COMPARATIVE LABOR LAW & POLICY JOURNAL

Volume 43, Number 3 Fall 2023

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Cite as
43 Comp. Lab. L. & Pol'y J. ___ (2023)

COMPARATIVE LABOR LAW & POLICY JOURNAL

UNIVERSITY OF ILLINOIS COLLEGE OF LAW

EDITORS AND EDITORIAL BOARD

Volume 43
2022–2023

Volume 43, Number 3
Spring 2023

INTERNATIONAL ASSOCIATION OF LABOR LAW JOURNALS

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University of Illinois College of Law
245 Law Building
504 East Pennsylvania Avenue
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Associate Professor of Law
Director, Centre for Law in the Contemporary Workplace
Queen's University
128 Union Street, Room C527a
Kingston, ON K7L 3N6
e-mail: banksk@queensu.ca

For non-law:
Barry Eidlin
Assistant Professor of Sociology
Stephen Leacock Building, Room 820
McGill University
855 Sherbrooke Street West
Montreal, QC H3A 2T7
e-mail: barry.eidlin@mcgill.ca

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INTRODUCTION

This collection has a serendipitous provenance. Finkin was asked for a contribution to a *Festschrift* for Werner Ebke, a friend of long standing, upon Ebke's retirement from a professorship in corporate law at Heidelberg. In seeking some connection between the worlds of commercial and employment transactions he returned to a 1937 article by Jack Dawson, the then dean of comparative law in the United States: *Economic Duress and the Fair Exchange in French and German Law*.[1] Dawson described the roots of the doctrine of duress in Roman law, founded in the wrongful exercise of overwhelming power – of threat – to compel another to make an agreement, and traced its development in modern civil law as portending a metamorphosis away from psychology and into economics. A cite check revealed that over the ensuing three quarters of a century Dawson's article had become largely neglected. Finkin sought opinion in Germany and France on whether Dawson had proven prescient and, if so, whether economic duress had any contemporary purchase in employment law. He found it had.[2]

We agreed that these developments should be addressed in greater depth and we enlisted contributors not only from France and Germany, but from Japan and the United States as well to place the metamorphosis of economic duress in a broader comparative light.

Not content with that alone, we enlisted James Gordley, whose erudition in comparative contract law is world acknowledged, to provide a capstone overview of what our contributors have to tell us. His essay considers employment under the second prong of Dawson's 1937 piece: not economic duress alone, but "fair exchange".

We are indebted to our contributors and to our capstone overseer. We have learned much from them and they have given us and our readers more to think about. Many thanks to all.

Sanford Jacoby
Matthew Finkin

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1. Jack Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TULANE L. REV. 345 (1937).

2. Matthew Finkin, *Hard Bargains: Economic Duress in German, French, and U.S. Employment Law*, *in* DEUTSCHES, EUROP. . .ISCHES UND VERGLEICHENDES WIRTSCHAFTSRECHT: FESTSCHRIFT FÜR WERNER F. EBKE ZUM 70 GEBURTSTAG 231 (Boris Paal, Dörte Poelzig & Oliver Fehrenbacher ed., 2021).

ECONOMIC DURESS IN LABOR CONTRACTS

James Gordley

I. THE MEANING OF "ECONOMIC DURESS"

A. The Legacy of the 19th Century

Relief for duress was traditionally given in situations like this one:

1. A owns a bar. B offers A a reasonable price for the bar, and, when refuses to sell, B threatens to have A beaten by thugs if he does not do so. A sells the bar.

It was traditionally denied in situations like this:

2. A's ship is sinking. B has a ship which is the only one in a position to rescue A. B offers to rescue A in return for 99% of the value of his cargo. The rescue is not dangerous and will cost be a small fraction of that amount. A accepts B's offer.

In the second situation, some courts now give relief for "economic duress," and some for what common lawyers call "unconscionability."

Contemporary jurists often explain relief in these situations by restating s19th century was an age of will theories. Contract was defined in terms of the will or consent of the parties which was supposed to be the source of all of their contractual obligations.[1]

According to some will theorists, particularly in France, relief was given in the first situation because consent was lacking or imperfect. The will of the party threatened was so longer free.[2] Others, particularly in Germany, pointed out in both situation 1 and situations 2 the disadvantaged party agrees only because he is in imminent peril, yet in situation 2 relief is not traditionally given for duress. The difference, they said, is that in situation 1, the source of the peril is the other party's threat of an unlawful act. Relief should be given, not because consent is lacking, but because it was procured by such

1. See JAMES GORDLEY, THE JURISTS A CRITICAL HISTORY [the pages to be cited: the subsection "contract" of the section "private law" in ch. VII (2013).

2. JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 181-82 (1991).

at threat.[3] In tort, the victim of an unlawful act is put back in the position he would have occupied if the act had not been committed. Here, the contract should be dissolved in order to put the disadvantaged party where he would have been if the threat had not been made.

In the second situation, the will theorists denied that, in principle, relief should be given. The parties had agreed on a price, neither had made an unlawful threat, and therefore the will of the parties should prevail. In France, some courts gave relief by asserting that there was duress even though, in the traditional sense, there was not.[4] In Germany, some jurists believed that "humanity" might justify making an exception to normal principles.[5]

Today relief is commonly given in the second situation although, as the contributions to this volume attest, it is often explained in much the the same way that 19th century jurists explained relief in the first: either consent is imperfect, if indeed it is not absent, or threat is improper, if indeed it is not illegal.

In the second situation, as Jonathan Harris[6] and Ryoko Sakuraba[7] observe, some courts in America and in Japan have given relief because the will of the disadvantaged party was not free. Reporting on German Law, Martin Löhnig and Philipp S. Fischinger describe this kind of situation as one in which "a contractual agreement that is formally autonomous is actually concluded by one party under conditions that can no longer be described as an exercise of free self-determination."[8] Nevertheless, it is not clear what it means to say that his will was not free or autonomous. In both, situations, however, the party chose the alternative he preferred among those presented to him. He preferred to sell his bar at the price offered rather than to be beaten by thugs. He preferred to be rescued at the price he was offered rather than to sink. His will was not overcome. Given the alternatives available to him, he chose the one he preferred.

As Harris notes, the Restatements of Contracts moved from a "lack of free will"[9] standard to a more expansive 'no reasonable alternative' standard.[10]"[11] Reporting on French law, Muriel Fabre-Magnan and Pascal Lokiec describe such as situation as one in which a contracting party "knows that it

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3. *Id*. at 183.
4. See*, infra* TAN 47.
5. 2 BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHT § 396, n. 2 , (7th ed. 1891),. 3 KARL VON VANGEROW, LEITFADEN FÜR PANDEKTEN-VORLESUNGEN 611 n. 1 (1847) (describing the views of others); 2 CARL VON W. . .CHTER, PANDEKTEN § 207, pp 472-73 (1881).
6. Jonathan F. Harris, *Economic Duress in U.S. Employment* this volume ms.105 TAN 17.
7. Ryoko Sakuraba, *Economic Duress in Labour Relations* this volume ms. 101.
8. Martin Löhnig & Philipp S. Fischinger, *Economic Pressure and German Law* this volume ms.
9. *See* Restatement (First) of Contracts § 492(b) (Am. L. Inst. 1923).
10. Restatement (Second) of Contracts § 175 (Am. L. Inst. 1981).
11. Harris, this volume ms. p. 102

is not in his/her interest to enter into the contract, but he/she has no choice and is forced to do so."[12] That formulation may mean little more than that the party would not have contracted otherwise. It is reasonable and in a party's best interest to sell a bar if the alternative is to be beaten, or to pay a high price to be rescued if the alternative is to sink, just as it is reasonable and in a party's best interest to pay for a medical operation if the alternative is to die. One's choice is as free and as much in one's self interest as the choice to buy food, shelter or clothing even though one needs them to live.

It does not help to say that he was at a bargaining disadvantage.[13] A person who needs a live saving medical operation may not bargain over the price: he agrees to pays the going rate. Suppose there were many ships in a position to rescue the one in distress, and enough time for them to bid against each other. The price would have been bid down to the cost of rescue plus a reasonable profit. The presence of a bargaining disadvantage seems to mean the absence of a competitive market price. The absence of a competitive market may be a good reason for giving relief but calling it a "bargaining disadvantage" does not explain why.

Nineteenth cemtury German jurists recognized that one cannot justify relief in the second situation by speaking of an imperfection in consent. They thought that one can do so in the first situation by saying that the threat was unlawful.[14] As Harris notes, some American courts ask whether a threat was improper.[15] In the second situation, however, the only impropriety is to refuse to rescue someone in distress except at a very high price. In the first situation, the threat was unlawful. Yet some courts give relief when it is not. A threat to bring criminal proceedings constitutes duress although to do so is not in itself tortious.[16] One who hires a contractor and discovers that he took illegal kickbacks on other projects can report him to the police but cannot threaten to do so in order to obtain a lower price. In *Mayerson v. Washington Mfg. Co*.,[17] the plaintiff was told that if he did not agree to a series of modifications of his employment contract "he would be fired and 'blackballed in the industry as a troublemaker.'" Relief was given for duress. It should not depend on whether the actions threated would constitute the tort of defamation.

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12. Muriel Fabre-Magnan & Pascal Lokiec, *The Defect of "Duress"*12.*in French Employment Law* this volume ms. 101.

13. The Second Restatement uses this phrase in speaking of unconscionability. *Id*. at §208 comm. c.

14. GORDLEY, supra note 2, at 183.

15. Harris, this volume ms. 102.

16. Restatement (Second) of Contracts § 176(1)(b) (Am. L. Inst. 1981).

17. 58 F.R.D. 377 (E.D. Penn., 1972).

B. A Different Approach

Elsewhere,[18] I have proposed an approach which escapes these difficulties. The challenge here is to show how that approach applies to labor contracts and how it can resolve the issues raised by the other contributors.

According to this approach, two considerations should govern whether a contract should be enforced. One is whether the contract enables each party to obtain a performance which is of greater value to him than the one that he is to give in return. It explains relief in the first situation just described. The second consideration is whether the terms of the contract are fair in the sense that at the time the contract is made, neither party is enriched at the other's expense. It explains relief in the second.

One reason that parties enter into contracts of exchange and the law enforces them is so that each can obtain something that he values more than what the gives in return. That purpose is not accomplished when but for the threat he would not have sold. He would then have sold because the value of the bar to him was less than that of the money he would receive plus the beating he would avoid. The party who made the threat does not have any right to execute. The purpose of a contract of exchange is not served when one party parts with something he values in return for something which the other party has no right to sell.

In the second situation described earlier – the rescue at sea – the rescue was of greater value to the party in distress than the price he agreed to pay for it, high as that price was. The other party may or may not have been under a duty to rescue him but we will presume that he had the right to charge for doing so. The problem is that he charged too much The price was unfair. The remedy should be to adjust the price, not to avoid the contract.

The 19th century will theorists denied that, in principle, unfairness is a ground for relief. It would be paternalistic and predicated on fallacious ideas of economic value.[19] Many contemporary jurists are inclined to agree although some of them will say that in a situation like that of the rescue at sea, one party "exploited" the other. We will see that if, in principle, unfairness were not a ground for relief, relief for economic duress would be unjustified.

II. LABOR CONTRACTS

We will return to these considerations at the end of this article. First we will see what light they shed on the problems of labor contracts which the other contributors have described.

