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COERCION IN CONTRACT LAW\*

*E. Allan Farnsworth\*\**

It was suggested that I might discuss the Restatement (Second) of Contracts, which was published less than a year ago.<sup>1</sup> Rather than deal with the Restatement Second as a whole, however, I thought it wiser to confine these remarks to some aspect of contract law and to deal with the impact of the Restatement Second on that aspect. I have chosen as a subject *coercion*, an aspect of contract law that is of central importance in a society that depends as heavily as does ours on individual choice. For the larger the role accorded to individual choice, the greater the significance of coercion in contracting.

The common law treats claims of coercion in contracting under the heading of duress. Over centuries, the law of duress has gradually been liberalized so that it is more broadly applicable. As the Supreme Court of Arkansas expressed it in 1938, there is "a progressive tendency toward a more liberal consideration of causes that would tend to avoid a contract" for duress.<sup>2</sup> I plan, first, to trace that "progressive tendency" as it is reflected in the Restatement Sec-

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\* This article is based on a Ben J. Altheimer Lecture, delivered on January 29, 1982. Parts of it are adapted from *Farnsworth on Contracts* (Little, Brown & Co. 1982) and are reproduced with permission of the holder of the copyright, E. Allan Farnsworth.

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1. Justice Robert Braucher was Reporter for roughly the first half of the project and the author was Reporter for the remainder.

2. *Perkins Oil Co. v. Fitzgerald*, 197 Ark. 14, 26-27, 121 S.W.2d 877, 883 (1938). The Arkansas Supreme Court recently has been critical of *Perkins*, saying that "it must be shown that there was a threat of some grievous wrong to establish duress." *Sims v. First Nat'l*

ond, and, second, to say a few things about the impact of these changes on allied areas of the law. Let us begin with an examination of the requirements for a claim of duress. Duress may take either of two forms: physical compulsion or threat.

Suppose that I put a pen in your hand and by sheer physical force move your hand so that it produces your signature on a contract with me. You are, in the picturesque phrase sometimes used, a "mere mechanical instrument" and your act (if we can call it "your act") does not result in a contract.<sup>3</sup> But such cases of duress by physical compulsion are rare, and I shall not discuss them further. Let us turn our attention to duress by threat.

Suppose that, instead of holding your hand and moving it by force, I tell you that if you do not sign a contract with me I will break your arm. You believe, with good reason, that I mean what I say and that I can do it. Seeing no other way out, you sign the contract. This is duress by threat. In contrast to the case where I moved your hand by physical force, your assent *is* effective to give rise to a contract. But it is a voidable contract—one that you can avoid ("rescind") if you reasonably promptly indicate your intention to do so and offer to make restitution of anything that you have already received from me under the contract. On avoidance, you are no longer bound by the contract and you are entitled to restitution of anything that I have already received from you under the contract. Needless to say, such cases of duress by *threat of physical harm* are almost as rare as cases of duress by *physical compulsion*. Of more practical interest are cases of duress by threat of *economic harm*.

For example, consider the following facts, taken from *Austin Instrument v. Loral Corporation*,<sup>4</sup> decided by the Court of Appeals of New York in 1971. A general contractor was awarded a six million dollar contract by the Navy for the production of radar sets. It then made a contract with a subcontractor to supply components.

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Bank, 267 Ark. 253, 260, 590 S.W.2d 270, 275 (1979). But this was said in a case of a threat by a third person.

3. See RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981) ("conduct . . . physically compelled by duress . . . is not effective as a manifestation of assent").

4. 29 N.Y.2d 124, 272 N.E.2d 533 (1971). The facts of the case have been simplified here. Austin's threat came when Loral, having been awarded a second contract by the Navy, told Austin that it would be awarded subcontracts only for those components for which it was the low bidder. Austin's threat was to stop delivery on the first subcontract unless it was given price increases under that subcontract and also awarded a subcontract for all the components required by Loral's second Navy contract. Loral made no claim on the second subcontract.

