Consenting under Stress

Hila Keren
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This Article highlights a disturbing gap between what is currently known about stress across a range of disciplines and the way stress is treated at law. It does so by focusing on parties who seek relief from harmful contracts, on the grounds that they consented under stress. The Article first exposes the leading legal view that stress is merely a subjective feeling and therefore merits no legal recognition. It then provides a pragmatic synthesis of the rich study of stress, in order to counter that misguided legal presumption and to offer a better understanding of the physical, social and psychological dimensions of stress.

Exploring both scientifically accepted causes of stress (stressors) and its known outcomes, the Article offers a new framing of stress and a set of analytic tools that allow better legal access to the problem. It argues that legal actors can and should use the non-legal scientific understanding of stress to evaluate the arguments of those who claim to have consented to an unwanted contract while under stress. The Article concludes that informed evaluation of stress arguments is not only pragmatically necessary, but also conceptually required for any legal system that, like contract law, relies on the power of choice and consent.

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INTRODUCTION: THE PROBLEM OF CONSENTING UNDER STRESS

Have you ever experienced severe stress: stress that made it difficult to think straight, and even more difficult to sleep? Stress that made you feel overwhelmed, and perhaps depressed? If so, you understand the problem raised by this article. Many of us have felt the impact of this kind of stress, especially in the wake of the recent economic crisis. But even if you have not yet experienced severe stress, you probably know what scientists have been arguing for years. Stress kills. Stress causes severe disease, depression, loss of memory, and rapid aging of the brain. It also impairs processes of decision making. In many disciplines, outside the law, researchers are focusing intensely on stress and its impact. They are investigating stress to better understand this human problem, and also to identify interventions that could help in mitigating it. In legal thought, however, the problem of stress is rarely noticed, and even more rarely understood.

One important legal context which demands awareness of stress and its impact is the broad sphere of contracts. Parties operating under stress often consent to detrimental, sometimes disastrous, agreements; they then ask courts to relieve them from the legal consequences, citing their distraught condition at the time of assent. To support their claims, they argue that a distressed state of mind produced a defective, even meaningless, “decision” to agree. Significantly, their argument invokes compulsion: a claim that stress left them no choice but to consent to an agreement that under “normal” conditions would have been unacceptable. This Article refers to this claim as “the stress argument”.

Although contract law does not inherently prevent courts from attending to the problem of contractual consent produced by stress, most courts fail to do so. Many courts tend to dismiss the stress argument, because they fail to understand how significantly stress can distort the decision-making process. Because those who consented to a contract under stress often argue that they had no choice but to agree, the stress argument is frequently discussed by litigants and courts under the doctrine of duress. However, while duress is certainly the leading defense discussed by courts, this framework is hardly exclusive. The stress argument is often analyzed under doctrines such as unconscionability or undue influence. Regardless of the doctrinal classifica-

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2 For fuller description see the discussion of outcomes of stress, infra in Part II.
tion, the question is straightforward: are there cases in which stress justify legal relief?

This Article answers this question in the affirmative. It seeks to expose a critical lack of legal understanding of the phenomenon of stress, and to make the normative argument that stress must be taken into account. To do so the Article focuses on three contexts in which the stress argument is repeatedly used: commercial loan agreements based on financial need; pre-nuptial agreements and separation settlements made in the intimate sphere and, in the employment context, resignation agreements that release the employer from liability. The argument that follows does not advocate automatic relief in every case in which a party has consented under stress. Humans suffer from many forms of stress, which differ in their intensity and in their potential to impair choice. Correctly understood, this Article calls for more legal awareness of the problem of stress and its potential to undermine contractual consent.

Part I analyzes the legal disregard of stress in the contractual arena. It reveals a troubling theme: that courts tend to favor narrow interpretation of the duress doctrine that fails to attend to distressed voices. Within this narrow framework courts too often dismiss stress arguments after classifying stress—without any reasoning or support—as nothing but a subjective feeling. As this Part demonstrates, this emotional taxonomy plays a major role in denying the stress a legal response. However, this Part also exposes a less prevalent judicial approach that responds to the problem of stress and is willing to offer relief to distressed parties. That such “stress-sensitive” approach exists is promising, yet these cases offer no analysis to counter the prevailing approach that disregards stress. The result is a confusing and inconsistent treatment of the problem of consent produced under severe stress. What is missing is an account of the problem of stress and how and to what extent it impairs consent.

In response to such need, Part II turns to non-legal disciplines. It synthesizes data regarding stress gathered from biology, sociology, neurosciences and psychology. In all these fields, scholars have engaged in a sustained inquiry into of what turns out to be one of the greatest threats to human health and wellness. The knowledge that has been accumulated, which illuminates the meaning, sources, symptoms and outcomes of stress, has much to offer to legal actors. This synthesis also suggests how those informative tools might be used to evaluate stress arguments in contracts cases. In short, this Part aims to highlight the magnitude of the problem, to counter the conventional legal argument that reduces stress to a subjective feeling, and to share possible standards that might be applied to the legal analysis of stress.

Part III integrates the knowledge explored in Part II into the legal analysis of distressed consent. As a starting point, it suggests a new perspective that focuses more on the stressed party and the quality of her consent, and
less on the behavior of the non-stressed party. This part argues further that the doctrinal demand that a distressed party demonstrate lack of reasonable alternatives to consent must be revised to reflect the impact of stress on a decision-maker’s ability to recognize and assess available alternatives. Finally, this Part proposes a four-element framework for articulating and evaluating stress arguments, offering courts and litigants the analytic tools to address the problem of consent under stress in a disciplined fashion.

In conclusion, the Article does not advocate releasing all parties under stress from the consequences of their consent. Such a move would be too damaging to people’s trust in a much-needed system of contract. It does suggest, however, that courts recognize the meaning of stress, give careful attention to stress arguments, and award relief if the ability to consent was substantially distorted by severe and proven stress. Without this change the predominant judicial approach will continue to permit and even reward exploitation of distress.

This Article offers two contributions: practical and theoretical. For practitioners, it explicates the current legal treatment of the problem of consenting under stress, proposing new ways to articulate stress arguments so they are less likely to be dismissed without consideration. For judges, it proposes novel tools to assess the credibility and weight of such stress arguments. For theorists interested in contract law, and in legal issues of consent more generally, the Article offers a fresh set of lenses through which the ideas of consent and fault, as well as their interaction, can be reexamined.

I. THE INCONSISTENT ANALYSIS OF STRESS ARGUMENTS

A. The Dominant Approach: No Relief

Most courts do not view stress that leads a person to accept an injurious contract, as a sufficient reason for relief from that contract. Parties arguing that their consent resulted from stress rather than free choice face two obstacles that arise from the duress doctrine. The leading obstacle is the doctrine’s fault requirement, which conditions relief on the wrongful behavior of the other party. This requirement results in a rejection of all arguments based on extrinsic stress that was not caused by the other party. The other obstacle is that relief is awarded only if the complaining party had no reasonable alternative to assent to the contract. Courts often point to alternatives that are unlikely to be available to the distressed parties; and they disregard the limitations that arise from their condition.

1. The Fault Requirement

Time and time again, courts have emphasized that to successfully use the defense of duress, the party seeking invalidation of a contract must con-
vince the court that her dire straits were caused by the other party. Consequently, most courts focus not on the stressed party but rather on the other party. They insist that culpability, fault, wrongfulness and coercion, in high doses, are necessary for the invalidation of a contract. Such fault-based approach leads to a systematic refusal to help those severely disrupted and worn off by stress. Pressure or desperation not produced by the other party’s wrongful behavior have been dismissed as irrelevant, and as inadequate to meet the legal tests of duress. This approach prevails even if the party demanding enforcement knew about the vulnerability of the distressed party and benefited from it.

To grasp how the fault requirement leads to the dismissal of stress-based arguments consider, for example, a recent sixth circuit decision. Mary Ann Gascho worked for thirty-five years as a nurse at a hospital until she lost her job. At the time she lost her job, she signed a separation agreement in which she waived all her claims against her employer. She later sued the hospital claiming sexual harassment under Title VII; she argued that despite the release, her allegations should be discussed entertained because her consent was a product of duress. For many years, Mary Ann was married to the president and CEO of the hospital, Dwight Gascho, with whom she had three children. After many years of marriage, Mary Ann became aware that her husband was having an affair with the vice president of the hospital. During that time, her husband abused her; one night, he raped her, leaving her with a split lip. Later, when Mary Ann confronted her husband’s mistress at the hospital, things became publically violent. Mr. Gascho, who admitted his infidelity, “grabbed her around the shoulders and dragged her into his office, causing bruises on her back and scratches on her back, arms and wrists.” Next, in his capacity as the hospital’s CEO, he fired her. At that point, the hospital’s Human Resources Director converted the discharge to a three-day suspension followed by a “mental health leave.” While on leave, the hospital’s officials visited Mary Ann and presented her with the separation agreement, which she eventually signed. That she was shaken, intimidated, and depressed by the entire crisis and its life-changing consequences was known to the hospital’s officials. However,

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5 Gascho, appeal, supra note 3, at 979-80. In another event reported in the case, he kicked her in bed, blaming her for “snoring like a cow.” Gascho, appeal, id. at 979.
6 Id. at 980.
7 Id. at 980.
8 According to the district court (but not mentioned by the appellate court) one of them “testified that he knew that [Mary Ann] was under a great deal of stress at the time.” He also testified that “[she] was nervous and distraught and that [she] was crying” adding that “[she]
despite offering a detailed description of Mary Ann’s distress, the court refused to award her relief.

The appellate court explained that its refusal to award relief, notwithstanding the extreme conditions, was due to the hospital’s lack of fault. Mary Ann’s distress had another cause: it was mainly the fault of her husband. Accordingly, Mary Ann’s condition, regardless of its severity, was insufficient to undermine the validity of her consent. Her witnessed physical injuries, her abuse by her husband, her undisputed “great deal of stress”, her recognized “mental anguish at her husband’s betrayal”; her documented fear of her husband’s ongoing threats; her noticeable loss of weight; her financial and professional anxiety; her ongoing crying; and the acknowledged fact that at the time of signing she was seeing a therapist and taking both antidepressants and prescribed sleeping aids, all these facts taken together were not enough to justify relief. Even a professional diagnosis, made only one day after the contract’s execution that confirmed Mary Ann’s “major depression” and “limited coping skills,” did not help. The fault requirement worked to block the stress argument even when no one doubted the stress or its severity.

A leading case for the proposition that the defense duress necessitates fault is Judge Posner’s Selmer v. Blakeslee-Midwest Co. In that case, a contractor refused to fully compensate a subcontractor, instead, he offered to settle with the subcontractor for less than the agreed upon amount. The subcontractor accepted and later sued for the difference, arguing that his consent emerged from a desperate financial condition that made him esp-

9 Note that in deciding so the court peculiarly ignored the evident connection between the hospital and its chief executive, Mary Ann’s boss and husband. See Gascho, appeal, supra note 3, 984 (“The hospital played no role in the husband's physical misconduct, and of course had no reason to know about the incidents at home.”).
10 Gascho, trial, supra note 4, at 2.
11 Gascho, appeal, supra note 3, at 984.
12 Gascho, trial, supra note 4, at 2.
13 Gascho, appeal, supra note 3, at 980.
14 According to the district court’s decision Mary Ann’s husband threatened her many times throughout the period preceding the agreement. He threatened, for example, that she “could not walk through the hospital without an escort” and that he will “destroy her life.” See Gascho, trial, supra note 4, at 2-3. The record also mentions that Mary Ann was “intimidated by Gascho and fearful of him” (id. at 3).
15 Gascho, trial, supra note 4, at 2.
16 Gascho, appeal, supra note 3, at 980.
17 Gascho, trial, supra note 4, at 2.
18 Gascho, appeal, supra note 3, at 980.
19 Gascho, trial, supra note 4, at 3.
20 Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924 (7th Cir. 1983).
cially vulnerable to the contractors’ pressure. In what has since become the most familiar phrasing of the duress doctrine, Judge Posner emphasized that fault of the defendant is required:

The mere stress of business conditions will not constitute duress where the defendant was not responsible for the conditions. 21

But why isn’t the stress enough? In Selmer, as in Gascho, the court acknowledged that such stress existed and influenced the assent if the party seeking relief. Judge Posner recognized the dire financial state of the subcontractor, 22 but explained that it did not matter because the other party, the contractor, “[could not] be held responsible for whatever it was that made [the subcontractor] so necessitous.” 23 What makes Selmer so significant is not simply that it establishes a fault requirement: Selmer also explains why the stress of one party does not alone justify relief. Rationalizing the logic of the duress defense, Judge Posner writes:

…the promise is unenforceable... not, as so often stated, because such a promise is involuntary,... The fundamental issue in a duress case is therefore not the victim's state of mind but whether the statement that induced the promise is the kind of offer to deal that we want to discourage, and hence that we call a “threat”. 24

In other words, to Judge Posner, 25 and to the many courts that follow his approach, the “state of mind” of the person under stress is never enough in and of itself. A contract might be “involuntary” and still be enforced—exactly as shown by Gascho and many other cases. 26 This part of the Selmer

21 Selmer, id. at 928, (quoting Johnson, Drake & Piper, Inc. v. United States, 209 Ct. Cl. 313, 531 F.2d 1037, 1042 (1976)). See also FDIC v. Linn, 671 F. Supp. 547, 560 (N.D. Ill. 1987) (“Defendants cannot blame [plaintiffs] for the pressures caused by defendants' own business decisions and by general economic conditions”).

22 Selmer, supra note 20, at 926 (“When the job was completed, Selmer demanded payment of $120,000. Blakeslee-Midwest offered $67,000 and refused to budge from this offer. Selmer, because it was in desperate financial straits, accepted the offer.”) (emphasis added). It is not clear from the case what made the subcontractor so desperate. See id. at 929.

23 Selmer, id. at 929.

24 Selmer, id. at 926-7 (emphasis added, citation omitted).

25 Interestingly, Judge Posner has been described as a judge that “has never written an opinion in which he found duress available to a litigant.” See Douglas G. Baird, The Young Astronomers, 74 U. Chi. L. Rev. 1641, 1651 (2007).

26 See, e.g., Lannan v. Reno, 1998 U.S. App. LEXIS 3292, 4-5 (7th Cir. 1998) (“While Lannan may have felt that the financial, personal, and medical stress in her life necessitated the acceptance of the defendant's offer of settlement, there is no evidence that the defendant exploited her, oppressed her, took undue advantage of her financial or personal problems, or otherwise wrongfully pressured her into signing the settlement agreement”); DCR Fund I, LLC v. TS Family Ltd. P'ship, 2008 U.S. App. LEXIS 1574, 9-12 (10th Cir. 2008) (stress
decision stands in the way of recognizing the problem of consent impaired by stress.

Further, not only is fault required in this narrow definition of duress, a higher degree of fault is now required. In Gascho, recall the argument that the hospital was not responsible for Mary Ann’s condition. Now consider the fact that the hospital, as an employer of both Mary Ann and her husband, had let its CEO and president drag an employee along the hall, causing her visible bruises and much humiliation, without taking any measures against its harassing senior executive. Even accepting the problematic argument that the hospital is not responsible for the “personal” behavior of its own president and CEO, isn’t it clear that the hospital was at least partially responsible for the turmoil that eventually led Mary Ann to resign and sign a release form?

The Gascho decision suggests that a stress argument may fail not only where stress is caused solely by extrinsic circumstances but also in “mixed” cases, where the stress results from a combination of some faulty behavior of the unstressed party and other extrinsic events. Indeed, as other cases further clarify, in some courts stress cannot be a ground for relief unless the other party was the dominant cause of it. Consequently, the problem of stress is marginalized: even severe stress of one party combined with some fault of the other is not sufficient.

1. The Reasonable Alternative Barrier

The distraught condition of the party consenting under stress is further marginalized by an insensitive application of the reasonable alternative test. According to this test a contract cannot be invalidated if the party seeking coming from wife’s illness and financial pressure is not enough “because it was not caused by any actions” of the other party).