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18. JAMES GORDLEY, FOUNDATIONS OF AMERICAN CONTRACT LAW page number to be surpplied (2023)

19. GORDLEY, *supra* note 2, at 201-08.

WHETHER AN EXCHANGE IS MUTUALLY BENEFICIAL

1. The conduct threatened

An exchange enables each party to receive something from the other that he values more than what he gives in return. Unless an exchage is mutually beneficial, in this sense, it does not serve the purpose for law recognizes and enforces contracts of exchange.

Contracts of exchange give people an incentive to act for the benefit of others: they can ask for something in return. Markets enable goods and services to be price rationed: they go to whomever is willing to pay the most for them.

A person may benefit, and benefit in the same way, whether he hires a bodyguard or pays a thug not to attack him. The thug is taking money, however, to protect a person from a danger that he creates in order to profit from it. The law wishes to prevent his activity, not to encourage it. The purposes of contract law are not served by enforcing a promise by the party that he threatened. We can say, if we like, that the threat is illegal. The reason why in principle the agreement should not be binding, however, is that the party who was threated was paying, at least in part, for something that the other party had no right to sell.

A party may have the right to do something and still not have the right to sell it. Even if the reason the law may recognizes that right to encourage a certain activity, it may not wish the benefit of its exercise to be price rationed.

A person who knows that a crime has been committed has the right to inform the authorities. But the law recognizes that right is so that criminals may be caught and punished, not to facilitate blackmail. In *Mayerson v. Washington Mfg. Co*.,[20] described earlier, an employer threatened to "blackball" the plaintiff unless to a series of modifications of his employment contract It did not matter whether blackballing the employee would have constituted the tort of defamation. If we like we can say that such threats are improper. The reason is the agreement is not binding, however, is that the party who was threated was paying, at least in party, for something the other party had to do but not to sell.

In employment-at-will contracts, each party as the right to terminate, and is often said to have the right to terminate for any reason or no reason. All terms of a contract, however, should be interpreted in terms of their purpose. The purpose is often to allocate the risks and burdens incident to an exchange. In an employment-at-will contract, neither party bears the risk of

20. 58 F.R.D. 377 (E.D. Penn., 1972).

being committed even if the contract has proved to be disadvantageous. The employee can if he no longer finds the job attractive or has been offered a higher salary. The employer can fire him if he no longer needs his services or can hire someone else more cheaply. Neither party should be able to use a term that allows him to terminate to impose a risk or burden on the party that the term was not meant to allocated. When a party tries to do so, some courts say he has no right to terminate and other that he is he is not exercising his to do so in good faith. In either case, he is asking the other party to give up a right return for a benefit that he has no right to sell.

In the United States, it has been held to be bad faith for a company to terminate a contract with an employee[21] or other agent[22] to avoid paying him a commission or of a stock option[23] to which he would otherwise be entitled. As the Restatement (Second) of Agency provides:

"An agent to whom the principal has made a revocable offer of compensation if he accomplishes a specified result is entitled to the promised amount if the principal, in order to avoid payment of it, revokes the offer and thereafter the result is accomplished as the result of the agent's prior efforts."[24]

In *Laemmar v. J. Walter Thompson Co*.,[25] the plaintiffs had purchased stock in the company that employed them subject to an option that the company could repurchase the stock if their employment were terminated for any reason. Officers of that company asked them to resell the stock to the company or to themselves in return for corporate notes payable over three years at six and one-half per cent interest. The plaintiffs did so because they were told that otherwise they would be discharged. Presumably, the stock was worth more to the plaintiffs than the corporate notes that they received in return. Again, the threat was improper because it made the exchange involuntary. The plaintiffs were at will employees, and the court assumed that the company had the right to discharge them. That right had to be exercised in accordance with the purpose which it was conferred. It was not conferred so that it could be sold to the plaintiff in return for their stock.

As Harris noted,[26] the Restatement (Second) of Contracts provides a breach of the duty to act in good faith may constitute duress. It uses an at-will employment contract as an illustration:

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

21. Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (Mass. 1977).
22. RLM Assocs. v. Carter Mfg. Corp., 248 N.E.2d 646 (Mass. 1969).
23. Lemmon v. Cedar Point, Inc., 406 F.2d 94 (6th Cir. 1969)
24. Restatement (Second) of Agency § 454 (Am. L. Inst. 1958).
25. 435 F.2d 680 (7th Cir. 1970).
26. This volume, ms. pp. 110-11.

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.[27]

In *Herrnson v. Hoffman*, an employee had notified his employer that he was in a legal dispute with his landlord involving payment of back rent.[28] The employer had remarked that he "view[ed the employer's workplace] as the place to be for the remainder of [the employee's] career" and gave the employee a check for $16,000 with "Loved" written on the memo line. The employee deposited the check in escrow pending resolution of the rent dispute but, two months later, the employer fired the employee. The employer then contacted the escrow agent to freeze the $16,000 and refused to allow the agent to release the funds until the employee signed a release of Age Discrimination in Employment Act of 1967 ("ADEA") claims.

Despite recognizing the high bar that the economic duress standard sets, the *Herrnson* court opined that "the threat of eviction is the kind of pressure that can give rise to duress" and voided the ADEA claim release.[29] The court applied factors from other contractual defenses to find that the employee had not ratified or acquiesced to the agreement, that he had promptly repudiated it by filing an ADEA claim, that he received nothing from the release other than funds that were already given to him, and that the gift was irrevocable.[30]

2. The severity of the threat

If the victim would have agreed without the threat, then he valued what he was to give up less than what the other party had the right to give in return. In principle, he should no longer claim that the contract should not be enforced. It is not surprising that some courts refuse to give relief when the consequences of the threat were so insubstantial that it seems likely the party threated would have consented without them. The real issue is whether the severity of the threat indicates that he would have done so although court confused it by saying that a threat must be severe enough to overcome the will or a party or to leave him with no reasonable alternative.

In a Japanese case, an employee had agreed to waive his claim for a retirement allowance to which he was entitled under Article 24 of the Labor Standards Act. He received nothing in return to which he was not already entitled. As Ryoko Sakuraba noted, "the standard" according to the Supreme Court, was whether the employee had given the consent based on free will.[31]

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27. Restatement (Second) of Contracts § 176 cmt. e, illus. 11 (Am. L. Inst. 1981).
28. No. 19-CV-7110 (JPO), 2021 WL 3774291, at *2 (S.D.N.Y. Aug. 24, 2021).
29. *Id.*
30. *Id.* at *2–*3.
31. Saikō Saibansho [Sup.Ct.] Jan.19, 1973 (Japan) (Singer Sewing Machine Case).

… [T]he Court held that the consent was given freely.[32] It would be better to say that it is unlikely the employee would have consented absent the threat.

In an American case described by Harris[33] "an employee successfully argued that she had no reasonable alternative to signing a claim release in exchange for severance pay, saying that she 'would not [have] been able to get a small U–Haul trailer to take our remaining basic belongings without receiving my checks.'[34] Furthermore, she testified that 'we were broke, and I felt that if I refused to sign the release form, my family and I would be homeless because we would be unable to get to California where we would be able to stay with our family.'[35] The judge held that "when there is 'a showing of peculiar necessity,' a refusal to pay money may leave one with no reasonable alternative."[36] It would be better to have said that the threat was sufficiently grave that it is likely she would not have released the claim had it not been made.

The issue was better formulated in a Massachusetts case, *International Underwater Contractors, Inc. v. New England Tel. and Tel. Co*.,[37] the plaintiff was a contractor who had completed extra work not called for by the contract on defendant's assurance that he would be paid for it. Plaintiff claimed $811,816.73 but released his claim in return for $575,000 because, the plaintiff alleged, as "a result of the [defendant's] failure … to meet its commitments," "the bank had refused to extend any more credit and [its] cash position was overdrawn," and, had it not accepted the defendant's offer, "it would not have been able to survive the demands of [its] creditors."[38] The court held that these "allegations…, if true, would make out a case for duress" because they "raise a question … whether the plaintiff was forced because of such difficulties to accept a disproportionately small settlement which it would not otherwise have accepted."[39] The question, indeed, was whether, absent the threat, the contractor would have released his claim.

B. Whether an Exchange is Fair

1. Wages

In the second situation, the party in distress received a performance of greater value to him than the one that he was to give in return. He preferred

32. Sakuraba, this volume ms. 110
33. Harris, this volume ms. 111.
34. Sheedy v. BSB Properties, LC, No. 2:13-CV-00290-JNP, 2016 WL 6902513, at *4 (D. Utah Mar. 1, 2016).
35. *Id.*
36. *Id.* at *3.
37. 393 N.E.2d 968 (Mass. App. 1979).
38. *Id*. at 971
39. *Id*.

to be rescued even at the high price he was offered. As noted earlier, it does not help to say that he was at a bargaining disadvantage. If there were many ships in a position to rescue the one in distress, and enough time for them to bid against each other, the price would have been bid down to the cost of rescue plus a reasonable profit. The contract would have been enforced at the price on which the parties agreed. The presence of a bargaining disadvantage seems to mean the absence of a competitive market price.

As I have suggested elsewhere, the absence of a competitive market price is the reason that the high price the rescuer charged in the second situation is unfair. Prices on a competitive market rise and fall in response to supply and demand. When prices of goods or services rise, there is an incentive to increase the supply. Moreover, goods and services are price rationed. They are allocated to whomever is willing to pay the most for them. In the second situation, the high price charged by the rescuer serves neither of these purposes. It is unlikely that more ships will cruise the seas looking for someone to rescue. The high price does not allocate the service among those who want it. There is only one ship to be rescued.

If a price is fair whenever each party is better off with a contract at that price than with no contract at all, the price in the second situation is fair. If we believe that it is not, then we must ask why price is unfair if it deviates from the one that would be set on a competitive market. I have suggested that it violates the principle against unjust enrichment. If the market price of goods or services rises, those who sell will be richer and those who buy will be poor. A fall in the market price will have the opposite effect. To freeze prices, however, would lead to the evils that economists describe. Prices would neither provide the right incentives for production nor allocate goods and services to those who are willing to pay the most. The fact that market prices must change to avoid these evils is not a reason for allowing someone charge a greater amount because the other party has the bad fortune to be unable to use a competitive market. If a bank mistakenly credits a customer's account with an extra thousand dollars, or a customer mistakenly hands a hot dog vendor three hundred dollar bills for a three dollar hot dog, the party who enriched is not allowed to profit from the other party's mistake. There is no reason the rescuer in the first situation should be able to profit from the other party's misfortune.

In a labor contract, by the same principle, an employee should not receive relief so long as the wages he is paid were set by a competitive market. In market for labor, as in markets for housing and medical services, the result may be unfortunate, and, indeed, unjust. Wages may fall to a subsistence level, and decent housing or medical procedures needed to restore health or preserve life may be unaffordable. The consequences of imposing a minimum wage, freezing rents, or capping the price of medical services may also

be unfortunate and for the same reasons as in any other market. The better solution may be found through taxes, subsidies, and the like. The problem, however, is one of distributive justice: of ensuing a fair distribution of wealth in the society. That problem cannot be remedied by courts adjusting wage rates case by case. Wages set by markets responding to supply and demand may be unfair, but it is not the kind of unfairness that courts can remedy.

Harris quoted Matthew Finkin's observation that "economic duress is inherent in the very institution" of waged labor.[40] It is true that some people work unwillingly, which may be unfortunate but is not unjust. It is true that sometimes the workers in an industry are under paid, which is an injustice the courts cannot remedy. The injustice that they can remedy is when wages deviate from those that would be set by a competitive market.