Soon after the subcontractor began delivery, however, it threatened to stop delivery unless the general contractor agreed to substantial price increases on the subcontract. The subcontractor did stop delivery, the general contractor was unable to find a substitute source, and it finally acceded to the subcontractor's demand. After the subcontractor had performed, the general contractor sued the subcontractor to recover \$22,250—the total of the price increases that the general contractor had paid under the subcontract. The Court of Appeals held that these facts made out a claim based on duress by threat.

What does a claimant need to show in order to succeed on a theory of duress by threat? The Restatement Second suggests four requirements.<sup>5</sup> First, there must be a threat. Second, the threat must be of a kind that the law condemns. Third, the threat must induce the victim's manifestation of assent. Fourth, the threat must be sufficiently grave to justify the victim's assent.

First, what is a threat? Though the Restatement Second attempts no definition, it may be of interest to consider that question in passing here. To begin with, a threat is a manifestation of an intent to do or not to do something in the future ("I'll break your arm" or "I'll break our contract"). But a *promise* is also a manifestation to do something in the future. Suppose a contractor says to a landowner, "I'll build the house." That is a promise. How does a threat differ from such a promise? Ordinarily, at least, a significant difference between a threat and any other statement of intention is that a threat manifests an intention to do or not to do something that is *less* desirable from the promisee's point of view than if the alternative were the case. Suppose that after the landowner has gotten the contractor to agree to build the house, the contractor says, "I will not build the house." You would call that a *threat* because his not building the house is less desirable from the landowner's point of view than his building it. Or suppose I say, "I'll give you a kiss." You might well ask, "Is that a threat or a promise?" And I would say that the answer depends on you: I have made a statement of intention, and whether it is the kind of a statement that is described here as a threat depends on whether my kissing you is less desirable from your point of view than my not kissing you.<sup>6</sup>

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

6. For a discussion of the view that a promise to do something involves not only a statement of intention to do it, but also of an intention to undertake to do it, see Raz,

We are not interested in threats in the abstract, however, but only in threats used to coerce someone else to make a contract. This kind of threat is conditional on the recipient's not giving his assent to a contract. For example, suppose that, after the contractor has agreed to build a house for the landowner for \$100,000, the contractor says, "I won't build the house if you don't promise to pay me \$150,000" ("I'll break the contract if you don't promise to pay me an extra \$50,000"). The contractor has made a conditional threat—a kind of conditional promise. But an *offer* is also a kind of conditional promise. How does the contractor's conditional threat differ from an offer?

The answer *seems* simple. When, at first, the contractor said, "I'll build the house if you promise to pay \$100,000," that was an *offer* because it was a promise, conditional on the landowner's consenting, to take a course of action (build the house) more desirable from the landowner's point of view. But when, later on, the contractor said, "I'll not build the house if you don't promise to pay \$150,000," that was a *threat*, conditional on the landowner's *not* consenting, to take a course of action (not build the house) less desirable from the landowner's point of view.

But is there really a difference? Does not every offer involve a more desirable and a less desirable alternative? When, at first, the contractor said, "I'll build the house if you promise to pay \$100,000," he also said by implication, "but I will not build the house if you do not promise to pay \$100,000." (If he was *not* saying this by implication, he would not be bargaining, would he?) And when, later on, the contractor said, "I'll not build the house if you don't promise to pay \$150,000," he also said by implication, "but I will build the house if you promise to pay \$150,000." (If he was not saying this by implication, he would not be coercing, would he?) So, is not the contractor making essentially the same kind of proposal in both situations?