27 See, e.g. Bank of Am. v. First Mut. Bancorp of Ill., Inc., 2010 U.S. Dist. LEXIS 65557, 32-33 (N.D. Ill. 2010). Like in Gascho, the party seeking relief in this case was arguing that its consent to demanding loan terms was a product of severe pressure and desperate circumstances. Again, the fault requirement led to a rejection of the request for relief. Yet, unlike in Gascho, the court did not ignore the possible contribution of the party seeking enforcement (Bank of America) to the poor condition of the party seeking relief (the borrowers). To the contrary, the court explicitly acknowledged at least some degree of misbehavior on the part of the bank, which kept lending the borrowers money, dangerously increasing their indebtedness, without disclosing to the borrowers the crucial fact, known to the bank, that their business partners were defrauding them in a manner that would eventually ruin them financially. However, the recognized misbehavior of the bank was determined to be insufficient to justify relief. Engaging in an evaluation of the level of fault on the part of the bank and weighing it against the fault of others, the court seems to conclude that, since the bank’s fault was not the only or at least the dominant reason for the borrowers’ demise, their argument fails. The court relied on the Selmer case to make this point, citing the latter case as “rejecting economic duress defense where one party may have contributed to, but did not proximately cause, the other’s financial vulnerability”. Id. at 33.
relief had a reasonable alternative other than agreeing to it. The logic of the test is that when a reasonable alternative exists, the decision to consent represents a meaningful choice and therefore should be enforced. However, when distressed parties argue that their stress had left them no choice many courts respond unsympathetically. They tend to point out that while the stress may have caused a feeling of compulsion, in reality other alternatives were available and therefore there is no justification for relief. For example, consider how the court applied the reasonable alternative test in Gascho. There, Mary Ann argued that given her exhaustion, intimidation, financial anxiety and depression, she had no choice but to consent to the hospital’s settlement offer. In response, the court dismissed her state of mind—even though evidence other than her testimony supported her high level of stress—and reclassified her “no-choice” as merely her “belief.” The court subsequently rejected that “belief” by contrasting it with what seemed to the court to be viable alternatives. Labeling the stress-based argument a “belief” or a “feeling” immediately removes it from the realm of objectivity, a requirement under the reasonable alternative test. The gap between stress arguments and the objective standard is further emphasized by the many courts who describe stress and stress arguments not simply as a feeling, but as a “subjective” feeling. Moreover, in some cases, the incompatibility is further highlighted by adopting the rhetoric of “subjective feeling” and then juxtaposing it to a description of the test that uses the term “objective”. For example, in Satter v. Wash. State Dep’t of Ecology the court maintained: “[w]hen Satter states that she suffered anxiety, depression, and an inability to sleep or be alone, she is speaking about things she subjectively felt and

28 Gascho, appeal, supra note 3, at 983 (“Gascho's belief ‘that [she] had no choice’ in signing the agreement, in view of the economic benefits offered and the risk of economic hardship if she declined the offer, does not by itself state a claim...”) (emphasis added). See also Cobb v. Potter, 2006 U.S. Dist. LEXIS 63118 (W.D.N.C., 2006) (“Plaintiff contends that she was under duress and felt as if she had no choice but to sign the waiver...” but “[p]laintiff was free to not sign the Pre-Arbitration Settlement Agreement.”).

29 See, e.g., Porter v. Chicago Bd. of Educ., 981 F. Supp. 1129, 1132 (N.D. Ill. 1997) (“Plaintiff's generalized expression of subjective feeling is fatally conclusory and wholly unsupported by specific factual averments to support a claim of duress.”). Reducing the argument to a “subjective feeling” is far from being an incidental choice of words. Rather, as a recent study shows, it is the characteristic method in which courts refuse to find duress in the reality of settlements achieved under judicial supervision. See Nancy A. Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalism?, 6 HARV. NEGOTIATION L. REV. 1, 76 (2011). See also Federal Deposit Ins. Co. v. Ramsey, 612 F. Supp. 326, 328-9 (E.D. Tenn. 1985) (“the defendant's subjective belief that he was under pressure to purchase stock was not sufficient to constitute economic duress without more.”); Yok Hing Law v. Corral, A120738, 2010 WL 528478, fn. 3 (Cal. Ct. App. 2010) (“Plaintiff...does not cite to any authority for the proposition that a subjective feeling of intimidation is sufficient to void an otherwise valid settlement agreement.”).
experienced”. The court then added that the legal “objective standard does not take into account the things Satter was subjectively feeling or experiencing emotionally.”

The conflict between the stress argument and the chosen standard is also reflected by the types of alternatives that courts consider as “reasonable”. Courts frequently point to options that require substantial agency and energy; significant amount of money; well-developed resilience skills and, perhaps most importantly, a strong drive to fight rather than to assent. The leading alternative that courts mention in this context is resisting the pressure to consent through litigation. Revealingly, they refer to the litigation alternative, in dozens of cases, as the need to boldly “stand pat and fight”. However, such expectation ignores the limited capabilities of distressed people at the time of consenting. For parties overborne by stress, initiating, funding and managing prolonged legal battles, often against people who were deeply involved in creating their condition, seems like an impossible mission.

Applying the objective/subjective dichotomy to this context, while marking the duress test as “objective” and the stress argument as “subjective” is, therefore, far from a neutral stance. It is also important to note the cumulative character of these doctrinal obstacles: since many courts consider duress as requiring both fault of one party and no reasonable alternatives by the other, and since those courts also narrowly construe those elements, they often work in concert to deny any relief for those consenting under stress.

B. Some Stress-Sensitive Cases

Despite the leading disregard of stress some courts take stress arguments into account and award relief to distressed parties. In those occasional cases a fundamental, albeit somewhat old, tenet of contract law is coming back to take center stage: meaningful consent. This tenet obscures the ma-

31 Id.
32 See, e.g., in Molsness v. City of Walla Walla, 84 Wn. App. 393, 399 (Wash. Ct. App. 1996) (“Mr. Molsness’ resignation is not rendered involuntary simply because he submitted it to avoid termination for cause, nor is it relevant that he subjectively believed he had no choice but to resign. Objectively, he did have a choice…to ‘stand pat and fight’. ”). A textual search for the phrase “stand pat and fight” has yielded at least 52 cases in which the phrase was used to describe a reasonable alternative.
33 See Gascho, appeal, supra note 3, at 984 (suggesting that Mary Ann Gascho, in her proved difficult condition, had several reasonable alternatives, all based on taking legal actions against her husband, including filing criminal charges against him, suing him in tort or obtaining a restraining order against him).
34 Those arguments will be further developed in Part III.
The majority's focus on fault and reasonable alternatives. While judges are naming that traditional concern differently—from will to choice to voluntariness—they are all showing some level of care about the impaired state of mind created by stress.

1. Taking Stress into Account

From time to time judges refuse to ignore circumstances that are evidently stressful. One example of judicial sensitivity to stress as impairing contractual consent is *Holler v. Holler*. That case follows a pattern in marital dissolution cases, in which brides-to-be were pressured by their future husbands to consent to unfair prenuptial agreements that deprived them of many of their marital rights. Generally, courts have dismissed duress arguments, made years after by the wives who had to face the results of their pressured, pre-wedding consent. They have refused to recognize the stress suffered by brides-to-be who faced the “choice” between signing an unfair prenuptial or a cancellation of their wedding. Even when the “choice” was presented to the bride just a few days before the wedding, courts repeatedly opined that cancelling the wedding was a reasonable alternative to consent.36 In *Holler*, however, the court found the stressful condition of the bride both relevant and significant.

Natalia came to the United States to marry William Holler after the two of them met during his visit to the Ukraine. She knew very little English and had no income of her own, which made her fully dependent on William’s support. Before they got married, Natalia became pregnant, and the visa enabling her legal stay in the States was about to expire. Under these circumstances, she wanted and needed to marry William to stay in the county, but he required her to sign an English written prenuptial agreement. He emphasized that “she must sign the agreement if she wanted to be married prior to the expiration of her visa.”37 Despite her many efforts to translate the agreement to Russian or read it in English, Natalia was unable completely to understand the agreement.38 Nor could she afford to hire a lawyer who would do that on her behalf.39 Eventually, only eight days before the expira-
tion of her visa, Natalia signed the agreement and married William five days later. When the couple separated years later, William argued that under the prenuptial agreement Natalia gave up her rights to equitable distribution of their marital property and for alimony. Natalia, on the other hand, asked for relief. Affirming a former decision of the family court, the court of appeal ruled for Natalia, taking into account the rare accumulation of circumstances that rendered her consent meaningless. 40

In another case, which stands in direct opposition to the Gascho decision, a female employee named Melinda Meyers prevailed where Mary Ann Gascho failed. 41 Male senior coworkers had sexually harassed Melinda, and, after she made efforts to resist and complain, her employer convinced her to resign and sign a release agreement. 42 At the time of consent, she was completely distraught: “she was in a ‘confused and upset’ psychological state,” 43 “extremely frightened and intimidated,” 44 emotional and unable to “deal with anything,” 45 “out of control” and broken down. 46 The court rejected her employer’s motion for summary judgment, explaining that after taking Melinda’s “mental state” into account, 47 she could not be legally seen as “knowingly and voluntarily” agreeing to the release she signed. 48

Cases such as Holler and Meyers differ greatly from the many cases that disregard the problem of stress. First, they seem to focus less on the unstressed party and more on the party who consented under pressure. Then, using varying terminologies, they tend to emphasize the principal that a valid contract cannot be based on professed consent not representing a meaningful choice. For the most part, the difference between these two judicial outlooks may be traced to two opposite views of duress. While the conventional approach underscores that duress is not about the state of mind

40 The courts’ reasoning will be discussed in the following section.
42 The question of how much explicit pressure to resign was put on Melinda was left factually undecided by the court. According to Melinda’s affidavit she was told that if she would not resign “she was going to be fired and would end up with no job and no money.” Meyers, id. at 8.
43 Meyers, id. at 11.
44 Meyers, at 12.
45 Meyers, id. at 12.
46 Meyers, id. at 12.
47 Meyers, id. at 10.
48 Meyers, id. at 17. It is worth noting that in the employment context the contractual doctrines discussed here are often supplemented by more protective doctrines that make it somewhat easier for stress-sensitive courts to take stress into account. Courts have been using variations of the “totality of circumstances” test to into account the condition of the consenting employee. Another doctrine that might be helpful for employees is the constructive discharge doctrine which asks: “Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?” See Pennsylvania State Police v. Suders, 542 U.S. 129, 130, (2004).
of the party seeking relief, the stress-sensitive cases portray duress first and foremost as an issue of inappropriate state of mind. The Holler court, for example, emphasizes that notion by adopting the following definition:

Duress is a *condition of mind* produced by improper external pressure or 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*.

Similarly, in Meyers, the court referred directly to stress and characterized duress as “the taking of undue advantage of the business or financial *stress* or extreme necessities or weaknesses of another.” Other stress-sensitive cases have highlighted the concern for the quality of consent of the stressed party using a variety of phrases. They concluded, for example, that stressful conditions may “wholly incapacitate a person from exercising his judgment,” may render the consent “involuntary,” and may result in no “meaningful choice.” Such courts have also concluded that more inquiry should be made into the existence of “meaningful ‘consent.’” These different expressions echo the repeated emphasis in Holler of the freedom of will as a leading tenet of both contract law and the doctrine of duress.

2. The Lack of Counter-Theory

How do those stress-sensitive courts reconcile their approach with the fault requirement that prevents the accommodation of stress in the majority

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49 Selmer, *supra* note 20, at 927 (“The fundamental issue in a duress case is therefore not the victim’s state of mind…”).


51 Meyers, *supra* note 41, at 6 (emphasis added).

52 Odorizzi v. Bloomfield School District, 54 Cal. Rptr. 533, 540 (Cal. Ct. App. 1966) (“It is possible that exhaustion and emotional turmoil may wholly incapacitate a person from exercising his judgment.”).

53 *See In re Davis*, 169 B.R. 285 (E.D.N.Y. 1994). *See also* Emery-Watson v. Mantakounis, 412 B.R. 670, 675 (Bankr. D. Del. 2009) (“The Court finds that the Debtor had *an absence of meaningful choices* with regard to saving the Property from foreclosure at the time they contracted with the Defendant for its ‘sale.’”).

54 *Williams v. First Gov’t Mortg. & Investors Corp.*, 225 F.3d 738, 749 (D.C. Cir. 2000) (doubting the meaningfulness of consent of Mr. Williams who had “only a sixth-grade education from the segregated schools of Savannah, Georgia” and who in order to escape foreclosure gave his consent to a refinancing agreement that left him with no means to get food (and other necessities)).

55 Holler, *supra* note 35, at 266-7 (stating that “[f]reedom of will is essential to the validity of an agreement” and “[t]he central question with respect to whether a contract was executed under duress is whether, considering all the surrounding circumstances, one party to the transaction was prevented from exercising his free will…”).
of courts? Some of them avoid the doctrine of duress altogether and utilize alternative legal doctrines to offer people consenting under severe stress relief. Specifically, those courts mainly use the proximate doctrines of undue influence\(^56\) and unconscionability.\(^57\) At other times they avoid duress by turning to other contractual doctrines,\(^58\) or, when available, to special statutes.\(^59\) Other stress-sensitive courts, instead of avoiding duress, attempt to harmonize the conventional interpretation of the doctrine with their own sensitivity to stress. The result, however, may be more confusing than harmonious. In fact, in one case the court described the duress doctrine as containing both the idea that stress is not enough unless caused by the other party, and the opposite idea that great stress or extreme weakness might be enough, even without the causal element.\(^60\) In a similar manner, the Holler court highlighted the significance of free will, together with the requirement of fault, as if they can naturally co-exist.\(^61\) Only that court’s actual applica-

\(^{56}\) For using undue influence to cope with a stress problem instead of using duress see, e.g., Odorizzi, supra note 52, at 130 (“Undue influence, in the sense we are concerned with here, is a shorthand legal phrase used to describe persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment. The hallmark of such persuasion is high pressure, a pressure which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion.”, emphasis added). In other times, the doctrines of duress and undue influence were used side by side. See, e.g., Johnson v. IBM 891 F. Supp. 522 (1995) (discussing duress and undue influence arguments and rejecting them both).

\(^{57}\) For using unconscionability to cope with a stress problem see, e.g., Williams, supra note 54. Mr. Williams found himself agreeing to an impossible refinancing agreement in fear of losing his home in a foreclosure process. Since the other party (a mortgage company) did not cause Mr. Williams’ financial problems the conventional application of the duress doctrine probably could not had helped him. More generally, what makes unconscionability a possible home to distraught parties is its concern with the lack of “meaningful choice”. See, Holler, supra note 35, at 269 (“Unconscionability is the absence of meaningful choice on the part of one party…”).

\(^{58}\) Other doctrines that have been used are good faith and public policy. For good faith see e.g. Williams v. B & K Medical Systems, Inc., 732 N.E.2d 300 (Mass. App. Ct. 2000). For public policy see, e.g. Motley v. Motley, 120 S.E.2d 422 (N.C. 1961).

\(^{59}\) See, e.g., Blistein v. St. John’s College, 860 F. Supp. 256 (D. Md. 1994) (job loss case discussing relief from waiver since employer did not follow the requirements of Older Worker’s Benefit Protection Act).

\(^{60}\) See Rehfeld v. United Parcel Serv., 08 CV 1266, 2008 WL 4865987, 5(N.D. Ill. 2008) (Stating, with direct reference to Posner’s decision in Selner, that “[w]ith respect to the party coerced into signing an agreement, difficult financial circumstances or a weak bargaining position are insufficient to establish duress, provided that the other party was not responsible for creating those conditions.”; and then adding “[r]ather, to claim duress, a party must be under great stress or in a state of extreme necessity or weakness.” (emphasis added, citations omitted).

\(^{61}\) See, e.g. Holler, supra note 35, at 266-67.
tion of the doctrine reveals the stress-sensitive departure from the fault requirement.\textsuperscript{62}

One court has gone so far as to use the duress doctrine without reference to any fault requirement. In \textit{In re: Accredited Home Lender Holding Co.},\textsuperscript{63} the court used the duress doctrine to find for a stressed party without alluding to any fault requirement. Similar to some of the cases already discussed,\textsuperscript{64} the context was a loan agreement signed by a stressed borrower. In this case the borrower gave his consent to a problematic agreement under the pressure of anticipated home foreclosure and later asked for relief. In response, the lenders argued that the borrower could not use the duress defense because he failed meet the two main tests of the doctrine: fault and reasonable alternative.\textsuperscript{65} First, in terms of fault, the lenders maintained that according to the duress doctrine, circumstances not caused by them could not be part of the coercion analysis.\textsuperscript{66} Second, in terms of reasonable alternatives, the lenders contended that the borrower had an alternative to consenting: “he could have defended the foreclosure action.”\textsuperscript{67} This structure of argument would have certainly worked under the conventional interpretation of the duress doctrine. However, the court decided to award the borrower relief under the duress defense; it did so by focusing on the borrower’s condition. The court noted that at the time of consenting, the borrower was facing a loss of his home, was not represented by a lawyer and “was under the care of a physician for post-traumatic stress syndrome.”\textsuperscript{68} Significantly, the court disregarded the lenders’ no-fault arguments.

