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Stepping Out of the Morass of Duress Cases: A Suggested Policy Guide

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I. INTRODUCTION

Contract law primarily focuses on differentiating between promises that warrant enforcement and promises that do not.[1] The courts and classical commentators use principles of voluntarism[2] as the main theoretical standard to demarcate between enforceable, valid contracts and unenforceable, invalid ones.

The duress defense reflects the importance of consent in contract law by excusing a contract obligation if the agreement is coerced[3]

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[1] We could imagine a world in which promises were enforceable simply on the basis of the moral suasion of the promise. C. FRIED, CONTRACT AS PROMISE 8 (1981) ("By promising we transform a choice that was morally neutral into one that is morally compelled."). So conceived, a promise alone could trigger contract liability. If the promissory quality of a statement alone could result in its enforceability, then the legal inquiry would be limited to an examination of the words used to determine whether they were promissory. Once a statement is determined to be a promise, it would be binding. Such a system would obviate the need for careful legal delineation between enforceable and unenforceable promises. Nevertheless, "[i]t is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep *all* one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient." Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1933). For various reasons, the law limits the types of promises that are enforced. *See* C. FRIED, *supra*, at 3 (discussing the limited nature of promise enforcement); *see also* Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (reviewing the will, reliance, efficiency, fairness, and bargain theories of contract and advocating the adoption of a consent theory to determine which contracts should be enforced); Cohen, *supra*, at 571-85 (reviewing the history of contract law and discussing a variety of theories used to justify the enforcement of promises).

This focus on contract formation and enforcement has prompted criticism from some scholars who have urged that greater attention be devoted to practical problems of contract performance. *See, e.g.*, Farnsworth, *A Fable and A Quiz on Contracts*, 37 J. LEGAL EDUC. 206, 208-09 (1987).

[2] As one commentator observed:

> The distinction between voluntary and involuntary actions is an essential feature of our moral, political, and legal discourse . . . .
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> . . . .
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> . . . Our moral and legal responses to individual behavior are typically based on (what I shall call) *the voluntariness principle*. The general assumption is that promises are binding, rights can be waived, and punishment appropriately applied if, but only if, the relevant actions are voluntary.

A. WERTHEIMER, COERCION 3-4 (1987).

Others have observed that "'actions are regarded as involuntary when they are performed under compulsion. . . . An act is compulsory when it has an external origin of such a kind that the agent or patient contributes nothing to it.'" Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 564 n.85 (quoting ARISTOTLE, ETHICS [NICHOMACHEAN] III, at 1109b30-1110a16 (J. Thomson trans. 1976)).

[3] Initially the doctrine of duress reflected the importance of the principle of voluntarism as a determinant of enforceability. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 254-56 (1947) (discussing how the concept of duress evolved to dovetail with free will notions). *But see* Mather, *Contract Modification Under Duress*, 33 S.C.L. REV. 615, 638 (1982) (explaining the current conceptual basis for duress claims as one to "distinguish between

or not fully voluntary.[4] The law will enforce only consensual agreements[5]—those that are reached voluntarily. If a promisor is co-

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bargains that enhance the prospects for mutual benefit and those that do not").

The duress defense is powerful because it raises the fundamental issue of the degree of consensual behavior required to trigger contract liability. Under a system committed to voluntarism, *see supra* note 2, the plea that "'I was forced into doing it,'" A. WERTHEIMER, *supra* note 2, at 3, seems particularly compelling.

Traditionally, scholars did not confront the question of what minimum amount of choice was required to validate an agreement. This was largely a result of the mythical but widespread perception that parties had autonomy and that real differences in bargaining power, market leverage, or wealth did not impair such autonomy. Under this view, all contracting parties were presumptively free to choose, or not, as they wished. Moreover, because "[c]apitalist theory typically assumes that market transactions are voluntary and uncoerced, even if they are made against a background of economic necessity," A. WERTHEIMER, *supra* note 2, at 4-5, courts did not confront issues of impaired choice that might result from such economic necessities. *See also* Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 195, 207 (1987) (describing two "paranoid" individuals negotiating at arm's length as the conceptual basis of classical contract law); Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 475-76 (1983) (discussing the presumption of equality among all contracting parties in classical contract law and its continuing impact).

Recognition of a duress-based excuse from contractual obligations illustrates a modern tendency to provide avoidance mechanisms for parties who are unfairly disadvantaged by the bargaining process. This insures that contracts comport with relevant societal norms. *See, e.g.*, Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 104 (1988) ("Although based in part on the principle of freedom of contract, modern contract law is also tempered . . . by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties' actual agreements."); *see also* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1024 (1985) ("The doctrines of duress and unconscionability are self-consciously 'public' insofar as they are designed to police the limits of 'fair' bargain."). Expanded notions of fraud and undue influence serve much the same purpose. *See* James & Gray, *Misrepresentation—Part II*, 37 MD. L. REV. 488, 523-27 (1978) (discussing expanded notions of actionable fraud).

This Article, while recognizing the jurisprudence of duress as a tool for promoting distributive justice and fairness, posits other, as yet unrecognized, policies that are either implicit in extant case law or that should be adopted to guide duress outcomes. These policies, which are not based on fairness, serve to reorient the jurisprudence away from duress as an altruistic doctrine.

[4] *See, e.g.*, Rubenstein v. Rubenstein, 20 N.J. 359, 365, 120 A.2d 11, 13 (1956) (explaining that the basis of the duress doctrine is the absence of "actual consent").

Commentators have criticized the notion that coerced agreements are not enforceable because they evidence less than "real" consent. These scholars have argued that contrary to accepted notions, the consent in coerced agreements is very real. Professor Dalzell, for example, states:

> When we do stop to think about it, however, it is . . . plain that the more unpleasant the prospective alternative, the more genuine is the consent to the contract necessary to escape that alternative; in other words, that the consent to a contract resulting from duress is probably far more real than the typical contractual consent.

Dalzell, *Duress By Economic Pressure I*, 20 N.C.L. REV. 237, 240 (1942) [hereinafter Dalzell, *Duress I*]; *see also* Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606 (1943) (arguing that even choices made between unpalatable alternatives are the result of free will); Philips, *Are Coerced Agreements Involuntary?*, 3 LAW & PHIL. 133, 133-34 (1984) ("The supposition that coerced actions are involuntary is the result of a natural error. . . . A coerced agent is presented with unwanted, unpleasant alternatives, but is free to choose and to act upon the least obnoxious of them."). As Justice Holmes explained "'[i]t always is for the

erced into entering into a contract, she is entitled to avoid the agreement at her option[6] because the agreement does not de-

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interest of a party under duress, to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.'" Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67, 70 (1918), *quoted in* Hale, *supra*, at 618.

Professor Dawson's critique of the "reality of consent" standard, *see* Dalzell, *Duress I*, *supra*, at 238-40, was the most trenchant of all. *See* Dawson, *supra* note 3. Dawson posited that the very notion of consent was a false one since all agreements were coerced. *See id.* at 266. It follows that it makes no sense to separate valid from invalid agreements depending on whether the consent was real.

[5] The *Restatement* reflects the consensualism standard when it states: "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979). Orthodox bargain theory constituted the traditional mechanism for insuring a mutual exchange.

Recently, critics have undermined the centrality of the consensual model by delegitimizing it and depicting it as a vehicle for protecting privilege and oppression. "[I]n modern society, we have begun to question the legitimacy of the order of power established by the uninhibited exploitation of the potentialities of ownership and knowledge." H. COLLINS, THE LAW OF CONTRACT 12 (1986); *see also* R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 121 (1986) (discussing trends in the critical legal studies movement involving theorists who posit law's function in perpetuating "social divisions and hierarchies"); Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 852 (1983) [hereinafter Feinman, *Critical Approaches*] (discussing the function of "[contract] law as a legitimating ideology and as an expression of legal consciousness" which "conceal[s] the reality of economic injustice in society"); Hillman, *supra* note 3, at 110-13 (discussing the Critical Legal Studies idea that contract law legitimizes the perpetuation of inequalities).

Modern critics have also debunked notions of consensualism by depicting the liberal conception of contract law, on which consensualism is premised, as value laden rather than value neutral. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 201 (1977) ("The emergence of the objective theory, then, is [a] measure of the influence of commercial interests in the shaping of American Law. . . . [A] legal ideology of formalism [was elaborated] that could . . . disguise gross disparities of bargaining power under a facade of neutral and formal rules . . . ."). This critique opened the legal system up to questioning on the nature of its adopted underlying values, including the value of consensual exchange.

Legal critics have also undermined the centrality of the consensualism principle of individual freedom to contract by emphasizing the "counterprinciples" of community and family. *See, e.g.*, R. UNGER, *supra*, at 60-75. These competing principles lead to indeterminate results because the judiciary has to choose between conflicting values. *See* Dalton, *supra* note 3, at 1006, 1010-12 (discussing the "tension" attributable to the clash between liberal freedom of contract and regulatory conceptions of contract law); Feinman, *Critical Approaches*, *supra*, at 847 (positing that "the two [models of individual autonomy and collectivism] are fundamentally in conflict").

Some recent scholarship has sought to reaffirm the importance of consensualism principles in contract law, albeit in a modified form.

> If the "death of contract" movement is a product of a disillusionment with and abandonment of both the will theory of contract as a distinct source of contractual obligation and the bargain theory of consideration as the means of formally distinguishing between enforceable and unenforceable exercises of the will, the "resurrection of contract" is a recognition of contract law's proper function as a transfer mechanism that is conceptually dependent on more fundamental notions of individual entitlement.

Barnett, *supra* note 1, at 321; *see, e.g.*, Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 905-08 (1987) (advocating an approach focusing on assent as a basis for finding

serve enforcement.[7]

Duress cases involve multifarious fact patterns[8] in which the alleged coercer offers her victim two unpalatable alternatives. Archetypal choices are: "your money or your life"[9] or "your last ten

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contractual liability in cases in which explicitly reciprocal or formalized contracting is unlikely to occur); *see also* Feinman, *Contract After the Fall* (Book Review), 39 STAN. L. REV. 1537, 1538 (1987) (reviewing H. COLLINS, THE LAW OF CONTRACT (1986)) (describing neoclassical scholars' use of assent-based theory to "produce predictable, yet flexible, legal doctrines that balance mutual assent and public regulation").

[6] A successful duress claim permits avoidance of the obligation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 comment d (1979) ("Duress by threat results in a contract voidable by the victim."); *see also* E.A. FARNSWORTH, CONTRACTS § 4.19, at 267 (1982) (recognizing a duress victim's right to avoid contracts induced by threats); Fingarette, *Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape*, 42 WASH. & LEE L. REV. 65, 65 (1985) (recognizing duress as one of many "legal excuses and pleas in avoidance").

Because duress renders the contract voidable but not void, the victim is given the option of performing or not. *See* E.A. FARNSWORTH, *supra*, § 4.19, at 267. Nevertheless, some contracts involving duress are void: those that involve nonvolitional behavior. *See* A. WERTHEIMER, *supra* note 2, at 46; *see also infra* note 9 (discussing nonvolitional behavior).

[7] *See* Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 81 (1981) (noting that under duress "any agreement [a party] makes is not morally binding"); *see also* A. WERTHEIMER, *supra* note 2, at 46 (proposing a theory that "yields the conclusion that a contract is binding if and only if it ought to be binding"). Professor Wertheimer states that "[a] coerced promise is not morally binding." *Id.* at 3; *see also* Mather, *supra* note 3, at 625 n.33 (indicating that "duress is coercion inducing an agreement the law ought not to enforce").

[8] Claims of duress regularly involve varied fact patterns. Professor Dalzell deftly broke these situations down into: (1) refusals to turn over goods to their owner; (2) refusals to provide utility services; (3) threats by government officials; (4) threats to breach contracts; and (5) threats by one spouse against the other. Dalzell, *Duress I*, *supra* note 4, at 241-77. Current commentators treat duress claims differently, often considering all fact patterns together and developing theories to identify the central elements of coercion to be applied across a wide range of situations. *See* Westen, *supra* note 2, at 559, 559-69 (identifying the "core elements of coercion"); *see also* A. WERTHEIMER, *supra* note 2 (examining the concept of coercion from both a philosophical and a legal perspective); Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (S. Morgenbesser, P. Suppes & M. White eds. 1969) (discussing the conditions for coercion generally).

[9] This "paradigm" case is discussed by Professor Wertheimer in A. WERTHEIMER, *supra* note 2, at 6-7. Professor Frankfurt would call proposals of this ilk "biconditional." Frankfurt, *Coercion and Moral Responsibility*, in ESSAYS ON FREEDOM OF ACTION 65, 66 (T. Honderich ed. 1978). For example, "when a highwayman tells a traveller that it's his money or his life, biconditionality is presumably intended: the highwayman will kill the traveller if the traveller refuses to hand over his money, while he will spare his life otherwise." *Id.* at 66-67. The case of the threatened death to the robbery victim would constitute physical duress. These "paradigmatic" situations have provided a ready basis for excuse even in the traditional world of limited relief from contract liability. *See* Fingarette, *supra* note 6, at 72.

The above example involves a "constrained" choice. A. WERTHEIMER, *supra* note 2, at 9-10. A constrained choice is "one where the agent is confronted with unwanted alternatives, but is quite capable of making rational choices among them." *Id.* at 9; *see also* Fingarette, *supra* note 6, at 74 (distinguishing rational choices made between undesirable alternatives from "sheer mindless panic"). Professor Wertheimer discusses the concept of constrained choices by contrasting them with "nonvolitional acts." A. WERTHEIMER, *supra* note 2, at 9. Nonvolitional

cents for a loaf of bread."[10] Duress defenses also arise when: a promisor threatens not to perform unless she secures added compen-

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acts are characterized by "either serious loss of the ability to reason, or serious loss of self-control from causes other than the loss of reasoning ability" and thus would result in void contracts. Fingarette, *supra* note 6, at 76. Professor Wertheimer describes such "involuntary *acts* [as] involv[ing] a *defect* of volition." A. WERTHEIMER, *supra* note 2, at 9. These acts are comparatively rare, and clearly do not warrant enforcement. *Id.* at 30 (discussing RESTATEMENT (SECOND) OF CONTRACTS § 492(a)); *cf.* MODEL PENAL CODE § 4.01(1) (Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."), *discussed in* Fingarette, *supra* note 6, at 76 n.29.

An inequality of resources, which restricts the contract alternatives that are available, contributes to constrained choice. *See* H. COLLINS, *supra* note 5, at 58 ("In practice, people suffer constraints from shortages of resources, the costs of action and inaction, and subordination to the interests of others."). Admittedly, inequalities of resources constrain freedom, and "[a]dvocates of capitalism need not deny that A's property rights restrict B's freedom to do what he wants or to satisfy his preferences." A. WERTHEIMER, *supra* note 2, at 253; *see also* Frankfurt, *supra*, at 83-84 (discussing how reactions to the conditions which limit choice differ depending upon whether the limits are environmentally created or the result of human intervention).

Traditionally, the law has tolerated such cases of constrained choice and refused affected parties contract avoidance because

> for the most part our habitual Anglo-Saxon individualism has been in control of the common law, so as to make any such curb exceptional. We have been proud of our "freedom of contract," confident that the maximum of social progress will result from encouragement of each man's initiative and ambition by giving him the right to use his economic powers to the full.

Dalzell, *Duress I*, *supra* note 4, at 237; *see also* Murphy, *supra* note 7, at 82 (discussing the argument for "legitimate 'inequalities of fortune'" (quoting Justice Pitney in Coppage v. Kansas, 236 U.S. 1, 17 (1914))); Westen, *supra* note 2, at 560 (positing that coercion does not result from natural conditions but from "[a] constraint . . . brought to bear on an agent . . . *by another agent*"). As the illusory nature of the freedom model became apparent, *see* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943), the courts expanded the duress excuse to offer relief in cases of choice constrained by economic pressures. *See supra* note 3.

[10] Professor Dalzell relies on the bread example to illustrate the limits continually placed on our freedom by the alternatives that we confront. "I agree to pay ten cents for a loaf of bread, not because I want to give the baker ten cents, but because that's the only way I can get the bread. I am choosing between alternatives, giving up the dime or doing without the bread." Dalzell, *Duress I*, *supra* note 4, at 239. If courts were to find duress on the facts of the bread case, they would be giving parties a free way out of contractual obligation based on "inequalities of fortune," *supra* note 9, for which the other party was not responsible. Denying duress claims in such circumstances would be consistent with an ideal of individualism in which each party is "entitled to enjoy the benefits of [its] efforts without an obligation to share or sacrifice them to the interests of others." Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713 (1976). For a discussion of the benefits of a system indifferent to sharing, see Feinman, *Critical Approaches*, *supra* note 5, at 839-42 (discussing self-reliance and welfare maximization as two of the primary benefits of an individualistic ethos).

If courts broadened available excuses to include economic need, they would be administering legal rules to favor the less fortunate based on principles of altruism. For a discussion of this competing principle of altruism in modern contract law, see *id.* at 842-44 (listing the core elements of the collectivist ideal for deciding contracts cases including social values and interdependence). *See also* Kennedy, *supra*, at 1717-22 (elaborating on the elements of the altruistic

sation[11] or other concessions, such as more favorable treatment in unrelated contracts;[12] a debtor offers a creditor a settlement at less than the amount actually owed;[13] an employer threatens an employee with termination or other undesirable consequences unless the employee agrees to accept an unfavorable settlement on a compensation claim;[14] an employer threatens not to hire an employee unless the employee kicks back part of her wages;[15] someone threatens to criminally prosecute an adult child unless the parents deed their home to the coercer;[16] or a person threatens to withhold a lifesaving drug or rescue unless the victim pays an "exorbitant" sum.[17]

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ideal). If altruism determined outcome, there might be a disincentive to do business with parties of lesser wealth for fear that courts would routinely overturn the contractual obligations of the injured party.

[11] *See, e.g.*, Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102 (9th Cir. 1902) (holding that second contract for greater compensation entered into upon refusal to perform first contract was unenforceable for lack of consideration); Gross Valentino Printing Co. v. Clarke, 120 Ill. App. 3d 907, 912-13, 458 N.E.2d 1027, 1031 (1983) (second contract for additional compensation not found to be coercive in absence of evidence that legal redress would have been inadequate).

[12] *See, e.g.*, Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971) (holding that a refusal to supply goods under an existing contract unless the purchaser agreed to buy supplier's goods for an unrelated contract was coercive).

[13] Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15 (Alaska 1978) (holding actionable a claim of duress by a company in imminent danger of bankruptcy which accepted $97,500 in satisfaction of a contract claim valued at between $260,000 and $300,000); Rich & Whillock, Inc. v. Ashton Dev., Inc., 157 Cal. App. 3d 1154, 204 Cal. Rptr. 86 (1984) (relying on *Totem* for a similar holding).

[14] *See, e.g.*, Perkins Oil Co. v. Fitzgerald, 197 Ark. 14, 121 S.W.2d 877 (1938) (upholding a jury finding of duress when an employer threatened to discharge the stepfather of an employee injured at his workplace unless the employee accepted an unfavorable personal injury settlement offer); Wise v. Midtown Motors, Inc., 231 Minn. 46, 42 N.W.2d 404 (1950) (duress claim allowed when a current employer threatened a discharge if the employee did not accept an unfavorable settlement offer for unpaid wages made by the previous employer); Mitchell v. C.C. Sanitation Co., 430 S.W.2d 933 (Tex. Civ. App. 1968) (holding actionable a claim of duress by an at will employee threatened with discharge unless he signed a release for personal injuries sustained while working).

[15] Caivano v. Brill, 171 Misc. 298, 11 N.Y.S.2d 498 (Mun. Ct. 1939).

[16] Haumont v. Security State Bank, 220 Neb. 809, 374 N.W.2d 2 (1985).

[17] Economists might question the assertion that any price could be "exorbitant" even for a lifesaving drug. The theory would be that the price, though high, is value-maximizing for the sick person because the price represents the value attached to the drug because of its lifesaving capacity. The economists might, however, refuse to enforce a similar promise made in another context, but for a different reason. If A agrees to aid B, who is lost in a snowstorm, only if B cedes all her wealth to A, Judge Posner would refuse enforcement because if courts awarded "the whole value of the rescue, . . . people [would be induced] to take socially excessive precautions to avoid having to be rescued, as well as inducing an excessive investment in resources devoted to rescue." R. POSNER, ECONOMIC ANALYSIS OF LAW 175 (1986) (footnote omitted).

The example of having to pay a very high price for a lifesaving drug is discussed in Murphy, *supra* note 7, at 83. Professor Murphy argues that if the pressure on the victim results from circumstances not caused by the "coercer," "then it seems that something stronger is needed

In all of these cases one person pressures another into making contract concessions or accepting unfavorable terms that she would not otherwise have agreed to had other, more desirable, alternatives existed[18] or had the coercion not been applied.[19] The victim acquiesces because the coercer's superior bargaining power, or the victim's desperate circumstances, leaves little room to resist or to bargain for better terms. The court's task is to determine when the promisor should be offered a reprieve from her ordinary contract obligations because the underlying agreement is not voluntary.

The current law of duress is wholly unsatisfactory. This is due in part to a misguided focus on whether duress is a public or private doctrine. In the heyday of classical contract law, courts and commentators focused on private law concepts, viewing duress as a means by which parties could escape agreements that contravened their will.[20] Professor Dawson offered another conceptual

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to free me from my obligation than the claim that all of my alternatives are grim or the claim that the situation is not my fault." *Id.* Permitting avoidance merely because the sick party faced grim and desperate choices would potentially open up all bargains to avoidance claims.

[18] The freedom to choose is never untrammeled and rarely does one have the freedom to choose among only desirable alternatives. Dalzell, *Duress I*, *supra* note 4, at 239 ("[I]t is easy to forget that a will exercises its freedom only in selecting one of several possible courses of action."). The fact that the choice is constrained does not automatically lead to a successful duress claim.

[19] Professor Westen voices this formulation of coercion when he states "[t]o say that X_1 'coerced' X into doing something means that X chose to do something that, but for the constraint or promise of constraint X_1 brought to bear on him, X would not have chosen to do." Westen, *supra* note 2, at 565-66; *see also* Bayles, *A Concept of Coercion*, NOMOS XIV (Am. Soc'y Pol. & Legal Phil.) 19 (J. Pennock & J. Chapman eds. 1972) ("[A] further requirement for a person to be coerced is that he would have chosen differently had he not been threatened.").

[20] Professor Atiyah and others have rejected the overborne will theory as a conceptual basis for duress. Atiyah argues for its abandonment in Atiyah, *Economic Duress and the "Overborne Will,"* 98 LAW Q. REV. 197, 201 (1982) (suggesting that will theory belongs on the "historical scrapheap"). *See also* Note, *Economic Duress After the Demise of the Free Will Theory: A Proposed Tort Analysis*, 53 IOWA L. REV. 892, 894 (1968) ("The free will concept, however, has serious shortcomings. Because both normal contracts and those formed under duress result from a choice between alternative evils, it is impossible to distinguish one situation from the other on the basis of any difference in the freedom of the consent."). Professor Fingarette suggests that although the language used to describe overborne will theory, Fingarette, *supra* note 6, at 71, is "rhetorically rich," it lacks "objective specificity of meaning." *Id.* at 72. Accordingly, he would redirect the inquiry to whether there was "unfair choice." *Id.* at 79.

