d at 535.

72 *Id.* at 536 ("We find without any support in the record the conclusion reached by the courts below that Loral failed to establish that it was the victim of economic duress.").

73 *Id.* at 535.

74 *Id.*

75 *Id.*

76 *Id.* at 536.

77 272 N.E.2d at 536.

78 *Id.* at 537.

79 *See supra* note 44 .

80 50 N.E. 555 (Mass. 1898).

contract assigning her share of her father's estate set aside on the basis that she agreed to the assignment under duress.[81] She claimed that she signed because the other party threatened to tell her husband, who apparently had mental difficulties, that her son had stolen from the other party.[82] The court held that the lower court acted improperly in directing a verdict against the woman and that the matter should have been left to the jury.[83] Justice Holmes, writing for the court, stated:

> If a contract is extorted by brutal and wicked means, and a means which derives its immunity, if it have immunity, solely from the law's distrust of its own powers of investigation, in our opinion the contract may be avoided by the party to whom the undue influence has been applied.[84]

Once again, the threat is not one of physical injury or traditional duress of goods. Yet, the court was willing to accept the situation as one that might present a defense of duress. Unfortunately, the courts are, and have been, unsure of the bounds of this broader notion of duress for quite some time.

III. THE RESTATEMENTS

The *Restatement (First) of Contracts* attempted to define the duress doctrine. Section 492 stated that duress is:

> (a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or
>
> (b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.[85]

Part (a) referred to the rare situation mentioned earlier[86] in which the conduct that constitutes assent to the bargain is not the product of the actor's

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81 *Id.* at 556.

82 *Id.*

83 *Id.* at 557.

84 *Id.* at 556.

85 RESTATEMENT (FIRST) OF CONTRACTS § 492 (1932).

86 *See supra* note 5 and accompanying text.

volition as would be the case when someone holds the actor's hand to the paper and forces a signature.[87] Both the *Restatement (First)* and the *Restatement (Second) of Contracts* agree on the treatment contracts formed in this way should receive—the contracts are void.[88]

Part (b) of the *Restatement (First)* dealt with the form of duress that results in a voidable contract—the form of duress in which a party must decide to contract or not to contract while facing a threat of negative consequences.[89] The *Restatement (First)* set forth that there must be a "wrongful threat" that "precludes" the exercise of "free will and judgment" and therefore is causally related[90] to the inability to exercise free will.[91] The *Restatement (First)* did not attempt to define when one is precluded from exercising free will and judgment[92] but did clarify that the standard is a subjective one.[93] With regard to the nature of the threat, the *Restatement (First),* in section 493, provided a laundry list of threats that could be the basis of duress but then section 493 ended with the great catch-all, "any other wrongful acts."[94] In an attempt to explain, a *Re-*

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87 *See supra* note 5 and accompanying text. Wertheimer refers to this situation as one of non-volitional duress. *See* WERTHEIMER, note 5, at 30.

88 *See* RESTATEMENT (FIRST) OF CONTRACTS § 494 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981).

89 RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. b (1932).

90 RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. f (1932). "[T]he fear must be a cause inducing entrance into a transaction, and though not necessarily the sole cause, it must be one without which the transaction would not have occurred."

91 *Id.*

92 *See* RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. e (1932). "[T]here is no line of absolute demarcation between fear that deprives a person of free will and judgment, and lesser degrees of fear . . . ."

93 *See* RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. a (1932). Comment a states in part:

> The test of what act or threat produces the required degree of fear is not objective. The threat need not be such as would put a brave man, or even a man of ordinary firmness, in fear. The question is rather, did it put one entering into the transaction in such fear as to preclude the exercise by him of free will and judgment.

94 Section 493 states:

> Duress may be exercised by
>
> (a) personal violence or a threat thereof, or
>
> (b) imprisonment, or threat of imprisonment, except where the imprisonment brought about or threatened is for the enforcement of a civil claim, and is made in good faith in accordance with law, or
>
> (c) threats of physical injury, or of wrongful imprisonment or prosecution of a husband; wife, child, or other near relative, or
>
> (d) threats of wrongfully destroying, injuring, seizing or withholding land or other things, or

statement (First) comment stated that acts may be wrongful even if not criminal or tortious or in violation of a contractual duty if the acts involve "abuse of legal remedies" or the acts "are wrongful in a moral sense."[95]

Courts following this definition would, in effect, perform a two-part inquiry. First, a court would ask and answer the question of whether there was a wrongful threat. Second, a court would determine whether the wrongful threat caused a loss of free will. Courts have long used, and continue to use, this basic two-part framework: one part dealing with the nature of the constraint caused by one of the parties and one part dealing with the effect of the constraint on the other party's choice.[96] Courts have, of course, disagreed on the substance of the two parts.[97] While many courts have followed the teaching of section 492 by focusing on the presence or absence of free will, courts have not uniformly applied the *Restatement (First)* version of the test for the type of threat that may be a basis for a valid duress claim.[98]

The *Restatement (Second) of Contracts* attempts to improve upon the *Restatement (First)*. With regard to the voidable contract situation, the *Restatement (Second)* significantly modified the approach. The *Restatement (Second)* replaced the free will notion of the *Restatement (First)* with the idea that if the victim has "no reasonable alternative," the contract is voidable if an "improper threat" causes the situation of "no reasonable alternative."[99] The comment

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(e) any other wrongful acts . . . .

RESTATEMENT (FIRST) OF CONTRACTS § 493 (1932).

95 RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. g (1932).

96 *See, e.g.*, Young v. Anne Arundel County, 807 A.2d 651, 692 (Md. Ct. Spec. App. 2002) ("To establish duress there must be a wrongful act which strips the individual of the ability to utilize his free will."); Kendrick v. Barker, 15 P.3d 734, 741 (Wyo. 2001) ("[D]uress exists whenever a person is induced, by the unlawful act of another, to perform some act under circumstances which deprive him of the exercise of free will." (quoting *In re* TR, 777 P.2d 1106, 1111 (Wyo. 1989))). *See also* Krilich v. Am. Nat'l Bank & Trust Co., 778 N.E.2d 1153 (Ill. App. Ct. 2002); Goode v. Burke Town Plaza, Inc., 436 S.E.2d 450 (Va. 1993).

97 *See infra* section IV.C. and section V.A. (discussing treatment of the free will part of the inquiry). *See infra* section V.D. (discussing the threat part of the inquiry).

98 For example, some courts state that a threat, to be a basis for duress, must be unlawful. *See, e.g.*, Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1242 (10th Cir. 1990) ("unlawful act"); Nasik Breeding & Research Farm Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 527 (S.D.N.Y. 2001) ("unlawfully made" threat); Gubitz v. Sec. Mut. Life Ins. Co., 692 N.Y.S.2d 139, 140 (N.Y. App. Div. 1999) (The court refused to apply the duress doctrine because the party's conduct was not "illegal," stating: "It is well established that where the alleged menace was ... to stop performance under a contract or to exercise a legal right, there is no actionable duress."). *See also* discussion *infra* section VI.D.

99 RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

states that the free will approach is flawed because of "vagueness and impracticability."[100]

The *Restatement (Second)* defined an "improper threat" in section 176(1) as one of the following: (1) a threat of a crime or a tort, (2) a threat that is a crime or tort, (3) a threat of criminal prosecution, (4) bad faith threat to use civil process, or (5) a threat to breach the duty of good faith and fair dealing in a contract relationship.[101] In addition, the *Restatement (Second)* section 176(2) stated:

> A threat is improper if the resulting exchange is not on fair terms, and
>
> (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
>
> (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
>
> (c) what is threatened is otherwise a use of power for illegitimate ends.[102]

The *Restatement (Second)* also allows for use of the duress doctrine when a third party causes the duress "unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction."[103]

In many areas of contract law, the *Restatements* have been extraordinarily influential.[104] Often a court adopts a *Restatement* section as the law of that jurisdiction on a particular point.[105] The courts have not embraced as heartily

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[100] RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (1981). *See also* Andreini v. Hultgren, 860 P.2d 916, 921 (Utah 1993) (discussing the changes made by the *Restatement (Second)*).

[101] *See* RESTATEMENT (SECOND) OF CONTRACTS § 176(1) (1981).

[102] RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (1981).

[103] RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1981).

[104] *See* Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508 (1998).

[105] For example, many courts have adopted the *Restatement (Second) of Contracts* § 90 version of the promissory estoppel doctrine. *See, e.g.*, Chapman v. Boman, 381 A.2d 1123 (Me. 1978); Chesus v. Watts, 967 S.W.2d 97 (Mo. Ct. App. 1998); Talley v. Teamsters Local No. 377, 357 N.E.2d 44 (Ohio 1976). *See also* Benedetto v. Wanat, 829 A.2d 901 (Conn. App. Ct. 2003); United Parcel Serv. Co. v. Rickert, 996 S.W.2d 464 (Ky. 1999); Birt v. Wells Fargo Home Mortgage, Inc., 75 P.3d 640 (Wyo. 2003).

the *Restatement* definitions of the duress doctrine.[106] While many courts still use the language of the free will analysis, which is a part of the *Restatement (First)* definition, long after the publication of the *Restatement (Second)*, some courts have used the "no reasonable alternative" concept of the *Restatement (Second)* in addition to the free will analysis[107] or in place of it.[108] In addition, some courts have analyzed the threat in terms similar to the definition of an improper threat found in section 176(1) of the *Restatement (Second)*.[109] Very few, however, have used the fairness factors in section 176(2) of the *Restatement (Second)*.[110] Some courts use a definition of threat not in accord with either *Restatement*.[111]

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[106] *But see In re* Marriage of Speigel, 553 N.W.2d 309, 318 (Iowa 1996) (quoting *Restatement (Second) of Contracts* section 175(1) in dealing with a prenuptial contract).

[107] *See, e.g.*, Am. Life Ins. Co. v. Parra, 63 F. Supp. 2d 480, 498 (D. Del. 1999), *aff'd in part, rev'd in part*, 265 F.3d 1054 (3d Cir. 2001) (unpublished table decision) ("a release may be void for duress where a party's manifestation of assent is induced by (1) an improper threat, (2) which overcomes the party's free will and (3) leaves the party with no reasonable alternative to protect his interest"); Leonard v. Univ. of Del., 204 F. Supp. 2d 784, 788 (D. Del. 2002) ("To prove duress, Leonard must demonstrate: (1) an improper threat, (2) which overcame his free will, and (3) left him with no reasonable alternative to protect his interest."). *See also* Todd v. Blue Ridge Legal Servs., Inc., 175 F. Supp. 2d 857, 864 (W.D. Va. 2001) . The court stated: "[T]he court shall assume that the defendants' acts were wrongful. Furthermore, the court shall accept the plaintiff's statement that her will was overcome." Yet, the court later noted that the coercive threat must leave the plaintiff "without any reasonable alternative." (quoting King v. Donnkenny, Inc., 84 F. Supp. 2d 736, 738 (W.D. Va. 2000)).

[108] See *In re* Marriage of Spiegel, 553 N.W.2d 309 (Iowa 1996). In *Speigel* the court decided that the lower court was wrong in finding the prenuptial contract unenforceable on the basis of duress. The court found that the bargainer had the reasonable though embarrassing option of canceling the wedding. *See also* Andreini v. Hultgren, 860 P.2d 916, 921 (Utah 1993) (the court adopted the *Restatement (Second)* approach); Mach. Hauling, Inc. v. Steel, 384 S.E.2d 139, 142 (W. Va. 1989) ("Recently, courts have tended to avoid the term 'free will' as applied to the victim, but instead have utilized the concept that the victim had 'no reasonable alternative.'").

[109] *See, e.g., Andreini*, 860 P.2d at 921 ("We agree with this reasoning and explicitly adopt the legal standards of duress set forth in sections 175 and 176 of the Restatement (Second) of Contracts."). *But see* Am. Life Ins. Co. v. Parra, 63 F. Supp. 2d 480, 498 (D. Del. 1999), *aff'd in part, rev'd in part*, 265 F.3d 1054 (3d Cir. 2001) (unpublished table decision) (noting that Delaware does not follow section 176(1) of the *Restatement (Second)* regarding the breach of the duty of good faith).

[110] Only a few published opinions have applied section 176(2). *See* Vail/Arrowhead, Inc. v. Dist. Court, 954 P.2d 608, 612-13 (Colo. 1998) (en banc) (the court quoted all of section 176 and remanded for consideration in light of section 176); Richards v. Allianz Life Ins. Co., 62 P.3d 320, 328 (N.M. Ct. App. 2002) (the court noted that no New Mexico court had applied section 176(2) but because it would "fruitfully be applied to resolve this case and appears well-grounded," the court used it to conclude that a case for duress had not been made); Maust v. Bank One Columbus, N.A., 614 N.E.2d 765, 769 (Ohio Ct. App. 1992) (the court relied upon section 176 to deny summary judgment); Boud v. SDNCO, Inc., 54 P.3d 1131, 1137 (Utah 2002) (finding no section 176(2) factors applicable); *Andreini*, 860 P.2d at 921 (the court reversed the grant of summary judgment because there was evidence that an improper threat as defined in section 176(2)(b) had occurred). In Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293, 1299 (M.D. Ala. 1999), the

Courts have not recognized duress when a third party causes the threat even though section 175(2) of the *Restatement (Second)* espouses this view. In fact, courts affirmatively hold to the contrary.[112] For example, in *Kosawska v.*

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court quoted section 176(2) and commented that section 176(2) "appears to encompass the concept of 'economic duress'". Yet, in the analysis the court relied on the Alabama definition of duress as "'wrongful acts or threats'" which cause "'financial distress'" leaving no "'reasonable alternative'". *Id.* (quoting Int'l Paper v. Whilden, 469 So. 2d 560, 562 (Ala. 1985). *See also In re* Marriage of Baltins, 212 Cal. App. 3d 66, 83-84 (Cal. Ct. App. 1989) (the court set aside property and support provisions of a marital dissolution on the basis of duress, quoting section 176 in a footnote); Eckstein v. Eckstein, 379 A.2d 757, 761 (Md. Ct. Spec. App. 1978) (the court quoted a *Tentative Draft* of the *Restatement (Second)* but did not apply it); *Steel*, 384 S.E.2d at 142 n.7 (W. Va. 1989) (quoting section 176 but ultimately finding no duress because duress cannot be based on conduct that the party has a legal right to do; such a position is inconsistent with section 176(2)).

[111] *See, e.g., In re* Paternity of K.R.H., 784 N.E.2d 985, 990 (Ind. Ct. App. 2003) (quoting Rutter v. Excell Indus., Inc., 438 N.E.2d 1030, 1031 (Ind. Ct. App. 1982)) ("'there must be an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract or discharge one'"). *See infra* section IV.C. and section V. (discussing the various approaches taken by courts).

[112] *See, e.g.,* Andes v. Albano, 853 S.W.2d 936, 942-43 (Mo. 1993) ("however, any allegation that her own counsel pressured her to sign the release simply cannot be attributed to opposing counsel."); Sheet Metal Workers Nat'l Pension Fund v. Bryden House, Ltd. P'ship, 719 N.E.2d 646, 652 (Ohio Ct. App. 1998) (quoting Blodgett v. Blodgett, 551 N.E.2d 1249 (Ohio 1990)) ("To avoid a contract on the basis of duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party."'); Dockery v. Estate of Massey, 958 S.W.2d 346, 348 (Tenn. Ct. App. 1997) (the actions complained of were not those of the opposing party so no duress finding was possible); ABB Kraftwerke Aktiengesellschaft v. Brownsville Barge & Crane, Inc., 115 S.W.3d 287, 294 (Tex. App. 2003) (refusing to recognize a threat by a third party as a basis for a duress claim); H.R.N., Inc. v. Shell Oil Co., 102 S.W.3d 205, 216 (Tex. App. 2003) ("Furthermore, economic duress may be claimed only when the party against whom it is claimed was responsible for the claimant's financial distress."); Lee v. Lee, 44 S.W.3d 151, 154 (Tex. App. 2001) (in a case involving the enforceability of a property settlement agreement, the party claiming duress relied upon actions and statements of that party's own attorney as a basis of the duress; the court clarified that the duress must be imposed by the other party to the contract, not a third party). *See also* W.T. v. Dep't of Children & Families, 846 So. 2d 1278, 1281 (Fla. Dist. Ct. App. 2003) (quoting City of Miami v. Kory, 394 So. 2d 494, 497 (Fla. Dist. Ct. App. 1981) (a document in which a mother surrendered parental rights was not the product of duress because there was no "'improper and coercive conduct of the opposite side'"; the claim was based primarily on conduct of the mother's own attorney, not the party on the other side of the agreement).