When they do, as Martin Löhnig and Philipp Fischinger observe, German courts give relief under § 138 of the German Civil Code.

"if there is a noticeable disproportion between the objective value of the work performance promised by the employee and the wages promised by the employer.[41] In order to determine whether this is the case, the labor courts compare the wage agreed by the contracting parties with the usual market wage for the specific job. The following applies: In general, the wage agreement is considered to violate public policy if the agreed wage is less than two-thirds of the usual market wage.[42]"[43]

"If the wage agreement violates § 138 BGB, the employment contract as such remains effective, but the wage agreement is void. As a result, the employee is entitled to the usual market wage.[44]"[45]

It requires considerable expertise to "compare the wage agreed by the parties with the usual market wage for a specific job." That may be the reason that many jurisdictions do not allow court to do so absent special circumstances that suggest why the party was unable to obtain the market rate. Germany may be different because such cases come before special labor courts which have such expertise.

In any event, as Löhnig and Fischinger note, some German jurists say that in such cases relief is given as a matter of "public policy."[46] That may be misleading. In principle, relief should be given as a matter of justice as it

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40. Matthew W. Finkin, *Hard Bargains: Economic Duress in German, French, and the U.S. Employment Law*, FESTSCHRIFT FÜR WERNER F. EBKE ZUM 70, AT 12. GEBURSTAG, (September 22, 2021), https://ssrn.com/abstract=3928718, quoted by Harris, this volume ms. 115.

41. Staudinger/Fischinger § 138 mn. 542 (Ger.).

42. BAG, NZA 2009, 837, 838 (Ger.); BAG, NZA 2012, 978, 979 (Ger.); BAG, NZA 2012, 1307, 1311 (Ger.); BAG, Mar. 18, 2014, 9 AZR 694/12 (Ger.).

43. Löhnig & Fischinger, this volume ms. 108-09.

44. BAG, AP Nr 2 zu § 138 (Ger.); BAG, NZA 2006, 1354, 1357(Ger.); BAG, NZA 2016, 494, 497 (Ger.); BAG, May 24, 2017, 5 AZR 251/16 [juris Rn 39] (Ger.).

45. Löhnig & Fischinger this volume ms. 109.

46. *Id*. at 108-09.

is in other situations in which a party has been unjustly enriched. 'The public policy is that justice should be done.

If there are circumstances that indicate why a party was unable to contract at the market rate, it is more likely that there is such a deviation. A court should be more willing to give relief. In France, the highest court for civil matters *(Cour de cassation*) did so in favor of an employer whose *métayers* (tenants of a farm who pay rent in kind) threatened "not to continue their services to him" unless he paid them more money. He was "a paralyzed old man, weakened by illness, confined to bed, and abandoned by the members of his family" and consequently "at their mercy."[47]

There is no general remedy under the French Civil Code for an unfair price. In the case just described, the court gave relief for duress. Like 19th century jurists, the court described relief for duress as though it were given because of lack of consent. It "was of a kind to inspire such a fear in him that he found it impossible to resist their demand." Even in the 19th century, the Cour de Cassation gave relief for duress on fact like those of the second situation we described earlier.[48] In 1886, Fleischer, captain of the steamship *Rolf* whose ship was stuck in the sands of the Bay of the Seine and was about lose both his ship and cargo … agreed to pay 18,000 francs for the services of a tugboat…." After he vainly argued with the captain" of the tug, "he only agreed … in order to save his ship, which otherwise would have very shortly foundered and have been lost. . .." The court gave relief, it said, because a party is not bound to an agreement "when the consent is not free, when it is only given because of fear inspired by a considerable and present evil to which the promisor's person or fortune is exposed."

As we have seen, traditionally, relief for duress had been given in case like the first situation described earlier in which the threat is to harm the threatened party rather that to refuse to contract with him. If our approach is correct, the reason that relief should be given in the second situation as in the cases just described is that the advantaged party charged more than he could on a competitive market. It is misleading to say that relief is given because "consent … is only given because of fear inspired by a considerable and present evil…." No relief would have been given if the evil was as considerable but the price was different.

As Fabre-Magnan and Lokiec note, "[t]he 2016 reform of contract law … add[ed], in the new article 1143 … that "there is also [duress] when a party, abusing the state of dependence in which his co-contractor finds himself, obtains from him a commitment which he would not have entered into in the absence of such constraint and derives from it a manifestly excessive

47. Cour de cassation, ch. req., 27 January 1919, S. 1920. I. 198.
48. Cour de cassation, ch. req., 27 April 1887, D. 1888. I. 263.

advantage'."[49] That provision recognizes that relief is given when the advantaged party obtains "a manifestly excessive advantage." It is misleading to say that it is because he "abused" the other party's "state of dependence." In cases like those we have described, the other party was "dependent" only the sense that he lacked access to a competitive market price, and the advantaged party "abused" that "state" only by charging more that he otherwise could have done.

2. Auxiliary terms

In some of the cases described by the other contributors, the problem was with the wages the parties agreed upon but with some other term of their contract. Courts discussed the economic pressures that led a party to accept the term. The real problem, however, was that the term was unfair.

Terms that allocate the risks and burdens incident to an exchange are fair provided that the party who assumes these risks and burdens is compensated for doing so. Imperfections in the market or the economic pressures to which a party is subject may explain why he was not property compensated. But if he had been compensated, he would not be entitled to relief. The contract would not have been unfair.

In some cases, the term itself seems so burdensome that it is unlikely that a party was compensated for agreeing to it.

Löhnig and Fischinger describe a German case in which a commercial agent's contract contained a clause that forbad him from working for a competing company for two years if the contract was terminated for a reason for which he was responsible.[50] After a termination for which he was responsible, the commercial agent claimed that the clause forcing him to be inactive and depriving him of any possibility of earning money was invalid. He had probably only accepted the clause because otherwise, he would not have been able to carry out the desired activity in the first place. The Federal Constitutional Court refused to enforce the clause, noting that that it deprived him of any possibility of earning money and that he probably accepted it only because his employer would not have hired him without it. The court said that the conditions for free self-determination had not been met because, although commercial agents were legally independent, but often could not act on an equal footing with economically more powerful companies. The commercial agent had hardly any room for negotiation. (102-03)

The result is correct but the court's explanation is not helpful. Hardly any employee of a large company can act on an equal footing with his

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49. Fabre-Magnan and Lokiec this volume 105 (substituting "duress" for "violence" to avoid confusion).

50. BVerfGE, 81, 242 (Ger.), described by Löhnig and Fischinger, this volume ms. 102.

employer. If that circumstance deprives him of "free self-determination," few employment contracts are made freely. If the terms had been fair, the employee could not have obtained relief on the ground that there was no room for negotiation. What mattered was whether was fairly compensated for the non-competition clause.

In other cases, the clause required an employee to submit disputes to arbitration. In Europe, arbitration clauses are regarded as so likely to be unfair that that they are presumed to be invalid according to the Directive on Unfair Terms in Consumer Contracts of the European Commission.[51] One reason is that litigation in European countries is often so inexpensive that it is much more expensive to arbitrate.

As Harris notes, a New York court enforced arbitration clause in *Abreau v. Fairway Market. LLC*.[52] It noted that "the Plaintiffs continued his or her employment for years after signing the Arbitration Agreements thereby 'intentionally accepting' the 'benefits' of that contract." Louisiana may be less willing to so, [53] perhaps, Harris notes, because of the influence of French law.[54] For instance, in *Standard Coffee Service Co. v. Babin*, in which salesmen to sign agreed arbitration agreements under threat of termination, the court gave relief for economic duress.[55] The court observed that the employee "was faced with being deprived of his economic security, although a healthy male and able to earn a living [, and] . . . under this set of circumstances, a reasonable person with the subjective characteristics of [the employee] would have felt forced into signing the employment contract."[56]

The result may be correct but, again, the rationale is misleading. If the employer should not be allowed to require an arbitration clause as a condition of employment, the reason must be that the clause is unfair. If it were fair, an employee could not complain that he either had to accept it or else seek employment elsewhere.

In an American case described by Harris, the clause in question made it difficult for a Filipina immigrant nurse to quit her job. Her contract required her to pay $20,000 if she quit before working an impossibly large number of hours.[57] She brough suit under the Trafficking Victims Protection Act and

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51. Directive of the European Council on Unfair Terms in Consumer Contracts, 93/13/EEC, 5 April 1993, Annex 1(q).

52. No. 17-CV-9532 (VEC), 2018 WL 3579107, at *2 (S.D.N.Y. July 24, 2018) mentioned by Harris this volume ms. 114 n. 69.

53. *See, e.g.*, Garage Sols., LLC v. Person, 201 So. 3d 962, 966 (La. App. 3d Cir. 2016) (finding duress when employer refused to pay employee earned wages until employee signed training repayment agreement provision (TRAP) requiring employee to repay training costs at time of departure).

54. Harris, this volume ms. 116.

55. 472 So. 2d 124, 127 (La. App. 5th Cir. 1985).

56. *Id.* at 127.

57. Carmen v. Health Carousel, LLC, No. 1:20-CV-313, 2023 WL 5104066, at *14-15 (S.D. Ohio Aug. 9, 2023), described by Harris, this volume, ms. 119.

survived a motion to dismiss. Much of her claim was based on her inability to pay the amount for reasons unrelated to her employment, including that she had to borrow the $20,000 from her boyfriend.[58] If the terms had been fair, however, a court would be unlikely to excuse her because for personal reasons she had difficulty living up to them. It would like claiming she should be paid more because she needs more money.

In these cases, the clause to which an employee objected was so onerous as to cast doubt as to whether he had been fairly compensated for agreeing to it. In other cases, a threat by the employer made it seem more likely that he was not compensated fairly. The threat by itself would not warrant relief. Yet relief would not have been given, most likely, except for the threat.

In the Restatement (Second) of Contracts, there is a section which provides that a threat is "improper" when "the impropriety consists of the threat in combination with resulting unfairness. Such a threat is not improper if it can be shown that the exchange is one on fair terms."[59] The drafters adopted this provision in response to "developing notions of "economic duress" or "business compulsion." The difficulty is that if the evil to be remedied is the unfairness of the terms, it is hard to see why the threat must be improper for relief to be given. A better formulation would recognize that the threat is relevant only if it is evidence that the terms are unfair.

A frequent situation is the modification of the terms of an existing contract. In Japan, as Sakuraba noted, terms and conditions of labor contracts are normally set by 'work rules,' a kind of employee handbook that an employer is mandated by law to set for each of the employer's business branches with ten or more workers (Article 89 of the Labor Standards Act). In 1968, the Supreme Court held that work rule changes, although written and notified unilaterally by employers, apply to the branch's workers so long as the changed provisions are considered reasonable and notified to the employees. Their validity does not depend on whether employees had known about the changes or whether the employees had given consent.

In other jurisdictions, however, courts consider whether the employee gave consent, and, if so, whether he was induced to do so by a threat. The threat is evidence that the modification to which he consented was unfair

In a case Harris described, *Gilkerson v. Nebraska Colocation Centers, LLC*, the Eighth Circuit denied an employer's motion for summary judgement on a duress claim where the employer had the employee, under threat of termination, sign a contract rescinding an earlier more beneficial employment contract.[60] The court noted that the modification of the terms was unfair. It deprived the employee of protections for termination only for cause,

58. *Id.* at *4.
59. Restatement (Second) of Contracts § 176 comm. a. (Am. L. Inst. 1981).
60. 859 F.3d at 1118–20, described by Harris, this volume ms. 115

a retirement bonus, opportunities for commissions, and a more favorable job title.[61] The court also found in relevant that he company president "pointed out that it 'would be tough' for [the employee] to be unemployed, in part because [the employee] had health problems and couldn't afford to lose his insurance."[62] It was relevant because it showed that the employee had to be threatened to get him to agree. If the modifications was fair, the threat would not be needed.