Whatever the analytic framework chosen by the few stress-sensitive courts has been, the framework has never directly and explicitly recognized stress alone as a ground for relief. These stress-sensitive cases are so few and use such different methods in responding to the stress argument that general rules are difficult to synthesize and destined to be imprecise. However, in each of the stress-sensitive decisions, the

\begin{itemize}
  \item \textsuperscript{62} In \textit{Holler} the court did take into account elements of the wife’s condition that could not have been considered as caused by her husband, such as her limited proficiency in English and her fear of having to leave the US due to the expiration of her visa.
  \item \textsuperscript{63} \textit{In re Accredited Home Lender Holding Co.}, 441 B.R. 443 (2011).
  \item \textsuperscript{64} \textit{Recall Bank of America, supra note 27, and Williams, supra note 54}.
  \item \textsuperscript{65} \textit{Accredited Home, supra note 63, at 447 (“The Debtors argue that the circumstances giving rise to the Forbearance Agreement were not coercive. They assert that they acted within their legal rights as set forth in the Mortgage by commencing the foreclosure action. They contend that Mr. Smalls had an alternative to signing the Forbearance Agreement: he could have defended the foreclosure action.”}).
  \item \textsuperscript{66} \textit{Id.} at 447 (citing McLaughlin v. State Dept. of Natural Res., 526 So. 2d 934, 936 (Fla. Dist. Ct. App. 1988) as holding that to prove duress a party must show ‘(1) that one side involuntarily accepted the terms of another, (2) that circumstances permitted no other alternative, and (3) that said circumstances were the result of coercive acts of the opposite party.’”) (emphasis added).
  \item \textsuperscript{67} \textit{Id.}
  \item \textsuperscript{68} \textit{Id.}
\end{itemize}
court intuited two underlying principles, even if it did not emphasize them. First, stress can be a serious and demonstrable condition that might truly impair consent and as such, deserves judicial attention: this differs starkly from classifying stress as merely a subjective feeling. Second, consenting under stress justifies relief because it stands in conflict with the contractual ideals of volition, free agency and meaningful choice: this assumption counters the fault requirement. While the goal of this Part has been to analyze the legal confusion with regard to the problem of consenting under stress, the goal of the next two Parts is to argue the importance of those two Intuitions. Accordingly, the coming Part focuses on the first intuition and on the actual meaning of stress, suggesting scientific foundation to the serious concern of stress-sensitive courts.

II. UNDERSTANDING STRESS

A. The Study of Stress

Stress is not merely a subjective feeling. The reason so many disciplines are interested in researching stress is the growing awareness of its bitter consequences to individuals and their health and well-being, to families and their cohesion, to communities and their strength, and to society at large. Works in biomedicine, psychology, neuroscience, sociology and education all point—through diverse methods and different theories—to one conclusion: while some stress can be valuable or at least tolerable, prolonged, high levels of stress produce negative impact on human beings’ lives. This damaging aspect of stress—to physical health, to mental condition, to cognitive functioning, and to a combination thereof—has been motivating the study of stress, for several decades. Beyond concluding the

69 To clarify: smoothing out the differences between the cases or resolving a doctrinal incoherence is not a one of the goals of this Article.

70 Part III will engage with the second intuition regarding the importance of quality of consent.

71 There are numerous statistics of the impact of stress in the United States. See, e.g., Henry L. Thompson, The Stress Effect: Why Smart Leaders Make Dumb Decisions--And What to Do About It 112 (2010) (“in the United States, stress costs industry an estimated $300 billion a year… it is also linked to the six leading causes of death…: heart disease, cancer, lung ailments, accidents, cirrhosis of the liver, and suicide…more than 200 million people take medication related to controlling stress.”).

72 For a concise description of the development of the scientific study of stress see David C. Glass, Foreword, in THE HANDBOOK OF STRESS SCIENCE: BIOLOGY, PSYCHOLOGY AND STRESS, (Richard J. Constanda & Andrew Baum, eds., 2011) (Hereinafter: HANDBOOK OF STRESS). Many mention the seminal work of the Viennese endocrinologist Hans Selye and his 1956 book The Stress of Life as marking the beginning of the modern focus on the problem of stress as an identifiable subject. See, id. at xvii. See also http://www.stress.org/hans.htm?AIS=52dae20f60b5de40f5a06a09615ebf (“Stress has become such an ingrained part of our vocabulary and daily existence, that it is difficult to
stress is damaging, however, the study of stress is sprawling and at least one stress scholar has gone as far as to call this body of work “internally incommensurable.”73 At the same time, efforts to establish an interdisciplinary discourse of stress are flourishing,74 and scholars seem to share a belief in the inability to capture the phenomenon of stress under one leading discipline as it is never merely psychological, purely physical, or solely sociological.

The following synthesis of the study of stress is a pragmatic response to these challenges, a “useful synthesis”75 especially tailored for legal actors who wonder how legal analysis can take stress into account. As I have shown in Part I, the main resistance to arguments based on stress comes from the notion that stress is so personal and emotional that it cannot be assessed, proved, analyzed and incorporated into a legal discourse. Therefore, my goal is to offer an analysis of stress that explains its patterns, enabling practitioners to structure stress arguments and assisting courts to evaluate them. In creating a general framework, I found it most helpful to draw on the Stress Process model, which was created in the 1980s by sociologist Leonard Pearlin, and which inspired numerous works on stress.76 According to this model exposure to stressors that exceed one’s ability to cope with them creates the condition of stress, sometimes called distress or a stress response. Despite working under this sociological structure, my analysis includes other findings about stress, which come from disciplines that do not necessarily share a sociological outlook. For example, scientists interested in the impact of stress on the cardiovascular system may care less

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73 Hammond, id. at vii.
74 See, e.g., HANDBOOK OF STRESS, supra note 72.
75 Kathryn A. Abrams & Hila Keren, Who’s Afraid of Law and the Emotions, 94 MINN. L. REV. 1997, 2048 (2010) (defining “useful synthesis”: “A ‘useful synthesis’ will sort and arrange the nonlegal knowledge in a manner which responds to the context and legal questions at hand. This means that some important theories or data will be purposefully omitted, while other facts and theories may be emphasized beyond their relative weight outside of law.”).
about the causes of stress although those are at the core of the sociological approach. They may care more about the exact hormones released by the stressed-brain, data which in turn may be less significant to sociologists.

The legal perspective, however, necessitates attention to both causes and outcomes, which may be crucial to courts’ ability to evaluate the credibility of the stress argument and to decide what legal meaning should be assigned to it. Therefore, the following exploration of the study of stress is divided into two sections. The first is focused on stressors and suggests information relevant to assessing plausibility of stress arguments. The second concerns the outcomes of stress, offering tools to recognize known symptoms of stress that can further assist the plausibility evaluation. Finally, the second section explains the powerful impact of stress on behavior and decision making.

B. Common Stressor

Earthquake, financial crisis, death of a loved one, work overload, car accident, divorce, incapacitating illness, to name a few, are all negative experiences that can be highly challenging to humans’ well-being. Most people experiencing events or situations of these kinds are deeply affected by them, and thus those circumstances may be considered as “normatively stressful.” Conditions that typically cause stress are also known in the literature as “stressors”, i.e., the stimuli that cause stress.77 The evolution of the “stressor” terminology to connect dissimilar human experiences has been the principal accomplishment of the pioneering stress research and a chief facilitator of the study of stress.

Efforts to create a taxonomy of stressors followed. Scientists observed that stressors come in many shapes and forms. Some, like an injury, are “acute” and short-term, while others, such as unemployment, may be “chronic” and persist over a long period of time. Some are shared by many, like wars for example, while others, such as illness or bereavement, are more individually experienced. Many stressors are inescapable; take a hurricane for example, while others may involve some level of choice, such as pursuing a divorce. Despite those distinct categories, the study of stress has shown that very different stressors can cause very similar negative results, to the physical, mental and psychological well-being of people. It is this quality of stressors that has brought some researchers to declare that stressors are “objective,” emerging from verifiable characteristics of the environment and causing similar results. And indeed, while some stressors might affect people differently, certain stressors, such as the death of a

78 The term was coined by Selye and is used by most stress theorists.
loved one, are so noxious that almost every person affected experiences a similar stress. This observation, although quite elementary in the study of stress, appears quite significant to law. If bereavement, for example, is a stressor for nearly everyone, then a stress argument coming from a grieving person can be presumed to be fairly credible. Accordingly, cataloguing stressors that have a universal effect may render the prima facie stress argument plausible. The study of stress does just this: it has produced inventories of common stressors that originate in traumatic experiences (such as rape), life-changing events (such as divorce), and chronic conditions (such as poverty).

1. Traumatic Stressors

Following the Vietnam War the American Psychiatric Association (APA) officially added Posttraumatic Stress Disorder (PTSD) to its Diagnostic Manual of Mental Disorders (DSM). Setting standards for diagnosing the newly acknowledged disorder, the DSM defined the first criterion as an exposure to a "traumatic-stressor." The original purpose of this "stressor criterion" was to identify traumatic stressors that do not depend on the victim’s individual reaction to events, but rather on a clinical evaluation of what would have been stressful for an imagined "average" person. Importantly, creating a stressor criterion in the DSM has spurred various checklists of potential traumatic stressors. For example, the Life Events Check-

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81 Naomi Breslau & Ronald C. Kessler, The Stressor Criterion in DSM-IV Posttraumatic Stress Disorder: An Empirical Investigation, 50 BIOLOGICAL PSYCHIATRY 699 (2001). Although this initial “objective” approach was later supplemented by a subjective criterion, the diagnostic work still starts from a search for a traumatic event. See, AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 463-464 (4th ed., Text Revision, DSM-IV-TR, 2000) (“Traumatic events...include, but are not limited to, military combat, violent personal attack (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration, as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents or being diagnosed with a life-threatening illness.”).
82 For a compressive description of many of those measuring instruments see Suzan M. Orsillo, Measures for Acute Stress Disorder and Posttraumatic Stress Disorder, in PRACTITIONER’S GUIDE TO EMPIRICALLY BASED MEASURES OF ANXIETY (Martin M. Antony, Susan M. Orsillo, Lizabeth Roemer, eds., 2001). See also Naomi Breslau & Lonni R. Schultz, Trauma and Posttraumatic Stress Disorder in the Community, 55 ARCH GEN PSYCHIATRY (1998), available online at http://archpsyc.ama-assn.org/cgi/reprint/55/7/626, and Breslau & Kessler, supra note 81, at 700-1 (both using empirically a 19-item list that is based on the DSM’s stressor criterion)
list (LEC), is a 17-item list of events that is often used by psychiatrists applying the stressor criterion. The LEC’s stressors are as follows:

1. Natural disaster (for example, flood, hurricane, tornado, earthquake);
2. Fire or explosion;
3. Transportation accident (for example, car accident, boat accident, train wreck, plane crash);
4. Serious accident at work, home, or during recreational activity;
5. Exposure to toxic substance (for example, dangerous chemicals, radiation);
6. Physical assault (for example, being attacked, hit, slapped, kicked, beaten up);
7. Assault with a weapon (for example, being shot, stabbed, threatened with a knife, gun, bomb);
8. Sexual assault (rape, attempted rape, made to perform any type of sexual act through force or threat of harm);
9. Other unwanted or uncomfortable sexual experience;
10. Combat or exposure to a war-zone (in the military or as a civilian);
11. Captivity (for example, being kidnapped, abducted, held hostage, prisoner of war);
12. Life-threatening illness or injury;
13. Severe human suffering;
14. [Witnessing] sudden, violent death (for example, homicide; suicide);
15. Sudden, unexpected death of someone close to you;
16. Serious injury, harm, or death you caused to someone else;
17. Any other stressful event or experience

Inventories of traumatic stressors, such as the LEC, can serve as a professional and reliable resource to assist in the evaluation of stress arguments because they include stressors that have been professionally recognized as predicting a stress disorder. Compare, as a brief example, the stressors of Mary Ann Gascho, who was raped and beaten by her then-husband, with

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83 Although the LEC’s list may seem lengthy its importance to our topic—and more generally the importance of similar inventories of traumatic stressors—seems to justify its inclusion here.


the acknowledgment that sexual assaults (number 8 on the LEC inventory) and physical assaults (number 6 on the list), are traumatic stressors.

A possible addition to inventories such as the LEC are stressors that do not clearly meet the current threshold of the stressors criterion, but are still severe enough to raise arguments in support of their inclusion. PTSD’s theorists have argued, for example, that beyond the recognized traumatic events, room in the inventories should be made for the cumulative stress that occurs in cases such as repeated harassment at work or prolonged care for a terminally ill partner. 86 Although such recommendations are yet to be accepted, even stressors that potentially result in PTSD can be evaluated as normative and universal stressors in the context of stress arguments.

2. Life Events as Stressors

Stress theorists have shown widespread interest in the properties of events that make them stressful. Major life events, such as divorce or being fired, have been recognized as universally stressful. Throughout the second half of the 20th century researchers dedicated much effort to identifying those life events and to assessing their relative weight as stressors. Such evaluation of events was mainly based on the amount of readjustment individuals were required to do, the events’ desirability, the stressors’ foreseeability, and the individuals’ ability to control their occurrence. One pioneering tool of measurement was the Social Readjustment Rating Scale (SRRS). 87 The original SRRS listed 43 such events and rated them by assigning numbers (called “life-change units”)—ranging from 100 (death of spouse) to 11 (minor violations of the law)—to each of them.

Crucial to the legal discussion of consenting under stress is realizing that in the cases discussed earlier, the events that triggered the individuals’ stress arguments are ranked as significant stressors under the SRRS. For example: divorce is ranked second (out of 43) on the list and assigned 73 life-change units; marriage is ranked seventh and is assigned 50 units; being


“fired at work” is the eighth event on the list with 47 units; pregnancy is 12th (40 units); and “change in financial state” is 16th with 38 units.\textsuperscript{88} Such a checklist method is based on the idea that major changes in life can be measured in an objective manner.\textsuperscript{89} Moreover, central to the SRRS’s measurement of stress level is the idea that stressors accumulate. For example, if someone who is going through divorce also loses her job and subsequently suffers financial troubles due to the two events—similar to the facts of Gascho\textsuperscript{90}—the units should be summed up, to a total of 158 life-change units, to best capture the possible magnitude of their joint impact. Although aspects of the SRRS were criticized by some stress researchers,\textsuperscript{91} others relied on it and further refined it.\textsuperscript{92} Despite the lack of a universally agreed-upon list of stressors,\textsuperscript{93} the checklist methods of measuring stress are still “the dominant research procedure” used in \textit{thousands} of empirical studies of exposure to stressors.\textsuperscript{94}

The value of the flourishing study of stressful life events in general,\textsuperscript{95} and of the use of life event inventories in particular, to our topic seems straightforward. It offers a well-researched—and empirically tested—list of stressors, and a relatively practical way to evaluate the credibility of any given stress argument.

\textsuperscript{88} Holmes & Rahe, supra note 87.
\textsuperscript{89} Barbara Anderson, Elaine Wethington and Thomas Kamarck, \textit{Interview Assessment of Stressor Exposure, in} \textit{HANDBOOK OF STRESS}, supra note 72, at 566.
\textsuperscript{90} Gascho, appeal, supra note 3.
\textsuperscript{91} \textit{MEASURING STRESS, supra} note 87, at 5-6. \textit{See also} Jay R. Turner & Blair Wheaton, \textit{Checklist Measurement of Stressful Life Events, in MEASURING STRESS, supra} note 87, at 36-7.
\textsuperscript{93} Anderson et al., \textit{supra} note 89, at 566.
\textsuperscript{94} \textit{Id.} at 566 (explaining that checklists are used as either a stand-alone approach or combined with a follow-up interview and maintaining that their popularity “appears to lie in the intuitive appeal of the stress concept, the assumption that “more events are worse” and the efficiency and economy of the method.”). \textit{See also} Pearlin, \textit{supra} note 76, at 245 (defining life events inventories as an “inviting research tool.”).
\textsuperscript{95} Caroline Aldwin, \textit{Stress and Coping across the Lifespan, in} \textit{OXFORD HANDBOOK OF STRESS, HEALTH AND COPING}, 18 (Suzan Folkman ed., 2010) (“life events are most commonly studied”).
3. Chronic Stressors

In addition to short-term events, some enduring conditions produce high levels of stress. Stressors in this group are chronic, and they put humans under special demands that may lead not only to distress but also to an exhaustion of resources that—in a vicious circle—causes greater subsequent vulnerability to other stressors. As opposed to the life events discussed above, the challenge here results not so much from the need to adapt to changes. It stems from the ongoing requirement of coping with difficult unchanging realities, coming from poverty, continuous unemployment, persistent financial worries, marital troubles, disability, loneliness, among others. Chronic stressors are different from life events stressors in the way they start, persist and end. Specifically, they don’t necessarily begin at a discrete moment, but rather may exist as a “state” or develop insidiously as a problematic, continuing condition in the social environment. They often persist for a long time, with fluctuating intensity, sometimes cutting through different phases of life. And, unlike life events, they usually do not come to a defined end. In fact, while some chronic strains may gradually dissipate, others, such as living in a dangerous neighborhood or suffering from discrimination, may influence individuals from birth to death.

Due to all those characteristics of chronic stressors, the task of organizing them in inventories and measuring their impact is a challenging one. Yet as with life events, a universal aspect may be found in many of the chronic stressors. Most people will find stressful, for example, constantly lacking the money to pay the rent or mortgage, or facing frequent conflicts with their spouse or their boss. In an effort to define some standardization, stress theorists have found it useful to focus on chronic strains that typically arise within the contexts of “major social roles,” such as work, marriage and parenthood. Difficulties at work, problems with a spouse, and worries about kids are all significant chronic stressors, according to this understanding, because of the way people are invested—physically and psychologically—in their social roles. As a result, inventories of chronic stressors tend to focus on strains at work and within the family context.