Other courts define duress clearly to require the duress to be imposed by the other party to the contract. *See, e.g.,* Primary Health Network, Inc. v. State, 52 P.3d 307, 312 (Idaho 2002) ("A party claiming economic duress must prove ... that the circumstances were the result of coercive acts of the other party."); *In re* Yannalfo, 794 A.2d 795, 797 (N.H. 2002) (quoting Goodwin R.R. v. State, 517 A.2d 823, 830 (N.H. 1986) ("'To establish duress, a party must show . . . that the coercive circumstances were the result of the other party's acts . . . .'"); *Boud*, 54 P.3d at 1136 ("duress exists when a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative'" (quoting *Andreini*, 860 P.2d at 921)); Kendrick v. Barker, 15 P.3d 734, 741 (Wyo. 2001) ("such circumstances are the result of coercive acts of the other party").

Khan,[113] an automobile owner settled with a repair shop for damage to her automobile.[114] The owner then claimed that the settlement was the product of duress exerted by her attorney.[115] The court affirmed the lower court's grant of summary judgment on the basis that a contract cannot be rendered unenforceable unless the duress emanates from a third-party who is involved with the other party to the contract.[116] Because the auto owner's attorney had no involvement with the repair shop, the duress doctrine could not apply.[117]

IV. THE DURESS DOCTRINE IN THE COURTS

A. Ultimate Result

Commentators over the years have noted that the courts make an absolute mess of applying the duress doctrine.[118] While it is certainly true, and has been true for decades, that the courts' treatment of duress is unpredictable and sometimes nonsensical, there are lessons to be learned from a deeper look at duress as it exists in the courts today.

In published state cases from 1996 through 2003, duress was discussed in eighty-eight cases. In many of these cases, the party claiming duress was appealing a grant of a motion to dismiss or a grant of summary judgment on the duress claim. Thus, the appellate court was, in many cases, simply deciding whether the lower court decided the matter prematurely and should consider the duress claim more fully.[119] In only nine of the eighty-eight cases did the court decide the matter in favor of the duress claim.[120] In only two cases did the court

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[113] 929 S.W.2d 505 (Tex. App. 1996). *But see* Mason v. Ariz. Educ. Loan Mktg. Assistance Corp. (*In re* Mason), 300 B.R. 160, 167 (Bankr. D. Conn. 2003) (discussing approvingly the idea of duress being based on a threat by a third party).

[114] *Kosawska,* 929 S.W.2d at 506.

[115] *Id.* at 507.

[116] *Id.* at 508.

[117] *Id.*

[118] *See, e.g.,* Dawson, *supra* note 2, at 288 ("the conflict and confusion in results of decided cases seems greater that ever before"); Note, *supra* note 3, at 892 ("The limits of the doctrine, however, are not clear, and the courts have not used consistent standards for a finding of duress.").

[119] *See, e.g.,* ABB Kraftwerke Aktiengesellschaft v. Brownsville Barge & Crane, Inc., 115 S.W.3d 287, 294 (Tex. App. 2003) (review of grant of summary judgment); Rochelle Assocs. v. Fleet Bank, 645 N.Y.S.2d 798 (N.Y. App. Div. 1996) (review of grant of summary judgment); Slone v. Purina Mills, Inc., 927 S.W.2d 358 (Mo. Ct. App. 1996) (review of grant of summary judgment).

[120] *See* Inter-Tel, Inc. v. Bank of Am., 985 P.2d 596 (Ariz. Ct. App. 1999); Krantz v. BT Visual Images, L.L.C., 89 Cal. App. 4th 164, (Cal. Ct. App. 2001); Vail/Arrowhead, Inc. v. Dist. Court, 954 P.2d 608 (Colo. 1998) (en banc); Bath v. Hi-Tech Int'l, Inc., 704 So. 2d 292 (La. Ct. App. 1997); Young v. Anne Arundel County, 807 A.2d 651 (Md. Ct. Spec. App. 2002); *In re* Estate of

affirm a lower court's finding of duress.[121] In one case the court reversed and remanded but clearly held that the prenuptial agreement at issue was the product of duress.[122] In the other six cases, the appellate court remanded for further proceedings on the duress issue.[123]

Only two federal appellate cases have resulted in findings in favor of duress since the beginning of 1995.[124] One might expect more findings in favor of duress in the opinions of the federal district courts since those courts are trial courts. Yet, in the years 2000, 2001, 2002, and 2003, only three published opinions from the district courts or bankruptcy courts have been in favor of duress.[125] In one bankruptcy case the court held a debt consolidation agreement was the product of duress.[126] The other two courts held that the duress claim in each case should not have been summarily dismissed.[127]

Hollett, 834 A.2d 348 (N.H. 2003); Blumenthal v. Tener, 642 N.Y.S.2d 26 (N.Y. App. Div. 1996); Radford v. Keith, 584 S.E.2d 815 (N.C. Ct. App. 2003), *aff'd,* 591 S.E.2d 519 (N.C. 2004) (per curiam); *In re* Adoption of B.T.D., 68 P.3d 1021 (Utah Ct. App. 2003).

121 *See Bath,* 704 So. 2d 292 ; *Radford,* 584 S.E.2d 815.

122 *See In re Hollett,* 834 A.2d 348 (the court stated that prenuptial agreements deserved heightened scrutiny).

123 *See Inter-Tel,* 985 P.2d 596; *Krantz,* 89 Cal. App. 4th 164; *Vail/Arrowhead,* 954 P.2d 608; *Young* v., 807 A.2d 651; *Blumenthal,* 642 N.Y.S.2d 26; *In re* Adoption of B.T.D., 68 P.3d 1021 (Utah Ct. App. 2003).

124 *See* Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1322 (Fed. Cir. 2003); Contempo Design, Inc. v. Chicago & N.E. Ill. Dist. Council of Carpenters, 226 F.3d 535, 535 (7th Cir. 2000). Other cases in which duress was raised as an issue but rejected include: Rochester Ford Sales, Inc. v. Ford Motor Co., 287 F.3d 32, 43 (1st Cir. 2002); VKK Corp. v. Nat'l Football League, 244 F.3d 114, 121-25 (2d Cir. 2001); Prof'l Serv. Network, Inc. v. Am. Alliance Holding Co., 238 F.3d 897, 900-02 (7th Cir. 2001); Rissman v. Rissman, 213 F.3d 381, 385-87 (7th Cir. 2000); Bennett v. Coors Brewing Co., 189 F.3d 1221, 1228-29 (10th Cir. 1999); Gibson v. Wal-Mart Stores Inc., 181 F.3d 1163, 1167 (10th Cir. 1999); Strickland Tower Maint., Inc. v. AT & T Communications, Inc., 128 F.3d 1422, 1425-26 (10th Cir. 1997); Reimonenq v. Foti, 72 F.3d 472, 477-78 (5th Cir. 1996); McCallum Highlands, Ltd. v. Washington Capital Indus., Inc., 66 F.3d 89, 92 (5th Cir. 1995).

125 *See* Mason v. Ariz. Educ. Loan Mktg. Assistance Corp. *(in re Mason),* 300 B.R. 160, 167-169 (Bankr. D. Conn. 2003); Gen. Motors Corp. v. Paramount Metal Prods., 90 F. Supp. 2d 861, 875 (E.D. Mich. 2000).

126 *See Mason,* 300 B.R. at 167.

127 *See Gen. Motors,* 90 F. Supp. 2d at 875; King v. Donnkenny, Inc., 84 F. Supp. 2d 736, 739 (W.D. Va. 2000). Other cases in which the district courts have discussed the duress doctrine include: Benincasa v. Flight Sys. Auto. Group, L.L.C., 242 F. Supp. 2d 529, 538 (N.D. Ohio 2002); Gonzalez v. Fla. Dept. of Highway Safety, 237 F. Supp. 2d 1338, 1361 (S.D. Fla. 2002); Outek Caribbean Distribs., Inc. v. Echo, Inc., 206 F. Supp. 2d 263, 263 (D. P.R. 2002); Leonard v. Univ. of Del., 204 F. Supp. 2d 784, 787-88 (D. Del. 2002); U.S. v. Speed Joyeros, S.A., 204 F. Supp. 2d 412, 425 (E.D.N.Y. 2002); Todd v. Blue Ridge Legal Servs., Inc., 175 F. Supp. 2d 857, 861-65 (W.D. Va. 2001); DeLuca v. Bear Stearns & Co., 175 F. Supp. 2d 102, 106-14 (D. Mass. 2001); Pellerin Const., Inc. v. Witco Corp., 169 F. Supp. 2d 568, 575-80 (E.D. La. 2001); Mathias v. Jacobs, 167 F. Supp. 2d 606, 609-27 (S.D.N.Y. 2001); Nasik Breeding & Research Farm Ltd. v.

B. *Possible Explanations*

One must ask why duress, though raised by parties, has such a low rate of success in the courts. Three explanations are possible. First, perhaps the party raising the issue of duress does not have the case for it. Perhaps the party seeking to avoid a contract is looking for any port in the storm and so claims duress when the facts really do not support the application of the doctrine.[128] Or perhaps the party cannot determine whether the doctrine applies or not because there is no clear statement of the doctrine upon which to rely.

A second explanation of the miserly approach courts have taken regarding the duress doctrine may be that courts have no clear idea what duress is or should be and so decline to find it. The courts may be erring on the side of caution because they face a wasteland of guidance.[129]

A third possible explanation for why claims of duress have not succeeded is that courts have a general wariness of any doctrine that requires a court not to enforce an apparently otherwise enforceable contract. This reticence to set aside contracts is clearly a manifestation of the courts' inherent belief in the value of the freedom of contract. The courts do not want to set aside a contract on any basis because of a belief that to do so inflicts an injury on the ideal of freedom of contract.

One basis for the high esteem the notion of freedom of contract enjoys is that protecting the freedom of contract protects the broader and more amorphous concept of freedom by allowing autonomy of choice. Any limitation of freedom regarding contracting is a limitation of this broader notion of freedom.[130]

Another basis for the policy in favor of freedom of contract is that freedom of contract is as an essential premise to society's ordering of private obligations, perhaps regardless of any inherent value freedom of contract might

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Merck & Co., 165 F. Supp. 2d 514, 525-28 (S.D.N.Y. 2001); Scandiavian Satellite Sys., AS v. Prime TV Ltd., 146 F. Supp. 2d 6, 8-19 (D.D.C. 2001); Milgrim v. Backroads, Inc., 142 F. Supp. 2d 471, 475-76 (S.D.N.Y. 2001); Hudson v. Ind. Limestone Co., 143 F. Supp. 2d 1032, 1034-39 (S.D. Ind. 2001); Hyman v. Ford Motor Co., 142 F. Supp. 2d 735, 741-49 (D.S.C. 2001); Morris v. N.Y. City Employees' Ret. Sys., 129 F. Supp. 2d 599, 605 (S.D.N.Y. 2001); G.E.B., Inc. v. QVC, Inc., 129 F. Supp. 2d 856, 861 (M.D.N.C. 2000); Amoco Oil Co. v. Gomez, 125 F. Supp. 2d 492, 500-06 (S.D. Cal. 2000); Legal Aid Soc'y v. City of N.Y., 114 F. Supp. 2d 204, 224-26 (S.D.N.Y. 2000); Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055, 1057-62 (S.D. Ind. 2000).

[128] *See, e.g,* Tarpy v. County of San Diego, 110 Cal. App. 4th 267, 270 (Cal. Ct. App. 2003) (dog owner claimed that he agreed to consent to the spaying of his dog under duress); Crase v. Hahn, 754 So. 2d 471, 474 (Miss. Ct. App. 1999) (the purchaser of a house claimed duress though the seller had offered to call off the deal); Boud v. SDNCO, Inc, 54 P.3d 1131, 1137 (Utah 2002) (a buyer of a yacht claimed that he signed the sales contract under duress).

[129] *See* discussion in sections IV.C. & V. *supra.*

[130] *See* Mark Pettit, Jr., *Freedom, Freedom of Contract, and the 'Rise and Fall,'* 79 B.U.L. REV. 263, 282-89 (1999) (discussing the relationship of freedom and freedom of contract. *See also* Stewart, *supra* note 3 (discussing freedom and freedom of contract).

have.[131] The freedom of contract concept means that individuals have the right to choose obligations freely and that the law will honor those choices not simply to honor freedom notions for inherent value but because the honoring of such obligations promotes optimal market and societal behavior in terms of efficiency and fairness. A long held assumption about market behavior is that optimal results on the whole obtain when each individual actor in the market chooses the best option for that individual.[132] "'A very strong presumption of enforceability of contracts that represent the freely bargained agreement of the parties' exists reflecting 'the principle that it is in the best interest of the public not to unnecessarily restrict peoples' freedom of contract.'"[133] Thus, the policy in favor of freedom of contract counsels minimizing the interference of government, via regulation or judicial action, with private contracting. A result of the influence of the policy in favor of freedom of contracting would be a standard for finding duress that ensures that contracts are set aside on the basis of duress only when one party's choice to enter into the bargain is substantially and improperly fettered. Another result of the influence of the policy in favor of freedom of contract may be a reticence of individual judges to find duress on the particular facts of the case before them even when the court also applies a duress test that gives appropriate deference to the freedom of contract.[134]

Yet, if assent to a bargain is not the product of unfettered choice— if parties to a contract do not have the unfettered freedom to choose which bargains are best for them and which are not—the freedom of contract of the indi-

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131 *See generally* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT (Harvard University Press 1993) (discussing various theories of freedom of contract); Pettit, *supra* note 130, at 282 (discussion market theories); K.M. Sharma, *From "Sanctity" to "Fairness": An Uneasy Transition in the Law of Contracts,* 18 N.Y.L. SCH. J. INT'L & COMP. L. 95, 109-110 (1999) (discussing the market role of freedom of contract); Stewart, *supra* note 3, at 229 (discussing the freedom of contract with regard to private ordering). *See also* Dalzell, *supra* note 9, at 237 ("We have been proud of our 'freedom of contract,' confident that the maximum of social progress will result from encouragement of each man's initiative and ambition by giving him the right to use his economic powers to the full.").

132 *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 49 (Little, Brown 1977) (espousing this thesis). *See also* Randy Barnett, *A Consent Theory of Contract,* 86 COLUM. L. REV. 269, 278-79 (1986); Hale, *Bargaining, supra* note 10 (discussing the concept of individual bargaining as the basis for the economic system).

133 Roberts' Hair Designers, Inc. v. Pearson, 780 N.E.2d 858, 869 (Ind. Ct. App. 2002) (quoting Eck & Assocs. v. Alusuisse Flexible Packaging, Inc., 700 N.E.2d 1163, 1167 (Ind. Ct. App. 1998)).