As Fabre-Magnan and Lokiec note, "in a famous decision of July 5, 1965,"[63] the *Cour de cassation*, the highest French court for civil matters, refused to enforce a self-employed worker's contract to sell a company's products to which he agreed shortly after he renounced an earlier more favorable contract. The court found that "at the time of his resignation, Maly, who had to leave Paris and move to Grenoble with a sick child, was in urgent need of money, that his employer refused to carry out the obligations resulting from the initial contract, that he found himself in the alternative of either starting a lawsuit which could be long or accepting to receive an immediate reduced sum, by agreeing to continue his activity under draconian clauses, with a considerable reduction in the rate of commission, renunciation of social benefits, etc, one of which was illegal and all of which was unfair." One can be all the more sure that the new terms were unfair because of the threat to deprive him of funds that he urgently needed.

III. Economic Duress, Unconscionability, *Lésion* and *Wucher*

The contributors considered how the doctrine of economic duress differs from other doctrines such as unconscionability. We can now see that the legal recognition of economic duress as a distinct doctrine is an artifact of history.

In the United States the doctrine of economic duress anticipated the relief that was later given for unconsionabilityu. As Harris noted, in an article on economic duress published in 1947, John Dawson said:

"change has been broadly toward acceptance of a general conclusion that . . . restitution is required of any excessive gain that results, in a bargain transaction, from impaired bargaining power, whether the impairment

61. 859 F.3d at 1118–19 (citing City of Scottsbluff v. Waste Connections of Nebraska, Inc., N.W.2d 725, 745 (Neb. 2011)) (observing that, to constitute economic duress, Nebraska law requires "that the agreement [] be unjust, unconscionable, or illegal").

62. Gilkerson v. Nebraska Colocation Centers, L.L.C., No. 8:15-CV-37, 2016 WL 3079705, at *2 (D. Neb. May 31, 2016), *rev'd and remanded sub nom. Gilkerson*, 859 F.3d at 1119–20.

63. Cour de cassation, ch. soc., 7 July 1965, Bull. civ. IV, no. 545 (Fr.), described by Fabre-Magnan and Lokiec, this volume ms. 102.

consists of economic necessity, mental or physical disability, or a wide disparity in knowledge or experience."[64]

The doctrine of unconscionability which was adopted as § 2-302 of Uniform Commercial Code of 1952.[65] It was one of the most controversial sections of the Code. In 1981, an equivalent provision was adopted as without much controversy as § 208 of the Second Restatement of Contracts.[66] It provides:

"If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."

By adopting the doctrine of unconscionability, the drafters recognized whether a contract can be enforced may depend on whether it is substantively unfair. Once that step had been taken, the drafters might have concluded that they did not need to recotnize economic duress as a separate doctrine. They might have said concluded that the courts that introduced that doctrine were reluctant to admit that the substantive unfairness of a bargain warranted relief. Gradually, as Dawson described, they became less reluctant to do so. The drafters might have said that the relief that was once given for economic duress is a special case of the relief now given for unconscionability. As we have seen, the will theorists denied that relief should be given for unfairness. To give relief for so-called economic duress without mentioning fairness made is sound as though relief was given because of some constraint placed upon the will.

Instead of including economic duesswithin the ambit of § 208, the drafters treated it, along with traditional duress, in §§ 175-76. Section 175(1) provides: "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." According to § 175(2): "A threat is improper if the resulting exchange is not on fair terms, and … (c) what is threatened is otherwise a use of power for illegitimate ends." Since the object of the threat is to induce the other party to agree to a bargain on unfavorable terms, it would seem that there is duress whenever one party threatens not to contract unless his unfair terms are accepted. Section 175(1) provides that the threat must leave him with no reasonable alternative. If he would not have contracted absent the threat, then, as we have seen, he had no reasonable

64. John P. Dawson, *Economic Duress – An Essay in Perspective,* 45 MICH. L. REV. 253, 289 (1947), quoted by Harris, this volume ms. 115..

65. U.C.C. § 2-302 (Am. L. Inst. & Unif. L. Comm'n 1952).

66. Restatement (Second) of Contracts § 208 (Am. L. Inst. 1981).

alternative. The threat explain why he contracted but the evil to be remedied is the unfairness.

American jurists distinguish substantive unconscionability, which concerns the unfairness of the terms, from procedural unconscionability, which concerns the process which led the disadvantaged party to accept the unfair terms. The Second Restatement speaks rather vaguely of a "bargaining disadvantage":

"Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance. Such a disparity may also corroborate indications of defects in the bargaining process, or may affect the remedy to be granted when there is a violation of a more specific rule."[67]

"Bargaining disadvantage," as we saw earlier, can merely mean that under the circumstances, a party could not obtain a fair bargain. The drafters could have described a threat that induces the other party to agree to unfair terms is a bargaining disadvantage. Economic duress would then have been recognized as a form of procedural unconscionability. That formulation would have the advantages of simplicity and clarity. We would not be left with the unanswerable question of how the two doctrines differ in principle.

Before codification, French law gave a remedy for *lésion* – a disparity between the contract and the just price – to sellers of land. Robert Pother explained that "equality so that one party is injured in that one of the parties is injured if he gives more than he receives…."[68] In principle, "the injury (*lézion*) that the party suffers … is sufficient in itself to render the contract invalid (*vitieux*),"[69] French law only gave a remedy to sellers of land because "our fathers considered that wealth consists in land and made little of goods";[70] moreover, "commerce would be troubled if one allowed recission for *lézion* in regard to goods."[71] Borrowing from Pothier, the French Civil Code of 1804 confined relief for lesion to sellers of land. Art. 1118 provided: "*Lésion* only invalidates an agreement in certain contracts and among certain persons…." According to art. 1674, "if the seller is injured (*lésé*) by more than seven-twelfths of the price of an immoveable, he has the right to demand the rescission of the sale…."

The 19th century will theorists did not understand why relief should ever be given. Jurists who were sympathetic to relief for *lésion* such as Alexandre Duranton, Edouard Colmet de Santerre, and Victor Marcadé said that

67. *Id.* comm. c.
68. Robert Pothier, *Traité des obligations* §33 (1761),
69. *Id.*
70. *Id.*
71. *Id.*

although inadequacy of the price was not in itself a ground for relief, it was evidence of a "defect in consent": of fraud, mistake, duress, or a sort of moral constraint.[72] Jurists who were unsympathetic said that if that were so, relief should not be given for *lésion* but for fraud, mistake or duress."[73]

As we have seen, however, the courts gave relief for duress when the captain of a tugboat charged an excessive price for rescuing a ship and when the employers to a paralyzed old man demanded an excessive price for continuing their services. When the Code was reformed in 2016, these results were formally approved by adding art. 1143: "There is also duress where one contracting party exploits the other's state of dependence and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, and gains from it a manifestly excessive advantage."

French jurists have claimed that the 2016 reforms reaffirmed "the principle of indifference with regard to *lésion*."[74] They note that the 2016 reforms replaced art. 1118 of the 1804 Code by art. 1168 which provides that in contracts of exchange (synallagmatic contracts), "the absence of equivalence in the performances is not a cause for the invalidity of the contract unless the law provides otherwise." According to Sophie Pellet, this article "preserve[d] the traditional refusal of recission for lesion" and so "duly paid homage to the liberty of contract."[75] Jean-Baptiste Seube concluded that "[t]his solution is explained by the liberal foundation of the law of contract…."[76]

Instead, the reformers might have explicitly reaffirmed the position of Pothier: that in principle contracts of exchange require equivalence in the value of the parties' performances, although in practice it is given only when the law so provides. They could then have provided that relief is given when one party exploits the other's state of dependence to a manifestly excessive advantage.

By failing to do so, they recognized economic duress as a ground for relief distinct from *lésion*. They gave the false impression that the evil to be remedied is not the disparity in price but the constraint placed upon the decision of the disadvantaged party. As we have seen, that cannot be correct. Had the contract been made on fair terms, that constraint would not have mattered.

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72. 10 ALEXANDRE DURANTON,. COURS DE DROIT FRANÇAIS SUIVANT LE CODE CIVIL §§200-201 (1834): 5 ANTOINE MARIE DEMANTE & EDMOND COLMET DE SANTERRE, COURS DE DROIT FRANÇAIS SUIVANT LE CODE CIVIL §28 *bis* (1834). VICTOR MARCADÉ, EXPLICATION THEORETIQUE ET PRATIQUE DU CODE NAPOLEON *357-358* (1859)..

73. See 24 CHARLES DEMOLOMBE, CHARLES. *COURS DE CODE NAPOLEON* §194 (1867) ; 15 FRANÇOIS LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS §485 (1867–1878).

74. Sophie Pellet, *Le contenu licite et certain du contract*, in *Le nouveau droit des obligations,* DROIT ET PATRIMOINE 61, 64 (nº 258, mai 2016)

75. Id. at 63.

76. JEAN-BAPTISTE SEUBE, ET AL., DROIT DES CONTRATS BILAN DE LA RÉFORME ET LOI DE RATIFICATION 95 (2018).

No distinct doctrine of economic duress emerged in Germany. The original draft of the Civil Code of 1900 reflected the view of the will theorists that no relief should be given for unfair terms. In the final draft a second paragraph was added to § 138. The first paragraph provides that "[a] legal transaction that violates good morals (*gute Sitten*) is void."

The second paragraph gives relief for *Wucher*. That word is commonly translated as "usury" although in German in includes harsh terms of any sort, not just the taking of interest on loans. According to paragraph two:

A legal transaction is also void when a person takes advantage of the need, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of financial advantages for himself or a third party that are obviously disproportionate to the performance given in return.

"Taking advantage of the need" of the other party is like taking advantage of his "inexperience lack of judgmental ability, or grave weakness of will." It is one more circumstance to be considered but not the basis of a separate doctrine.

In any event, since 1936, German courts have found the limitations of this second paragraph confining. When a contract gives one party a disproportionate advantage, the other party can obtain relief on the ground that "good morals" have been violated under paragraph one, without demonstrating that he was vulnerable in any of the ways specified in paragraph two. [77] The courts have said that some additional element must be necessary; otherwise, the second paragraph would serve no purpose. The additional element, it said, is that the advantaged party must have exhibited a reproachable "character."[78] The standard, according to the Bundesgerichtshof, the highest court for civil matters, is that

"according to present case law (*Rechtsprechung*) … independent of the elements of *Wucher* of § 138(2) of the Civil Code, a legal transaction is void for violation of good moral under § 138(1) when there is a striking disproportion between performance and counter performance together with a reproachable intention (*verwerfliche Gesinnung*) of the advantaged party, because he knew the difficult situation (*schwierige Lage*) of his contractual partner and exploited it or failed to recognize that his contractual partner is only concluding an excessively disadvantageous contract due to a distressed situation (*Zwangslage*)…."[79]

That is not much of a limitation. The "distressed situation" need not constitute "need" within the meaning of paragraph two or there would be no reason to apply paragraph one. A distressed situation seems mean whatever

77. Reichsgericht, 31 March 1936, RGZ 150, 1.
78. *Id.*
79. Bundesgerichtshof, 5 June 1981, BeckRS 1981, 31073667.

circumstances led the disadvantaged party to accept excessively onerous terms. It would be strange if the advantaged party neither knew nor could recognize that absent such circumstances, the disadvantaged party would not have accepted these terms.