Surely the form of the statement cannot make a difference. Of course it is usual for what we call an "offer" to emphasize enticement and for what we call a "threat" to emphasize intimidation. But the contractor's offer would be no less an offer if he said, turning

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*Promises and Obligations*, LAW, MORALITY AND SOCIETY (P. Hacker & J. Raz ed. 1977). For a discussion of threats and promises, see P. ATIYAH, PROMISES, MORALS, AND LAW 157-60 (1981). The discussion there, however, is mainly concerned with whether it is possible to conceive of circumstances in which a threat that would not commonly be regarded as an offer can nevertheless create an obligation with regard to the action threatened—a question with which I am not here concerned.

it around: "I will not build the house if you do not promise to pay me \$100,000, but I will build the house if you do promise to pay me \$100,000"—and added—"You will never get another chance at a price as low as this." Every offer involves a threat of this kind. Nor would the contractor's threat be any less a threat if he said, turning it around: "I will build the house if you promise to pay me \$150,000, but I will not build the house if you do not promise to pay me \$150,000"—and added—"I hope that you will take advantage of this good opportunity for you." Every threat involves an offer of this kind. Nothing is gained by attempting to distinguish offers from threats for the purposes of the law of duress.<sup>7</sup> Since a claim of duress can only succeed if the threat was one that the law condemns, the significant task is not to distinguish offers from threats but to distinguish those threats that the law condemns from those that it does not condemn.

What kinds of threats does the law condemn?<sup>8</sup> The first cases to recognize claims of duress involved threats of physical harm ("I will break your arm"). Later cases included wrongful detention of goods ("I will retain your Rembrandt").<sup>9</sup> In these early cases the action threatened was ordinarily a crime or at least a tort, and it was natural to characterize the threat itself as "unlawful," or at least as "wrongful." But now that the doctrine of duress has been liberalized to include cases of economic duress, where the threatened act is neither a crime nor a tort, it seems preferable to ask not whether the

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7. Since the law of duress gives legal consequences to a threat only if it is *improper*, the characterization of a proposal as a threat has no legal significance unless the threat is characterized as improper. In other words, the law does not distinguish an offer that is not a threat from a threat that is not improper. On the distinction sometimes drawn in philosophy between an offer and a threat, see *infra* note 21.

8. At this point a digression concerning "warnings" is in order. Consider these facts based on a recent Florida case. An employer said to an employee, "I am going to fire you." The employee, who was seeking another job, asked, "May I quit first," the employer said, "Yes," and the employee resigned. The employee later claimed that her resignation had been obtained by duress—a threat to fire her. The court held, however, that there was no duress, noting that the employer had not said "Quit or be fired," but that the employee had raised the possibility of resignation. *City of Miami v. Kory*, 394 So. 2d 494 (Fla. Dist. Ct. App. 1981).

The decision seems right because the concern of the law of duress is with threats used to induce someone into making a contract and here the employer did not say "I am going to fire you" in order to induce the employee to resign. Philosophical discussions of coercion support this by distinguishing warnings from threats. See, e.g., Nozick, *Coercion*, in *PHILOSOPHY, POLITICS & SOCIETY* 101, 120-27 (1972). *RESTATEMENT (SECOND) OF CONTRACTS* § 176 comment c (1981) concurs.

9. The seminal case on duress of goods was *Astley v. Reynolds*, 2 Strange 915, 93 Eng. Rep. 939 (K.B. 1732) (detention of pawned plate until excess interest was paid).

threat was "illegal" or "wrongful" but whether it was "improper," the term adopted by the Restatement Second.<sup>10</sup> Yet the line that separates improper threats from legitimate bargaining is not always easy to draw. The difficulty is hinted at in what may be the most notorious threat in contemporary prose. When Johnny Fontane protested, "This guy is a personal friend of J. Edgar Hoover . . . You can't even raise your voice to him."—"He's a businessman," the Don said blandly, "I'll make him an offer he can't refuse."<sup>11</sup>

Some kinds of threats are plainly improper. A threat to do something that is a crime or a tort is an obvious example. Some less obvious examples are listed in the Restatement Second.<sup>12</sup> One of these, mentioned earlier, is a threat to break a contract. Such a threat is improper, but only if it "is a breach of the duty of good faith and fair dealing" under the contract with the victim.<sup>13</sup> In explaining this category, the commentary to the Restatement Second falls back on the commentary to the Uniform Commercial Code, which says that "extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith."<sup>14</sup> The Reporter's Notes to the Restatement Second cite *Austin v. Loral* in support.<sup>15</sup> In the case of the contractor who now wants \$150,000 to build the \$100,000 house, the propriety of his threat would depend on his reason—his threat might be improper if his desire for the extra \$50,000 resulted from a suddenly acquired taste for expensive sports cars but not improper if it resulted from his having unexpectedly struck rock during excavation. The Restatement Second, like the Code, would have courts distinguish among such threats according to the reasons for making them.

