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# Pre-Dispute Arbitration Agreements, Freedom Of Contract, And The Economic Duress Defense: A Critique Of Three Commentaries

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# **PRE-DISPUTE ARBITRATION AGREEMENTS, FREEDOM OF CONTRACT, AND THE ECONOMIC DURESS DEFENSE: A CRITIQUE OF THREE COMMENTARIES**

STEVEN W. FELDMAN\*

## ABSTRACT

Arbitration under the Federal Arbitration Act (FAA) is the most important topic in current contract law and commentary. The Supreme Court has issued eight merits decisions construing the FAA since 2011, the lower state and federal courts issued more than 1,000 decisions considering the FAA in 2014, and there were 81 full-length articles, notes, and comments on arbitration in the same year.

Recently, three commentators, Professor Margaret Jane Radin of the University of Michigan Law School, Professor Nancy S. Kim of the California Western School of Law, and former Lecturer in Law James P. Dawson of the Yale Law School, have proposed the use of an expanded economic duress defense to help consumers combat unfair pre-dispute arbitration agreements. This Article summarizes each commentator's position and identifies my concerns. While such arbitration clauses can sometimes be unfair, all three proposals are flawed on numerous grounds. The primary problem is that the authors' revised duress doctrines draw unworkable distinctions between improper coercion of offerees and legitimate bargaining techniques in a free market society.

My analysis is the first in the legal literature that comprehensively discusses the connection between the economic duress defense generally and FAA arbitration specifically. As I will demonstrate, the two subject areas emphasize freedom of contract as they promote the necessary certainty and predictability of contractual relations. Thus, they accomplish the proper balance between binding the buyer to the arbitral process he agreed to in the contract and prohibiting the seller from enforcing a bargain if he procured it through unduly coercive tactics.

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\* Attorney-Advisor, U.S. Army Corps of Engineers, Huntsville, Alabama. Thanks to Professors Christopher Drahozal, David Horton, David Friedman, Jean Sternlight, and Ken Ching for their excellent insights and suggestions. Thanks especially to my wife, Dr. Gayla Feldman, for her love and support.

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## INTRODUCTION

Arbitration under the Federal Arbitration Act (FAA)<sup>1</sup> is the most important topic in current contract law and commentary. The Supreme Court has issued eight merits

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<sup>1</sup> 9 U.S.C. §§ 1-16 (2012).

decisions interpreting the FAA since 2011.<sup>2</sup> In 2014, state and federal courts issued well over 1,000 decisions considering the FAA.<sup>3</sup> Further, in 2014 scholars wrote eighty-one full-length articles, notes and comments on arbitration. Recently, three commentators—Professor Margaret Jane Radin, Professor Nancy S. Kim, and former Lecturer in Law James P. Dawson—each proposed the use of an expanded economic duress defense to help consumers combat what the authors believe to be unfair pre-dispute arbitration clauses.<sup>4</sup> This Article summarizes each commentator’s position, provides my concerns about their proposals, and suggests an overarching theory for the legal doctrine of economic duress under the FAA.

Even though Radin, Kim, and Dawson wish to “expand” the economic duress defense, all three authors couch their proposals in the traditional terminology of economic duress: coercion, oppression, the offeror’s wrongful acts, and the offeree’s absence of reasonable alternatives.<sup>5</sup> While differing in some of the details, the three proposals have striking parallels. Each author contends (1) true assent is lacking in these adhesion contracts; (2) companies are exploiting consumers; and (3) traditional notions of duress should be “expanded” to protect “vulnerable” consumers because of their need for the relevant product or service.<sup>6</sup>

Because each author relies to an extent on current economic duress doctrine, it is fair to analyze whether each proposal meets foundational legal standards. This Article in no way criticizes the three commentators for expanding existing law. My

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<sup>2</sup> BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013); Nitro-Lift Techs., LLC v. Howard, 133 S. Ct. 500 (2012); Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012); KPMG LLP v. Cocchi, 132 S. Ct. 23 (2011); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

<sup>3</sup> State courts considering challenges to an arbitration agreement must apply the FAA to a transaction involving interstate commerce. *See, e.g.*, Frizzell Constr. Co. v. Gatlinburg, LLC, 9 S.W.3d 79, 84 (Tenn. 1999) (“[T]he provisions of the FAA are to be applied in both state and federal courts”) (citing decisions). While this Article focuses on the FAA, almost all states have their own arbitration statutes. *See* Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 890 (2010). A number of states recognize duress as an enforcement defense under state arbitration requirements. *E.g.*, St. Fleur v. WPI Cable Sys./Mutron, 879 N.E.2d 27, 31 (Mass. 2008); Moore v. Woman to Woman Obstetrics & Gynecology, LLC, 3 A.3d 535, 539 (N.J. Super. Ct. App. Div. 2010); Hill v. NHC Healthcare/Nashville, LLC, No. M2005-01818-COA-R3-CV, 2008 WL 1901198, at \*6 (Tenn. Ct. App. Apr. 30, 2008).

<sup>4</sup> MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND, THE RULE OF LAW* (2013); Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265 (2014); James P. Dawson, Comment, *Contract After Concepcion: Some Lessons from the State Courts*, 124 YALE L.J. 233 (2014).

<sup>5</sup> RADIN, *supra* note 4, at 15, 20, 123, 151; Kim, *supra* note 4, at 266, 276-78, 282; Dawson, *supra* note 4, at 234-35, 243.

<sup>6</sup> RADIN, *supra* note 4, at 5, 20, 93-95, 151-52; Kim, *supra* note 4, at 266, 271 n.32, 277-86; Dawson, *supra* note 4, at 240-45. For the earliest analysis of duress and arbitration, see Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?* 17 BERKELEY J. EMP. & LAB. L. 131, 153 (1996) (“[T]he threat of unemployment in many cases will induce employees to agree to compulsory arbitration regardless of their opposition to the policy and thus will constitute duress.”).

primary concern is that their proposals draw unworkable distinctions between legitimate free market bargaining techniques and improper coercion of offerees. My analysis will show that Radin, Kim, and Dawson deviate in numerous and prejudicial ways from well-settled and carefully balanced legal principles governing the economic duress defense. I will combine this doctrinal assessment of their proposals with a normative critique of their expansions of the economic duress defense. In providing this analysis, I acknowledge the extensive commentary criticizing (or defending) the Supreme Court's arbitration jurisprudence<sup>7</sup> and that a pre-dispute arbitration clause can sometimes be unfair.

Besides assessing the three commentators' suggestions, this Article operates on a deeper level that can assist scholars, bench, and bar. This Article is the first in the legal literature that comprehensively discusses the intersection between the FAA and the economic duress defense. The positive theme I propose is that the economic duress defense and the FAA emphasize freedom of contract and help solidify the certainty and predictability of contractual relations. I use the three proposals as a vehicle for showing why current law is fair and effective. Thus, the economic duress defense works well as courts accomplish the proper balance between binding the offeree to the arbitral process agreed to in the contract and prohibiting the offeror from enforcing a bargain procured through unduly coercive tactics.

This Article will proceed as follows. Part I summarizes each author's reform. Part II shows how the FAA preempts the authors' particular duress formulation as a challenge to contractual arbitration. Part III demonstrates how the authors' suggested revamping of economic duress doctrine would impair freedom of contract and destabilize the predictability and certainty of contract, especially consumer agreements.

## I. OVERVIEW OF THE THREE PROPOSALS

### A. Radin's Proposal

Margaret Jane Radin, the Henry King Ransom Professor of Law at the University of Michigan and the William Benjamin Scott and Luna M. Scott Professor of Law, Emerita, at Stanford University, is the author of *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*.<sup>8</sup> Her book received high praise from most commentators, earning such plaudits as "groundbreaking,"<sup>9</sup> "a great achievement," "eloquent and powerful,"<sup>10</sup> and a "masterpiece."<sup>11</sup>

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<sup>7</sup> E.g., Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?* 57 STAN. L. REV. 1631 (2005). Compare Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998) (defending the Court's approach), with Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 480 (2006) ("There is reason to believe that arbitration clauses lower the contract price of the goods, services, or money, or provide weaker parties with more advantageous terms, because arbitration reduces the parties' joint costs of contracting.").

<sup>8</sup> RADIN, *supra* note 4.

<sup>9</sup> Hugh J. Treacy, Book Review, in Benjamin J. Keele & Nick Sexton, *Keeping Up with New Legal Titles*, 105 L. LIBR. J. 369, 376-77 (2013) ("[W]e now have a thoughtfully crafted

In *Boilerplate*, Radin observes that the legal system must contrast consent with non-consent with regard to a person's allegedly "agreed-upon" transfer of entitlements.<sup>12</sup> She contends that a principal type of non-consent is "coercion and its allied conceptions of force and duress" and that one "controversial" aspect of duress and coercion in the field of contracts is economic duress.<sup>13</sup>

Radin heavily criticizes mass market mandatory arbitration clauses as a prominent example of what she calls an improper "boilerplate rights deletion scheme."<sup>14</sup> She believes that these clauses deprive "large numbers of people both of their right to jury trial and their right to aggregative remedies (either class actions or classwide arbitration)."<sup>15</sup> In this respect, Radin argues that the indigent are the powerless victims of these duplicitous practices.

She further poses the dilemma poor people would face if the law invalidated these oppressive rights deletion schemes. In colorful language, Radin argues that the poor would have to elect between the "frying pan" and "the fire."<sup>16</sup> "The frying pan is [the consumer] being deprived of rights without consent; the fire is [the consumer] being deemed unable to enter into enforceable contracts."<sup>17</sup> In Radin's opinion, it is doubtful that the recipient exercises free choice with these transactions.<sup>18</sup> Accordingly, Radin believes that the law must enhance the traditional regulatory measures for abusive merchant practices.<sup>19</sup> One such regulatory measure in need of reform, according to her, is economic duress.

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work of scholarship that will challenge readers to achieve new understandings of contract law within our print and electronic boilerplate world. . . . [I]t is a groundbreaking work.").

<sup>10</sup> Oren Bar-Gill, *Boilerplate Symposium VII: Oren Bar-Gill on Consent Without Reading*, LAW PROFESSOR BLOGS NETWORK: CONTRACTSPROFBLOG (May 21, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-vii-oren-bar-gill-on-consent-without-reading-.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-vii-oren-bar-gill-on-consent-without-reading-.html) ("Professor Radin's book is an eloquent and powerful critique of the fine-term, boilerplate contracts that pervade modern life. . . . Radin's book is a great achievement.").

<sup>11</sup> David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 464 (2013) ("dense and sprawling masterpiece"); see also Theresa Amato, *Boilerplate Symposium II: Theresa Amato on Remedies to the Problems Posed by Boilerplate*, LAW PROFESSOR BLOGS NETWORK: CONTRACTSPROFBLOG (May 14, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-ii-theresa-amato-on-remedies-to-the-problems-posed-by-boilerplate.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-ii-theresa-amato-on-remedies-to-the-problems-posed-by-boilerplate.html) ("Professor Radin's masterpiece *Boilerplate* sets forth the intellectual underpinnings for an energetic movement to correct the imbalance of power between corporations and consumers in fine print contracts.").

<sup>12</sup> RADIN, *supra* note 4, at 20.

<sup>13</sup> *Id.* at 20, 123, 150-51, 275-76 nn.2 & 3 (discussing the economic duress defense).

<sup>14</sup> *Id.* at 35.

<sup>15</sup> *Id.* at 130.

<sup>16</sup> *Id.* at 150.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 150-51.

<sup>19</sup> *Id.* at 150-53.

Regarding economic duress, Radin notes that the law is unclear on what types of choices arise from consent or coercion.<sup>20</sup> She indicates that the easy cases are when the actor threatens the victim with physical harm if he does not accede to the actor's desires — “[y]our money or your life” — but she says most circumstances are not so clear-cut.<sup>21</sup> She further indicates whether a choice represents true volition is open to dispute.<sup>22</sup> “[S]ufficiently exploitive” terms, Radin believes, can still be coercive and unenforceable even where the victim manifests assent to the wrongdoer.<sup>23</sup> She posits that the law must clearly define coercive terms and explain which fact situations support a finding of economic duress.<sup>24</sup>

As a remedy for improper arbitration clauses, she proposes refocusing economic duress from “expectation” to “exploitation.”<sup>25</sup> Radin explains that “[r]ecipients could theoretically . . . invoke some species of duress when presented with take-it-or-leave-it boilerplate in acquiring a necessity of life . . . .”<sup>26</sup> But at the same time, she contends that “[t]hese traditional doctrines were in the past interpreted quite narrowly by the courts.”<sup>27</sup>

### B. Kim's Proposal

Nancy S. Kim is Professor of Law and ProFlowers Distinguished Professor of Internet Studies at the California Western School of Law and the author of *Wrap Contracts: Foundations and Ramifications*,<sup>28</sup> which examines how electronic contracts impact society and control consumer behavior. Reviewers have called her book “provocative, thoroughly researched with terrific references, and very stimulating.”<sup>29</sup>

In an article that replicates her points in *Wrap Contracts*, Kim considers mass-market consumer electronic contracts to be a “particularly virulent strain of aberrant contract.”<sup>30</sup> Kim sees these contracts as unfair in “their form, their medium, and their content,” which creates extra perils for consumers beyond conventional paper contracts.<sup>31</sup>

More specifically, Kim argues at length that these contracts exploit consumers in several ways. First, they foster confusion because merchants promulgate them in various modes and thereby cause uncertainty because consumers do not understand

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<sup>20</sup> *Id.* at 151.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 275 n.2 (internal punctuation omitted).

<sup>27</sup> *Id.*

<sup>28</sup> NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* (2013).

<sup>29</sup> Frederic H. Marienthal, Book Review, 43 *COLO. LAW.* 108, 108 (2014).

<sup>30</sup> Kim, *supra* note 4, at 265.

<sup>31</sup> *Id.*

the terms.<sup>32</sup> Second, websites can be deceptively consumer-friendly, such that a mere click of the mouse can form a contract.<sup>33</sup> The use of hyperlinks in electronic contracts, she believes, is often a trap for the unwary.<sup>34</sup> Further, Kim attacks the practice in which merchants reserve the right to make unilateral contract modifications where the consumer “accepts” the changed term by continuing to access or receive services after the revisions become effective.<sup>35</sup> Kim indicates that it is even more unfair where the consumer will be deemed bound by his failure to actively reject the contract after receiving notice of the terms, such as with browserwraps.<sup>36</sup>

Kim believes companies take gross advantage of consumers’ well-known proclivity to accept the terms without reading them, even when the terms are one-sided in favor of the merchant and often oppressive to the consumer.<sup>37</sup> Thus, Kim contends that the common-law duty to read a contract—which binds the offeree regardless of his understanding or acknowledgement of the terms—should apply with less force in electronic contracting.<sup>38</sup> The reasons she offers for abrogating this duty are the sheer mass of material in electronic contracts and the pervasive use of hyperlinks. According to Kim, “[t]oday, a consumer is practically unable to engage in any online activity without being forced to accept the terms of an electronic contract.”<sup>39</sup>

To counteract merchants that misuse electronic contracts to exploit consumers, Kim proposes an “expanded” duress defense, which she calls “situational duress.”<sup>40</sup> To prevail in a claim for contract avoidance, the consumer must show the drafting company made an improper threat leaving the consumer with no reasonable alternative.<sup>41</sup> Where the consumer meets its burden of proof, the contract would be void and not merely voidable as under current law.<sup>42</sup>

This situational duress defense does not cover all instances of electronic contracting:

Rather, the defense should be used in the electronic contracting context if  
(1) a drafting company uses an electronic contract to block consumer

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<sup>32</sup> *Id.*

<sup>33</sup> Kim observes that as compared with paper contracts, where consumers understand they are entering into a contract when they sign, electronic contracts can leave the consumer “often ignorant that any bargain has taken place.” *Id.* at 274.

<sup>34</sup> *Id.* at 272.

<sup>35</sup> *Id.* at 271.

<sup>36</sup> *Id.* at 267.

<sup>37</sup> *Id.* at 266.

<sup>38</sup> *Id.* at 275-76.

<sup>39</sup> *Id.* at 276.

<sup>40</sup> *Id.* at 286-87.

<sup>41</sup> *Id.* at 266.

<sup>42</sup> *Id.*



access to a product or service; (2) the consumer has a “vested interest”<sup>43</sup> in that product or service; and (3) the consumer accepts the terms because she was blocked from the product or service after attempting to reject or decline them. In these situations, the consumer's action should not be effective as a manifestation of assent and the contract should be void.<sup>44</sup>

Regarding the improper threat element in a contract avoidance claim, Kim says the merchant “acts improperly or wrongfully by creating a situation that results in an unfair choice: contract acceptance or forfeiture.”<sup>45</sup> For Kim, this creates coercion because “the company is threatening the consumer with the loss of something in which she has a vested property or proprietorship interest.”<sup>46</sup> She further explains that the threat looms over the consumer because he or she has “no choice but to accept the new or additional terms or forfeit her content and contracts.”<sup>47</sup> As for the element that the consumer has “no reasonable alternative” except to enter the contract, the consumer must establish that he or she “attempted to decline or reject the terms but was forced to accept them.”<sup>48</sup> If the merchant makes it difficult for the consumer to reject the electronic contract, she argues, that action renders the consent coerced and the consumer has a valid defense of situational duress.<sup>49</sup>

### C. Dawson's Proposal

James P. Dawson is a former Lecturer in Law at Yale Law School. He argues for an expanded economic duress defense in arbitration cases in response to the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*.<sup>50</sup> In *Concepcion*, the Court held that the FAA preempts California's judicial rule permitting an unconscionability defense that forecloses the consumer's ability to bring a class-wide remedy to an arbitration clause.<sup>51</sup>

Dawson observes that some state courts have read *Concepcion* narrowly to remedy what he indicates is the Court's brazenly “conservative” and “anti-consumer” approval of “forced arbitration” clauses.<sup>52</sup> Applauding these state court efforts, Dawson contends that additional “ambitious” and “innovative” remedies are

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<sup>43</sup> The consumer has a “vested interest” in the product or service when (1) the merchant uses a “rolling contract,” (i.e., the merchant furnishes the consumer the terms after the completion of the acts constituting offer and acceptance) or (2) the consumer is a “content hostage,” (i.e., when the consumer uses a service that permits him to store content on the company's servers, such as Facebook or Twitter). *Id.* at 279-80.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 282.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 283.