Despite the criticism of the overborne will theory as an explanation for duress case outcomes, courts continue to use the free will standard as an arbiter of enforceability. *See, e.g.*, Wilson v. Aetna Casualty & Sur. Co., 228 So. 2d 229, 232 (La. Ct. App. 1969) (rejecting economic duress as a ground for invalidating release and noting that duress involves free will being overborne); Wise v. Midtown Motors, Inc., 231 Minn. 46, 51, 42 N.W.2d 404, 407 (1950) (indicating that the test of coercion is "whether the coercion was of such a character as to overcome the free will of the victim"); Manufacturers Am. Bank v. Stamatis, 719 S.W.2d 64, 68 (Mo. Ct. App. 1986) (finding that "[t]he evidence showed a fear of criminal penalties and other consequences, which may not have actually existed, but the threats of which may have

basis,[21] positing that duress serves a public, not private, function.[22] In Dawson's view, the duress defense is an "underground"[23] method of policing abuses in the bargaining process, regulating inequalities of bargaining power,[24] and correcting inadequacies of consideration.[25] Moreover, his perception of the "broader objectives"[26] of duress law fueled a philosophical debate that still rages: Is contract law primarily concerned at its "core"[27] with facilitating private bargains free from

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been sufficient to overcome the duress claimant's free will"); Rubenstein v. Rubenstein, 20 N.J. 359, 365, 120 A.2d 11, 13 (1956) ("Duress in its more extended sense means that degree of constraint or danger, either actually inflicted or threatened and impending, sufficient in severity or in apprehension to overcome the mind or will of a person of ordinary firmness . . . ."); Port of Nehalem v. Nicholson, 122 Or. 523, 259 P. 900 (1927) (positing a standard for duress based on overcoming free will), *overruled on other grounds*, Godell v. Johnson, 244 Or. 587, 418 P.2d 505 (1966); First Tex. Sav. Ass'n v. Dicker Center, Inc., 631 S.W.2d 179, 184 (Tex. Ct. App. 1982) (using a test for duress based on overcoming free will).

[21] Professor Dawson's 1947 article is still considered the seminal work on duress. *See* Dawson, *supra* note 3. It not only reoriented conceptual theories of duress but also undermined the traditional importance of the much vaunted, and in Dawson's view, much overrated, concepts of consensualism and private autonomy in contract law. *Id.* at 266-67; *see also supra* note 5 (tracing the debunking of consensualism in the literature).

[22] Among the public factors Professor Dawson identified as determining outcome in duress cases are unequal bargaining power and unjust enrichment. Dawson, *supra* note 3, at 253, 282-83; *see also* Dawson, *Duress Through Civil Litigation: II*, 45 MICH. L. REV. 679, 715 (1947) (suggesting the importance of gain by coercer in context of duress claims); Hale, *supra* note 4, at 628 (suggesting a public approach based on "judicious legal limitation on the bargaining power of the economically and legally stronger" party in the context of duress); Note, *supra* note 20, at 896-900 (documenting various public policies behind the duress doctrine that can be used to supplement analysis in deciding duress cases).

Courts have legitimized the importance of the bargaining power factor in deciding duress claims. *See, e.g.*, International Paper Co. v. Whilden, 469 So. 2d 560, 563 (Ala. 1985) (finding that the duress claimant lacked reasonable alternatives in the face of duress attributable to the "superior bargaining power" of the purported coercer); Day v. Bicknell Minerals, Inc., 480 N.E.2d 567, 571 (Ind. Ct. App. 1985) (finding no actionable duress because the purported coercer "was not in a dominant position"); King Enters. v. Manchester Water Works, 122 N.H. 1011, 1014, 453 A.2d 1276, 1277 (1982) (scrutinizing the bargaining process and finding "free and voluntary negotiations" based on changes in the terms of an agreement which benefitted the plaintiff); Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 337-38, 173 A.2d 258, 263 (1961) (finding duress when claimant franchisee was forced to make overpayments to a franchisor whose control prevented franchisee from pursuing litigation as an alternative); Caivano v. Brill, 171 Misc. 298, 299, 301, 11 N.Y.S.2d 498, 500, 502 (Mun. Ct. 1939) (finding duress in a kickback arrangement between employer and employee based on "clear recognition of the fact that employer and employee do not meet as equals").

[23] G. GILMORE, THE DEATH OF CONTRACT 56-57 (1974) (discussing "case law undergrounds" involving a "pre-contractual duty"). For a further discussion of these "undergrounds," see Gordon, Book Review, 1974 WIS. L. REV. 1216 (reviewing G. GILMORE, THE DEATH OF CONTRACT (1974)).

[24] Dawson, *supra* note 3, at 253.

[25] *Id.* at 276-82.

[26] *Id.* at 253.

[27] Kennedy, *supra* note 10, at 1737 (discussing the traditional concept of classical contract

state interference, with public regulation of unfair agreements being mere sideshows; or is such a core principle impossible precisely because of the important countertendency of public regulation,[28] thereby leading to open warfare between private and public norms?[29]

The philosophical debate only serves to distract decisionmakers from important duress issues. Furthermore, the articulations and applications of the duress rule *itself* are unsatisfactory. Courts have faced intractable problems in determining if coercion exists in a particular case. Courts and commentators have articulated different theories of coercion—including theories based on will or morality—in the hope that a statement of an overall theory can be used to define the "core elements"[30] of the defense. These theories, however,

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law consisting, at the core, of principles founded on autonomy and individualism in which the "existence of countertendencies was acknowledged, but in a backhanded way" and relegated away from the core to the "periphery"); *see supra* note 5 (discussing this conflict in the scholarly literature).

[28] For a discussion of the role of counterprinciples and norms in modern contracts jurisprudence, see R. UNGER, *supra* note 5, at 60-75. *See also* Dalton, *supra* note 3, at 1010-12 (discussing public values that stand in opposition to private values of autonomy and the suppression of such values by the traditional contract model); Feinman, *Critical Approaches*, *supra* note 5, at 834 (discussing the emergence of tort-like values into the previously private world of contract); Kennedy, *supra* note 10, at 1713-24 (discussing counterprinciples of individualism and altruism).

[29] Legal scholars and philosophers have fiercely debated the issue of whether contract law is private in the sense that it merely implements the private agenda of the parties or whether it has a public component that actively interferes with private choices in order to validate important social values of fairness and community. *See, e.g.*, R. UNGER, *supra* note 5, at 60-75 (discussing "counterprinciples" to freedom of contract values); *see also* Dalton, *supra* note 3, at 1010-39 (discussing the history of "public" and "private" aspects of contract theory); Feinman, *Critical Approaches*, *supra* note 5, at 830-36 (discussing the values of individualism in the classical model and public policy agenda in modern contract law); Gordon, *supra* note 3, at 207-13 (contrasting public with private values); Hillman, *supra* note 3, at 104 (noting the "conflicting principles" of autonomy and fairness); Kennedy, *supra* note 10, at 1685 (discussing the impact of approaches based on "individualism" and "altruism" as applied to substantive private law issues); Kostritsky, *supra* note 5, at 958-61 (discussing this fundamental contradiction in modern contract theory).

[30] One device for identifying coercive proposals focuses on the distinction between coercive threats and noncoercive offers, with "[t]he most fundamental difference between threats and offers . . . [being] this: a threat holds out to its recipient the danger of incurring a penalty, while an offer holds out to him the possibility of gaining a benefit." Frankfurt, *supra* note 9, at 67.

The difficulty with the threat/offer distinction is that all contracts contain implied threats. Dawson, *supra* note 3, at 266 ("[T]he freedom of the 'market' was essentially a freedom of individuals and groups to coerce one another . . . ."). Moreover, in order to apply the test one requires a further device for determining when a penalty exists. Professor Westen proposes a definitional paradigm for coercion which can be used in determining if a penalty exists:

> (13) a constraint or promise of constraint, Y, that X_1 knowingly brings to bear on X in order that X choose to do something, Z_1, that X would not otherwise do and that X does not wish to be constrained to do, where X knows that X_1 is bringing or promising to bring Y to bear on him for that purpose, and where the constraint renders X's doing Z_1 more

are inadequate because they are unworkable and because they inhibit courts from considering important policy concerns. Confusion prevails in duress law;[31] consequently courts cannot reach consistently sound results.

The "will theory,"[32] which attempts to ascertain whether the coercer's pressure or threat has actually overborne a claimant's will,[33] is defective because it requires courts to ascertain the unknowable: the actual intent of the party alleging duress.[34] Morality-based theories

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eligible to X than it would otherwise be.

Westen, *supra* note 2, at 569.

Joseph Raz offers his own definition of coercion as follows:

P coerces Q into not doing act A only if . . .

(1) P communicates to Q that he intends to bring about or have brought about some consequence, C, if Q does A.

(2) P makes this communication intending Q to believe that he does so in order to get Q not to do A.

(3) That C will happen is, for Q, a reason of great weight for not doing A.

(4) Q believes that it is likely that P will bring about C if Q does A and that C will leave him worse off, having done A, than if he did not do A and P did not bring about C.

(5) Q does not do A.

(6) Part of Q's reason for not doing A is to avoid (or to lessen) the likelihood of C by making it less likely that P will bring it about.

Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, in 7 MIDWEST STUDIES IN PHILOSOPHY, SOCIAL AND POLITICAL PHILOSOPHY 89, 108 (P. French, T. Uehling, Jr. & H. Wettstein eds. 1982), *discussed in* A. WERTHEIMER, *supra* note 2, at 203 n.4.

[31] Confusion persists because the duress determination is not simply a factual or empirical question in all cases. *See* A. WERTHEIMER, *supra* note 2, at 31 (suggesting that volitional/constrained choice duress cases are "at least partially moralized" and not purely "empirical"); *see also* Westen, *supra* note 2, at 544 ("'Justice' and 'duress' . . . are normative by definition."). Because the test is not purely empirical, it cannot be administered mechanically and is subject to uncertain manipulation based upon social norms.

Confusion in the duress case law also exists because "coercion is a single concept that is sufficiently open-textured to encompass a range of diverse and mutually inconsistent norms," *id.* at 547, and can be used "to advance normatively inconsistent positions." *Id.* at 548. The conflict in norms is something that plagues contract law adjudication in all contexts. *See* Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1025 (1981) [hereinafter Gordon, *Historicism*] (noting the failure of thinking that purports to use "suprahistorical norms transcending time and space" to decide conflicts between competing norms); *see also* Feinman, *Critical Approaches*, *supra* note 5, at 834 n.19 (discussing the level at which various scholars would interject social policy judgments into their systems). *But see* Hillman, *supra* note 3, at 104 (suggesting conflicting values can be and are accommodated within one system with the "freedom of contract and other principles shar[ing] the spotlight"). For another insight into the reason for the confusion, see Ogilvie, *Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract*, 26 MCGILL L.J. 289, 289 (1981) (discussing the fact that "[n]o clear formulation of an underlying rationale of 'economic duress' or its necessary elements has appeared in the jurisprudence to date").

[32] *See infra* notes 61-62.

[33] Such a fact-finding approach is arguably an empirical one. A. WERTHEIMER, *supra* note 2, at 7-8 (discussing empirical criteria).

[34] Because the actual intent of the party alleging duress cannot be known, the "inquiry therefore becomes indirect—we turn to objective evidence of the party's subjective intent."

focus not on the promisor's free will but on whether the coercer's behavior violates moral norms (or a "moral baseline").[35] Morality-based theories are unworkable because there exist many different potential baselines, but no clearly articulated factors to identify the appropriate one.[36] In addition, morality-based theories require courts to answer questions in the abstract without regard to the actual social consequences of their decisions.[37] The approach followed by the *Restatement (Second) of Contracts*[38] offers no better solution because its doctrinal elements are open-ended, ambiguous, and almost impossible to apply with any predictability.[39]

Because the theories of coercion offer little help, courts manipulate the doctrinal elements, sometimes dispensing with or ignoring one or more of them.[40] Courts conveniently attach a label to their conclusions

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Dalton, *supra* note 3, at 1025. But this shifts the focus to the behavior of the other party and the empirical terms of the deal. *Id.*

[35] For a discussion of moral baseline theory, see A. WERTHEIMER, *supra* note 2, at 206-214 (reviewing aspects of Robert Nozick's theory as elaborated in Nozick, *supra* note 8, at 440); Westen, *supra* note 2, at 572 (discussing baseline theory in relation to changes in conditions).

[36] Professor Wertheimer acknowledges that actually setting an appropriate moral baseline requires "nothing less than a complete moral and political theory." A. WERTHEIMER, *supra* note 2, at 217; *see id.* at 206-11 (illustrating the complexities and difficulties involved in establishing a baseline). Note that in spite of these complications, Wertheimer's argument incorporates a moral baseline. *Id.* at 267; *see also* Mather, *supra* note 3, at 615 ("tests [for coercion] fail to produce determinate results when moral coloration is not clear").

[37] *See* A. WERTHEIMER, *supra* note 2, at 237 (taking the position that "'external' or policy considerations should have little bearing on the validity of a coercion claim"). Wertheimer thinks that the elements of coercion should be developed in the abstract and that policy considerations and consequences should not be determinative of the threshold question of whether duress exists. *Id.*

[38] The doctrinal tests for duress are outlined in the RESTATEMENT (SECOND) OF CONTRACTS §§ 175-176 (1979). The core elements of the Restatement test include "improper threat" and "no reasonable alternative." *Id.* § 175; *see infra* note 108.

[39] The doctrinal tests for duress are not self-executing because the concept is "normative by definition. . . . [D]enominating A's conduct toward B as 'duress' in some sense condemns A's conduct, because 'duress' is defined as a normatively illegitimate compulsion." Westen, *supra* note 2, at 544-45. The doctrinal formulation forces courts to grapple with normative questions that are difficult to resolve.

[40] For a general discussion of the manipulability of doctrinal elements in contract law, see Gordon, *Historicism*, *supra* note 31, at 1025 ("[S]upposedly purely technical schemes of offer-and-acceptance rules, for instance, [have been] shown to be indefinitely manipulable in *theory* to reach the results of 'contract formed' or 'no contract formed' in any particular case . . . ."). *See also* Feinman, *Critical Approaches*, *supra* note 5, at 834 (recognizing the inevitable impact of policy judgments on legal outcomes).

The general manipulability of doctrinal elements is reflected in the duress case law. Courts have, for example, inconsistently applied the "no reasonable alternative" prong of the *Restatement* approach. *See supra* note 38; *infra* note 108. In some instances, courts interpreting this doctrinal requirement have required that a party seeking avoidance rights on the ground of duress pursue legal remedies as a precondition to a successful recovery under duress; in other instances they have not done so. For example, in London Homes, Inc. v. Korn, 234 Cal. App. 2d 233, 44 Cal.

based on the presence or absence of these elements without explaining why they have reached different conclusions using the same doctrinal

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Rptr. 262 (1965), a developer pursued a subdivision development and attempted to acquire the defendant's land. *Id.* at 235, 44 Cal. Rptr. at 263. At a critical stage in the developer's (plaintiff's predecessors) efforts, the defendant demanded money in excess of the agreed upon contract price for a land tract. *Id.* at 236, 44 Cal. Rptr. at 264. Because a substantial delay would have imperiled development plans, the developer acquiesced. *Id.* at 237, 44 Cal. Rptr. at 264. The court rejected a duress claim on those facts, finding the failure to pursue legal relief a business decision. *Id.* at 239, 44 Cal. Rptr. at 265-66; *see also* Adams v. Schiffer, 11 Colo. 15, 17 P. 21 (1888), *quoted in* Dalzell, *Duress by Economic Pressure II*, 20 N.C.L. REV. 341, 342 (1942) [hereinafter Dalzell, *Duress II*] (finding in the case "no discussion of the remedies that might be available"); King Enters. v. Manchester Water Works, 122 N.H. 1011, 1015, 453 A.2d 1276, 1278 (1982) (plaintiff's settlement agreement was not involuntary when plaintiff chose to settle rather than pursue available legal relief).

The court in Scutti v. State Road Dep't, 220 So. 2d 628 (Fla. Dist. Ct. App. 1969) took a different approach, calling an alternative that required the victim to suffer economic losses impracticable. In *Scutti*, when the developers applied for an occupancy permit for a building, the county denied the request, falsely alleging violations of setback requirements. *Id.* at 629. The developers acquiesced in an unfavorable waiver that the state later used to argue a limitation on potential damages from a subsequent condemnation of the developer's property. *Id.* In deciding whether duress was exerted by the county, the court readily recognized that the developers "could have engaged in litigation." *Id.* But the court found duress in view of the fact that pursuit of a legal remedy would have subjected the builders "to a substantial legal liability to their tenant for inability to deliver possession." *Id.*; *see also* Manufacturers Am. Bank v. Stamatis, 719 S.W.2d 64, 72 (Mo. Ct. App. 1986) (third-party plaintiff sued bank for duress even though no evidence was offered that such plaintiff first sought legal relief from improper demand); Haumont v. Security State Bank, 220 Neb. 809, 814-16, 374 N.W.2d 2, 7-8 (1985) (parents who transferred life savings and property to a bank to avoid prosecution of their son permitted to claim duress despite not having sought legal redress); McCubbin v. Buss, 180 Neb. 624, 629, 144 N.W.2d 175, 179 (1966) (employee threatened with termination unless he gave up stock option rights did not seek legal redress as a precondition to a duress action, yet the court found that "evidence of business coercion is clear and convincing"); S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 62 N.J. 369, 386, 301 A.2d 738, 747-48 (1973) (upon a showing of "'business complusion,'" claimant was entitled to seek a judicial remedy despite a contractual agreement waiving any claim of coercion and despite absence of a showing that duress claimant sought a judicial remedy in response to authority's demand for improper sewerage connection charges); Peter Matthews, Ltd. v. Robert Mabey, Inc., 117 A.D.2d 943, 944, 499 N.Y.S.2d 254, 256 (1986) (finding that plaintiffs had no "practical alternative" to succumbing to moving company's demand for liability limitation despite not having sought a prior judicial remedy); Friar v. Vanguard Holding Corp., 78 A.D.2d 83, 90, 434 N.Y.S.2d 698, 702 (1980) (permitting the seller of a home who paid a mortgage recording tax that a bank was required by law to pay, to bring action for restitution on the ground of duress despite the fact that the seller did not seek prior judicial redress on finding that "no realistic alternative" existed); Peters, Ricker & Co. v. Railroad Co., 42 Ohio St. 275, 285 (1884) (no showing by duress claimant of an effort to secure a legal remedy to force carrier to transport goods at required rates, because resort to the courts would not be adequate to save the business), *cited in* Dalzell, *Duress I*, *supra* note 4, at 245-46. A review of the cases cited above reveals that in some instances the courts do not even discuss the legal redress issue; in other instances, the court confronts the issue, but differs on the threshold showing of the impracticability of the legal remedy. Sometimes, the court equates the failure to pursue an available legal remedy with the taking of a business risk for which the "victim" should not be offered relief.

The differing results in these cases demonstrates the manipulability of the standards governing the reasonableness of alternatives in a duress claim. *See* Dalton, *supra* note 3, at 1034. Despite

elements in factually similar cases.

Traditional coercion theories and elements are simply inadequate as an exclusive focus of analysis in duress cases. This Article does not propose a new theory of duress. Instead, it suggests a refinement of doctrine in which the courts candidly articulate certain key policy goals and develop elements based on them. These policy goals include efficiency, disclosure of unexpected risks, judicial capability, reliance, and economic incentives. If decisionmakers adopted the policy analyses suggested here, the predictability of judicial decisionmaking would be enhanced and a supplemental analysis would be available when the doctrinal elements become difficult to apply.[41] Moreover, this approach would preserve limited judicial resources, contribute to the efficient prevention of resource misallocation,[42] reduce judicial capability problems,[43] discourage one party from speculating at the expense of another,[44] provide incentives for economic industriousness,[45] and discourage economic negligence.[46]

Part I of this Article has suggested that these policy factors should

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the fact that the "'reasonable alternatives' [test] has a reassuringly rational and objective ring," *id.* at 1033, it is difficult to apply with predictable results. The differing approaches to the question of the necessity of pursuing legal relief may depend on a court's view of whether the legal remedy is an adequate or impracticable remedy, either because of the delay it will cause or the inadequacy of the damages available. *See* Dalzell, *Duress II*, *supra*, at 378-82 (discussing when a legal remedy may be inadequate).

For a different twist on the manipulability of the reasonable alternative prong of duress, see First Nat'l Bank of Cincinnati v. Pepper, 547 F.2d 708, 715 (2d Cir. 1976) ("'no reasonable alternative'" to fee settlement existed when lawyer refused to turn over corporate papers necessary to effectuate the closing of an asset purchase, when a lack of papers could have subjected stockholders to a breach action by the purchaser of the assets). On the other hand, courts have held that the mere failure to obtain the satisfaction of a "hope of obtaining a gain" should not qualify for duress relief. *See, e.g.*, Pope v. Ziegler, 127 Wis. 2d 56, 60, 377 N.W.2d 201, 203 (Ct. App. 1985).

Because the determination of whether the remedy is "reasonable" or "adequate" depends on apparently differing judicial views of how much economic loss the duress claimant should suffer before being able to claim duress, the doctrinal element of a "reasonable alternative" is infinitely manipulable. Consequently, a different approach should be adopted. Resolution in all of these cases should depend not on what economic losses a particular court thinks a duress victim should be required to assume (because there seems to be no agreement on what loss is enough to warrant relief other than bankruptcy, which is clearly enough) but on the basis of a systematic analysis of what policy concerns would be advanced or hindered by a finding of duress.

[41] In addition, the policies enumerated here may simply help to rationalize results in existing case law.

[42] *See infra* text accompanying notes 162-249.

[43] Judicial capability problems are discussed generally in R. DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW 1-2 (1978). *See infra* notes 304-21 and accompanying text (examining judicial capability in the context of duress cases).

[44] *See infra* text accompanying notes 322-41.

[45] *See infra* text accompanying notes 360-75.

[46] *See infra* text accompanying notes 376-85.

be considered by courts deciding duress cases and that the *Restatement (Second) of Contracts* comments should be expanded to expressly account for them. Part II will demonstrate that the current analysis of duress claims leads to a morass of inconsistent and unpredictable results. It will explore both the inability of theoretical approaches to resolve these ambiguities in case law, and question their value as standards for assessing the coerciveness of proposals.[47] This exploration will underscore the need for a more policy-oriented approach. Part III of this Article suggests several policy factors that should be used to supplement the *Restatement's* doctrinal approach to deciding duress claims, and documents the advantages of adopting these policies in approaching duress claims.[48]

II. The Morass of Case Law—Current Approaches to Resolving the "Hard Cases"[49]

A. The Problem of Indeterminacy

The absence of clearly articulated guidelines undermines consistency and predictability in the use of the doctrinal elements of duress. Courts often reach inconsistent results on similar facts by manipulating the doctrinal elements of duress. Courts do not agree, for example, on when a creditor's offer of a reduced settlement posing

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[47] *See infra* text accompanying notes 49-107.

[48] *See infra* text accompanying notes 120-385. Professor Whitford, commenting on a draft of this Article, pointed out that the distinction drawn between policy and doctrine in this Article may be too clear cut. Most doctrines, after all, have some underlying policy rationales. "A well stated doctrine becomes just an efficient way for testing whether a policy objective will be served by a particular result." Letter from William C. Whitford to Juliet P. Kostritsky (Feb. 4, 1989). Conceived in this way and accepting the usual coalescence between underlying policies and doctrine, the duress doctrinal formulation can be conceptualized as oriented towards achieving the dual policy objectives of voluntarism and fairness. *See* Dalton, *supra* note 3, at 1032-36. Thus, in one sense, this Article is merely suggesting *different* policy considerations from those currently reflected in the doctrinal formulation. In another sense, however, because the current doctrinal formulation is so ambiguous, manipulable, and oriented to admittedly amorphous concepts, the manipulation of results does not seem to constitute an efficient resolution of the defined policy objectives. The doctrinal formulation of duress seems divorced from policy objectives and the elements merely become labels that courts attach to justify their conclusion on the duress claim. Thus, the distinction between doctrinal formulation and policy concerns remains viable.