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96 Stephen J. Lepore, Measurement of Chronic Stressors, in MEASURING STRESS, supra note 87, at 102-121.
98 See, e.g., Pearlin, supra note 76, at 245 (describing the problem and suggesting to focus on those chronic stressors that occur within roles); Lepore, supra note 96 (pointing to the problem and reviewing available measuring instruments).
99 See, e.g., Pearlin, supra note 76, at 245.
100 Examples at the work context include the Work Environment Scale, the Occupational Stress Inventory and the Job Content Questionnaire. Examples at the marital/familial context
Exploring patterns in inventories of chronic stressors appears valuable to the ability to assess the reasonability and credibility of stress arguments. Applying the social role idea, many people tend to share high levels of stress that arise from some of the following: (1) *overload* in fulfilling their role (be it at work or at home),\(^\text{101}\) (2) *interpersonal conflicts* within their role (such as with their supervisor or their spouse),\(^\text{102}\) (3) *conflicts between roles* (working parents are the prime example),\(^\text{103}\) (4) *unwanted roles* (such as in the case of homemakers who would rather have outside employment),\(^\text{104}\) (5) *unachievable roles* (inability to get a job, to find a spouse or to have kids as leading examples),\(^\text{105}\) and, (6) *loss of role* (with examples that range from having to retire from work to coping with empty nest after the children have left the home).\(^\text{106}\) To this role-oriented inventory of chronic stressors, other scholars have added more “general” strains, which cut across roles, such as residing in a dangerous area, living in an air polluted environment, or suffering from a severe illness. Stress theorist Blair Wheaton, for example, has created a 60-item inventory that includes both role-related and more general chronic stressors. That inventory can be quite useful to legal practitioners, judges and legal theorists.\(^\text{107}\)

An instructive case already mentioned in Part I can be that of Mr. Williams who lived in poverty his entire life, suffered from never-ending financial troubles and found himself unable to feed his children or pay the bills when he agreed to a problematic loan agreement.\(^\text{108}\) Realizing that Wheaton’s accepted measuring instrument includes potential chronic stressors such as “you don’t have the money to buy the things that you or your kids need” as well as “your rent or mortgage is too much”;\(^\text{109}\) could have been helpful in assessing Mr. Williams’ stress argument regarding his condition and his inability to give meaningful consent.

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\(^{101}\) Pearlin, *supra* note 76, at 245.

\(^{102}\) Id.

\(^{103}\) Id. (naming this category “role captivity”).

\(^{104}\) Wheaton, *supra* note 97, at 56-7 (underscoring the importance of not having a major social role without including it in the role-oriented stressors). I believe that emphasizing the frustration of not being able to achieve a desired role better explains the connection to stress.

\(^{105}\) Pearlin, *supra* note 76, at 245 (naming this category “role reconstructing”). I believe that emphasizing the loss in the changing role better explains the connection to stress.

\(^{106}\) Wheaton, *supra* note 97, at 69-70 (appendix A)

\(^{107}\) See *supra* notes 54 and 57.

\(^{108}\) Wheaton, *supra* note 97, at 69 (appendix A)
C. Individual and Social Differences Explained

Thus far we have portrayed a relatively “objective” picture of stressors without differentiating between individuals. However, even major stressors are not always consistent in the effects that they produce. What is it that changes the influence that similar stressors have over individuals? For the most part, such differences can be explained and analyzed. Contrary to the leading legal view, they do not attest that stress is a subjective phenomenon that is random in its impact on individuals.

1. Individual Differences

Richard Lazarus’s celebrated “appraisal theory of stress”, explains differences in individuals’ response to stressors, and can offer salient guidance. As distinct from the above effort to universalize stressors, which is sometimes termed “the environmental approach,” the appraisal theory emphasizes that for most “stressors” what is highly stressful for some may not be as stressful for others. The differences between individuals are explained by their personal appraisal of the stressfulness of a given situation. Thus, in their seminal 1984 book Stress Appraisal and Coping, Lazarus and Folkman define stress not as an event but as “a particular relationship between the person and the environment that is appraised by the person as taxing or exceeding his or her resources and endangering his or her well-being.”

The personal appraisal process is not, however, as capricious, erratic or unreliable as envisioned by some legal actors. It is a rich cognitive categorization practice that Lazarus and other scholars have carefully delineated in years of research. Their study focuses on two separate evaluations: A “primary appraisal” of the significance of the stressor for the concrete individual; followed by a “secondary appraisal” of the resources available to that individual to cope with what is assessed to be stressful. They show that those “personal” appraisals follow recognizable patterns that can be explained and that allow for intelligent investigation and analysis.

110 LAZARUS & FOLKMAN, supra note 77.
111 See supra note 87.
112 LAZARUS & FOLKMAN, supra note 77, at 19.
113 Id. at 19.
114 In 1984 Lazarus and Folkman decided to continue their use of the primary/secondary terminology despite their own dissatisfaction with it. See id., at 31 (explaining the authors’ doubts). Therefore, I use different terminology: “Appraisal of Significance” for their “Primary Appraisal” and “Appraisal of Resources” for their “Secondary Appraisal”.


a. Appraisal of Significance

Appraising the significance of stressors depends on both personal and situational factors. On the personal level the appraisal depends on the relative importance of the stressful matter in one’s life and such importance depends on a concrete set of commitments and beliefs. As conceptualized by Lazarus and Folkman, “[t]he deeper a person’s commitment, the greater the potential threat or harm.”\textsuperscript{115} Accordingly, perceiving a matter as salient to their well-being tends to make people particularly vulnerable to stress related to that matter.\textsuperscript{116} This principal of relative significance can be very constructive in evaluating stress arguments in legal cases. For example, a person losing his home due to foreclosure,\textsuperscript{117} or a job of thirty five years\textsuperscript{118} are probably experiencing his or her losses as larger than an real estate investment that has only monetary value or the loss of a temporary job. Fortunately, the concrete significance of a stressor in one’s life does not require mindreading skills but only willingness to analyze the particularities with special awareness to the linkage between significance and stress.

Beyond the question of what is at stake personally, there are common situational factors that can create differences in the appraisal of stressors. It should be noted that these situational factors are all matters of fact—as opposed to internal feelings—and therefore they lend themselves to legal analysis and assessment. Many times the special weight of a stressor can be explained not by personality factors, but rather by the phenomenon of “clustering of stressors.”\textsuperscript{119} To fully appreciate the weight of stressors on the individual, decisionmakers must bear in mind how stressors accumulate, converge and proliferate.\textsuperscript{120} Sometimes several stressors exist independently of one another, but still have a cumulative effect. Consider, for example, being exposed to a natural disaster while being unemployed. However, frequently the stressors are strongly linked to each other and several “primary stressors” lead to “secondary stressors”.\textsuperscript{121} For example, a loss of job can engender financial strains which may create, or enhance, marital conflicts that can end in a divorce, generating a great sense of loneliness and a new set of financial strains. As even this simplified example illustrates, occasionally the primary stressors are less acute than their consequential stress-

\begin{footnotes}
\textsuperscript{115} Id. at 57.
\textsuperscript{116} Id. at 59.
\textsuperscript{117} See Accredited Home, supra note 63, and text next to notes 63-68.
\textsuperscript{118} See Gascho, appeal, supra note 3.
\textsuperscript{119} Pearlin, supra note 76, at 248.
\textsuperscript{120} LARZARUS & FOLKMAN, supra note 77, at 113 (explaining that the situation should “be considered in the context of the person’s overall functioning, and in relation to what else is going on in the person’s life.”). See also Pearlin, supra note 76, at 247.
\textsuperscript{121} Pearlin, supra note 76, at 248.
\end{footnotes}
ors as the problem of stress tends to escalate over time. Moreover, stressors typically cross over individuals. Thus, one’s exposure to stress may be enhanced by exposure to stressors impacting people close to her.\textsuperscript{122} An example, taken from one of the cases in which the court rejected the stress,\textsuperscript{123} is where a borrower’s ongoing financial strains were intensified by his wife’s illness: her stress spilled over and enhanced the stress in his life.\textsuperscript{124}

Additionally, time-related situational factors often play a role in the individual appraisal of stress.\textsuperscript{125} First, the \textit{imminence} of a stressful event or situation matters. While surprising negative changes may be stressful, studies show that the anticipation period \textit{before} the stress begins tends to enhance the stressfulness by adding the weight of anxiety and worries to the initial meaning of the nearing stressor. In those studies, the level of stress appeared to reach its peak when “there was enough time for subjects to grasp the significance of the threat, but not enough time to generate effective coping strategies.”\textsuperscript{126} Second, the \textit{duration} of the stressful situation makes a difference, as suggested more generally by the study of chronic stressors. When a stressful situation persists over time, as in the case of ongoing financial strains, it is more likely to “wear the person down psychologically and physically.”\textsuperscript{127} Third, \textit{uncertainty} or \textit{ambiguity} about the nature of a threat, whether it will happen, and what might be done about it, may also add to the potential stress in a given situation. It can increase the level of threat by limiting the individual’s sense of control and by intensifying the sense of helplessness, adding a layer of anxiety that is often associated with uncertainty. Awareness of this last point may help, for example, in evaluating the credibility of the kind of stress argument made in \textit{Satter}. In that case, an employee was sent home to await the conclusion of an investigation committee, without knowing for what she was being blamed. While the court cast doubt on the stress argument by highlighting the fact that she

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Melissa A. Milkie, \textit{The Stress Process Model: Some Family-Level Considerations}, in \textit{ADVANCES}, supra note 76, p. 96 (explaining that a stress transfer “is discussed in sociological and other literature as “crossover” or contagion of stressors “ and giving the example of an ill family member whose situation inflicts stress on other family members). See also Nicole E. Roberts & Robert W. Levenson, \textit{The Remains of the Workday: Impact of job stress and exhaustion on Marital Interaction in Police Couples}, 63 J. Marriage \& Family (2001) (researching police couples and concluding that “job stress and exhaustion can negatively impact marriage”).
\item DCR Fund I, LLC v. TS Family Ltd. P’ship, 261 F. App’x. 139 (10th Cir. 2008), at 143.
\item Id.
\item \textit{Lazarus \& Folkman}, supra note 77, at 92 (explaining that “time may be one of the most important parameters of stressful situations, yet it has been one of the most neglected areas in stress research.”).
\item Id. at 95-6 (describing experiments by Nomikos and Folkins).
\item Id. at 98.
\end{enumerate}
\end{footnotesize}
was fully paid while sitting at home, it reflected no awareness of the ambiguity of the employee’s situation as a known enhancer of stress.\textsuperscript{128}

To sum up, we have seen how personal and situational factors can lead to the assignment of different significance to similar stressors, either enhancing or diminishing their impact. We have also seen that the particular intensity of stressors derives, however, not only and not mainly from personal feelings. Rather, it emerges from given conditions that can be cognitively assessed. Therefore, an appropriate legal evaluation of a particular stress argument would require paying attention to particular factual elements and balancing them, a task familiar to most legal actors.

b. Appraisal of Resources

Because people have different resources, they differ in their ability to cope with stressful situations. Financial means, available familial and social support, health, energy, education and other skills, all dictate the ability of an individual to cope with stressors.\textsuperscript{129} Generally, stressors have greater potential to cause distress when the cognitive appraisal of the individual leads to a conclusion that there are not enough resources to cope. Lazarus and Folkman explain that the appraisal of resources “is more than a mere intellectual exercise in spotting all the things that might be done. It is a complex evaluative process that takes into account which coping options are available, the likelihood that a given coping option will accomplish what it is supposed to, and the likelihood that one can apply a particular strategy or set of strategies effectively.”\textsuperscript{130}

The question of resources also depends on personal and situational factors. At the personal level, individuals differ in the resources available to them. When facing a cancellation of a wedding, for example, it matters greatly whether the bride-to-be is unemployed,\textsuperscript{131} or has her own savings and sources of independent income to deal with the crisis.\textsuperscript{132} It also matters whether she is alone in this country, like Ms. Holler,\textsuperscript{133} and other foreign brides\textsuperscript{134}, or has familial and other sources of social support. While individ-

\begin{itemize}
\item \textsuperscript{128} Satter, \textit{supra} note 31. \textit{See also LAZARUS AND FOLKMAN, supra note 77, at 100-101} (maintaining that when the time of the stressful event is unknown the temporal uncertainty tends to add to the appraisal of the stress).
\item \textsuperscript{129} LAZARUS AND FOLKMAN, \textit{supra} note 77, at 158-59 (defining resources as “factors that precede and influence coping, which in turn mediates stress” and summarizing common coping resources).
\item \textsuperscript{130} LAZARUS AND FOLKMAN, \textit{supra} note 77, at 35.
\item \textsuperscript{131} Holler, \textit{supra} note 35.
\item \textsuperscript{132} \textit{See, e.g., In re Marriage of Spiegel}, 553 N.W.2d 309 (Iowa 1996) (bride is an educated business woman with some income).
\item \textsuperscript{133} Holler, \textit{supra} note 35 (bride from the Ukraine).
\item \textsuperscript{134} \textit{In re Bonds}, 5 P.3d 815 (Cal. 2000) (bride from Sweden). \textit{See also Friezo v. Friezo}, 281 Conn. 166 (2007) (bride from England).
\end{itemize}
ual dispositions—such as optimism or self-esteem—are part of the personal resources that allow or constrain the coping process, and are admittedly difficult to external assessment,\textsuperscript{135} most of the other personal factors are recognizable and assessable.

Situational factors can also play a role in the appraisal of resources. Time and timing, as a leading example, has much influence: while having time can allow access to personal resources such as consultation and social support, time pressure can constrain the ability to draw on resources. For example, many of the brides-to-be that were pressured to sign inferior pre-nuptial agreements were required to do so in the last few days before the wedding and therefore had very limited ability to cope with the stressor they were facing.\textsuperscript{136}

c. A Summary and a Comment about Feelings

Individual differences in experiencing stress do exist, and the judicial review of a stress argument cannot remain general; it surely requires taking into account the concrete aspects of the problem, both personal and situational. The appraisal theory’s greatest contribution may have been to the debate whether stress is objective, as suggested by inventories of common stressors, or subjective as suggested by the fact that individuals respond differently to similar stressors. The appraisal theory suggests that both conceptions are true, but neither can fully describe the causes of stress. Instead, it offers a view of the process as a dynamic \textit{transaction} between personal components and environmental elements, a mixture of objective and subjective properties.\textsuperscript{137} This transactional model currently dominates the study of stress and admittedly requires deviation from a purely objective approach.\textsuperscript{138} However, it should not render impossible the legal task of analyzing stress arguments. Long years of studies offer enough understanding of the patterns of individual responses to stressful events to allow informed evaluation.

Finally, the appraisal approach does not deny the place of emotions in the process. However, “emotions” under this approach are not disparaged, as in the legal approach, as “merely a subjective feeling”; instead, emotions are conceptualized as an integral and important part of an efficient cognitive process. For example, a wife’s love for her husband is a relevant factor in the appraisal of the stress caused by the husband’s announcement that he

\textsuperscript{135} Although scholars and experts do analyze and assess them on a regular basis. \textit{See}, \textit{e.g.}, Michele M. Tugade, \textit{Positive Emotions and Coping: Examining Dual-process Models of Resilience}, in \textit{OXFORD HANDBOOK}, \textit{supra} note 95, at 186-199.

\textsuperscript{136} \textit{See}, \textit{e.g.}, Francavilla v. Francavilla, 969 So. 2d 522 (Fla. Dist. Ct. App. 2007) (agreement signed an hour before the wedding); \textit{See also} Friezo, \textit{supra} note 134 (agreement signed one day before the wedding).

\textsuperscript{137} \textit{LAZARUS} \& \textit{FOLKMAN}, \textit{supra} note 77, at 114.

\textsuperscript{138} Aldwin, \textit{supra} note 95, at 17 (stating the dominance of the transactional model).
wants a divorce. Without such emotion, when the wife shares the fading of affection and devotion, divorce may be unpleasant but not an experience that necessarily creates a new stressful condition. As this example shows, the question of love is relevant to the cognitive appraisal of the potential stressor of divorce. Indeed, the study of emotions demonstrates that emotions play a vital part in a productive cognitive process, and therefore should not be ignored. So, although there is no doubt that emotions are—and indeed should be—included in the appraisal process, it does not justify defining stress as a “feeling” that cannot be analyzed.