<sup>48</sup> *Id.* at 283-84.

<sup>49</sup> *Id.* at 278, 279, 283.

<sup>50</sup> Dawson, *supra* note 4 (analyzing *AT &T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)).

<sup>51</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

<sup>52</sup> Dawson, *supra* note 4, at 233.

needed to “cabin” *Concepcion* and to assist state court judges in remaining the “final arbiter” of state law.<sup>53</sup>

Dawson focuses on the economic duress defense as one antidote to *Concepcion*. Under the FAA, duress is a generally applicable defense to the enforcement of an arbitration agreement or clause.<sup>54</sup> The Supreme Court has stated repeatedly that a party’s allegation of economic duress can be a viable basis under the FAA to challenge an arbitration contract.<sup>55</sup> Dawson proposes to “expand” the contract defense of economic duress to make it easier to invalidate arbitration provisions.<sup>56</sup> In his view, current duress doctrine would be improved if it displayed more sensitivity to “social inequality and context and included aggrieved parties’ experience and perspectives.”<sup>57</sup>

Dawson references one current common-law version of the duress defense in which a “party with superior bargaining power committed a wrongful act, threatened the party with inferior bargaining power, or otherwise engaged in oppressive or coercive behavior.”<sup>58</sup> Dawson’s replacement duress formulation is that “no valid contract can be formed when an offeror proposes a take-it-or-leave-it deal requiring the offeree to either (1) consent to a nonnegotiable contract clause requiring arbitration of all disputes or else (2) forego something that a reasonable person would deem necessary for modern life.”<sup>59</sup>

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<sup>53</sup> *Id.* at 233-34. For similar criticisms, see Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012). Other commentators have a more optimistic view of *Concepcion*. See Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 153, 154 (2014) (“[A]t least some of the preemption holdings courts have attributed to *Concepcion* are due, not to *Concepcion*, but instead to well-established law predating *Concepcion*.”).

<sup>54</sup> For a court to consider the duress defense to the enforcement of an arbitration clause, the alleged coercion must relate specifically *either to* the arbitration clause rather than to the contract as a whole *or to* both the arbitration clause *and* the overall contract. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967); *Associated Elec. Co-op., Inc. v. International Broth. of Elec. Workers, Local No. 53*, 751 F.3d 898, 905 (8th Cir. 2014); *Bilyeu v. Johanson Berenson LLP*, 809 F. Supp. 2d 547, 552 (W.D. La. 2011) (analyzing decisions). Otherwise, the arbitrator decides the issue of duress. See *Prima Paint*, 388 U.S. at 403–04; see also *Associated Elec. Co-op., Inc.*, 751 F.3d at 905.

<sup>55</sup> See, e.g., *Concepcion*, 131 S. Ct. at 1746 (“[9 U.S.C. § 2] permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (“Like other contracts, however, [arbitration agreements] may be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’”); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA].”).

<sup>56</sup> Dawson, *supra* note 4, at 233-34.

<sup>57</sup> *Id.* at 244 (quoting Orit Gan, *Contractual Duress and Relations of Power*, 36 HARVARD J.L. & GENDER 171, 171 (2013)).

<sup>58</sup> *Id.* at 243 (citing *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 57 (1st Cir. 1986); *Fees v. Mut. Fire & Auto Ins. Co.*, 490 N.W.2d 55, 58 (Iowa 1992)).

<sup>59</sup> *Id.* at 242.

Dawson contends that his proposal “remain[s] faithful to Supreme Court precedent” based on the Court’s oft-repeated statement that arbitration is “a matter of consent, not coercion.”<sup>60</sup> Further, he believes that his proposal to expand economic duress doctrine comports with the basic notion of the defense, which is whether “a party with superior bargaining power has coerced the other party to accept the terms because of the latter’s severe economic necessity.”<sup>61</sup>

## II. FAA PREEMPTION AND THE PROPOSALS FOR AN EXPANDED DURESS DEFENSE

Radin devotes some attention to FAA preemption<sup>62</sup> but does not expressly consider whether FAA preemption would impact her proposal. Kim does not raise the possibility that the FAA could preempt her proposed reform. Although Dawson asserts he wishes to “remain[ ] faithful to Supreme Court precedent”<sup>63</sup> and acknowledges the FAA rule of preemption,<sup>64</sup> Dawson also does not analyze whether his expanded duress defense would survive FAA preemption. The following discussion will explain why the FAA would preempt all three authors’ proposals.

### A. FAA Overview and Preemption Principles

A “strong” public policy favors arbitration over litigation because arbitration is expeditious, avoids litigation delays, relieves court congestion, and is more economically efficient, for all parties, than a jury trial.<sup>65</sup> Congress enacted the FAA to execute this policy and overcome judicial hostility to arbitration agreements.<sup>66</sup>

Under the FAA, a written provision agreeing to settle by arbitration a controversy arising out of a contract involving interstate commerce is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>67</sup> As part of this objective, Congress has protected arbitration agreements by putting them on “an equal footing as compared with other contracts.”<sup>68</sup> The “equal footing” doctrine means that the FAA “does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms.”<sup>69</sup>

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<sup>60</sup> *Id.* at 244 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010)).

<sup>61</sup> *Id.* at 242 (quoting Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 26-27 (2008)).

<sup>62</sup> See RADIN, *supra* note 4, at 131-35, 278, 283.

<sup>63</sup> Dawson, *supra* note 4, at 235.

<sup>64</sup> *Id.* at 240.

<sup>65</sup> *E.g.*, *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 152 (4th Cir. 1993); *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1186 (Cal. 1976).

<sup>66</sup> See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

<sup>67</sup> 9 U.S.C. § 2 (2012) (emphasis added).

<sup>68</sup> *Concepcion*, 131 S. Ct. at 1745.

<sup>69</sup> *Kirby v. Lion Enters., Inc.*, 756 S.E.2d 493, 497-98 (W. Va. 2014) (quoting *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909, 917 (W. Va. 2011)); see also *Concepcion*, 131 S. Ct. at 1748 (finding the purpose of the FAA is to “ensur[e] that

The FAA's reach is "broad" and coextensive with the "full reach" of the Commerce Clause.<sup>70</sup> Consumer contracts are subject to the same rules as other agreements.<sup>71</sup> While the FAA preempts state law specifically targeting arbitration, the FAA does not override generally applicable state contract defenses, such as fraud, duress, or unconscionability.<sup>72</sup> Thus, for example, the Supreme Court has stated repeatedly that a party's allegation of economic duress can be a viable basis to challenge an arbitration contract.<sup>73</sup> The FAA also does not preempt a neutral state-law contract formation requirement simply because it can be used to invalidate an arbitration agreement.<sup>74</sup>

The Supreme Court's standard on FAA preemption is quite strict. The Court has stated that "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the equal footing] requirement of [9 U.S.C.] § 2."<sup>75</sup> Another core principle is that "state [law] requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted."<sup>76</sup> Further, a state statute or legal doctrine may not treat arbitration as an "inferior means of dispute resolution."<sup>77</sup> For this reason, the Supreme Court has disapproved "attacks on arbitration [that] 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'"<sup>78</sup>

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private arbitration agreements are enforced according to their terms") (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

<sup>70</sup> *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

<sup>71</sup> *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1167 (10th Cir. 2014).

<sup>72</sup> *L & R Farm P'ship v. Cargill Inc.*, 963 F. Supp. 2d 798, 803 (W.D. Tenn. 2013) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

<sup>73</sup> *E.g., Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010).

<sup>74</sup> *Mitchell v. Am. Fair Credit Ass'n, Inc.*, 122 Cal. Rptr. 2d 193, 201 (Cal. Ct. App. 2002).

<sup>75</sup> *Perry*, 482 U.S. at 492 n.9.

<sup>76</sup> *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting 2 IAN MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 19.1.1, (1994)).

<sup>77</sup> *See THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1165-66 (10th Cir. 2014) (citing Supreme Court decisions).

<sup>78</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)). For other commentary on FAA preemption and arbitration, see, for example, William G. Phelps, Annotation, *Preemption by Federal Arbitration Act (9 U.S.C.A. §§ 1 et seq.) of state laws prohibiting or restricting formation or enforcement of arbitration agreements*, 108 A.L.R. Fed. 179 (1992); Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233 (2011); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189 (2011); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541 (2004); Kristopher Kleiner, Comment, *AT&T Mobility LLC v. Concepcion: The*

*B. Radin's Approach and the FAA*

Radin is unabashed in her philosophical opposition to contemporary pre-dispute arbitration terms in mass-market consumer contracts. Radin repeatedly indicates that these clauses are a blight on the U.S. economy.<sup>79</sup> She also contends that they degrade U.S. democratic institutions because these arbitral contracts improperly require consumers to forfeit numerous state-granted rights, such as the right to trial by jury.<sup>80</sup> Further, she objects that modern pre-dispute arbitration terms and processes that: (1) bypass the consumer's right to collective remedies, such as class actions and class arbitration; (2) result in decisions rarely subject to appellate review; (3) involve arbitrators that are usually business persons who are more sympathetic to merchants than consumers; and (4) are inefficient because they are secret, ad hoc and, non-precedential.<sup>81</sup>

Indeed, her antipathy goes so deep that she accuses the Supreme Court in its interpretation of the FAA of condoning "invidious" racial or sexual discrimination and of "underwriting democratic degradation" of governmental institutions by "making redress impossible, in practice if not in theory, for large numbers of people."<sup>82</sup> Thus, for Radin, the current arbitration system is inconsistent with the "rule of law";<sup>83</sup> however, Radin gives minimal attention to another rule of law: FAA preemption. Radin's implacable opposition reveals her view that pre-dispute arbitration, as administered under mass-market consumer contracts, is inferior to litigation and such arbitral provisions should be targeted for "severe" modification or even elimination.<sup>84</sup> Hence, her suggestion would be preempted as failing the "equal footing" rule.

*C. Kim's Approach and the FAA*

Kim's proposal overlooks FAA preemption as she emphasizes the perceived "aberrant" features of adhesion contracts versus required arbitration clauses.<sup>85</sup> Nevertheless, she includes arbitration clauses in the "aberrant" contract category and inappropriately singles out these clauses as "one sided," "onerous," and "unfair" to consumers.<sup>86</sup> Therefore, her proposal also could not overcome the "equal footing" rule.

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*Disappearance of the Presumption Against Preemption in the Context of the FAA*, 89 DENV. U. L. REV. 747 (2012).

<sup>79</sup> See, e.g., RADIN, *supra* note 4, at 15-18.

<sup>80</sup> *Id.* at 183.

<sup>81</sup> *Id.* at 134-35.

<sup>82</sup> *Id.* at 183.

<sup>83</sup> *Id.* at 132-33, 183. Radin repeatedly couples "mass market boiler plate" with the pejorative word "scheme." See, e.g., *id.* at 35, 39, 174.

<sup>84</sup> *Id.* at 183.

<sup>85</sup> See Kim, *supra* note 4, at 1-11.

<sup>86</sup> *Id.* at 271, 282.

*D. Dawson's Approach and the FAA*

Dawson's theme resembles Radin's, in that both authors are diametrically opposed to adhesive pre-dispute arbitration clauses. Although Dawson's opinion, when it comes to enforcement of required arbitration clauses, is "the equities so strongly favor the claimant,"<sup>87</sup> the legal rule is the opposite. Courts have observed, "rather than being viewed as oppressive, arbitration clauses are favored by both state and federal law as an economical form of dispute resolution which relieves the congestion of overburdened courts."<sup>88</sup> Despite FAA preemption case law, Dawson repeatedly focuses on (and wishes to strike down) contracts solely because they have arbitration as a required remedy.<sup>89</sup> Alternatively, Dawson believes that arbitration is an inferior rights vindication mechanism as compared with litigation;<sup>90</sup> this position, which is equally fatal to his case, also flaunts the FAA.

To prove the last point, a careful review of Dawson's Comment reflects his strong disapproval of contemporary arbitration. He suggests, "[g]iven that economic duress is a court-made concept, courts could also loosen or even suspend the [traditional] wrongful-act requirement [in arbitration cases]."<sup>91</sup> In his Comment, Dawson makes clear that his concern is to combat what he pejoratively and repeatedly terms "forced-arbitration"<sup>92</sup> (a label mostly used in the literature by partisan "employee advocates").<sup>93</sup> Employee advocates use the term "forced-arbitration" to distinguish this practice from what they view as voluntarily negotiated arbitration in the workplace.<sup>94</sup>

"Forced-arbitration," as used by Dawson and others, is a loaded term because it fails to explain why the parties' manifested assent, in the form of a signed contract, to pre-dispute arbitration is insufficient to establish a binding agreement. By using the code word "forced-arbitration" Dawson has fallen into the mistake of substituting labels for analysis. Professor Macneil addressed a similar issue when he observed:

Using such terms as *compulsory* or *mandatory* in such circumstances is, at best, highly confusing. At worst, it constitutes question-begging: The very question at stake where such questions arise is whether whatever consent to arbitrate as has been manifested should or should not be given full contractual effect. To call the arbitration compulsory or mandatory is to answer by label, not by attention to the facts and by analysis.<sup>95</sup>

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<sup>87</sup> Dawson, *supra* note 4, at 243.

<sup>88</sup> Rust v. Drexel Firestone Inc., 352 F. Supp. 715, 717 (S.D.N.Y. 1972) (citing cases).

<sup>89</sup> Dawson, *supra* note 4, at 243-46 (stating ways in which he believes arbitration clauses violate legal norms).

<sup>90</sup> See generally *id.*

<sup>91</sup> *Id.* at 243.

<sup>92</sup> See, e.g., *id.* at 234, 247.

<sup>93</sup> See Andrew J. Gordon & Kimberley C. Weber, *Foreword: Forced Arbitration in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 1, 1 n.1 (2014).

<sup>94</sup> *Id.*

<sup>95</sup> 2 IAN MACNEIL ET AL., FEDERAL ARBITRATION LAW § 17.1.2.2 (1994).

In his heavy criticisms of arbitration as an inferior form of dispute resolution, Dawson further complains that merchants seek to overwhelm consumers with confusing and lengthy boilerplate terms so that consumers will accept arbitration without actual agreement to this process: “[consumers] ‘consent’ to these arbitration clauses because they don’t know what else to do.”<sup>96</sup> Dawson’s criticism on this point is off-target because he does not address the settled rules of contractual assent. Thus, if the offeree’s outward actions convey assent to the offeror from an objective standpoint, there is no requirement that the offeree subjectively assent.<sup>97</sup> Commentators have argued that many reasons, such as the lack of awareness, the lack of perceived alternatives, and the impact of cognitive biases, demonstrate true subjective assent is frequently missing in contracting.<sup>98</sup>

The *Restatement (Second) of Contracts*, however, has a different take:

Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. *But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.*<sup>99</sup>

Note further that if the party bringing the claim sues in court and bypasses a contractual requirement for arbitration, any notion of “forced-arbitration” is academic if the responding party also does not insist upon arbitration. In this situation, the moving party creates a right of election in the respondent to require arbitration, which it can decline.<sup>100</sup>

In many other respects, Dawson’s suspicion of arbitration as a fair method of alternative dispute resolution is intense and pervasive. He believes that state courts must “protect lay claimants” from an “anti-consumer” Supreme Court bent on

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<sup>96</sup> See Dawson, *supra* note 4, at 246.

<sup>97</sup> See, e.g., *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga.*, 995 F. Supp. 2d 587, 609 (N.D. Tex. 2014) (“Whether a contract has been formed is determined by the ‘objective standard of what the parties said and how they acted, not by their subjective state of mind.’”) (arbitration case); *Bloomington Partners, LLC v. City of Bloomington*, 364 F. Supp. 2d 772, 779 (C.D. Ill. 2005) (“To determine whether the parties intended to be bound by the alleged contract, a court looks not to the parties’ subjective intent, but rather to objective evidence of their intent as expressed to each other in their writings.”) (arbitration case); see also *DeLeon v. Verizon Wireless, LLC*, 143 Cal. Rptr. 3d 810, 820-21 (Cal. Ct. App. 2012) (“Mutual consent necessary to the formation of a contract ‘is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.’ Although mutual consent is a question of fact, whether a certain or undisputed state of facts establishes a contract is a question of law for the court.”) (quoting *Alexander v. Codemasters Grp. Ltd.*, 127 Cal. Rptr. 2d 145, 152 (Cal. Ct. App. 2002)).

<sup>98</sup> See, e.g., Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 251-52 (Franklin G. Miller & Alan Wertheimer eds., 2010).

<sup>99</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (AM. LAW INST. 1981) (emphasis added).