[49] *See generally* Murphy, *supra* note 7 (reexamining the concept of hard choices). The hard cases referred to are those in which one party is presented with two unpalatable choices. *See supra* note 9 (discussing biconditional and constrained choices).

economic hardship for the debtor qualifies as actionable duress.[50] They differ on when a threat is improper or wrongful, and when a threat to exercise a legal right insulates one from a charge of wrongful action and therefore a finding of duress. Some courts hold that no wrongful threat can exist when the action threatened lies within one's legal rights,[51] while other courts are willing to find duress even when the act threatened is entirely lawful standing alone.[52] No consensus exists on what constitutes a "reasonable alternative" to an allegedly coercive offer such that it will preclude a finding of duress.[53] Some courts require a duress claimant to demonstrate unsuccessful prior attempts to settle the dispute through legal means; others omit that requirement.[54] Courts have encountered difficulties in determining what constitutes tolerable "hard bargaining" as opposed to impermissible duress.[55] Finally, courts disagree on when the financial necessities realistically constraining a duress claimant's options should be attributed to the defendant's (putative coercer's) conduct. Apparently, they agree on the principle that "[t]he mere stress of business conditions will not constitute duress when the defendant was not responsible for the conditions,"[56] but disagree on when the coercer

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[50] *Compare* Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15 (Alaska 1978) (offer of $97,500 on $260-300,000 debt was coercive when debtor knew creditor faced impending bankruptcy) *with* Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924 (7th Cir. 1983) (general contractor's offer to pay $67,000 of the $120,000 extra costs of completion was not coercive under Wisconsin law despite subcontractor's financial difficulties) *and* Hackley v. Headley, 45 Mich. 569, 576, 8 N.W. 511, 514 (1881) (refusal to pay more than $4,000 on a claimed debt of $6,200 was not duress, though debtor might be financially ruined if he failed to obtain the full amount).

[51] *E.g.*, Schmalz v. Hardy Salt Co., 739 S.W.2d 765, 768 (Mo. Ct. App. 1987) (no actionable duress found when an employer threatened to fire an employee unless he accepted a severance settlement because there was "no wrongful conduct"; employer was within his legal rights in threating termination); Manufacturers Am. Bank v. Stamatis, 719 S.W.2d 64, 68 (Mo. Ct. App. 1986) (court found evidence "sufficient to submit" a duress claim even though it was not unlawful for the bank to request that the makers sign a promissory note).

[52] *E.g.*, McCubbin v. Buss, 180 Neb. 624, 629, 144 N.W.2d 175, 179 (1966) (evidence of duress was "clear and convincing" when an employer threatened to fire an employee unless the employee ceded valuable stock option rights, even though the employer acted within his legal rights since employment was terminable at will). The differing results in the cases, *see* cases cited *supra* notes 50 and 51, suggest that it is erroneous to assert that duress claims will be unsuccessful when a party threatens to do that which it has a legal right to do. E.A. FARNSWORTH, *supra* note 6, § 4.17, at 259.

[53] For an extended discussion of the manipulability of the reasonable alternative element of duress, see *supra* note 40.

[54] *See, e.g.*, Adams v. Schiffer, 11 Colo. 15, 17 P. 21 (1888); *see infra* text accompanying notes 284-95 (discussing *Adams*).

[55] E.A. FARNSWORTH, *supra* note 6, § 4.17, at 262-64. Professor Farnsworth does not seek to discourage "hard bargaining between experienced adversaries," but characterizes contracts made by "a threat to exercise a power for illegitimate ends" as suspect. *Id.* at 263.

[56] *See* Johnson, Drake & Piper, Inc. v. United States, 531 F.2d 1037, 1042 (Ct. Cl. 1976); *see*

is sufficiently responsible for the victim's economic straits for the claim to be actionable.[57]

In order to sort out the morass of results and provide an overall theory useful for determining the particular circumstances that justify avoidance of contractual responsibility, courts and commentators have developed two types of economic coercion theory:[58] "empirical"[59] and "morality-based."[60] The will theory of coercion,[61] once the dominant

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also W.R. Grimshaw Co. v. Nevil C. Withrow Co., 248 F.2d 896, 904 (8th Cir. 1957) (holding that plaintiff must show that "the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities").

[57] *See infra* notes 189-90 and accompanying text.

[58] This discussion proceeds on the assumption that theories of economic coercion are to be assessed by Professor Barnett's evaluative criteria. These "criteria for comparing theories include at least three factors: (a) the number of known problems the theory handles as well or better than its rivals, (b) the centrality of the problems that the theory handles well, and (c) the promise that the theory offers for solving future problems." Barnett, *supra* note 1, at 270; *cf.* Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1035 (1978) (discussing components of explanatory legal theory).

[59] Wertheimer sets up this distinction between empirical and value-laden choices. A. WERTHEIMER, *supra* note 2, at 53.

[60] Wertheimer posits that the modern law of duress, as reflected in both the "choice" prong (no reasonable alternative) and the "proposal" prong (improper threat), is infused with moralized judgments. A. WERTHEIMER, *supra* note 2, at 53; *see also* Dalton, *supra* note 3, at 1032-36 (discussing the moralized "substantive fairness" aspects of duress); Fingarette, *supra* note 6, at 81-82 (asserting that the effort to determine whether real choice or reasonable choice exists requires resort to "legal norm"); Murphy, *supra* note 7, at 86-87 (underscoring moral choices at issue in finding duress).

Professor Dalton notes these value-laden aspects of deciding duress cases when she states: "The line-drawing exercise actually took the form of distinguishing between unacceptable and acceptable behavior by the favored party, although this focus was not made explicit." Dalton, *supra* note 3, at 1027.

[61] "Will theories maintain that commitments are enforceable because the promisor has 'willed' or chosen to be bound by his commitment." Barnett, *supra* note 1, at 272. The justification for basing enforceability on an inquiry into the will was that "'the will is something inherently worthy of respect.'" *Id.* (quoting Cohen, *supra* note 1, at 575). In the duress context, the will theory suggests that courts will find agreements to be unenforceable if the alleged victim acquiesced against her will.

Critics fault the will theory on several grounds. First, because it is often difficult to ascertain the actual intent of a party, the approach may be impractical. *Id.*; *see also* Dalton, *supra* note 3, at 1025 (asserting that an approach based on will theory is "rendered unworkable by the problem of knowledge. We cannot directly know or ascertain the subjective intent of the disfavored party.") The will theory also is deficient because it fails to explain case law which makes manifested intent, rather than actual intent, determinative of contract liability. *See* RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1979) (defining promise in terms of "manifestation of intention"). The emphasis on manifested intent in contract law undermines the importance of inner will. Under the manifested intent test, a promisor cannot escape contract liability by alleging that enforcement will violate her true will; if she has led another person reasonably to expect a commitment, she will be bound. *See, e.g.*, Embry v. Hargadine, McKittrick Dry Goods Co., 127 Mo. App. 383, 105 S.W. 777 (1907). For a discussion of the significance of the manifest intent principle and the objectification of the will, see Dalton, *supra* note 3, at 1039-1046. Finally, courts and commentators have rejected the will theory on normative grounds because

theory for deciding enforceability questions in this and other areas of contract law, is considered empirical.[62] A morality-based theory of coercion, which rejects value-neutral decisionmaking as an impossibility, looks to standards of fairness, distributional concerns,[63] and other "moral baselines"[64] to decide whether agreements are coerced.

B. Theories for Resolving the Indeterminacy Problem

1. Will Theory: The Paradigm of the Overborne Will[65]

Will theory focuses on whether the promisor who acquiesces in an agreement has actually consented to the demand, and thus should be bound, or whether the agreement is voidable because the promisee's coercion has overborne the promisor's will.[66] The theory's focus on the displacement of the individual will implies a psychological test[67] to determine whether "[a] psychic capacity has been seriously dis-

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of the potential threat its adoption would pose for contractual certainty and planning. *See, e.g.*, Barnett, *supra* note 1, at 273 & n.11 (recognizing that relying on subjective evidence of actual intent "might create a de facto option in the promisor"). As David Hume has said: "'If the secret direction of the intention . . . could invalidate a contract, where is our security?'" *Id.* at 273 n.10 (quoting D. HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS 30 n.5 (C. Hendel ed. 1957) (1st ed. 1751)). For a discussion of the shift from the subjective to the objective theory of contract law and its implications for a responsibility (tort) model of contract obligation, see Dalton, *supra* note 3, at 1042-65. *See also supra* note 20 (discussing defects in will theory).

[62] The will theory was considered empirical when courts and commentators, committed to the principle of voluntarism and consensual exchange, *see supra* note 5, believed that they could and should ascertain the free will of the parties. In part, the ease with which they decided free will questions on empirical grounds depended on their disregard of actual disparities which might have affected the freedom of the parties. *See supra* note 3.

[63] For a prime example of the view that distributional concerns are an important factor in duress outcomes, see the discussion of Professor Dawson's article *supra* in the text accompanying notes 21-26. *But see infra* note 162 (explaining why distributional motives do not completely explain duress case law outcomes).

[64] For a discussion of "moral" and "nonmoral" baselines, see A. WERTHEIMER, *supra* note 2, at 206-11. *See also infra* text accompanying notes 88-107.

[65] *See* Fingarette, *supra* note 6, at 71-82 (discussing the inadequacy of overborne will theory both as an explanation of case law results, and as a normative standard, and instead advocating an approach based on fairness).

[66] Dalton, *supra* note 3, at 1027; Dawson, *supra* note 3, at 263; *see, e.g.*, Rubenstein v. Rubenstein, 20 N.J. 359, 372, 120 A.2d 11, 17 (1956) (in deciding the validity of a conveyance attacked on duress grounds the court found a "*prima facie* showing here of a compulsive yielding to the demand for the conveyances, rather than the volitional act of a free mind"); *see also* cases cited *supra* note 20.

[67] *See* Fingarette, *supra* note 6, at 72; *see also Rubenstein*, 20 N.J. at 371, 120 A.2d at 16 (suggesting an analysis of duress based on psychological factors).

abled,"[68] and whether so much pressure has been applied as to impair the victim's ability to choose rationally and to act willingly.[69]

The test for duress based on the will theory illustrates the importance of autonomy principles in nineteenth-century contract law.[70] The exception for agreements made in the absence of an assertion of free will "seemed appropriate, even necessary, to nineteenth century will theorists, who believed that enforcement of contracts was all about implementing the free wills of the parties."[71]

Courts deciding duress cases still rationalize the denial of enforcement by principles of consent. Thus, the test is whether the threat has overborne a person's free will.[72] Problems with the will theory, however, undermine its usefulness as an appropriate standard for deciding future cases.[73] The will theory is defective because it is based on a false central issue. It focuses on the "reality" of the victim's consent.[74] In fact, if one takes account of the real will of the party in individual duress cases, one concludes that in most cases the victim often eagerly and rationally chooses one option to avoid a less desirable alternative.[75] In these cases, there is no problem with "'volitional

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[68] Fingarette, *supra* note 6, at 72.

[69] *Id.* at 75-76, 87-88.

[70] The centrality of the autonomy principle in nineteenth-century contract law is undisputed. *See, e.g.*, Dalton, *supra* note 3, at 1012; Dawson, *supra* note 3, at 256 (discussing the introduction of the concept of free will into economic duress analysis); Mensch, *Freedom of Contract as Ideology* (Book Review), 33 STAN. L. REV. 753, 758-59 (1981) (positing the voluntary exchange of promises as one of the main tenets of the classical model of contract law); Metzger & Phillips, *supra* note 3, at 475-78 (discussing the importance of individual freedom of will to classical contract law). For a discussion of the changing role of the autonomy principle and its role in contract law and jurisprudence, see *supra* note 5.

[71] Dalton, *supra* note 3, at 1027.

[72] *See supra* note 20.

[73] *Cf.* Barnett, *supra* note 1, at 285-86 (discussing the defects of normative standards).

[74] Dalzell, *Duress I*, *supra* note 4, at 238; *see also* Dalton, *supra* note 3, at 1025 ("One approach is to focus on the disfavored party, and ask whether that party's assent to the transaction was genuine."). The *Restatement (Second) of Contracts* still focuses on the reality of assent. Section 175 comment c provides: "A party's manifestation of assent is induced by duress if the duress substantially contributes to his decision to manifest his assent. . . . The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress." RESTATEMENT (SECOND) OF CONTRACTS § 175 comment c (1979).

[75] "[I]t is further plain that the more unpleasant the prospective alternative, the more genuine is the consent to the contract necessary to escape that alternative; in other words, that the consent to a contract resulting from duress is probably far more real than the typical contractual consent." Dalzell, *Duress I*, *supra* note 4, at 240; *see also* Atiyah, *supra* note 20, at 200 (explaining that "the more extreme the pressure, the more real is the consent of the victim"); Philips, *supra* note 4, at 133-34 (1984) ("A coerced agent is presented with unwanted, unpleasant alternatives, but is free to choose and to act upon the least obnoxious of them.").

> [A] victim of coercion may deliberate and choose how to act, and may continuously act intentionally and purposefully—as an intelligent agent of the coercer—in order to keep conduct in accord with the current demands of the coercer. All this establishes in fact what

capacity,' the kind of thing plainly suggested by the idiom of the broken will."[76] In fact, when the victim "must choose between payment and tragedy, [her] choice is certainly an expression of the most genuine, heartfelt consent—and often a very happy consent indeed."[77] Thus, because the consent given may be very real, it is inappropriate to decide cases on the basis of whether the agreement represents an overborne or "destroyed" will.[78] The will theory focuses on an event, the total destruction of the will, that is unlikely to occur except in rare cases in which the victim becomes a "mere mechanical instrument."[79] Thus, the test is not likely to be useful in differentiating valid from invalid agreements in the vast majority of cases.[80]

The will theory, moreover, is an inherently unworkable normative standard for determining if a duress defense should succeed. First, because "[w]e cannot directly know or ascertain the subjective intent of the disfavored party"[81] the approach is difficult to apply.[82] Second, the overborne will approach relegates decisionmaking on the grounds of whether the "coercer's" behavior is somehow acceptable or unacceptable to underground status and thus deflects attention from important policy matters.[83]

The overborne will theory mistakenly assumes that parties to contracts normally have unrestrained freedom and unlimited choice.[84] Yet, because freedom is a relative matter and "a will exercises its freedom only in selecting one of several possible courses of action,"[85]

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is incompatible with the meaning of the legal concept of 'unwilled behavior.' Fingarette, *supra* note 6, at 73-74.

[76] Fingarette, *supra* note 6, at 75.

[77] Dalzell, *Duress I*, *supra* note 4, at 238.

[78] Not only does the focus seem inappropriate because it fails to correspond with the reality of the cases, but it is misguided as a normative standard because it neglects important policy considerations. *See infra* Part III.

[79] RESTATEMENT (SECOND) OF CONTRACTS § 174 comment a (1979). For a discussion of such nonvolitional acts, see A. WERTHEIMER, *supra* note 2, at 9.

[80] See *supra* note 9 for examples of "biconditional" or "constrained" choices in which the actor's will is real but her choice is nevertheless clearly coerced.

[81] Dalton, *supra* note 3, at 1025.

[82] Professor Fingarette examines how focusing on the fairness of the choice might aid in determining whether the choice was coerced. Fingarette, *supra* note 6, at 79-82.

[83] Dalton, *supra* note 3, at 1025-32; *see also supra* note 20 (documenting defects in will theory). Courts and commentators have been reluctant to accept the centrality of policy issues in decisions regarding duress. According to Dalton, even Professor Dawson was reluctant to "reformulate duress doctrine around the hitherto buried standard of bad behavior." Dalton, *supra* note 3, at 1030. Instead, he focused on the impairment of bargaining power as a justification for intervention, thereby "commit[ting] Dawson to replicating the underlying structure of the formalist duress doctrine." *Id.* at 1031.

[84] Dalzell, *Duress I*, *supra* note 4, at 239.

[85] *Id.*

an approach based on whether the agreement is the product of free will or not, as alternative absolute choices, is not likely to yield sensible results. If all choice is constrained in some way,[86] then a duress approach based on absolute free will would make *all* contracts voidable for duress. The free will theory is thus unable to distinguish between enforceable and unenforceable agreements. The relevant question should be a normative one: Under what circumstances should the agreement be enforced? When is a lack of choice available to the promisor so compelling that enforcement should be withheld?[87] That normative decision should not be based on the elusive concept of free will.

2. Normative Theories:[88] The "Moral Baseline" Approach[89]

Defects in the will theory and its debunking in the literature[90]

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[86] *Id.*

[87] According to Wertheimer, "[w]e *always* choose from among a limited set of options. Nonetheless, some sets of options are more constrained than others, and it is these relatively highly constrained choice situations that I have in mind." A. WERTHEIMER, *supra* note 2, at 10. The lack of any choice available to the promisor (coercee) emphasizes the need for promisee (coercer) to exercise restraint. Another approach would focus on whether the promisee (the coercer) has a property right in the threatened alternative. That property right question would be solved by reference to social objectives such as identifying and enforcing property rights in order to foster optimal allocation of resources to production. *See* Conybeare, *The Private and Social Utility of Extortion*, 71 AM. ECON. REV. 1028, 1029-30 (1981) (examining the use of social objectives to determine the legality of acts of extortion); Demsetz, *On Extortion: A Reply*, 68 AM. ECON. REV. 417, 418 (1978) (examining the social utility of "wealth transfer" and focusing on the legal system's method of "alter[ing] the definition of property rights").

[88] Professor Barnett would classify normative or standards-based theories as "those which evaluate *the substance* of a contractual transaction to see if it conforms to a standard of evaluation that the theory specifies as primary." Barnett, *supra* note 1, at 277. Because the approach to duress based on normative standards "embod[ies] an assumption that we can distinguish the acceptable from the unacceptable; the attempt to make this distinction throws us directly into the problem of power[:] . . . the power of the state to control private arrangements and to evaluate private power relations." Dalton, *supra* note 3, at 1025-26. The reluctance to admit a public role in private contractual arrangement derives from a continued attachment to the notion that courts can act as value-neutral facilitators of the choices of private parties, thereby protecting the "vaunted neutrality of the state as enforcer of the will of the parties." *Id.* at 1029. The reluctance to admit a public role for contract law has prompted commentators and courts to manufacture a variety of techniques designed to suppress the public aspect of duress. *See, e.g., id.* at 1026-27; Gordon, *Historicism*, *supra* note 31, at 1024-25 (describing systems of legal thought in which "denial that particular contexts of time and place are relevant to the enterprise of legal rationalization" (emphasis removed)). All legal rules are in some sense government interventions and therefore can be considered "public." Simply providing a claim for damages for breach of an express contract would be a "public" act in this context.

Other normative theories for deciding duress claims not discussed in the text include Professor Mather's "matrix for harmful modifications." Mather, *supra* note 3, at 632. Mather's framework

prompted some commentators to offer a second theory of coercion—one based on normative standards. Morality-based theory permits the substantive review of an agreement to determine whether it comports with relevant moral or societal norms of fairness and cooperation.[91] If the agreement does not satisfy such standards, then it should be voidable for duress.

The morality-based approach to differentiating coercive from noncoercive proposals defines coercion as a worsening of the victim's position when measured against some baseline or other frame of reference.[92] As Professor Wertheimer explains, "A makes a threat when, if B does *not* accept A's proposal, B will be worse off than in the relevant baseline position."[93] The appropriate question to ask under a moral baseline standard[94] is whether the threat "is a con-

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does not provide a wholly satisfactory approach. First, Professor Mather's discussion of the "sympathetic amendment" identifies a reduction in social gain from the amount anticipated as a reason to make a buyer share the seller's anticipated loss without providing a justification for that loss sharing. *Id.* at 632-34. Although a seller's reduced profit may be troubling, it is not clear why that fact alone justifies the buyer in bearing that cost "to relieve [the] [s]eller from bearing the entire burden." *Id.* at 633. Second, in some ways the test would be overly restrictive in judging the propriety of amendments. Mather would reject as coercive what he calls a "holdup amendment," *id.* at 636-37, ignoring the hidden costs to society of nonenforcement. Because the suggested amendment may not be palpably unfair, it may be costly to alert potential coercers to the involuntariness of the transaction. *See infra* text accompanying notes 162-99.

[89] A. WERTHEIMER, *supra* note 2, at 206-11 (describing "moral"and "nonmoral" baselines as defined by Nozick, *supra* note 8, at 440).

[90] *See* Atiyah, *supra* note 20; Dalzell, *Duress I*, *supra* note 4; Dawson, *supra* note 3.

[91] *See* Feinman, *Critical Approaches*, *supra* note 5, at 843.

[92] *See* Westen, *supra* note 2, at 573 (finding a particular "proposal can thus be characterized accurately as either a threat or an offer, depending on which baseline one stipulates"). Baselines help to bring meaning to the distinction between offers of rewards, which are often regarded as noncoercive, and threats of burdens, which are deemed coercive. *Id.* at 571-72. Unless we are to regard these terms as merely "semantic," *id.* at 574 n.107 (citing Farnsworth, *Coercion in Contract Law*, 5 U. ARK. LITTLE ROCK L.J. 329, 332-33 (1982)), one must decide on a baseline against which to measure the proposal; otherwise, one will not be able to decide whether it threatens the victim with a penalty or offers the recipient a reward. *Id.* at 572.

[93] A. WERTHEIMER, *supra* note 2, at 204. If duress is conceptualized in this way, then proposals in the form of amendments to improve the recipient's position are not coercive even if refusal of the offer would leave the recipient in a worse position: "If the amendment makes B better off than the original terms, not merely as well off, her assent to the amendment has obviously not been coerced because it was not the result of the threat." Mather, *supra* note 3, at 625 n.34.

[94] Commentators have suggested standards other than a moral standard to establish baselines. For example, Wertheimer describes a predictive, or statistical test, A. WERTHEIMER, *supra* note 2, at 207-211, and Westen describes a preference standard. Westen, *supra* note 2, at 577-78. The predictive test measures proposals against "what is 'normal' in . . . society." A. WERTHEIMER, *supra* note 2, at 207. If the proposal would make the recipient better off than would otherwise normally be the case based on predictions about how people are likely to act, a court would find no coercion. *Id.* The preference standard looks at what the recipient of the proposal

ditional promise to leave the recipient worse off than he ought to be left under the circumstances."[95]

The moral baseline theory suffers from defects that inhere in any normative standard.[96] One major obstacle to consistent application of this theory is that agreement on the standards for judging the morality of a proposal may be impossible to reach.[97] Such a determination depends entirely on where one sets the baseline against which the acceptability of the threat is to be measured.[98] Moreover, because there are many possible baselines and because moral baseline theory does not itself resolve where to set the baseline, many results seem plausible, although not compelled. Results in duress cases appear certain only when the baseline is indisputable.

Wertheimer and others contrast the following two examples to highlight the fact that the application of an indisputable concept of moral obligation invites divergent results. In the first example, "A realizes that B is about to lose a large sum in the stock market. A tells B that he will help B avoid the loss if and only if B gives him 15 percent of the amount he would have lost."[99] In the second example, "A comes upon an auto wreck and an injured B on a desolate stretch of road. A tells B that he will call an ambulance if and only if B gives him $100."[100] According to the analysis of several commentators, coercion does not exist in the stockmarket case because A is not required under a moral baseline approach to render his services for free.[101] Moral obligations, however, obligate A to call an ambulance,

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wanted. If the proposal violates that preference, it is coercive. Westen, *supra* note 2, at 577-78.

The interplay of all three baselines—moral, predictive, and preference—can be seen in the slave case example drawn by Professor Nozick. Nozick, *supra* note 8, at 450-51. If a slaveholder who regularly whips his slave, makes a proposal to stop whipping the slave if he will work for the owner on Sunday, but to continue whipping him if he does not work on Sunday, the propriety of the threat will be different when measured under the various baselines. *See* A. WERTHEIMER, *supra* note 2, at 208-09. Under the predictive test, the slave expects regular beatings, and the proposal does not make the slave worse off than under an expected reality, and thus the proposal is an offer. *Id.* at 208. Under both the moral and preference baselines, the offer would be coercive. Under the moral baseline, since "[h]e ought to occupy a position in which he is not regularly whipped for the sport of it . . . the slaveholder is conditionally promising to leave [the slave] decidedly worse off." Westen, *supra* note 2, at 583-84. Under a preference test the proposal would be coercive for a slave who preferred not to be whipped and to maintain a Sunday holiday.

[95] Westen, *supra* note 2, at 576.

[96] Barnett, *supra* note 1, at 285-86.

[97] *Id.*

[98] *See infra* text accompanying notes 99-107.

[99] A. WERTHEIMER, *supra* note 2, at 214 (providing an example drawn from Gunderson, *Threats and Coercion*, 9 CAN. J. PHIL., 247, 258 (1979)).