Note that each of the improper threats just mentioned is a threat to do something one has no legal right to do—to commit a crime or a tort, or to break a contract. Can there be duress if the person making the threat has a right to do the thing that he threatens to do? Courts have often said that such a threat cannot be duress. Thus the Supreme Court of Arkansas said in 1924 that "[I]t is not duress to threaten to do that which a party has a legal right to do."<sup>16</sup>

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10. See *supra* note 5.

11. M. PUZO, *THE GODFATHER* 39 (1969). See also *id.* at 384, 400.

12. See RESTATEMENT (SECOND) OF CONTRACTS § 176 (1981).

13. *Id.* § 176(1)(d).

14. *Id.* § 176 comment e, quoting UCC § 2-209 comment 2.

15. *Id.*, Reporter's Note to comment e.

16. *Ellis v. First Nat'l Bank*, 163 Ark. 471, 474, 260 S.W. 714, 715 (1924).

And yet this is clearly incorrect, as the Supreme Court of Arkansas itself recognized in 1938, when it decided *Perkins Oil Co. v. Fitzgerald*.<sup>17</sup> Fitzgerald, a young man in his early twenties got a job oiling machines in an oil seed mill where his stepfather had worked for some time. One day in August he caught his hand in a machine and, in attempting to extricate himself, caught his other hand. Fitzgerald lost both arms at about the elbow. The following January, five months later, the mill asked Fitzgerald to execute a release relinquishing his claims against the mill for \$5,000 (the limit of the responsibility of the mill's insurer). Jasspon, one of the owners of the mill, told him that if Fitzgerald sued, counsel for the oil mill would be able to delay any recovery for perhaps ten years; that if Fitzgerald did not accept the \$5,000 in settlement the oil company would fire Fitzgerald's stepfather and Jasspon would exert his influence to see that the stepfather was not hired by any similar business; and that Jasspon knew that Fitzgerald, his mother, and his brother (who had an invalid wife) were all wholly dependent on Fitzgerald's stepfather. This was an offer that Fitzgerald could not refuse, and he executed the release. Later, however, he sought to avoid it.

I assume that Jasspon had a right to do what he threatened to do. The stepfather's employment was surely terminable at will without cause, so his firing would not have been a breach of contract. And as long as Jasspon did not defame the stepfather, his exercise of his influence to prevent his employment elsewhere was probably not tortious. Certainly the Arkansas Supreme Court did not suggest that what Jasspon threatened would have of itself been wrongful. Nevertheless, it allowed Fitzgerald to avoid the release. When can one's threat be said to be improper if one only threatens what one has a right to do? According to the Restatement Second,

A threat is improper if the resulting exchange is not on fair terms, and . . . the threatened act would harm the recipient and would not significantly benefit the party making the threat . . . .<sup>18</sup>

Jasspon's threat was improper in this sense. Firing Fitzgerald's stepfather would have harmed Fitzgerald without significantly benefiting Jasspon. The philosopher Robert Nozick has termed exchanges such as that proposed by Jasspon "unproductive."

If I buy a good or service from you, I benefit from your activity; I am better off due to it, better off than if your activity wasn't done or you didn't exist at all . . . . Whereas if I pay you for not

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17. *See supra* note 2.

18. RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(a) (1981).

harming me, I gain nothing from you that I wouldn't possess if either you didn't exist at all or existed without having anything to do with me.<sup>19</sup>

Under the Restatement Second a threat that proposes such an unproductive exchange may be the basis for a claim of duress even though the person making the threat has a right to do what he threatens.