<sup>100</sup> See *Vireo, P.L.L.C. v. Cates*, 953 S.W.2d 489, 491-92 (Tex. App. 1997).

“colonizing” state contract law.<sup>101</sup> Dawson sees a Supreme Court that has (a) improperly overturned “decades” of its arbitration precedents, (b) usurped state courts “of their traditional role as the final arbiter of contracts,” and (c) attempted to “pull the wool over the nation’s eyes” with decisions like *Concepcion*.<sup>102</sup> Dawson, however, gives little heed to judicial pronouncements that “even generally applicable state-law rules are preempted if in practice they have a ‘disproportionate impact’ on arbitration or ‘interfere[ ] with fundamental attributes of arbitration and thus create[ ] a scheme inconsistent with the FAA.’”<sup>103</sup>

Still other passages from his Comment strengthen Dawson’s view that non-negotiable boilerplate arbitration harms the commercial system. He posits that such clauses require consumers to relinquish commodities “necessary to live in the twenty-first century.”<sup>104</sup> Furthermore, these “forced arbitration clauses” have “stripped lay claimants of basic procedural protections and given big business the ability to abuse consumers without fear of class-action liability.”<sup>105</sup> Dawson accuses the Supreme Court of a “hypnotic obsession with consent [that] is impossible to square with the facts on the ground”<sup>106</sup> and that masks the Court’s approval of consumer “coercion.”<sup>107</sup> Where an adhesion agreement contains an arbitration clause, Dawson wants state courts to engage in an “aggressive interrogation of a contract’s formation.”<sup>108</sup> He further shows his preference for litigation over arbitration when he cites the “troubling reality” that “nearly every action” that Americans take — “right down to include eating a bowl of Cheerios—could constitute a waiver of their right to enter court.”<sup>109</sup>

By generating this barrage of criticisms about the legitimacy of arbitration, Dawson is sealing his proposal to the doom of FAA preemption. Oddly, Dawson makes no meaningful attempt to analyze whether his proposal meets the FAA’s preemption standards. The closest he comes to a defense against FAA preemption is his claim that his theory “would allow judges to deploy duress doctrine to void all sorts of contracts—ranging from spousal agreements to mortgages to forced arbitration clauses.”<sup>110</sup> In other words, Dawson uses these afterthoughts to recast his doctrine implicitly as one of general applicability to avoid the equal footing rule.

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<sup>101</sup> Dawson, *supra* note 4, at 233, 235.

<sup>102</sup> *Id.* at 234-235, 246.

<sup>103</sup> *Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013) (alteration in original) (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (rejecting argument that Montana’s standard for enhanced mutual assent applied to all contracts). In *Concepcion*, the Court rejected the argument that California’s version of unconscionability applied to all contracts. *Concepcion*, 131 S. Ct. at 1748.

<sup>104</sup> Dawson, *supra* note 4, at 244.

<sup>105</sup> *Id.* at 247.

<sup>106</sup> *Id.* at 244.

<sup>107</sup> *Id.* at 238, 244, 247.

<sup>108</sup> *Id.* at 238.

<sup>109</sup> *Id.* at 247.

<sup>110</sup> *Id.* at 244.



Despite this possibility, Dawson's duress model cannot escape that it is specifically designed to reduce the availability of arbitration, which contravenes the FAA's "equal footing" doctrine. But for the perceived problems of contractual arbitration, Dawson would not be proposing a reform of duress doctrine.<sup>111</sup> It takes very little for a state legislature or court to express undue hostility to arbitration to warrant preemption; even a passing observation could suffice.<sup>112</sup> Dawson more than amply meets this low threshold. Therefore, Dawson cannot overcome that his proposal adversely targets arbitration because his desired effect is to "cabin" arbitration agreements and to "limit the scope of FAA preemption."<sup>113</sup> Dawson misses that the Supreme Court has ruled, "[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."<sup>114</sup>

It cannot be gainsaid that these three proposals do not derive their meaning from whether arbitration is at issue (in whole or part) or that their authors greatly prefer litigation over arbitration. Because all three authors' proposals violate the "equal footing" rule of the FAA, the FAA would preempt their suggestions for a more lenient duress defense in arbitration cases.

### III. THE RADICAL (AND DESTABILIZING) REVISIONS OF THE ECONOMIC DURESS DOCTRINE

#### A. *The Authors and Legal Doctrine*

As mentioned in the Introduction, I find no fault with these authors merely because they go beyond existing case law standards in their proposals. It is helpful, however, to determine just how far the authors depart from the foundational elements of current economic duress doctrine and to show the impact such variances have on the viability of their normative suggestions.

While she uses some traditional duress terminology, Radin's proposal has no link to case law. One example of this absence is her position that the focus for economic duress should shift from "expectation" to "exploitation."<sup>115</sup> The law, however, already takes this perspective into account: "the doctrine of economic duress is a

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<sup>111</sup> See *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013) (deeming a Montana doctrine of contractual mutual assent preempted because its "primary purpose" was to render arbitration agreements invalid at a "higher rate" than other contract terms).

<sup>112</sup> "Ordinarily, common-law principles can invalidate an arbitration agreement, but not when based on a policy hostile to arbitration." *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1170 (10th Cir. 2014). The court found sufficient evidence that New Mexico courts were hostile to arbitration by the passing comment in a New Mexico Court of Appeals regarding "subjecting the weaker party to arbitration." *Id.* at 1168 (quoting *Figuroa v. THI of N.M. at Casa Arena Blanca, LLC*, 306 P.3d 480, 491 (N.M. Ct. App. 2012)). The Tenth Circuit said this brief passage "clearly evince[es] the view that having to arbitrate a claim is disadvantageous." *Id.* at 1169.

<sup>113</sup> See Dawson, *supra* note 4, at 233-35.

<sup>114</sup> *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 281 (1995).

<sup>115</sup> RADIN, *supra* note 4, at 151.

‘last resort’ to correct exploitation of business exigencies ‘when conventional alternatives and remedies are unavailing.’”<sup>116</sup>

Again, without case law support, she states that economic duress is “especially controversial” and “extremely contentious.”<sup>117</sup> She argues, “[c]ourts could try to explain better what sort of terms [are economically coercive] and in particular what specific terms can give rise to economic duress.”<sup>118</sup> Radin sees the victims of wealth disparity in the United States as being especially well-positioned to allege economic duress in their dealings with merchants.<sup>119</sup> Therefore, Radin notes, the more frequently a practice is “normatively” unfair to the consumer that correspondingly makes out a stronger case for economic duress.<sup>120</sup>

Kim accurately summarizes the case law elements of the common-law duress defense but proposes an “expansion” to “recognize the unique way in which electronic contracts can be used to force terms upon consumers who have no choice but to accept them.”<sup>121</sup> Kim believes that electronic contracts are an “aberrant” vehicle because companies have exploited consumers “in a coercive manner” with “aggressive and oppressive terms.”<sup>122</sup> She further faults the courts for how they have applied “doctrinal rules without considering the impact of the electronic form on the behavior of the parties.”<sup>123</sup> However, Kim is careful to point out that her proposal for situational duress does not cover all forms of electronic contracting.<sup>124</sup>

Thus, her proposal for reform makes duress “situational” and limited to where consumers are “uniquely vulnerable because of their interest in the relevant product or service.”<sup>125</sup> Kim’s proposal does not rely on the current case law standards of the economic duress defense, and Kim acknowledges this fact.<sup>126</sup>

Dawson says he accepts the common law’s requirement that a claimant to state a claim for duress must show “oppressive or coercive behavior.”<sup>127</sup> Although he prefers an “expanded version” of duress to “loosen” or “suspend” the “wrongful act” requirement, he states that his proposal addressing “forced arbitration” satisfies the requirement for coercion and that his suggestion for expanding duress is “colorable

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<sup>116</sup> *Johnson v. Int’l Bus. Machs. Corp.*, 891 F. Supp. 522, 529 (N.D. Cal. 1995) (citing *Rich & Whillock, Inc. v. Ashton Dev., Inc.*, 204 Cal. Rptr. 86, 90 (Cal. Ct. App. 1984)).

<sup>117</sup> RADIN, *supra* note 4, at 124, 151.

<sup>118</sup> *Id.* at 151.

<sup>119</sup> *Id.* 151-52.

<sup>120</sup> *Id.* at 151-52.

<sup>121</sup> Kim, *supra* note 4, at 278.

<sup>122</sup> *Id.* at 266.

<sup>123</sup> *Id.* at 267.

<sup>124</sup> *See id.* at 279.

<sup>125</sup> *Id.* at 278.

<sup>126</sup> Kim, *supra* note 4, at 278-79 (noting that her “new” and “novel” defense is an “expansion” of existing doctrine and departs from prevailing principles by deeming the effect of duress is to make the contract “void” and not “voidable”).

<sup>127</sup> Dawson, *supra* note 4, at 243.

under existing law.”<sup>128</sup> Thus, Dawson believes that his re-engineered duress defense doctrine fits within existing case law boundaries.

The following sections of this article will collect the sound principles that many jurisdictions enforce regarding economic duress applicable to arbitration agreements, but that Radin, Kim and Dawson omit or give short shrift. As will be seen, the authors’ suggestions are not maintainable as legitimate extensions of existing law because they are radical and destabilizing revisions of the common-law economic duress doctrine.

### *B. The Policy of the Economic Duress Defense*

The duress defense has changed significantly from its early common law origins, where the defense was limited to actual imprisonment or physical harm to the offeree.<sup>129</sup> Referring to “the modern doctrine of economic duress,” commentators aptly have said the “doctrine is constantly being extended and expanded and bears slight resemblance to common-law duress.”<sup>130</sup> Today, most jurisdictions recognize economic duress (also called “business compulsion”) as a defense to contract enforcement or to support a cause of action for contract rescission.<sup>131</sup>

Parties who enter into an agreement under duress have two remedies. They may either seek rescission of the agreement or they may affirm the agreement and sue for damages.<sup>132</sup> Parties seeking to rescind the contract must be ready, willing, and able to return the consideration.<sup>133</sup> Parties electing to affirm the contract and sue for damages are not required to return, or offer to return, the consideration they received.<sup>134</sup>

Regarding the economic duress doctrine in contract cases, the Supreme Court observed “the word duress implies feebleness on one side, overpowering strength on the other.”<sup>135</sup> The duress defense helps ensure that the offeree’s manifestation of assent reflects bona fide agreement of the bargain to the offeror.<sup>136</sup> The term “manifested assent,” in the sense of external acts and conduct, is used advisedly

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<sup>128</sup> *Id.* at 242-43.

<sup>129</sup> JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.2 (6th ed. 2009). For a comprehensive recital of the changing nature of duress, see *Ford v. Engleman*, 86 S.E. 852 (Va. 1915).

<sup>130</sup> 28 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 71:1 (4th ed. 2003).

<sup>131</sup> See *Finstad v. Ransom-Sargent Water Users, Inc.*, 849 N.W.2d 165, 169 (N.D. 2014) (citing 28 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 71:7 (4th ed. 2003)).

<sup>132</sup> *Mutual Savs. Life Ins. Co. v. Osborne*, 15 So.2d 713, 718 (Ala. 1943).

<sup>133</sup> *Ledbetter v. Frosty Morn Meats*, 150 So.2d 365, 371 (Ala. 1963).

<sup>134</sup> *Coastal Concrete Co. v. Patterson*, 503 So.2d 824, 830 (Ala. 1987); see also *Solomon v. FloWarr Mgmt.*, 777 S.W.2d 701, 705 (Tenn. Ct. App. 1989).

<sup>135</sup> *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 300 (1942).

<sup>136</sup> 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.16 (3d ed. 2004); see also Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 120 (1996).

because “no testimony can show with certainty what the actual mental condition of the party was [at the time].”<sup>137</sup> Duress also has an element that the actor act in defense of his property interests.<sup>138</sup>

Accordingly, the policy for economic duress is:

“[T]o discourage or prevent an individual in a stronger position, usually economic, from abusing that power . . . in a bargain situation.” Thus, the fundamental issue in duress cases is whether the statement which induced the agreement is the type of offer to deal that the law should discourage as oppressive and thus improper.<sup>139</sup>

The three authors’ suggestions do not warrant a fundamental change in duress legal doctrine. To an extent, they misapprehend the nature of doctrinal change under the common law. While there is no doubt that “[t]he common law has an inherent capacity for growth and change,”<sup>140</sup> courts “particularly loath to indulge in the abrupt abandonment of settled principles and distinctions that have been carefully developed over the years.”<sup>141</sup> “The persistent movement of the common law toward satisfying the needs of the times is soundly marked by gradualness.”<sup>142</sup> Where a perceived need exists for “fundamental changes” in the law, they must be brought about sparingly and with deliberation,<sup>143</sup> because “[p]redictability is an important component of our common law system.”<sup>144</sup> Another concern is that while Dawson correctly states that the “precise elements of an economic duress claim vary from jurisdiction to jurisdiction”<sup>145</sup> another truism is that the wording varies less than the substance and most jurisdictions follow very similar foundational principles regarding the economic duress defense.<sup>146</sup> The authors’ proposals undermine these values through a radical restructuring of common law economic duress.

<sup>137</sup> *Wilkerson v. Bishop*, 47 Tenn. 24, 28 (1869).

<sup>138</sup> See *Schlossberg v. E.L. Trendel & Assocs.*, 380 N.E.2d 950, 953 (Ill. App. Ct. 1978) (explaining that compulsion, or duress, occurs “[w]here a person, to prevent injury to himself, his business or property, is compelled to make payment of money which the party demanding has no right to receive and no adequate opportunity is afforded the payor to effectively resist such demand”).

<sup>139</sup> *Richards v. Allianz Life Ins. Co.*, 62 P.3d 320, 327 (N.M. Ct. App. 2002) (alteration in original and citations omitted) (quoting *First Nat’l Bank v. Sanchez*, 815 P.2d 613, 616 (N.M. 1991)).

<sup>140</sup> 15A AM. JUR. 2D *Common Law* § 2 (2014).

<sup>141</sup> *State v. Lead Indus. Ass’n*, 951 A.2d 428, 445-46 (R.I. 2008) (quoting John T. Loughran, *Some Reflections on the Role of Judicial Precedent*, 22 *FORDHAM L. REV.* 1, 8 (1953)).

<sup>142</sup> *Falcone v. Middlesex Cty. Med. Soc’y*, 170 A.2d 791, 799 (N.J. 1961).

<sup>143</sup> *Aranson v. Schroeder*, 671 A.2d 1023, 1027 (N.H. 1995).

<sup>144</sup> *Hill v. Mayall*, 886 P.2d 1188, 1191 (Wyo. 1994).

<sup>145</sup> Dawson, *supra* note 4, at 243.

<sup>146</sup> See LORD & WILLISTON, *supra* note 130, at § 71:19 (“There have been numerous formulations of the elements necessary to invoke the defense of economic duress or business compulsion, though all of them share certain basic characteristics.”).

*C. Defining “Force,” “Coercion,” and “Oppression”*

Dawson, Radin, and Kim each indicate that a merchant who merely furnishes the consumer a contract that contains a forced arbitration clause meets the element of force, coercion, or oppression.<sup>147</sup> Simply proposing a contract, however, is not what the law means by the “force,” “coercion,” or “oppression” needed to show economic duress. Instead, a complex body of law explains the circumstances evidencing the vendor’s use of force, coercion, or oppression to obtain a contract. These factors far exceed the depth of the explanations in the three commentaries.

Duress is an improper persuasion technique that operates extrinsically to the contract terms. As the Georgia Court of Appeals has observed, “[d]uress must come from without, and not from within. It must be exerted by the other person or his agent, and can not be a creation of the mind of the person claiming his will has been restrained by fear.”<sup>148</sup> Accordingly, the party proposing a contract must *further* commit “wrongful pressure”; that is, acts or threats, to induce the purported victim to accept the terms, such as by “extortive measures,” “compulsion,” or “improper or unjustified demands.”<sup>149</sup>

The existence of economic pressure upon the offeree and even a threat of considerable financial loss absent contract acceptance are not necessarily “duress” for purposes of rendering a contract unenforceable.<sup>150</sup> The same is true for the offeree’s fear of economic hardship or financial devastation.<sup>151</sup> A good example of economic duress is where A threatens B, his former employee, that A will try to prevent B’s employment elsewhere unless B agrees to release a claim that he has against A, and B, having no reasonable alternative to the threat, is thereby induced to make the contract.<sup>152</sup>

When such economic stress occurs, it “must be attributable to the party against whom the duress is alleged.”<sup>153</sup> The test for duress is based on “improper external pressure or influence”<sup>154</sup> that operates on the “condition of the mind of the person

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<sup>147</sup> See Dawson, *supra* note 4, at 242 (explaining that duress results merely from the vendor “proposing” an improper take it or leave it deal); RADIN, *supra* note 4, at 150-52 (indicating that the mere existence of such a contract is inherently coercive); Kim, *supra* note 4, at 283 (“The introduction of an electronic contract . . . creates an improper threat in the sense that the company forces the consumer to accept or risk forfeiture of valuable goods or services.”).

<sup>148</sup> *Mabou v. Eller*, 502 S.E.2d 760, 763 (Ga. Ct. App. 1998) (quoting *King v. Lewis*, 4 S.E.2d 464, 468 (Ga. 1939)).

<sup>149</sup> See, e.g., *Haston v. Crowson*, 808 So. 2d 17, 22 (Ala. 2001).

<sup>150</sup> *Metcalf Constr. Co. v. United States*, 102 Fed. Cl. 334, 347 (2011).