134 *See* Samuel Williston, *Freedom of Contract,* 6 CORNELL L. Q. 365, 366 (1921) ("Adam Smith, Ricardo, Bentham, and John Stuart Mill successively insisted on freedom of bargaining as the fundamental and indispensable requisite of progress; and imposed their theories on the educated thought of their times with a thoroughness not common in economic speculation."). *See also* Rich & Whillock, Inc. v. Ashton Dev., Inc., 157 Cal. App. 3d 1154, 1159, (Cal. Ct. App. 1984) ("reluctan[ce] to set aside agreements because of the notion of freedom of contract and . . . the desirability of having private dispute resolutions be final").

vidual is less.[135] Indeed, the individual's freedom as a measurable commodity is less.[136] To the extent that the notion of freedom encompasses some idea of autonomy to enter into binding arrangements, then "to enforce agreements made by fraud or coercion would nullify the point of allowing binding agreements in the first place."[137] Also, assumptions about market behavior may fail. Society cannot assume that the market process works to achieve optimal results and efficiencies if the basic assumption that parties to a bargain choose the best option for themselves does not apply. When a bargainer makes a choice but is constrained by duress, those assumptions may not be valid. The systemic result that individual self-maximizing decisions yield optimal market conditions may not obtain.[138]

There has been much discussion over the years about whether courts are valuing the freedom of contract or whether the policy is in disfavor.[139] In recent years some commentators have suggested that the freedom of contract is recognized as a strong doctrine.[140] Earlier accounts had called the continued viability of the doctrine into question.[141] There is no doubt that legislation has taken certain subjects out of the general contract discourse and regulated those areas specially. For example, many states have statutes regulating much regarding surrogate parent contracts.[142] In this way, some freedom regarding contracting has, no doubt, been reduced. Within the realm of judicially administered general contract doctrine, the treatment of the duress doctrine exemplifies the strength of the notion of freedom of contract within the realm of judicial decision- making. In addition, the political climate of the early years of the twenty-first century is not one that would encourage judicial holdings that could be viewed as contrary to freedom of contract and therefore contrary to freedom in general.[143] The rhetorical force of a plea for freedom of contract is tremen-

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135 *See* Hale, *Bargaining, supra* note 10, at 627-28.

136 *See* WERTHEIMER, *supra* note 5, at 20 ("If respect for liberty requires that one be permitted to make binding agreements, it also demands that binding agreements reflect one's *voluntary* choices."); Pettit, *supra* note 130, at 282-87 (arguing that an increase of freedom of contract is not necessarily an increase of freedom in all cases).

137 WERTHEIMER, *supra* note 5, at 21.

138 *See* WERTHEIMER, *supra* note 5, at 48-49. *See also* POSNER, supra note 132, at 49.

139 *See, e.g.*, P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (Clarendon Press 1979) ; F.H. BUCKLEY, ED., THE FALL AND RISE OF FREEDOM OF CONTRACT (Duke University Press 1999); GRANT GILMORE, DEATH OF CONTRACT (Ohio State University Press 1974).

140 *See, e.g.* BUCKLEY, *supra* note 139.

141 *See, e.g.*, ATIYAH, *supra* note 139; GILMORE, *supra* note 139; TREBILCOCK, *supra* note 131.

142 *See* 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS § 81.6 (2003).

143 The first years of the century, marked by the 9/11 disaster and the response of the United States militarily and in the form of anti-terror legislation and sentiment, has been one in which patriotism and talk of "freedom" has been high.

dous.[144] Indeed, in commenting in the 1930s on the force of the idea of freedom of contract, Professor Morris Cohen noted, "pleas that under present conditions we need certain limitations on the freedom of contract have encountered the objection that we must not go against history and thereby revert to barbarism."[145] Yet, as others have noted, individual liberty and the aggregate freedom of contract will be lessened absent some limits on freedom of contract just as the efficiency of traveling on the roadways would be less absent traffic laws.[146] In other words, though the duress doctrine results in holding some contracts unenforceable, the result is a maximization of freedom of contract by only enforcing contracts freely made.

The definition of the doctrine itself reflects the power of the notion of freedom of contract. Courts have defined duress narrowly so that a finding of duress is rare indeed. In addition, the law of many states gives even more substance to the reticence to set aside any contract by requiring that the party claiming duress prove the case by clear and convincing evidence.[147] But even when refusing to enforce a contract is possible given the jurisdiction's definition of duress, the courts may refuse to do so.[148] As one court has stated, "Duress is not readily accepted as an excuse."[149] With regard to economic duress in particular,

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144 *See* Pettit, *supra* note 130, at 280.

145 Cohen, *supra* note 13, at 554.

146 *See id.* at 587 ("Regulations, therefore, involving some restrictions on the freedom of contract are as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways.").

147 *See, e.g.*, Moss v. Davis, 794 A.2d 1288, 1288-90 (Del. Fam. Ct. 2001); W.T. v. Dep't of Children & Families, 846 So. 2d 1278, 1281 (Fla. Dist. Ct. App. 2003); *In re* Gibson-Terry & Terry, 758 N.E.2d 459, 468 (Ill. App. Ct. 2001); Reliable Furniture Co. v. Am. Home Assurance Co., 466 P.2d 368, 370 (Utah 1970); Pelfrey v. Pelfrey, 487 S.E.2d 281, 284 (Va. Ct. App. 1997) (quoting Norfolk Div. of Soc. Servs. v. Unknown Father, 345 S.E.2d 533, 541 (1986) (quoting 63 MICHIE'S JURISPRUDENCE *Duress and Undue Influence* §§ 2-3 (Repl. Vol. 1985))) (""'[D]uress is not readily accepted as an excuse,' and must be proven by clear and convincing evidence."). *See also* Mason v. Ariz. Educ. Loan Mktg.Assistance Corp. (*In re Mason*), 300 B.R. 160, 165 (Bankr. D. Conn. 2003); Berardi v. Meadowbrook Mall Co., 572 S.E.2d 900, 905 (W. Va. 2002) (quoting Warner v. Warner, 394 S.E.2d 74 (W. Va. 1990)) (when the contract is a settlement, "'this Court will not set aside such agreements on allegations of duress ... absent clear and convincing proof of such claims'").

148 *See* Coop. Res. Ctr., Inc. v. Southeast Rural Assistance Project, Inc., 569 S.E.2d 545, 547 (Ga. Ct. App. 2002) (finding no duress, the court stated, "Georgia courts are reluctant to void contracts, and we have found no Georgia decision voiding a contract on the theory of economic duress.").

149 Seward v. Am. Hardware, 171 S.E. 650, 662 (Va. 1933), *quoted in* Todd v. Blue Ridge Legal Servs., Inc., 175 F. Supp. 2d 857, 863 (W.D. Va. 2001). *See also* Nasik Breeding & Research Farm Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 527 (S.D.N.Y. 2001) (quoting Orix Credit Alliance, Inc. v. Bell Realty, Inc., 1995 WL 50591, at *3 (S.D.N.Y. August 23, 1995) (quoting Int'l Halliwell Mines v. Cont'l Copper & Steel Indus., 544 F. 2d 105, 108 (2d Cir. 1976))) ("A party seeking to avoid a contract because of economic duress shoulders a heavy burden.").

one court has stated: "The doctrine applies only to special, unusual, or extraordinary situations."[150] This reticence is an additional and unfortunate effect of the influence of the policy of freedom of contract because the result may be the enforcement of bargains that are not the product of substantially unfettered decision-making. Such enforcement actually may reduce freedom of contract and is certainly contrary to the underlying justification for the policy in favor of freedom of contract.

C. *The Use of the Free Will Concept*

The test for duress that has been used by many courts is one that focuses on the free will of the bargainer.[151] This test is consistent with the fact that historically contractual liability has been based on the notion of freely willed assent of the parties.[152] For example, in *Goode v. Burke Town Plaza, Inc.*,[153] the Virginia Supreme Court stated that duress exists "when a defendant commits a wrongful act sufficient to prevent a plaintiff from exercising his free will, thereby coercing the plaintiff's consent."[154] Another phrasing is that the threat

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[150] Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293, 1299 (M.D. Ala 1999) (quoting Ralls v. First Fed. Sav. & Loan, 422 So. 2d 764, 766 (Ala. 1982)).

[151] *See generally* JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 9.2, at 316 (5th Ed. 2003) ("[t]he general rule is that any wrongful act or threat which overcomes the free will of a party constitutes duress").

[152] *See* Roscoe Pound, *The Role of Will in Law*, 68 HARV. L. REV. 1, 4-7 (1954) ; Elizabeth Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 758-59 (1981) (voluntary exchange is a basic tenet of classical contract theory); WILLISTON, *supra* note 134, at 367-72.

[153] 436 S.E.2d 450 (Va. 1993).

[154] *Id.* at 452. This test was quoted and applied in Todd v. Blue Ridge Legal Servs., Inc., 175 F. Supp. 2d 857, 863 (W.D. Va. 2001). *See also* Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1242 (10th Cir. 1990) ("the lack of free will"); Vanguard Packaging, Inc. v. Midland Bank, 871 F. Supp. 348, 352 (W.D. Mo. 1994) (quoting Andes v. Albano, 853 S.W.2d 936, 942 (Mo. 1993) (quoting McCandlish v. Linker, 231 S.W.2d 162, 164 (Mo. 1950))) ("[t]he central question with respect to duress is whether, considering all the surrounding circumstances, one party to the transaction was 'prevented from exercising his free will by the threats or wrongful conduct of the other'"); Zebedeo v. Martin E. Segal Co., 582 F. Supp. 1394, 1417 (D. Conn. 1984) (citing Galusha v. Sherman, 81 N.W. 495 (Wisc. 1900)) ("The wrongful conduct at issue could take virtually any form, but must induce a fearful state of mind in the other party, which makes it 'impossible for [the party] to exercise his own free will.'"); Moss v. Davis, 794 A.2d 1288, 1290 (Del. Fam. Ct. 2001) (The act "overcomes the will of a person."); Krilich v. Am. Nat'l Bank & Trust Co., 778 N.E.2d 1153, 1162 (Ill. App. Ct. 2002) (quoting Hurd v. Wildman, Harrold, Allen & Dixon, 707 N.E.2d 609 (Ill. App. Ct. 1999)) ("Duress occurs where one is induced by a wrongful act or threat of another to make a contract under circumstances that deprive one of the exercise of one's own free will." Hurd v. Wildman, Harrold, Allen & Dixon, 303 Ill. App.3d 84, 91 236 Ill. Dec. 482, 707 N.E.2d 609 (1999) To establish duress, one must demonstrate that the threat has left the individual "bereft of the quality of mind essential to the making of a contract.'" Hurd, 303 Ill.App.3d at 91, 236 Ill.Dec. 482, 707 N.E.2d 609 (quoting Alexander v. Standard Oil Co., 97 Ill.App.3d 809, 815, 53 Ill.Dec. 194, 423 N.E.2d 578 (1981)).; Putz v. Allie, 785 N.E.2d 577, 582 (Ind. Ct. App. 2003) (quoting Day v. Bicknell Minerals, Inc., 480

has left the individual "bereft of the quality of mind essential to the making of a contract."[155] This formulation suggests even more strongly a capacity test as opposed to a choice constraint test. Another related formulation is one requiring "involuntary acceptance of contract terms."[156] Whatever the formulation of this

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N.E.2d 567, 571 (Ind. Ct. App. 1985)) ("The ultimate fact to be determined is whether the purported victim was deprived of the free exercise of his will."); Young v. Anne Arundel County, 807 A.2d 651, 692 (Md. Ct. Spec. App. 2002) ("To establish duress there must be a wrongful act which strips the individual of the ability to utilize his free will."); *In re* Estate of Davis, 832 So. 2d 534, 538 (Miss. Ct. App. 2001) (citing Duckworth v. Allis-Chalmers Mfg. Co., 150 So. 2d 163 (Miss. 1963))("[I]t must ultimately determine whether the specific conduct by the dominant party dispossessed the complaining party of all volition."); Hughes v. Pullman, 36 P.3d 339, 343 (Mont. 2001) (citing Hoover v. First Bank (N.A.)-Billings, 707 P.2d 915, 919 (Mont. 1990)) (The act "overcomes the will of a person."); Lyons v, Lyons, 734 N.Y.S.2d 734, 736-37 (N.Y. App. Div. 2001) (quoting Mahony v. Moorman, 650 N.Y.S.2d 153 (N.Y. App. Div. 1996)) ("To maintain a claim of duress, plaintiff must demonstrate that threats allegedly made by defendant 'deprived [her] of the ability to act in furtherance of [her] own interests' or deprived her of the ability to exercise her own free will.") ; Radford v. Keith, 584 S.E.2d 815, 817 (N.C. Ct. App. 2003), *aff'd,* 591 S.E.2d 519 (N.C. 2004) (quoting Smithwick v. Whitley, 67 S.E. 913, 914 (N.C. 1910)) ("'Duress exists where one, by unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will.'"); HRN, Inc. v. Shell Oil Co, 102 S.W.3d 205, 215-16 (Tex. Ct. App. 2003) *rev'd on other grounds* HRN, Inc. v. Shell Oil Co., 2004 WL 190835 (Tex. August 27, 2004) (citing Chapman's Children Trust v. Porter & Hedges LLP, 32 S.W.3d 429, 443 (Tex. Ct. App. 2000)) ("There can be no duress without the following: . . . (2) the action or threat was of such a character as to destroy the other party's free agency; (3) the threat or action overcame the opposing party's free will and caused it to do that which it would not otherwise have done and that which it was not legally bound to do; . . . ."); Kendrick v. Barker, 15 P.3d 734, 741 (Wyo. 2001) (quoting *In re* TR, 777 P.2d. 1106, 1111 (Wyo. 1989)) ("'[D]uress exists whenever a person is induced, by the unlawful act of another, to perform some act under circumstances which deprive him of the exercise of free will.'").

[155] *Alexander*, 423 N.E.2d at 582 (quoting Kaplan v. Kaplan, 182 N.E.2d 706, 709 (Ill. 1962). *See also* Hyman v. Ford Motor Co., 142 F. Supp. 2d 735, 744 (D.S.C. 2001) (citing *In re* Nightingale Estate, 189 S.E. 890, 897 (S.C. 1937); Cherry v. Shelby Mut. Plate Glass & Cas. Co., 4 S.E.2d 123 (S.C. 1939)) ("[u]nder South Carolina law, duress has been defined as coercion that puts a person in such fear that he is 'bereft' of the quality of mind essential to the making of a contract and the contract was thereby obtained as a result of this state of mind").

[156] Nasik Breeding & Research Farm Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 527 (S.D.N.Y. 2001) (citing Kamerman v. Steinberg, 891 F.2d 424, 431 (2d Cir. 1989)). *See also* Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1326 (Fed. Cir. 2003) ("involuntary accepted the terms of another"); Ben & Jerry's Homemade, Inc. v. La Soul, Inc., 983 F. Supp. 504, 507 (D. Vt. 1997) (citing Kokoletsos v. Frank Babcock & Son, Inc., 538 A.2d 178 (1987)) ("one side must have involuntarily accepted the terms of another"); N. Fabrication Co. v. UNOCAL, 980 P.2d 958, 960 (Alaska 1999) (citing Zelinger v. SOHIO Alaska Petroleum Co., 823 P.2d 635, 657 (Alaska 1992)) ("one party involuntarily accepted the terms of another"); *In re* Yannalfo, 794 A.2d 795, 797 (N.H. 2002) (quoting Goodwin R.R. v. State, 517 A.2d 823, 830 (N.H. 1986)) ("To establish duress, a party must show that it involuntarily accepted the other party's terms . . . ."); Dunes Hospitality, L.L.C. v. Country Kitchen Int'l, Inc., 623 N.W.2d 484, 490 (S.D. 2001) ("one side involuntarily accepted the terms of another").