[100] *Id.*

[101] *Id.* at 214-15 (discussing the views of Gunderson and Haksar).

thereby making his threat not to do so unless he is paid $100 wrongful.[102] In these examples, the boundaries of conduct required under moral obligation theory seem self-evident.

In other cases, however, the morality of the proposal is not as obvious. Morality is not a universal and self-evident concept but a debatable one susceptible to numerous subjective interpretations. Therefore, it is impossible to set a universally acceptable moral baseline against which to measure the coerciveness of a proposal; hence, the theory is inadequate as a vehicle for deciding cases. The problem of a multiplicity of moral baselines is illustrated by the following example, given by Professor Nozick. "A is B's normal supplier of illegal drugs for $20 per day. One day, A proposes to B that he will supply B's drugs if and only if B beats up C."[103] Nozick finds A's proposal to be noncoercive because he concludes that moral obligation does not require A to be a drug supplier for B.[104] But Wertheimer proposes that the analysis is "murkier" than at first appears if one admits that it is possible to find some moral obligation that would require A to continue to act as B's supplier.[105]

Because moral issues often present a murky quagmire,[106] agreement on the propriety of a threat measured by a moral baseline may be difficult.[107] To resolve ambiguities on the moral issue, courts and commentators should focus on the societal consequences of finding

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[102] *Id.*

[103] *Id.* at 209 (providing an example drawn from Nozick, *supra* note 8, at 447).

[104] Nozick, *supra* note 8, at 447-48, 450-51; *see* A. WERTHEIMER, *supra* note 2, at 209 (interpreting Nozick's view).

[105] A. WERTHEIMER, *supra* note 2, at 209 & n.27 (suggesting the possibility that "[e]ven if the drug relationship is immoral from an external perspective, it is arguable that *within* that relationship, A is morally required to continue to supply B with drugs"); *see also* Frankfurt, *supra* note 9, at 72 (discussing the relevance of a prior course of dealings in determining if a proposal is coercive or noncoercive).

[106] *See, e.g.*, A. WERTHEIMER, *supra* note 2, at 229-33. Professor Wertheimer's discussion of the Lecherous Millionaire example, which is drawn from Feinberg, *Noncoercive Exploitation*, in PATERNALISM 208 (R. Sartorius ed. 1983), illustrates the deficiencies of a moral baseline analysis. In the example the millionaire offers a mother money to cover medical expenses to save her dying child if she will become the millionaire's mistress. A. WERTHEIMER, *supra* note 2, at 229. If the rights-based (moral) baseline is accepted, then one would find the proposal to be noncoercive since the millionaire is not obligated to help. *Id.* at 231. An alternative analysis that focuses on the policy consequences of granting or denying relief should be factored into the debate on duress claims. Under this policy-based analysis, it may be that the societal consequence of denying the duress claim would be undesirable. A waste of resources might result if millionaires seek out desperate mothers secure in the expectation that courts will not void their contracts. *See* Daly & Giertz, *Externalities, Extortion, and Efficiency*, 65 AM. ECON. REV. 997, 1001 (1975) ("[E]xtortion [could be] an extremely expensive method of allocating and distributing resources."); *see also* R. POSNER, *supra* note 17, at 174-76 (discussing the economics of rescue).

[107] *See* A. WERTHEIMER, *supra* note 2, at 53 (asserting that the test for duress based on the propriety of a threat is "moralized").

duress. Otherwise, the dilemma will remain unsolved, with each side arguing that its position is morally compelled. Focusing on labeling the proposal as violative of some abstract moral baseline is unproductive because it diverts attention from what the result should be in light of underlying policy concerns.

C. *The* Restatement (Second) of Contracts *Doctrinal Approach*

The main current doctrinal standard for deciding duress claims in contract cases—the *Restatement (Second) of Contracts*—provides no better guidance than the theoretical approaches explored in Part II. The *Restatement* tests are so ambiguous as to be almost meaningless and therefore easily manipulable by courts.

The first prong of the *Restatement's* contract duress defense is partly normative. Section 175(1) would render a contract voidable by the victim if the "manifestation of assent is induced by an improper threat."[108] Section 176 of the *Restatement* goes on to define improper threat:

> (1) A threat is improper if
>
> (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
>
> (b) what is threatened is a criminal prosecution,
>
> (c) what is threatened is the use of civil process and the threat is made in bad faith, or
>
> (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
>
> (2) A threat is improper if the resulting exchange is not on fair terms, and
>
> (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
>
> (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or

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[108] RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979). The full text of § 175 reads as follows:

> (1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.
> (2) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

Id.

(c) what is threatened is otherwise a use of power for illegitimate ends.[109]

Thus, even if it is neither criminal nor tortious, the threat may still be improper if it "is a breach of the duty of good faith and fair dealing under a contract,"[110] or if, as a result of the threat, there is an "unfair exchange" and there has been either "prior unfair dealing" or "a use of power for illegitimate ends."[111] The standards for interpreting the impropriety of the threat are open-ended standards characteristic of modern contract law.[112] Ultimately, these guidelines for judging improper threats fail to provide a satisfactory solution because they sidestep the very questions they raise. As Professor Dalton queries, "What uses of power *are* illegitimate, what kinds of pressure *are* unfair, in the contractual context?"[113] The *Restatement* itself does not provide clearly articulated standards for determining when an exchange is unfair or when there is unfair dealing.[114] Consequently, courts manipulate these standards according to their own views of fairness in the particular case.[115]

The second prong of the doctrinal duress analysis also fails to provide adequate guidance to decisionmakers and suffers from the same open-endedness as the threat element. Section 175(1) turns on whether the party subjected to an improper threat had a "reasonable alternative" to acquiesence in the threatening party's proposal.[116] Normative elements necessarily inhere in the determination of whether a given alternative course of action is reasonable or not.[117] Courts manipulate this reasonableness criterion, sometimes holding for example, that an available legal remedy, even if costly to the threatened party, is necessarily a reasonable alternative. At other times, courts dispense altogether with requiring the inability to resort to the law as a condition for a successful duress claim.[118] Courts also manipulate

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[109] *Id.* § 176.

[110] *Id.* § 176(1)(d).

[111] *Id.* § 176(2)(b)-(c).

[112] Moreover, as Professor Dalton states, "These [standards] raise the very questions they were supposed to answer." Dalton, *supra* note 3, at 1035.

[113] *Id.*

[114] *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 comments a-f (1979) (providing no definition for "unfair exchange" or "unfair dealing"). *But see id.* comment f (giving examples and commentary on these issues).

[115] *See supra* note 22.

[116] *See supra* note 108.

[117] The normative element is reflected in "[t]he 'objectivity' of the 'reasonable alternatives' standard." Dalton, *supra* note 3, at 1033.

[118] Court manipulation of the reasonable alternative prong of duress doctrine can be seen by examining case law. *Compare* London Homes, Inc. v. Korn, 234 Cal. App. 2d 233, 44 Cal. Rptr. 262 (1965) (plaintiff voluntarily chose not to pursue a civil suit for damages and therefore a

the degree to which economic hardship may entitle a claimant to accede to the threat and forgo a financially ruinous alternative.[119]

III. A Suggested Policy Guide for Deciding Duress Cases

Because of the ambiguous and open-ended nature of doctrinal tests, courts inevitably encounter difficulties in applying them in a predictable and consistent fashion. This Article suggests that the courts should look to other, more clearly articulated, policies to assist them in deciding duress claims. Clarifying these policies will clarify application of the elements of duress.

A. Efficiency Concerns in the Duress Context

An efficiency policy should be incorporated into the traditional doctrinal duress analysis. An efficiency standard normally seeks to evaluate various rules of law to determine if they permit individuals to maximize their individual welfare, and to make both parties to a transaction "better off."[120] An efficiency policy based on judicial economy,[121] efficient prevention of resource misallocation,[122] and/or efficient

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claim of duress was inappropriate) *and* King Enters. v. Manchester Water Works, 122 N.H. 1011, 1015, 453 A.2d 1276, 1278 (1982) (plaintiff's claim that settlement was coerced by city water authority failed where plaintiff opted not to continue to pursue his legal remedy) *with* Adams v. Schiffer, 11 Colo. 15, 17 P. 21 (1888) (court did not discuss pursuit of civil relief in deciding a duress claim), *noted in* Dalzell, *Duress II*, *supra* note 40, at 341-42 *and* S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 62 N.J. 369, 301 A.2d 738 (1973) (plaintiff permitted to prevail on a duress claim despite a failure to challenge the improper action of the coercer in court before acquiescing); *see also* cases cited *supra* note 40; Dalton, *supra* note 3, at 1033 n.126 & 1033-34 (discussing "the manipulability of the reasonable alternative standard").

[119] *See* cases cited *supra* note 118.

[120] Economists conclude that welfare maximization for individuals will result in an aggregate increase in welfare for society as a whole. *See, e.g.*, A. Kronman & R. Posner, The Economics of Contract Law 1-2 (1979); Cooter & Eisenberg, *Damages for Breach of Contract*, 73 Calif. L. Rev. 1432, 1460-61, 1463-64 (1985). This Article focuses on efficiency not only at the micro-individualized level, but also seeks to evaluate at the macro level whether certain results will be efficient in terms of saving judicial resources or expenses. These latter concerns do not fit neatly within the private welfare model.

This Article goes beyond the two private parties to the exchange to promote the general social welfare. Thus, the test for the efficient allocation of judicial resources in the context of contractual duress, *see infra* text accompanying notes 126-46, should be considered part of a broader efficiency test. Although conservation of judicial resources is a pressing issue at the local level, it is rooted in broader economic policies. *See infra* note 127.

[121] *See infra* text accompanying notes 126-61.

[122] *See infra* text accompanying notes 162-248.

normative case outcomes,[123] would provide a supplemental means of deciding duress claims. In addition, incorporation of efficiency policy concerns into duress analysis would provide a theoretical underpinning for the cases, explain and organize results,[124] and thereby increase predictability in cases when doctrinal applications are otherwise uncertain.[125]

1. The Case for Explicit Consideration of the Judicial Economy Factor: A Useful Analysis When Doctrinal Ambiguities Exist

a. Judicial Economy as an Efficiency Concern

Courts should be reluctant to find duress if the result would produce needless delay and a waste of judicial resources. Judicial resources are wasted if a finding of duress will only prompt further actions in which the winner of the duress claim will inevitably lose on the ultimate substantive issue. The pattern of waste could occur in one of two ways. A prevailing duress claimant may prompt the coercer to institute a second action to vindicate her substantive rights. Alternatively, the coercer may be able to vindicate her rights by taking unilateral action that will disadvantage the duress claimant. In either case, a finding of duress may promote a waste of judicial resources.

If the duress victory prompts a second lawsuit by the coercer, and the duress claimant has a losing substantive claim, the duress finding will only temporarily advantage a party who will lose in the second lawsuit. A duress finding merely postpones loss by the duress claimant until the defeat on the merits in the second lawsuit. Thus, if a contract required B to furnish particular goods to A, a general contractor, and if B refused to furnish those goods and did not agree to do so until A threatened to exercise its legal remedies (including hiring another party to do the work and charging B with the costs),

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[123] *See infra* text accompanying notes 250-80.

[124] An efficiency theory can explain otherwise inexplicable variations in the case law and in this sense "seeks a scientific explanation for the welter of legal microdata, an explanation in the compound form of (1) a descriptive law that can order the data, organize them into an elegant, trenchant, parsimonious macropattern, and impart to them an 'implicit logic.'" Michelman, *supra* note 58, at 1035.

[125] For examples illustrating the potential of an efficiency theory to resolve the outcome of a case whose resolution would be uncertain under a strict doctrinal analysis, see *infra* text accompanying notes 138-46.

B's claim of duress should be rejected.[126] If the court found duress, then A would be prompted to institute a suit to compel B to furnish the product required under the contract. A finding of duress would thus only temporarily advantage B and prompt a second wasteful lawsuit.[127]

A waste of judicial resources can also occur in situations in which the coercer may, despite a finding of duress, exercise unilateral power to vindicate her rights, thus rendering a judicial finding in the duress claimant's favor wasteful. Assume that an employer gives an employee at will the option of being fired or accepting a favorable severance package. The employee acquiesces in the severance pay and then challenges the agreement on duress grounds and seeks reinstatement.[128] If the court voids the agreement on duress grounds, then the employer may simply exercise its right to terminate the employee.[129] Thus, by a duress finding, the employee gains no more than temporary

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[126] This hypothetical is based on W.R. Grimshaw Co. v. Nevil C. Withrow Co., 248 F.2d 896 (8th Cir. 1957).

[127] Although this hypothetical may be explained in terms of the wrongful act prong of the *Restatement* (most would agree that it is not wrongful to threaten to resort to one's legal remedies in order to pressure a non-performing party), the wrongfulness analysis may have limited usefulness in situations where agreed upon norms do not automatically resolve the wrongfulness issue. In these instances efficiency analysis may be useful.

In its simplest form, efficiency focuses on achieving the greatest output with the least input. The conservation of judicial resources is a particularized, narrow type of efficiency that ties into broader economic justifications for duress.

For example, imagine that A owes B money (the "associated claim"). Later, in response to a threat by B, A agrees to pay B the money owed (the "subsequent settlement deal"). If an inquiry into the merits of the associated claim reveals that the duress claimant has a losing claim and that the threatener would likely win, the duress claim should be denied. In this circumstance, any expenditure of resources by the threatener, including the resources devoted to the threat, will most likely be worth the present value of winning. On the other hand, if the duress claimant is likely to win on the associated claim, then any expenditure of resources by the threatener, including the resources devoted to the threat, will likely exceed the present value of winning. Thus, the threat is likely to have a negative value for the threatener. Courts should find duress in such cases. The economic justifications for duress can be viewed as part of the general economic justification for this type of result.

When the threatener has a losing associated claim, the threat is arguably of "no benefit to the actor" in terms of "individual private utility," Conybeare, *supra* note 87, at 1029, and therefore the threat is extortionate. Extortion involves "an act which merely redistributes income and reduces social welfare by the amount of any transaction costs." *Id.* at 1028. Thus, judicial resources should be expended to undo such transactions. This would prevent the allocation of resources to such negative transactions.

[128] This hypothetical is based on Schmalz v. Hardy Salt Co., 739 S.W.2d 765 (Mo. Ct. App. 1987), although in that case the employee did not seek reinstatement.

[129] For a discussion of the traditional rule granting an employer the right to discharge employees at will unless the contract expressly provides for a specific duration, as well as an exploration of judicially created limitations on this doctrine, see Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986).

relief that will be eliminated once the employer exercises its termination rights. If the employer should subsequently fire the employee and the employee challenges the termination, the court would undoubtedly uphold the termination.[130] Thus, deciding the duress claim in favor of the employee initially would only buy time. Given the scarcity of judicial resources, it is wasteful to utilize them in this fashion.

Of course, all settlements result in judicial economies. Because settlements avoid the necessity of judicial intervention on a disputed issue, they are favored creatures of the law.[131] The judicial economy suggested here is, however, different from that normally applicable with compromise agreements. In an ordinary compromise, judicial economy suggests that the agreement not be upset because of the judicial expenditure that would be entailed in doing so. This judicial economy is thought to override individual dissatisfaction with the settlement. The judicial economy identified here is even more compelling. It suggests that settlements not be overturned when there is no chance that the party claiming relief ultimately will prevail. No compelling reason exists to upset the settlement because the claimant would ultimately lose on the merits. This may not be the case, however, when avoidance of the agreement will enable the allegedly coerced party to advance a winning claim.

b. Application and Explanation

Even if the judicial economy explanation is fortuitously consistent with case law results, the question of whether the approach is more useful than traditional doctrinal analysis or should merely be used to supplement such analysis remains open. In the two hypotheticals discussed above, the *Restatement*'s doctrinal approach would inquire into whether the threat to resort to legal remedies or the threat of

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[130] If there is no second lawsuit because the employee does not challenge the later termination, then one might legitimately inquire how one decision (no duress) conserves judicial resources more than another decision (duress) when judicial resources are used to decide only one case. Even in that instance, a finding of no duress could conserve judicial resources and be preferable to a finding of duress because it might discourage future lawsuits by similarly situated employees.

[131] *See, e.g.*, Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 928 (7th Cir. 1983) (denying duress claim by citing "[t]he adverse effect on the finality of settlements and hence on the willingness of parties to settle their contract disputes without litigation" if settlements were voidable on the ground that one party had been financially desparate when the settlement was made); London Homes, Inc. v. Korn, 234 Cal. App. 2d 233, 241, 44 Cal. Rptr. 262, 267 (1965) ("If the courts should begin to encourage suits like this one, land deals would never be final in this country.").

immediate firing was improper.[132] Because there may be general agreement that these threats are not wrongful, the cases seem easy to resolve under the traditional wrongfulness rubric because conventional doctrine states that it is not duress to threaten to do what one has a legal right to do.[133] Moreover, the employment hypothetical is a relatively simple case to resolve under a moral baseline approach.[134] The employee is not entitled to continue in his employment at all; therefore, one could characterize the proposal for resignation with severance benefits as an offer rather than a coercive proposal. The proposal makes the employee "better off" than she would be if terminated with the possibility of not recovering any severence benefits, and is therefore a noncoercive offer.[135] This would be true even if the employee preferred to continue on and receive her regular wages. Thus, a strict doctrinal analysis based either on wrongfulness or on a moral baseline seems adequate.

Nevertheless, the judicial economy approach may prove useful in cases in which the doctrinal element of wrongfulness is not easy to apply and thus subject to manipulation.[136] Furthermore, the approach

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[132] *See supra* note 38 (discussing the improper threat element).

[133] *But see supra* note 52.

[134] *See supra* note 92.

[135] *See* A. WERTHEIMER, *supra* note 2, at 215.

[136] The manipulability of the reasonable alternative prong of duress doctrine has already been addressed in *supra* notes 40 and 118. The manipulability of the wrongfulness component is evidenced by comparing the following cases; in each, the employer offered the employee a choice between two unpalatable alternatives. Although all the employers had a legal right to fire the employees, the courts reached differing conclusions as to whether the threat to terminate made the resulting agreement voidable for duress. *Compare* Laemmar v. J. Walter Thompson Co., 435 F.2d 680 (7th Cir. 1970) (threat to terminate employees at will if they did not agree to sell their stock to company officers deemed actionable on the issue of duress) *and* Wise v. Midtown Motors, Inc., 231 Minn. 46, 42 N.W.2d 404 (1950) (threat to cause discharge of former employee from present employment and use of legal process to ruin him unless he released claim against former employer permits inference of duress) *and* McCubbin v. Buss, 180 Neb. 624, 144 N.W.2d 175 (1966) (threat to discharge employee if he did not agree to cancel stock purchase contract deemed wrongful and cancellation agreement may be rescinded) *with* Schmalz v. Hardy Salt Co., 739 S.W.2d 765 (Mo. Ct. App. 1987) (not wrongful for employer to offer employee choice of resignation with reduced severance or termination) *and* Fox v. Piercey, 119 Utah 367, 227 P.2d 763 (1951) (not wrongful for employer to offer fireman option of resignation or termination).

Some commentators have explained the variability in the case law results in terms of the presence of a threat made to extract a collateral benefit for the employer. *See* E.A. FARNSWORTH, *supra* note 6, § 4.17, at 261-62. Others would explain them in terms of an unjust benefit to the employer. *See* Dawson, *supra* note 3, at 282-88. This Article suggests that the variability in results may be explained in terms of efficiency. Efficiency policy concerns provide an explanation for these results that may be easier to apply than the slippery concepts of unjust enrichment or collateral benefits. The usefulness of the tests suggested here in resolving a wide range of factual situations, and the societal benefits in terms of conservation of judicial resources, prevention of resource misallocation, and encouragement of appropriate economic incentives,

may enhance predictability when the coercer's action does not fall within the ambit of specifically protected contractual rights, but also does not explicitly violate tort or criminal law standards. The *Restatement* tests for judging wrongfulness in the noncriminal/nontort context are based on normative ideas of unfair exchange and the illegitimate use of power. But they do not directly resolve how the issues of fairness and legitimacy should be solved.[137] In a case in which the "wrongfulness" of the action is problematic, the judicial economy analysis can facilitate appropriate case outcomes.

Finserv Computer Corp. v. Bibliographic Retrieval Services[138] illustrates a case in which ambiguities concerning the "wrongfulness" of the coercer's actions should be supplemented by an efficient judicial resource allocation analysis. In *Finserv,* the defendant executed an agreement that "provided compensation to plaintiff for its assistance in the founding and financing of defendant."[139] The contract was entered into after the plaintiff had threatened to interfere with the defendant's funding arrangements and threatened to sully its president's reputation by calling him a "welcher."[140] When defendant refused to honor the agreement, plaintiff sued.[141]

Finserv is a case in which the wrongfulness component of doctrinal duress analysis may be difficult to apply. Standing alone, the threats do not fit into predefined categories of tort or crime. Normative and

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suggest the adoption of efficiency policy guides in duress analysis. Duress avoidance may be available because such a result will increase efficiency. For example, in the *McCubbin* case, the duress avoidance may be available to encourage the disclosure of certain information in order that parties may bargain for mutual benefit. The employer who utilized the pressure of terminating the employee's job should have a duty to disclose that such pressure would be used before prior to the plaintiff's purchase of his stock because it would have affected the value of the stock purchase. Having failed to disclose that information, the employer should be prohibited from using the tactic. A duress finding will thus penalize the employer for failing to disclose the potential use of such tactics and encourage the disclosure of unexpected and collateral pressures so that bargaining to mutual advantage can occur.

The employment cases provide good examples of situations in which the employer threatens to do that which he has a legal right to do: terminate an employee at will. Nevertheless, courts sometimes find the threat to be wrongful. Similarly, threating to sue in order to induce an agreement when the maker of the threat lacks a good faith basis for believing he has a cause of action is the type of bad faith that will make an agreement voidable. *See* A. WERTHEIMER, *supra* note 2, at 42.

[137] The ease of deciding cases involving a threat that is not independently wrongful is as mythical as the theoretical ease of deciding contract formation cases according to doctrinal tests. *See* Gordon, *Historicism, supra* note 31, at 1025-26; *see also supra* text accompanying note 112.

[138] 125 A.D.2d 765, 509 N.Y.S.2d 187 (1986).

[139] *Id.* at 766, 509 N.Y.S.2d at 188.

[140] *Id.*

[141] *Id.* at 765, 509 N.Y.S.2d at 188. The duress claim was raised by way of an affirmative defense. *Id.*

moral baseline approaches are difficult to apply to *Finserv* because of the difficulty of ascertaining whether the threat to call someone a welcher in these circumstances is morally objectionable or legally wrongful.[142]

Nonetheless, even if *Finserv* is difficult to decide under the wrongfulness element or moral baseline theories, the court should find no duress on judicial economy grounds. Finding duress would only temporarily benefit the defendant and thus waste judicial resources. If the court granted the duress claim, the defendant could void the coerced agreement to pay the plaintiff.[143] The defendant, however, would still owe the plaintiff for services rendered and presumably the plaintiff could still recover on a *quantum meruit* or other related theory.[144] Thus, denying the duress claim avoids the waste of judicial resources entailed in granting the defendant a victory which would subsequently be overturned in an action by the plaintiff to recover the amount owed.[145]

In addition to providing a new approach for deciding cases, judicial efficiency helps to explain a pattern of cases in which courts have refused to find duress when the claimant clearly had a losing case on the merits.[146] Courts may refuse to find duress as a way of

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[142] *See supra* text accompanying notes 96-107.

[143] *See supra* note 6 (discussing the right to avoid agreements entered into under duress).

[144] For a discussion of the circumstances under which restitution would be available as an alternative basis of recovery, see E.A. FARNSWORTH, *supra* note 6, § 2.20, at 98-104.