<sup>151</sup> *Cochran v. Ernst & Young*, 758 F. Supp. 1548, 1556 (E.D. Mich. 1991).

<sup>152</sup> See RESTATEMENT, *supra* note 99, at § 176 illus. 11; see also *Massi v. Blue Cross & Blue Shield Mut. of Ohio*, 765 F. Supp. 904, 909-10 (N.D. Ohio 1991) (finding a claim for economic duress where an employee, after learning his position was eliminated, was told to sign a waiver agreement or he would not receive severance benefits).

<sup>153</sup> *Chouinard v. Chouinard*, 568 F.2d 430, 434 (5th Cir. 1978).

<sup>154</sup> *Gilley v. Gilley*, 778 S.W.2d 862, 864 (Tenn. Ct. App. 1989).

claiming the intimidation.”<sup>155</sup> Economic duress must be based on *conduct* of the opposite party and not merely on the *necessities* of the purported victim.<sup>156</sup>

The wrongfulness of the pressure or threat is a matter of degree and exists on a continuum. The gravity or magnitude of the threat in relation to the contract at issue, along with the resulting degree of unfairness, is a significant consideration. Thus, “[p]ressure may be considered wrongful when ‘it is so oppressive under given circumstances as to constrain one to do what his free will would refuse.’”<sup>157</sup> Economic duress also occurs where the offeror has exacted a “disproportionate exchange of values” (i.e., unfair consideration) between the parties.<sup>158</sup> On the other hand, where the complaining party is challenging a contract term “that he could have been expected to agree to even if not under duress, the inference of duress is weakened, along with the further inference that duress caused whatever harm the victim is seeking to redress.”<sup>159</sup>

A contract can be valid on its face even where the result of the bargain came from oppressive conduct of the offeror.<sup>160</sup> “[T]here is nothing *per se* unconscionable about arbitration agreements.”<sup>161</sup> Although “there is no line of absolute demarcation” between a threat that deprives a party of its free will as opposed to a threat that portends some lesser degree of harm, any “finding of duress at least must reflect a conviction that one party to a transaction has been so improperly imposed upon by the other that a court should intervene.”<sup>162</sup>

Overlooking the above principles and constraints, the authors draw unworkable lines between legitimate bargaining techniques in a free-market society and the offeror’s intolerable coercion of offerees. A severe danger exists that the authors’ proposed expansions of the duress defense would apply where the plaintiff signed

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<sup>155</sup> *Windham v. Alexander, Weston & Poehner, P.C.*, 887 S.W.2d 182, 185 (Tex. App. 1994).

<sup>156</sup> *See, e.g., Int’l Paper Co. v. Whildren*, 469 So.2d 560, 563 (Ala. 1985) (“It is said that economic duress must be based on conduct of the opposite party and not merely on the necessities of the purported victim.”); *see also McCord v. Goode*, 308 S.W.3d 409, 413 (Tex. App. 2010) (“Duress must be shown from the acts or conduct of the party accused of duress, not the emotions of the purported victim.”).

<sup>157</sup> *Shanley & Fisher, P.C. v. Sisselman*, 521 A.2d 872, 879 (N.J. Super. Ct. App. Div. 1987) (quoting *Rubenstein v. Rubenstein*, 120 A.2d 11, 15 (N.J. 1956)); *see also Wurtz v. Fleischman*, 293 N.W.2d 155, 160 (Wis. 1980).

<sup>158</sup> *Gainey v. Gainey*, 675 S.E.2d 792, 799 (S.C. Ct. App. 2009); *see also* RESTATEMENT, *supra* note 97, at § 176 cmt. a (“The fairness of the resulting exchange is often a critical factor in cases involving [such] threats.”); LORD & WILLISTON, *supra* note 130, at § 71:43 (“Where there is adequacy of consideration, there is generally no duress.”).

<sup>159</sup> *Prof’l Serv. Network, Inc. v. Am. All. Holding Co.*, 238 F.3d 897, 902 (7th Cir. 2001) (Posner, J.); *see also In re Cheryl E.*, 207 Cal. Rptr. 728, 736 (Cal. Ct. App. 1984) (stating that a contract cannot be rescinded based on duress when evidence shows the offeree would have entered the contract notwithstanding the duress).

<sup>160</sup> *Cummings, Inc. v. Dorgan*, 320 S.W.3d 316, 331 (Tenn. Ct. App. 2009) (“[A] contract, although valid on its face, may not be enforceable if it can be proved that the contracting party acted under duress.”).

<sup>161</sup> *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996).

<sup>162</sup> *Hellenic Lines, Ltd. v. Louis Dreyfus Corp.*, 372 F.2d 753, 758 (2d Cir. 1967).

the contract “merely because he or she entered into it with reluctance, the contract was very disadvantageous to him or her, the bargaining power of the parties was unequal, or there was some unfairness in the negotiations preceding the agreement.”<sup>163</sup> These circumstances, as well as an offeree’s mere “acquiescence” to the offeror, are insufficient.<sup>164</sup> Another key limitation missing from the authors’ proposals is that a party may assert the affirmative defense of economic duress “only when the party against whom it is claimed was responsible for the claimant’s financial distress.”<sup>165</sup>

Again, the mere existence of the merchant’s superior bargaining position over the buyer is not automatic proof that the merchant further exerted wrongful pressure on the claimant.<sup>166</sup> Briefly stated, the essence of duress is an improper threat that induces a “reasonably prudent person”<sup>167</sup> to enter a contract against the latter’s better “judgment” and “desire.”<sup>168</sup> All the above policies are needed to safeguard arbitration contracts given their central role in a properly functioning commercial-law system.

#### *D. Economic Duress and Causation*

The three proposals do not address the element that the duress was the “sole and efficient cause” of the person’s entering the contract,<sup>169</sup> if the person had an independent reason for accepting the deal duress is absent.<sup>170</sup> “If the payment or exchange is made with the hope of obtaining gain, there is not duress; it must be solely for the purpose of protecting the victim’s business or property interests.”<sup>171</sup>

<sup>163</sup> 17A C.J.S. *Contracts* § 230 (2015).

<sup>164</sup> See *Coop. Res. Ctr., Inc. v. Se. Rural Cmty. Assistance Project, Inc.*, 569 S.E.2d 545, 547 (Ga. Ct. App. 2002); see also *Dunes Hosp., LLC v. Country Kitchen Int’l, Inc.*, 623 N.W.2d 484, 489-91 (S.D. 2001).

<sup>165</sup> *Deer Creek Ltd. v. N. Am. Mortg. Co.*, 792 S.W.2d 198, 203 (Tex. App. 1990); accord *Cheshire Oil Co., v. Springfield Realty Corp.*, 385 A.2d 835, 839 (N.H. 1978); see also *Ariel Preferred Retail Grp., LLC v. CW Capital Asset Mgmt.*, 883 F. Supp. 2d 797, 820 (E.D. Mo. 2012) (stating that a party’s knowledge of the other party’s financial pressures is irrelevant to the question of duress, because the financial necessity of a party, not caused by the other contracting party, does not constitute duress).

<sup>166</sup> See *Evans v. FedEx Express*, No. W2013-01717-COA-R3-CV, 2014 WL 309351, at \*4 (Tenn. Ct. App. Jan. 29, 2014).

<sup>167</sup> *Chellen v. John Pickle Co.*, 344 F. Supp. 2d 1278, 1292 (N.D. Okla. 2004).

<sup>168</sup> *Delaney v. Chief of Police of Wareham*, 539 N.E.2d 65, 70 (Mass. App. Ct. 1989).

<sup>169</sup> *Conagra Trade Grp., Inc. v. Fuel Expl., LLC*, 636 F. Supp. 2d 1166, 1173 (D. Colo. 2009) (quoting *Hastain v. Greenbaum*, 470 P.2d 741, 747 (Kan. 1970)). “It is obvious that if some factor other than the wrongful act of which plaintiffs complain motivated them to enter into the . . . agreement, there was no duress.” *Hous., Inc. v. Weaver*, 246 S.E.2d 219, 225 (N.C. Ct. App. 1978); cf. *Rubenstein v. Rubenstein*, 123 A.2d 67, 70-71 (N.J. Super. Ct. Ch. Div. 1956) (“[I]f it can be shown that the action sought to be avoided would not have taken place had it not been for the alleged coercive acts by the defendant, the transaction will be deemed to have been procured by duress, notwithstanding that it may be shown that there were other contributory, efficient causes of action sought to be avoided.”).

<sup>170</sup> See *S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1528 (7th Cir. 1993).

<sup>171</sup> *Id.* (quoting *Pope v. Ziegler*, 377 N.W.2d 201, 203 (Wis. Ct. App. 1985)).

Therefore, if the buyer wants to purchase the commodity, and has reservations about whether a contract term (such as required arbitration) is too onerous, duress will be absent when the buyer accepts the deal and his desire for the item overcomes his objection to the unfavorable term(s).

Because the three proposals insufficiently acknowledge the element that the offeror—*besides* inviting the offeree's contract acceptance—must have applied unlawful or improper pressure through “coercion” to “induce” the other party to enter the contract,<sup>172</sup> their proposed reforms greatly dilute and even omit the driving element of the defense. There is no justification for a lesser standard in arbitration cases.

#### *E. Free Agency/State of Mind of the Victim*

The authors' formulations inadequately cover the case-law standard that the actor's threat or coercion has “practically destroy[ed] the free agency of a party”<sup>173</sup> or “induce[d] a fearful state of mind in the other party, which makes it impossible for [the party] to exercise his own free will.”<sup>174</sup> This form of coercion induces the victim to sign a contract that he otherwise would not have accepted.<sup>175</sup> Thus, the presence of economic duress means the absence of the victim's “volition.”<sup>176</sup>

As a practical matter, the victim of undue duress necessarily alleges that “the agreement was not signed voluntarily.”<sup>177</sup> The bar is high because the law distinguishes lack of volition and the party's difficult economic choices: “[T]he fact that a party faces a difficult choice—[such as] between additional benefits or pursuing his legal rights—does not alone indicate lack of free will.”<sup>178</sup> To the same effect, the offeree's mere annoyance, vexation, personal embarrassment, or the pressure of the circumstances does not deprive the party of his free will.<sup>179</sup>

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<sup>172</sup> See *Int'l Paper Co. v. Whilden*, 469 So. 2d 560, 563 (Ala. 1985) (“Unless unlawful or unconscionable pressure is applied by the other party to induce the entering into a contract, there is not economic compulsion amounting to duress.”); see also *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 792 N.E.2d 488, 494 (Ill. App. Ct. 2003) (“‘Coercion’ and ‘duress’ have essentially the same meaning: overpowering another's free will by imposition, oppression, or undue influence.”).

<sup>173</sup> *Holler v. Holler*, 612 S.E.2d 469, 474 (S.C. Ct. App. 2005); *accord T.G. v. Dep't of Children & Families*, 9 So.3d 48, 49 (Fla. Dist. Ct. App. 2009).

<sup>174</sup> *Noble v. White*, 783 A.2d 1145, 1149 (Conn. App. Ct. 2001) (quoting *Zebedeo v. Martin E. Segal Co.*, 582 F. Supp. 1394, 1417 (D. Conn. 1984)); see also *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 521 (Colo. App. 2006) (It must “clearly appear that the force or threats employed actually subjugated the mind and will of the person against whom they were directed . . . .”) (quoting *Wiesen v. Short*, 604 P.2d 1191, 1192 (Colo. 1979)).

<sup>175</sup> See *Norton v. Mich. State Highway Dep't*, 24 N.W.2d 132, 135 (Mich. 1946); see also *LORD & WILLISTON*, *supra* note 130, at § 71:20.

<sup>176</sup> See *Cox & Floyd Grading, Inc. v. Kajima Const. Servs.*, 589 S.E.2d 789, 791 (S.C. Ct. App. 2003).

<sup>177</sup> *In re Estate of Hollett*, 834 A.2d 348, 351 (N.H. 2003).

<sup>178</sup> See *EEOC v. Am. Express Publ'g Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988).

<sup>179</sup> See *Herget Nat'l Bank of Pekin v. Theede*, 537 N.E.2d 1109, 1112 (Ill. App. Ct. 1989).



These last judicial principles suggest that the threat qualifies for duress only when it leaves the person with the absence of contracting capacity.<sup>180</sup> “The ultimate fact in issue,” in a duress claim, “is whether the victim was *bereft* of the free exercise of his will power.”<sup>181</sup> In effect, the duress overpowers the victim’s “will and inclination,”<sup>182</sup> and substitutes the wrongdoer’s will for the other party’s desires.<sup>183</sup>

Kim and Dawson briefly mention the case law stating that duress is lacking when the consumer was not deprived of his free will when agreeing to arbitrate. However, it is clear these authors see no requirement for the destruction of the buyer’s “free agency” or “free will.”<sup>184</sup> Radin does not mention the free will issue either way in her discussion of economic duress, but it is also plain that Radin sees no such requirement for a destruction of that capability.<sup>185</sup> The three authors further overlook the possible injustice to the merchant when, despite the buyer’s later allegation of the merchant’s threats and coercive pressure, all the merchant can observe either in-person or through electronic communication, is a willing purchaser that signs the contract without complaint. These unambiguous external manifestations of assent are the essence of contract making<sup>186</sup> and are equally applicable to arbitration contracts.<sup>187</sup> As a result, the authors’ proposals undermine the principle that “the courts do not want to punish an innocent party who entered into the contract without any reason to suspect that the other party was subject to improper coercion.”<sup>188</sup>

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<sup>180</sup> See *id.* at 1111 (stating that economic duress operates on the theory that party is deemed to have lacked mental capacity requisite to making of contract).

<sup>181</sup> *Aurora Bank v. Hamlin*, 609 S.W.2d 486, 488 (Mo. Ct. App. 1980) (emphasis added); see also *Alexander v. Standard Oil Co.*, 423 N.E.2d 578, 582 (Ill. App. Ct. 1981) (“To establish duress, one must demonstrate that the threat has left the individual ‘bereft of the quality of mind essential to the making of a contract.’”) (quoting *Kaplan v. Kaplan*, 182 N.E.2d 706, 709 (Ill. 1962)); *Yurek v. Shaffer*, 678 S.E.2d 738, 746 (N.C. Ct. App. 2009) (providing a good discussion of the factors indicating when the victim’s will has been overcome); Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 470 nn.154-56 (2005) (extensive citations). *But see* RESTATEMENT, *supra* note 99, at § 175 cmt. b (criticizing the free will element because it is “vague and impracticable”).

<sup>182</sup> See *Fed. Deposit Ins. Corp. v. Ramsey*, 612 F. Supp. 326, 328 (E.D. Tenn. 1985).

<sup>183</sup> See *People ex rel. Carpentier v. Daniel Hamm Drayage Co.*, 161 N.E.2d 318, 321 (Ill. 1959) (“Acts performed by a person under duress or compulsion are not to be attributed to his will. They are, in the eyes of the law, the result of another’s will, for which the actor should not be held responsible.”).

<sup>184</sup> See Dawson, *supra* note 4, at 244; Kim, *supra* note 4, at 283-86.

<sup>185</sup> See RADIN, *supra* note 4, at 150-52.

<sup>186</sup> See *supra* notes 97-98 and accompanying text; cf. RESTATEMENT, *supra* note 99, at § 19 cmt. c (“[E]ven though the intentional conduct of a party creates an appearance of assent on his part, he is not responsible for that appearance *unless* he knows or has reason to know that his conduct may cause the other party to understand that he assents.”) (emphasis added).

<sup>187</sup> See, e.g., *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119-20 (2d Cir. 2012).

<sup>188</sup> LORD & WILLISTON, *supra* note 130, at § 71:8.

*F. Duress: A Doctrine of Last Resort and a Policy to Safeguard Freedom of Contract*

The three authors' expansion of duress runs counter to settled policy that economic duress is a "sparingly" invoked and "narrowly restricted" doctrine.<sup>189</sup> According to case law, it applies "only to special, unusual, or extraordinary situations in which [the actor] uses unjustified coercion . . . to induce a contract [with the victim.]"<sup>190</sup> An overly liberal economic duress defense would make signed contracts of "little value" and thereby leave contracting relationships "in a confused and chaotic state."<sup>191</sup> Consistent with the legal doctrines noted above, case law indicates that courts are narrowly construing the economic duress defense.<sup>192</sup> Put more succinctly, "the doctrine of economic duress is considered a doctrine of 'last resort'"<sup>193</sup>—but that is not the Radin, Kim, or Dawson approach.

The authors also fail to explore the ramifications of their hollowed-out duress defense for the overall commercial-law system. Although bona fide duress claims "occur very infrequently" in the legal world,<sup>194</sup> the three proposals would substantially increase allegations of this duress defense. These proposals would incentivize the entire consumer population to seek contract rescission where consumers are strongly dissatisfied (actual or feigned) with "forced" arbitration. Dawson, Radin, and Kim apparently have no difficulty in potentially destabilizing every cable television contract, cell phone contract, insurance contract, and many other mass-market consumer contracts<sup>195</sup> merely because the consumer strongly

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<sup>189</sup> See *In re Am. Int'l Grp., Consol. Derivative Litig.*, 976 A.2d 872, 885 (Del. Ch. 2009) ("Given that the doctrine of duress is usually asserted when a person knowingly violates a legal duty, courts rightly employ duress sparingly"); see also *Chase Manhattan Bank, N.A. v. Ntarelli*, 401 N.Y.S.2d 404, 409 (N.Y. Sup. 1977) (naming duress a "narrowly restricted defense"). Radin erroneously states that courts have narrowly construed duress "in the past." RADIN, *supra* note 4, at 275 n.2.