There are other formulations. *See, e.g.,* W.T. v. Dep't of Children & Families, 846 So. 2d 1278, 1280 (Fla. Dist. Ct. App. 2003) (citing Herald v. Hardin, 116 So. 863, 864 (Fla. 1928)) ("A condition of mind produced by an improper external pressure or influence that practically destroys the

free will test, courts generally apply the test in a subjective manner so that the court is only concerned about the free will of the bargainer, not the free will of the reasonable bargainer.[157] Occasionally, a court has used an objective free will test.[158]

Any test focusing on free will is problematic because the paradigmatic duress situation is, in fact, a situation in which the bargainer exercises free will. That will is simply limited significantly by the choices available. Society may not like the constrained nature of the choices facing a bargainer in a duress situation, but the bargainer chooses nonetheless between those choices. One cannot say that limiting the choices available to a bargainer completely robs the bargainer of his or her free will. There are degrees of freedom and degrees of free will. The free will concept does not account for gradations.[159]

Also, one must recognize that all choice is constrained in some ways.[160] All of us make decisions in the context of the circumstances in which we find ourselves. Professor Dalzell gives the example of a bargainer agreeing to pay ten cents to a baker for a loaf of bread.[161] The bargainer's free will is restrained because the bargainer must choose between the two options given to him: to give ten cents or to go without bread. The duress doctrine has never been used to eliminate all constraints on free decision-making and thus does not perfect free will in situations such as the bread contract.[162] As many commentators and philosophers have noted, the type of situation courts have used duress to regulate is a situation in which the bargainer is exercising his or her own will in a rational manner just as the bread bargainer does. When a party signs an agree-

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free agency of a party and causes him to do an act or make a contract not of his own volition."); *Cherry*, 4 S.E.2d at 123. (Duress is a "condition of the mind produced by improper external pressure of influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition.").

157 *See, e.g., Kaplan*, 182 N.E.2d at 709. *See also Todd*, 175 F. Supp. 2d at 863 (discussing the objective and subjective approaches); Mason v. Ariz. Educ. Loan Mktg. Assistance Corp. (*In re Mason*), 300 B.R. 160, 166 (Bankr. D. Conn. 2003) (applying a subjective analysis even when the party claiming duress is particularly gullible). *See generally* PERILLO, *supra* note 151, at 316; Note, *supra* note 3, at 893-94.

158 *See, e.g.*, Smith v. Lenchner, 205 A.2d 626, 628 (1964). *See also* WERTHEIMER, *supra* note 5, at 34. For a historical discussion of objective tests, see Dawson, *supra* note 2. Regarding an objective analysis, Dawson states: "That it directly influenced decision at any time is unlikely and for present purposes it can be henceforth ignored." *Id.* at 238.

159 *See* WERTHEIMER, *supra* note 5, at 29; Dalzell, *supra* note 9, at 238.

160 *See* WERTHEIMER *supra* note 5, at 10; Rick Bigwood, *Coercion in Contract: The Theoretical Constructs of Duress*, 46 U. TORONTO L.J. 201, 201-02 (1996).

161 *See* Dalzell, *supra* note 9, at 239.

162 *See* Hale, *Bargaining, supra* note 10, at 612 ("all money is paid, and all contracts are made, to avert some kinds of threats"); Hale, *Coercion, supra* note 10.

ment at gunpoint, that party is responding to two alternatives and making a rational choice between the two. In both situations the parties consent.[163]

Because the free will concept truly does not fit the reality of the duress paradigm, courts are at a loss as to how to determine when the bargainer has been robbed of free will and when the bargainer has retained his or her free will. In other words, since the test does not fit the situation, applying the test is impossible.[164] As long as the bargainer chooses between options by means of rational thought, the bargainer exercises free will. Thus, duress in the constrained choice scenario can never exist. Since the burden is on the party claiming duress to prove lack of free will, or lack of voluntariness, courts usually conclude that the party has failed to make the proof.[165]

Even if the free will concept fits the paradigm of the duress situation, any test asking a court to determine whether a party has been deprived of free will, without further guidance, is too vague to be of use to courts. A good example of the confusion is evidenced by the following intriguing statement in *Vanguard Packaging, Inc. v. Midland Bank*:[166] "Furthermore, in order to establish a claim of economic duress, plaintiff must show that the wrongful act, which overcame his free will, caused him to do something he would not have otherwise done."[167] Though it is perhaps possible, it is difficult to grasp a situation in which a party could satisfy the burden of proof with regard to the absence of free will and yet not be able to prove that the party, as a result, did something he or she would not otherwise have done.

Also, tests using the verbiage of "free will," "involuntary acceptance," and "bereft of the quality of mind" improperly lead courts to considerations of capacity rather than considerations of choice constraints.[168] Thus, once again, the party claiming duress cannot succeed in proving the case because there is usually, especially in business settings, no impairment of decision-making ca-

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163 *See* WERTHEIMER, *supra* note 5, at 9, 33-35. *See also* Cohen, *supra* note 13, at 569 (There is freedom to choose but the choice is constrained to the point of not being free.); Fingarette, *supra* note 12, at 74 (distinguishing constrained choice from "sheer mindless panic"). *See generally* ATIYAH, *supra* note 10, at 198-202; Philips, *supra* note 12.

164 Note, *supra* note 3, at 924 (noting that the use of a free will test has added confusion to the duress doctrine).

165 *See, e.g.*, Todd v. Blue Ridge Legal Servs., Inc., 175 F. Supp. 2d 857, 854-65 (W.D. Va. 2001); N. Fabrication Co. v. UNOCAL, 980 P.2d 958, 961-62 (Alaska 1999); Dunes Hospitality, L.L.C. v. Country Kitchen Int'l, Inc., 623 N.W.2d 484, 492-93 (S.D. 2001). *See also supra* section IV.A. (discussing the scarcity of court decisions in favor of a finding of duress).

166 871 F. Supp. 348 (W.D. Mo. 1994).

167 *Id.* at 352 (citing Manufacturers Am. Bank v. Stamatis, 719 S.W.2d 64, 66-67 (Mo. Ct. App. 1986).

168 *See* Kostritsky, *supra* note 3, at 599-600 (the language implies a psychological test); Fingarette, *supra* note 12, at 72 (whether a "psychic capacity has been seriously disabled").

pacity. So, for example, in *Hyman v. Ford Motor Co.*,[169] the court applied a test that the claimer of duress must be "'bereft' of the quality of mind essential to the making of a contract."[170] The business could not satisfy this test in a situation involving the signing of a release as part of an agreement whereby Ford repurchased a car dealership.[171] The court noted that the business consulted with counsel and that rarely will duress exist "'when the parties are sophisticated and represented by counsel during negotiations.'"[172] Yet, while the presence of an attorney may affect undue influence and decision-making capacity, it does not affect the situation of constrained choice. If the business has the choice of bankruptcy or signing a contract, the fact that the bargainer has the resource of an attorney to explain the alternative does not change the array of alternatives.[173]

A free will test is particularly useless, and particularly ridiculous, when the free will in question is that of an entity such as a corporation. How is a court to make a determination of whether the corporation has been deprived of free will? In *General Motors Corp. v. Paramount Metal Products Co.*,[174] Paramount contracted to supply all of General Motors' seat frame requirements on a "just in time" basis.[175] Paramount later threatened to stop supplying the seat frame if General Motors did not agree to an increased price for the products.[176] General Motors agreed to the increased price but then obtained a substitute supplier and claimed duress with regard to the price increase.[177] The court concluded that it was possible for General Motors to prove that Paramount's actions had deprived it of "the exercise of [its] ...free will."[178]

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169 142 F. Supp. 2d 735 (D.S.C. 2001).

170 *Id.* at 744 (citing *In re* Nightingale Estate, 189 S.E. 890, 897 (S.C. 1937); Cherry v. Shelby Mut. Plate Glass & Cas. Co., 4 S.E.2d 123 (S.C. 1939)).

171 *Id.* at 745.

172 *Id.* at 746 (quoting Humana Kansas City, Inc. v. Cont'l Cas. Co., 1995 WL 669241 (W.D. Mo. Nov. 8, 1995), *aff'd*, 94 F.3d 648 (8th Cir. 1996)(table)).

173 *See* Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1243 (10th Cir. 1990) (agreeing that the presence of an attorney does not negate a finding of duress).

174 90 F. Supp. 2d 861 (E.D. Mich. 2000).

175 *Id.* at 864.

176 *Id.*

177 *Id* at 865.

178 *Id.* at 875. *See also Applied*, 912 F.2d at 1242; Hyman v. Ford Motor Co., 142 F. Supp. 2d 744, 745 (D.S.C. 2001); Vanguard Packaging, Inc. v. Midland Bank, 871 F. Supp. 348, 352-55 (W.D. Mo. 1994); Coop. Res. Ctr., Inc. v. Southeast Rural Assistance Project, Inc., 569 S.E.2d 545, 547 (Ga. Ct. App. 2002) (the court concluded that one corporation "was deprived of its free will by" the other corporation).

Commentators long have recognized the impossibility of applying the free will concept to duress.[179] Indeed, though the *Restatement (First)* spoke in terms of free will,[180] the *Restatement (Second)* abandoned the concept in favor of an analysis of whether the bargainer had a reasonable alternative to the bargain now the subject of complaint.[181] The comment to the *Restatement (Second)* referred to the free will concept as difficult due to "vagueness and impracticability."[182] The comment continued, "It is enough if the threat actually induces assent . . . on the part of one who has no reasonable alternative."[183]

Yet, courts of today continue to quote a test for duress involving free will, sometimes along with a test of no reasonable alternative.[184] For example, in *Hyman v, Ford Motor Co.,*[185] the court quoted a test requiring the bargain to be "'bereft' of the quality of mind essential to the making of a contract,"[186] but then tossed the following into the mix: "[E]ven considering all favorable inferences from the alleged facts in Hyman's favor, he still cannot establish he had no reasonable alternative but to sign the release."[187] The court never explained how the reasonable alternative related to the quality of mind test. Another ex-

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179 *See* ATIYAH, *supra* note 10, at 201 (the "'overborne will' theory should now be consigned to the historical scrapheap").

180 *See* RESTATEMENT (FIRST) OF CONTRACTS § 492 (1932).

181 *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

182 *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (1981).

183 *Id. See also* WERTHEIMER, *supra* note 5, at 29 ("The rejection of the will theory, at least as a complete account of contractual duress, is now enshrined in virtually all the standard tests and in the major treatise which attempts to summarize and explain the accepted doctrines of contract law.").

184 *See, e.g.,* Am. Life Ins. Co. v. Parra, 63 F. Supp. 2d 480, 498 (D. Del. 1999), *aff'd in part, rev'd in part,* 265 F.3d 1054 (3d Cir. 2001) (citing E.I. Dupont de Nemours & Co. v. Custom Blending Int'l Inc., 1998 WL 842289 at *4 (Del. Ch. Ct. November 24, 1998)) ("a release may be void for duress where a party's manifestation of assent is induced by (1) an improper threat, (2) which overcomes the party's free will and (3) leaves the party with no reasonable alternative to protect his interest"); Leonard v. Univ. of Del., 204 F. Supp. 2d 784, 788 (D. Del. 2002) (citing *Dupont*, 1998 WL 842289 at *4)) ("To prove duress, Leonard must demonstrate: (1) an improper threat, (2) which overcame his free will, and (3) left him with no reasonable alternative to protect his interest."). *See also* Todd v. Blue Ridge Legal Servs., Inc., 175 F. Supp. 2d 857, 864 (W.D. Va. 2001) (quoting King v. Donnkenny, Inc., 84 F. Supp. 2d 736, 738 (W.D. Va. 2000)). The court stated: "[T]he court shall assume that the defendants' acts were wrongful. Furthermore, the court shall accept the Plaintiff's statement that her will was overcome." *Todd*, 175 F. Supp. 2d at 864. Yet, the court later noted that the coercive threat must leave the plaintiff "without any reasonable alternative." *Id.*

185 142 F. Supp. 2d 735 (D.S.C. 2001).

186 *Id.* at 744.

187 *Id.* at 745.

ample of this confusion is *Luttjohan v. Goodyear Tire & Rubber Co.*,[188] in which the court stated the following: "The elements of economic duress are '1) a wrongful act or improper threat; 2) the absence of a reasonable alternative to entering the agreement; and 3) the lack of free will.'"[189]

Far too much time has passed since the publication of the *Restatement (Second)* and too many decisions have been rendered to conclude that courts have not had the opportunity to consider the *Restatement (Second)*. The courts seem to ignore the *Restatement (Second)* and all of the literature dealing with the faults of a free will test. Why? There may not be an answer other than that courts have engaged, perhaps, in blind regurgitation of precedent within each jurisdiction.[190] Then again, perhaps other parts of the duress portion of the *Restatement (Second)* are so offensive to courts that they reject the *Restatement (Second)* entirely with regard to duress and are left with no other ready test or definition. For example, the portion of the *Restatement (Second)* that calls for analysis of the substance of the deal may, in effect, repel courts entirely.[191] Of course, it is entirely possible that the courts have carefully considered the matter and choose to retain the free will concept.

V. SUGGESTIONS FOR IMPROVEMENT

A. The Alternatives Analysis

The duress doctrine will not be usable until courts move away from the flawed free will notion. However, the entire duress analysis should not be re-

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188 927 F. Supp. 403 (D. Kan. 1996).

189 *Id.* at 411 (quoting Comeau v. Mount Carmel Med. Ctr., Inc., 869 F. Supp. 858, 865 (D. Kan. 1994)). *See also* Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1242 (10th Cir. 1990) ("In general the elements of economic duress are: (1) a wrongful act or improper threat; (2) the absence of a reasonable alternative to entering the agreement; and (3) the lack of free will."); Am. Life Ins. Co. v. Parra, 63 F. Supp. 2d 480, 498 (D. Del. 1999), *aff'd in part, rev'd in part*, 265 F.3d 1054 (3d Cir. 2001) ("a release may be void for duress where a party's manifestation of assent is induced by (1) an improper threat, (2) which overcomes the party's free will and (3) leaves the party with no reasonable alternative to protect his interest"); Moss v. Davis, 794 A.2d 1288, 1290 (Del. Fam. Ct. 2001) (duress elements are "(1) a wrongful act; which (2) overcomes the will of a person; who (3) has no adequate legal remedy to protect their interest"); Dunes Hospitality, L.L.C. v. Country Kitchen Int'l, Inc., 623 N.W.2d 484, 490 (S.D. 2001) (requiring involuntary acceptance and "circumstances permit[ting] no other reasonable alternative"); Kendrick v. Barker, 15 P.3d 734, 741 (Wyo. 2001) (quoting Blubaugh v. Turner, 842 P.2d 1072, 1074-75 (Wyo. 1992))("'(1) a party involuntarily accepts the terms of another, (2) circumstances permit no other alternative'").

190 *See, e.g.*, Radford v. Keith, 584 S.E.2d 815, 817 (N.C. Ct. App. 2003), *aff'd*, 591 S.E.2d 519 (N.C. 2004) (quoting Smithwick v. Whitley, 67 S.E. 913, 914 (N.C. 1910)). "'Duress exists where one, by unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will.'"

191 *See* RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (1981).

stricted to an analysis of the nature of the threat. The effect of the threat on the party's choice is relevant. The test of choice constraint should focus on the extreme nature of the constraint and identify situations of extreme constraint for application of the duress doctrine. The "no reasonable alternatives" test of the *Restatement (Second)* does this rather well.[192]

Some courts have used a "no alternatives" analysis along with a voluntariness or free will analysis. For example, in *Nasik Breeding & Research Farm, Ltd. v. Merck & Co.*,[193] the court stated a test requiring "involuntary acceptance of contract terms" and "no other alternative to accepting the imposed terms."[194] Nasik claimed that it had entered into the settlement of claims "because it was on the verge of bankruptcy, and did not have the time and resources to litigate against several multinational conglomerates."[195] Having stated the rule regarding an alternative in absolute terms, the court concluded that Nasik "had the option of turning down the settlement and pursuing a legal claim."[196]

Litigation is almost always an alternative to agreeing to an unfortunate set of terms. Yet, litigation is occasionally not a realistic alternative.[197] In the *Nasik* situation, if bankruptcy was indeed imminent absent the bargain, it seems a bit of a fairy tale to say that the complaining party could refuse the bargain, file bankruptcy, engage in lengthy litigation, and bounce back into the market anew. Thus, the *Nasik* court's use of a "no alternative" test is problematic.

In *Krilich v. American National Bank and Trust Co.*,[198] a party, Bongi Development Corporation, failed to pay on a note for the purchase of a piece of property and claimed that it partly agreed to the deal only because the other party threatened to breach a second contract.[199] In particular, the party threat-

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192 *See id.* at § 175. *See also* Dalzell, *supra* note 9, at 240 (suggesting such a standard).