[145] Other cases in which the judicial economy analysis might prove useful include Enslen v. Village of Lombard, 128 Ill. App. 3d 531, 470 N.E.2d 1188 (1984) (even if the court were to find a resignation voidable for duress, the city still might be able to terminate employee); Beznos v. Martin, 22 Mich. App. 376, 177 N.W.2d 226 (1970) (even if a finding of duress would entitle plaintiff to recover $1,500 paid for the reconveyance, the claimant would still owe defendants money for land defendants reconveyed to plaintiff); King Enters. v. Manchester Water Works, 122 N.H. 1011, 453 A.2d 1276 (1982) (even if the court voids the agreement requiring the developer to pay for water connections, the duress claimant would lose a subsequent lawsuit since no court would permit a developer to obtain water connections for free); Grad v. Roberts, 14 N.Y.2d 70, 198 N.E.2d 26, 248 N.Y.S.2d 633 (1964) (even if a note for $5,000 and payment of $10,000 were voidable for duress, the underlying contractual obligation would still entitle the alleged coercer to a subsequent trial if the plaintiff refused to pay this amount as per the terms of the contract).

[146] W.R. Grimshaw Co. v. Nevil C. Withrow Co., 248 F.2d 896, 902, 904 (8th Cir. 1957) (when a subcontractor was previously obligated by contract to furnish window sills, the court found no duress in a second agreement to do the work); City of Chicago v. American Nat. Bank & Trust Co., 146 Ill. App. 3d 784, 497 N.E.2d 413 (1986) (when a property owner challenged an agreement for compensation for condemned land on duress grounds, duress was not available because the city acted within its rights to institute condemnation proceedings); Schmalz v. Hardy Salt Co., 739 S.W.2d 765 (Mo. Ct. App. 1987) (employee who had no legal basis on which to resist termination lost on a duress claim); First Data Resources, Inc. v. Omaha Steaks Int'l, Inc., 209 Neb. 327, 307 N.W.2d 790 (1981) (when a claimant alleged duress in agreeing to a price increase, duress was unavailable because the alleged coercer had a contractual right

discouraging parties from pursuing meritless substantive claims under the guise of a duress action. In part this may be explained as an effort to conserve scarce judicial resources. Courts may weigh the relative costs of a lawsuit on the substantive claim against the costs of a lawsuit on the duress claim. Because duress claims involve complex determinations of a threat's wrongfulness, as well as of the reasonableness of the alternatives, courts may try to discourage duress claims when the duress claimant would not prevail on the underlying

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to terminate the agreement to provide services if assent to the price increase was withheld); Waara v. Kane, 269 N.W.2d 395 (S.D. 1978) (lessee argued duress in agreeing to a rental increase at renewal; but had lessee attempted to challenge the rate increase, he would have lost on the merits since presumably on expiration of the lease, city could charge whatever it wanted); Crocker v. Schneider, 683 S.W.2d 335, 339 (Tenn. Ct. App. 1984) (party alleging duress to avoid a contract had a losing claim because the other party had a "right to insist" on reducing the joint venture agreement to writing as a condition for plaintiff's withdrawal from a HUD application); Simpson v. MBank Dallas, N.A., 724 S.W.2d 102 (Tex. Ct. App. 1987) (when bank did not have to agree to restructure a debt to facilitate sale of business, seller who was required to execute personal guarantees could not complain of duress).

Alternatively, if the claimant clearly has a substantially meritorious claim that she forsakes under a coerced "agreement," the courts more readily entertain claims of duress. Leeper v. Beltrami, 53 Cal. 2d 195, 347 P.2d 12, 1 Cal. Rptr. 12 (1959) (agreement to satisfy a mortgagee's false claim on property in order to lift a cloud on title of property is voidable for duress if raised within the statute of limitations); Scutti v. State Rd. Dep't, 220 So. 2d 628, 630 (Fla. Dist. Ct. App. 1969) (claimant who entered into a waiver agreement in order to obtain an occupancy permit that had been wrongfully denied prevailed on a duress claim); Wise v. Midtown Motors, Inc., 231 Minn. 46, 42 N.W.2d 404 (1950) (employee suing employer for compensation for services rendered was entitled to rescind a settlement agreed to under duress); S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 62 N.J. 369, 301 A.2d 738 (1973) (a duress claim was available to a customer who agreed to pay sewer connection assessments when charges were discriminatory in violation of statute). Nevertheless, the presence of a winning claim does not guarantee that the plaintiff will prevail on duress. The court may deny relief where the plaintiff had "reasonable alternatives" to the coerced agreement and failed to pursue them. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 comment b (1979).

One explanation for the fact that results in duress cases are often linked to the merits of the victim's substantive claim focuses on judicial economy concerns. If the duress claimant would clearly have lost anyway on the merits, courts should discourage the claimant from pursuing a duress claim. Because claimants will inevitably lose on the merits, they will often decline to pursue these claims and thereby save the courts from wasting limited resources on losing claims.

Another unarticulated policy concern, which might help to explain why courts are reluctant to let plaintiffs win on a duress claim when they could not win on the merits, is a policy against wild card results. If duress claimants could routinely prevail in cases that they would lose on the merits, then duress claims would pose a challenge to the body of substantive law governing the transaction.

Why, then, do parties with meritorious substantive claims prevail more frequently on duress issues? Arguably, judicial economy concerns dictate that the settlement should always be accorded finality and that no party should be able to upset a settlement, even on duress grounds. Nonetheless, a policy of always denying duress relief to parties with valid substantive claims would promote other kinds of inefficiency. Parties who could get a party with a winning claim to make an enforceable concession might overvalue the benefit of such contracts, falsely secure in the hope that they could capitalize on others' economic straits. That result would promote a misallocation of resources.

substantive issues. Encouraging a trial whose outcome is relatively certain rather than a duress action in which the issues are murkier and less well defined helps to conserve judicial resources. By foreclosing parties from bringing duress claims, courts relegate parties to an initial pursuit of the claims on the merits. Because they stand to lose at that stage, parties will keep such losing cases out of court, thereby saving the court's needed resources for more meritorious cases.

c. How Courts Go Wrong in Failing to Incorporate Judicial Economy Analysis

A court may reach inappropriate results by failing to incorporate the judicial economy policy outlined here and continuing to rely exclusively on the *Restatement's* doctrinal tests. *Beznos v. Martin*[147] illustrates a case in which judicial economy analysis might have proved useful because strict doctrinal analysis, applied in isolation, yielded undesirable consequences. In *Beznos,* the plaintiff owned two adjacent lots, one with a house and one without. While negotiating for the sale of the house (on lot 1), the plaintiff sold off the vacant lot (lot 2). When the purchaser of the vacant lot discovered that the driveway to the house on lot 1 encroached on his property, he threatened to destroy it unless the original owner, the plaintiff in this case, gave him $1,500.[148] The plaintiff agreed to pay that amount in return for a deed to the driveway, but later argued that the money had been extorted under duress.[149] Without a deed to the entire driveway, the plaintiff would have been unable to sell lot 1 with the house. Thus, arguably, the plaintiff had no choice but to acquiesce in the demand.[150] The court's analysis focused on the plaintiff's duress claim and whether the transaction was "voluntary."[151] The court found enough facts to raise an issue of duress.[152]

Because it is so amorphous and manipulable, the voluntariness theory cannot resolve the duress claim. Even under the *Restatement*

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[147] 22 Mich. App. 376, 177 N.W.2d 226 (1970).

[148] *Id.* at 377-78, 177 N.W.2d at 227.

[149] *Id.* at 378, 177 N.W.2d at 227.

[150] It was not literally true that the vendor had no choice; however, the choice of jeopardizing the house sale was unpalatable. *See supra* note 9 (discussing the concept of "constrained" choices).

[151] *Beznos*, 22 Mich. App. at 378-79, 177 N.W.2d at 227.

[152] *Id.* at 379, 177 N.W.2d at 227-28.

test,[153] it is not clear what the outcome in *Beznos* would be, or if that outcome would reflect a proper result. The court would have to grapple with the "wrongfulness" of the threat. In the instant case the defendants threatened to destroy the part of the driveway that they owned unless the plaintiffs compensated them. Since the land was the defendants', they could do with it whatever they wanted.[154]

Under a moral baseline approach, one could argue that because the threatening party was not obligated to give up or even permit use of the driveway, the threat to destroy it would not violate any legal or moral duty; therefore, a duress claim should not succeed.[155] The proposal by the owner of the vacant lot, to sell the section of driveway rather than destroy it, was an offer to make the plaintiff better off, and not a coercive threat.[156]

In duress analysis, however, whether a legal act is wrongful depends upon the context.[157] Neither the wrongfulness nor the moral baseline approaches determine whether an action is wrongful because threatening to exercise one's legal rights does not by itself resolve the question of the propriety of the threat for *Restatement* purposes. When the destruction of one's own property would secure no inherent benefit, a threat to destroy it would be wrongful if made merely to extort money from another party and if the "resulting exchange is

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[153] *See supra* note 38.

[154] There is no clear standard attached to a concept based on "doing what one wants with one's own property." This can be seen by contrasting *Beznos* with Wolf v. Marlton Corp., 57 N.J. Super. 278, 154 A.2d 625 (Super Ct. App. Div. 1959). In *Wolf,* the plaintiffs sued to recover a deposit on a house purchase that never closed. *Id.* at 280, 154 A.2d at 626. In defending its refusal to return the deposit, the builder argued that it had been coerced into not consummating the sale when the plaintiffs threatened to resell the house to an undesirable buyer should the builder force the plaintiffs to go through with the sale. *Id.* at 282, 154 A.2d at 627-28. The subsequent sale would reportedly ruin the builder's business. *Id.* Despite a finding that the plaintiffs could lawfully sell the property to an "undesireable purchaser" should the deal close, the court found the threat to be improper and coercive. *Id.* at 288, 154 A.2d at 630. Thus, if the trial court found that the threats were made, and believed the builder's will was overcome, the defendants could "treat the contract as breached, and recover damages." *Id.* at 288-89, 154 A.2d at 631. *Beznos* and *Wolf* demonstrate that there are limits to the legitimate use of one's property.

It is difficult to resolve the question of the "wrongfulness" of the proposal in *Beznos*, because a mere determination of lawfulness based on the idea that owners can do what they want with their own property does not resolve the issue. This Article suggests one means—judicial economy—for resolving the propriety of the threat when a reference to wrongfulness will not suffice.

[155] *See supra* notes 88-107 and accompanying text.

[156] *Id.*

[157] *See supra* notes 51-52 and accompanying text; *see also* Wolf v. Marlton Corp., 57 N.J. Super. 278, 154 A.2d 625 (Super. Ct. App. Div. 1959) (coercer's threat found wrongful for purposes of duress action even though the act threatened was lawful).

not on fair terms."[158] Thus, in *Beznos*, even assuming that the threat harmed the recipient and did not benefit the maker of the threat, one would still need to resolve whether the exchange was fair. If threats to exercise one's legal rights can provide the foundation for a successful duress claim, the question becomes which legal threats give rise to a claim. The *Restatement* tests are inadequate because they state that sometimes an action is acceptable and sometimes it is not.[159] Because they are so open-ended, the supplemental *Restatement* tests, which focus on unfair exchange, unfair dealing, and the illegitimate use of power, are also inadequate guidelines on wrongfulness.[160]

A final problem with the *Restatement* test is that to decide whether the threat is wrongful or violative of a moral norm requires a circular analysis. One cannot determine whether an action is wrongful or violates a norm without an *a priori* understanding of whether the behavior is acceptable. Thus, a rights-based approach derived from either the *Restatement* or a moral baseline does not resolve the issue of whether a threatened action is wrongful.

The policy of judicial economy could resolve these ambiguities. Under the judicial economy analysis the appropriate question becomes: *Should* duress be available in *Beznos* when the threat is the exercise of a legal right? The court should find no duress because doing so would only temporarily assist the plaintiff. Presumably, the defendant would then bring an action for restitution for the value of the property conveyed. A finding of duress will not solve the problem, but merely add judicial costs. The parties will still have to expend additional resources in order to reach a settlement on the driveway's value and barring that, another court case will follow.[161]

2. Continued Efficiency Concerns: Minimizing the Costs of Resource Misallocation

A second efficiency rationale which should be adopted in duress

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[158] *See* RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(a) (1979); *see also* E.A. FARNSWORTH, *supra* note 6, § 4.17, at 263.

[159] *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 & comments (1979).

[160] *See id.* § 176(2)(b)-(c); *see also* Dalton, *supra* note 3, at 1035 ("[O]ur doctrine has not developed reliable guidelines for distinguishing this unacceptable conduct from the kind of self-interested and self-reliant conduct on which the contractual system is based.").

[161] *See infra* Section III G (discussing economic negligence and exploring other policy reasons which support a denial of the duress claim in *Beznos*). For more discussion of the economic negligence concept, see *infra* text accompanying notes 376-85.

cases focuses on the efficient prevention of resource misallocation. This policy promotes the efficient allocation of resources by putting the risk of voidability due to duress on the party who can more easily discover that the deal was not voluntary.[162] A deal is not voluntary if it is not likely to be value-maximizing for both par-

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[162] Some critics might decry the return to voluntariness as an arbiter of duress. One could argue that it does not make sense to designate voluntariness as a central component of duress analysis because contracts entered into under extreme pressure are still voluntary in the sense that the aggrieved party was still able to "choose rationally." *See* Bayles, *Reconceptualizing Necessity and Duress*, 33 WAYNE L. REV. 1191, 1209-10 (1987). This Article, however, focuses on voluntariness in a different sense. It is not concerned with whether the victim actually desired the transaction, the traditional focus of the will theory, *see supra* notes 20 and 61, but with whether the coercer is likely to be aware that the deal is unlikely to be value-maximizing for the victim. Professor Hillman discusses this concept when he suggests a presumption that "a modification that involves a substantial net loss on the contract to the promisor is the product of coercion." Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 886 (1979) [hereinafter Hillman, *Contract Modifications*]. The "tip-off" that an agreement was coerced follows from the idea that "[r]easonable persons ordinarily will not voluntarly [sic] relinquish important contract rights in return for nothing or for very little." *Id.* at 885. The test, which is based on the efficient cost avoider concept, is similar to a "reason to know" test. *See* Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 712-716 (1984) (discussing the use of the reason to know test in promissory estoppel cases); Speidel, Restatement Second: *Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785, 793-96 (1982) (explaining the use of the reason to know test to determine whether a contract was made).

There are three types of fact patterns which should raise a substantial doubt in the mind of the putative coercer as to whether the deal is value-maximizing for the victim. In the first, the difference between what the victim gives up and what the putative coercer gains in the exchange is disproportionate. In the second type, the coercer withholds information from the victim and it is not clear that the victim would have entered the deal had she been fully informed. Thus, the deal is presumptively not value-maximizing. *See infra* notes 210-46 and accompanying text. In the third type of case, there are persuasive barriers to bargaining that interfere with self-interested hard bargaining. In all of these cases, the alleged coercer is, or should be, on notice that the deal is too good to be true (disproportionately in her favor) and that the agreement may not reflect the victim's best interest.

First Nat'l Bank v. Pepper, 547 F.2d 708 (2d Cir. 1976) is an example of a case involving disproportionality in the exchange. When an attorney found a buyer for a corporation, but the deal did not close, the attorney refused to turn over the corporate papers required for another sale until stockholders paid him a $100,000 fee. *Id.* at 715. The attorney in this case demanded payment even though he "had no reasonable basis for believing he was entitled to [the amount]" he extracted from the stockholders. *Id.*; *see also* Furman v. Gulf Ins. Co., 152 F.2d 891 (8th Cir. 1946) (when an insurance agent gave up an agency worth $20-25,000 in return for a release from liability for $7,000 in debts, a valid claim of duress was stated); International Paper Co. v. Whilden, 469 So. 2d 560 (Ala. 1985) (duress found when victim agreed to indemnify paper company, which did not disclose the fact that there was $40,000 in potential liabilities, in exchange for payment of an admitted debt of $7,000); Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15 (Alaska 1978) (duress claim valid when debtor, knowing creditor's financial difficulty, offered a $97,500 settlement on an acknowledged debt of $260,000-300,000); Rich & Whillock, Inc. v. Ashton Dev., Inc., 157 Cal. App. 3d 1154, 1157, 204 Cal. Rptr. 86, 88 (1984) (duress found when a subcontractor acquiesced in a $50,000 settlement of an outstanding debt exceeding $72,000 "in order to survive"); Wise v. Midtown Motors, Inc., 231 Minn. 46, 42 N.W.2d 404 (1950) (jury question on duress when an employee released claims

ties.[163] If one party could easily discover the involuntariness of the transaction but enters into the deal anyway, the court should more readily grant relief to the victim.[164] Therefore, the party who can easily prevent a misallocation of resources will have an incentive to do so.[165] On the other hand, if it would burden the coercer to ascertain whether the deal is involuntary or if it would have other economic or social costs that discourage acceptable behavior,[166] courts should be reluctant to find duress because it would increase the costs of

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for services rendered that exceeded $6,800 for $200 under a threat of financial ruin and loss of new job).

Cases involving the failure of one party to disclose information relevant to whether the deal is value-maximizing for the other party are discussed *infra* in text accompanying notes 210-46.

The third category includes cases in which the agreement may not be value-maximizing for one party and that fact is likely to be evident to the other party. These cases involve persuasive barriers or reasons why one party does not bargain in its best interest. Such barriers are likely to exist when the victim is enmeshed in a relationship with a third party such that she is unable to act vigorously in her self interest. *Cf.* Kostritsky, *supra* note 5, at 936-40 (discussing relationships between the bargaining parties themselves). For cases recognizing the impact of a relationship with a third party, see Haumont v. Security State Bank, 220 Neb. 809, 374 N.W.2d 2 (1985) (parents permitted to avoid a mortgage and guarantee agreement that they executed under a threat of prosecution of their son); Port of Nehalem v. Nicholson, 122 Or. 523, 259 P. 900 (1927) (defendant's agreement to pay $4,407.34 to prevent the criminal prosecution of a family member was voidable on the basis of duress), *overruled on other grounds*, Godell v. Johnson, 244 Or. 587, 418 P.2d 505 (1966).

It is possible to posit separate rationales for each of these lines of cases. For example, a finding that the cases which involve a disproportionality in exchange are more likely to successfully invoke duress can be explained in terms of a regulatory concern with policing unfair bargains, *see, e.g.*, Dawson, *supra* note 3, at 282-88 (discussing duress in terms of preventing unjust enrichment), or in terms of the intrusion of distributive or altruistic motives. The distributive justice explanation cannot and should not be summarily rejected. Many modern commentators subscribe to the notion of duress as a doctrine for correcting unfair exchanges. *See, e.g.*, Dalton, *supra* note 3, at 1031-39 (discussing modern contract law and its focus on fairness). Nevertheless, the distributive justice or fairness explanation for duress claims is not entirely satisfactory. If one were to carry distributive and fairness concerns to their logical conclusion, then more plaintiffs would prevail than currently do. Moreover, if fairness is the operative norm, it is not clear why duress doctrine has not been extended to correct imbalances in available resources that limit some parties' choices. *See supra* note 9.

One advantage of an explanation based on the efficient resource allocation theory is that it provides an overarching theory capable of explaining different lines of cases. Thus, it would meet one of Professor Barnett's criteria for a superior theory—this is, that "the number of known problems the theory handles as well or better than its rivals . . . ." Barnett, *supra* note 1, at 270. Moreover, denying enforcement of such bargains would have the significant benefit of avoiding a costly waste of resources. Finally, it would provide a mechanism for courts to avoid reading erroneous results that might obtain if they followed current theories. *See infra* text accompanying notes 200-09.

[163] One of the primary benefits to voluntary exchange is that it maximizes value on both an individual and societal basis. A. KRONMAN & R. POSNER, *supra* note 120, at 1-2.

[164] Allocating the cost of a misallocation to the party who can most easily prevent the problem is a proper basis for formulating legal rules. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 2-9 (1978) (discussing allocation of risk).

[165] *Id.* at 7.

[166] *See infra* text accompanying notes 266-80.

contracting. In addition, the policy of efficient prevention of resource misallocation would promote standardization of applications of duress and supplement difficult doctrinal analysis.[167]

Courts should consider several factors in deciding if either party is in a better position to prevent a misallocation of resources. These factors include whether persuasive barriers that interfere with a party's hard bargaining exist[168] and whether there is an apparent disproportionality in the exchange. If such barriers are palpable and one party can easily detect them while the other party cannot, and the barriers are accompanied by a disproportionate exchange, the court should more readily allocate the risk of duress to the party who can easily prevent resource misallocation. This would reduce contracting costs by reducing the resources that must be devoted to discovering errors in resource allocation. This approach is consistent with that taken in other contexts such as mistake[169] and fraud.[170]

Another factor that courts should consider is the merits of the victim's claim. If the victim has a losing case, the other party will assume that any deal offered is enforceable and valid. The coercer is likely to assume that whatever she offers the other party is within acceptable norms and that she will not be accused of coercion in connection with extra concessions to the "victim." It would be difficult and costly to deter behavior that is considered "normal." If such behavior is subject to a charge of coercion, it may lead coercers to overcompensate to avoid all potential deals that the other party may later exploit for duress purposes. This would not be efficient or conducive to economic investment.

It would also be costly to deter the coercer when the victim has no legal rights and the coercer is the one who makes the concession because there is nothing to arouse the coercer's suspicions about the transaction. When the coercer makes the concessions, receiving nothing that she is not already entitled to,[171] she is likely to assume that the transaction, if voidable by anyone, would be voidable by her on the ground of lack of consideration.[172] In this instance, the party who

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[167] *See infra* text accompanying notes 210-46.

[168] For a discussion of the types of barriers that can interfere with self-interested hard bargaining, see Kostritsky, *supra* note 5, at 935-40.

[169] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 153, 154 (1979).

[170] *See id.* § 164.

[171] The parameters to the entitlement may be set by the terms of the contract.

[172] That assumption is likely to arise because in other contexts, a disproportionality in exchange may entitle the adversely affected party to avoid its contract obligation. *See, e.g.*, Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969) (when the contract price was unconscionable, the court reformed the installment contract to reflect the amount paid).

is in the best position to detect a misallocation of resources would not be the coercer. The only party with reason to suspect a misallocation would be the victim; therefore, the court should not find duress as it would place the burden of detection on the wrong party.

a. Applying the Efficient Prevention of Resource Misallocation Concept

Day v. Bicknell Minerals, Inc.[173] illustrates the difficulty of detecting the involuntariness of an agreement. In *Bicknell Minerals*, Union Minere began negotiating to buy Bicknell Minerals from its shareholders.[174] After some negotiations, the parties concluded a tentative oral agreement under which the buyer would pay a stipulated amount for the stock and would also release the shareholders from certain liabilities.[175] When Union Minere's board of directors would not ratify the tentative purchase agreement, the parties executed a written agreement containing terms less favorable to the stockholders.[176] When the buyer sued for specific performance of the written agreement, the shareholders counterclaimed requesting that the written agreement be reformed to the original oral terms, arguing that they had acquiesced to the less favorable written agreement under duress.[177] The court rejected the duress claim because "there is no evidence of any wrongful act or coercion of the shareholders" by the buyer.[178] Additionally, the court found that the seller's absence of choice was not *caused* by the buyer.[179] The seller was in financial straits due to its own actions in a prior default.[180] Moreover, the court found no lack of free will.[181]

Bicknell Minerals can be analyzed under the normative standards of the *Restatement's* wrongful act doctrinal element.[182] It is not clear, however, that the conclusion of no wrongful act is compelled. The stockholders' claim is that the buyer took advantage of the seller's economic straits, causing it to succumb to unfavorable contract terms. Was this pressure merely hard bargaining or was it wrongful coer-

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[173] 480 N.E.2d 567 (Ind. Ct. App. 1985).
[174] *Id.* at 568.
[175] *Id.* at 569.
[176] *Id.*
[177] *Id.* at 569-70.
[178] *Id.* at 571.
[179] *Id.*
[180] *Id.*
[181] *Id.* at 571-72.
[182] *Id.* (focusing on the wrongful act question).

cion?[183] One application of the wrongful act doctrine suggests the following analysis. Because the buyer was not obligated to close the deal, he could insist on any terms he chose to close the deal.[184] From this perspective, the *Bicknell Minerals* case is no different from any case in which one party negotiating a deal says to the other party: "Here are my terms—take them or leave them." Under that conceptual framework, the threat not to close except on the given terms is not wrongful. To hold otherwise would subject all contracts to claims of voidability on duress grounds because most contract negotiations include a threat at some point not to close except on certain terms.[185] Because there is no obligation to close, threats in such circumstances are not wrongful.[186]

Bicknell Minerals can also be viewed as a situation in which one party with no contract obligation to the other, exploits the other's economic straits. If so, it is not so easy to conclude that the conduct of the purchaser was benign. Even when a coercer has no obligation to make an offer to the other party, the resulting agreement may be voidable for duress, if she exploits the dire economic straits of the other party to extract a favorable deal.[187] The issue becomes what factor establishes an actionable claim.[188] The wrongfulness analysis fails to provide an answer.