<sup>190</sup> E.g., *Newburn v. Dobbs Mobile Bay, Inc.*, 657 So. 2d 849, 852 (Ala. 1995); *Dunes Hosp., LLC, v. Country Kitchen Int'l*, 623 N.W.2d, 484, 489 (S.D. 2001); see also *In re Lehman Bros. Holdings Inc.*, 519 B.R. 47, 58 (Bankr. S.D.N.Y. 2014) ("[Under New York law], successful claims of economic duress are reserved for 'extreme and extraordinary cases.'") (quoting *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 123 (2d Cir. 2001)).

<sup>191</sup> *Nixon v. Leitman*, 224 N.Y.S.2d 448, 467-68 (N.Y. Sup. Ct. 1962).

<sup>192</sup> See Giesel, *supra* note 181, at 463. Professor Giesel explains that in published state cases from 1996 through 2003, duress was discussed in eighty-eight cases, but in only nine of those cases did the court resolve the matter in favor of the duress claim. *Id.* Similarly, from 1995 to 2003, only two federal appellate cases resulted in findings in favor of duress. *Id.* at 464. Radin asserts that courts apply the economic duress defense "unpredictably." RADIN, *supra* note 4, at 124. The statistics from the Giesel article, however, show that courts, predictably, reject the claim.

<sup>193</sup> LORD & WILLISTON, *supra* note 130, at § 71:19.

<sup>194</sup> See *King v. Donnkenny, Inc.*, 84 F. Supp. 2d 736, 738 (W.D. Va. 2000) (applying Virginia law).

<sup>195</sup> See Dawson, *supra* note 4, at 246 (citing these contract types). Dawson considers these items necessities, and protected by the economic duress doctrine, but most courts state otherwise. See *infra* notes 242-249 and accompanying text. Because Kim's proposal is more limited to instances of situational duress regarding aberrant electronic contracts, such as

believes an arbitration clause is oppressive. It must be remembered that “[r]escission is a harsh remedy, typically disfavored by the courts.”<sup>196</sup>

Moreover, for Radin, Kim, and Dawson it appears that the party’s mere subjective dissatisfaction with pre-dispute arbitration would suffice to raise the defense, but the courts generally include both subjective and objective components to prevail on the defense. The subjective element is the party’s personal reaction to circumstances, while objective elements are the reasonableness of the fear and unjustness of the injury based on how reasonable persons would react to the circumstances.<sup>197</sup>

The three commentators also are seemingly unconcerned with the adverse impact of readily available rescission upon the legitimate interests of the vendors of goods and services, many of which are small businesses living on tight profit margins. The authors’ willingness to give numerous purchasers an easy exit strategy from their contracts and to leave a class of merchants potentially unable to cover their costs can only harm, not enhance, the economy.<sup>198</sup>

A related reason why a properly calibrated economic duress defense is necessary for the commercial system is that courts must give breathing room to freedom of contract.<sup>199</sup> “Freedom of contract” means parties have the right to bind themselves legally; it is a judicial concept that contracts are based on mutual agreement and free choice.<sup>200</sup> Courts and commentators have observed,

Freedom of contract is a “paramount public policy” that takes individual autonomy ‘seriously as a principle for ordering human affairs.’ It is the

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“content hostage” situations, her proposal does not extend as far as Dawson’s or Radin’s. See Kim, *supra* note 4, at 282-85.

<sup>196</sup> JDI Holdings, LLC v. Jet Mgmt., 732 F. Supp. 2d 1205, 1231 (N.D. Fla. 2010).

<sup>197</sup> *Averette v. Indus. Concepts, Inc.*, 673 So.2d 642, 644 (La. Ct. App. 1996); see also *Oskey Gasoline & Oil Co., v. Cont’l Oil Co.*, 534 F.2d 1281, 1286 (8th Cir. 1976); *Dunes Hosp., LLC v. Country Kitchen Int’l*, 623 N.W.2d 484, 490 (S.D. 2001). Some jurisdictions go further: “A duress defense is evaluated according to an objective standard.” *Mathias v. Jacobs*, 167 F. Supp. 2d 606, 614 (S.D.N.Y. 2001); see also *Allen v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 675 N.E.2d 187, 190 (Ill. App. Ct. 1996); *Dockery v. Estate of Massey*, 958 S.W.2d 346, 348 (Tenn. Ct. App. 1997) (noting that “economic duress” is so coercive and severe that person of ordinary firmness could not resist it). Still other jurisdictions make the test subjective. See *Shanley & Fisher, P.C. v. Sisselman*, 521 A.2d 872, 878 (N.J. Super. Ct. App. Div. 1987) (“[T]he test for duress is subjective, rather than objective, and does not turn on whether the duress is of ‘such severity as to overcome the will of a person of ordinary firmness.’”) (quoting *S.P. Dunham & Co. v. Kudra*, 131 A.2d 306, 309 (N.J. Super. Ct. App. Div. 1957)). For additional discussion of the “subjective/objective” test, see LORD & WILLISTON, *supra* note 130, at § 71:20.

<sup>198</sup> The U.S. Supreme Court has emphasized the value of ensuring fairness to businesses facing increased liability. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (approving an arbitration clause that barred class action relief because otherwise defendants could face a “devastating loss” with the undue risk that “defendants will be pressured into settling questionable claims”).

<sup>199</sup> See Giesel, *supra* note 181, at 465-68 (noting role of freedom of contract in limiting the validity of the economic duress defense).

<sup>200</sup> *Freedom of Contract*, BLACK’S LAW DICTIONARY 779 (10th ed. 2014).

‘founding principle’ of the American economy, a ‘cherished’ value of the legal system, and a ‘vital part’ of contractual obligation. Perhaps even more importantly, it is a fundamental individual right, consistent with law and public policy, protected by the federal and many state constitutions, as well as by federal and state civil rights legislation and the [Uniform Commercial Code].<sup>201</sup>

As one commentator points out, “[t]he reluctance with which courts find duress at all and the reluctance of courts to adopt an approach involving review of the substantive fairness of the deal suggests that *courts of today are highly influenced by the notion of freedom of contract.*”<sup>202</sup>

Numerous courts point to the need for freedom of contract by both buyer and seller because this concept promotes “the necessary certainty, stability and integrity of contractual rights and obligations.”<sup>203</sup> An adequate duress doctrine thereby aids the autonomy of the individual parties and their ability to enjoy liberty of contract.<sup>204</sup> Another aspect of the relation of economic duress and the freedom of contract is that “[c]ourts are reluctant to set aside agreements or to interfere with the freedom of contract because of the desirability of finality in private dispute resolutions.”<sup>205</sup> As a result, the economic duress defense is limited whereby “ordinary hard bargaining is not only acceptable, but indeed, desirable, in our economic system, and should not be discouraged by the courts.”<sup>206</sup> Absent any

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<sup>201</sup> Steven W. Feldman, *Autonomy and Accountability in the Law of Contracts: A Response to Professor Shiffrin*, 58 DRAKE L. REV. 177, 220-22 (2009) (citing authorities).

<sup>202</sup> Giesel, *supra* note 181, at 487 (emphasis added).

<sup>203</sup> *E.g.*, *ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (quoting *McCall v. Carlson*, 172 P.2d 171, 187-88 (Nev. 1946)); *Rich & Whillock, Inc. v. Ashton Dev., Inc.*, 204 Cal. Rptr. 86, 90 (Cal. Ct. App. 1984) (“[Economic duress combat] exchanges make a mockery of freedom of contract and undermine the proper functioning of our economic system.”); *see also* RESTATEMENT, *supra* note 99, at ch. 7 introductory note (“Contract law has traditionally relied in large part on the premise that the parties should be able to make legally enforceable agreements on their own terms, freely arrived at by the process of bargaining.”).

<sup>204</sup> *See Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 33 (Or. 2014) (“The right to contract privately is part of the liberty of citizenship, and an important office of the courts is to enforce contractual rights and obligations.”); *see also Moyers v. City of Memphis*, 186 S.W. 105, 109 (Tenn. 1916) (“[I]f there is one thing which more than another public policy requires, it is that [persons] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.”) (cited approvingly in *In re Baby*, 447 S.W.3d 807 (Tenn. 2014)); Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 202 (2013) (“Duress doctrine should honor parties’ autonomy and decisions but at the same time acknowledge their constraints.”).

<sup>205</sup> *Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411, 414 (Okla. 1986). In this regard, duress can be deemed a challenge to party autonomy because it allows a court to override the parties’ manifestation of assent based on the extrinsic misconduct of the offeror. *See* CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 74 (1981).

<sup>206</sup> LORD & WILLISTON, *supra* note 130, at § 71:7.

“legally cognizable restraint,” both parties remain “free to drive whatever bargain the market will bear.”<sup>207</sup>

The question arises regarding the connection between freedom of contract, economic duress, and arbitral agreements. Freedom of contract has a long history with the Supreme Court<sup>208</sup> and includes the Court’s emphasis on freedom of contract as the underlying policy of the FAA.<sup>209</sup> As one author observes, the Court sees “[n]o contradiction or tension whatsoever between both efficient and resolution-facilitative procedures, on the one hand, and freedom of contract, on the other.”<sup>210</sup> Instead, “the Court [has] embraced freedom of contract . . . both as a descriptive matter and as a normative one.”<sup>211</sup> Thus, the Court’s FAA jurisprudence reflects the belief that “freedom of contract [is] essential for arbitration to realize its promise as an efficient dispute resolution procedure because of the parties’ need for procedural ‘adaptability.’”<sup>212</sup> A commentator concludes, “the FAA now stands for pure procedural freedom of contract.”<sup>213</sup> Accordingly, freedom of contract is an important link between the economic duress defense and arbitration.

Indeed, numerous state and federal court decisions expressly connect “freedom of contract” with the arbitral process. The Second Circuit Court of Appeals has commented, “[i]t follows that a state law which limits freedom of contract with respect to arbitration agreements covered by the FAA conflicts with the FAA and is preempted by it.”<sup>214</sup> The Tenth Circuit Court of Appeals has opined, “freedom of contract [ensures] that parties are not required to submit to arbitration any dispute

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<sup>207</sup> *Cabot Corp. v. AVX Corp.*, 863 N.E.2d 503, 512 (Mass. 2007).

<sup>208</sup> *See, e.g., Gibbs v. Consol. Gas Co. of Balt.*, 130 U.S. 396, 408 (1889) (“[W]hile it is justly urged that those rules which say that a given contract is against public policy, [they] should not be arbitrarily extended so as to interfere with the freedom of contract . . .”).

<sup>209</sup> *See* 7 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 15:11 (4th ed. 2010) (“This freedom of contract ideal, resulting in substantial party autonomy concerning arbitration, was reiterated forcefully in the final arbitration decision of the Court’s 1995 term, *First Options of Chicago, Inc. v. Kaplan* [514 U.S. 938 (1995)].”); 7 PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW § 21:43 (2014) (“The [Supreme Court’s] ‘freedom to contract’ message [in arbitration cases] is both inviting and forcefully stated.”) (analyzing *Volt Info Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989)).

<sup>210</sup> J. Maria Glover, *Disappearing Claims and the Erosion of Public Law*, 124 YALE L.J. 3052, 3063 (2015).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 3064 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

<sup>213</sup> *Id.* at 3074 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1743 (2011)); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)). Thus, the Court in *Italian Colors* emphasized that courts “rigorously enforce” the parties’ agreement as written. *Italian Colors*, 133 S. Ct. at 2306. While no Supreme Court case was found expressly using the phrase “freedom of contract” or “liberty of contract” in its arbitration case law, the Court uses the rhetoric judges typically employ to support the freedom of contract. *See id.*; *see also Concepcion*, 131 S. Ct. at 1743.

<sup>214</sup> *Fahnestock & Co., v. Waltman*, 935 F.2d 512, 520 (2d Cir. 1991).

which [they have] not agreed so to submit.”<sup>215</sup> In another example, a U.S. District Court in Utah, citing Utah law, commented that “[w]e respect the parties' freedom to contract by enforcing arbitration agreements according to their terms and ensuring that arbitration proceedings are conducted in the manner to which the parties have agreed.”<sup>216</sup> Many more examples exist exemplifying this judicial perspective and the decisions all vigorously support freedom of contract in matters of arbitration.<sup>217</sup>

The judicial philosophy to support good faith and even hard bargaining in arbitral agreements is an important element of free market principles. Where a party in the American capitalist system through talent or diligence obtains market superiority over competitors or customers, the mere fact that the party in the arbitral setting has “intentionally gained market power with the purpose and intent of exercising leverage against its customers” does not show the merchant’s conduct “went beyond hard bargaining.”<sup>218</sup> As stated by the Second Circuit,

Because an element of economic duress is thus present when many contracts are formed or releases given, the ability of a party to disown his obligations under a contract or release on that basis *is reserved for extreme and extraordinary cases*. Otherwise, the stronger party to a contract or release would routinely be at risk of having its rights under the contract or release challenged long after the instrument became effective.<sup>219</sup>

Insofar as the weaker party in many, if not in almost all, contract negotiations could potentially claim duress because of the parties’ disparity in power, and thereby readily disown his obligations and disrupt the economy, courts will strictly construe the defense against the party asserting it.<sup>220</sup> Consistent with this rule, the party seeking to void a contract because of economic duress “shoulders a heavy

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<sup>215</sup> *Chelsea Family Pharmacy v. Medco Health Sols.*, 567 F.3d 1191, 1196 (10th Cir. 2009).

<sup>216</sup> *Roberts v. Cent. Refrigerated Serv.*, 27 F. Supp. 3d 1256, 1259 (D. Utah 2014).

<sup>217</sup> *E.g.*, *Kitsap Cty. Deputy Sheriff's Guild v. Kitsap County*, 219 P.3d 675, 678 (Wash. 2009) (“Reviewing an arbitration decision for mistakes of law or fact would call into question the finality of arbitration decisions and undermine alternative dispute resolution. Further, a more extensive review of arbitration decisions would weaken the value of bargained for, binding arbitration and could damage the freedom of contract.”); *Miller v. Miller*, 707 N.W.2d 341, 345 (Mich. 2005) (noting that the parties decide the scope of arbitration, and a court may not “infringe[ ] on the parties' recognized freedom to contract for binding arbitration.”); *L & R Realty v. Conn. Nat'l Bank*, 715 A.2d 748, 753 (Conn. 1998) (“Arbitration agreements illustrate the strong public policy favoring freedom of contract and the efficient resolution of disputes.”); *Feinberg v. Boros*, 951 N.Y.S.2d 110, 120 (N.Y. App. Div. 2012) (“[F]reedom of contract dictates that parties to an arbitration should be free to contract to the scope of that arbitration, including the reach of the arbitral decision.”).

<sup>218</sup> *Cf.* *Cabot Corp. v. AVX Corp.*, 863 N.E.2d 503, 512, 514 n.6 (Mass. 2007); *see also* *Dunes Hosp., LLC v. Country Kitchen Int'l*, 623 N.W.2d 484, 490 (S.D. 2001) (“All negotiations inherently involve a certain amount of pressure and coercion.”).

<sup>219</sup> *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 123 (2d Cir. 2001) (emphasis added).

<sup>220</sup> *See id.* at 124; *see also* *Cabot Corp.*, 863 N.E.2d at 512.

burden”<sup>221</sup> to prove his case by “clear and convincing evidence.”<sup>222</sup> No reason exists to construe arbitration contracts under a different standard. Another doctrine counseling a narrow interpretation of the duress defense in arbitration cases is the rule that courts in construing arbitral contracts “should apply ordinary state-law principles that govern the formation of contracts.”<sup>223</sup> Radin’s, Kim’s, and Dawson’s proposals inadequately acknowledge these public policies.<sup>224</sup> Because the proposed suggestions to expand the duress defense beyond exceptional circumstances violate the usual state-law principles the proposals deprive arbitration agreements of the “equal footing” guarantee.<sup>225</sup>

### G. The Duress Defense: Is the Contract Void or Voidable?

Dawson and Radin apparently accept settled doctrine that “even where a party is subject to duress, the resulting contract is voidable, not void.”<sup>226</sup> The difference between a “void” and “voidable” contract is that with the former, no contract ever came into being and is incapable of enforcement, but with the latter, the victim has the choice of denying the existence of the agreement or of affirming the contract and being bound by the terms.<sup>227</sup>

The *Restatement (Second) of Contracts* observes,

The distinction between a “void contract” and a voidable contract has important consequences. For example, a victim of duress may be held to

<sup>221</sup> *Davis & Assocs. v. Health Mgmt. Servs.*, 168 F. Supp. 2d 109, 114 (S.D.N.Y. 2001).

<sup>222</sup> Giesel, *supra* note 181, at 468 n.147 (2005) (citing decisions).

<sup>223</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006).

<sup>224</sup> Radin subscribes to the freedom of contract as a “core value” but argues extensively that the current system of adhesion contracting has eradicated this freedom because she sees a system of involuntary divestment of consumer rights. *See RADIN, supra* note 4, at 3, 19, 56. Kim briefly mentions that the economic duress defense protects the freedom of contract but does not explain why her proposed dilution of the duress defense is consistent with this core value. Kim, *supra* note 4, at 278. Dawson makes no mention of the freedom of contract. Freedom of contract, however, can co-exist with adhesion contracts. *See Bailey v. Lincoln Gen. Ins.*, 255 P. 3d 1039, 1047 (Colo. 2011) (insurance policies); *see also Forecast Homes, Inc. v. Steadfast Ins.*, 105 Cal. Rptr. 3d 200, 210 (Cal. Ct. App. 2010).