193 165 F. Supp. 2d 514 (S.D.N.Y. 2001).

194 *Id.* at 527.

195 *Id. See also* Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1326 (Fed. Cir. 2003) ("the circumstances permitted no other alternative"); N. Fabrication Co. v. UNOCAL, 980 P.2d 958, 960 (Alaska 1999) (quoting Zeilinger v. SOHIO Alaska Petroleum Co., 823 P.2d 653, 657 (Alaska 1992) (quoting Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15, 21 (Alaska 1978))) ("Duress is said to exist where '(1) one party involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of coercive acts of the other party.'"); Primary Health Network, Inc. v. State, 52 P.3d 307, 312 (Idaho 2002) ("no other alternative"); *In re* Yannalfo, 794 A.2d 795, 797 (N.H. 2002) (quoting Goodwin R.R. v. State, 517 A.2d 823 (N.H. 1986)) ("'the party had no alternative but to accept the terms set out by the other party'").

196 *Id.*

197 *See* Jason Scott Johnston, *Default Rules/ Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335, 362-63 (1993) (stating that legal remedies for breach are "systemically undercompensatory").

198 778 N.E.2d 1153 (Ill. App. Ct. 2002).

199 *Id.* at 1159.

ened to breach the other contract by failing to improve the property that was the subject of the contract.[200] The breach of this second contract would cause Bongi great losses from construction delays.[201] Bongi claimed the breach would cause financial collapse and bankruptcy.[202] Any litigation regarding this second contract, Bongi claimed, would result in protracted litigation.[203] Applying a free will test of duress, the lower court granted a motion to dismiss and the appellate court affirmed, in part on the basis that Bongi had an adequate judicial remedy for any breach of contract by the other party.[204] The Illinois Court of Appeal stated: "We acknowledge that Bongi's damages would have been substantial, but we disagree with Bongi that all of the consequential and incidental damages of Krilich's threatened breach could not have been recovered through judicial proceedings."[205] It is difficult to fathom a claim of duress that could survive a motion to dismiss with such a stringent alternatives analysis.[206]

The *Restatement (Second)* idea of analyzing whether the bargainer had a reasonable alternative is a much more usable, though perhaps not perfect, test for duress. This test asks the court to identify alternatives facing the party claiming duress and to determine whether any of those alternatives were reasonable at the time of contracting.[207] If the bargainer had reasonable alternatives and yet chose the bargain now the subject of complaint, one can infer that the bargain was a product of less restricted choice. If the party had no reasonable choice but the bargain now the subject of complaint, then it is likely that the decision to enter the bargain was the product of substantially constrained choice. No analysis of the lack of free will is necessary. Courts should work successfully with this more precise focus.[208]

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200 *Id.*

201 *Id.*

202 *Id.* at 1163.

203 *Id.*

204 *Id.*

205 *Id.* at 1163. The court also supported its holding with the fact that the party claiming duress "enjoyed access to legal counsel during ... the negotiation period." *Id.*

206 Other courts have used a "no adequate remedy" test. *See, e.g.,* Moss v. Davis, 794 A.2d 1288, (Del. Fam. Ct. 2001) ("no adequate legal remedy"); Hughes v. Pullman, 36 P.3d 339, 343 (Mont. 2001) (the duress claim failed because the claimant had "an adequate legal remedy" in that he could have refused to agree to an evaluation and treatment and then could have demanded a hearing if he were suspended). "Adequate" may be the functional equivalent of "reasonable."

207 *See* Restatement (Second) of Contracts § 175 (1981). *See also supra* notes 99-100 & accompanying text.

208 *See, e.g.,* Krantz v. BT Visual Images, L.L.C., 89 Cal. App. 4th 164 (Cal. Ct. App. 2001); Nobel v. White, 783 A.2d 1145, 1149 (Conn. App. Ct. 2001); Richards v. Allianz Life Ins. Co., 62 P.3d 320, 327 (N.M. Ct. App. 2002); Dunes Hospitality, L.L.C. v. Country Kitchen Int'l, Inc., 623 N.W.2d 484, 490 (S.D. 2001); Andreini v. Hultgren, 860 P.2d 916, 922-23 (Utah 1993); Berardi

In dealing with such a test, the availability of a legal remedy in the courts will almost always subvert a finding of duress. If the law provides a remedy apart from a finding of duress, that remedy should be sufficient. The duress doctrine need not come to the rescue.[209] Yet, as the Wyoming Supreme Court stated in *Kendrick v. Barker,*[210] "[a] person may not have a reasonable alternative or remedy when the delay in pursuing the remedy would cause immediate or irreparable serious loss or financial ruin."[211]

A legal remedy might be inadequate because of the requisite delay which accompanies any form of litigation, the kinds of injury for which a court will award recompense, and the uncertainty of the remedy in general.[212] The *Kendrick* court, if faced with the facts of *Nasik* or *Krilich,* may have found the judicial remedies available in those situations to be unreasonable alternatives. Thus, a finding of duress in each of those cases would be possible using the "no reasonable alternative" analysis. Yet, even with a "no reasonable alternative" test, a court's discomfort with setting aside a contract can lead to a stringent view of reasonableness. Moving to a "no reasonable alternative" test, therefore, would not assure a duress finding in cases like *Nasik* and *Krilich.*[213]

B. *Duress Should Not Be Confused with Undue Influence*

Some courts today seem to blur the line between the duress doctrine and the doctrine of undue influence.[214] Undue influence has been an equity doctrine

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v. Meadowbrook Mall Co., 572 S.E.2d 900 (W. Va. 2002).

209 *See* WERTHEIMER, *supra* note 5, at 35 ("If one decides to forego what is an adequate remedy, it is arguable that society has done all that it needs to do."). *See also* Dalzell, *supra* note 9, at 240 ("it is better to require the use of such remedies where practicable than to resort to an indiscriminate overhauling of transactions in court").

210 15 P.3d 734 (Wyo. 2001).

211 *Id.* at 741 (quoting Blubaugh v. Turner, 842 P.2d 1072, 1074-75 (Wyo. 1992)).

212 *See* John Dalzell, *Duress by Economic Pressure II,* 20 N.C. L. REV. 341, 370-71 (1942) (discussing the delay and uncertainty accompanying judicial remedies).

213 *See* Kostritsky, *supra* note 3, at 595 n.40 (noting the "no reasonable alternative" test is easily manipulated). *See also* Claire Dalton, *An Essay in the Deconstruction of Contract Doctrine,* 94 YALE L.J. 997, 1033 (1985); Dalzell, *supra* note 212, at 378-82.

214 *See, e.g., In re* Marriage of Baltins, 212 Cal. App. 3d 66, 83-87 (1989). In setting aside a property settlement in a case in which the wife claimed duress, the court stated: "To show lack of consent, it was unnecessary to establish that she lacked the capacity to contract, only that she was in such a mentally weakened condition due to anxiety and emotional anguish or exhaustion that she was unable to protect herself against Husband's demands." *Id.* at 85. In a footnote, the court noted the undue influence connection: "Although the trial court's findings were of duress and extrinsic fraud or mistake, the record also demonstrates undue influence, that is 'persuasion which overcomes the will without convincing the judgment.'" *Id.* at 85, n.9 (quoting Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123, 130 (1966)). *See also* Noble v. White, 783 A.2d 1145 (Conn. App. Ct. 2001), in which the court noted the problem.

focusing on the voluntariness of the bargain with special attention given to defects of the contracting party's mental abilities caused in part by the actions of the other party.[215] Historically, the duress doctrine has not dealt with the contracting party's mental abilities or capacity.[216] Rather, the two situations dealt with by the duress doctrine may or may not have involved reduced capacity to contract. In the first duress scenario the party signs the contract only because the other party guides the agreeing party's hand on the paper.[217] The bargain is unenforceable under duress because it is not voluntarily entered into without regard to capacity. In the second and more common duress scenario, the party agrees to the bargain only because the other party has threatened improper action as the alternative to assent.[218] The contract is set aside on the basis of duress because of choice constraint, not because of a limiting of decisional capacity. The bargainer's capacity to contract is not at issue. The common traditional duress paradigm is that the bargainer, with full ability to comprehend and evaluate the situation, including the alternate choices or the absence of such, must decide to assent or not when a lack of assent may not be a reasonable choice. If decision-making capacity factors are included in the definition of the duress

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> The defendants claimed undue influence as a special defense. Although the court failed to rule on the defendants' undue influence special defense, it did conclude that the installment agreement was obtained under duress and, thus, was void. Although the undue influence and duress doctrines are separate and distinct, they are often treated and discussed together. See, e.g., Jenks v. Jenks, 642 A.2d 31 (Conn. App. Ct. 1994), rev'd on other grounds, 657 A.2d 1107 (1995). We, therefore, will treat the defendants' special defense of undue influence as one for duress.

783 A.2d at 1149.

215 *See, e.g.*, Odorizzi v. Bloomfield School Dist., 54 Cal. Rptr. 533 (1966).

216 *See generally* Dawson, *supra* note 2, at 262. Dawson stated:

> Equity doctrines of undue influence had been concerned from the outset with a different type of inequality of bargaining power. They were never conceived, like common law doctrines of duress, as a corollary of the law of crime and tort. They were aimed instead at protection for the mentally or physically inadequate, whose inadequacy fell short of a total lack of legal capacity.

217 *See* RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981). The illustration in the *Restatement* is quite helpful. Illustration one states:

> A presents to B, who is physically weaker than A, a written contract prepared for B's signature and demands that B sign it. B refuses. A grasps B's hand and compels B by physical force to write his name. B's signature is not effective as a manifestation of his assent, and there is no contract.

See also WERTHEIMER, *supra* note 5, at 30 (this situation is "nonvolitional duress").

218 *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981). Section 175 states in part: "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."

doctrine, many traditional duress situations would no longer constitute duress. For example, a corporation would probably never be able to successfully claim duress because a corporation would have a difficult time indeed claiming that the other party to the contract has reduced its decision-making capacity. Yet, the corporation's assent may have been the product of a situation of substantially constrained choice. By expanding the duress doctrine to a consideration of decision-making capacity factors, the application of the duress doctrine is limited to a smaller set of possible situations. Yet, situations no longer covered by the doctrine are situations of substantially constrained choice. Such a limiting of the doctrine should be avoided. The duress doctrine should not stray from the traditional paradigm.[219]

The courts have strayed from this tradition both in the definition of duress and also in applying the definition to the facts.[220] This straying, however, appears to be the result of inattention and confusion rather than the result of any kind of intentional reasoned thought. Use of the free will concept as a part of the definition of duress provides fertile ground for confusion as to whether courts should consider capacity to contract factors. The notion of what a lack of free will might be is so vague as to allow for a variety of interpretations.[221] Indeed, some courts have repeated and applied dated statements of the free will concept that muddy the water even more than the stark notion of free will might confuse the issue.[222] In *Krilich v. American National Bank and Trust Co.*,[223] the

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219 *See* Stewart, *supra* note 3, at 177 (arguing against confusing undue influence with duress). *See also* WERTHEIMER, *supra* note 5, at 8-9 (discussing the confusion).

220 *See, e.g.*, DeLuca v. Bear Stearns & Co., 175 F. Supp. 2d 102, 114 (D. Mass. 2001) (in finding no duress, the court noted that the party was given two days to consider and consult with an attorney); Coop. Res. Ctr., Inc. v. Southeast Rural Assistance Project, Inc., 569 S.E.2d 545, 546 (Ga. Ct. App. 2002) ("[I]n any event, when the signer of an agreement is sophisticated in business matters and has access to and in fact obtains advice of counsel, the defense of duress is not available to void the contract.").

221 *See, e.g.*, Radford v. Keith, 584 S.E.2d 815 (N.C. Ct. App. 2003), *aff'd*, 591 S.E.2d 519 (N.C. 2004). The court used a free will definition of duress and then noted the following in affirming a jury verdict of duress:

> [A] jury could determine that plaintiff was detained in Keith's office for several hours, that plaintiff was emotionally upset by the tone of the meeting, and that plaintiff did not have counsel present to advise her. Plaintiff stated that at this time, she was crying and her "mind went crazy thinking[,] 'where am I going to go'" and that she had done something wrong that would lead to incarceration. At trial, Keith testified that he was angry and upset and asked his associate to '... go outside and be sure that we're not interrupted' while he and plaintiff met in his office, The jury could find that Keith's directive that his associate stand guard at the office door prevented plaintiff from exercising her will to leave defendants' office. Therefore, a jury could find that defendants' actions were so severe as to overcome plaintiff's will to leave Keith's office.

Id. at 818-19.

222 *See, e.g.*, Hyman v. Ford Motor Co., 142 F. Supp. 2d 735 (D.S.C. 2001); Krilich v. Ameri-

Illinois Court of Appeal stated: "Duress occurs where one is induced by a wrongful act or threat of another to make a contract under circumstances that deprive one of the exercise of one's own free will . . . . To establish duress, one must demonstrate that the threat has left the individual 'bereft of the quality of mind essential to the making of a contract.'"[224] This formulation, focusing as it does on the "quality of mind essential" to contracting, invites courts to focus on mental ability and decision-making capacity to contract factors. Any definition of the duress doctrine that is so broad is inconsistent with traditional duress.

Courts have also strayed from the traditional duress doctrine in evaluating the facts of individual cases. Georgia courts have been particularly uniform in this regard. These courts repeat the mantra that a party cannot avail himself or herself of the duress doctrine if the party had the benefit of an attorney's advice.[225] The advice of an attorney is certainly relevant in dispelling a claim of undue influence or any other claim that the party complaining had less than adequate mental ability or capacity to comprehend the bargain, its benefits, and its burdens. Yet, the advice of an attorney does not eliminate the constrained choice that may be facing the party. In almost every contracting situation, the presence of an attorney is helpful in explaining the nature of the deal and all possible alternatives. Thus, the bargainer, represented by counsel, can understand the proposed contract fully and can understand the consequences of various paths of action.[226] The presence of an attorney cannot create alternatives that were not already in existence, however. In other words, the attorney has no effect on the ultimate array of alternatives the bargainer faces. So, for example,

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can Nat'l Bank & Trust Co., 778 N.E.2d 1153 (Ill. App. Ct. 2002). *See also* Kostritsky, *supra* note 3, at 599-600 (the language implies a psychological test).

223 778 N.E.2d 1153 (Ill. App. Ct. 2002).

224 *Id.* at 1162 (quoting Hurd v. Wildman, Harrold, Allen & Dixon, 707 N.E.2d 609, 615 (Ill. App. Ct. 1999) (quoting Alexander v. Standard Oil Co., 423 N.E.2d 578, 582 (Ill. App. Ct. 1981) (quoting Kaplan v. Kaplan, 182 N.E.2d 706, 709 (Ill. 1962)))).

225 *See, e.g.*, Coop. Res. Ctr., Inc. v. Southeast Rural Assistance Project, Inc., 569 S.E.2d 545, 546 (Ga. Ct. App. 2002) ("[I]n any event, when the signer of an agreement is sophisticated in business matters and has access to and in fact obtains advice of counsel, the defense of duress is not available to void the contract."); Frame v. Booth, Wade & Campbell, 519 S.E.2d 237, 241 (Ga. Ct. App. 1999) (After noting that the party claiming duress was "a sophisticated businessman" and that "he had access to and consulted with counsel of his choice," the court concluded: "Even if we were to conclude that Booth's actions constituted economic duress, we therefore would also conclude that he waived any reliance upon this defense.").