In *Bicknell Minerals*, the court also justified its holding of no duress on the finding that the buyer did not cause the stockholders' "precarious" economic situation.[189] This explanation offers no help analytically because courts sometimes find a wrongful act even when the

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[183] *See* E.A. FARNSWORTH, *supra* note 6, § 4.17, at 263-64 (distinguishing legitimate from improper use of power).

[184] A. WERTHEIMER, *supra* note 2, at 41-44, 214 (discussing the relationship between a lack of obligation and an absence of duress).

[185] *Cf.* Dalzell, *Duress I*, *supra* note 4, at 239 ("Plainly most contracts that are enforced are entered into merely as a means of avoiding a less desirable alternative, hence this fact cannot be said to impair that real consent which is essential.").

[186] This can be seen in *Bicknell Minerals*. *See supra* notes 173-98 and accompanying text. The case involves an implied threat amounting to "deal with us on these terms or there is no deal."

[187] In every situation in which the putative coercer makes the offer "take my terms or none," the coercer could argue that she is protected because the victim can always walk away from the deal. But in some instances a court views that option as unpalatable and finds duress. Thus, the option of walking away from the deal cannot itself explain the *Bicknell Minerals* result.

[188] It could be argued that actionable claims involve unfairly taking advantage of another's economic necessities, but it is not clear what factors would prevent that same analysis from voiding unfavorable contracts to which parties agree because they have few alternatives.

[189] Day v. Bicknell Minerals, Inc., 480 N.E.2d 567, 571-72 (Ind. Ct. App. 1985).

coercer's contribution to the victim's economic straits is problematic.[190] Thus, the fact that the buyer did not cause the stockholders' dire financial straits does not preclude a claim of duress. The labeling of the action as not wrongful thus seems mechancially easy to reach without being compelled or inevitably correct.

To resolve any doctrinal ambiguities in the *Bicknell Minerals* case the court should analyze the case under the resource misallocation rubric. In *Bicknell Minerals*, the buyer (putative coercer) would probably not suspect resource misallocation for several reasons. The parties were deemed to be "sophisticated businesses and businessmen dealing with each other on behalf of their principals."[191] In this respect, there were no obvious impediments to the parties being able to act ruthlessly in pursuing their self-interest.[192] Furthermore, the parties were not locked into an ongoing relationship.[193] Had they been, there might have been persuasive barriers to self-interested negotiation. Moreover, because the shareholders had pursued the possibility of a sale to another entity, they appeared to be capable of acting in their self-interest.[194] Finally, as part of the deal the buyer agreed to assume certain bank debts, to release the individual shareholders from personal liabilities, and to give the shareholders two million dollars from future income.[195] There appears to be no gross disparity in the exchange;[196] both the buyer and the shareholders were taking certain risks and obtaining certain benefits. The buyer gained shares that could become more or less valuable in exchange for incurring substantial liability. The shareholders were relieved of certain liabilities but risked the possibility that the shares could become more valuable in the hands of the buyer.[197]

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[190] When a debtor threatens to withhold an admitted debt or to pay less than the amount owed, the court must decide whether the proposal to pay less was mere exploitation of the creditor's economic straits or whether the proposer contributed to the financial difficulties. In Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15 (Alaska 1978) the court cited the rule that economic necessities alone are insufficient for a duress claim unless they are caused by the coercer, and then found sufficient evidence of duress to require a trial. In order to win, the creditor would have to establish causation between its economic straits and the threat to delay payment if the creditor did not settle for a lesser amount. *Id.* at 18-19. It is not clear that it will be able to establish this unless it is determined that all threats to pay a reduced amount to a creditor automatically "cause" desperate financial straits.

[191] *Bicknell Minerals*, 480 N.E.2d at 571.

[192] *See* Kostritsky, *supra* note 5, at 935-40 (discussing barriers to self-interested hard bargaining).

[193] *See Bicknell Minerals*, 480 N.E.2d at 568-69.

[194] *Id.* at 571.

[195] *Id.* at 569.

[196] *See supra* note 162 (discussing disproportionality of exchange as a factor).

[197] Each party to a contract takes certain risks in the hope that future gains will result from taking the risk.

Because no "red flags" existed to indicate problems in bargaining power or unconscionable dealing, the buyer in *Bicknell Minerals* should have been able to assume that the deal was voluntary. As this transaction entailed risks and benefits for both sides,[198] there would have been an enormous cost in alerting the buyers to the shareholders' secret doubts about the transaction. On the other hand, the shareholders were in a position to know that the buyer would never have assumed the debts and liabilities without the tendered stock. Thus, the shareholders were in the best position to prevent a misallocation of resources. To find duress against the buyer would put an undue burden on the buyer to discover involuntariness.[199] If the court permitted an economic duress claim, transaction costs of negotiating the sale would have been wasted. To avoid that result, future buyers will have to expend resources toward discovering whether the seller has any duress grounds for attacking the deal. To permit a claim of duress in such a situation would promote an inefficient use of resources. Thus, it makes economic sense to deny the duress claim.

The case of *Selmer Co. v. Blakeslee-Midwest Co.*[200] provides an example of how the resource misallocation theory permits an outcome different from that reached by the court under traditional doctrinal duress analysis. In that case, the court ignored the resource misallocation policy and reached an erroneous result. The plaintiff/subcontractor had agreed to complete a job for a fixed fee and rather than terminate the job when the defendant/general contractor delayed in supplying materials, the plaintiff agreed to complete the job for a negotiated extra amount.[201]

Upon completion, the subcontractor submitted a claim for $120,000, but the general contractor refused to pay more than $67,000.[202] The subcontrator was "in desperate financial straits" and therefore ac-

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[198] For examples in which the court found no actionable duress since there appeared to be risk and benefit on both sides, see Higgins v. Brunswick Corp., 76 Ill. App. 3d 273, 395 N.E.2d 81 (1979) (creditor-lessor dismissed its lawsuit and paid off unsecured creditors of debtor-lessor in exchange for a lease of a bowling alley); King Enters. v. Manchester Water Works, 122 N.H. 1011, 453 A.2d 1276 (1982) (city (purported coercer) constructed water connections needed for builder's apartment complex in exchange for builder's agreement to pay for the connections); Grad v. Roberts, 14 N.Y.2d 70, 198 N.E.2d 26, 248 N.Y.S.2d 633 (1964) (stock was released in exchange for payment of a legitimate debt); Crocker v. Schneider, 683 S.W.2d 335 (Tenn. Ct. App. 1984) (settlement for services rendered was exchanged for a waiver, which allowed a closing to go forward).

[199] Otherwise, alleged coercers will devote an enormous expenditure of resources to ascertaining the voluntariness of a transaction, which will contribute to a misallocation of resources.

[200] 704 F.2d 924 (7th Cir. 1983).

[201] *Id.* at 926.

[202] *Id.*

quiesced in the lower payment.[203] The subcontractor filed suit against the general contractor claiming that the reduced settlement had been procured by duress.[204]

The *Selmer* court rejected the duress claim because the putative coercer had not actually caused the purported victim's economic distress.[205] The court noted the importance of enforcing contractual settlements in order to uphold the reliability of out-of-court resolutions of contract disputes to protect parties who could not afford to litigate.[206]

There are several difficulties in the court's justifications for the conclusion that no duress existed. The policy favoring settlements does not resolve the basic problem of contract law that arises from the difficulty of distinguishing between enforceable and unenforceable settlements.[207] Likewise, the court's second justification, that the defendant did not cause the claimant's economic difficulties, has proven not to be determinative.[208]

Under the misallocation of resources test, the duress claim should have been allowed in *Selmer*. The general contractor was the party in the best position to prevent a misallocation of resources. Clearly, the subcontractor would not have continued to expend resources had the general contractor not agreed to pay the additional amount. Because the general contractor specifically sought the expenditures, the subcontractor had no reason to suspect that the general contractor would refuse to pay extra for the work caused by the delay.

The resource misallocation theory might have advantages over a fairness theory based on disproportionality in exchange.[209] The settlement for the extra expenses might not be so grossly disproportionate as to be unfair. Nevertheless, because the general contractor had every reason to believe that the subcontractor would not have allocated his resources for the job if the general contractor had not agreed to pay the extra expenses incurred, the resource misallocation theory suggests that the agreement should be voidable. Otherwise a party who might easily prevent resource misallocation will fail to do so, promoting costly misallocation.

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[203] *Id.*

[204] *Id.*

[205] *Id.* at 928-29.

[206] *Id.* at 928.

[207] If the policy favoring settlements were in fact determinative, then no settlements would be voidable for duress.

[208] *See supra* note 190.

[209] *See supra* note 162.

b. Explaining the Success of Duress Cases Involving Fraud Based on Efficient Prevention of Resource Misallocation

The line of cases involving the intersection of fraud and coercive proposals implicitly reflects the importance of the resource misallocation analysis in deciding duress issues.[210] Under the resource misallocation analysis the party that commits fraud by withholding relevant and material information could easily have disclosed the information and prevented a resource misallocation by the less informed party.[211] Therefore, the party committing fraud should be subject to the risk of voidability on the ground of duress.

Application of the efficient prevention of resource misallocation theory to cases involving both fraud and duress issues[212] will effectively show why plaintiffs are likely to prevail on duress. The recognition of a resource misallocation analysis achieves the societal benefit of preventing resource misallocation at a low cost, thereby promoting economic efficiency. The resource misallocation theory also provides a normative standard for deciding cases and thus promotes predictability in judicial decisionmaking. In contrast, when approached from

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[210] For a case recognizing the interconnection between fraud and duress, see Leeper v. Beltrami, 53 Cal. 2d 195, 207, 347 P.2d 12, 21, 1 Cal. Rptr. 12, 21 (1959) ("The two types of wrongdoing, duress and fraud, are often factually closely interconnected and indistinguishable."). This Article explains both doctrines in terms of one theory based on the efficient prevention of resource misallocation.

[211] The party committing the fraud withholds or distorts information when the disclosure of that information could have prevented resource misallocation. This assumes, of course, that a fully informed party will not misallocate their resources.

[212] *See, e.g.*, International Paper Co. v. Whilden, 469 So. 2d 560 (Ala. 1985) (blanket indemnity was voidable for duress where defendant indemnitee withheld information bearing on potential liability of indemnitor); Rich & Whillock, Inc. v. Ashton Dev., Inc., 157 Cal. App. 3d 1154, 204 Cal. Rptr. 86 (1984) (after defendant misled plaintiff into thinking that extra expenses incurred in performing a grading contract would be covered, defendant then demanded that plaintiff accept less than the amount promised and was subject to a duress claim); Scutti v. State Rd. Dep't, 220 So. 2d 628 (Fla. Dist. Ct. App. 1969) (where county misled property owners and refused to issue a necessary permit because of nonexisting setback violations, the resulting agreement, which limited damages for this property taking was voidable for duress); Manufacturers Am. Bank v. Stamatis, 719 S.W.2d 64 (Mo. Ct. App. 1986) (bank customer was permitted to allege duress in signing a note where bank erroneously indicated a failure to sign would subject the maker to criminal and civil penalties); Peter Matthews Ltd. v. Robert Mabey, Inc., 117 A.D.2d 943, 499 N.Y.S.2d 254 (1986) (moving company presented a bill of lading limiting damages to $15,000, but there was no evidence that a liability limit had been disclosed when plaintiff selected the moving company); Harstad v. Frol, 41 Wash. App. 294, 704 P.2d 638 (1985) (broker-agent failed to disclose a personal interest in the transaction and further misled seller into believing that seller must assume a large debt to close the real estate deal); Litten v. Jonathan Logan, Inc., 220 Pa. Super. 274, 286 A.2d 913 (1971) (buyer who misled seller into believing that an oral agreement would govern a subsequent dealing threatened a breach unless seller entered a written agreement with substantially different terms).

a purely doctrinal standpoint under the *Restatement* test for duress, the finding of duress remains inexplicable. Courts are likely to find contracts voidable for duress even though the doctrinal requirements of duress are not met.

International Paper Co. v. Whilden[213] illustrates this type of fraud and duress situation. In this case, a paper company, International, agreed to buy timber from the owners of a tract of land.[214] A third party, Whilden, who had contracted to cut and haul the timber, entered into a subsequent contract to buy logs from International and made a down payment as required by the contract.[215] After the cutting project was finished, International owed Whilden $7,000,[216] which represented the difference between the advance payment and the actual cost of the logs.[217] International refused to refund the excess money unless Whilden agreed to indemnify International for liability to the land owner for damages allegedly arising out of the cutting project.[218] Whilden agreed to the indemnity provision, but later claimed that he was unaware the land owner was claiming $40,000 in damages against International for its unauthorized cutting of trees.[219] Apparently, Whilden was under the impression that thirty unauthorized trees had been cut down.[220] In fact, the total was 650.[221]

At trial, Whilden was successful in arguing that the indemnity agreement had been executed under duress.[222] The appellate court upheld this finding based on the unequal bargaining power between the parties,[223] and the plaintiff's financial hardship.[224]

Under traditional contract law, the "threat" to withhold an admitted debt[225] is not enough on its own to support a finding of duress.[226] The additional factors cited by the court—unequal bargaining power and economic hardship to plaintiff—are also insufficient to mandate

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[213] 469 So. 2d 560 (Ala. 1985).
[214] *Id.* at 561.
[215] *Id.*
[216] *Id.* at 562.
[217] *Id.* at 561.
[218] *Id.* at 562.
[219] *Id.*
[220] *Id.*
[221] *Id.* at 563.
[222] *Id.*
[223] *Id.*
[224] *Id.* at 563-64.
[225] *Id.* at 563.
[226] E.A. FARNSWORTH, *supra* note 6, § 4.18, at 266 ("[C]ourts have traditionally assumed that a reasonable alternative was available in the case of a threat not to pay money . . . .").

a finding of duress.[227] Furthermore, the plaintiff must ordinarily show that the defendant caused the plaintiff's economic hardship.[228] Although the court found that Whilden had no reasonable alternative but to agree to indemnify, other courts have refused to provide relief for a party who has agreed to particular terms because of the seemingly greater economic leverage and bargaining power of the other party.[229] The court's willingness in *International Paper* to find duress despite the factors that weigh against such a holding may be partially attributable to International's nondisclosure of the extent of the liability for improperly cut timber. Nevertheless, an examination of the underlying policy concerns of the efficient prevention of resource misallocation doctrine may explain why the court relaxed the requirements for duress in this case.

Under the efficient prevention of resource misallocation doctrine, International should assume the risk of voidability because it withheld information concerning the improperly cut timber,[230] knowing that it was depriving Whilden of material information that might have affected Whilden's willingness to sign the indemnity agreement. International was clearly in the best position to prevent a misallocation of Whilden's resources. Whilden had no reason to suspect that the deal with International was not in International's best interest. If duress had been denied, future parties relying on this doctrine would

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[227] Unequal bargaining power alone is not a sufficient basis for invalidating contracts on duress grounds. If unequal bargaining power were operative as an independent determinative factor, then most cases of duress would be decided in favor of the claimants. As one commentator stated:

> If the mere *fact* of impaired bargaining power, in combination with an inequivalence of exchange, were enough to invoke duress doctrine, impaired bargaining power would not serve the purpose Dawson acknowledges it still must: isolating just those kinds of impairment that the law is prepared to redress without feeling that the whole structure of bargaining between unequals is put in jeopardy.

Dalton, *supra* note 3 at 1031.

[228] Courts generally require a showing that the plaintiff's dire financial circumstances have been caused by the defendent. If the defendant merely takes advantage of already existing circumstances, the plaintiff is not usually successful in claiming duress. *See, e.g.,* W.R. Grimshaw Co. v. Nevil C. Withrow Co., 248 F.2d 896, 904 (8th Cir. 1957) ("The assertion of duress must be proven by evidence that the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities."), *cert. denied,* 356 U.S. 912 (1958); Fruhauf Sw. Garment Co. v. United States, 111 F. Supp. 945, 951 (Ct. Cl. 1953) ("It has become settled law that the mere stress of business conditions will not constitute duress where the defendant was not responsible for those circumstances."); First Tex. Sav. Ass'n v. Dicker Center, Inc., 631 S.W.2d 179, 186 (Tex. Ct. App. 1982) ("Stress of business conditions will not constitute duress unless the defendant was responsible for that condition.").

[229] *See, e.g.,* Schmalz v. Hardy Salt Co., 739 S.W.2d 765 (Mo. Ct. App. 1987) (despite inequality in bargaining power generally found between employer and employee, employee loses on the duress claim).

[230] International Paper Co. v. Whilden, 469 So. 2d 560, 563 (Ala. 1985).

incur excessive search costs to determine whether the proposed transaction was value-maximizing, thus increasing contracting costs.

Rich & Whillock, Inc. v. Ashton Development, Inc.[231] is an illustration of a situation in which the "victim" of coercion incurs an expense at the behest of the "coercer." The coercer then offers the victim a settlement that differs materially from that which was promised to secure the expenditures. The victim acquiesces and then sues for duress.[232] In this case, the defendant/general contractor hired the plaintiff/subcontractor to do excavation work for a fixed amount.[233] The contract expressly stated that "[a]ny rock encountered will be considered an extra at current rental rates."[234] When rock was encountered, the parties negotiated a price for the blasting work but "emphasized, however, [that] the estimate was not firm and the actual cost could go much higher due to the unpredictable nature of rock work."[235] During the excavation, the general contractor did not question the interim billings and assured the subcontractor that the extra costs would be paid.[236] When the subcontractor posted the final billing, the general contractor refused to pay the billed amount and offered a substantially lower settlement.[237] The subcontractor agreed to the settlement because it was "'under duress in that [they] felt they would face financial ruin if they did not accept the lesser sum and that defendants, knowing this, threatened no further payment unless'" the lower sum was accepted.[238] The *Rich & Whillock* court found that the defendant's settlement offer was made in bad faith and was coercive given the circumstances of the plaintiff's precarious financial position and the possibility of impending bankruptcy.[239] The plaintiff was therefore permitted to rescind the settlement agreement and the court awarded the full amount due under the original agreement.[240]

The *Rich & Whillock* result granting duress relief does make eco-

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[231] 157 Cal. App. 3d 1154, 204 Cal. Rptr. 86 (1984).

[232] *See, e.g.*, Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924 (7th Cir. 1983) (general contractor made subcontractor a take-it-or-leave-it settlement offer of $67,000 on a $120,000 claim).

[233] *Rich & Whillock*, 157 Cal. App. 3d at 1156, 204 Cal. Rptr. at 87.

[234] *Id.*

[235] *Id.*

[236] *Id.*, 204 Cal. Rptr. at 88.

[237] *Id.* at 1156-57, 204 Cal. Rptr. at 88.

[238] *Id.* at 1157, 204 Cal. Rptr. at 88. The general contractor offered to pay the subcontractor $50,000 on the remaining balance of $72,286.45 if the subcontractor accepted the lower payment and signed a standard release. *Id.* at 1156-57, 204 Cal. Rptr. at 88.

[239] *Id.* at 1160, 204 Cal. Rptr. at 90-91.

[240] *Id.* at 1161, 204 Cal. Rptr. at 91.

nomic sense when analyzed under a burden allocation analysis. Yet an examination of other cases suggests that a denial of relief might also have been appropriate because courts have often refused relief on grounds of duress when a party has agreed to settlement because of serious financial problems.[241] Moreover, where the facts are reversed and the party seeking relief for duress has been subjected to a price increase, rather than a reduced settlement offer, courts have refused to grant that relief despite financial problems.[242] Courts rationalize their refusals of relief by distinguishing "causing" from merely "taking advantage" of an unequal situation.[243] Courts posit that unless the putative coercer was directly responsible for, or "caused" the "victim's" necessitous economic circumstances,[244] no relief is available. In *Rich & Whillock*, although the defendant's low offer certainly made an already precarious economic situation worse, it is hard to conclude that the defendant *caused* the impending bankruptcy. If *Rich & Willock* is indicative of the manner in which the "causing" doctrine will typically be analyzed, it may prove so manipulable that no party can rely on the result of its application.

Because the result in *Rich & Whillock* is problematic in light of existing doctrinal distinctions, the efficient prevention of resource misallocation doctrine should be applied to help explain the holding of the case. Under the theory of efficient prevention of resource misallocation doctrine, the general contractor was in the best position to prevent a misallocation of resources. The risk of voidability on duress grounds should have been allocated to him, and the subcontractor left with the option to rescind the reduced settlement. At the time the subcontractor allocated its resources to excavation the general contractor had every reason to know that the subcontractor would not allocate resources to the rock excavation without an agreement to be paid in full for the extra work.[245] In order to encourage disclosure of material information affecting resource allocation and thus the

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[241] *See, e.g.*, Hackley v. Headley, 45 Mich. 569, 576, 8 N.W. 511, 514 (1881) (refusal by debtor to pay the full debt that was due did not constitute duress despite the fact that "plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it").

[242] *See, e.g.*, London Homes, Inc. v. Korn, 234 Cal. App. 2d 233, 44 Cal. Rptr. 262 (1965) (finding no duress when defendant refused to perform a contract unless plaintiff paid more for the land even though plaintiff's failure to agree would subject him to economic hardship).

[243] *See* A. WERTHEIMER, *supra* note 2, at 39-41 (discussing "causing" and "taking advantage" as distinguished in case law).

[244] *Id.* at 39.

[245] Rich & Whillock, Inc. v. Ashton Dev., Inc., 157 Cal. App. 3d 1154, 1156, 204 Cal. Rptr. 86, 88 (1984).

efficient use of resources, claims of duress by parties in the position of the subcontractor ought to be granted.[246]

c. Under the Efficient Prevention of Resource Misallocation Doctrine Agreements are Voidable When There is No Reasonable Basis for the Threat of Civil Process

Efficient prevention of resource misallocation offers an explanatory rationale for another application of the duress doctrine. Traditionally, a party may void an agreement when civil process is threatened but there is no reasonable basis for believing that the claim has merit.[247] Although commentators have rationalized this result in terms of abuse of process, efficient prevention of resource misallocation provides a persuasive alternative rationale. The coercer, who knows that the threatened suit lacks a reasonable basis, is in the best position to prevent the misallocation of resources through disclosure of that fact. Nevertheless, in taking advantage of her superior knowledge over the other party, she has affirmatively assisted in the misallocation of resources to benefit her own interests. The doctrine of duress should be administered to force the necessary disclosure and thereby efficiently allocate resources.

d. Response to Critiques of the Efficient Prevention of Resource Misallocation Theory

The efficient prevention of resource misallocation theory is open to criticism on the ground that the test, which is partially based on concepts of bargaining and on terms of exchange, is not necessarily *more* persuasive than the traditional test based on concepts of fairness reflected in the *Restatement*.[248] The resource misallocation test serves as an attractive alternative, however, which has several advantages over the fairness test. First, the fairness concept is so manipulable that the result of its application as reflected in case law is inconsistent

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[246] *See* R. POSNER, *supra* note 17, at 85 (discussing the importance of assigning the risk by asking "[w]ill imposing liability create incentives for value-maximizing conduct in the future?").

[247] E.A. FARNSWORTH, *supra* note 6, § 4.17, at 260-61; *see also* Leeper v. Beltrami, 53 Cal. 2d 195, 347 P.2d 12, 1 Cal. Rptr. 12 (1959) (finding wrongful conduct amounted to duress when defendants knowingly asserted a false claim on property).