<sup>225</sup> Dawson states that the decisions are generally “hostile” to claims of economic duress and praises those “few” cases that are “receptive” to the defense. Dawson, *supra* note 4, at 244. In point of fact, the cases that Dawson criticizes as failing to understand “the realities on the ground” analyze at length—and correctly apply—the legal standards for economic duress. *See id.* at 244 n.64 (citing decisions). As for the three cases that Dawson cites as being “receptive,” Dawson acknowledges that the Texas case was reversed on appeal. *See In re RLS Legal Sol., LLC*, 156 S.W.3d 160 (Tex. App. 2005), *rev’d*, 221 S.W.3d 629, 632 (Tex. 2007). In the Alabama case cited, the court “made no findings of fact” and therefore it was impossible to tell if economic duress was present at all. *Ex parte Early*, 806 So. 2d 1198, 1202 (Ala. 2001). The only valid citation he provides is a Massachusetts case, *ITT Commercial Fin. Corp. v. Tyler*, No. 917660, 1994 WL 879497, at \*5-7 (Mass. Super. Ct. Aug. 10, 1994), which addresses a common pattern of economic duress.

<sup>226</sup> *See Mandavia v. Columbia Univ.*, 912 F. Supp.2d 119, 128 (S.D.N.Y. 2012).

<sup>227</sup> *See RESTATEMENT, supra* note 99, at § 7.

have ratified the contract if it is voidable, but not if it is “void.” Furthermore, a good faith purchaser may acquire good title to property if he takes it from one who obtained voidable title by duress but not if he takes it from one who obtained “void title” by duress.<sup>228</sup>

This decision is at the election of the victim, who might decide that notwithstanding the offeror’s coercion, the victim desires the freedom of contract to ratify the transaction.<sup>229</sup> Thus, courts have said, “[a] party may ratify a contract or release entered into under duress by ‘intentionally accepting benefits under the contract.’”<sup>230</sup> Indeed, courts have gone so far as to say that “[a] party who fails to promptly challenge an agreement on the ground of duress waives the defense.”<sup>231</sup>

Sound reasons exist why a contract induced by economic duress is voidable and not void. “[J]ust as in the case of fraud, mistake, undue influence, and other invalidating causes, there is an actual and intended expression of assent by the victim to the transaction in question, [even] though [how] . . . the assent was obtained make[s] it inequitable to [mandate] the enforcement of the resulting bargain.”<sup>232</sup> Therefore, based on the external acts of the parties, which is the basis for the contract, the requisites for a binding agreement are present if the offeree chooses to accept the deal and withdraw his earlier manifested non-concurrence.<sup>233</sup> On the other hand, if the victim of duress changes his mind and wishes to obtain the benefit of the contract imposed by the other party, a rule disallowing this choice would rob the offeree of his freedom of contract to ratify the agreement.

The above discussion is also in line with the rule that when a serious question exists about the validity of a contract, the agreement should be voidable instead of void whenever possible. In a related area, courts have said, “[i]n circumstances where public policy imposes limitations on the freedom of contract, [courts] are

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<sup>228</sup> *Id.* at § 174 cmt. B, cmt. d; see also LORD & WILLISTON, *supra* note 130, at § 71:8 (stating the general rule that a contract procured through duress is “voidable” and not “void”). The authorities do provide that an act of physical duress could render an arbitration agreement void, but such allegations are extremely rare. See *Farnsworth v. Towboat Nantucket Sound, Inc.*, 790 F.3d 90, 97 (1st Cir. 2015).

<sup>229</sup> See *Anselmo v. Mfrs. Life Ins.*, 771 F.2d 417, 420 (8th Cir. 1985); see also *DiMartino v. City of Hartford*, 636 F. Supp. 1241, 1252 (D. Conn. 1986); *Willms Trucking Co., v. JW Constr. Co.*, 442 S.E.2d 197, 202 (S.C. Ct. App. 1994).

<sup>230</sup> *VKK Corp. v. Nat’l Football League*, 244 F.3d 114, 123 (2d Cir. 2001) (quoting *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989)).

<sup>231</sup> *Acquire v. Canada Dry Bottling*, 906 F. Supp. 819, 828 (E.D.N.Y. 1995); see also *New Orleans Flooring Supply, Inc. v. Kentile Floors, Inc.*, No. 93 Civ. 8158, 1994 WL 97505, at \*2 (S.D.N.Y. Mar. 18, 1994) (“A contract signed under duress is not void but voidable, and a party must move quickly or the defense is deemed waived and the contract ratified”); *Port Chester Elec. Constr. Corp. v. Hastings Terraces, Inc.*, 284 A.D. 966, 967 (N.Y. App. Div. 1954).

<sup>232</sup> LORD & WILLISTON, *supra* note 130, at § 71:8.

<sup>233</sup> 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:37 (4th ed. 1992) (“The only justification for enforcement of the modified undertaking . . . seems to be the apparent voluntariness of the promisor in freely uttering [his] new promise . . .”).



well-advised to wield a scalpel rather than a sledgehammer.”<sup>234</sup> Emphasizing freedom of contract policies, an Illinois court observed,

The courts are reluctant to restrict the freedom of citizens to make their own agreements. Declaring a contract void and unenforceable is a power the courts therefore exercise sparingly. An agreement will not be held void, as being contrary to public policy, unless it is “clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy or unless [it is] manifestly injurious to the public welfare.”<sup>235</sup>

All the above principles have equal resonance in the arbitral setting. Because arbitration agreements occupy such a central role in the American economy, they deserve “equal footing” on this issue.

Kim travels an unusual path on this “void/voidable” point. In her proposal, she states that “[u]nlike traditional duress, a finding of situational duress would render a contract void and not merely voidable.”<sup>236</sup> She indicates that consumers are “uniquely vulnerable” because of their great interest in the relevant product or service.<sup>237</sup> Therefore, the “contract” should be void because of the strong possibility that a consumer could be entrapped into contractual liability based on external conduct evidencing implied ratification.<sup>238</sup> This argument, however, is not persuasive. The better view is to leave the choice to the individual under the freedom of contract to seek out the proper advice and to affirm or disaffirm the original coercive transaction. Where the law allows the parties to make the transaction voidable, this choice holds out the possibility that parties can repair their bargain and lessens the potential for economic disruption, which is a policy objective equally pertinent to arbitration agreements.

#### *H. Duress and the “Necessaries of Modern Life”*

Radin is content to leave unexplained her statement that recipients could experience a form of duress “when presented with take it or leave it boilerplate in acquiring a necessity of life.”<sup>239</sup> Kim does not address whether her proposal covers the victim’s necessities. Under Dawson’s proposal, the coercion element is met when the actor’s proposal would cause the second party to “forego something that a reasonable person would deem necessary for modern life.”<sup>240</sup> Unfortunately,

<sup>234</sup> *Baugh v. Novak*, 340 S.W.3d 372, 384 (Tenn. 2011).

<sup>235</sup> *In re M.M.D.*, 820 N.E.2d 392, 399 (Ill. 2004) (quoting *H&M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E.2d 1177, 1180 (Ill. 2004)).

<sup>236</sup> Kim, *supra* note 4, at 266, 278.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 278.

<sup>239</sup> RADIN, *supra* note 4, at 275 n.2.

<sup>240</sup> Dawson, *supra* note 4, at 242. In a later passage, Dawson restates the proposed coercion element as what would would cause the victim to “forego some commodity that is necessary to live in the twenty-first century.” *Id.* at 244. The two versions differ in that the second test omits the requirement for a “reasonable” person’s deprivation and that it transforms the

Dawson does not explain the criteria for how a particular commodity would meet this standard. Does the phrase “necessary for modern life” refer to the usual legal definition of “necessaries?” Also, does he mean to include some or all of the following commodities that he appears to link to his standard, which include “internet service providers,” “public utility,” “hospital” services, “airline” service, “cellular phone” service, “brokerage for a retirement account,” “nursing home,” “cable television,” and “credit cards?”<sup>241</sup> Most importantly, how does Dawson’s proposal categorize arbitration agreements—do all or most of them come within the definition of “necessaries?”

Numerous problems exist with this element of Radin’s and Dawson’s proposed test. First, one accepted meaning of “necessaries” is “things that are indispensable to living,” which include “whatever food, medicine, clothing, shelter and personal services usually considered reasonably essential for the preservation of life.”<sup>242</sup> If Radin’s and Dawson’s intent is to rely on the accepted meaning of “necessaries,” then cellular phone service,<sup>243</sup> cable television service,<sup>244</sup> and personal computers<sup>245</sup> are outside the definition. Similarly, brokerage for retirement accounts and breakfast cereals should also be excluded because they are not “necessary for modern life.”

A second, more liberal definition of “necessaries” also exists. This standard covers whatever is reasonably needed for subsistence, health, comfort and education, considering the person’s age, station in life and medical condition.<sup>246</sup> Excluded from this definition is anything purely ornamental, anything solely for pleasure, anything the person already has been furnished, anything that concerns his estate or business beyond personal needs, and borrowed money.<sup>247</sup> This second standard goes beyond the first one by considering the person’s personal attributes. If this standard is Radin’s and Dawson’s intent, do they propose that courts conduct a searching inquiry into the victim’s personal needs and station in life so that the very well-off could be entitled to more protection than the average person? In this regard, case law provides that a “necessary” item for a multi-millionaire’s lavish lifestyle could

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concept “modern life” into the “twenty-first century.” This Article assumes that Dawson meant to incorporate a “reasonable person’s” perspective for both versions.

<sup>241</sup> *Id.* at 242-47.

<sup>242</sup> *Necessaries*, BLACK’S LAW DICTIONARY 1192 (10th ed. 2014).

<sup>243</sup> See *Halprin v. Verizon Wireless Serv.*, No. 07-4015, 2008 WL 961239, at \*7 (D.N.J. Apr. 8, 2008); see also *Stiener v. Apple Comput., Inc.*, 556 F. Supp. 2d 1016, 1027 (N.D. Cal. 2008) (finding iPhone is not a necessity); *Riensch v. Cingular Wireless LLC*, No. C06-1325Z, 2007 WL 3407137, at \*8 (W.D. Wash. Nov. 9, 2007); *Dreyfus v. Ameritech Mobile Commc’ns.*, 700 N.E.2d 162, 167 (Ill. App. Ct. 1998); *Butcher v. Ameritech Corp.*, 727 N.W.2d 546, 554 (Wis. Ct. App. 2006).

<sup>244</sup> See *Smith v. Prime Cable of Chi.*, 658 N.E.2d 1325, 1333 (Ill. App. Ct. 1995).

<sup>245</sup> See *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1202 (C.D. Cal. 2006).

<sup>246</sup> See *Necessaries*, *supra* note 242, at 1192; see also *Walter v. Palisades Collection, LLC*, Civil Action No. 06-378, 2011 WL 1666869, at \*4 (E.D. Pa. May 2, 2011) (noting that this standard is broader than the bare essentials needed “to hold body and soul together”).

<sup>247</sup> See *Necessaries*, *supra* note 242, at 1192; see also *Walter*, 2011 WL 1666869, at \*4.

include a chauffeured limousine, a private chef, a mink coat, and even whale meat and caviar.<sup>248</sup>

If the second standard is the intent, the intrusion into the individual's lifestyle and the potential for defendants to harass plaintiffs about their life choices is plain. In any event, courts should construe "necessaries" "as closely as possible" (just like economic duress itself) so as to preclude opening the door to a broad class of contracts for items that are merely useful and to avoid destroying the "necessaries" classification altogether.<sup>249</sup> By leaving the concept "deemed necessary" so open-ended, Radin and Dawson provide inadequate guidance to the bench and bar on covered versus uncovered commodities, a problem equally pertinent to arbitration agreements.

### *I. Effect of the Offeror's Good Faith, Legally Permissible Negotiating Position*

Courts accept that a wrongful threat for purposes of economic duress is lacking if the actor has a "good faith belief" that his negotiating position is a "plausible one" under the circumstances.<sup>250</sup> The merchant's mere use of non-negotiable arbitral boilerplate is morally blameless because courts properly reason that "the very ubiquity of the practice precludes a conclusion that the use of a nonnegotiable contract, on its own, is in any way unethical."<sup>251</sup> Similarly, most courts say "it is not duress to threaten to take action which is legally permissible."<sup>252</sup> These principles stem from the concept that "[a]n intentional wrongful act is an essential element of a claim for duress."<sup>253</sup> Radin gives little attention to this doctrinal point about the economic duress defense. While Kim mentions the wrongful act requirement of duress at length in her article,<sup>254</sup> she does not connect it with arbitration contracts.

<sup>248</sup> See *Necessaries*, *supra* note 242, at 1192; see, e.g., *Gimbel Bros. v. Pinto*, 145 A.2d 865 (Pa. Super. Ct. 1958) (mink coat); *Bloomingdale Bros. v. Benjamin*, 112 N.Y.S. 2d 33 (N.Y. Civ. Ct. 1951) (whale meat and caviar).

<sup>249</sup> See 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 9:19 (4th ed. 2009).

<sup>250</sup> See, e.g., *Happ v. Corning, Inc.*, 466 F.3d 41, 45 (1st Cir. 2006); *Zebedeo v. Martin E. Segal Co.*, 582 F. Supp. 1394, 1417 (D. Conn. 1984) ("[W]here one party insists upon a contractual provision, which it honestly believes itself entitled to, unless such belief is patently unreasonable, conduct cannot be wrongful, and thus, cannot constitute duress."); *River Bank Am. v. Diller*, 45 Cal. Rptr. 2d 790, 804 (Cal. Ct. App. 1995) (finding that duress will be absent merely because one party in good faith mistakenly takes a different view of contract rights from the other party).

<sup>251</sup> *Vasquez v. Greene Motors, Inc.*, 154 Cal. Rptr. 3d 778, 787 (Cal. Ct. App. 2013).

<sup>252</sup> *Kammerman v. Steinberg*, 891 F.2d 424, 432 (2d Cir. 1989) (quoting *Hammelburger v. Foursome Inn Corp.*, 431 N.E.2d 278, 285 n.4 (N.Y. 1981)); see also *Redmon v. McDaniel*, 540 S.W.2d 870, 872 (Ky. 1976) ("[I]t is not duress to threaten to do what one has a legal right to do, nor is it duress to threaten to take any measure authorized by law and the circumstances of the case."); cf. *City of Scottsbluff v. Waste Connections of Neb., Inc.*, 809 N.W.2d 725, 744 (Neb. 2011) ("Lawful coercion becomes impermissible when employed to support a bad-faith demand: one that the party asserting it knows (or should know) to be unjustified.")

<sup>253</sup> *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 664 S.E.2d 8, 12 (N.C. Ct. App. 2008).

<sup>254</sup> *Kim*, *supra* note 4, at 276-78, 281-82.

The proceeding discussion focuses on the Dawson proposal, which comes closest of the three commentaries to addressing this connection.

One of Dawson's main concerns about arbitration agreements is to protect employees from perceived employer overreaching.<sup>255</sup> Contrary to Dawson's assertions, the near-unanimous weight of authority says it is *not* economic duress where an employer refuses to grant or continue a person's employment unless the employee agrees to waive his statutory right to litigate an employment dispute in court.<sup>256</sup> As a New Jersey court remarked, "courts that have considered this issue have consistently determined that the economic coercion of obtaining or keeping a job, without more, is insufficient to overcome an agreement to arbitrate statutory claims."<sup>257</sup> Along the same lines, commentators have confirmed that "[d]uress claims also fail because employers have the legal right to mandate arbitration as a condition of employment, and employees have the free will to refuse employment or quit if they do not wish to be bound."<sup>258</sup>

Furthermore, Dawson is incorrect that the employee will be the victim of duress where the employer imposes the choice of continuing employment or "waiv[ing] her right to litigate employment disputes before a court or an administrative agency."<sup>259</sup> As courts have commented, "[a] prospective, voluntary agreement to proceed to arbitration with a [statutory right of action] does *not* amount to an employee 'foregoing,' or waiving, statutory rights."<sup>260</sup> Rather, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"<sup>261</sup> Even more misleading is Dawson's argument that the employer commits a wrongful act in compelling a prospective employee to choose between employment and waiver of the ability to litigate a possible dispute in court.<sup>262</sup> Courts have said, "[i]f [the applicant] disagreed with anything contained in the application she was free to simply look elsewhere for employment. . . . When a party . . . voluntarily *agrees* to something in

<sup>255</sup> See Dawson, *supra* note, 4, at 243 (commenting extensively).

<sup>256</sup> *Id.* (citing this circumstance as constituting duress). See generally Jay M. Zitter, Annotation, *What Constitutes Duress by Employer or Former Employer Vitiating Employee's Release of Employer from Claims Arising out of Employment*, 79 A.L.R. 6th 377 (2012).

<sup>257</sup> See Quigley v. KPMG Peat Marwick, LLP, 749 A.2d 405, 412 (N.J. Super. Ct. App. Div. 2000) (citing cases).

<sup>258</sup> Stephen A. Plass, *Mandatory Arbitration as an Employer's Contractual Prerogative: The Efficiency Challenge to Equal Employment Opportunity*, 33 CARDOZO L. REV. 195, 220 (2011); see Cooper v. MRM Inv., 367 F.3d 493 (6th Cir. 2004) (holding that the district court erred in refusing to compel arbitration where an employee was required to sign arbitration agreement as a condition of employment); see also Hathaway v. Gen. Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1986) ("[W]hen the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit.").