2. Social Differences

Another reason why stress-related arguments can still be assessed in courts despite their seemingly individuated character is the strong link between stress and social conditions. The social study of stress has focused on people’s backgrounds to identify social patterns and to enable analysis of the structural elements that make up the stress process. Inspired by Pearlín’s Stress Process model, social studies have repeatedly illustrated that differences in stress experiences can often be explained by “the effects of social inequality on allocations of resources, status, and power”. They have demonstrated how social factors such as gender, race and socioeconomic status color the stress picture and create patterned differences between individuals.

a. Gender

Patterns of exposure and vulnerability to stressors seem to follow the “gender line.” While research shows that males are more exposed and vulnerable to stress caused by, for example, physical violence, war traumas and unemployment, females tend to suffer from increased exposure and vulnerability to stress that rises, for instance, from sexual violence, interper-

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139 See, e.g., Antonio R. Damasio, Descartes’ Error, xv (1994) (arguing that emotions are forms of intelligent awareness: “just as cognitive as other precepts”). See also Terry A. Marroney, The Persistent Cultural Script of Judicial Dispassion, 99 Cal. L. Rev. 646-48 (2011) (reviewing arguments and literature that explain how emotion plays a critical role in reasoning, rationality and moral judgment).
140 Pearlín, supra note 76, at 241-3.
142 Other contexts were studied too. See Elizabeth G. Menaghan, Work, Family and their Intersection, in ADVANCES, supra note 76, at 131-148 (lack of education and problems of personal status). See also Elena M. Fazio, Sense of Mattering in Late Life, in ADVANCES, id., 149-176 (aging).
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sonal relationships and care-giving duties. Those patterns clearly correlate with the conventional allocation of life domains between women and men. Despite many changes in gender roles, men in the 21st century are still more likely to be the primary providers of the financial resources of their family, and are expected by others and by themselves to fulfill that role. Similarly, women are still more likely to be the primary homemakers and caretakers of children and aging adults, and are still expected (by others and by themselves) to satisfy the requirements of domestic roles.

Such a gendered social setting obviously exposes more women than men to “private-life” and domestic stressors and more men than women to “public-life” and market stressors. But the differences go deeper, beyond the environments occupied by men and women, to invade individuals’ internal world and the way they “define and evaluate themselves.” Individuals experience stress more in particular domains because performance in those domains is more significant in their lives and is more important to their sense of self. Thus, the gendered reality modifies the meaning individuals assign to general stressors. It also changes the personal resources they use to cope with such stressors. Indeed, the study of stress has produced some findings that are relevant to the legal evaluation of stress arguments made in courts by men and women.

Perhaps the most consistent and pronounced pattern reported in the stress literature is that females are influenced more than males by interpersonal stressors. This important finding can be explained by females’ greater exposure to and investment in interpersonal situations (e.g. through raising children), and even more so by their interdependent definition of the self, where risks to significant relationships as well as stressors encountered by close others are experienced as stressful for them. Conversely, males’ self-identity is more tied to an independent definition of self, with more emphasis on autonomy, and therefore it tends to make men less vulnerable to comparable interpersonal stressors. Such consistent empirical results—supported by at least 119 survey studies of over 83,000 individuals and never contradicted—should definitely be taken into account when assessing the likelihood of sincerity when a woman is making a stress argument based on severe interpersonal problems in her life. Such reports reflect a recognized social phenomenon and not a random collection of individual senti-

145 *Mary C. Davis, Mary H. Burleson and Denise M. Kruszewski, Gender: Its Relationship to Stressor Exposure, Cognitive Appraisal/Coping Processes, Stress Responses, and Health Outcomes, in The Handbook of Stress*, supra note 72, at 247.
146 *Id.* at 248.
147 *Id.* at 248. See also, Helgeson, supra note 144, at 67.
148 Davis et al., supra note 144, at 67.
ments and they suggest giving more credibility to stress arguments that match those established patterns.\textsuperscript{149}

Interestingly, job-related stressors have a different impact on the genders, one which does not precisely mirror interpersonal stressors. In fact, women usually report more job-related events that cause stress than men. However, before concluding that women are simply more sensitive to stress than men,\textsuperscript{150} it should be noted that women’s vulnerability arises from their general lower status at work, as women are more often “employed in occupations that entail high demands and low control.”\textsuperscript{151} Accordingly, when researchers control for occupational status and compare women and men in equivalent jobs, the differences seem to disperse.\textsuperscript{152} One job-related stressor, however, that has greater impact on men than on women is unemployment or the loss of a job. The same logic that explains women’s special vulnerability to interpersonal stressors seems to be in effect when it comes to men’s unemployment. Since providing for one’s family and having an autonomous status is at the core of the traditional view of masculinity and at the heart of many men’s self-identity the meaning of job losses and prolonged unemployment periods appears to be more dramatic for them.\textsuperscript{153}

The distinctive experiences of stress in the lives of women and men should be considered when evaluating individual stress arguments. Gender taken as a social stressor may explain differences in individuals’ response to stressors without making their argument “subjective” in an arbitrary sense. Consequentially, more credibility should be given, for example, when the stress argument is coming from a man that was exposed to violence or a job loss or from a woman that was exposed to sexual harassment or a harsh divorce.

b. Race

Racism is still a grave and pervasive social problem, and as such it has a significant impact on individuals’ experiences of stress. Racial discrimination or other mistreatment is now accepted by stress theorists as an independent cause of chronic stress.\textsuperscript{154} Race-related stress as an enduring condi-

\textsuperscript{149} This suggestion is based on the empirical findings and made without taking a position on the robust debate within feminist legal theory about whether women are, by biology or socialization, more oriented toward interpersonal connection than men.

\textsuperscript{150} The literature shows, for example, that men are more vulnerable to traumatic stressors. See Davis et al., supra note 145, at 249–250 and Helgeson, supra note 144, at 64–65.

\textsuperscript{151} Davis et al., supra note 145, at 250.

\textsuperscript{152} Id. at 250.

\textsuperscript{153} Helgeson, supra note 144, at 64, 70–71.

\textsuperscript{154} See Elizabeth Brondolo, Nisha Brady ver Halen, Daniel Libby and Melissa Pencille, Racism as a Psychological Stressor, in The HANDBOOK OF STRESS, supra note 72, at 167. See also Shelly P. Harrell, A Multidimensional Conceptualization of Racism Related Stress:
tion develops in a process that begins with discriminatory events. Although the initial racist personal experiences may vary in their origins, forms, frequency and covertness, they eventually generate a general and persistent vulnerability to stress. Sometimes the racist experiences are so frequent and significant that they create enduring stress in and of themselves. At other times, even a few isolated events—when joined with collective experiences and historical injustices—can trigger transformations in cognition, behavior and psychological perceptions. They then tend to increase the vulnerability to racial stressors. An individual who was hurt by racist experiences may therefore appraise later racist events as more significant and threatening, and may interpret the meaning of further ambiguous episodes as “threatening instances of ethnic discrimination,” even when, in the absence of these past experiences, such episodes may not appear so devastating.

In addition, race may deplete coping resources. One of the damages of years of institutional, cultural and interpersonal race discrimination is a segregated reality. Minorities are more likely than other groups to live in impoverished areas in which the environmental conditions include poor education, relative lack of social support, scarce recreational opportunities, and inadequate health services. Clearly, such an impoverished reality not only creates more stressors, but also plays a role in draining coping capabilities. Maya Angelou opens her story Wouldn’t Take Nothing for my Journey Now with a compelling description of such race-related stressful reality. She writes:

In late 1903 Mrs. Annie Johnson of Arkansas found herself with two toddling sons, very little money, a slight ability to read and add simple numbers. To this picture add a disastrous marriage and the burdensome fact that Mrs. Johnson was a Negro.

Implications for the Well-Being of People of Color, 70 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 42 (2000).

Those include discriminatory institutional policies, derogating messages conveyed by the media and personal expressions of prejudice.

Harrell, supra note 154, 46-47 (stating that stress is enhanced by collective experiences, when one perceives that the racial group with which they identify is generally not treated fairly and by historical injustices when individuals believe that the group with which they identify has been historically mistreated or oppressed).


Brondolo et al., supra note 154, at 171.

Harrell, supra note 154, at 45.

Id. at 46.

To make things even worse, the racial stress itself, by its own toxic nature, not only impairs environmental and social resources, it also tends to disrupt and weaken the most personal coping resources such as self-esteem, agency, and hopeful disposition. Moreover, because racism is “an uncontrollable stressor,” it often leads people to develop a sense of helplessness that further limits their resilience. Finally, since racism is frequently associated with depressive symptoms—and depression is known to reduce social participation, cognitive flexibility and energy—many minority individuals are even less equipped to cope with the many stressors in their lives. Because of chronic race-related stressors and race-related limited coping resources, non-white individuals arguing that they were encumbered by stress should not be heard as voicing an individual and subjective claim. Rather, the place of race as a social stressor should be acknowledged and taken into account in evaluating the credibility and intensity of stress argument made by minorities.

c. Socio-Economic Status and a Summary

Low social status also creates or enhances stress, as it impairs coping resources. Generally, exposure to stressors and problems in coping with them increase “as one goes down the social hierarchy.” This has much to do with the lack of control that characterizes lower social status; it causes greater vulnerability to stress due to universal reasons such as economic and social powerlessness and to more personal reasons such as lower self-confidence.

To summarize this social dimension of stress, the individual experience of stress is seldom merely personal and is rarely unique. Strong social pressures emerging from defined contexts such as gender, race and social status create patterns of difference. Moreover, studies have shown that the accu-
mulation of such social factors— as in the case of single mothers\textsuperscript{167}—adds depth and weight to the problem. Appreciating what theorists have called “the social distribution of stress”\textsuperscript{168} can assist decisionmakers seeking to evaluate the credibility of stress arguments; it can free them from the limiting notion that stress is too private, subjective and internal to be assessed.\textsuperscript{169}

D. Outcomes of Stress with a Focus on Consenting

Prolonged stress can produce both immediate and longer-term consequences, which run the gamut from the physiological, to the cognitive to the psychological. In many disciplines, the study of stress has mainly focused on the negative effect of distress on people’s health and well-being. Years of studies have produced a body of findings too fast to be summarized here.\textsuperscript{170} Instead, this section will first explore particular biological outcomes of stress that can potentially inform the legal approach to stress arguments. It then will focus on the impact of stress on an individual’s decision-making process, which can lead a party to consent to a contract that s/he might otherwise not accept.

1. The Biological Outcomes of Stress

The biological study of the outcomes of stress makes clear that legal actors can no longer describe stress as a feeling. In fact, research have shown that the chain of dichotomies shaping traditional western thinking simply do not work in the context of stress. Pairs of concepts—such as body/soul, reason/emotion, physiology/psychology and objective/subjective—are never opposites when it comes to stress. Rather, the concepts overlap and interrelate such that they cause changes to numerous human systems. Think, for instance, about a family man under a threat of losing his job. When his brain perceives the stressful events, its cognitive appraisal of the situation triggers a chemical response: the release of a cascade of “stress hormones”—such as

\textsuperscript{167} Avison’s interesting body of work focusing on single mothers offers a vivid example of the accumulation of social stressors. His studies show that single mothers suffer from the combination of stressors typical to gender, low social status and often race and therefore are significantly more exposed and vulnerable to stress. See, e.g., William R. Avison, \textit{Family Structure and Women’s Life: a Life Course Perspective}, in \textit{ADVANCES}, supra note 76, at 71-92.

\textsuperscript{168} Turner et al., \textit{supra} note 141, at 106.

\textsuperscript{169} Research focusing on personality differences highlights two main qualities that make some people more resilient than others to stress: hardiness and having a sense of control (or mastery). See, e.g., Lazarus & Folkman, \textit{supra} note 77, at 212.

\textsuperscript{170} It shows, inter alia, that distress is strongly associated with a variety of severe disease, with speeding the aging and the death of brain cells, and with the development of mental illness. See, e.g., SHAWN TALBOTT, \textit{THE CORTISOL CONNECTION: WHY STRESS MAKES YOU FAT AND RUINS YOUR HEALTH - AND WHAT YOU CAN DO ABOUT IT}, 81(2007).
adrenalin and cortisol. Those hormones then “initiate a series of other chemical changes, as well as physiological, cognitive, emotional, physical, and behavioral changes.”

Now the man may suffer from some physical symptoms such as headaches, lack of sleep, weight gain, and higher blood pressure. All of these are known results of overexposure to stress hormones. Psychologically, he may also become less patient with the people around him, more moody, perhaps even depressed, which might possibly add to the work-related situation or to personal problems at home. If the problems persist and become chronic, the constant presence of stress hormones will cause additional physiological and psychological problems. Those may include an inability to turn off the stress response, leading to even more exposure to those hormones. Thus, at the most fundamental level, recognizing the connection between stressful situations and overexposure to stress hormones can help legal actors conceptualize the problem of stress as much more than a feeling. The next step is to recognize the common symptoms of overexposure to stress hormones, which can assist both in structuring and in evaluating stress arguments.

**a. Insomnia**

Chronic inability to sleep is a known result of stress, and it can be explained by high levels of stress hormones. Biologist Robert Sapolsky’s acclaimed and fascinating book “Why Zebras Don’t Get Ulcers” had emphasized this symptom, adding that “75 percent of cases of insomnia are triggered by some major stressor.”

As Sapolsky maintains, “stress not...

171 Id. at 31 (explaining that “[a]drenaline is responsible for the “up” feeling that causes excitement, while cortisol is responsible for modulating the way our bodies use various fuel sources.”). Adrenalin, also known by its American name Epinephrine, is one of the two main hormones secreted in response to stress by the sympathetic nervous system (the other one being noradrenaline). Cortisol is one of the most known hormones in a group of hormones called “glucocorticoids” that are secreted by the adrenal gland following the release of special hormones in the brain. The full description of the different hormones that play a role in times of stress is beyond the scope of this article. Robert Sapolsky offers a fascinating detailed explanation to general audiences. In a nutshell, once a stressor was recognized two waves of hormonal response follow: “Epinephrine acts within seconds; glucocorticoids back this activity up over the course of minutes or hours.” See, Robert M. Sapolsky, Why Zebras Don’t Get Ulcers: The Acclaimed Guide to Stress, Stress-Related Diseases, and Coping, 30-31 (3rd ed., 2004) (explaining the process and summarizing: “[i]together, glucocorticoids and the secretions of the sympathetic nervous system (epinephrine and norepinephrine) account for a large percentage of what happens in your body during stress.”). For the sake of simplicity those waves of hormones with their orchestrated secretion will hereinafter be called “the stress hormones”.

172 Id. at 31 (explaining that “[a]drenaline is responsible for the “up” feeling that causes excitement, while cortisol is responsible for modulating the way our bodies use various fuel sources.”).

173 Id. at 116.

174 Id. at 116.

175 Id. at 226-239 (chapter 11: Stress and a Good Night’s Sleep).

176 Id. at 236.
only can decrease the total amount of sleep but can compromise the quality of whatever sleep you do manage.\textsuperscript{177} The connection between stress and sleeping problems is explained by the fluctuating levels of cortisol in our bodies. Under normal conditions, the highest levels of this stress hormone are present in our bodies during the early morning, helping us to wake up and face the tasks of the day. Those levels are supposed to decline throughout the day, eventually allowing us to calm down enough when the time comes to get some sleep.\textsuperscript{178} However, chronic stress prevents this healthy decline of cortisol and causes high levels of it all day long; leading to interrupted sleep. A vicious circle follows: sleep deprivation is not only a symptom of stress, but a universal stressor that in turn contributes to even higher levels of cortisol and therefore more problems sleeping.\textsuperscript{179} Recognizing insomnia as a symptom of stress could have been useful in Gascho, in which the plaintiff’s stress argument was supported by undisputed evidence regarding a severe—and professionally medicated—sleeping problem.\textsuperscript{180} Accordingly, the scientifically-documented “cortisol connection” between stress and sleeping problems could assist courts in the evaluation of stress arguments in cases that include proven insomnia.

b. Depression

Another known symptom of stress that is associated with excessive stress hormones is depression. Sapolsky’s work had highlighted this tight tie,\textsuperscript{181} and, as more recent works show, “it is evident that inexorable link exists between stress and depression, and new research has dramatically increased our understanding of the relationship between the two.”\textsuperscript{182} This strong bond between stress and depression is critical to our topic in at least two ways. First and most basically, since distressed parties seeking relief sometimes present evidence with regard to their diagnosed depression, realizing that stress often causes depression can make their argument significantly more credible. As with stress, depression is not merely a feeling, and although we all get truly upset from time to time, diagnosed depression is

\textsuperscript{177} Id. at 236.
\textsuperscript{178} TALBOTT, supra note 170, at 99.
\textsuperscript{179} SAPOLSKY, supra note 171, at 227 (“Not getting enough sleep is a stressor; being stressed makes it harder to sleep. Yup, we’ve got a dread vicious cycle on our hands”).
\textsuperscript{180} Gascho, appeal, supra note 3, 980 (stating that at the time of contracting Ms. Gascho was… taking …"Lunesta, Ambien, Benadryl and Ultram, all to help her sleep"). See also Satter, supra note 31 (reporting a stress reaction that included “an inability to sleep”).
\textsuperscript{181} See, generally, SAPOLSKY, supra note 171, at 271- 309 (discussing the strong ties of stress and depression). See also TALBOTT, supra note 170, at 23 (describing the linkage between over and under exposure to cortisol and stress-related depression).
\textsuperscript{182} David A. Gutman & Charles B. Nemeroff, Stress and Depression, in the HANDBOOK OF STRESS, supra note 72 at 353.
different: it is a medically acknowledged disease with severe, sometimes
life threatening, consequences.\textsuperscript{183} Thus, when a party describes high levels
of stress that led to a diagnosis of depression, courts can benefit from the
rapidly-accumulating knowledge that shows how typical such a connection
is.\textsuperscript{184}

Second, when people are under stress \textit{combined} with depression there is
very little they can actively do. There is a proven connection between stress,
depression and impaired agency. A frequent feature of major depression is
“psychomotor retardation”—a severe decrease in the ability to concentrate
or act, which makes even simple activities, such as making an appointment
or getting dressed in the morning, exhausting and nearly impossible to ac-
complish.\textsuperscript{185} Furthermore, stress and depression are also associated with
cognitive “learned helplessness,”\textsuperscript{186} that is, an inclination to surrender to
one’s situation out of “a distortive belief that there is no control or outlets in
any circumstance.”\textsuperscript{187} Studies have shown that “[o]vergeneralizing” the
meaning of a particular stressful situation, the distressed tends to extend the
original helplessness and conclude that there is nothing that can be done
even if others can see possible paths of action.\textsuperscript{188} Given the impact of stress
and depression it is much more explicable why the alternative to “stand pat
and fight,” which many courts view as reasonable,\textsuperscript{189} is quite clearly out of
the realm of possible responses for many of those who are depressed.