[248] The test based on fairness has been proposed by Professor Dawson, *see* Dawson, *supra* note 3, and endorsed by others, including Professor Dalton. *See* Dalton, *supra* note 5; *supra* text accompanying note 113.

and unpersuasive. The efficient prevention of resource misallocation theory offers courts additional factors on which to focus and provides guidance that may enhance predictability. Second, the resource misallocation theory is advantageous for its ability to explain other factors such as the correlation between fraud and duress. Finally, as is indicated by the *Selmer* case discussed above, the resource misallocation theory has a particular advantage when compared with the fairness theory based on disproportionality in exchange.

e. Postscript

The foregoing discussion suggests that the law should allocate the risk of voidability on duress grounds to the party who can most easily prevent a misallocation of resources and fails to do so. Nevertheless, courts may be able to prevent resource misallocation by refusing to entertain duress claims when the alleged victim has a losing contract claim.[249] If parties with losing contract claims are given an avoidance mechanism, they may begin to think that the courts will save them from losing deals. Parties will then allocate their resources recklessly by undervaluing the risks associated with the business transaction. The parties will neglect to take account of the fact that the other party may offer them a modified agreement incapable of being attacked on duress grounds, but will decide to walk away from the deal altogether. If a party has a losing claim on the merits and is permitted to prevail on a duress claim, parties will begin to discount the risk associated with the losing claim and invest more resources in that enterprise. Thus, the risk will tend to become undervalued.

3. Efficient Economic Results: A Normative Analysis

A third type of efficiency concern, efficiency of outcome, often influences the manner in which duress cases are decided. This concept dictates that a court should not allow the duress defense when a waste of economic resources or costly overdeterrence would result. A theory of efficient normative outcomes may prove useful for identifying cases in which duress claims should be permitted. Because of the manipulability of their doctrinal elements,[250] current theories do not

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[249] *See supra* note 146.

[250] *See supra* notes 108-19 and accompanying text.

provide a complete or satisfactory analysis of these cases.

The prevention of costly overdeterrence by a non-superior risk bearer is one normative efficiency concern.[251] The superior risk bearer is that party to whom a risk should be allocated because she can most efficiently reduce the cost of the risk to both parties.[252] Courts should allocate risk in a manner that coincides with private risk allocation[253] and, thus, does not prompt costly measures and wasted resources.

Red-Samm Mining Co. v. Port of Seattle[254] is an example of a case in which the party claiming duress is the superior risk bearer. A finding of duress for the claimant here would require the non-superior risk bearer to take steps that would be costly, resulting in a waste of resources. The plaintiff contractor in *Red-Samm* bid on a construction contract for the defendant.[255] After the bids were opened, the defendant, Port of Seattle, discovered an arithmetical error in the calculation of the bid.[256] The defendant then offered the plaintiff the bid at the lower corrected amount.[257] The plaintiff agreed, but later argued that it had agreed to the lower amount under compulsion.[258] The court rejected the duress claim on the basis of the availability of reasonable alternatives, including refusing to accept the job at that amount.[259] The presence of an alternative indicates that the second prong of doctrinal duress[260] was not met and, thus, the duress claim was defeated.

The doctrinal analysis, however, is not wholly satisfactory. The conclusion that no reasonable alternative existed appears to be a label that the court attaches to, rather than a persuasive rationale for, the

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[251] Professor Halpern addresses this concept of risk allocation when he states:

> The efficiency analysis, whether in terms of "superior risk bearer" or "least-cost bearer," or more general efficiency criteria, is a determination as to how two supposedly risk averse parties would have allocated the risk of disruptive events had they been required specifically to do so and had their goal been an efficient, least-cost, present transaction. What is involved is a complicated set of trade-offs relating to how much each party would have been willing to pay to have the other assume the risk.

Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon,"* 135 U. PA. L. REV. 1123, 1160 (1987) (footnotes omitted).

[252] *Id.* at 1157-59.

[253] For a discussion of the would-be private allocation, see Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 597-603 (1982).

[254] 8 Wash. App. 610, 508 P.2d 175 (1973).

[255] *Id.* at 612-13, 508 P.2d at 176-77.

[256] *Id.* at 613, 508 P.2d at 177.

[257] *Id.*

[258] *Id.*

[259] *Id.* at 614-16, 508 P.2d at 178-79.

[260] *See supra* notes 116-19 and accompanying text.

denial of recovery. The court does not offer a persuasive rationale for why the possible alternative of rejecting the bid, and thereby losing the job and its contract bid bond, was reasonable.[261] In every case, the party claiming duress asserts that economic necessities dictate acquiescence in the deal, and in each case, the court must determine if the available options were "reasonable alternatives" to the proffered deal. Unfortunately, this test gives the court discretion and offers no guidance to the contracting parties.

An approach based on either a moral baseline[262] or on the wrongful act prong of doctrinal duress[263] suggests the following analysis of the no-recovery result in *Red-Samm*: Because the Port of Seattle was under no legal or moral obligation to accept the contractor's bid, a proposal to the contractor on any terms that would close the transaction would make the contractor better off and would therefore not be wrongful. Measured against a baseline of no deal at all, the proposal is a noncoercive offer.

A legal rights analysis based on either the wrongful act component or the moral baseline analysis seems deficient both as an explanatory rationale and as a normative standard. Because courts sometimes find duress when the option offered the victim is extremely grim or made in bad faith, even if the purported coercer acts wholly within her lawful rights,[264] those approaches fail to explain why the threat to exercise a legal right in a particular case is different and therefore not subject to attack on duress grounds.

Because of the shortcomings of current theories, a policy approach should be adopted. A persuasive policy reason suggests that the duress claim should indeed be rejected in *Red-Samm*; granting duress might promote overdeterrence and inefficiency by prompting the Port of Seattle to oversee and double-check all bids made by contractors before their submission to insure their accuracy and catch subcontractors' arithmetical errors. Yet, the party in the best position to prevent an arithmetical error at the least cost is the party who submits the bid. If a court denied the Port of Seattle the right to

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[261] *See Red-Samm*, 8 Wash. App. at 615-16, 508 P.2d at 178-79.

[262] *See supra* notes 88-107 and accompanying text.

[263] *See supra* notes 108-19 and accompanying text.

[264] Arguably what distinguishes those cases in which courts find actionable duress, despite the fact that one party was exercising legal rights, is the presence of other factors such as unequal bargaining power, unjust enrichment, or bad faith. Since none of these factors are present in *Red-Samm*, there is nothing to make the threat to "deal with me on my terms or not at all" a wrongful one.

This Article suggests that the legal rights analysis is flawed and therefore it might be helpful to look to external policy considerations to determine whether a duress claim should be permitted.

require performance at the lower corrected dollar figure, the Port, in an effort to foreclose the possibility of an agreement being voided, might be tempted to hire extra employees to insure that the bidders do the correct arithmetic before they submit their bids. This would result in a costly waste of resources. If the Port of Seattle made a similar offer to the next lowest bidder (who also made a mistake in calculation), the Port would risk the repeat result of the bidder voiding the agreement. To avoid that result, the Port might insist on reviewing the arithmetic of the bids before they were submitted, thus insuring against the possibility of a repeated voiding of agreements on duress grounds. Yet, the party in the best position to prevent the mistake from occurring is the bidder himself.[265] To avoid that costly oversight, the court should deny the duress claim. In that way, the recipient of the bid will not be induced to undertake expensive and costly double-checking of the figures.

Costly overdeterrence can provide a benchmark for separating valid from invalid duress claims in a variety of other contexts as well. Overdeterrence may result if parties prevail on duress claims when the "coercing party" has acted within the ambit of generally accepted behavior and norms.[266] To hold otherwise would generate unnecessary costs. If courts were to void for duress such commonly accepted behavior as a private physician conditioning treatment of a patient on the payment of a fair price,[267] courts would have a hard time convincing doctors that they were exerting unacceptable pressure in charging a fair price.

The costly overdeterrence that may occur if a court voids a contract

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[265] Kronman discusses this same concept in connection with unilateral mistake. Kronman, *supra* note 164, at 6-9.

[266] Acceptable behavioral norms might not be considered a novel test, but merely a different label for lawful behavior. Behavioral norms, however, include legal norms as well as social norms. A concern with social norms is not novel; some commentators would set the relevant baselines by such norms. *See, e.g.*, A. WERTHEIMER, *supra* note 2, at 207 (measuring one baseline by "what is 'normal' in . . . society"). The focus here is different—it is on the costly waste of resources that would result if one were to set baselines at odds with social norms.

This framework may be helpful in rethinking Eisele v. Ayers, 63 Ill. App. 3d 1039, 381 N.E.2d 21 (1978). In *Eisele*, medical students challenged a large tuition increase, partly on duress grounds. *Id.* at 1041-42, 381 N.E.2d at 24. The court rejected the duress claim, stating that, "in light of the financial realities and reduced Federal funding," there was nothing "wrong or oppressive in [the] defendants' decision to raise tuition." *Id.* at 1045, 381 N.E.2d at 27. In deciding the duress claim, the court might have considered whether a guarantee against large tuition increases was a social norm. If not, then it might have been appropriate to reject the duress claim; otherwise, it would be costly to deter future coercers who would have to be re-educated about the acceptable social norms. There is, of course, some circularity in this argument since legal decisions can affect the nature of expected social norms of behavior.

[267] A. WERTHEIMER, *supra* note 2, at 207-08 (discussing the example of the public and private physicians).

when parties are acting within societal norms is illustrated by *Xerox Corp. v. ISC Corp.*[268] In *Xerox*, the plaintiff, Xerox, contracted to sell the defendant, ISC, certain computer software.[269] Following a suggestion from Xerox, the defendant leased the computer hardware necessary to run the programs from a third party, EDCON, who itself had leased this hardware from Xerox.[270] Subsequently, EDCON defaulted in rental payments and Xerox cancelled its hardware lease.[271] This left ISC without the hardware necessary to run its programs, making the software effectively useless.[272] Xerox then proposed to lease directly to ISC the necessary hardware in exchange for a settlement agreement and four promissory notes.[273] ISC acquiesced because it was left in a "difficult position" and needed the equipment.[274] When Xerox sued ISC for failure to pay on the promissory notes, ISC argued that the transaction was voidable for duress.[275] The defendant contended bad faith in the Xerox cancellation of EDCON's lease and improper pressure on the defendant to agree to the new lease terms.[276] The court refused to find duress, concluding that the defendant could not "complain of duress simply because Xerox terminated a contract with a third party who failed to perform that contract."[277]

Analyzed from a doctrinal standpoint, Xerox had no legal obligation to allow ISC access to the hardware. Therefore, an agreement that gave ISC access on Xerox's terms, even if unpalatable to ISC, could not be wrongful. The question of the wrongfulness of Xerox's actions, however, is not quite so clear. First, focusing on legal rights will not resolve the duress claim since acting within one's legal rights is not an absolute shield.[278] The fact that Xerox had a legal right to propose any lease terms is therefore not dispositive of the duress issue. Moreover, if *Xerox* is conceptualized as a case about the limits of exploiting another's economic necessities, the outcome is uncertain since the propriety of capitalizing on a party's weakness to extract favorable terms is itself problematic.[279]

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[268] 632 P.2d 618 (Colo. Ct. App. 1981).
[269] *Id.* at 619.
[270] *Id.* at 622.
[271] *Id.*
[272] *Id.*
[273] *Id.* at 619.
[274] *Id.* at 622.
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *See* cases cited *supra* notes 51 and 52.
[279] *See supra* notes 56-57 and accompanying text.

Efficiency concerns reflected in the policy of upholding agreements when the coercer acts within the range of acceptable norms help to make the result in the *Xerox* case compelling. If a court should find duress, it would in effect be finding that a party with a lease could not cancel that lease even for nonpayment of rent if doing so would cause an unrelated third party economic hardship. That result would be costly to enforce because it is contrary to behavior that is acceptable in the business community.[280] For this reason courts should be reluctant to grant a duress defense in such circumstances.

B. Encouraging Disclosure of Unexpected Risks

Decisions in duress cases should incorporate a policy that encourages the disclosure of unusual or unexpected risks and material information.[281] Failure of one party to disclose an unusual risk or material information known only to that party should enable the ignorant party to prevail on a duress claim when the "coercer" attempts to capitalize on risks that are outside the risks associated with a particular transaction.[282] Granting duress in such circumstances would provide an incentive to the knowledgeable party to disclose such information and prevent a misallocation of resources based on imperfect or incomplete information. This would enhance the efficient allocation of resources by giving both parties an incentive to provide enough information to allow each of them to determine whether the deal they are entering into maximizes value.[283]

Adams v. Schiffer[284] illustrates why duress claims should succeed when the coercer seeks to impose a risk that is not one of the normally foreseeable risks of a transaction. In *Adams,* the defendant, Schiffer, purchased property from Adams.[285] Thereafter, Adams' son Richard made a claim to the property.[286] Schiffer gave Richard $10,000

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[280] *See* Gordon, *supra* note 3, at 203-10.

[281] *Cf.* Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854) (reflecting on the relationship between the unforseeable risks flowing from a contract, and the measure of damages to be awarded if those risks occur).

[282] In an analogous situation, in cases involving a unilateral mistake by one party which the other party has reason to know about, courts are likely to excuse the mistaken party. *See* Kronman, *supra* note 164, at 5-9 (discussing the rationale for excusing unilateral mistake).

[283] *Cf. id.* at 7-8 (suggesting an allocation of risk to minimize the "joint costs" of a unilateral mistake; the risk should be on the party in the best position to prevent a costly mistake).

[284] 11 Colo. 15, 17 P. 21 (1888).

[285] *Id.* at 16, 17 P. at 22.

[286] *Id.* at 23, 17 P. at 25-26.

to quiet title;[287] and then sought reimbursement from Adams senior, who refused to pay.[288] To pressure Adams, Schiffer persuaded his brother, who was his banking partner, to refuse to allow Adams to draw on his bank account.[289] Adams ultimately settled in order to obtain a release of his funds, and then brought suit to recover the settlement.[290] The court found that the settlement was void for duress.[291]

The outcome is not justifiable in doctrinal terms because the court did not explain why the pursuit of a legal remedy was not a reasonable alternative for Adams senior.[292] Nor is it clear that the threat to tie up the father's account is illegal and therefore wrongful under the *Restatement*.[293] Furthermore, because it is not clear whether the bank's refusal to release funds was morally wrongful or whether such conduct would constitute a wrongful action sufficient to satisfy the *Restatement's* requirements, application of the moral baseline theory to *Adams* might be difficult.[294] But even if the doctrinal or moral baseline approaches do not explain the outcome in *Adams*, policy considerations on disclosure of risk militate in favor of the duress finding. Because a bank depositor would not expect his account to be manipulated by the bank for actions unrelated to the account, normal expectations would be upset if duress were not found.[295] Ordinarily this is not a risk that would be foreseeable by a person opening a bank account, therefore the burden should be on the other party to disclose that risk or forego the opportunity of later exploiting it.

McCubbin v. Buss[296] provides another example of a failure to disclose

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[287] *Id.* at 23, 37-39, 17 P. at 26, 32-33.

[288] *Id.* at 39, 17 P. at 33.

[289] *Id.* at 34, 40, 17 P. at 31, 33.

[290] *Id.* at 40, 17 P. at 34.

[291] *Id.*

[292] *See* Dalzell, *Duress II*, *supra* note 40, at 341-42 (discussing *Adams v. Schiffer* and noting the failure of the court to consider whether Adams had alternative remedies available). This failure is puzzling in view of the requirement under the *Restatement* that the party seeking relief must have had no other choice or reasonable alternative but acquiescence. *See supra* note 108. The policy based on unexpected risks conflicts with the policy discussed *supra* text accompanying notes 132-61, positing the benefits of a policy of judicial economy. Perhaps these two competing policies cannot be reconciled, but there is no reason why one should overshadow the other.

[293] *See supra* notes 108-19 and accompanying text. Although the court does conclude that the interference with the plaintiff's bank account was an unlawful interference, *Adams*, 11 Colo. at 40, 17 P. at 33-34, the withholding of the money constitutes no crime or tort and thus the court must decide if the withholding is an improper threat.

[294] *See supra* notes 88-107 and accompanying text (discussing how a moral baseline distinguishes a coercive from a noncoercive proposal).

[295] *See Adams*, 11 Colo. at 40, 17 P. at 34 (discussing the normal relationship between a depositor and a bank).

[296] 180 Neb. 624, 144 N.W.2d 175 (1966).

an unexpected risk. In *McCubbin*, the plaintiff was a stockholder and general manager of a close corporation.[297] Shortly after the defendant became the majority stockholder, the defendant first tried to persuade the plaintiff to agree to a contract that would have cancelled a stock-purchase contract, and then threatened to terminate plaintiff's employment in order to induce cancellation of the stock-purchase contract.[298]

The plaintiff signed the cancellation contract, but his employment was nevertheless terminated. He then brought an action for rescission of the cancellation contract and reinstatement of the stock option.[299] The court found business compulsion[300] evident on the facts, entitling the plaintiff to recission and reinstatement of the stock-purchase contract.[301]

The plaintiff could not have reasonably anticipated that his continued employment would depend on giving up a stock option.[302] Rather, he would have anticipated that it would depend on his performance and economic conditions. Because giving up a stock option is not within the normal realm of expected risk, the parties would not have bargained regarding that particular risk. For this reason, the employer should have an obligation to disclose the risk or forego the opportunity to capitalize on it later. This policy of disclosing unusual risks to the other party would prevent enforcement of contracts where the risks had not been disclosed.[303]

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[297] *Id.* at 625, 144 N.W.2d at 177.

[298] *Id.* at 627, 144 N.W.2d at 178.

[299] *Id.* at 625, 144 N.W.2d at 177.

[300] Business compulsion is another term used to describe economic duress. *See, e.g.*, Dalzell, *Duress I, supra* note 4, at 240 & n.6.

[301] *McCubbin*, 180 Neb. at 631, 144 N.W.2d at 180.

[302] *McCubbin* may be explained in two ways other than the policy of requiring certain parties to disclose unexpected risks. The first explanation is based on unjust enrichment. Buss was arguably unjustly enriched when McCubbin gave up his stock option. An alternative explanation for the result is put forth by Professor Farnsworth: "Duress may be found if, for example, an employer who has the right to terminate the employment at will threatens to fire an employee as a means of obtaining some unrelated advantage . . . ." E.A. FARNSWORTH, *supra* note 6, § 4.17, at 262; *see also* Conybeare, *supra* note 87, at 1028 (discussing the distinction used to decide extortion cases that is based on "whether there is a clear nexus between the act threatened and the property demanded"). However, the explanation based on the disclosure of unexpected risk is a plausible one and is consistent with the fraud cases discussed *supra* in text accompanying notes 211-46.

[303] If one party can easily, and at low cost, disclose information that would affect the other party's decision to proceed with the transaction, and the other party would not have expected the nondisclosed risk, the duress rules should require disclosure. Illustrative is Peter Matthews, Ltd. v. Robert Mabey, Inc., 117 A.D.2d 943, 499 N.Y.S.2d 254 (1986). In *Mabey*, a moving company, after a truck was loaded with the plaintiff's personal property, refused to proceed unless the plaintiff agreed to a $15,000 limit on damages. *Id.* at 943-44, 499 N.Y.S.2d at 255-

C. *Denying Duress to Avoid Judicial Capability Problems*

Judicial capability[304] should also affect the availability of duress relief. If granting the duress claim would involve the court in having to set a price or undo a transaction that would necessitate a complex valuation, the court should be reluctant to grant the duress claim. Valuation is best left to the parties,[305] and the court should not become involved in a question it may be ill-equipped to resolve. On the other hand, if judicial grants of duress will not involve the court in valuation questions, the court should be more willing to grant relief. Recognition of judicial capability problems would help to resolve ambiguities that arise under current doctrinal analysis.

King Enterprises v. Manchester Water Works[306] illustrates a case in which the granting of relief would have involved the court in setting a price for services. In *King Enterprises*, the plaintiff began construction of an apartment complex and then requested that the defendant, the city water company, provide the necessary water.[307] The defendant responded by demanding the payment of an assessment, but the plaintiff refused to pay the requested amount.[308] Subsequently, the parties agreed to a price concession.[309] After construction of the water main was undertaken by the defendant, however, the plaintiff refused to pay, alleging that the agreement was void for duress.[310] In its analysis, the *King Enterprises* court recognized the two key doctrinal elements of duress: a wrongful act and an absence of reasonable alternatives.[311] To resolve whether the agreement was

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56. The plaintiff argued duress and the court found "facts sufficient to withstand [the defendant's motion for] summary judgment" noting that the plaintiff had no "practical alternative to compliance." *Id.* at 944, 499 N.Y.S.2d at 256.

Mabey can also be analyzed in terms of forced disclosure. The defendant could have easily disclosed the $15,000 damage limit before the plaintiff agreed to use his services; therefore a failure to disclose that fact should preclude the defendant from capitalizing on the limit since the plaintiff could reasonably have anticipated that a mover would provide full coverage absent disclosure on limits of liability. Forcing the disclosure would have the societal benefit of meeting the parties' reasonable expectations and of permitting similarly situated plaintiffs to devote their resources to their highest valued uses.

[304] *See supra* note 43.

[305] Leaving valuation to the parties is a main tenet of classical contract law. Dalton, *supra* note 3, at 1068. This concept has come under attack recently by critics who have postulated the importance of public policy considerations that run counter to these classic individualistic values. *See supra* note 5.

[306] 122 N.H. 1011, 453 A.2d 1276 (1982).

[307] *Id.* at 1013, 453 A.2d at 1276-77.

[308] *Id.*, 453 A.2d at 1277.

[309] *Id.*

[310] *Id.*

[311] *Id.* at 1014, 453 A.2d at 1277.

in fact voluntary, the court looked at the fairness of the bargaining process.[312] The court found the agreement to be "a product of free and voluntary negotiations" because the purported coercer engaged in a give-and-take with the alleged victim, and made a price concession.[313] The court found no wrongful acts by the defendant.[314]

The court concluded that duress should not be available because the water company did not cause the developer's need for water connections to become acute, and in fact the developer himself caused the crisis and had reasonable alternatives.[315] Yet, these rationales do not necessarily insulate an agreement from attack on duress grounds and thus they may not represent the best analysis.

A policy that might provide more effective guidance to a court than that offered by the doctrinal analysis is the judicial capability policy. Granting duress relief in the *King Enterprises* case would have enmeshed the court in determining the appropriate price for the water connections. This problem is likely to occur because once the agreement between the parties is voided, the water works company may now bring a lawsuit to recover the reasonable value of the requested connections. The court should be reluctant to void the agreement on grounds of duress because it would embroil the court in a price dispute.[316] Because the court's doctrinal analysis is not necessarily compelling, judicial capability more appropriately justifies the finding of no duress. To avoid judicial capability problems, there should be a willingness to grant duress relief when that finding will not enmesh the court in economic evaluations. Courts should be more willing to

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[312] *Id.* at 1014-15, 453 A.2d at 1277-78.

[313] *Id.* at 1014, 453 A.2d at 1277. Nevertheless, if voluntariness is the test, it is not clear why some negotiating indicates that a final proposal by the putative coercer is any more acceptable or voluntarily assented to under the circumstances.

[314] *Id.*, 453 A.2d at 1278.

[315] *Id.* at 1014-15, 453 A.2d at 1278; *see supra* note 190 and accompanying text.

[316] Another case in which a grant of the duress claim would enmesh the court in an economic evaluation that a court may be ill-equipped to handle on judicial capability grounds is Grad v. Roberts, 14 N.Y.2d 70, 198 N.E.2d 26, 248 N.Y.S.2d 633 (1964). In *Grad*, the plaintiff was indebted to the defendant for engineering services. *Id.* at 72, 198 N.E.2d at 26, 248 N.Y.S.2d at 634. To pressure the plaintiff into paying the debt, the defendant refused to transfer stock to the plaintiff unless the plaintiff paid his debt. *Id.* at 73, 198 N.E.2d at 27, 248 N.Y.S.2d at 635. The plaintiff agreed to secure the stock transfer, but later argued the agreement should be voidable for duress. *Id.* The court disagreed, stating that it was "but simple justice" for the defendant to exploit his strategic stock advantage. *Id.* at 74, 198 N.E.2d at 28, 248 N.Y.S.2d at 636.