The Restatement Second describes another situation in which a threat is improper even though the person making the threat has a right to do what he threatens:

A threat is improper if the resulting exchange is not on fair terms, and . . . the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat . . . .<sup>20</sup>

Suppose a situation in which the contractor has not yet made a contract with the landowner but has intentionally led him "down the garden path" so far that the landowner had no practical alternative but to rely on *this* contractor to build the house even if his bid is \$100,000. At that point, the Restatement Second says, it is improper for the contractor to exact an exchange that is not on fair terms.

This finds some support in another of Nozick's distinctions, under which a proposal is coercive if what is proposed is from the victim's point of view worse than "the normal or expected" course of events ("You won't get your daily dose of drugs if you don't sign the contract") or worse than the "morally expected" course of events ("I will inflict my daily beating on you if you don't sign the contract").<sup>21</sup> Nozick would reach the same result as the Restatement Second in the example given since not building the house would, in

19. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 84 (1974).

20. RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(b). *See also id.* § 176 comment f (giving the example of "manipulative conduct during the bargaining stage that leaves one person at the mercy of the other").

Subparagraph (2)(c) states a third situation, one that will not be discussed here:

A threat is improper if the resulting exchange is not on fair terms, and . . . what is threatened is otherwise a use of power for illegitimate ends.

21. *See* Nozick, *supra* note 8, at 112-13. Nozick would say that such a proposal is an offer and not a threat at all. A substantial body of literature has developed over the philosophical question: Is an offer a threat? For the views of others, compare Bayles, *A Concept of Coercion*, in *NOMOS XIV, COERCION* 17 (1972) ("coercion . . . never involves a promise of benefit"), with Held, *Coercion and Coercive Offers*, *id.* at 49 ("A person unable to spurn an offer may act as unwillingly as a person unable to resist a threat."). On the relevance of this question to the law of duress, see *supra* note 7.

the circumstances, be worse than the "morally expected" course of events from the landowner's point of view.

But Nozick's test would include situations not included in the Restatement Second's. Suppose, for example, that the contractor has built many identical houses for the owner, each for \$50,000, and now (with no inflation) insists on \$100,000. Is it likely that a court would hold that a proposal to build a house for \$100,000 was an improper threat because "the normal or expected" or the "morally expected" course of events was to build houses for \$50,000? It does not seem so. As the commentary to the Restatement Second puts it:

Hard bargaining between experienced adversaries of relatively equal power ought not to be discouraged. Parties are generally held to the resulting agreement, even though one has taken advantage of the other's adversity, as long as the contract has been dictated by general economic forces.<sup>22</sup>

Thus, though the Restatement Second may find support in Nozick's formulation, it does not cast as wide a net.

In passing judgment on these more marginal cases of improper threats, keep in mind that duress—unlike misrepresentation—gives no claim to damages. The only consequence of concluding that a threat is improper and therefore the basis for a claim of duress is to allow restitution upon avoidance of the contract or, as John Dawson summarized it, "to cancel out advantages secured by superior bargaining power."<sup>23</sup> Furthermore, note that in these marginal cases (as opposed to threats to commit crimes or torts or to break contracts) the Restatement Second imposes an additional requirement for an improper threat that the resulting exchange be one that is not on fair terms.<sup>24</sup> To a limited extent this counterbalances the Restatement Second's general expansion of the concept of an "improper threat."

Third, when does a threat induce the manifestation of assent? What is required here is simply causation. Did my threat to twist your arm actually induce you to sign the contract or would you have signed it anyway? Did the subcontractor's threat to break the subcontract actually induce the general contractor to agree to the modification or would it have agreed anyway?

Fourth, when is a threat sufficiently grave to justify the victim

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22. RESTATEMENT (SECOND) OF CONTRACTS § 176 comment f (1981).

23. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 287 (1947).