226 *See, e.g.*, Moss v. Davis, 794 A.2d 1288 (Del. Fam. Ct. 2001) (before agreeing to marriage, an elderly person consulted two attorneys). *See also* Dunes Hospitality, L.L.C. v. Country Kitchen Int'l, Inc., 623 N.W.2d 484 (S.D. 2001). The court seemed to be using the sophistication of the parties and the involvement of attorneys as evidence of the fact that the parties were aware of the alternative, which was reasonable. The court stated: "Clearly, Dunes consisted of sophisticated members and investors, and was well represented by experienced, competent lawyers. Dunes' decision to enter into this settlement agreement was the result of an informed and deliberate decision. The proposals ... were not unreasonable alternatives." 623 N.W.2d at 492.

in *Krilich v. American National Bank and Trust Co.*,[227] the bargainer complaining of duress, Bongi, claimed that the other party threatened to breach an earlier contract to disastrous effect on Bongi if Bongi did not agree to purchase another property. The party agreed to the purchase but then failed to pay on the note, claiming duress. That party, if the facts are accepted as claimed, agreed to the purchase arrangement because the other alternative, to refuse the deal, would lead to the other party breaching a contract to improve another property. That breach would cause Bongi to suffer "'financial collapse', bankruptcy, and protracted litigation."[228] The fact that Bongi was represented by counsel and had the benefit of counsel's advice does not change the situation presented by the opposing party. Yet, the court relied in part on the fact that Bongi was represented by counsel during the contract negotiation to affirm the lower court's grant of a motion to dismiss.[229] Similarly, in *Berardi v. Meadowbrook Mall Co.*,[230] the court affirmed the grant of summary judgment denying a duress claim involving a release. The court stated: "Indeed, '[w]here an experienced businessman takes sufficient time, seeks the advice of counsel and understands the content of what he is signing he cannot claim the execution of the release was a product of duress.'"[231] The courts of Pennsylvania have stated that the opportunity to consult with an attorney, even if an attorney is not in fact consulted, defeats a claim of duress.[232]

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227 778 N.E.2d 1153 (Ill. App. Ct. 2002).

228 *Id.* at 1163.

229 *Id.* at 1163 ("Because Bongiovanni enjoyed access to legal counsel during the three-month negotiation period and because Bongi had an adequate potential judicial remedy, we conclude that the trial court correctly dismissed the affirmative defenses and counterclaim alleging economic duress.").

230 572 S.E.2d 900 (W. Va. 2002).

231 *Id.* at 906 (quoting Schmalz v. Hardy Salt Co., 739 S.W.2d 765, 768 (Mo. Ct. App. 1987)). *See also* Hyman v. Ford Motor Co., 142 F. Supp. 2d 735, 746 (D.S.C. 2001) ("Hyman's assertions of duress are substantially undermined by the fact that he was represented by counsel throughout the termination of Agreement and the bankruptcy proceedings."); Rubin v. Laser, 703 N.E.2d 453, 459-60 (Ill. App. Ct. 1998) ("[T]he party who executed the agreement, moreover, is a lawyer and was represented by counsel in the negotiation of the release. There is no indication that his will was overborne."); Patton v. Wood County Humane Soc'y, 798 N.E.2d 676, 680 (Ohio Ct. App. 2003) (noting that the party was allowed to seek the advice of counsel); Sheet Metal Workers Nat'l Pension Fund v. Bryden House Ltd. P'ship, 719 N.E.2d 646, 652-53 (Ohio Ct. App. 1998) (finding no duress, the court stated, "we have sophisticated parties and their attorneys dealing on an equal footing"). *But see* Krantz v. BT Visual Images, L.L.C., 89 Cal. App. 4th 164, 176 (Cal. Ct. App. 2001). In *Krantz* the trial court granted summary judgment on the duress claim because the plaintiff "'had reasonable alternatives at the time he signed the Teaming Agreement and was not facing any financial jeopardy ... [and] that his attorney was reviewing it.'" The appellate court stated: "We do not, however, consider these statements sufficient in themselves to negate the duress claim as a matter of law." *Krantz*, 89 Cal. App. 4th at 176.

232 *See, e.g.*, Easton v. Bristol-Myers Squibb Co., 289 F. Supp. 2d 604, 612 (E.D. Pa. 2003) (quoting Three Rivers Motor Co. v. Ford Motor Co., 522 F.2d 885, 893 (3d Cir. 1975)) ("Under

The passage of time is another factor that is relevant in determining the reasonable alternatives known to the party claiming duress. Yet, the passage of time cannot enlarge the set of options the bargainer faces. Courts should take care not to place too much emphasis on this factor when the claim is duress, not undue influence.[233]

Likewise, the expertise or sophistication of the party claiming duress is helpful to a court in determining whether that party was aware of alternatives. Yet, such a factor cannot change the deal presented by the other party. If the situation is one in which the party must consent to the deal or face bankruptcy, no amount of sophistication can change those alternatives. Some courts have relied, perhaps inappropriately, on the sophistication of the party to deny a claim of duress.[234] Courts must guard against using such a factor too broadly.

C. *The Duress Doctrine Should Not Directly Regulate Substantive Fairness*

The *Restatement (Second) of Contracts*, in section 176(2), states:

Pennsylvania law 'where the contracting party is free to come and go to consult with counsel, there can be no duress in the absence of threats of actual bodily harm.'"); SKF USA, Inc. v. Workers' Comp. Appeal Bd. (Smalls), 714 A.2d 496, 501 (Pa. Commw. Ct. 1998) ("Where, as here, a party had a reasonable opportunity to consult with legal counsel before entering into a contract, the party may not seek to invalidate the contract on the basis of economic duress.").

[233] *See* Gouldstone v. Life Investors Ins. Co., 514 S.E.2d 54, 57 (Ga. Ct. App. 1999). While finding no threat, the court also noted that the party claiming duress had more than a week to decide, "thus giving Gouldstone time to seek an attorney or to otherwise determine if the 'threat' was genuine." *See also* DeLuca v. Bear Stearns & Co., 175 F. Supp. 2d 102, 114 (D. Mass. 2001) (in finding no duress, the court noted that the party was given two days to consider and consult with an attorney).

[234] *See, e.g.*, Mathias v. Jacobs, 167 F. Supp. 2d 606, 614 (S.D.N.Y. 2001) ("experienced businessmen" represented by attorneys); Golden v. McDermott, Will & Emery, 702 N.E.2d 581, 589 (Ill. App. Ct. 1998) ("Golden was a legally sophisticated attorney who negotiated the severance agreement over the course of several months"; no duress found). The West Virginia Supreme Court in Berardi v. Meadowbrook Mall Co., 572 S.E.2d 900 (W. Va. 2002), stated:

> While economic duress may reach large business entities as well as the "proverbial little old lady in tennis shoes," Anderson & Anderson Contractors, Inc. v. Latimer, 162 W. Va. 803, 807 n.2, 257 S.E.2d 878, 881 n.2 (1979), when the parties are sophisticated business entities, releases should be voided only in "'extreme and extraordinary cases.'" Davis & Assoc., Inc. v. Health Mgmt. Servs., Inc., 168 F. Supp. 2d 109, 114 (S.D.N.Y. 2001) (quoting VKK Corp. v. N.F.L., 244 F.3d 114, 123 (2d Cir. 2001). Indeed, "[w]here an experienced businessman takes sufficient time, seeks the advice of counsel and understands the content of what he is signing he cannot claim the execution of the release was a product of duress." Schmalz v. Hardy Salt Co., 739 S.W.2d 765, 768 (Mo.Ct.App.1987) (citing Anselmo v. Manufacturers Life Ins. Co., 771 F.2d 417, 420 (8th Cir. 1985)).

572 S.E.2d at 906.

> A threat is improper if the resulting exchange is not on fair terms, and
>
> (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
>
> (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
>
> (c) what is threatened is otherwise a use of power for illegitimate ends.[235]

Thus, this section provides for duress to be used to regulate not only the fairness of the process of the bargain but also the fairness of the substance of the bargain. This section was a response to entreaties by some commentators that duress ought to directly regulate substance.[236]

Courts have disagreed. In recent history, courts generally have not used the duress doctrine to directly regulate substantive fairness of bargains. Even so, modern courts easily could have bowed to the power of the *Restatement (Second)* and adopted section 176(2) or at least the position it states. Very few courts have done so. Only a few courts, in the more than twenty years since the publication of the *Restatement (Second),* have mentioned section 176(2).[237] In a very few cases, the court has relied upon section 176(2).[238] In several cases, the court cites or quotes all of section 176 and it is not possible to determine whether the court relied on the substantive fairness provisions of section 176(2) to decide the matter[239] or, rather, on the more traditional statement of section 176(1).[240] In a few cases, the court cited or quoted section 176(2) but appar-

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[235] RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (1981).

[236] *See, e.g.,* Dawson, *supra* note 29, at 598 (espousing consideration of the justness of the resulting transaction); Dawson, *supra* note 2, at 282-83 (same). For a later argument for substantive fairness regulation, see Fingarette, *supra* note 12, at 71-82.

[237] *See* Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293 (M.D. Ala 1999); Am. Life Ins. Co. v. Parra, 63 F. Supp. 2d 480 (D. Del. 1999), *aff'd in part, rev'd in part,* 265 F.3d 1054 (3d Cir. 2001); *In re* Marriage of Baltins, 212 Cal. App. 3d 66 (1989); Vail/Arrowhead, Inc. v. Dist. Court, 954 P.2d 608 (Colo. 1998); Eckstein v. Eckstein, 379 A.2d 757 (Md. 1978); Richards v. Allianz Life Ins. Co., 62 P.3d 320 (N.M. Ct. App. 2002); Maust v. Bank One Columbus, N.A., 614 N.E.2d 765 (Ohio Ct. App. 1992); Boud v. SDNCO, Inc., 54 P.3d 1131 (Utah 2002); Andreini v. Hultgren, 860 P.2d 916 (Utah 1993); Mach. Hauling, Inc. v. Steel, 384 S.E.2d 139 (W. Va. 1989).

[238] *See* Richards v. Allianz Life Ins. Co., 62 P.3d 320 (N.M. Ct. App. 2002); Boud v. SDNCO, Inc., 54 P.3d 1131 (Utah 2002); Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).

[239] *See* Vail/Arrowhead, Inc. v. Dist. Court, 954 P.2d 608 (Colo. 1998); Maust v. Bank One Columbus, N.A., 614 N.E.2d 765 (Ohio Ct. App. 1992).

[240] *See* discussion accompanying notes 99-101 *supra.*

ently did not apply it.[241] A few courts, without reference to the *Restatement,* have required that the resulting transaction be measured for fairness.[242]

In *Andreini v. Hultgren,*[243] the court engaged in the clearest adoption of section 176(2). In that case, the plaintiff had sustained paralysis of the hands after a surgery.[244] The plaintiff sued the physicians and the hospital, claiming malpractice.[245] The plaintiff claimed that a release he signed before a second surgery did not block his action because he had signed the release under duress.[246] The lower court granted summary judgment in favor of the physicians and the hospital.[247] The Supreme Court of Utah explicitly adopted sections 175 and 176[248] and specifically relied on section 176(2)(b).[249] Thus, the court decided the matter on the basis that the "resulting exchange [was] not on fair terms"[250] and that "the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat."[251] The *Andreini* court reversed the grant of summary judgment.[252]

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241 *See* Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293 (M.D. Ala 1999); Am. Life Ins. Co. v. Parra, 63 F. Supp. 2d 480 (D. Del. 1999), *aff'd in part, rev'd in part,* 265 F.3d 1054 (3d Cir. 2001); *In re* Marriage of Baltins, 212 Cal. App. 3d 66 (Cal. Ct. App. 1989); Eckstein v. Eckstein, 379 A.2d 757 (Md. 1978); Mach. Hauling, Inc. v. Steel, 384 S.E.2d 139 (W. Va. 1989).

242 *See, e.g.,* Mason v. Ariz. Educ. Loan Mktg. Assistance Corp. (*In re Mason),* 300 B.R. 160, 167 (Bankr. D. Conn. 2003) (the court concluded that the agreement was unfair because it robbed the debtor of the right to discharge of the debt in bankruptcy); Noble v. White, 783 A.2d 1145, 1149 (Conn. App. Ct. 2001)(quoting Barbara Weisman, Trustee v. Kaspar, 661 A.2d 530, 549 n. 15 (1995)) ("For a party to demonstrate duress, it 'must prove [1] a wrongful act or threat [2] that left the victim no reasonable alternative, and [3] to which the victim in fact acceded, and that [4] the resulting transaction was unfair to the victim.'").

243 860 P.2d 916 (Utah 1993). *See also* James Barnett, *Recent Developments in Utah Case Law, Utah's Standards for Determining Duress,* 1995 UTAH L. REV. 265 (1995).

244 Andreini v. Hultgren, 860 P.2d 915, 917 (Utah 1993).

245 *Id.*

246 *Id.* at 920.

247 *Id.* at 917.

248 *Id.* at 921 ("We agree with this reasoning and explicitly adopt the legal standards of duress set forth in sections 175 and 176 of the Restatement (Second) of Contracts.").

249 *Id.* at 922.

250 *Id.* ("This evidence is sufficient to establish the legal possibility that the 'resulting exchange'--defendants' unfulfilled promise to correct Andreini's injury exchanged for Andreini's release of all claims against defendants--is 'not on fair terms' within the meaning of section 176(2) of the Restatement."). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (1981).

251 860 P.2d at 922 ("Based on this evidence, a jury could find that defendants engaged in unfair dealing that significantly increased the effectiveness of their threat to refuse to undertake the corrective surgery."). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(b)

The courts' rather stark reticence to apply the substantive fairness provisions of the *Restatement (Second)* section 176 indicates the collective unwillingness of the courts to make duress determinations on the basis of the substantive fairness. The courts have spoken with their actions. Even when given the imprimatur of the *Restatement (Second),* the courts refuse.

Courts do not refuse because they are incapable of making such determinations. They are obviously capable; they police substantive fairness with the doctrine of unconscionability.[253] Courts refuse because precedent tells them that the duress doctrine has not been so used in the past. Further, the tradition in contract law has been to not evaluate bargains on a substantive basis, [254] though there have been exceptions.[255] Thus, modern courts view even a peppercorn as consideration. Courts do not determine sufficiency of consideration.[256] While some doctrines, such as unconscionability, do require a review of the substance of the deal, these doctrines are relatively new to contract law. The fact that the unconscionability doctrine requires a substantive fairness analysis does not mean that the duress doctrine should require a substantive fairness analysis also. The duress doctrine is and should remain a doctrine distinct from unconscionability and should remain within the bounds of the traditional doctrine.[257]

(1981).

252 *Id.* at 923.

253 *See generally* James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business,* 88 CAL. L. REV. 1815, 1820 (2000) (discussing substantive review of the bargain with the doctrine of unconscionability); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975) (same).

254 See Mark L. Movsesian, *Two Cheers for Freedom of Contract,* 23 CARDOZO L. REV. 1529, 1529 (2002) (courts refrain from substance analysis). Early English law concerned itself with fairness. This changed as "liberal individualism became more entrenched in the law." WERTHEIMER, *supra* note 5, at 21-22. *See also* Spencer N. Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness,* 8 OXF. J. LEGAL STUD. 17, 21 (1988) ("The justification for the principle that courts should not investigate the adequacy of consideration (or fairness of the transaction) is that it would mark a move away from a market economy to one which is judicially supervised.").

255 *See* Dawson, *supra* note 2, at 277-82 (discussing modern exceptions to the refusal to substantively evaluate the consideration exchanged).

256 *See* ROSCOE POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 153-54 (2d ed. 1959) ("The equivalent theory must wrestle at the outset with the doctrine that inadequacy of consideration is immaterial so that the equivalent is often Pickwickian."). *See generally* EDWARD JENKS, THE HISTORY OF THE DOCTRINE OF CONSIDERATION 12 (1892). One commentator has stated: "One of the most frequently and emphatically declared axioms of contract law is that our courts are not concerned with the equivalence of the consideration given for a promise." Dalzell, *supra* note 9, at 237. *See also* Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law,* 33 NEW ENG. L. REV. 265 (1999) (discussing courts' reticence to evaluate consideration).