<sup>259</sup> Dawson, *supra* note 4, at 243.

<sup>260</sup> EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500, 503 (E.D. Mich. 1997), *rev'd on other grounds*, 177 F.3d 448 (6th Cir. 1998).

<sup>261</sup> Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626–28 (1985)).

<sup>262</sup> See Dawson, *supra* note 4, at 244–45.

an attempt to obtain employment they are not being ‘forced’ to do anything.”<sup>263</sup> Therefore, Dawson’s argument that the waiver of a statutory right is equal to an agreement to arbitrate is unconvincing.

Dawson has overlooked his best counter-argument in addressing the employee discharge scenario. In a widely cited illustration, the *Restatement (Second) of Contracts* indicates that the threat of employee discharge can constitute duress where

A makes a threat to discharge B, his employee, unless B releases a claim that he has against A. The employment agreement is terminable at the will of either party, so that the discharge would not be a breach by A. B, having no reasonable alternative, releases the claim. A’s threat is a breach of his duty of good faith and fair dealing, and the release is voidable by B.<sup>264</sup>

According to the case law, however, this illustration applies only where a contract exists between A and B, and does not apply when there is employment at will.<sup>265</sup> The majority rule is that employment at will unaccompanied by a bilateral contract does not include the implied covenant of good faith and fair dealing.<sup>266</sup> Because the vast majority of American workers operate under employment at will,<sup>267</sup> the *Restatement* illustration would provide only limited assistance to Dawson’s argument. Another obstacle to an employee’s successful invocation of economic duress is that “people want to eat first and consider legal and philosophical implications later. The average worker in need of a job is unlikely at the outset to balk at an arbitration clause.”<sup>268</sup> It bears emphasis, however, that duress should be absent even with employment at will because all workers inherently face such pressure with any decision to leave or stay at his job if a worker is dissatisfied with his employer.

Dawson next argues it will be economic duress where a merchant refuses to provide the consumer an “essential service” unless the consumer agrees to arbitrate

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<sup>263</sup> *Frank’s Nursery & Crafts*, 966 F. Supp. at 504 (emphasis in original); accord *Cooper*, 367 F.3d at 504.

<sup>264</sup> RESTATEMENT, *supra* note 99, at § 176 cmt. e, illus. 11.

<sup>265</sup> See, e.g., *DeJean v. United Airlines, Inc.*, 839 P.2d 1153, 1160 (Colo. 1992) (noting the *Restatement* illustration concerns a threat to breach a contract).

<sup>266</sup> See *Suburban Hosp., Inc. v. Dwiggins*, 596 A.2d 1069, 1077 (Md. 1991) (“To the extent that we are asked to impose a general requirement of good faith and fair dealing in at-will employment situations, we decline the invitation. ‘[A] small number of courts have implied a covenant of good faith and fair dealing into employment contracts . . . . The majority of courts confronting the issue, however, have refused on both policy and analytical grounds to imply any version of the covenant of good faith and fair dealing into [at will] employment contracts.’”) (quoting Peter Stone Partee, Note, *Reversing the Presumption of Employment at Will*, 44 VAND. L. REV. 689, 699 (1991)); see also *Green v. Medco Health Sols. of Tex., LLC*, 947 F. Supp. 2d 712, 732 (N.D. Tex. 2013) (“The general rule provides that a duty of good faith and fair dealing cannot arise from an at-will employment relationship.”).

<sup>267</sup> E.g., Marian K. Riedy & Kim Sperduto, *At-Will Fiduciaries? The Anomalies of a “Duty of Loyalty” in the Twenty-First Century*, 93 NEB. L. REV. 267, 268 (2014).

<sup>268</sup> Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1387 (1991).

all disputes arising from a non-negotiable contract.<sup>269</sup> To the contrary, a provider of essential or necessary services can properly employ an adhesion contract that mandates the consumer accept arbitration. A couple prime examples are pre-dispute arbitration agreements for nursing home<sup>270</sup> or doctor-patient<sup>271</sup> services. Indeed, it would violate the FAA for a state to fence off essential or necessary consumer services from the FAA. As stated by the Supreme Court, “when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”<sup>272</sup> On the other hand, a particular contract for necessary services can result from duress under the particular circumstances.<sup>273</sup>

The above employee discharge scenario shows the linkage between the bargaining between two economic actors and freedom of contract. Most instances, such as where the employer gives the employee the choice of discharge or accepting an arbitration agreement, or where a merchant asks the consumer to decide between forgoing a purchase or accepting arbitration as part of the sale, concern valid free market activity. Generally, these circumstances are the antithesis of duress because they merely ask the offeree to select between “perfectly legitimate alternatives.”<sup>274</sup> “Furthermore, a seller’s refusal to perform unless a buyer signs an arbitration agreement is not economic duress against the latter, at least where the buyer will not suffer a forfeiture by refusing to sign, since the seller has the legal right to refuse to sell under that circumstance.”<sup>275</sup>

Finally, Dawson argues that there is a line of cases that “[states] a company’s status as the sole supplier of a particular product may subject the company to economic duress claims in certain circumstances.”<sup>276</sup> Dawson misreads these cases.

<sup>269</sup> See Dawson, *supra* note 4, at 243.

<sup>270</sup> *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012).

<sup>271</sup> *Buraczynski v. Eyring*, 919 S.W.2d 314, 318 (Tenn. 1996).

<sup>272</sup> *Brown*, at 1203-1204 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)); see also *Buraczynski*, 919 S.W.2d at 318 (finding that doctor-patient arbitration agreement in an adhesion contract not automatically unenforceable under the Tennessee Uniform Arbitration Act).

<sup>273</sup> Cf. *Covenant Health & Rehab. of Picayune, LP v. Lumpkin*, 23 So. 3d 1092, 1098 (Miss. Ct. App. 2009) (recognizing this possibility).

<sup>274</sup> *LORD & WILLISTON*, *supra* note 130, at § 71:14.

Simply because the alleged victim is faced with a variety of options, none of which is especially good and, indeed, all of which are bad, does not give rise to duress; as long as there are some reasonable, though unpalatable, alternatives, the alleged victim has a choice, and duress will not be found.

*Id.* at §71:40.

<sup>275</sup> 6 C.J.S. *Arbitration* § 30 (2015). The seller’s right to refuse to sell is subject to the antitrust laws, though. See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (“In absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . . .”); see also *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1358 (Fed. Cir. 1999).

<sup>276</sup> Dawson, *supra* note 4, at 245-47.

Instead, they stand for the accepted doctrine that “a threatened breach constitutes duress where the failure to receive the promised performance will result in irreparable injury to the business.”<sup>277</sup> To illustrate this point, economic duress will be absent where party A (without otherwise being oppressive or abusive) threatens party B that A will exercise rights that are legally available to A.<sup>278</sup> No reason exists why the rules cited above should differ with an arbitration agreement.

*J. Availability of an Alternative Remedy*

Radin’s proposal to expand the duress defense does not satisfactorily accept the consistently applied rule that if the purported victim has the alternative of “an adequate legal remedy,” economic duress is absent.<sup>279</sup> The same critique applies to Kim’s proposal<sup>280</sup> and Dawson’s proposal<sup>281</sup> for economic duress dilution.

Case law indicates that the claimant must show that he had no feasible alternative legal remedy as an element of the action or defense of economic duress.<sup>282</sup> The prevailing rule is that,

[i]n making the determination whether a plaintiff who asserts a duress claim had a reasonable alternative available, the courts employ an objective test that considers all of the circumstances surrounding the

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<sup>277</sup> LORD & WILLISTON, *supra* note 130, at § 71:41. Compare *Thomas Constr. Co. of Mo. v. Kelso Marine, Inc.*, 639 F.2d 216, 220 n.4 (5th Cir. 1981) (a general contractor in executing a purchase order was under economic duress in that the only alternative source of concrete would be for it to set up its own batch plant and such would be economically prohibitive), with *In re Nat’l Steel Corp.*, 316 B.R. 287, 310 (Bankr. N.D. Ill. 2004) (finding that a sole supplier’s mere refusal to deal with a customer because the customer will not accept the supplier’s terms is not economic duress).

<sup>278</sup> See, e.g., *Choksi v. Shah*, 8 So. 3d 288, 293-94 (Ala. 2008) (“It is never duress to do that which a party has a legal right to do.”) (quoting *Neuberger v. Preferred Accident Ins. Co.*, 89 So. 90, 92 (Ala. Ct. App. 1921)). But see *Richards v. Allianz Life Ins. of N. Am.*, 62 P.3d 320, 329 (N.M. Ct. App. 2002) ([W]hile a threat by a party not to perform a contractual duty is not by itself improper, it may be found improper if combined with a threat which is extortionate, results in a forfeiture, or is made for purposes unrelated to the contract, such as inducing the recipient to make a separate contract.”).

<sup>279</sup> See RADIN, *supra* note 4, at 151-52. Compare *Cabot Corp. v. AVX Corp.*, 863 N.E.2d 503, 514 (Mass. 2007) (“[C]ourts have consistently held that the presence of an adequate legal remedy undermines claims of economic duress.”) (quoting *Ismert & Assocs., Inc. v. New England Mut. Life Ins.*, 801 F.2d 536, 549 (1st Cir. 1986) (Breyer, J., concurring)), with *Nelson v. Stanley Blacker, Inc.*, 713 F. Supp. 107, 109 (S.D.N.Y.1989) (“In order to prevail on a claim of economic duress, plaintiff must show, *inter alia*, that he had available no legal remedies to avoid the duress.”).

<sup>280</sup> See Kim, *supra* note 4, at 277, 281-84, 286.

<sup>281</sup> See Dawson, *supra* note 4, at 242-43 (mentioning the “no reasonable alternative” test but failing to provide any details on its scope).

<sup>282</sup> See, e.g., *Totem Marine & Tug Barge, Inc. v. Alaska Pipeline Serv.*, 584 P.2d 15, 22 (Alaska 1978) (“Thus, in order to avoid a contract, a party must also show that he had no reasonable alternative to agreeing to the other party’s terms, or, as it is often stated, that he had no adequate remedy if the threat were to be carried out.”); see also John Dalzell, *Duress by Economic Pressure* (pt. 2), 20 N.C. L. REV. 341, 369-73, 378-82 (1942) (citing Radich v. Hutchins, 95 U.S. 210, 213 (1877)).

particular transaction. Thus, whether a contract should be voidable because of duress depends on whether the plaintiff, in addition to either doing what the defendant demanded or not doing it, had a reasonable third option, and if so, whether a reasonably prudent person would have taken that available option.<sup>283</sup>

For any goods or services, where a party seeks contractual rescission because of economic duress, such a plaintiff has the reasonable alternative that it can immediately go to court and seek preliminary injunctive relief followed by a declaratory judgment on the merits.<sup>284</sup> Although resorting to the courts might not be an adequate alternative where the purported victim's immediate business or property interests are at stake, the fact remains that plaintiffs can and do invoke these alternative remedies in many contexts with little, if any, prejudicial delay.

This doctrine is further related to the principle that time pressure is frequently a necessary element of the coercion. Case law says, “[d]uress will not prevail to invalidate a contract entered into with full knowledge of all the facts, *with ample time* and opportunity for investigation, consideration, consultation, and reflection.”<sup>285</sup> Similarly, duress will be absent where the plaintiff had the opportunity to consult with counsel before entering into the allegedly coercive contract.<sup>286</sup> The burden is on the complaining party to show it lacked this opportunity.<sup>287</sup> Even if one accepts the dubious argument that arbitration agreements are inherently coercive, nothing about arbitration agreements indicates that they should operate under different legal standards.

Should the increasing prevalence of electronic contracting and similar innovations result in a different legal test for arbitration agreements? Kim argues that a consumer encountering a rolling contract lacks a sufficient legal alternative to reject the terms and to return the product.<sup>288</sup> With a “rolling contract,” such as for computer software, where the box containing these goods has additional terms, these post-purchase terms can be binding after the purchaser has reviewed them after the purchase.<sup>289</sup> The contract is “rolling” because the effect of the transaction is to delay

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<sup>283</sup> LORD & WILLISTON, *supra* note 130, at § 71:14.

<sup>284</sup> See *Cabot Corp.*, 863 N.E.2d at 511; *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1, 8 (D. Mass. 2004) (“[A]bsent compelling circumstances, the availability of a reasonable alternative, such as a legal or administrative remedy, will defeat a claim of economic duress.”).

<sup>285</sup> *In re Nat'l Steel Corp.*, 316 B.R. 287, 310 (Bankr. N.D. Ill. 2004) (emphasis added) (quoting *Clement v. Buckley Mercantile Co.*, 137 N.W. 657, 661 (Mich. 1912)); see also *Hopkins v. NewDay Fin., LLC*, Civ. No. 07-3679, 2008 WL 2654635, at \*2 (E.D. Pa. June 30, 2008) (finding that employees informed that their employer would terminate their employment if they failed to sign an agreement to accept arbitration were under severe time pressures when they signed the agreement).

<sup>286</sup> See *Carlile v. Snap-on Tools*, 648 N.E.2d 317, 323 (Ill. App. Ct. 1995); see also *Degenhardt v. Dillon Co.*, 669 A.2d 946, 950-51 (Pa. 1996).

<sup>287</sup> See *Nelson v. Stanley Blacker, Inc.*, 713 F. Supp. 107, 109 (S.D.N.Y. 1989) (“In order to prevail on a claim of economic duress, plaintiff must show, *inter alia*, that he had available no legal remedies to avoid the duress.”).

<sup>288</sup> Kim, *supra* note 4, at 283-84.

<sup>289</sup> *Id.* at 279.



the contract formation until the buyer has reviewed the terms and decided whether they are acceptable.<sup>290</sup> Where the buyer timely objects and rejects the goods, he can return them and obtain a refund.<sup>291</sup> Moreover, “a person who voluntarily declines to take with him a box containing important materials relating to the product he purchased must be treated as though he had received the box (and the materials in it).”<sup>292</sup> Absent a purchaser’s timely objection and return of the goods, the terms become binding regardless of his subjective assent (or non-assent) to those terms.<sup>293</sup>

As can be seen from the above summary, while there is certainly complexity and new ways of applying common-law concepts of offer and acceptance to a rolling contract, there is no hint of threats, force, coercion, or similar forms of oppression against the consumer in the usual circumstances. “While new commerce on the Internet [and elsewhere] has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”<sup>294</sup> Because economic duress cannot be based on mere “acquiescence,”<sup>295</sup> Kim is incorrect when she argues that “[t]he company is forcing the consumer into the contract and the consumer acquiesces in order to avoid forfeiture of a vested interest.”<sup>296</sup> Therefore, the standard concepts of economic duress are applicable to arbitral agreements and no persuasive legal reason exists to accept the proposition that rolling contracts are automatically reflective of improper economic coercion.

#### *K. Ratification of Economic Duress*

Ratification issues commonly arise with contentions that the putative victim has ratified (i.e., condoned) the original coercive agreement. The essential elements of ratification are the removal of duress and the alleged victim’s intent to ratify<sup>297</sup> where at the time of the act the victim had full knowledge of the facts and the capability of acting freely.<sup>298</sup> The victim’s ratification of a contract initially induced through duress can occur in three different ways: (1) intentionally accepting contractual benefits; (2) acquiescing in the contract for a substantial time after receiving the opportunity to avoid it; or (3) acting upon the contract such as by performing under it or acknowledging it.<sup>299</sup> Radin and Dawson leave out whether they accept the standard “ratification doctrine” and its consequences. Kim implicitly

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<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Norcia v. Samsung Telecomms. Am., LLC*, No. 14–CV–00582–JD, 2014 WL 4652332, at \*16 (N.D. Cal. Sept. 18, 2014).

<sup>293</sup> *Id.*; see also John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35, 37–38 (2012) (explaining “rolling contracts”; extensive analysis of cases).

<sup>294</sup> *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 124 (2d Cir. 2012) (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004)) (analyzing rolling contracts).

<sup>295</sup> See *Dunes Hosp., LLC v. Country Kitchen Int’l*, 623 N.W.2d 484, 491 (S.D. 2001).

<sup>296</sup> Kim, *supra* note 4, at 285.

<sup>297</sup> *United States v. McBride*, 571 F. Supp. 596, 613 (S.D. Tex. 1983).

<sup>298</sup> *Hous., Inc. v. Weaver*, 246 S.E.2d 219, 228 (N.C. Ct. App. 1978).

<sup>299</sup> *Cabot Corp. v. AVX Corp.*, 863 N.E.2d 503, 515 (Mass. 2007).

rejects this doctrine because she states that under her theory the contract would be void and not voidable.<sup>300</sup> Kim is correct that only “[a] contract that is voidable for duress may be ratified and affirmed.”<sup>301</sup>

The economic duress defense seeks to remedy injustice and not to create it.<sup>302</sup> Keeping this principle in mind, what this ratification doctrine requires is for the claimant to “complain promptly of the coercive acts that allegedly forced it into the contract” or else risk a finding that he has lost the ability to disclaim the contract.<sup>303</sup> In this way, the offeree disaffirming the contract “shortly” after its execution does his part to help ensure the stability and reliability of contracts and to dispel the doubts that could have surrounded the validity of the contract.<sup>304</sup> Further, the purported victim disaffirming the voidable contract must restore, “if possible,” the benefit to the offeror.<sup>305</sup> Arbitration contracts require the same protection to preserve the freedom of contract and the predictability of commercial transactions.