Under a contrary holding the plaintiff would have been able to rescind the agreement regarding the debt and to recover the money paid, but this would have required the court to evaluate the defendant's release of the stock. If the debt agreement is voided, the court might have to readjust the terms of the stock deal to account for the lost ability to secure the payment. That valuation might be one the court is ill-equipped to handle.

grant relief if they can simply undo a transaction without facing the added burden of making economic evaluations. The court may, for example, void a deed executed by an anguished parent which was conveyed to a third party to prevent the criminal prosecution of an adult child.[317] This would entail no complex valuation question since the court can simply reverse the transaction. Similarly, even when a grant of duress upsets a transaction, but there is clear evidence of what the parties thought the services were worth, there will not be judicial capacity problems. The court in those instances would not be starting from scratch in setting prices.

The judicial capability concept is illustrated by *Rich & Whillock, Inc. v. Ashton Development, Inc.*[318] In *Rich & Whillock* the parties agreed on a price for excavation work and also agreed that any extra rock work would be done at current rental rates.[319] The general contractor's actions caused the subcontractor to believe that there would be no problem with payment.[320] After the subcontractor completed performance, the general contractor offered a reduced amount to cover the additional expense.[321] Granting the duress claim in this case would not involve the court in an inquiry into the appropriate payment because the parties had already agreed that current rental rates would apply. The court can therefore undo the transaction without taking on the added burden of determining the value of the services. The court should therefore be more willing to grant relief.

D. Judicial Risk Reallocation: Speculation at the Other Party's Expense

Risk allocation[322] provides another guide for deciding duress cases. If the parties have allocated risks in a certain fashion, and one party tries to rely on duress so as to reallocate the risk, duress should not

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[317] *See* Haumont v. Security State Bank, 220 Neb. 809, 374 N.W.2d 2 (1985).

[318] 157 Cal. App. 3d 1154, 204 Cal. Rptr. 86 (1984).

[319] *Id.* at 1156, 204 Cal. Rptr. at 87.

[320] *Id.*, 204 Cal. Rptr. at 87-88.

[321] *Id.* at 1156-57, 204 Cal. Rptr. at 88.

[322] Risk allocation concepts also figure prominently in the doctrine of commercial impracticability. *See* Halpern, *supra* note 251, at 1160-61 (discussing the efficiency model for allocating risks in a way that is consistent with the allocation parties would have made for future contingencies had the requisite information been available).

be available.[323] Reallocation of risk on grounds of duress would encourage economic negligence by protecting parties from erroneous risk calculations. Moreover, such reallocation of risk by the courts would contribute to the misallocation of resources. Parties would have to assume the risk that courts will bail out the losing party. Even when the parties do not allocate the risks explicitly, the court should not grant a duress claim when doing so would make the transaction essentially risk free for the complaining party. Moreover, permitting parties to have it both ways[324] and voiding contracts whenever it is desirable to do so, would upset the basic tenet of contract law, which prohibits parties from speculating at one another's expense.[325] Finally, most parties expect that if risks are assumed on both sides, there is equivalence in the deal. Permitting duress in those circumstances would unduly burden the party who must ferret out involuntariness in circumstances that bespeak normalcy.[326]

Risk reallocation concepts are illustrated by *First Data Resources, Inc. v. Omaha Steaks International.*[327] Under the contract involved in *First Data*, either party could terminate the agreement on ninety days notice.[328] The plaintiff wrote a letter notifying the defendant that it would exercise its right to terminate the contract unless a higher price was negotiated.[329] The defendant agreed to a price increase, but later refused to pay.[330] When the plaintiff sued for payment, the defendant sought to avoid the agreement on duress grounds.[331]

First Data can be explained under the current doctrinal approach of determining the existence of an improper threat and of a reasonable alternative.[332] The advantage of the risk allocation analysis (discussed

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[323] Arguably, the disinclination to reallocate risks is merely another way of saying that if the party is acting within her legal rights, then duress should not be available, but if a party is exceeding her legal rights, then duress should be available. By definition, if a party is acting within her legal rights, she is not trying to reallocate risks, while if a party is exceeding her legal rights she may be trying to do so. Nevertheless, risk reallocation analysis offers several advantages. It provides a persuasive economic rationale for case results. It may also help to reach a result when doctrinal limitations do not provide a clear answer. *See infra* text accompanying notes 327-41.

[324] Courts are reluctant to permit a party to "have its cake and eat it too." Red-Samm Mining Co. v. Port of Seattle, 8 Wash. App. 610, 616, 508 P.2d 175, 178 (1973).

[325] For a discussion of the anti-speculation policy in contract law as it is manifested in the mutuality of obligation principle, see E.A. FARNSWORTH, *supra* note 6, § 3.2, at 107-08.

[326] *See supra* text accompanying notes 162-209.

[327] 209 Neb. 327, 307 N.W.2d 790 (1981).

[328] *Id.* at 329, 307 N.W.2d at 792.

[329] *Id.*

[330] *Id.* at 329-30, 307 N.W.2d at 792.

[331] *Id.* at 330-31, 307 N.W.2d at 792.

[332] Since the contract permitted termination upon ninety days notice, it was not improper to give notice. Thus there was no improper threat and any proposal that made the recipient "better

below) over these modes of analysis is that it provides a persuasive economic rationale for the no duress result.

Application of risk allocation concepts[333] suggests that voiding the modified agreement should not be allowed because it would insulate the defendant from one of the very risks that he initially undertook. The defendant took the risk that after the contract was terminated pursuant to its terms any aspect of the contract could be renegotiated, including the price. Permitting a duress claim to succeed would in effect give the defendant a better deal than he received from the contract. It would also give contracting parties an incentive to acquiesce in modifications, knowing they could later avoid them on the ground of duress. Thus they would be insulated from risk and gain one-sided protection from the courts.

First Data can also be analyzed in terms of misallocation of resources. The defendant, knowing that without the price increase the plaintiff would terminate the contract, contributes to the plaintiff's misallocation of resources by abiding by the modified contract terms in order to get a temporary extension of the contract. The risk allocation analysis suggests that duress should not be granted when doing so would make the transaction risk-free for one party at the expense of the other. Permitting the duress claim under such circumstances would contribute to an easily preventable misallocation of resources. In these cases, the party who is attempting to gain a risk-free transaction knows at the time of formation that there would have been no deal if the other party had known that the supposed victim intended to speculate at the other's expense and then allege duress to get out of a transaction if it turned out to be unfavorable. Because no one would enter into such a transaction, the party who plans to speculate is in the best position to prevent a misallocation of resources and the duress defense should not be allowed to that party.

Higgins v. Brunswick Corp.[334] typifies the problem of permitting a claim of duress by a party attempting to insulate itself from risk. In *Higgins,* the plaintiffs, real estate brokers, constructed a bowling alley and purchased bowling equipment from the defendants.[335] Subsequently, when the plaintiffs defaulted in their payments and filed a

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off" than he would be upon termination would be a noncoercive offer. A moral baseline approach suggests the same result since the plaintiff has no obligation to continue the contract. Nevertheless, since the contractual rights test is so manipulable as to be an unreliable mode of analysis, exclusive reliance on it seems misplaced.

[333] *See supra* text accompanying notes 322-32.

[334] 76 Ill. App. 3d 273, 395 N.E.2d 81 (1979).

[335] *Id.* at 274, 395 N.E.2d at 83.

petition for bankruptcy, the defendants filed an action seeking repossession of the equipment and payment of the outstanding balance.[336] The defendants agreed to abandon the legal action and to satisfy the claims of the plaintiffs' unsecured creditors in return for a lease for the bowling alley.[337] Plaintiffs agreed, but later attempted to rescind the lease on the grounds of duress.[338] The court rejected the claim based on the voluntariness of the agreement, the plaintiffs' access to counsel, the defendant's innocence in the plaintiffs' economic reversals, and the absence of any bargaining power abuse.[339] Because some of these factors are manipulable by the courts[340] and are either not sufficient in themselves or too conclusory to justify a finding of duress, the relevant focus should be the normative issue: Should duress be available as a defense?

The better explanation for denying relief to the plaintiffs in *Higgins* can be found in the plaintiffs' attempt to insulate themselves from all risk. The defendants took a calculated risk that the bowling alley would not be profitable enough to justify the agreed upon rent; the plaintiffs took the risk that the lease would turn out to be more valuable than the rent. Under these circumstances, granting duress relief to a party who has gambled and lost on a calculated risk in effect allows one party to speculate at the expense of the other and to recapture an opportunity that he has foregone in contracting.[341] This approach fails to put the requisite pressure on the party in the best position to prevent a misallocation of resources.

E. Reliance: Its Actual and Desired Effect on Outcome

Another factor which does and should affect outcome is the relative degree of reliance between the purported coercer and alleged victim.[342] If the victim has relied to its detriment on assurances by the coercer

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[336] *Id.* at 275, 395 N.E.2d at 83.

[337] *Id.*

[338] *Id.* at 276, 395 N.E.2d at 84.

[339] *Id.* at 277-78, 395 N.E.2d at 85-86.

[340] For instance, the voluntariness test has no established standards and thus is easily manipulated. Furthermore, the defendant's participation, or lack thereof, in the plaintiff's economic reversals is not always determinative of whether the agreement is voidable for duress. *See supra* notes 56-57 and accompanying text.

[341] Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 376-38 (1980) (discussing breach of contract as an attempt to recapture "forgone opportunities").

[342] Professor Hillman disputes the importance of reliance as a precondition for arguing a successful duress claim. *See* Hillman, *Contract Modifications*, *supra* note 162, at 872.

and the coercer has not relied in an equivalent fashion, the court should be more willing to grant the victim's duress claim. If, however, the alleged coercer has relied to its detriment on the victim's assurances in a way that the victim has not, the court should be more likely to deny the duress claim. Where neither the victim nor coercer has relied detrimentally, the court should consider the other policies outlined in this Article when determining whether to grant relief.

Wurtz v. Fleischman[343] provides an illustration of disparate reliance between the coercer and victim. In *Wurtz,* the buyer and seller entered into a real estate deal in which the buyer agreed to pay with an exchange of property rather than with cash for the seller's tax benefit.[344] Pursuant to the agreement, the seller commenced a search for property suitable for the exchange.[345] The buyer purchased a McDonald's restaurant at the seller's request.[346] Because the restaurant was only valued at $246,400 and the agreement called for $300,000 in real estate, the parties agreed to an extension to give the seller time to decide on the additional property needed to close the deal.[347] After the buyer expended $150,000 to purchase the restaurant, the seller threatened to cancel the closing unless the buyer came up with an extra $50,000 worth of property.[348] To close the deal, the buyer agreed, but later claimed duress.[349] Because an exclusive reliance on doctrinal analysis would be likely to result in inconsistent outcomes for similar fact patterns in such cases,[350] this Article advocates that the courts

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[343] 89 Wis. 2d 291, 278 N.W.2d 266 (Ct. App. 1979), *rev'd,* 97 Wis. 2d 100, 293 N.W.2d 155 (1980). Although reversed, the *Wurtz* appellate court's rendition of the facts provide a good basis for discussion.

The Wisconsin Supreme Court found that the appellate court "exceeded its authority . . . by making factual determinations in lieu of, and in addition to, the findings made by the trial court." *Wurtz,* 97 Wis. 2d 100, 102, 293 N.W.2d 155, 156 (1980). The case was remanded to the trial court to "make the necessary findings" for appellate review. *Id.* at 109, 293 N.W.2d at 159-60.

[344] *Wurtz,* 89 Wis. 2d at 298, 278 N.W.2d at 268.

[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] *Id.* at 299, 303, 278 N.W.2d at 269, 270.

[349] *Id.* at 300, 278 N.W.2d at 269.

[350] In *Wurtz,* it would be difficult to resolve the propriety of the threat not to close unless additional value were forthcoming. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1979). Courts have dealt with similar claims in the real estate context and have reached different conclusions on the availability of duress. *Compare* Smelo v. Girard Trust Co., 158 Pa. Super. 473, 45 A.2d 264 (1946) (developer who paid $3,000 down and incurred additional obligations was found to be the victim of duress, and a modified agreement, which obligated him to pay penalties on back taxes and which was signed to prevent cancellation of a land sale, was found to be voidable) *with* London Homes, Inc. v. Korn, 234 Cal. App. 2d 233, 44 Cal. Rptr. 262 (1965) (even though plaintiff expended more than $150,000 in reliance on first agreement, duress

focus on reliance concerns. The buyer had relied by making expenditures at the seller's request.[351] The seller demonstrated no equivalent detrimental reliance.[352] Therefore, it may be appropriate to grant a duress claim.

Use of the reliance factor to decide duress claims is supported by several factors. First, to the extent that reliance results in a benefit to the coercer, the coercer should be made to pay. Any agreements which avoid that obligation should be voidable. Second, to the extent that the reliance is foreseeable, and exploited by the coercer, duress should be granted on the theory that otherwise the party in the best position to avoid a resource misallocation would benefit from a failure to do so. Finally, a denial of duress will increase the costs of contracting in the future. Parties will refuse to accede to other parties' requests for their reliance expenditures without significant guarantees of performance.

F. Societal Effects of Treatment of Duress Claims

Another policy goal that courts should consider in duress claims is the effect that the decision will have on behavior that society wants to encourage or discourage. If the denial of duress will harm important societal goals, then the duress claim should be granted.[353] The importance of these societal goals should override technical and doctrinal deficiencies of duress claims. Conversely, if a denial of duress will promote important goals, the defense should be available. This social policy helps to rationalize and justify results in the cases that cannot be explained under current theories.

In *S.S. & O. Corp. v. Township of Bernards Sewerage Authority*,[354] the municipality granted certain necessary permits to a developer

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sufficient to void the renegotiated agreement was not found). In some of the cases focusing on the "no reasonable alternative" criteria courts have found that a victim's failure to pursue litigation dooms the duress claim, even if the delay caused by the litigation would entail economic hardship. *See, e.g., id.* (because plaintiff did not sue for breach of the original contract due to business pressures, the court found that the renegotiated contract, in which plaintiff agreed to pay an additional $650 per acre, was voluntarily entered into). Other courts have reached contrary results. *See, e.g.*, Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 337, 173 A.2d 258, 263 (1961) ("[T]ested by the practicalities of the business situation in which the defendants here found themselves, we think they had no adequate remedy through any form of litigation.").

[351] *Wurtz*, 89 Wis. 2d at 303, 278 N.W.2d at 270.

[352] *Id.* at 304, 278 N.W.2d at 271.

[353] As noted *supra* note 37, Professor Wertheimer would discount the importance of societal effects in deciding duress claims.

[354] 62 N.J. 369, 301 A.2d 738 (1973).

that were conditioned on the developer's entering into a written contract for adequate sewage connections.[355] The developer entered a contract by which he agreed to pay $900 for each sewage connection and also agreed to disclaim that any coercion had been applied by the Authority.[356] The developer later contended that the charges should only have been $700[357] and that the payments had been made to the Authority under coercion.[358]

A grant of relief here is not easily justified under a doctrinal analysis because there is no showing that the claimant explored other reasonable alternatives. But the public policy implications of denying the duress claim to the developer, and the incentives to undesirable behavior that would result, dictate a finding of duress. Were the court to deny that coercion existed in *S.S. & O.*, the Authority would have a strong incentive to disregard clear legal mandates. Moreover, because the Authority engages in many transactions with developers, it would be more efficient to deter the Authority than to put the risk on each individual developer.[359] Thus, the public policy analysis helps to resolve an ambiguity in the doctrinal analysis.

The public policy of providing incentives for economic development would resolve other duress claims when the resolution would otherwise be uncertain under doctrinal tests or other theories of coercion. In *Lustgarten v. Jones*,[360] the plaintiffs wanted to enter the gasohol market and sought out defendants because of their business contacts and expertise.[361] The parties reached an agreement to form a corporation pursuant to which each subscribed to a certain number of shares.[362] After the agreement was made, defendants contacted an oil company to obtain a lease for the new corporation.[363] Because the new company was undercapitalized, the oil company declined.[364] Thereafter, defendants informed plaintiffs that the company's finances were hampering efforts to successfully enter the gasohol market.[365] The

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[355] *Id.* at 372, 301 A.2d at 740.

[356] *Id.* at 372-73, 301 A.2d at 740.

[357] *Id.* at 376, 301 A.2d at 742.

[358] *Id.* at 371, 301 A.2d at 739.

[359] For efficient deterrence purposes it would be important to deter municipal authorities rather than developers. *See generally* Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 127-35 (1988) (suggesting that efficient deterrence policies would place the incentives for deterrence on the professional wrongdoer).

[360] 220 Neb. 585, 371 N.W.2d 668 (1985).

[361] *Id.* at 586, 371 N.W.2d at 669.

[362] *Id.* at 586-87, 371 N.W.2d at 669-70.

[363] *Id.* at 587, 371 N.W.2d at 670.

[364] *Id.*

[365] *Id.* at 588, 371 N.W.2d at 670.

parties entered a new agreement that voided the earlier stock agreement.[366] The plaintiffs then sued to void the second agreement on the ground of duress.[367] The plaintiffs, who were seeking recission, argued that duress arose from the "'substantial difference in economic position and business experience'" between the parties.[368] In rejecting a duress claim based on the above facts, the court found that the pressure arose not from actions of the defendant, but from the actions of third party oil companies.[369] Moreover, the court found that the deal was not "unjust, unconscionable or illegal."[370]

The doctrinal analysis is deficient for resolving the question on these facts. First, the court's emphasis on the fact that the purported coercer was not the cause of the economic adversity for the plaintiffs is, as demonstrated earlier, a manipulable factor and not determinative of outcome.[371] But even when the coercer exploits the economic necessities of the duress claimant, which the claimant herself caused, the exploitation may in some instances be sufficient to justify a finding of wrongful pressure.[372]

A morality-based analysis would focus on the propriety of the coercer's actions.[373] Under a strict rights normative analysis one might conclude that the defendants had the "right" to request a termination of the agreement since they were not bound by the first agreement to stay in business with the plaintiffs forever. Application of a strict rights analysis would examine whether the defendants had the right to request that the earlier agreement be replaced with a different agreement. Arguably, since the earlier agreement did not specifically prohibit termination, there was no limit on the right to terminate. Yet it is difficult to determine in the abstract whether the defendants' request for termination was wrongful. The problem with the rights analysis is that the determination as to when rights exist or when one is obligated to do something is manipulable and therefore inconclusive.[374] Such threats may or may not be wrongful when measured against a baseline which is not absolute.[375] Where the line is drawn depends on value judgments about what kind of behavior society

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[366] *Id.*

[367] *Id.* at 589, 371 N.W.2d at 671.

[368] *Id.*

[369] *Id.* at 592, 371 N.W.2d at 672. It would therefore be inefficient to deter the defendant.

[370] *Id.*

[371] *See supra* text accompanying notes 56-57.

[372] *See supra* notes 55-57 and accompanying text.

[373] *See supra* notes 88-107 and accompanying text.

[374] *See supra* notes 103-07 and accompanying text.

[375] *See supra* notes 96-107.

wants to promote or will tolerate. It is important that these lines be drawn since there does not seem to be any easy means of resolving the issue according to ambiguous or abstract rights.

Because the moral baseline standards are manipulable, the duress determination should be based on social policy considerations. The relevant question to ask is what kind of behavior does society want to permit in a situation involving a risky business venture that one party decides to terminate when the business encounters difficulties? If proposals to terminate the business are voidable for duress when the venture fails, then one party is insulated against the risk of the venture failing. Such a result would contravene expected business norms that each party assumes the risk of failure. Otherwise, one party would be offering to indemnify the other, thus discouraging investment in new ventures. Parties with expertise would be reluctant to provide help to a fledgling company if the other party could insulate itself from all risk should the venture fail. Policy concerns suggest that the duress claim be denied to insure requisite incentives for business ventures.

G. Economic Negligence and Duress Case Outcomes

A final policy which courts should consider in deciding duress cases is the encouragement of economic industriousness and discouragement of economic negligence. If the denial of duress would provide a disincentive to careful economic planning by someone who is a position to plan and to minimize the "joint costs" of a mistake,[376] then the duress claim should be granted.

Beznos v. Martin,[377] described previously,[378] illustrates a situation in which economic negligence concerns should affect the duress claim. The plaintiff in *Beznos* owned two adjacent lots, one of which was vacant.[379] While the plaintiff was negotiating to sell the lot with the house, he sold the vacant lot to the defendant.[380] It turned out that the driveway from Lot 1 encroached on the defendant's vacant lot.[381] The defendant then threatened to destroy the driveway unless he

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[376] Kronman, *supra* note 164, at 14.

[377] 22 Mich. App. 376, 177 N.W.2d 226 (1970).

[378] *See supra* notes 147-61 (describing *Beznos* and analyzing the facts in terms of both judicial economy and the *Restatement*).

[379] *Beznos*, 22 Mich. App. at 377, 177 N.W.2d at 226.

[380] *Id.*, 177 N.W.2d at 226-27.

[381] *Id.*, 177 N.W.2d at 227.

was paid $1,500 for a reconveyance.[382] The plaintiff acquiesced because the destruction of the driveway would have prevented the sale of the lot with the house.[383] The plaintiff later argued that the agreement to pay $1,500 in return for the deed was executed under duress.[384]

Accepting that the case would be difficult to decide under current doctrinal approaches,[385] consider how the case would be resolved by an economic industriousness analysis. Since property owners are in the best position to know what they are selling and would not have to undertake search costs to determine what they own, that party should be allocated the risk that the property is different than what is deeded. Moreover, allocation of the risk to the purchaser would increase the burden of contracting to an undesirable level. The purchaser would have no reason to suspect that when he bought the property, he received less than all of the rights that were promised.

Permitting a duress claim to succeed in *Beznos* would be a disincentive to the seller to use care in describing the property to be sold. Moreover, the seller, who is in the best position to prevent a misallocation of resources, would not be encouraged to do so. Thus, in order to encourage careful economic planning and to prevent resource misallocation, the seller should not be permitted to avoid a contract on duress grounds.

Avoidance on duress grounds also should not be available where it would insulate a party from the consequences of his own mistakes and economic miscalculations. This might encourage business people to think that the courts would give them an out and save them from the usual consequences of their contract defaults. This might also encourage them to invest in contracts on the mistaken assumption that courts would reallocate the losses to favor one party.

IV. Conclusion

Courts confront difficult choices when they decide which factual

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[382] *Id.* at 377-78, 177 N.W.2d at 227.

[383] *Id.* at 378, 177 N.W.2d at 227.

[384] *Id.*

[385] *See supra* notes 153-61 and accompanying text; *see also* USLife Title Co. v. Gutkin, 152 Ariz. 349, 732 P.2d 579 (1986). This case provides another example of a case in which an economic analysis would be beneficial. The vendors intended to convey certain property to the purchasers, but the property was not so conveyed because of escrow agent's clerical error in preparing the deed. *Id.* at 353, 732 P.2d at 583. The court found that it did not constitute duress for the vendors to insist on a $17,000 payment to convey the disputed property. *Id.* at 356, 732 P.2d at 586. Any other result would encourage the escrow agent to be negligent in preparing other deeds, which would create incentive for sloppy preparation of deeds by party in charge.

situations warrant relief on duress grounds. The current articulations and applications of the duress rule are unsatisfactory. Moreover, the available theories of coercion are both inherently unworkable and inadequate because they do not address central policy issues. Consequently, courts do not consistently reach sound results.

Policy considerations based on efficiency, reliance, judicial capability, disclosure of unexpected risks, and economic incentives must be integrated into the law of duress. Such integration would enhance the predictability of judicial decisionmaking by offering an alternative analysis for courts to use when doctrinal elements of duress prove difficult to apply. Moreover, this approach would achieve certain societal benefits. It would enhance the preservation of limited judicial resources, contribute to a more efficient allocation of resources, discourage speculation in contracting, and provide appropriate incentives for economic industriousness. The courts should incorporate these policy concerns and develop guidelines consistent with them in order to achieve rational and effective decisionmaking in duress cases.