257 *See* Stewart, *supra* note 3, at 176-77 ("The hallmark of duress is the impairment of the second party's autonomy, while the hallmark of unconscionability is the substantive unfairness of

Perhaps more important than precedent is the collective opinion of the courts as to their proper role. The reluctance with which courts find duress at all and the reluctance of courts to adopt an approach involving review of the substantive fairness of the deal suggests that courts of today are highly influenced by the notion of freedom of contract. Perhaps their view, independent of precedent, is that courts should leave substance to the contractors and not interfere with the self-determination of the contractors except in clear cases of application of traditional doctrines along traditional lines. If courts place priority on the public policy of freedom of contract, they are not likely to expand on traditional contract doctrines so as to do violence to the freedom of contract. Thus, the courts have not expanded upon the traditional doctrine of duress to analyze the substantive fairness of a bargain. The courts' inaction regarding section 176(2) and the more general refusal to treat the duress doctrine as a substantive fairness doctrine are not creatures of happenstance but rather are policy choices.

Given the courts' well-grounded unwillingness to use the duress doctrine as a regulator of the substantive fairness of deals, the ivory tower should accept the failure of the experiment of section 176(2) and substantive fairness review generally. Duress should not be hobbled by being made more confusing in definition or less appealing to courts in light of those courts' favored policy, freedom of contract.

D. Threats That Should Be Recognized as Bases for Duress

1. The Present Lack of Clarity

The duress doctrine has never applied to all situations of constrained choice.[258] No one has ever been allowed to have a contract set aside on the basis of duress simply because that person had no choice but to enter into the deal. Rather, the doctrine has set aside a contract only when the party not claiming duress has taken action that makes that party blameworthy. If that party is blameworthy in creating the situation of constrained choice, the generally offensive nature of setting aside the contract is less compelling. The all-important determination, then, is whether that party is blameworthy. This determination is the rub. Modern courts have a variety of views on what finding is necessary. Some courts do not appear to understand the standards they espouse.

In the early days of the duress doctrine, there was little doubt about blameworthiness and thus the application of the doctrine. Duress applied only when one party threatened the other party with death or serious bodily injury or

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the bargain."). *But see* DiMatteo, *supra* note 256 (discussing generally the move to fairness analysis); Sharma, *supra* note 131, at 112 (noting the move to fairness consideration).

[258] *See* Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian,* 50 AM. J. COMP. L. 131, 145 (2002) ("All choices are constrained choices simply by virtue of the fact of being made in the context of society.").

actually imprisoned that party.[259] Killing or seriously injuring or imprisoning a party were crimes so no one would dispute that the threatener had taken action that marked the threatener as blameworthy. Assuming that the other requirements of duress were satisfied, setting aside the resulting contract was therefore just and justifiable for both the constrained party and the constraining party. Once the doctrine expanded to recognize that duress could exist with other threats, the courts became confused as to the proper standard for determining which threats could be the basis of a duress claim. Modern courts have done nothing to clarify the situation.

The *Restatement (Second) of Contracts* section 175(1) states that duress requires "an improper threat."[260] Section 176(1) defines "an improper threat" as one threatening a crime or tort, one that would be a crime or tort itself, one that is a threat of criminal prosecution, one that is a bad faith threat to use civil process, and one which is a "breach of the duty of good faith and fair dealing under a contract with the recipient."[261] Section 176(2) presents situations in which threats are improper in part because the transaction is unfair.[262] As discussed in an earlier section, the substantive analysis suggested by section 176(2) has not been part of the duress tradition, is not now generally part of the duress doctrine, and should not be a part of the duress doctrine.[263] Thus, the present discussion does not include such a definition of "an improper threat."

Some courts have followed the teachings of section 176(1).[264] More often, however, courts state that an actionable threat is one that is "wrongful."[265]

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259 JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 9.2 (5th ed. 2003). Blackstone stated,

> A fear of battery ... is no duress; neither is the fear of having one's house burned, or one's goods taken away or destroyed because in these cases, . . . should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life, or limb.

Id. at 316 (quoting 1 BLACKSTONE'S COMMENTARIES 131 (Lewis's ed.)).

260 RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

261 RESTATEMENT (SECOND) OF CONTRACTS § 176(1) (1981).

262 RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (1981).

263 *See* discussion *supra* section V.C.

264 *See, e.g.,* Krantz v. BT Visual Images, L.L.C., 89 Cal. App. 4th 164, 176 (Cal. Ct. App. 2001). The court in *Krantz* also listed the factor of whether the threat was for illegitimate ends. *Id.* This factor is contained in the fairness portion of section 176 but the *Restatement* requires a finding that resulting transaction is unfair in addition to the illegitimate ends finding. *See* RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (1981). The *Krantz* court does not mention this additional fairness requirement. *See also* Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1330 (Fed. Cir. 2003). The *Rumsfeld* court did not rely on section 176(1) explicitly but stated that duress can be based on a threat that is illegal, a breach of the covenant of good faith and fair dealing in an existing contract, or a breach of contract without a good faith belief such action is permissible.

Some courts explain that "wrongful" can be expansive in scope. For example, the New Jersey Superior Court in *Quigley v. KPMG Peat Marwick, LLP*,[266] stated that "wrongful" can include "wrongful, not necessarily in a legal, but in a moral or equitable sense."[267] Of course, courts do not delineate the kinds of threats that could be deemed morally wrong. Some courts apply the "wrongful" threat test in a manner that makes it clear that wrongful threats or threats of wrongful action need not be synonymous with illegal threats or threats of illegal action.[268] Other courts use a combined test of "wrongful or unlawful."[269] The use of both terms in the alternative may create the inference that a threat may be the basis of a duress claim if it is unlawful or if it is not unlawful but is otherwise wrongful. The question is then the composition of that latter set of situations.

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[265] *See, e.g.*, Jamestown Farmers Elevator, Inc. v. Gen. Mills, Inc., 552 F.2d 1285, 1290 (8th Cir. 1977) ("wrongful coercive acts"); Todd v. Blue Ridge Legal Servs., Inc., 175 F. Supp. 2d 857, 863 (W.D. Va. 2001) (quoting Goode v. Burke Town Plaza, Inc., 436 S.E.2d 450, 452 (Va. 1993)) ("'wrongful act'"); Noble v. White, 783 A.2d 1145, 1149 (Conn. App. Ct. 2001) ("wrongful act"); Moss v. Davis, 794 A.2d 1288, 1290 (Del. Fam. Ct. 2001) ("wrongful act"); Hughes v. Pullman, 36 P.3d 339, 343 (Mont. 2001) ("wrongful act"); *In re* Yannalfo, 794 A.2d 795, 797 (N.H. 2002) ("exerted pressure wrongfully"); Adalian v. Stuyvesant Plaza, Inc., 733 N.Y.S.2d 739, 741 (N.Y. App. Div. 2001) ("wrongful threat"); Fred Ehrlich, P.C. v. Tullo, 710 N.Y.S.2d 572, 573 (N.Y. App. Div. 2000) ("wrongful threat"); Dunes Hospitality, L.L.C. v. Country Kitchen Int'l, Inc., 623 N.W.2d 484, 490 (S.D. 2001) ("coercive wrongful act").

[266] 749 A.2d 405 (N.J. Super. Ct. 2000).

[267] *Id.* at 412 (quoting Cont'l Bank v. Barclay Riding Acad., Inc., 459 A.2d 1163, 1175 (1983), *cert. denied*, 464 U.S. 994 (1983)). *See also* N. Fabrication Co. v. UNOCAL, 980 P.2d 958, 961 (Alaska 1999) (quoting Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15, 22 (Alaska 1978)) (including acts that are "criminal, tortuous, or even merely 'wrongful in the moral sense'"); Krilich v. Am. Nat'l Bank & Trust Co., 778 N.E.2d 1153, 1162 (Ill. App. Ct. 2002) (citing Hurd v. Wildman, Harrold, Allen, & Dixon, 707 N.E.2d 609 (Ill. App. Ct. 1999) ("The acts or threats complained of must be wrongful; however, the term 'wrongful' is not limited to acts that are criminal, tortuous, or in violation of contractual duty. They must extend to acts that are also wrongful in a moral sense.")). This approach was rejected by Dunes Hospitality, L.L.C. v. Country Kitchen Int'l, Inc., 623 N.W.2d 484 (S.D. 2001). The *Dunes* court stated that "[i]nstruction ... [twenty-four] allowed the consideration of a wrongful act to include those 'merely wrongful in the moral sense.'" *Id.* at 491. The court continued: "We reject these as improper statements of the law of economic duress." *Id.* at 490.

[268] *See, e.g., Jamestown Farmers Elevator*, 552 F.2d at 1290-91 (a threat to put another out of business can be wrongful).

[269] *See, e.g.*, Coop. Res. Ctr., Inc. v. Southeast Rural Assistance Project, Inc., 569 S.E.2d 545, 547 (Ga. Ct. App. 2002) ("wrongful or unlawful"); Suwanee Swifty Stores, Inc. v. Nationsbank, N.A., 536 S.E.2d 299, 302 (Ga. Ct. App. 2000) ("wrongful or unlawful"); Sheet Metal Workers Nat'l Pension Fund v. Bryden House Ltd. P'ship, 719 N.E.2d 646, 652 (Ohio Ct. App. 1998) ("a wrongful or unlawful act or threat"). *But see* Berardi v. Meadowbrook Mall Co., 572 S.E.2d 900, 905 (W. Va. 2002) ("unlawful threats or wrongful, oppressive, or unconscionable").

Other courts state that the threat must be "unlawful."[270] Even with this choice of words, there is lack of clarity. Would a threat that would be a breach of the covenant of good faith and fair dealing in an existing contract be "unlawful"? Such conduct is not illegal in the sense of being a crime or even a tort. At least one court has stated that bad faith conduct within an existing contract can be "unlawful" for purposes of duress.[271]

In contrast, many courts, regardless of the language they use to state the test for an actionable threat, use additional language that seems to indicate that only criminal threats or threats of criminal conduct can be the basis of duress. For example, in *Hurd v. Wildman, Harrold, Allen and Dixon,*[272] the Illinois Appellate Court defined "wrongful" to include wrongs in a "moral sense" as well as a legal sense. The court then stated: "[T]he defense cannot be predicated upon a demand that is lawful or upon doing or threatening to do that which a party has a legal right to do."[273] This phrase about duress not being based on anything the actor has a legal right to do has been stated and restated by numerous courts.[274] If the literal truth of this statement is the rule, then only if the

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[270] *See, e.g.,* Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1242 (10th Cir. 1990) ("unlawful act"); Nasik Breeding & Research Farm Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 527 (S.D.N.Y. 2001) ("unlawfully made" threat).

[271] *See Applied Genetics Int'l,* 912 F.2d at 1242 (a threat to report to the SEC and a threat to breach a contract, made in bad faith, can be "unlawful").

[272] 707 N.E.2d 609 (Ill. App. Ct. 1999).

[273] *Id.* at 614.

[274] *See, e.g.,* Suwannee Swifty Stores, Inc. v. NationsBank, N.A., 536 S.E.2d 299, 302 (Ga. Ct. App. 2000) (quoting Gen. Motors Acceptance Corp. v. Bowen Motors, 306 S.E.2d 675,679 (1983)) ("'It is not duress to threaten to do what one has a legal right to do.'"); *In re* Estate of Davis, 832 So. 2d 534, 538 (Miss. Ct. App. 2001) (quoting Duckworth v. Allis-Chalmers Mfg. Co., 150 So. 2d 163, 163 (Miss. 1963)) ("[Economic duress] cannot be predicated upon a demand which a party has a legal right to do."); Crase v. Hahn, 754 So. 2d 471, 475 (Miss. Ct. App. 1999) (duress requires a threat "to do something which they had no legal right to do"); Lyons v. Lyons, 734 N.Y.S.2d 734, 737 (N.Y.App. Div. 2001) (quoting Matter of Rychlick v. Coughlin, 472 N.Y.S.2d 761, 763 (N.Y. App. Div.), *aff'd,* 468 N.E.2d 702 (N.Y. 1984)) ("A mere 'threat to do that which one has the legal right to do does not constitute duress.'"); Ehrlich v. Tullo, 710 N.Y.S.2d 572, 573 (N.Y. App. Div. 2000) ("wrongful threat") ("threatened exercise of a legal right is not economic duress"); Patton v. Wood County Humane Soc'y, 798 N.E.2d 676, 680 (Ohio Ct. App. 2003) (it is not an improper threat if the party threatening was legally entitled to do the threatened act); Flynt Eng'g Co. v. Cox, 99 S.W.3d 99, 102 (Tenn. Ct. App. 2002) (citing Windham v. Alexander, West, & Poehner, 887 S.W.2d 182 (Tex. App. 1994)) ("to do what one has a legal right to do is insufficient to create duress"); Osorno v. Osorno, 76 S.W.3d 509, 511 (Tex. Ct. App. 2002) (citing Brown v. Aztec Rig Equip., Inc., 921 S.W.2d 835, 845 (Tex. Ct. App. 1996)) ("For duress to be a contract defense, it must consist of a threat to do something the threatening party has no legal right to do."); Wolfe v. C.S.P.H., Inc., 24 S.W.3d 641, 645 (Tex. Ct. App. 2000) ("Duress requires proof of a threat to do something which the threatening party has no right to do."). *See* Dawson, *supra* note 2, at 287. Dawson stated: "No single formula has achieved so wide a circulation in the duress cases as the statement that 'It is not duress to threaten to do what there is a legal right to do.' Certainly no other formula is anything like so misleading." *See also* Hale, *Bargaining, supra* note 10, at 613 (discussing Hardie & Lane v. Chilton [1928] 2 K.B. 306,

actor breaks the law can there be a successful claim of duress. A bad faith threat to breach a contract could not be a basis of duress because a contracting party does have the right to breach. The exercise of that right may entail the payment of damages, of course. As early as 1898 Justice Holmes begged to differ with courts requiring a strict notion of unlawfulness for an actionable threat. In *Silsbee v. Webber*[275] he wrote: "[I]t does not follow that, because you cannot be made to answer for the act, you may use the threat."[276] However, it is possible that courts, when using the above statement, are being imprecise. It is possible that those courts would argue that breach of a contract in bad faith is an act the breacher had no right to do and, therefore, such a threat would be actionable. The meaning of the statement can be unclear, especially if the court has made other, more expansive statements about the required nature of the threat.

Occasionally, a court is both more limiting and clearer in defining the type of threat that can be the basis of a duress finding. For example, in one case the court refused to apply the duress doctrine because the party's conduct was not "illegal."[277] The court continued: "It is well established that where the alleged menace was ... to stop performance under a contract or to exercise a legal right, there is no actionable duress."[278] Thus, according to this case only criminal threats or threats of criminal acts can be the basis of a duress finding. Perhaps one of the most confusing statements is that of the Texas Court of Appeals in *ABB Kraftwerke Aktiengesellschaft v. Brownsville Barge & Crane, Inc.*[279] The court stated that economic duress required "(1) a threat to do something that a party has no legal right to do; (2) illegal exaction or some fraud or deception; and (3) imminent restraint so as to destroy free agency without present means of protection."[280]

What is clear after this survey of relatively recent cases is that there is much confusion in the courts as to the standard to use for identifying a threat that can be the basis for a finding of duress. Much of this confusion perhaps can be blamed on blind regurgitation of language from earlier cases and imprecise drafting of opinions. No one can dispute that the use of "wrongful" as a test, without further explanation, is less than elucidating. A definition of wrongfulness in terms of "moral" wrong is likewise not helpful. Further, courts have

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in which Scruton, L.J., stated that the threat was not actionable if "'the threatener has a legal right to do what he threatens.'" Hale responded: "The statement is also too broad.").

275 50 N.E. 555 (Mass. 1898).

276 *Id.* at 556.

277 Gubitz v. Sec. Mut. Life Ins. Co., 692 N.Y.S.2d 139 (N.Y. App. Div. 1999).

278 *Id.* at 140.

279 115 S.W.3d 287 (Tex. Ct. App. 2003).