As Löhnig and Fischinger noted, the German Labor Court has given relief when an employee was paid a good deal less than the prevailing wage rate. In giving relief to bus driver who had been paid less than half the going rate, the court said:

"The subjective element for a *wucher*-like transaction in the sense of § 138 BGB is present. If a particularly large disproportion between performance and counter performance is established, because the value of the performance is at least twice as large and the value of the counter performance, this warrants the factual finding of a reproachable intention (*verwerfliche Gesinnung*)."[80]

The circumstances that led an employee to agree to such a low wage may have been of an economic nature, but the employee does not have to establish what they were. There is no distinct doctrine of economic duress.

Whether or not we use the term "duress" does not matter as long as we are clearly about the principles on which relief is given. If we are correct, there are two principles. One is that be made for the mutual advantage of the parties. It is not if one party is consent only because the other offered in return something that he had no right to sell by doing or withholding something that he had no right to do or to withhold. The second principle is equivalence or fairness in exchange. This principle is violated if one party charges more than the competitive market price. It is violated if one party inserts a term in the contract that allocates a risk or burden to the other party for which he is not compensated.

80. Bundesarbeitsgericht, 18 November 2015, NJW 2016, 2359, 2360.

ECONOMIC DURESS IN CANADIAN EMPLOYMENT LAW: THE LITTLE SIBLING IN "EMPLOYEE RIGHTS"

Bruce Curran†

INTRODUCTION

Since World War II, an "employee rights" paradigm has competed with an "efficiency" paradigm in Canadian employment law.[1] While these terms will be expounded upon below, generally the "employee rights" paradigm refers to a normative claim that the law ought to provide an array of protections for employees, and facilitate their personal dignity, autonomy, and fair treatment;[2] in contradistinction, the "efficiency" paradigm maintains that employment law ought to facilitate "the most efficient way of increasing the profitability of the employer's firm" and respect market forces.[3] This tension is at play in all three legal regimes governing work in Canada—the common law, labor relations, and regulatory.[4] The common law, which is judicially created and enforced, has developed doctrines applicable to the employment relationship based heavily on contact law. Labor relations legislation enables workers to act collectively to organize, bargain, and strike, and is based on the US Wagner Act Model (with some uniquely Canadian features). The regulatory regime provides employees with statutory protections, including human rights, occupational health and safety, and privacy, and establishes a floor for working conditions, such as a minimum wage, in legislation referred to as employment standards. Originally, the employment standards of the regulatory regime were introduced specifically for the benefit of women and children, with the labor relations regime intended to yield superior conditions for men who were generally thought to be the primary wage earners for the family unit.[5] These differing purposes

†Associate Professor, Faculty of Law, University of Manitoba. The author would like to acknowledge and thank David Doorey for ideas for this paper, many of which have been incorporated. All errors are the author's own.

1. PETER BARNACLE ET AL., EMPLOYMENT LAW IN CANADA §8.4–8.11(4th ed. 2005).
2. *Id.* at §§1.32–1.37.
3. *Id.* at §1.39, §7.109.
4. *See* DAVID J. DOOREY, THE LAW OF WORK (2d ed. 2020).
5. Judy Fudge, *Reconceiving Employment Standards Legislation: Labour Law's Little Sister and the Feminization of Labour*, 7 J. L. & SOC. POL'Y 73, 77 (1991).

led Judy Fudge to famously brand employment standards as "labour law's little sister."[6]

The emphasis of this paper will be on the common law, as that has been the primary source of advancements in the "employee rights" paradigm over the past five decades. The Supreme Court of Canada has led these advancements, espousing a benevolent conceptualization of employment law that recognizes the uniqueness of the employment relationship relative to commercial transactions, the inequality of bargaining power between employees and employers, the psychological importance of work to people, and workers as a vulnerable group in need of protection. As part of these advancements, courts have developed various doctrines providing employees with protections. Such doctrinal developments included the "fresh consideration" requirement for enforcing modifications to the employment contract; the duty on employers to dismiss in good faith; the duty on the parties to perform the contract in good faith as part of a general "organizing principle of good faith"; unconscionability; and economic duress, which will be the focus of this paper. In very general terms, economic duress gives a victim of coercive pressure the right to rescind the agreement that was the product of that pressure. Recission is a remedy enabling the cancellation of the contract and the return of the parties to the positions they would have occupied if the contact had not been made.[7] At first blush, the economic duress doctrine appears to have great potential to protect employees from the oppressive conduct of their employers. Employees are susceptible to coercion from their employers due to a limited set of alternatives—Most individuals are forced to seek employment, and remain in their jobs, in order to earn the wages required to purchase the goods necessary for survival.[8] Consequently, the agreements that employees enter into with their employers are often not the product of utmost free will. Despite its promise, the economic duress doctrine has not really "grown up." It has been deployed conservatively and marginalized in the presence of siblings perceived to be more capable in the family of "employee rights." I will argue that this marginalization is likely to continue for the foreseeable future, and economic duress will remain the "little sibling," to adapt Fudge's famous analogy.

This paper will explore two "whys" in detail: Why has the "employee rights" paradigm flourished in Canadian common law?; and Why hasn't economic duress played a bigger role in this paradigm? This exploration will proceed in five parts. First, I will expand upon the "employee rights" and the "efficiency" paradigms, for context. Second, the Canadian development of

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6. *Id.* at 78.

7. JOHN D. MCCAMUS, THE LAW OF CONTRACTS 372–376 (2020).

8. Robert L. Hale, *Bargaining, Duress and Economic Liberty* 43 COLUM. L. REV. 603, 604–06 (1943). See also the discussion at 621–24.

the doctrine of economic duress will be discussed. Third, I will review other selected doctrinal developments in the "employee rights" paradigm. Fourth, reasons will be posited as to why the judiciary has advanced the "employee rights" paradigm. Last, I will prognosticate about the likely future of the economic duress doctrine.

I. "EMPLOYEE RIGHTS" VERSUS "EFFICIENCY" PARADIGM

The "employee rights" paradigm began its ascendancy shortly after World War II.[9] According to this paradigm, it is important to provide workers with a range of rights and freedoms that facilitate their dignity, autonomy and fair treatment. From a philosophical standpoint, "the individual employee has certain inalienable 'fundamental human rights' that must be protected in the workplace in order for our system of work organization to be considered morally 'just' and, therefore, worthy of support."[10] To "rights" proponents, there is a moral imperative to provide these protections due to the employment relationship being inherently one of "submission" and "subordination"[11] with a profound power imbalance between virtually all employees and their employers. Respect for autonomy and dignity is realized by preventing the superior power wielders (employers) from subjecting employees to unacceptable economic and/or psychological harms. These protections permit workers to enjoy "the sort of life opportunities that we expect in a liberal-democratic society."[12] Under this paradigm, "the economic and psychological security provided by a decent work relationship is the gateway to civil liberty in the public law sense of that term."[13] The rights paradigm is not necessarily inimical to the interests of business: certain schools of human resource management, such as the "high-involvement model,"[14] posit that fair treatment of employees is not only the right thing to do, but will also enhance business performance.

Some of the rights that the common law system has developed are specific protections for employees related to dismissal, such as reasonable notice, just cause, and the concept of constructive dismissal. These concepts will come up in a number of places in this paper, so a brief explanation is in order for readers who are unfamiliar with them. Employers have an obligation to provide employees with reasonable notice (or pay in lieu of

9. BARNACLE ET AL., *supra* note 1 at §§8.4–8.11.

10. *Id.* at §1.23.

11. These terms were popularized by Otto Kahn-Freund. *See* OTTO KAHN-FREUND, PAUL L. DAVIES & MARK R. FREEDLAND, KAHN-FREUND'S LABOUR AND THE LAW 18 (3d ed. 1983).

12. BARNACLE ET AL., *supra* note 1 at §1.24.

13. *Id.*

14. For a discussion of this model, see Anil Verma & Daphne Taras, *Managing the High-Involvement Workplace*, *in* CANADIAN LABOUR AND EMPLOYMENT RELATIONS 125 (Morley Gunderson et al. eds. 6th ed. 2009).

reasonable notice) if their employment is ending. The length of reasonable notice is not capable of formulaic prediction, but a judge is supposed to assess it on an individualized basis using an open-ended list of considerations from the caselaw, such as the nature of the position, length of service, age, and the availability of similar employment.[15] Generally, an employer does not have an obligation to provide reasonable notice if it has "just cause" to dismiss the employee.[16] Constrictive dismissal is a legal construct when the employer demonstrates an intention to no longer be bound by the employment contract, without expressly dismissing the employee. It typically occurs when the employer introduces a fundamental change to the employment contract that the employee does not agree to.[17]

Adherents to the "efficiency" paradigm wish to facilitate business performance. This paradigm places primacy on the fact that private business is extremely competitive and is driven by the profit motive. Advocates believe that the law should respect the role of market forces and freedom of contract in determining the terms and conditions of employment. According to this paradigm, the legal obligations on employers should be kept to a minimum, so as not to be a drag on the efficient functioning of commercial enterprises. A key assumption of the paradigm is that management is best situated to make decisions on human resource matters. The law must respect the managerial prerogative and give management maximum flexibility in deciding how to run the business, including human resource decisions, and should not second-guess or override these decisions. Moreover, it is the employer, and not the court, who has to live with the consequences of the human resource decisions. The law should provide the employer with maximum flexibility, including the flexibility to unilaterally modify the terms and conditions of the employment relationship. Any reasonable notice awards should be modest, in order to minimize the employer cost of terminating the relationship, and to enable the employer to respond quickly to fluctuations in demand for the goods and services it sells. According to proponents of this paradigm, all stakeholders (e.g., employers, employees, government, and society-at-large) will be better off in the long run if employment law facilitates efficiency.[18]

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15. *See* Bruce J. Curran & Sara J. Slinn, *Just Notice Reform: Enhanced Statutory Termination Provisions for the 99%*, 20 CANADIAN LAB. & EMP. L.J. 229, 232 (2017).

16. BARNACLE ET AL., *supra* note 1 at §III.4

17. *See* Potter v. New Brunswick Legal Aid Services Commission, 2015 S.C.C. 10.

18. BARNACLE ET AL., *supra* note 1 at §1.39.

II. ECONOMIC DURESS IN CANADA

In Canada, the contract of employment is the "fundamental building block" for modern work law regulation,[19] and the contractual doctrine of economic duress is one that is recognized in Canadian employment law. Originally, duress was only recognized where there was actual or threatened violence to a person, but was eventually broadened to include payments "extracted through the improper seizure or retention of the plaintiff's personal property."[20] It was only in the late 1970s that it was expanded further to apply to economic pressure more generally.[21] There is no uniformly recognized legal definition of duress in Canada. However, according to one authoritative source, the hallmark of the doctrine is the impairment of the target's autonomy to freely enter into the contract.[22] At common law, the remedy of duress is to make contact voidable at the election of the victim, and it is therefore called a "recessionary doctrine."[23]

Economic duress must be distinguished from the closely-related doctrines of undue influence and unconscionability. All three are species of the genus "contractual unfairness."[24] Duress is a common law doctrine, whereas undue influence and unconscionability are equitable doctrines.[25] Commentators agree that these doctrines are conceptually distinct, although most acknowledge that their boundaries are very blurry. According to McCamus, a common theme for all three is that they are "applicable to circumstances where a stronger party has taken advantage of a weaker party in the course of inducing the weaker party's consent to the agreement."[26] He has stated, "in a particular fact situation, it may be appropriate to consider the application of two or even all three of the doctrines."[27] Unlike in duress, there does not have to be explicit pressure for undue influence. The basis of the plea of "undue influence" is simply that one party has been induced into an agreement by the "unconscientious use by one person of power possessed by him over another."[28] Most commonly, the plea will be successful where there is a relationship of trust and confidence entitling the court to presume undue

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19. Claire Mummé, "That Indispensable Figment of the Legal Mind": The Contract of Employment at Common Law in Ontario, 1890–1979 3 (2013) (unpublished PhD dissertation, York University) (https://digitalcommons.osgoode.yorku.ca/phd/5/).