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

in succumbing to it? The early common law imposed a very strict test. According to Lord Coke, in the early part of the seventeenth century, the victim might avoid a contract only

for fear of losse of life, . . . of losse of member, . . . of mayhem, and . . . of imprisonment; otherwise it is for fear of battery, which might be very light, or for burning of his houses, or taking away, or destroying of his goods or the like, for there he may have satisfaction in damages.<sup>25</sup>

(Note that it is not entirely clear that Coke would have considered my threat to break your arm—as opposed to my threat to break it off—sufficient.) This strict view was echoed as late as 1856 in *Burr v. Burton*, the earliest Arkansas duress case that I have been able to find, in which it was said that there must be a threat that “excites a fear of some grievous wrong, as of death, or great bodily injury, or unlawful imprisonment.”<sup>26</sup>

But the notion that the victim of a threat to property might always be expected to refuse assent and resort to an action for damages began to give way in the eighteenth century with the recognition of “duress of goods,” the wrongful detention of the victim’s property. This presaged a major change in the doctrine of duress and paved the way for the more liberal doctrine of economic duress in cases like *Austin v. Loral* and *Perkins Oil Co. v. Fitzgerald* in which the threat goes to the victim’s economic interests rather than to his person or his property. In the course of this expansion of duress, courts have had great difficulty in formulating the standard to be applied. The early common law imposed a stubbornly objective requirement that the threat be sufficient to overcome the will of “a person or ordinary firmness”<sup>27</sup> or—as an Arkansas judge expressed it just over a century ago—“A man or person of ordinary courage.”<sup>28</sup> The pendulum then swung to a more subjective standard under which the threat need only have deprived the particular

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25. E. COKE, SECOND INSTITUTE 482-83 (1642).

26. 18 Ark. 214, 233 (1856).

27. 1 W. BLACKSTONE, COMMENTARIES\* 131 (1765), relying on 2 H. BRACON, ON THE LAW AND CUSTOMS OF ENGLAND 65 (Thorne tr. 1968) (“nor is it the fear of the weak and timid, but such as may occur in a resolute man”). For an application of the test, see *King v. Lewis*, 188 Ga. 594, 4 S.E.2d 464 (1939) (“overcome the mind and will of a person of ordinary firmness”).

28. *Bosley v. Shanner*, 26 Ark. 280, 281 (1870) (approving jury instruction that threat must suffice to “excite the reasonable apprehensions of a man or person of ordinary courage”), quoted with approval in *Fonville v. Wichita State Bank & Trust Co.*, 161 Ark. 93, 96, 255 S.W. 561, 562 (1923).

victim of his "free will."<sup>29</sup> Difficulties in giving meaning to the term "free will" have now caused the pendulum to swing back to another more objective standard under which the threat must have left the particular victim—as the Restatement Second puts it—"no reasonable alternative."<sup>30</sup>

From what I have said so far, you can see that the expansion of the doctrine of duress is due primarily to the liberalization of two of the four requirements: the second (that the threat be one that the law condemns) and the fourth (that the threat be sufficiently grave to justify the victim's assent). Now I turn to the effect of this expansion on two doctrines that are allied to duress: undue influence and the pre-existing duty rule. I call these doctrines "allied" rather than "related" to duress because though, like duress, they may be used to give relief against coercive practices, they have very different ancestries. Let us look at the first of these three allied doctrines, undue influence.

Whereas the concept of duress grew up in courts of law, that of undue influence developed in courts of equity, a distinction that may be of special interest in Arkansas, since it still has courts of equity. The purpose of the concept of undue influence was to give relief to victims of unfair transactions that were induced by improper persuasion. In contrast to duress, the essence of which was simple fear induced by threat, the equitable concept of undue influence was aimed at the protection of those afflicted with a weakness that fell short of incapacity against improper persuasion that fell short of misrepresentation or duress by those in a special position to exercise such persuasion. Two elements are commonly required: first, a special relation between the parties; second, improper persuasion of the weaker by the stronger.<sup>31</sup>

Traditionally, the special relation is one of trust or confidence that justifies the weaker party in assuming that the stronger will not act in a manner inconsistent with his welfare. Examples include the relations between parent and child, husband and wife, clergyman

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29. *Winget v. Rockwood*, 69 F.2d 326, 330 (8th Cir. 1934) ("the ultimate fact in issue is whether such person was bereft of the free exercise of his will power"); *Austin Instrument Co. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533 (1971) (threat deprived victim of "its free will"); see RESTATEMENT (FIRST) OF CONTRACTS (1932) § 492(b) ("precludes him from exercising free will and judgment").