2. Stress and Impaired Decision-Making

Consenting to a contract is a product of a decision-making process. Such a view is supported by the legal doctrines of duress, unconscionability
and undue influence—in their shared requirement that the party seeking
relief prove s/he has no reasonable alternative to agreement. Understanding
the impact of stress on the effectiveness of that decision-making processes
and any available alternatives to agreeing is thus important. As we shall

\textsuperscript{183} The study of depression is of course beyond the scope of this Article. However, it seems
to me as if the legal disregard of depression has high correlation to the legal disregard of
stress.

\textsuperscript{184} Stress arguments are often accompanied by arguments and evidence regarding depression. Currently many courts disregard that aspect of the argument even when the depression is severe and well proved. For a recommendation of a different approach See \textit{infra} Part III.

\textsuperscript{185} \textsc{Sapolsky}, \textit{supra} note 171, at 275.

\textsuperscript{186} \textit{See, generally, Martin Seligman, Helplessness: On Depression, Development and Death} (1975) (One of the most influential works in psychology in general and the definitive book on the subject of learned helplessness in particular). \textit{See also Sapolsky}, \textit{supra} note 171, at 494-5 (offering a review of learned helplessness literature in the context of stress and depression).

\textsuperscript{187} \textsc{Sapolsky}, \textit{supra} note 171, at 305.

\textsuperscript{188} \textit{Id.} at 302.

\textsuperscript{189} \textit{See supra} note 32 and accompanied text.
now see, the legal presumption that the availability of alternatives means that the consenting party made a meaningful choice is frequently unsound when stress is present.

a. The General Effect of Stress on Decision-Making

Some stress studies show that prolonged stress can “wreak havoc with decision making.”\(^{190}\) Although the intersection of decision-making models and stress theories is yet to be fully developed,\(^{191}\) stress theorists believe that “chronic stress can lead to dysfunctional decision-making.”\(^{192}\) Specifically, judgments made under stress are limited because the brain is consumed by the need to cope with the stressors and their outcomes.

Studies of the impact of stress on cognition began following the Second World War and resulted in an expressed a consensus that “the competence of human judgment is decreased by stress.”\(^{193}\) However, only the recent development of the neurosciences has allowed researchers access to the processes in the brain triggered by exposure to stress. The current findings, albeit not conclusive, reveal how stress impairs high-order brain abilities that are essential for effective decision-making; specifically those operations performed by the prefrontal cortex (PFC). Under non-stress conditions, the PFC orchestrates the “intelligent regulation of behavior, thought and emotion.”\(^{194}\) Under conditions of psychological stress, however, stress hormones interfere with that regulation. Evolutionarily geared to prepare the body for a “fight-or-flight” response,\(^{195}\) those hormones limit the ability of the brain to do other, less urgent, tasks. Specifically, they work to limit memory and attention regulation as well as other complex brain activities performed by the PFC. Therefore, under stress conditions the amount and quality of information we can recall, process and store declines.\(^{196}\) At the same time, the high levels of stress hormones strengthen the function of other regions of the brain; the hormones released under stress “switch the brain from thoughtful, reflective regulation by the PFC to more rapid reflex-

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190 THOMPSON, supra note 71, at 116.
191 HAMMOND, supra note 72, at 25-27 (describing the “gulf” that separates theorists of stress from decision making researchers).
194 Amy F. T. Arnsten, Stress Signaling Pathways that Impair Prefrontal Cortex Structure and Function, 2009 NAT REV NEUROSCL, at 3-4.
195 Id. at 5.
196 THOMPSON, supra note 71, at 136.
ive regulation by the amygdala and other sub-cortical structures. While such a brain process may be efficient when people are under a physical threat, it is fundamentally detrimental when they are expected to make rational choices requiring analysis, self-control and long-term thinking. It can lead to dysfunctional decision-making.

b. The Specific Impact of Stress on the Evaluation of Alternatives

Since the legal analysis of decisions made under stress depends on the analysis under the reasonable alternative test, understanding the impact of stress not only on the final decision, but also more particularly on one’s ability to recognize and assess existing alternatives becomes important. While careful appraisal of alternatives is essential to every appropriate decision making, it is very difficult to sustain under stress when one “can’t think straight.” Again, the problem stems from the release of stress hormones. They cause arousal that in turn creates “hypervigilance”: hasty and impulsive patterns of behavior that lead to ineffective decision-making. Such patterns were observed in an experimental study that focused specifically on the way stress influences the scanning and consideration of available alternatives.

The alternatives study compared “the manner in which stressed and unstressed individuals consider and scan decision alternatives,” and it is often cited in the decision-making literature to explain how stress limits the ability to choose between alternatives. One hundred and one students participated in the study and took a computerized multiple-choice analogies test containing 15 questions. Students were asked to choose the correct answer out of six alternatives presented separately on the screen. They were able to navigate freely between the reviewed alternatives and to control both the order and the speed of their review. To choose one of the alternatives,

197 Arnsten, supra note 194, at 7.
198 Id. at 7. In addition, Chronic prolonged stress may even lead to structural, longer-term, changes in the PFC, id. at 9-10.
199 Dias-Ferreira at al., supra note 192.
200 Irving L. Janis, Decision Making under Stress, in HANDBOOK OF STRESS: THEORETICAL AND CLINICAL ASPECTS, 60 (Leo Goldberger and Shlomo Berezniitz 2nd ed., 1993) (describing the vigilance that is required to cope with stress and stating that vigilance exists when “the decision maker searches painstakingly for relevant information…and appraises alternatives carefully before making a choice.”).
201 THOMPSON, supra note 71, at 158.
203 See, e.g., Hammond, supra note 72, at 170, 172, 176, 216, Dan Zakay, The Impact of Time Perception Processes on Decision Making under Time Stress, in TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING, 60 (Ola Svenson & A. John Maule eds., 1993).
the students had to press the enter key, which then prompted the display of the next question on the screen. The time that the students spent reviewing each alternative as well as the sequence by which the alternatives were visited were recorded. The goal was mainly to trace the method of deciding rather than to simply measure the quality of the end result. The participants were randomly divided to groups: some were only asked to do their best, others had to take the test under stress created as part of the experiment. Importantly, the stressed participants were put under stress without using time-pressure: they were free to review each alternative for as much time as they needed and to revisit alternatives that seemed to require more attention. Instead, the stressor chosen for this study was the threat of electric shock. While time pressure would predictably yield a rushed style of decision-making, it may be less comprehensible how being under a different kind of stress impacts the analysis of alternatives.

The results of the alternatives study were remarkable. The participants under stress demonstrated a significantly inferior performance compared to their non-stressed counterparts. First, stress had the detrimental effect of “premature closure,” defined as making a decision before all available alternatives were considered. Although few non-stressed participants engaged in premature closure, 80% of the cases in which alternatives were ignored occurred among the distressed subjects. In fact, many of those subjects “chose an answer before they had even seen the correct alternative.” The study’s findings regarding premature closure lend support to works describing the effect of stress on attention in which the cognitive process is impaired by a “tunnel vision,” i.e., an inclination to only focus on limited dimensions of a given problem.

Second, stress also caused “nonsystematic scanning,” defined as a disorganized and scattered method of review in which the stressed decision-maker “searches frantically for a way out of the dilemma, and rapidly shifts back and forth between alternatives.” Recording every departure from a serial sequence of review, the study demonstrated significantly deficient scanning patterns in the distressed groups. Compared to the non-stressed

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204 Much work has been dedicated to time pressure as a stressor that impairs decision-making. See, e.g., JANIS & MANN, supra note 193, at 59 (examining the role of imminence within the context of decision-making processes and stating that the quality of decision making depends on the answer to the question “Is there sufficient time to make a careful search for an evaluation of information and advice?”). See also LAZARUS & FOLKMAN, supra note 77, at 93.

205 Keinan, supra note 202, at 639.

206 Id. at 642.

207 Id. at 643.

208 Id. at 639 (citing Janis, supra note 200, at 72).

209 Id. at 641 (explaining the measurement of that aspect of the performance).
participants, subjects under stress visited the alternative answers in a much more scattered and disordered fashion.\textsuperscript{210}

Finally, in terms of “quality of performance,” defined as choosing the right answers, subjects under stress decided incorrectly at a higher rate than their counterparts. Notably, the distressed were not simply wrong more often. The study also showed a strong correlation between incomplete patterns of scanning of alternatives and decreased quality of performance: 67% of the cases of premature closure, for example, led to choosing an incorrect answer.\textsuperscript{211} This last point has a palpable link to the legal stress argument. Typically, parties seeking relief and stress-sensitive judges attempt to explain the mistaken decision to consent to a disadvantageous contract by the failure to engage in an appropriate consideration process. The alternatives study supports the reasonableness of that argument.

The alternatives study demonstrates that stress significantly impairs the consideration of alternatives and leads to flawed decisions.\textsuperscript{212} The application of these findings to the evaluation of contractual stress arguments in general, and, more specifically, to the “reasonable alternative” test, is notable. It suggests that judges may base their conclusions regarding the quality of apparent consent on alternatives not truly available to distressed individuals. Such a possibility clearly undermines the conventional presumption that the “reasonable alternative” test is objective. It thus also suggests that the application of the alternative test to distressed individuals requires adjustment to take into account the fact that stress distorts the “consenter’s” understanding of such alternatives.

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This Part has shown that the conventional legal analysis of consenting under stress cannot be reconciled with the results other disciplines have produced in their study of stress. The conflict mainly exists around the two pillars of the conventional legal analysis: the one that classifies the condition of stress as a subjective feeling and the one that refuses relief whenever reasonable alternatives seem to have been available. While some immediate legal implications were already discussed in this Part, the goal of the next Part is to further integrate the non-legal knowledge with the legal issue.

\begin{footnotes}
\footnotetext[210]{Id. at 642.}
\footnotetext[211]{Id. at 642.}
\footnotetext[212]{Although the nature of the experiment did not require lengthy consideration of each of the alternatives other works also demonstrate that stress shortens the time dedicated to the assessment of each alternative. See Id. at 640, 642-643 (discussing “temporal narrowing”).}
\end{footnotes}
III. INTEGRATION: STRESS-SENSITIVE CONTRACTUAL ANALYSIS

So far we have seen how the problem of consenting under stress is disregarded in most courts or—in rare cases—is recognized in an under-theorized manner. We have also seen how other disciplines have studied the human condition of stress, coming to cogent conclusions about stressors and their impact. The goal of this Part, therefore, is to integrate the discussions and to offer a stress-sensitive contractual analysis of the problem of consent under stress. In general, the task calls for both a theoretical and practical discussion. Theoretically, the study of stress illuminates the ways the tenets of consent and fault—which are fundamental under contract law—play out in the context of agreements made under stress. The practical question is how willing legal actors, from lawyers to judges, can utilize the knowledge about stress to improve the legal response to this condition. I turn to those two aspects of the integration task now.

A. The Study of Stress and the Theories of Contract Law

The contractual discourse on stress arguments circles around two leading ideas—quality of consent and level of fault. When a stress argument is made courts have to strike a balance between those ideas, as they stand in conflict and typically reside with opposing parties: defective consent on the side of the distressed party seeking relief versus some fault on the side of the unstressed party who is insisting on enforcement. More often than not, judicial concern for finding enough fault trumps the judicial concern about flawed consent and therefore the stress argument is dismissed.\(^{213}\) It is therefore imperative to re-examine both the role of consent and the notion of fault in light of the understanding of stress. I argue that a new balance is required since under stress, a person’s consent is “weaker” and the fault of the other party is “stronger” than what courts have thus far considered.

1. Stress and the Problem of Consent

In contrast to the ideal of freedom of contract, the consent produced under stress may no longer reflect a free choice or a true exercise of the human will. Rather, stress typically constrains and distorts the process of decision making, producing a defective form of consent that can hardly justify enforcement. When we recognize the toll of stress on the quality of consent, two contrasting reactions come to mind. On the one hand, it can be ar-

\(^{213}\) ALAN WERTHEIMER, COERCION, 53 (1987) (arguing that the modern doctrine of duress can be seen as being more about “wrongness and unfairness” than about “freedom and voluntariness…”).
gued—following Judge Posner’s reasoning—\footnote{See the discussion of the Selmer case in Part I, supra notes 20-25 and accompanying text.}—that contract law does not and should not care about the \textit{quality} of consent once it has been given. According to this line of thought consent is understood in absolute terms, as either perfectly present or completely missing. Arguably, an expression of consent functions in a dichotomous world and is either valid or invalid (if coerced by the other party). Such a view denies the possibility that non-coercive or less-than-coercive conditions can create an act of consent that does not amount to a meaningful consent.

On the other hand, and in opposition to Judge Posner’s reasoning, it can be argued that contract law—being the field of law based on voluntary choices and consent—\footnote{\textit{Brian Bix, Contracts, in The Ethics of Consent}, 251, 266-7 (Franklin G. Miller and Alan Wertheimer eds., 2010) (portraying consent as the “essence of contract law and discussing consent theories of contracts). \textit{See also Randy E. Barnett, A Consent Theory of Contract}, 86 Col. L. Rev., 269 (1986)(proposing that the moral basis of a contract is founded on the consent of the parties to exercise rights and assume duties.).}—must examine not only the existence of consent, but also the actual quality of consent. Accordingly, many shades of consent—on the spectrum between perfect consent and coerced consent—exist. And, consequentially, some higher levels of impaired consent should not be sufficient for the enforcement of contracts, even if they were not fully produced by the fault of the other party.

In choosing between those two distinct approaches, it should be noted that, as a descriptive matter, the modern law of contracts does not confirm the first, Posnerian view. Instead, the modern law of contracts reflects some sensitivity to the quality of consent, beyond its existence. In fact, all the contractual defenses, which reflect acknowledged reasons to avoid enforceability, can be explained by the need to recognize the problem of defective consent.\footnote{\textit{Bix, supra} note 215. at 257. \textit{See also Peter Birks and Chin Nyuk Yin, On the Nature of Undue Influence, in Good Faith and Fault in Contract Law} 57-58 (Jack Beaton & Daniel Friedmann eds., 1995) (arguing that “the doctrine of undue influence is about impaired consent, not about wicked exploitation”); \textit{Wertheimer, supra} note 213, at 233 (“Hard choices are importantly different from other choices. They have a particularly severe constraining effect”).} As a result, children,\footnote{\textit{Restatement (Second) Contracts} §14 (1981).} mentally ill individuals,\footnote{\textit{Restatement (Second) Contracts} §15 (1981).} alcoholics,\footnote{\textit{Restatement (Second) Contracts} §16 (1981).} parties operating under mistake,\footnote{\textit{Restatement (Second) Contracts} §153 (1981).} or those who are dependent on others or those who are lacking in bargaining power,\footnote{\textit{Restatement (Second) Contracts} §208 (1981).} to use some examples, may
get relief under our conventional law, despite their apparent consent.\textsuperscript{223} What all those examples have in common is the tenet that meaningful consent—and not simply a token of consent—is required to have a valid contract. Moreover, although the current Restatement avoids choosing between a focus on deterring bad behavior and a focus on the quality of consent, the first Restatement emphasized the importance of free will,\textsuperscript{224} and, at least in one jurisdiction, taking advantage of the other party’s stress is explicitly covered by the law of duress.\textsuperscript{225}

At the normative level the question becomes more challenging: \textit{should} contract law care about cases in which the consent does not represent a true will? In her analysis of the concept of consent Professor Robin West has suggested that we are all too quick to assume that consensual acts, such as entering into contracts, reflect a true choice made by the consenting party. In reality, she argues, many consensual acts only mean that outright coercion has not occurred. And, as West puts it: “[t]hat it is consensual doesn’t tell us that it is harmless, or good, or beneficial. It still might have been exploitative, alienating, or grossly unfair.”\textsuperscript{226} In the context of consenting to have sex, West suggests that agreeing to an arrangement that is unfair or harmful can reside in an overlooked place on the spectrum: one that lies between consenting to something that is good (pleasurable sex) and consenting due to coercion (rape). In this unnoticed middle-ground, we find what West calls the “unwanted consent”: consenting to something one does

\textsuperscript{223} But compare to Danielle Kie Hart, \textit{Contract Formation and the Entrenchment of Power}, 41 Loy. U. Chi. L.J. 175, 218 (2009) (arguing that “modern contract law, at least as presently constructed, will not be able to remedy [problems of defective consent] effectively using its expanded policing doctrines.”).
\textsuperscript{224} Compare \textit{Restatement of Contracts} §492 (defining duress as “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.”) to \textit{Restatement (Second) of Contracts} §176 (1981) (duress exists “[i]f 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.”). Interestingly the comment following the first Restatement’s definition stressed the need to protect the vulnerable from agreeing to which they are not interested in. In its relevant part it reads: “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. Age, sex, capacity, relation of the parties, attendant circumstances, must all be considered. Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves; timid persons are generally the ones influenced by threats, and the unscrupulous are not allowed to impose upon them because they are so unfortunately constituted.”
\textsuperscript{225} The courts of Illinois, for example, define duress as the “[t]he imposition, oppression, undue influence or the taking of undue advantage of the stress of another whereby one is deprived of the exercise of his free will.” \textit{See}, e.g., Pierce v. Aichison, Topeka & Santa Fe Ry. Co. 65 F.3d 562, 569 (7th Cir.1995).
\textsuperscript{226} Robin West, \textit{Sex, Law and Consent}, in \textit{The Ethics of Consent}, supra note 215, at 234.
not desire. People often consent despite themselves, with different degrees of reluctance, for a variety of reasons that make consenting better than refusing.\textsuperscript{227} Stress, I argue, produces such unwanted consent. And, since it is inferior to the ideal meaningful consent, which expresses human will and freedom, it should not be subject to the same legal presumption of validity that is offered to fuller consent. Rather, impaired consent calls for a more careful and contextual response, one that aspires to place any given case somewhere on the spectrum between full consent and full coercion.