20. MCCAMUS, *supra* note 7 at 408–409.

21. *Id.* at 410.

22. Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175, 177 (1997).

23. MCCAMUS, *supra* note 7 at 407.

24. Anna S. P. Wong, *Fresh Consideration Rule: Insights from Its Resurrection in* Quach v Mitrux Services Ltd, 54 U.B.C. L. REV. 483, 520 (2021).

25. MCCAMUS, *supra* note 7 at 403.

26. *Id.*

27. *Id.*

28. Earl of Aylesford v. Morris (1873), 8 Ch. App. 484 at 491.

influence, such as parent and minor child, guardian and ward, doctor and patient, or lawyer and client.[29] The doctrine of unconscionability is meant to address situations where an unfair bargain resulted from inequality of bargaining power.[30] Modern courts have seized on the explicit "inequality of bargaining power" component in the doctrine of unconscionability and have applied the doctrine more frequently in the employment setting than economic duress, and substantially more than undue influence. [31] Consequently, undue influence will not be the emphasized in this paper.

While the doctrine of economic duress is certainly recognized in Canada, the state of the law is somewhat unsettled, in part because the Supreme Court has not made a definitive pronouncement on the doctrine. [32] In the following subsections, I will first go over the status of the doctrine generally in Canadian contract law. Then, I will proceed to focus on economic duress in Canadian employment law specifically.

A. In Contract Law Generally

Sir Thomas Erskine Holland once described the common law as "chaos with a full index",[33] a phrase that aptly describes the current state of the economic duress doctrine in Canada! Canadian common law has been heavily influenced by the jurisprudence of England,[34] given Canada's colonial history and its continued membership in the British Commonwealth (even though English jurisprudence is no longer binding in Canada).[35] The English decisions on economic duress in the late 1970s and early 1980s are a case in point, as they have guided the development of the doctrine in Canada. There is a general consensus in the Canadian jurisprudence that economic duress involves economic threats exerted by a coercer against a victim, and that the pressure exerted must leave the victim with little choice but to consent to the agreement. However, the Canadian courts have adopted three different tests which have important differences.[36]

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29. BARNACLE ET AL., *supra* note 1 at §7.108.
30. MCCAMUS, *supra* note 7 at 450.
31. BARNACLE ET AL., *supra* note 1 at §7.108.
32. NAV Canada v. Greater Fredericton Airport Authority, 2008 N.B.C.A. 28, para. 37.
33. THOMAS ERSKINE HOLLAND, ESSAYS UPON THE FORM OF THE LAW 171 (1870).
34. Mummé, *supra* note 19 at 238.
35. This paper is not focused on developments in the province of Quebec, which still has a civil code legal system, owing to its origins as a colony of France.
36. Farhad Siddiqui & Zackary Goldford, *Economic Duress in the Canadian Common Law of Contracts: What's the Test*, 53 ADVOC. Q. 371 (2023).

1. Pao On Test

The principle of economic duress was first authoritatively recognized in the United Kingdom in 1979 by Lord Scarman in Pao On v. Lau Yiu Long,[37] a decision of the Judicial Committee of the Privy Council. Pao On involved a threatened breach of contract, as do many of the economic duress cases that have come after.[38] The plaintiff, Pao On, had agreed to sell the shares of his company to the defendant, Lau Yiu Long, in return for the defendant's shares in the defendant's company, Fu Chip. However, the plaintiff also extracted an indemnity from the defendant, protecting the value of the Fu Chip shares. The indemnity gave certain unanticipated advantages to the defendant, and once these became apparent the plaintiff refused to close the transaction unless the defendant executed a second indemnity providing the plaintiff with additional protections if the shares in Fu Chip depreciated. The defendant, fearing a negative reaction in the investment community should the deal not close, took legal advice and agreed to the second indemnity. Ultimately, the shares went down in value and the plaintiff demanded that the defendant honour his second indemnity. The defendant refused on several grounds, including an allegation that the second indemnity was signed under "economic duress."[39]

On economic duress, Lord Scarman ruled that it was not present in the case at bar, because the commercial pressure did not rise to the level of coercion. However, in *obiter dicta*, he took the opportunity to recognize the doctrine's existence and enunciate its principles. He stated, "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent."[40] He also set out four contextual factors indicating the purported victim was under duress: whether he protested; whether he lacked "an alternative course open to him such as an adequate legal remedy"; "whether he was independently advised"; and "whether after entering the contract he took steps to avoid it."[41]

The threshold set by Lord Scarman in this case has become known as the "overborne will" test, and it is thought to be a very high one to satisfy.[42] The analysis is focused entirely on the state of mind of the purported victim in order to determine whether the integrity of their consent was undermined by economic pressure.[43] The phrase "coercion of the will" suggests that the victim must have no control over their actions in order for the decision to consent to be an involuntary one. In the opinion of Siddiqui and Goldford,

37. [1979] 3 All ER 65.
38. MCCAMUS, *supra* note 7 at 410.
39. [1979] 3 All ER 65 at 69–73.
40. *Id.* at 78.
41. *Id.* at 78.
42. MCCAMUS, *supra* note 7 at 412.
43. Siddiqui & Goldford, *supra* note 36 at 372.

"[W]e see the Pao On approach as unsatisfactory because victims might have their free will intact while being deprived of all practical alternatives, and in these situations, there might still be economic coercion that ought to rise to the level of economic duress."[44] The Pao On test has been endorsed three times by Canadian appellate courts in the last 15 years.[45]

2. Universe Tankships Test

Three years later, Lord Scarman was given the opportunity to revisit economic duress in Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation[46] and he took the opportunity to set out a modified test. Although Lord Scarman's decision was a dissenting one, his modified test has found traction in the jurisprudence of the UK and Canada.

Universe Tankships Inc. was an international shipping business whose ships flew under "flags of convenience." While one of its ships was in a Welsh port, an international union threatened to "black" the vessel (deny it the tugboat assistance necessary to leave port) unless the company made certain monetary payments and entered into collective agreements covering the shipowner's crew. The trade union was using the practice of "blacking" ships flying under flags of convenience to gain leverage to disincentivize the use of inexpensive labor on such ships. One of the trade union's demands was that the ship owners make a payment to the trade union's "welfare fund." The shipowner complied with the demands but, after leaving port, pled economic duress and sought recovery of the amounts paid.

The test that Lord Scarman annunciated in this case has two prongs. The first prong, subjective in nature, is that there must be "pressure amounting to compulsion of the will of the victim."[47] According to Lord Scarman, this will typically be "not the lack of will to submit but the victim's intentional submission arising from the realization that there is no other practical choice open to him."[48] This first prong is similar to the one set out in Pao On and incorporates the four contextual factors, but likely establishes a lower threshold.

The second prong, more objective in nature, assesses "the illegitimacy of the pressure exerted,"[49] and thus invites an assessment of the conduct of the coercer. In determining the legitimacy, two factors have to be considered: the nature of the pressure; and the "nature of the demand which the pressure

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44. *Id.* at 386.
45. Bell v. Levy, 2011 B.C.C.A. 417; Arisoft Inc. v Ali, 2015 O.N.S.C. 7540; S.A. v. A.A., 2017 O.N.C.A 243.
46. [1982] 2 All E.R. 67.
47. *Id.* at 88.
48. *Id*.
49. *Id*.

is applied to support."[50] Lord Scarman applied this test to the facts of the case and ruled that economic duress was not present in the case at bar. While the first prong was satisfied, in that the shipowners had no practical alternative but to make the contributions demanded by the international union, the second prong was not satisfied—The union's demand for contributions was the subject of legal immunity under the applicable labor relations legislation. In the Law Lord's opinion, the shipowners could not recover the contributions.

The "legitimacy" prong of the Universe Tankships case has proved difficult to apply. Conduct which is clearly illegal, such as a threat to commit a crime or a tort, will easily satisfy this prong. However, the matter becomes murkier when the conduct is not illegal but merely aggressive i.e., when "lawful act duress" is involved. As McCamus states, "[T]he task of drawing the line between unacceptable coercion and legitimate commercial pressure has become most difficult."[51] An example of a difficult situation for the illegitimacy test is threatened breach of contract, which may seem illegitimate, but which the law readily recognizes as being lawful, subject only to various contractual remedies if the threat is carried out, such as damages or specific performance.[52]

Despite its problems, the "legitimacy of the pressure" prong may be necessary: There may be situations in which one party earnestly believes it has no practical alternative but to accede to the demand or request of a counterparty but the demanding party has acted in good faith and not in an exploitative manner. [53] This will often happen during the negotiation of an employment contract, where the employee, due to a lack of alternatives in the market place and compelling financial need, has no option but to accept a job offer that is unattractive to them but which is "fair" according to market conditions.[54] Siddiqui and Goldford opine that "[a]lthough the line between legitimate and illegitimate pressure must seem nebulous, this prong of the test allows the court a degree of discretion to uphold a contract even if there were economic pressures that, while unacceptable to the victim, are tolerable in the marketplace."[55] This discretion afforded to judges has made the Universe Tankships approach to economic duress the most popular in Canada, with several appellate courts in the last 15 years applying this test.[56]

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50. *Id.* at 89.
51. MCCAMUS, *supra* note 7 at 406.
52. NAV Canada v. Greater Fredericton Airport Authority, 2008 N.B.C.A. 28, para. 37; MCCAMUS, *supra* note 7 at 419.
53. MCCAMUS, *supra* note 7 at 424.
54. *Id*.
55. Siddiqui & Goldford, *supra* note 36 at 373.
56. *Id.* at 377.

3. Nav Canada Test

The third test was formulated in 2008 by Justice Robertson of the Court of Appeal of New Brunswick in NAV Canada v. Greater Fredericton Airport Authority Inc.[57] In that case, NAV Canada was a company with a regulatory monopoly on the provision of certain aviation services and equipment at Canada's airports.[58] The Greater Fredericton Airport Authority (GFAA) decided to improve one of the runways, and its contract with NAV Canada required the provider to bear the costs of installing an instrument landing system. [59] Despite the contract, NAV Canada insisted that the GFAA agree to pay for the new equipment before it was installed.[60] A standoff ensued, but a new agreement was ultimately entered into in which GFAA agreed to pay these costs, but not before registering a protest.[61] The case was, therefore, one of contractual modification, and Justice Robertson was careful to emphasize that the economic duress principles he was stating applied only in such situations.[62] According to McCamus, this is the typical fact pattern in which the doctrine of economic duress is applied: an undertaking or agreement extracted by a threatened breach of a pre-existing contractual arrangement.[63]

The threshold issue in the case was whether there was "fresh consideration" for the new agreement. Justice Robertson found that there was not, but in a radical step, he ruled that contractual modifications ought to be enforceable without "fresh consideration," provided that agreement to such modifications was not procured by economic duress.