280 *Id.* at 294 (citing King v. Bishop, 879 S.W.2d 222, 223 (Tex. Ct. App. 1994); Simpson v. MBank Dallas, N.A., 724 S.W.2d 102, 109 (Tex. Ct. App. 1987)).

relied on language such as the statement that duress cannot be based on a threat to do what the party has a legal right to do that originated in a time before the general notion of economic duress became widely recognized. Courts make such a statement and at the same time rely on language from other opinions such as a statement that a threat must be wrongful—without regard of whether the two statements are consistent with each other. This confusion cannot continue. For the duress doctrine to survive, there must be clarity with regard to the standard for an actionable threat.

2. A Proper Standard

This lack of clarity is but part of the problem, however. It is also important that courts apply a standard that is not only clear but also appropriate. Courts could, after all, remedy the clarity problem by recognizing only threats of criminal activity as a basis for the application of the duress doctrine. Other courts might accept only threats of criminal or tortious activity while even other courts might accept criminal, tortious, and bad faith activity. Unanimity of approach would be optimal, but not if the courts apply a flawed standard.

A return to the purpose of the threat requirement is helpful at this point. As the court in *Rich & Whillock, Inc. v. Ashton Development, Inc.*[281] stated:

> The underlying concern of the economic duress doctrine is the enforcement in the marketplace of certain minimal standards of business ethics .... They include equitable notions of fairness and propriety which preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value . . . . The economic duress doctrine serves as a last resort to correct these aberrations when conventional alternatives are unavailing.[282]

The threat requirement provides the selection mechanism for choosing which of the constrained choice contracting situations should be set aside. Contracts should be set aside when it is just and justifiable to do so—that is, when societal expectations of the sanctity of contracts would not be offended because of the peculiar nature of the particular situation. Setting aside a contract on the basis of duress is just and justifiable when one party has no reasonable alternative to the problematic bargain and when the other party has been proven to be particularly blameworthy regarding the constrained nature of the deal. No one would disagree with the notion that a criminal threat or a threat of criminal conduct is blameworthy conduct for purposes of the duress doctrine. Yet, at this point of societal and contract evolution, other sorts of threats are sufficiently

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281 204 Cal. Rptr. 86 (Cal. Ct. App. 1984).

282 *Id.* at 89-90.

blameworthy as well. Perhaps the *Restatement (Second) of Contracts* section 176(1) strikes the appropriate balance between the three most relevant interests: the threatener's blameworthiness, the protection of the constrained party's interests, and the societal interest in the sanctity of contract. Section 176(1) includes as actionable threats criminal and tortious threats, threats of criminal prosecution, bad faith threats to use civil process, and threats that are a breach of the duty of good faith and fair dealing under an existing contract.[283]

Each of these categories of threats shares the characteristic of being condemned elsewhere in the law. Thus, by using these categories to determine actionable threats, no novel blameworthy analysis is needed. If a threat is in fact a threat to commit a crime, as determined by the criminal law, it can be the basis of a duress claim.

Tortious threats clearly are condemned independent of the duress doctrine. Likewise, the law condemns, independent of the duress doctrine, a threat which breaches the duty of good faith and fair dealing in a contractual relationship. In the case of both tortious threats and such bad faith threats, the actor must pay a price for the actions.

Courts long have viewed threats of criminal prosecution in the context of a private contract negotiation as contrary to public policy.[284] As a result, courts often have denied enforcement of contracts involving promises of no criminal prosecution in exchange for other consideration.[285] This denial has been on the basis of public policy, not duress. The theory behind the lack of enforcement is that the public judicial process should not be co-opted for private gain.[286] Thus, threats of criminal prosecution are also condemned independently of the duress doctrine, just as crimes are. Finally, bad faith use of civil process is also a use of the public judicial process for inappropriate ends.[287]

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283 *See* RESTATEMENT (SECOND) OF CONTRACTS § 176(1) (1981).

284 *See* 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS § 83.1 (2003) ("[A]ny bargain for the purpose of stifling a criminal prosecution, whether or not the bargain is criminal, is always contrary to public policy and unenforceable."). *See also* Berman v. Coakley, 137 N.E. 667, 668 (Mass. 1923) ("the course of justice cannot be defeated for the benefit of an individual").

285 *See, e.g.*, Mason v. Arizona Educ. Loan Mktg. Assistance Corp. (*In re Mason*), 300 B.R. 160 (Bankr. D. Conn. 2003) (threat of prosecution and incarceration if the debtor did not agree to a consolidation); Baker v. Citizens Bank of Guntersville, 208 So. 2d 601, 606 (Ala. 1968) (citing Clark v. Colbert, 67 Ala. 92 (1880); Moog v. Strang, 69 Ala. 98 (1881); U.S. Fid. & Guar. Co. v. Charles, 31 So. 558 (Ala. 1901)) ("a contract based upon a promise or agreement to conceal or keep secret a crime which has been committed is opposed to public policy and offensive to the law"); Murphy v. Rochford, 371 N.E.2d 260, 264 (Ill. App. Ct. 1977) ("An agreement not to prosecute is void because it is against public policy, as well as possibly constituting a criminal offense."). *See also Bargaining*, *supra* note 10, at 619 (discussing this type of threat).

286 *See* Dawson, *supra* note 2, at 285-86 ("This development has been fitted into the classic conception of duress by describing the pressure as inherently improper, since processes intended for the vindication of public interests are misapplied when used to enforce civil liability.").

287 WERTHEIMER, *supra* note 5, at 43. *See, e.g.*, Chandler v. Sanger, 114 Mass. 364 (1874). After a debtor's ice wagon was loaded with ice, the creditor obtained a writ of attachment for the

Such conduct actually may rise to the level of a tort.[288] While the independent condemnation of such conduct is not as tangible as that for other categories of threats, condemnation exists nonetheless.

There is little support for an argument that one who threatens in any of these ways is not blameworthy. Likewise, the damage to the notion of freedom of contract seems slight. Assuming that the choice of one party is constrained to the point that the party has no reasonable alternative to the bargain, applying the duress doctrine in these threat situations seems just and justifiable.

A refreshing example of clarity of standard is *Rumsfeld v. Freedom NY, Inc.*[289] The government entered into a contract with Freedom NY that provided that Freedom NY would supply meals ready to eat (MREs) and the government would pay for the MREs in a series of progress payments.[290] The government sought to have the initial contract modified and refused to provide progress payments on that first contract unless Freedom NY agreed to the modification.[291] Freedom NY agreed to the modification but later claimed that the modification was the product of duress.[292] The *Rumsfeld* court clearly stated that precedent had "'done away with the requirement of an illegal act.'"[293] The *Rumsfeld* court explained that duress can be based on "wrongful" conduct and defined "wrongful" as "(1) illegal, (2) a breach of an express provision of the contract without a good faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing."[294] The court then concluded that the withholding of progress payments to obtain Freedom NY's agreement to the modification was, indeed, "wrongful."[295]

While the *Rumsfeld* court did not adopt the *Restatement (Second) of Contracts* section 176(1) per se, the court was clear in its statement of the stan-

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wagon. The debtor paid so he could obtain his wagon before the ice melted. The creditor had the right to obtain the writ but the bad faith approach to obtaining the ice resulted in a finding of duress. *See generally* Dawson, *supra* note 29, at 574 (noting the competing interest of "sanctity of transaction" and the resolution of civil disputes); Dalzell, *supra* note 212, at 345.

288 The torts of malicious prosecution and abuse of process might be implicated. *See* Dawson, *supra* note 29, at 576-77 (discussing malicious prosecution and abuse of process).

289 329 F.3d 1320 (Fed. Cir. 2003).

290 *Id.* at 1322-23.

291 *Id.* at 1324.

292 *Id.*

293 *Id.* at 1330 (quoting Sys. Technical Assocs., Inc. v. United States, 699 F.2d 1383, 1387-88 (Fed. Cir. 1983)).

294 *Id.*

295 329 F.3d at 1330-31. *See also* Sys. Technical Assocs., 699 F.2d at 1387-88 (Fed. Cir. 1983); David Nassif Assocs. v. United States, 644 F.2d 4 (Ct. Cl. 1981); Johnson v. Drake & Piper, Inc. v. United States, 531 F.2d 1037, 1042-43 (Ct. Cl. 1976).

dard to determine actionable threats and stated a standard very similar to that of the *Restatement (Second)* section 176(1). The court clearly noted that illegality of the threat was not the touchstone. This is quite a positive statement for improvement of the duress doctrine and its use by the courts. In addition, the *Rumsfeld* court clarified that one kind of legal but wrongful threat involved bad faith breach of contract or breach of the covenant of good faith and fair dealing, which is a part of every contract. This duty long has been recognized as a part of every contract. Section 205 of the *Restatement (Second) of Contracts* states: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[296] The Uniform Commercial Code (UCC) states: "Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement."[297]

The courts might fear recognizing breach of the duty of good faith and fair dealing as a basis for duress because of uncertainty as to the parameters of good and bad faith. The actual standard of determining good faith or the lack of good faith has been described as "frustratingly elusive."[298] The UCC defines the duty as "honesty in fact and the observance of reasonable commercial standards of fair dealing."[299] The comment to section 2-209 of the UCC provides further guidance by stating that in the contract modification scenario, "the extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith."[300]

One could argue that at least in the UCC context the duress doctrine need not reach the modification scenario because section 2-209 independently invalidates the modification. Some courts have applied section 2-209 in this manner.[301] Note, however, that the invalidation language appears in the com-

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296 RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

297 U.C.C. § 1-304 (2004). *See also* STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT (Little Brown 1995); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers,* 69 IOWA L. REV. 497 (1984); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith,* 94 HARV. L. REV. 369 (1980); Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating when the Covenant of Good Faith and Fair Dealings has been Violated: A Framework for Resolving the Mystery,* 47 HASTINGS L.J. 585 (1996); Paul J. Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods,* 18 J.L. & COM. 333 (1999); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization,* 67 CORNELL L. REV. 810 (1982); Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* 54 VA. L. REV. 195 (1968).

298 *See* Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law,* 88 CORNELL L. REV. 1025, 1033 (2003).

299 U.C.C. § 1-201(20) (2004).

300 U.C.C. § 2-209, cmt. 2 (2004).

301 *See, e.g.*, T & S Brass & Bronze Works, Inc. v. Pic-Air, Inc., 790 F.2d 1098 (4th Cir. 1986); Roth Steel Prod. v. Sharon Steel Corp., 705 F.2d 134 (6th Cir. 1983). *See also* Lumber Enters.,

mentary only, not in the UCC proper. Thus, the power of the invalidation language is questionable.[302] The issue of the invalidation language had been the subject of scholarly discussion before the 2001 revisions to the UCC.[303] Initially, the American Law Institute and the National Conference of Commissioners on Uniform State Laws proposed a change that would move the good faith requirement from commentary to text. The proposal stated: "An agreement made in good faith modifying a contract under this article needs no consideration to be binding."[304] Ultimately, no change was suggested to section 2-209.[305]

Section 89 of the *Restatement (Second) of Contracts* provides that a modification of an *executory* contract is binding "(a) if the modification is fair and equitable in view of circumstance not anticipated by the parties when the contract was made; or (b) to the extent provided by statute; or (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise."[306] Comment b to section 89 states in part:

> The limitation to a modification which is 'fair and equitable' goes beyond absence of coercion and requires an objectively demonstrable reason for seeking a modification . . . . The reason for modification must rest in circumstances not 'anticipated' as part of the context in which the contract was made, but a frustrating event may be unanticipated for this purpose if it was not adequately covered, even though it was foreseen as a remote possibility. When such a reason is present, the relative financial strength of the parties, the formality with which the modification is made, the extent to which it is performed or relied on and other circumstances may be relevant to show or negate imposition or unfair surprise.[307]

Inc. v. Hansen, 846 P.2d 1046 (Mont. 1993).

302 *See* Henry Mather, *Contract Modification Under Duress*, 33 S.C. L. REV. 615 (1982); Robert A. Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979); Irma S. Russell, *Reinventing the Deal: A Sequential Approach to Analyzing Claims for Enforcement of Modified Sales Contracts*, 53 FLA. L. REV. 49 (2001).

303 *See, e.g.*, Hillman, *supra* note 302; Johnston, *supra* note 197; Mather, *supra* note 302.

304 U.C.C. § 2-209 (2004) (Proposed NCCYSL draft, 3-1-99) quoted by Russell, *supra* note 302, at 87.

305 U.C.C. §2-209 (2004) (2003 Amendments).

306 RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

307 RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1981). One commentator has suggested that section 89 and U.C.C. section 2-209 direct courts to the same evidence and conclusion. *See* Johnston, *supra* note 197, at 382-83 ("objective evidence that the modification was actually motivated by an unanticipated change in circumstances that would make performance under the

While some courts have considered this section of the *Restatement* when evaluating a contract modification,[308] the duress doctrine remains the major consideration for all sorts of contracts, executory or otherwise. Thus, the recognition of bad faith within a contractual relationship is imperative.[309] Bad faith identifies the threatener as sufficiently blameworthy such that justice is best served by not enforcing a contract resulting from such a constrained choice bargain.

VI. CONCLUSION

There are no easy solutions to the duress doctrine's present plight. A review of recent cases reveals that a shocking amount of repair is necessary to salvage the doctrine. The doctrine originally existed as a tool to police bargains that were the product of significantly constrained choice when that constraint resulted from blameworthy conduct of the other party to the bargain. It should continue to do so as a way of maximizing justice.

Courts of today have become mired in confusing precedent and related doctrines and have, thus, lost their way. To once more gain sight of the ultimate goal of justice, courts must abandon the practice of analyzing the presence or absence of free will to identify a situation of constrained choice. The majority of traditional duress situations are situations in which the constrained party does exercise free will. Courts have stated the free will analysis in absolute terms. If courts apply the stated test in an intellectually honest manner, the free will test should always result in a finding of no duress.

Such a test is also hopelessly vague because a court is asked to determine the presence or absence of free will without guidance as to how the court should do so. This vagueness has created an environment in which courts inappropriately consider factors relating to decision-making capacity better suited to the doctrine of undue influence. Courts should limit consideration for duress purposes to the traditional situation of a bargainer who acts with significantly constrained choice but very often with rational decision-making capacity.

The "free will" test must be scrapped in favor of the more instrumental "no reasonable alternative" test. This test more appropriately determines whether a situation is one of substantially constrained choice. Use of such a test also will minimize the consideration of the contractor's decision-making capacity and will refocus attention on the constrained nature of the choice before even the most able contractor.

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terms of the original contract unprofitable for the performing party").

308 *See, e.g.*, Lowey v. Watt, 684 F.2d 957, 968 (D.C. Cir. 1982); Angel v. Murray, 322 A.2d 630 (R.I. 1974).

309 *See* Hillman, *supra* note 302 (Restatement § 89 and U.C.C. § 2-209 fail as contract modification policing mechanisms). *But see* Johnston, *supra* note 197, at 383-84 (disagreeing).

In addition, courts must break free of the language of earlier courts and recognize that duress can be based on threats of crimes or torts, threats that are criminal or tortuous, threats of criminal prosecution, threats of bad faith use of civil prosecution, and bad faith within an existing contractual relationship.

Parties making such threats prove themselves blameworthy. When such blameworthiness creates a contract that is the product of significantly constrained choice, justice is best served by not enforcing the contract. Here the freedom of contract bows to the rightness of not enforcing the contract because the constraint is significant enough to undermine the theories supporting the public policy in favor of freedom of contract. Also, the threatener's blameworthiness robs that party of the legitimate expectation that a court will enforce the contract, or others like it.

Also, any attempt to use the duress doctrine as a direct regulator of the substantive fairness of deals should be abandoned. Courts have rejected such a role in general and have rejected such a role for the duress doctrine even in the face of urging by commentators and the *Restatement* itself. Ultimately, courts should find duress if, as a result of an improper threat as defined earlier in this piece,[310] a party to a contract had no reasonable alternative but to agree to the deal.

[310] Courts should recognize that the bargaining process is fatally flawed if there is constrained choice and the constraint is caused by a threat violative of criminal or tort law, a threat violative of the covenant of good faith and fair dealing in an existing contractual relationship, a threat that is a bad faith use of civil process, or a threat to pursue criminal prosecution. *See supra* section V.D.