30. See *supra* note 5.

31. See RESTATEMENT (SECOND) OF CONTRACTS § 177(1) (1981) ("Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.")

and parishioner, and physician and patient. But some courts have extended the protection afforded by the doctrine beyond relations of trust and confidence to those in which the weaker party is for some reason under the domination of the stronger.

Once the requisite relation is shown, it must then be shown that the assent of the weaker party was induced by unfair persuasion on the part of the stronger. What will be characterized as "unfair" depends on a variety of circumstances, but the ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment, and a particularly important factor in showing unfairness in persuasion is imbalance in the resulting bargain.

The use of the doctrine of undue influence to give relief from coercion can be seen from the *Odorizzi* case.<sup>32</sup> *Odorizzi* was a school teacher who alleged that after he had been arrested on criminal charges of homosexual activity, questioned by the police, booked, released on bail, and gone for forty hours without sleep, the superintendent of the school district came to his apartment to ask for his resignation. The California District Court of Appeal noted the possibility "that exhaustion and emotional turmoil may wholly incapacitate a person from exercising his judgment" and held that the pleadings sufficed to show the required relation of "a dominant subject to a servient object."<sup>33</sup> It concluded that

the representatives of the school board undertook to achieve their objective by overpersuasion and imposition to secure plaintiff's signature but not his consent through a high-pressure carrot-and-stick technique—under which they assured plaintiff they were trying to assist him, he should rely on their advice, there wasn't time to consult an attorney, if he didn't resign at once the school district would suspend and dismiss him from his position and publicize the proceedings, but if he did resign the incident wouldn't jeopardize his chances of securing a teaching post elsewhere.<sup>34</sup>

The court held the resignation voidable on the ground of undue influence.

A court could equally well reach the same result, however, under the Restatement Second's expanded doctrine of duress. The liberalization of the requirement that the threat be one that the law

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32. *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 123, 54 Cal. Rptr. 533 (1966).

33. *Id.* at 131, 54 Cal. Rptr. at 540.

34. *Id.* at 135, 54 Cal. Rptr. at 543.

condemns would permit the court to find that the school board's threat to publicize any proceedings against Odorizzi and hurt his chances of obtaining another job was an improper one on the ground that doing so would harm Odorizzi and would not significantly benefit the school board. And the liberalization of the requirement that the threat be sufficiently grave to justify the victim's assent would permit the court to conclude that Odorizzi had no reasonable alternative but to resign in the face of the improper threat.

It is therefore a likely consequence of the liberalization of the requirements of duress that courts and litigants will place more emphasis on the coercive nature of transactions that were previously subject to attack only on the grounds of undue influence. The doctrine of duress may, in the long run, swallow up much of what has previously been considered to be undue influence.<sup>35</sup>

A second doctrine allied with duress is the pre-existing duty rule, an aspect of consideration. Under the rule, a party's performance of a duty that he already owes under a contract cannot be consideration for a promise by his cocontractant.<sup>36</sup> Nor can a party's promise to perform such a duty be consideration for a promise by his cocontractant. In practice, the rule has often played an important role in connection with contract modifications obtained by coercion.

For a simple example, recall the case of the contractor who agreed to build a house for \$100,000. Suppose that, after work has begun, he threatens to walk off the job unless the landowner promises to pay an extra \$50,000. The landowner, in urgent need of the house and despairing of finding another contractor quickly, promises to pay the extra \$50,000 in return for the contractor's finishing the work. But on completion of the house, the landowner refuses to pay more than the original \$100,000. Is the modification enforceable so that the contractor can recover the additional sum from the owner?