He then proceeded to analyze the economic duress issue. In his reasons, Justice Robertson was critical of the legitimacy component of the Universe Tankships test. He acknowledged that tortious and criminal conduct were fairly easy to categorize as illegitimate pressure, but was concerned with discerning the difference between lawful pressure that is legitimate from that which is not. He opined,

> [T]he criterion of illegitimate pressure adds unnecessary complexity to the law of economic duress, and presently lacks a compelling juridical justification, at least with respect to its application in the context of the enforcement of contractual variations. The law does not provide a workable

57. 2008 N.B.C.A. 28.
58. *Id.* at para. 2.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at paras. 51,53.
63. MCCAMUS, *supra* note 7 at 425.

> template for distinguishing between legitimate and illegitimate pressure.[64]

Justice Robertson went on to formulate a new multi-step test for economic duress in the context of contractual variations, but borrowed some components from prior tests. Under his new test, economic duress is dependent on two conditions precedent. First, the promise "must be extracted as a result of the exercise of 'pressure', whether characterized as a 'demand' or a 'threat'."[65] Second, "the exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer's demand."[66] If these two "threshold requirements" are satisfied, the trier of fact must proceed to determine whether the victim consented to the variation. To make a determination on consent, the judge should assess three factors: "(1) whether the promise was supported by consideration; (2) whether the coerced party made the promise 'under protest' or 'without prejudice'; and (3) if not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable."[67]

Justice Robertson ruled that economic duress was present in the case at bar. The two conditions precedent were satisfied, because Nav Canada exerted pressure, and by virtue of its monopoly, the GFAA had no practical alternative but to accede to Nav Canada's demand. Moving on to the second phase of his test, he also found that GFAA did not consent, because the promise was not supported by fresh consideration, and because the Airport Authority objected early and often to Nav Canada's demand to pay for the new landing system.

According to McCamus, "The analysis of the economic duress doctrine offered in the *NAV Canada* decision is boldly innovative and runs against the dominant view established in the English and Canadian jurisprudence on the subject."[68] However, Justice Robertson's "boldly innovative" test has generally not found favor with most other Canadian appellate courts.[69] Judges in Canada have expressly recognized that certain forms of pressure in commercial settings are acceptable. For example, in Martel Building Ltd. v. Canada,[70] a unanimous Supreme Court of Canada acknowledged, "The primary goal of any economically rational actor engaged in commercial negotiation is to achieve the most advantageous financial bargain… at the expense of the other negotiating party."[71] Given this recognition, common

64. Nav Canada, 2008 N.B.C.A. 28, para. 47.
65. *Id.* at para 53.
66. *Id.*
67. *Id.*
68. MCCAMUS, *supra* note 7 at 424.
69. Siddiqui & Goldford, *supra* note 36 at 381.
70. 2000 S.C.C. 60.
71. *Id.* at para. 62.

law courts have been reticent to allow rescission by parties who have been the target of ordinary commercial pressures. According to Siddiqui and Goldford, "Legitimacy, added to the test for economic duress in Universe Tankships, has been a way that some courts have drawn the line between desirable, or at least tolerable, commercial pressure and inappropriate coercion."[72]

4. Conclusion

All of this confirms that the precise parameters of the test for economic duress in the Canadian jurisprudence are not completely settled. There is general agreement that the will of the victim must be coerced through pressure to the point where they have little alternative but to agree, but the biggest points of contention appear to be whether the pressure exerted must be of an illegitimate nature to trigger the doctrine, and if so, the precise borderline between illegitimate and legitimate economic pressure. Writing about economic duress in the United States 70 years ago, Jack Dawson stated that it had failed to produce "a coherent body of doctrine, unified around some central proposition; on the contrary, the conflict and confusion in the results of decided cases seem greater than ever before"[73] and that it offers "no great encouragement for those who seek to summarize results in any single formula."[74] These comments are also applicable to the state of the doctrine in Canada now. Siddiqui and Goldford performed a recent survey of Canadian appellate-level decisions. Although they echoed Dawson's comments, they were able to conclude that the Universe Tankships approach was "the most popular of the three approaches".[75] Next, we turn to examining economic duress specifically in the context of Canadian employment law. This is necessary because the courts have emphasized on numerous occasions that different considerations apply to the employment relationship than commercial transactions.[76]

B. In Employment Law

It is easy to recognize the promise of the doctrine of economic duress for advancing the "employee rights" paradigm, and we will examine this from a theoretical perspective first. Then, we will review the jurisprudence, to see how the doctrine has been used in practice. The potential of economic

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72. Siddiqui & Goldford, *supra* note 36 at 383–384.
73. John P. Dawson, *Economic Duress: An Essay in Perspective*, 45(3) MICH. L. REV. 253, 288 (1947).
74. *Id.* at 289.
75. Siddiqui & Goldford, *supra* note 36 at 377.
76. *See, e.g.*, Wallace v. United Grain Growers Ltd., 1997 CanLII 332 (S.C.C.), paras. 91–92.

duress in the employment sphere has certainly been recognized by academics.[77] In theory, employers may make demands on or threats to job applicants or current employees that the targets, by virtue of their circumstances, might have no practical alternative but to accede to. The employer and the employee enter into any interaction with a gross inequality of bargaining power in most circumstances. There has been growing recognition from labor-market economists, even those from the staunchly neoclassical University of Chicago, of the negative impact of the superior bargaining power that employers have, a state they have labelled "monopsony power".[78] Employers have vastly superior financial, legal, and information resources than employees possess. The employer also typically has a far greater array of alternatives than the employee does if an employee doesn't agree to the demands,[79] in that the employer can usually easily replace a non-compliant employee with another willing worker in the job market. All of this makes the ability of employees to freely consent "largely illusory in the employment context because of the superiority in market power enjoyed by employers over most of their workers". [80]

Employees may wish to plead economic duress to nullify agreements made at the beginning, middle, or end of the employment relationship. They might want to rescind unfavourable agreements that are made when they are being hired, given the fact that some employers make unappealing demands on a "take it or leave it" basis. This imbalance does not end when the employment contract is signed. Frequently, employers will demand unfavourable (from the employee's perspective) changes to the employment contract, and employees have little choice but to accept, because the alternative is unappealing in the extreme—quitting and looking for work elsewhere, possibly combined with a constructive dismissal action with only a moderate chance of modest payoff. Even when ending the relationship, employers can typically use the employees' vulnerable financial situation as leverage to get them to sign a severance agreement that is substantially below their reasonable notice entitlements.

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77. *See, e.g.*, Barnacle, et al., *supra* note 1 at §7.107; Ravi Malhotra, *The Implications of the Social Model of Disablement for the Legal Regulation of the Modern Workplace in Canada and the United States*, 33 MAN. L.J. 1 (2009); Anna S. P. Wong, *Fresh Consideration Rule: Insights from Its Resurrection in* Quach v Mitrux Services Ltd, 54 U.B.C. L. REV. 483 (2021).

78. *See, e.g.*, Orley Ashenfelter, Henry Farber & Michael Ransom, *Labor Market Monopsony*, 28 J. LAB. ECON. 203 (2010); DWAYNE BENJAMIN, ET AL., LABOUR MARKET ECONOMICS: THEORY, EVIDENCE AND POLICY IN CANADA (2021); ERIC POSNER, HOW ANTITRUST FAILED WORKERS (2021). In labour-market economics, monopsony describes a market structure in which employers are large enough relative to the size of the local labour market that they possess the power to unilaterally set the terms and conditions of employment below the levels that would prevail in a competitive market.

79. The academic literature on negotiations has established the influence of one counterparty's alternatives on bargaining power. *See, e.g.*, ROY J. LEWICKI, DAVID M. SAUNDERS & BRUCE BARRY, ESSENTIALS OF NEGOTIATION (7th ed. 2021).

80. BARNACLE, ET AL., *supra* note 1 at §7.110.

Now, let us move from theory to practice. There is no known Canadian case involving an employee pleading economic duress to rescind an initial employment contract, which is consistent with McCamus' assertion that duress most often arises in contract *modification* situations. There are many cases where employees have pled duress when employers have unilaterally forced an alternation to the employment contract, and we will examine those in the next section. Following that, we will move to the end of the relationship, and discuss cases involving claims of economic duress in severance agreements.

1. Modification of Terms

One of the earliest cases in which economic duress was recognized (despite that legal term not being used) at the appellate level was Joseph Puiia v. Occupational Training Centre, a 1983 decision of the Prince Edward Island Court of Appeal.[81] After short stints of previous employment with the employer, the employee started in October of 1977 as a supervisor at a book bindery. Some 18 months later, the employer presented Puiia with documents entitled "terms and conditions of employment" and "offer of appointment and contract of employment," which Puiia had to sign (and did sign) in order to keep his job. These documents set out a provision for notice of dismissal that was much shorter than the period of reasonable notice to which Puiia was entitled at common law. About five months later, the bindery experienced financial difficulties, and the plaintiff was given notice of termination based on the new "agreement." At trial, the action for damages for wrongful dismissal was dismissed and the "agreement" held valid, but the Court of Appeal allowed the appeal. A set of unilaterally imposed "terms" could not, when tendered after employment started, bind the plaintiff. The employer imposed the terms on employee under the threat that he would lose his job if he did not sign. The essential ingredients of a valid contract, which were lacking in this case, are the consent of the parties to the agreement itself and their assent to its particular terms. To be effective, such consent must be voluntary, full and free. Consent obtained by coercion or any abuse of authority is insufficient in law to create the degree of bilateral agreement that is necessary in an enforceable contract. This was one of the rare instances where the employee successfully relied on economic duress to rescind the contractual modifications.

This brings us to a very prominent and oft-cited decision by the Ontario Court of Appeal in 1988. In Stott v. Merit Investment Corporation,[82] the employee was a securities salesman who was employed by the defendant

81. [1983] P.E.I.J. No. 41, 43 Nfld. & P.E.I.R. 283.
82. [1988] O.J. No. 134, 63 O.R. (2d) 545.

securities firm on a commission basis. The employee was retained by an unsophisticated client who implemented an aggressive investment strategy and experienced heavy losses, creating a deficit in the client account. Shortly thereafter, the employee was asked to sign an agreement with his employer, acknowledging his unconditional responsibility for the investor's debt and promising to repay it in installments (which monies would be reimbursed if the client ever made good on the losses). Two roads diverged in a yellow wood for the employee.[83] He was told that, if he did not sign the agreement, it would not go well for him at the firm and it would be difficult for him to find employment in the industry. On the other hand, if he did sign, the firm would hold him in high esteem and would open a trading account for him. The employee took the road *most* traveled and signed the agreement. He believed he would be fired if he didn't sign. Shortly afterwards the defendant began making monthly deductions from commissions otherwise payable to the plaintiff. As promised, the defendant set up a trading account for the plaintiff. When the plaintiff complained of his cash flow situation, the defendant responded with a guarantee of a bank loan. More than two years after signing the agreement (and with the client never paying for the losses), the employee had found his financial situation with the employer had become intolerable and resigned. The employee then sued the firm to recover the amounts he paid towards the client's debt.