To clarify: I am not arguing that every point on the above spectrum justifies relief. In some cases, impaired consent should be tolerated as it reflects the imperfect human condition and the need to allow markets to function. In other situations, however, the given consent represents too dangerous a sacrifice. Compare, for example, one’s automatic consent to a long form-contract for a sale of goods with one’s reluctant consent to a pay-cut in a difficult economy and then to one’s consent to resign a job and release her employer from liability after being sexually harassed.\textsuperscript{228} In all three cases, consent has been expressed but its quality has been admittedly compromised. The cases reflect, however, different places on the spectrum. In the first example of the form-contract, we can assume some desire for the purchased goods without true consent to the terms of getting them. In the second example, the pay-cut agreement is further away from full consent because both the goal of the contract and its terms are unwanted. Finally, in the third example, the “resign and release” agreement is the most problematic because it involves a compromise in the consenting party’s state of mind, in addition to the contract’s unwanted terms and results. The study of stress is valuable in calling attention to such “third-degree” cases of impaired consent. It cautions us against treating them as similar to other cases of compromised consent; in those cases of consenting under stress, there is an appearance of consent, but in terms of the necessary state of mind, we are dangerously close to having no consent at all.

There is a distinct risk in enforcing the products of severely-impaired consent, and it goes beyond the unfair terms of the deal. Under stressful conditions, the contractual process itself is injurious, and the lack of an appropriate legal process or remedy exacerbates the harm. Consenting due to desperate conditions damages a person’s integrity and sense of self-sovereignty.\textsuperscript{229} The distressed individual might internalize the message that her anguish and true wishes do not matter in courts of law. This in turn

\textsuperscript{227} In fact, many commentators have convincingly argued that for a host of reasons—from lack of awareness, to lack of alternatives, to cognitive biases—meaningful consent is almost always absent and therefore reflects the ideal exception rather than the norm. See, e.g., Bix, supra note 215, at 251.

\textsuperscript{228} The last scenario is based on the facts of Meyers, supra note 41.

\textsuperscript{229} West, supra note 215, at 245–47.
makes the contractual experience highly alienating: separating the pains of personhood from the legal act of consent and—by way of enforcement—allowing exploitation. In other words, without an appropriate legal process or remedy, consenting under stress can be more than immediately disempowering: it entails damage to the self-image of the distressed and further deepens her powerlessness.

For example, litigation over divorce settlements illustrates the unique damage that follows from failing to recognize the category of impaired consent. Under the pressure of divorce, women often sign harmful divorce settlements and later, courts often reject their request for relief. Specifically when responding to stress arguments by divorced women, courts deny the possibility that stress could create impaired consent. Consider, for example, the following statement:

While [the] wife's fear that she may lose custody of her children no doubt caused her anxiety, we do not recognize this as a factor impairing her ability to exercise her free will and make a meaningful choice.\(^{230}\)

Even though courts frequently admit the stressfulness of divorce, they treat it as “normal” and “common,” and therefore as a condition that does not negate consent. Consequently, they fail to discern the situations in which the stress was so severe that it led to impaired rather than sufficient consent. Professor Bryan studied many cases of divorce settlements and has convincingly argued that women pay the price for that judicial approach.\(^{231}\) In the part of her study that focuses on the refusal to release women from their own apparent consent, Professor Bryan explains that courts fail to protect women because they refuse to recognize gender differences in the experience of stress following divorce. In her words, “courts minimize wives' complaints of anxiety, depression, and mental distress, commonly noting that divorce always causes stress.”\(^{232}\) Adding the study of stress to this analysis, it is important to remember that every scale of common stressors includes divorce and ranks it high above many other stressful life events. This means that outside of law there is nothing “normal” about the level of stress in those cases, which is known to be acutely high. Furthermore, despite this common (“objective”) story the impact of divorce on individuals is not identical. Rather, and with regard to gender, the study of stress proves that interpersonal stressors, such as divorce, have a heightened impact on wom-


\(^{232}\) Id. at 1257.
To compound matters, women are especially susceptible to stress-related depression that in turn further limits their coping abilities and augments, in a vicious circle, their initial distress. Accordingly, it seems reasonable to see how women are more prone than men to suffer from the problem of impaired consent in the context of divorce settlements. Without awareness of this potential problem impacting consent, women’s participation in this contractual process is highly damaging. As Professor Bryan had put it: “divorce settlements, contrary to popular wisdom, frequently restrict rather than enhance women’s life choices by leaving them impoverished and embittered.”

In conclusion, enforcing contracts that are based on severely impaired consent is a clear and immediate danger to those who are consenting under stress, but it is also a significant hazard to the idea of contracts and to the theoretical justification of enforcing them. A system that cannot appropriately differentiate between fully formed and defective consent may eventually lose its fundamental legitimacy. As such, consent under stress that amounts to severely impaired consent should be regarded as a ground for relief and a justified reason for invalidating a contract.

Some commentators have cautioned against a liberal use of the defenses to enforceability—such as duress and unconscionability—arguing that extensive protection of weaker parties may deter market players from dealing with them, ultimately limiting the ability of weaker parties to function in a market society. However, this argument is not convincing for two main reasons. First, this argument predicts that even the potential award of relief would necessarily hinder the ability of the protected individuals to create binding contracts. However, this prediction is questionable: while the prospect of protection may deter some market players from contracting with the “protected,” in other cases it may not. It is at least as probable that the prospect of legal relief will educate or incentivize market players to negotiate more reasonably to avoid the invalidation of their contract. As one commentator noted, for example, “the potential husband might be interested in marrying, even if the terms of his proposed premarital agreement must be

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233 See supra note 146 and accompanying text.
234 SAPOLSKY, supra note 171, at 290.
235 Bryan, supra note 231, at 1170.
236 Inspired by West’s argument, supra note 215, I want to compare it to the damage caused by years of ignoring the problem of lack of consent to sex between married partners. More generally, a system that operates on behalf of justice but at the same time tolerates and allows clear injustice eventually has to change or face a loss of credibility.
237 Selmer, supra note 20, at 928 (“It is a detriment, not a benefit, to one’s long-run interests not to be able to make a binding commitment.”). See also, Richard Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & ECON. 293, 306-08 (1975).
238 The question raises the broader issue of paternalism which lies beyond the scope of this Article.
made more fair.\textsuperscript{239} Second, this argument assumes a simplistic model of the market, where the weaker market players can easily be identified and avoided. However, while some market players may develop a preference not to deal with an identified group of people to escape judicial scrutiny of transactions,\textsuperscript{240} it is much harder, or even impossible, to systematically avoid parties under stress. This conclusion arises from the fact that stress, as a form of vulnerability, is a universal and inevitable human condition that transcends group identities and instead necessitates contextual and concrete analysis, rather than a group-based protection.\textsuperscript{241} Everyone is vulnerable and can become distressed since we are all susceptible to an "ever-present possibility of harm, injury and misfortune."\textsuperscript{242} Thus, stress presents a "post-identity paradigm"\textsuperscript{243} that alleviates the risk of rejection of particular disadvantaged groups from the contractual sphere. Employers, for example, cannot avoid contracting with their resigning employees, even if courts will be more aware of the stressfulness of a job loss and will heighten their scrutiny over the terms of separation agreements. Since the proposed judicial protection on the basis of stress is carefully calibrated to context, it can create an incentive against exploitation without risking the ability of any particular group to create binding contracts.

2. Stress and the Problem of Fault

Even those who are convinced that the quality of consent—whether "perfect" or impaired—should stand at the center of any discussion involving stress and contracts may still wonder about its relationship to the concept of fault. Can impaired consent itself be sufficient ground for relief or should the impairment result necessarily from faulty acts of the other party?

We have already seen that requiring fault as a condition to relief is sometimes explained by the need to discourage wrongful behavior.\textsuperscript{244} The main problem with such a fault-based justification is that it conforms to the policies supporting tort law, rather than to the logic of contract. As many legal scholars have posited: modern contract law is mainly fault-free, while

\textsuperscript{239} Bix, supra note 215, at 260.
\textsuperscript{240} I have argued elsewhere that such preference is discriminatory and that contract law, in addition to other laws, should ban it. See Hila Keren, "We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional To Say? 11 MICH. J. RACE & L. 133, 172 (2005) (explaining why and how contract law has an essential role to play in the context of discrimination even when anti-discrimination laws are available and may apply).
\textsuperscript{241} In making this argument I am drawing on Martha Fineman’s compelling vulnerability theory. See, e.g., Martha A. Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 YALE J. L. & FEMINISM, 1, (2008).
\textsuperscript{242} Id. at 9.
\textsuperscript{243} Id. at 17.
\textsuperscript{244} Selmer, supra note 20.
tort law is the field of law saturated with fault.\(^{245}\) Remarkably, although the
fault-based justification is attributed to Judge Posner, it stands in stark con-

flict with Posner’s general writings on the topic of fault in contract law. In a
symposium dedicated to the “fault line” that divides tort law from contract
law,\(^{246}\) Judge Posner stressed: “[m]y thesis is that concepts of fault or
blame, at least when understood in moral terms rather than translated into
economic or other practical terms, are not useful addenda to the doctrines of
contract law.”\(^{247}\)

It can, of course, be argued that fault should be required in both fields of
law. Following such argument to its logical conclusion, it is possible that a
given behavior would justify awarding a relief under contract law and, at the
same time, constitute a tort. And indeed, current tort law addresses stress,
even recognizing it as a tort when one is evidently causing the stress of an-
other.\(^{248}\) However, even if fault \textit{may} appear in both fields of law, it does not
mean that it \textit{should} appear in both of them. In this context, note that placing
a tort-like goal in contracts has more than theoretical consequences. Be-
cause a fault-based system must insure that the action discouraged is im-
proper enough to justify legal intervention, the bar for fault is raised. While
a high bar might be appropriate under a tort regime, where fault is often
followed by heavy damages, it may be more problematic to adopt contrac-
tual high standard of fault when the risk is limited to the invalidation of the
contract. The end result of elevating the fault bar is dangerous: courts may
approve and legitimize the vice of taking advantage of another’s vulnerabil-
ity. They may find, as one court bluntly put it, that: “[t]he assertion of du-
ress requires more than that a party took advantage of another's negative
economic situation.”\(^{249}\) For all those reasons combined, subjecting the con-
tractual relief to a high standard of fault seems questionable.\(^{250}\)

\(^{245}\) \textit{See, generally,} Roy Kreitner, \textit{Fault at the Contract-Tort Interface,} 107 MICH. L. REV.
1533, 1535-36 (2009) (describing the shift in the modernization of contract law from a fault-

based regime to a no-fault, privatized regime).


\(^{247}\) Richard A. Posner, \textit{Let Us Never Blame a Contract Breaker,} 107 MICH. L. REV. 1349,
1349 (2009). Posner attributed his thesis to Holmes, \textit{id.} 1349 (“I have borrowed this thesis
from Holmes, who...drew a sharp distinction between tort and contract law, so far as issues
of fault or blameworthiness are concerned”).

\(^{248}\) \textit{See} \textit{Restatement (second) of Torts,} §46. Remarkably the comments to the Restatement
of Torts suggest that the legal understanding of what is referred to as “emotional dis-
tress” is far from being fully developed. So much so that a caveat was added stating “The
Institute expresses no opinion as to whether there may not be other circumstances under
which the actor may be subject to liability for the intentional or reckless infliction of emo-
tional distress.” Following the above caveat comment c states “The law is still in a stage of
development, and the ultimate limits of this tort are not yet determined.”


\(^{250}\) This is not to suggest that there are no “pockets of fault” in contract law. For a descrip-
tion of some see the articles mentioned in Omri Ben-Shahar & Ariel Porat, \textit{Fault in Ameri-
can Contract Law,} 107 MICH. L. REV. 1341, 1342 (2009) (describing contributions by Mel-
I would argue further that any consideration of fault should stem from the contractual structure of the dilemma: the need to balance the interests of the party seeking relief and the party who stands to lose a desirable contract if relief is awarded. Conditioning the relief to the distressed party on presence of some fault of the unstressed party can thus be seen as merely balancing their opposing interests. This balancing does not call for a high level of fault. The goal of assessing the behavior of the party seeking enforcement is not to deter, educate or punish that party, but rather to satisfy fairness concerns, i.e., to make sure that awarding relief would not cause injustice. Thus, even modestly flawed behavior should suffice to award relief to a severely distressed party.

Because a balancing justification is more plausible, the integration challenge is to demonstrate how the study of stress can help in re-conceptualizing the kind of fault that might justify relief. First, we are now more able to recognize that stress is almost never caused by one factor or one person; instead, we usually witness clusters of stressors and a resulting distress that has several different causes. Therefore, it is futile to require, as many courts do, that the party seeking enforcement be the main cause of the vulnerability of the party seeking relief. In reality, posing such a high bar of fault simply works to defeat the distressed party, even when some fault of the other party is evident. Such was clearly the situation in Gascho. Since Mary Ann was not only under the stress of losing her job, but was also going through a painful and violent divorce, her employer, the party seeking enforcement, could not have been, by definition, the main cause of her stress.

Second, and more significantly, the study of stress teaches us that stress—especially as it so often works in conjunction with depression and insomnia—is highly visible and frequently has many physical manifestations such as crying episodes, irritability, extreme weight changes, dependence on medical treatments, and daily use of medications. All those clear signs of vulnerability strongly suggest that at least some level of fault is almost always present in cases of consenting under stress. Such a basic level of fault originates from the awareness of one party that the other is operating under significant stress, and that awareness is followed by a decision to ignore the palpable signs of distress and move the deal to completion.

The idea can be illustrated by revisiting Gascho. The hospital did not cause Mary Ann’s divorce, but it strongly encouraged her to sign a release agreement, while understanding the precariousness of her condition and denying her time to recover. In fact, the representatives of the hospital who personally negotiated with Mary Ann admitted knowing everything about

vin Eisenberg, Richard Epstein and George Cohen). However, the authors summarize the entire symposium stating that “even after highlighting the many faces of fault in contract law, it is all the more clear that the role of fault is limited.” Id. at 1344.
her difficult situation—the bruises on her body, her major loss of weight, her severe depression, her insomnia, her medications and her constant weeping during the closure of the agreement. The hospital’s awareness combined with its determination to proceed with the contractual process should together represent a clear willingness to take advantage of Mary Ann’s vulnerability.

In most cases, however, the party seeking to enforce the contract is at a higher level of fault and is more involved in exacerbating the stress even if it cannot be blamed for initially causing it. Parties showing this type of opportunistic behavior are not only aware of the stress of the other but are actively adding to it by pressuring their distressed counterparty. They sometimes do so by creating time pressure, rushing the other party to give consent or suffer the consequences. This is a recurrent story, for example, in the context of prenuptial agreements, when brides-to-be are put in the dilemma of accepting an unfair prenuptial agreement or facing a last-minute cancellation of their wedding. Similar, time pressures are imposed in the lending process, where distraught borrowers are told by potential lenders that they have only a limited time to agree to refinancing agreement, before foreclosure will be initiated.