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35. For a suggestion that the doctrine of undue influence is also in danger of being swallowed up by that of unconscionability, see Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741, 775-76 (1982) (discussing the *Odorizzi* case as one under the "doctrine of unfair persuasion," an aspect of "the principle of unconscionability"). Eisenberg also suggests that the doctrine of duress may be in similar danger. *Id.* at 799 ("duress may now be seen as simply a special case of the exploitation of distress," also an aspect of "the principle of unconscionability"). It seems unlikely, however, that this fate will befall such a well-established doctrine designed to deal with coercive behavior, a cardinal abuse of the bargaining process—or, for that matter, that it will befall the comparably entrenched doctrine of misrepresentation.

36. RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

A natural response would be to analyze the problem in terms of duress. It is only relatively recently, however, that the common-law doctrine of duress has been broadened to encompass such situations of "economic duress." The traditional analysis of the problem proceeds in terms of the doctrine of consideration. Under that doctrine the owner would prevail on the ground that there was no consideration for his promise. All that the contractor did in return for the new promise—of \$50,000 more—was to perform a duty that he owed under an existing contract, and under the pre-existing duty rule, performance of such a duty is not consideration.

Note, however, an important limitation of this rule—the pre-existing duty rule merely makes the landowner's promise to pay the extra \$50,000 unenforceable for lack of consideration. It does not give the landowner a power of avoidance. If the landowner has already paid the contractor the \$50,000 (as had the general contractor in *Austin v. Loral*), the contractor can simply keep the money. The pre-existing duty rule gives the landowner no right to get it back once he has paid.

Courts have become increasingly hostile to the pre-existing duty rule. Though it serves in some instances to give relief to a promisor who has been subjected to overreaching, it serves in other instances to frustrate the expectations of a promisee who has fairly negotiated a modification. It does not, for example, distinguish between the situation where the contractor's demand for more money is motivated merely by opportunism and greed and that where the demand is prompted by the discovery of circumstances or the occurrence of events that make the contractor's performance more burdensome. Thus the rule would deny the contractor recovery of the additional \$50,000 regardless of whether his demand for it had been prompted by the unexpected discovery of rock which had made his task much more burdensome or by a suddenly acquired taste for expensive sports cars.

It is therefore not surprising that both courts and legislatures have made considerable inroads into the rule. Restatement Second section 89 undercuts the rule by providing:

A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated . . . when the contract was made . . . .<sup>37</sup>

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37. *Id.* at § 89(a).

The Restatement Second thus distinguishes the contractor who has struck rock from the contractor who has acquired a taste for expensive sports cars, laying down a test that approaches that of "good faith and fair dealing" it lays down for duress by a threat to break a contract.<sup>38</sup>

Is it not likely to occur to courts to take the next step by abandoning the pre-existing duty rule entirely and using the expanded doctrine of duress to protect parties against coerced modification?<sup>39</sup> It is true that a party claiming duress must show that the threat was sufficiently grave to justify his assent, a burden that is not imposed on him by the pre-existing duty rule. On the other hand, a party who can show duress has an advantage in that he has not only a defense if he is sued by the other party but also a ground for avoidance and restitution.

This result has already been achieved by the Uniform Commercial Code. Under UCC 2-209(1), "An agreement modifying a contract within this Article needs no consideration to be binding." Thus the pre-existing duty rule is abolished. Nevertheless, as was pointed out earlier, a requirement of good faith and fair dealing is imposed and "extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith."<sup>40</sup> Thus the expanded doctrine of duress is invoked to protect parties against coerced modifications.<sup>41</sup>

I come, therefore, to two conclusions. The first is that the Restatement Second reflects the "progressive tendency" toward expansion of the doctrine of duress, in its liberalization of both the requirement that the threat be one that the law condemns and the requirement that the threat be sufficiently grave to justify the victim's assent. The second is that it is not unreasonable to expect this expanded doctrine of duress to encroach on the doctrine of undue influence and to displace the pre-existing duty rule.

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38. See *supra* text at note 13.

39. See Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979).

40. See *supra* note 14.

41. Though the Code has no explicit requirement that the threat to break the contract be sufficiently grave to justify the victim's assent to the modification, it would make sense to infer a requirement that the threat leave the victim no reasonable alternative.