A possibility exists that Radin and Dawson would join Kim in rejecting the view that consumers could be held to ratify an otherwise onerous arbitration agreement. As with other writers,<sup>306</sup> Radin argues that boilerplate contracts shrink legal rights to the “vanishing point” and are only “purported contracts.”<sup>307</sup> Dawson argues that “a boilerplate agreement containing an arbitration clause is simply not a contract under state law” when there is an absence of true bargaining.<sup>308</sup> Notably, all three commentators cite no direct case law authority for these bold propositions.

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<sup>300</sup> See Kim, *supra* note 4, at 278.

<sup>301</sup> *Id.*; see also *Cabot*, 863 N.E.2d at 515; LORD & WILLISTON, *supra* note 130, at § 71:8 (stating general rule that contract procured through duress is “voidable” and not “void”).

<sup>302</sup> *Nixon v. Leitman*, 224 N.Y.S.2d 448, 468 (N.Y. Sup. Ct. 1962).

<sup>303</sup> *Cabot*, 863 N.E.2d at 516.

<sup>304</sup> *Id.* at 515; see also *VKK Corp. v. Nat’l Football League*, 244 F.3d 114, 123 (2d Cir. 2001) (discussing extensively this policy).

<sup>305</sup> See, e.g., *Consumer Health Info. Corp. v. Amylin Pharms., Inc.*, 54 F. Supp. 3d 1001, 1007 (S.D. Ind. 2014) (“[A] party claiming economic duress can effect a rescission only by promptly notifying the other party of an intent to rescind the agreement and restoring the consideration received.”); *Solomon v. FloWarr Mgmt., Inc.*, 777 S.W.2d 701, 705-06 (Tenn. Ct. App. 1989) (stating that persons seeking to rescind the contract must return or be ready, willing, and able to return the consideration); *Blanchard Press v. Aerosphere, Inc.*, 51 N.Y.S.2d 715, 720 (N.Y. Sup. Ct. 1944) (“One coerced into signing an agreement may rescind, but, to do so, must return the thing or benefit received thereunder.”); see also FARNSWORTH, *supra* note 136, at § 4:19.

<sup>306</sup> See, e.g., W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 541 (1971) (“But if one does pay attention to whether the supposedly necessary consents have been obtained in situations such as these, the conclusion is immediate that the standard form is not a contract.”).

<sup>307</sup> RADIN, *supra* note 4, at 3, 8, 10-12, 20, 22, 30, 158, 213.

<sup>308</sup> Dawson, *supra* note 4, at 239. Dawson further states, “The significant issue is whether the ‘contracty thing’ containing the arbitration clause can even be classified as a contract,” and “if the agreement cannot be negotiated or altered in any way--then a court could hold that no valid contract was ever formed.” *Id.* at 238.

While Radin,<sup>309</sup> Kim,<sup>310</sup> and Dawson<sup>311</sup> each rely on a 1970 law review article advocating that an adhesion agreement is more of a product than a contract,<sup>312</sup> it is clear that this idea is so far outside the mainstream that no court has found this conception persuasive.<sup>313</sup> Radin and Dawson also do not cite the established definition of a “contract” (“[A]n agreement, obligation, or legal tie whereby a party binds itself, or becomes bound, expressly or impliedly, to pay a sum of money or to perform or omit to do some certain act or thing”)<sup>314</sup> or explain why it does not apply to adhesion contracts.<sup>315</sup> Indeed, “contracts of adhesion are well accepted in the law and routinely enforced.”<sup>316</sup> Numerous cases hold that adhesion contracts meet the test for valid offer and acceptance.<sup>317</sup> Further, as another commentator observes, “[w]hile some writers have suggested that standard form contracts are not contracts at all but rather products that accompany goods and services, courts are reluctant to adopt that view, at least explicitly.”<sup>318</sup>

Accordingly, it is ironic that Radin, Kim, and Dawson each maintain that adhesion contracts with oppressive arbitration agreements are not contracts, but that it is also necessary for the law to expand the economic duress defense to relieve consumers of liability under these compelled instruments. What each author overlooks is on the one hand, if the document does not represent a contract and the agreement is void, then economic duress is not necessary to avoid liability because

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<sup>309</sup> See RADIN, *supra* note 4, at 100.

<sup>310</sup> See Kim, *supra* note 4, at 267.

<sup>311</sup> See Dawson, *supra* note 4, at 238.

<sup>312</sup> Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 143 (1970).

<sup>313</sup> Only two cases even mentioned this forty-five year old article and neither case relied on Professor Leff’s theory as the *ratio decidendi*. See *Brokers Title Co., v. St. Paul Fire & Marine Ins.*, 610 F.2d 1174, 1179-81 (3d Cir. 1979) (stating that a contract bargained between parties of relatively equal strength was not an adhesion contract); *Spychalski v. MFA Life Ins.*, 620 S.W.2d 388, 393-96 (Mo. Ct. App. 1981) (“A policy of insurance as a contract of adhesion will be given effect according to the objectively reasonable expectations of the insured or beneficiary as to the terms.”). Dawson and Radin also fail to mention that Leff undercut his own analogy regarding consumer contracts. See Leff, *supra* note 312, at 157 (“A consumer contract is not a thing, at least not the way cars, cows and couches are things. . . .”). In fact, Leff candidly observed, “[T]he economics of the mass distribution of goods make [never enforcing adhesion contracts] a commercially absurd answer.” *Id.* at 144.

<sup>314</sup> *Kosmicki v. State*, 652 N.W.2d 883, 893 (Neb. 2002).

<sup>315</sup> To her credit, Radin acknowledges that the law does consider boilerplate to be a valid method of contract formation even as she disagrees with this conclusion. See RADIN, *supra* note 4, at 12, 30.

<sup>316</sup> *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 356 (Cal. Ct. App. 2007).

<sup>317</sup> *E.g.*, *Energy Home v. Peay*, 406 S.W.3d 828, 834, 836 (Ky. 2013) (stating that adhesion agreement is consistent with valid “offer and acceptance.”); *Pietroske, Inc. v. Globalcom, Inc.*, 685 N.W.2d 884, 888 (Wis. Ct. App. 2004) (“Nothing in the contract prevented a true meeting of the minds.”).

<sup>318</sup> Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1314 (2005).

with a void contract there are no liabilities.<sup>319</sup> On the other hand, if the authors are saying that a lenient standard of economic duress is needed, then these commentators are accepting the possibility there can be a contract resulting from such circumstances. A transaction cannot be both a contract and a non-contract at the same time.

The common-law ratification doctrine treats both parties fairly, facilitates arbitration, and enhances the commercial law system. It is best to leave it to the individual under the freedom of contract to seek out the proper advice and to affirm or disaffirm the original coercive transaction to meet the consumer's best interests. At the same time, under the above-cited requirement that the victim make restitution to the other party "if possible," fairness requires that the individual claimant make restitution to the merchant in the interests of justice. One would predict that many, if not most, private parties would be unwilling to sacrifice the benefits of the contract that could later be seen as the product of economic duress simply because of the inclusion of an arbitration remedy.

#### *L. Conversion of Adhesion Contracts into Instruments of Duress*

The practical effect of the three authors' reformulated duress doctrines is that they have converted all adhesion contracts with pre-dispute arbitration clauses into instruments of duress. Their definition of an improperly coercive contract—that it is a take-it-or-leave-it deal requiring consent to a non-negotiable contract or forgoing certain benefits—is actually the definition of a contract of adhesion.<sup>320</sup> In point of fact, however, case law states that an adhesion contract does *not* necessarily implicate economic duress.<sup>321</sup> Similarly, another commentator rejects the argument that an adhesion contract with an arbitration clause is inherently coercive:

That is wrong. The consumer is free to put the pen down without signing the form. There is no duress in the typical "adhesion" contract. A consumer who contracts in such circumstances does so voluntarily. The

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<sup>319</sup> See 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:20 (4th ed. 2013) ("A promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor is often called a void contract."); 17A AM. JUR. 2D *Contracts* § 10 (2014) ("A void contract is no contract at all; it binds no one and is a mere nullity."); see also *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 258 (Mich. 2003) ("Where mutual assent does not exist, a contract does not exist."). If the contract does not exist, there is nothing for a court to "revise."

<sup>320</sup> Radin, Kim, and Dawson each contend that the contracts at issue are "contracts of adhesion." See RADIN, *supra* note 4, at 82-83, 147; Kim, *supra* note 4, at 267, 271; Dawson, *supra* note 4, at 239. The term "adhesion contract" refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis, without opportunity for bargaining and under such conditions that the "adherer" cannot obtain the desired product or service save by acquiescing in the form agreement. *Steven v. Fid. & Cas. Co.*, 377 P.2d 284, 297 (Cal. 1962).

<sup>321</sup> See *Griffith Labs. U.S.A., Inc. v. Pomper*, 577 F. Supp. 903, 906 (S.D.N.Y. 1984) ("Accordingly, even if [an employee] was asked to sign his contract with [the employer] on a 'take it or leave it' basis, it was not signed under duress and therefore remains valid.").

form may contain boilerplate terms which are unenforceable, but that does not make the contract any less voluntary.<sup>322</sup>

The three authors have discounted that “[adhesion contracts] are not inherently sinister and automatically unenforceable.”<sup>323</sup> With the bulk of contracts signed in this country being form contracts — “a natural concomitant of our mass production-mass consumer society” — any rule automatically invalidating adhesion contracts would be “completely unworkable.”<sup>324</sup> Because judges recognize that “the times in which consumer contracts were anything other than adhesive are long past,”<sup>325</sup> the authors’ unduly pro-claimant standard regarding arbitration agreements, which allow relatively free exercise of rescission for duress, would destabilize large sectors of the national economy.

#### *M. Duress and Monopolies*

Dawson notes that regional monopolies, such as public utilities or a hospital, often use contracts with mandated arbitration clauses.<sup>326</sup> Dawson advocates that when a court is asked to enforce these clauses, the “judge should apply the ‘no reasonable alternative test’ to hold that the consumer entered the contract for the essential good under duress and therefore no contract was ever actually formed.”<sup>327</sup>

Dawson’s concerns are not well founded. When an organization is a monopoly, its status is not per se illegal or improper under the antitrust laws.<sup>328</sup> The illegality arises only where the entity has acquired or maintained its strategic position, or sought to expand its market position, through proscribed restraints of trade.<sup>329</sup> Furthermore, when a utility charges a consumer the rate authorized by statute or rule, such as the directive of a public service commission, a lawful rate does not indicate duress. This conclusion finds support in the all-encompassing principle that “[i]t is

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<sup>322</sup> Ware, *supra* note 7, at 201 (responding to an argument by two other commentators that when a merchant presents to a consumer a form contract with an arbitration clause, the consumer has “no alternative” but to sign it because the duty to arbitrate is “imposed” on the consumer).

<sup>323</sup> Greenpoint Credit, LLC v. Reynolds, 151 S.W.3d 868, 874 (Mo. Ct. App. 2004) (quoting Hartland Comput. Leasing Corp. v. Ins Man, Inc., 770 S.W.2d 525, 527 (Mo. Ct. App. 1989)).

<sup>324</sup> *Id.* at 874-75.

<sup>325</sup> AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011). But contracts with mandatory arbitration clauses are not always adhesive. *See, e.g.*, Zaklit v. Glob. Linguist Sols., LLC, 53 F. Supp. 3d 835, 845-46 (E.D. Va. 2014) (holding that an employment contract is not an adhesion contract); Blackburn v. Ronald Kluchin Architects, Inc., No. 89203, 2007 WL 4340861, at \*4-5 (Ohio Ct. App. Dec. 13, 2007) (holding that a residential construction contract was not an adhesion contract).

<sup>326</sup> Dawson, *supra* note 4, at 245.

<sup>327</sup> *Id.*

<sup>328</sup> *See* Hatley v. Am. Quarter Horse Ass’n, 552 F.2d 646, 651-53 (5th Cir. 1977).

<sup>329</sup> *Id.*

never duress to do that which a party has a legal right to do.”<sup>330</sup> It is only where the utility charges a customer an illegal exaction, such as a discriminatory rate as compared with similarly situated consumers, will the payment reflect implied or even express duress.<sup>331</sup> Nothing about arbitral agreements counsels a different approach.

*N. Duress and Structures of Subordination and Social Inequalities*

Dawson argues that current duress doctrine focuses excessively on economic conditions and insufficiently on “the role law plays in creating and maintaining structures of subordination” and social “inequalities.”<sup>332</sup> Citing the works of Catharine A. MacKinnon, he also criticizes courts for giving insufficient attention to gender issues in light of the contention that the law favors “men over women.”<sup>333</sup> Dawson places particular emphasis on the writings of Orit Gan, who contends that judges should create a “broader, more complex duress doctrine that is sensitive to social inequality and context and that includes aggrieved parties’ experiences and perspectives.”<sup>334</sup>

Dawson overlooks the numerous cases that in fact deploy the same criteria he advocates should be used to define the scope of duress. These cases stand for the position that when deciding whether a party

was subject to duress or coercion in executing a contract, a court should take into consideration *all* of the circumstances surrounding the transaction, including, for example, the age, gender, educational level, mental, physical, and emotional health and business acumen and sophistication of the complaining party, as well as any prior dealings or other relationship, whether of affinity or of consanguinity, that may exist between the parties.<sup>335</sup>

While Dawson argues that the law fails to look beyond economic duress and should further examine social “inequalities,”<sup>336</sup> he omitted decisions applying the duress defense and stating that “[s]ocial or economic pressure illegally or immorally applied [also] may be sufficient.”<sup>337</sup> Under these decisions, the wrongfulness of

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<sup>330</sup> *Choksi v. Shah*, 8 So.3d 288, 294-95 (Ala. 2008) (quoting *Neuberger v. Preferred Accident Ins. Co.*, 89 So. 90, 92 (Ala. Ct. App. 1921)).

<sup>331</sup> *Tex. Power & Light Co. v. Doering Hotel Co.*, 147 S.W.2d 897, 905 (Tex. Civ. App. 1941), *aff’d*, 162 S.W.2d 938 (Tex. 1942).

<sup>332</sup> Dawson, *supra* note 4, at 243.

<sup>333</sup> *Id.* at 243-44.

<sup>334</sup> Gan, *supra* note 204, at 171.

<sup>335</sup> LORD & WILLISTON, *supra* note 130, at § 71:11 (emphasis added); *see also* *Rust v. Drexel Firestone Inc.*, 352 F. Supp. 715, 717 (S.D.N.Y. 1972).

<sup>336</sup> *See* Dawson, *supra* note 4, at 243 (citing Deborah Waire Post, *Outsider Jurisprudence and the “Unthinkable” Tale: Spousal Abuse and the Doctrine of Duress*, 26 U. HAW. L. REV. 469, 483 (2004)).

<sup>337</sup> *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1, 8 (D. Mass. 2004) (quoting *Int’l Underwater Contractors, Inc. v. New England Tel. & Tel. Co.*, 393 N.E.2d 968, 970 (Mass. App. Ct. 1979)).

duress includes going beyond mere economics where it violates the law, a contract, or morality.<sup>338</sup> Indeed, as referenced above, the “gender” of the victim is a specific judicial concern in determining the presence of duress.

The current doctrines more than adequately incorporate Dawson’s belief that an economic duress defense should take into account both the economic and non-economic aspects of the parties’ relationship from a broader societal perspective, including the moral aspects of the transaction and the victim’s “experiences and perspectives.”<sup>339</sup> Again, nothing about arbitration agreements should exempt them from this analysis.

#### CONCLUSION

“[T]he fundamental issue in duress cases is whether the statement which induced agreement is the type of offer . . . that the law should discourage as oppressive and thus improper.”<sup>340</sup> The authors’ low bar for economic duress as applied to arbitration agreements does not meet this standard. Their arguments violate foundational legal principles, including freedom of contract, that eliminate any real prospect that a state would adopt their doctrinal departures. The following reasons support rejection for their proposals.

First, the FAA’s wide ranging preemption provision and the courts’ strong enforcement of this policy render stillborn the authors’ suggested reforms to expand (more accurately to hollow out) the common-law duress defense to the enforcement of arbitral contracts. The existing common-law defense of duress is fair to both offerors and offerees as it strikes the proper balance between binding the buyer to the arbitral process he agreed to in the contract but prohibiting the seller from enforcing a bargain if he procured it through unduly coercive tactics.

Second, the proposals to dilute the economic duress defense undermine the predictability and reliability of contracts to the detriment of all buyers and sellers. Economic duress is present in almost all contract bargaining. Because of that business reality, and to avoid wholesale destabilization of various business sectors, the law must reserve the economic duress defense for extreme and extraordinary cases. Accordingly, this Article has established why sound public policy requires a narrow application of the economic duress defense in arbitration cases.

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<sup>338</sup> *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 792 N.E.2d 488, 494 (Ill. App. Ct. 2003) (“A demand is not duress unless it is ‘wrongful’ in the sense that it violates the law, a contract, or morality.”); *see also* Giesel, *supra* note 181, at 489 (collecting cases). A few courts hold otherwise on whether a wrongful act includes a morally wrong act. *See Dunes Hosp., LLC v. Country Kitchen Int’l*, 623 N.W.2d 484, 490-91 (S.D. 2001).

<sup>339</sup> Dawson, *supra* note 4, at 244 (citing Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171 (2013)).

<sup>340</sup> *Richards v. Allianz Life Ins. Co. of N. Am.*, 62 P.3d 320, 327 (N.M. Ct. App. 2002).