Stress studies, as we have seen, demonstrate that time pressure has the ability significantly to aggravate any given set of stressors. Beyond creating time pressure, other examples of fault—in the form of worsening the initial stress and enhancing the vulnerability—include creating an intimidating setting before or during the closure of the deal, overstating the harsh consequences of not signing the contract, and threatening legal actions. In one case, for example, a lender was aware of the borrower’s desperate condition, which included recent death of her husband followed by diagnosis of “severe depression and diabetes.” The lender then added pressure in order to obtain the borrower’s consent to a refinancing agreement she could not afford, warning her that she has to act or the lender “will have to take other action.”

For a vivid description of the impact of time pressure, in this lending context, see In re Davis, supra note 53, at 297 (“Everything was done so fast, sign this, sign this. The title man was there. He had a six o’clock appointment it was his son’s birthday and he was rushing and I was questioning this thing b/c I really didn’t want to do it. They kept on pushing me and pushing me and saying this and that.”).

Many stress-sensitive courts intuitively respond to the impact of time pressure. See, e.g., Holler, supra note 35, at 476-77 (“Husband made it perfectly clear to Wife that she must sign the agreement if she wanted to be married prior to the expiration of her visa”).


Id. Although the court did not find such exploitative behavior as satisfying the requirements of the duress doctrine it did find the facts as justifying a hearing with regard to possible unconscionability. However, there is a conceptual damage in thinking and declaring that there is not enough wrong in taking advantage of others. Also, in many other cases the analysis of “not-enough-fault” leads to total rejection of the stress argument. See, e.g., Storie, supra note 249.
To a large extent, fault is tied to stress because of its fundamentally seductive quality. Being so evident and extreme, stress seems to entice exploitation because it presents an easy opportunity to make extra-profit—profit not possible under “normal” conditions. Sadly, for too many players in the market, this temptation is hard to resist. Problematically, courts that fail to define the act of taking advantage as sufficient fault not only allow such behavior but also reward it.

To conclude, the kind of fault that should be required as a condition for relief should be changed to include all the cases in which the party seeking enforcement knew or should have known about the stress. Due to the characteristic visibility of stress and its outcomes a state of true innocence is, at best, rare. Indeed, in the many cases discussed in this Article no party argued that they failed to notice the stress of the party seeking relief. Therefore, each time the party seeking relief is able to prove its distress at the time of consent, relief should not be denied based on no-fault arguments unless the party seeking enforcement can show innocence, i.e., that there were no signs of severe stress and that it did not and should not have known about the other’s vulnerability. No party to a contract has a valid expectation for social support—by way of judicial enforcement—when it was involved in exploiting distress, like obtaining consent from someone who is shaking and crying. The proposed broadening of the concept of fault from causing stress to being aware of it can be supported by the need to protect individuals, and the market as a whole, from exploitative behavior.

Finally, what I suggest can also be explained in terms of risk allocation: taking advantage of perceptible stress in order to win a contractual windfall can be seen as taking a calculated risk that the distressed party may later on, typically after some recovery, seek relief. It is, therefore, within the judicial role, and in fact a judicial duty, to do justice in those situations by appropriately balancing the parties’ interests.

255 However, the possibility exists as one can imagine that some individuals might conceal their stress during the negotiation to avoid exploitation of their vulnerability.

256 Compare to the defense of unilateral mistake, RESTATEMENT (SECOND) CONTRACTS §153 comment a (explaining that “relief has been granted where the other party actually knew… or had reason to know of the mistake at the time the contract was made or where his fault caused the mistake”).

257 See. e.g., Spencer Nathan Thal, The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness, 8 OXFORD J. OF LEG. STUD. 17, 22 (1988) (“Freedom of contract doctrine should not be accepted as a validating principle for contracts which arise as a result of exploitation… The most significant problem...is...formulating a coherent definition of exploitation. Such a definition is essential in order to maintain the limited nature of the claim.”); Rich & Whillock, Inc. v. Ashton Development, Inc., 204 CAL. RPTR. 86, 89-90 (Cal. App. 1984) (“Those rules are not limited to precepts of rationality and self-interest. They include equitable notions of fairness and propriety which preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value. Such exchanges make a mockery of freedom of contract and undermine the proper functioning of our economic system.”).
3. Stress and the Objective/Subjective Dichotomy

As we have seen, the fault requirement is not the only obstacle to those who seek a remedy for consenting under stress. They are often judged for surrendering to “subjective” feelings rather than utilizing “objectively” available alternatives. A prime example appears in Satter, in which the court stated:

When Satter states that she suffered anxiety, depression, and an inability to sleep or be alone, she is speaking about things she subjectively felt and experienced. The Court’s duty …is to decide whether a reasonable person in Satter’s position…would have felt forced to resign. Such an objective standard does not take into account the things Satter was subjectively feeling or experiencing emotionally.²⁵⁸

Despite those clear words, the objective/subjective dichotomy is highly inappropriate if one understands how stress operates. Integrating that knowledge into the legal analysis produces several important conclusions. First, stress is not dominantly subjective but rather a common and patterned factual phenomenon, as suggested by the host of inventories of common stressors and recognized outcomes of stress. Even if stressors impact individuals differently, it is not mainly due to their unique emotional fabric, but is usually a result of other “objective” factors, such as other existing stressors, their social status and/or the resources available to them. Furthermore, since stress is visible, measurable and provable it can be described as “objective” rather than “subjective”. Many distressed parties show evident physical signs of severe stress—such as crying and shaking while giving their consent ²⁵⁹—and/or present clear professional evidence of their distressed condition.²⁶⁰ Their stress exists “objectively,” and should be evaluated accordingly.

Second, similar to the way in which stress is not merely “subjective”, the reasonable alternative test is not purely an objective test. The alternatives imagined in retrospect by judges are often not available to a distressed

²⁵⁸ Satter, supra note 31, at 16-17. For using similar juxtaposition see also Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975) (“duress is not measured by the employee’s subjective evaluation of a situation. Rather, the test is an objective one.”), Middleton v. Dept of Def., 185 F.3d 1374, 1379 (Fed. Cir. 1999) (“[t]his test is an objective, rather than subjective one; an employee’s subjective feelings are irrelevant.”).
²⁵⁹ McDevitt v. Guenther, 522 F. Supp. 2d 1272, 1278 (D. Haw. 2007) (a bride-to-be signing a harsh prenuptial agreement, in front of a notary, while crying, shaking and vomiting).
²⁶⁰ Gascho, appeal, supra note 3 (introducing detailed psychiatric report confirming a major depression from the day that followed the signing of the contract).
party who is under pressure to give consent or suffer severe consequences. It is doubtful, for example, whether a bride-to-be, just a few days before her wedding, can see (or should see) the alternative of cancelling her wedding in the last minute as a viable alternative. Although such an alternative may seem reasonable to a judge who looks at the situation years after the signing of the prenuptial agreement, such a view is not more objective than the bride’s perspective at the time of signing.261 More generally, judges often point to possible forms of action that are heavily influenced by their own (subjective) combination of capabilities, resources, resilience and calm. Consequently, they frequently end up recommending litigation as a reasonable alternative, without taking into account the demanding and intimidating nature of the process, especially for lay people overwhelmed by stress. Additionally, and more critically, as the alternatives study has shown,262 the scanning of alternatives by persons under stress is different than the scanning of alternatives by unstressed people—a fact that needs to be taken into account.

If stress is not a subjective feeling and the alternatives are not so objective it is essential to eliminate such rhetoric as—due to lingering legal aversion to subjectivity and resistance to arguments based on emotions263—it leaves little chance for appropriate treatment of the problem. The “reasonable alternative” test should therefore be refined to better reflect the science of stress which shows that distressed parties have limited reasonable alternatives.

B. Framework for Taking Stress into Account

Taking stress into account is not only highly important, as I have argued thus far; it is also attainable. Critically and perhaps surprisingly, it would require little change of doctrine. Once the veil of “subjective feeling” is removed and the focus is shifted from the fault of the party seeking enforcement to the quality of consent of the party seeking relief the challenge is almost fully met. Courts and practitioners can use the knowledge accumulated in years of research to evaluate stress arguments and in appropriate cases—when stress has led to an unfair contract—to prevent the exploita-

261 See, e.g., Spiegel, supra note 132 (“Here, Sara had a reasonable alternative—she could have canceled the wedding. Although she may have suffered embarrassment in doing so, we do not think social embarrassment from the cancellation of wedding plans, even on the eve of the wedding, renders that choice unreasonable.”).


263 See, e.g., Abrams & Keren, supra note 75.
tution of distressed parties. One stress-sensitive starting point may come from Europe, where the principles of contract law include an explicit ban on exploiting, or profiting from, the vulnerability of others. Then, I suggest that a stress-sensitive approach will build on the intuitions of stress-sensitive case law and augment it with considerations informed by the study of stress. Within this suggested stress-sensitive framework four elements deserve special attention: the existence of scientifically acknowledged common stressors, the presence of factors creating special vulnerability, the manifestation of recognized symptoms, and the question of alternatives to contractual consent for a distressed person.

1. Common Stressors

A stress argument relies on a stressor that allegedly had caused the stress. The inventories described in Part II allow an evaluation of the alleged stressor: the more recognizable and severe the stressor is considered by stress specialists the more credibility should be given to the stress argument. This Article highlights three contractual contexts in which the agreements are made in an environment that is loaded with common and acknowledged stressors. First, in the employment setting, employees consenting to resign and release their employers from liability are often doing so under special stressful circumstances. However, even without additional misfortunes the instability at the workplace and the anticipation of a job loss are recognized significant stressors. Second, the contracts between borrowers and lenders are frequently made under conditions related to the accepted stressor of financial strains. And third, in the intimate sphere, settlements between life-partners—either before the marriage or as part of a divorce process—are also made in connection with life-changing events that are ranked high

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264 To prevent such exploitation any of the existing doctrines of unconscionability, undue influence and/or duress may be used, and/or an expanded duty to negotiate in good faith can be adopted. Comparing the doctrines and choosing between them goes beyond the purpose and scope of this Article given its focus on the problem of stress. However, others have discussed the similarities and differences between those doctrines. See, e.g., John Phillips, Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine, 45 WAKE FOREST L. REV. 837 (2010).

265 Melvin A. Eisenberg, The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake and Nonperformance, 107 MICH. L. REV.1413, 1418(2009) (citing the Principles of European Contract Law which provide: “(1) A party may avoid a contract if, at the time of the conclusion of the contract: (a) it was ... in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and (b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit”).

266 Recall, for example, the sexual harassment suffered by Ms. Meyers, supra note 41, and the hostile environment that had developed in the hospital that employed Ms. Gascho, supra note 6.
on inventories of stressors. Other stress arguments can be concretely judged by a relatively simple review of the stress literature, which can assist in distinguishing situations that are acknowledged for their likelihood to produce stress from those which are less familiar or plausible.

2. Special Vulnerability Issues

In constructing or evaluating a stress argument special attention should be given not only to the commonalities between people but also to factors that make them differ in their response to stressful events. Under this element individual and social factors that tend to enhance or decrease the level of stress should be taken into account. Starting from the individual level, courts should evaluate any argument contextually to assess the significance of the leading stressor for the person before them. Additionally, the primary stressor in each case should not be reviewed in isolation; rather clustering of stressors and the tendency of stressors to proliferate should be considered; and other existing stressors should be defined as well. Holler,\textsuperscript{267} for example, demonstrates the way that a fear of a last minute wedding cancellation combines with the challenges of pregnancy, unemployment and an immigrant visa that is about to expire. Still at the individual level, the material and mental resources available for coping with “universal” or objective stressors should play an essential role in the evaluation of the magnitude of the stress. As we have seen, abundant resources make it easier to cope while exhausted reserves may escalate the initial problem.

Beyond the individual level, appreciation of what theorists have called “the social distribution of stress” necessitates sensitivity to the role of race, gender, and social status. For example, the fact that women are influenced more than men by interpersonal stressors, should add credibility to a stress argument made by women who have given consent in the course of a difficult divorce process. To take another example, research has demonstrated that every step down the ladder of socioeconomic status produces more stress, as less control allows less room for coping.\textsuperscript{268} Integrating this piece of information into the analysis can justify, for example, the intuitive result of the stress-sensitive Meyers decision.\textsuperscript{269} Meyers’s stress argument gains power if we bear in mind her low status as a young “sales associate” who was sexually harassed by a series of senior male managers. Moreover, in addition to special factors affecting individuals and social differences, some concrete circumstances should be considered relevant. For example, time

\textsuperscript{267} Holler, supra note 35.
\textsuperscript{268} See supra notes 165-166 and accompanying text.
\textsuperscript{269} Meyers, supra note 41.
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pressure is a leading one as it has been shown to aggravate any given stress, a fact that has been intuitively recognized by some stress-sensitive courts.270

3. Recognizable Symptoms

As we have seen stressors trigger a secretion of special hormones in the brain and those eventually create recognizable symptoms of stress such as insomnia, depression, and change in body weight. These symptoms can assist in evaluating the credibility of a given stress argument and can alleviate the fear of manipulation that comes from conceptualizing stress as merely a feeling. Importantly, recognizing the chemical “cortisol connection” between stress, insomnia, and depression makes it crucial that legal actors, from lawyers to judges, take greater cognizance of medical evidence. A psychiatric report that proves “major depression” and is not disputed by the other party, for example, cannot remain irrelevant to courts that care about quality of consent; and the same goes for evidence regarding use of prescribed medications to relieve stress symptoms.271

4. Reasonable Alternatives

I argued above that any consideration of reasonable alternatives must reflect the way that stress limits the ability to perceive alternatives, and impairs the competence to choose reasonably among those perceived as available. A stress-sensitive analysis would take these insights into account and re-focus the question of alternatives. If the stress argument is plausible, under the first three elements, the question should be whether it was reasonable for a person under such stress to consent to an undesirable contract. The burden of showing that another alternative was visible and viable for the person under stress should accordingly shift to the party seeking to enforce the contract.

CONCLUSION

These four elements suggest a framework for an informed evaluation of stress arguments that brings non-legal knowledge to an important and familiar legal question—the question of consenting under stress. Unfortunately,

270 Id. at 5 (stating that the situation became more acute since Meyers “had approximately three days to deliberate.”).
271 For courts’ disregard of medical evidence see, e.g., Gascho, supra note 3, Satter, supra note 31. See also Coleman v. Coleman, 681 P.2d 1269 (Utah 1984) (rejecting a stress argument despite a physician’s testimony that described the distressed party as “very depressed”, incapable of making important decisions and using prescribed tranquilizer and antidepressant).
with the current deep recession and its consequences the question is especially relevant and requires immediate attention. So far most cases fell short of handling the issue. However, as I have argued here, law cannot afford to remain coldly doctrinal and isolated from other bodies of knowledge. An isolated, insensitive legal response to stress could become another major stressor in people’s lives, exacerbating rather than mitigating problems of exploitation.

I am not the first to suggest that exploiting others’ vulnerability is or should be unacceptable under contract law. However, this Article is now contributing a studied explanation of why it is not only justified but also important, and quite urgent, to do so. To the legal arena it offers the first account of how stress can impair consent, even where that stress is not caused by the other party. It also provides a counter argument to Posner’s fault approach, which permits the exploitation of vulnerability as an acceptable contractual practice. With the study of stress gradually illuminating the scope of the problem and its dire consequences to individuals, communities and society at large, law cannot afford to remain behind. In the face of stressful life circumstances, the law can offer relief by outlawing the exploitation of stress and vulnerability. It is incumbent on legal actors to take this path.

In the field of contract law the long interdisciplinary journey charted here leads to a relatively simple, practical conclusion. A more responsive contract law must attend more carefully to the quality of consent, as a condition for contractual validity. Deploying the four basic elements outlined above, existing fairness-oriented doctrines, such as duress or unconscionability, can be used to protect those whose consent was impaired by stress. In fact, some stress-sensitive courts are already showing protective inclinations and this Article offers research-based justification for their decisions. Theoretically, however, the insight reflected in this Article extends far beyond the contractual arena. Consent given under stress presents a legal problem in a host of legal fields, both substantial and procedural. People may consent under stress to have sex (criminal law), to have children (family law), to go through medical procedures (health law), to use arbitration or mediation (civil procedure law), to sign a plea-bargain (criminal procedure) and so forth. In all those matters, and others, the law can benefit by understanding the operation and effects of stress and by accounting for it in the analysis of consent. This Article offers a path to that goal.

272 See, e.g., John P. Dawson, Economic Duress—An Essay in Perspective, 45 Mich. L. Rev. 253, 289 (1947) (famously arguing that the duress doctrine was based on the principle of prevention of excessive gain resulting from exploitation of impaired bargaining power). See also ALAN WEBER, EXPLOITATION, 36-76 (1996) (arguing that cases in which relief was given under the doctrine of unconscionability often can be explained by the existence of exploitation).