Justice Finlayson, for a majority of the court, assessed the issue of economic duress. He cited both Pao On and Universe Tankships but relied primarily on the Universe Tankships test. Justice Finlayson ruled that there was potentially a coercion of the employee's will as a result of illegitimate pressure. He found,

> Stott was pressured into signing the agreement in question and that the pressure applied could not be recognized by law as legitimate. He was called into his superior's office unexpectedly, he was confronted with a customer's delinquent account for which he must have felt some responsibility, he was given no opportunity to consider his position at leisure even though there were no external reasons for urgency, he was effectively discouraged from consulting a lawyer, and he (with full justification) feared for his job.[84]

However, despite his ultimate ruling that the pressure was illegitimate, Justice Finlayson took pains to clarify an absence of bad faith on the part of

83. This is a reference to "The Road Not Taken," a poem by Robert Frost.
84. *Id.* at para. 54.

the investment firm (in that they believed the claim against the employee to be legitimate).

Making use of the four contextual factors that Lord Scarman set out in Pao On, the Court of Appeal ruled that there must be an attempt to resile from the agreement with reasonable promptitude or raise continuing objections, and because the employee continued to work for 2.5 years, that wasn't satisfied. The Court of Appeal went on to hold that he did have reasonable alternatives: to either quit or refuse to sign and face being fired. The alternatives were reasonable, according to the court, because if he quit or was fired, the investment firm would be forced to sue him, he would have access to the court process, and, at worst, there would be a successful judgement and garnishment of his wages at his new employer, which would not be any worse than his situation at Merit.[85] According to the court, "On any standard of duress, Stott was not the victim. He obviously was content with the arrangement he made with [his manager] even after reflection, and all his subsequent conduct was an approbation of it."[86]

The next important case is Techform Products Ltd. v. Wolda.[87] Techform manufactured automotive parts and it hired Wolda as a mechanical engineer to help redesign the equipment and processes used to manufacture its main product, door-locking rods. Originally, Wolda was an employee but he became an independent contractor in 1989. In 1993, the engineer was asked to sign an "Employee Technology Agreement" (ETA)[88] giving Techform the intellectual property rights to all of his inventions while he was an independent contractor. Both parties understood that if Wolda didn't sign, Techform would no longer use his consulting services. However, the "tacit" understanding between the parties was that if Wolda did sign, Techform would continue the arrangement for the foreseeable future. He signed under some protest, and the relationship continued for several years. In 1996, the engineer then invented a "3D hinge," and a dispute arose as to whether the company owned the intellectual property rights to the hinge. If the ETA was invalidated, the engineer would own the rights to the hinge.

For our purposes, the main issue on appeal was whether the ETA was signed under economic duress. A unanimous Court of Appeal held that economic duress was not made out and overruled the trial judge on this point. The Court of Appeal relied on Universe Tankships and Stott and found that Wolda did not act with reasonable promptitude in attempting to resile from the agreement: The annual renewal process continued for several years after

85. *Id.* at paras. 55–56.
86. *Id.* at para. 56.
87. [2001] O.J. No. 3822, 56 O.R. (3d) 1.
88. This was called an "Employee Technology Agreement" despite the fact that Wolda was no longer an employee, and this point was contentious at the Court of Appeal.

the ETA was signed. The Court of Appeal ruled that the pressure applied by Techform on Wolda in order to have the ETA signed was legitimate for four reasons. First, this was an independent contractor arrangement that was reappraised and renewed annually, which gave the parties greater freedom to negotiate and modify the terms—the company could have insisted on something like the ETA as a condition for renewing the consultancy agreement at any annual renewal. Second, because Techform was paying for Wolda's time and assigning him projects, they had a legitimate interest in retaining the intellectual property rights that were the fruits of his labor, particularly in light of some problematic prior experiences Techform had had over issues of ownership of inventions. Third, Techform had a bona fide belief that it was entitled to own the inventions of its employees and consultants. Fourth, Wolda had ample time and opportunity when presented with the ETA to obtain independent legal advice.

Since Techform, only a few cases involving claims of economic duress have been brought, and those have occurred at the trial level with virtually all being dismissed.[89] However, there is a recent trial level decision where a claim of economic duress was successful. In Boutilier v. Rouvalis,[90] a worker performed property maintenance for approximately nine years, with her hours ranging from part-time to full time. In June of 2020, she attended a meeting with her supervisor, and an owner/manager also attended without any warning to the employee. The supervisor had brought a contract for the worker to sign which asserted her status as an independent contractor. She asked to have it reviewed by her lawyer before signing, but the supervisor and owner/manager insisted that the worker had to sign it there and then. She testified that she felt she had no option. She felt intimidated and if she did not sign it, she would have been dismissed. She did not read it at that time. During the meeting, the owner/manager yelled at her and called her a liar and some other names, but the worker ultimately signed the document. Two days later she was dismissed. The main ground for allowing the worker to void the contract was unconscionability. However, the judge also applied the Nav Canada test of economic duress and found that it was satisfied. He was very suspicious of the employer's motivation for having the agreement signed, although he did not make an express finding of bad faith. In *obiter dicta*, he stated the following:

> A possible explanation is that the Defendant had already, and previous to the meeting of June 22nd, made a decision to terminate Ms. Boutilier but wished to shore up their legal position by limiting her entitlement to notice of two weeks

89. *See, e.g.*, North Cariboo Flying Services Ltd. v. Goddard 2009 A.B.P.C. 219; Fitzgerald v. Southmedic Inc., 2012 O.N.S.C. 4472.

90. 2021 N.S.S.M. 54

> if just cause could not be established. Such a motivation would certainly raise the spectre of a breach of the duty of good faith in contractual performance, a subject that has been treated by the Supreme Court of Canada in the recent case of Bhasin v. Hrynew, 2014 SCC 71.[91]

This passage shows the potential of the evolving doctrine of good faith in Canadian contract law to assist a successful plea of economic duress. This evolving doctrine took a quantum leap forward in the Bhasin case mentioned in the passage, and we will examine the implications of Bhasin in a later section.

2. Termination of the Employment Contract

Now we move from the middle of the employment relationship to its end. In Canada, employees are often asked to sign a severance agreement (if the matter hasn't proceeded to litigation) or settlement agreement (if the employee has commenced a wrongful dismissal suit). The courts have occasionally set aside severance or settlement agreements on the basis of duress,[92] but in the vast majority of cases, such claims have been unsuccessful.[93] The court has a keen interest in maintaining the finality of such agreements.

The employee can also unilaterally end the employment contract by resigning. At times, an employee will be pressured to resign, by being told by the employer that they will be fired if they do not, and often, this is accompanied by the employer threatening to besmirch the employee's reputation or allege cause if they do not resign. This is not, strictly speaking, a situation where duress ought to apply, given the fact that quitting is a unilateral act to end the contract, and does not require agreement. Nevertheless, the law has used the concept of duress to invalidate the resignation.[94] The theory is that when the employee is left with no choice but to resign or be fired, the resignation is not voluntary and *de jure* a dismissal.[95] The law will judge employees to have effectively resigned only if their intention to quit is freely formed without coercion.[96]

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91. *Id.* at paras. 78–79.

92. STACEY R. BALL, CANADIAN EMPLOYMENT LAW §6.66 (1996).

93. Bartlett v. Canada Life Assurance Co., 1998 CarswellOnt 2925; Barr v. Pennzoil-Quaker State Canada Inc., [2007] O.J. No. 2859, 59 C.C.E.L. (3d) 89; Radhakrishnan v. Univ. of Calgary Faculty Assn., 1999 A.B.Q.B. 713; Edac Inc. v. Yee, [1994] O.J. No. 2544, 51 A.C.W.S. (3d) 247; Bayes v. RBC, 2021 O.N.S.C. 6836.

94. BARNACLE ET AL., *supra* note 1 at §13.16. *See also* Chan v. Decan, 2011 B.C.S.C. 1439; Deters v. Prince Albert Fraser House Inc. (1991), 93 Sask. R. 205 (Sask. C.A.); Templeton v. RBC Dominion Securities Inc., 2005 N.L.T.D. 130;Backman v. Hyundai Auto Canada Inc., [1990] N.S.J. 410 (QL).

95. BARNACLE ET AL., *supra* note 1 at §13.16.

96. *Id.*

3. Conclusion

One of the striking things to emerge from this summary is that other than to invalidate resignations, economic duress has not enjoyed a prominent role in Canadian employment law. Based on the caselaw, the doctrine appears to be rarely pleaded and, more rarely still, successful. Economic duress has not been robustly used to protect employees from the gross power imbalances they face at any stage of the employment relationship. Judges have applied the doctrine in a fairly conservative manner. For example, they insist that any employee resile from the agreement promptly, ignoring the constraints on the employee in doing so (e.g., Stott and Techform). Also, as was seen in Stott, they have often found that the employee had a practical alternative, and therefore their will wasn't coerced: According to the Ontario Court of Appeal, the employee, when pressured by his employer to sign the agreement to cover the client's losses, could have refused and resigned, even if that would have meant being dismissed and sued by the employer to recover those losses. Additionally, the courts have paid attention to the good faith of the employer in assessing the legitimacy of any pressure, typically finding the employer met that standard. We turn now to examine whether the panoply of other legal doctrines might be playing a more prominent role than economic duress in advancing the "employee rights" paradigm.

III. OTHER DEVELOPMENTS IN THE "EMPLOYEE RIGHTS" PARADIGM

A. Supreme Court of Canada Jurisprudence on the Employment Relationship

Since the late 1980s, the Supreme Court of Canada has generally developed the common law of employment in a direction that advances the "employee rights" paradigm and the lower courts have typically followed their lead. (Although, it would be a mistake in the extreme to believe that the Canadian trial and appellate courts, and even the Supreme Court, have developed the law entirely in this direction.) The Supreme Court has cited with approval scholarly opinions about the modern state of the employment relationship, such as Kahn-Freund's *Labour and the Law*, and established or refined doctrines that protect employee interests. In their legal analysis, they have expressly acknowledged the inequality of bargaining power inherent in the employment relationship, the associated vulnerability of employees as a group, and the fact that a unique set of considerations apply to the employment relationship in contradistinction with commercial relationships. As Brodie states, "The jurisprudence of the Canadian Supreme Court has

been at the forefront of a judicial conversion to a more progressive view of the employment relationship."[97]

Without a doubt, Chief Justice Dickson signaled the 'road to Damascus' moment for the court in the 1987 decision of Reference Re Public Service Employee Relations Act (Alberta),[98] a case in which legislation removing public sector workers' right to strike was being challenged under the Charter. He stated the following, which has been repeatedly quoted by judges, lawyers, and academics:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.[99]

In Slaight Communications Inc. v. Davidson,[100] a former employee of a radio station claimed unjust dismissal under the Canada Labour Code. The adjudicator found that he had been unjustly dismissed and awarded monetary compensation and a letter of reference. In light of his finding that the employer was particularly vindictive, the adjudicator prescribed specific wording for the reference letter, and forbid the employer from answering any questions from prospective employers beyond the statements in the letter. The employer appealed the reference remedy, on the grounds that it was a violation of its right to free expression under the Charter. Chief Justice Dickson, for a majority of the court, ruled that while the letter was such a violation, it was justified as a "reasonable limit" under s. 1 of the Charter. He stated,

> It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof.[101]

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97. Douglas Brodie, *Canadian Jurisprudence and the Employment Contract*, 51(3) INDUS. L. J. 626, 626 (2022).
98. [1987] 1 S.C.R. 313.
99. *Id.* at para 91.
100. 1989 CanLII 92 (SCC)
101. *Id.* at para. 16.

He went on to quote with approval a famous passage from Kahn-Freund that the employment relationship is "a condition of subordination" and that the law must be "a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship".[102] The Chief Justice observed the following:

> The Courts must . . . avoid constitutionalizing inequalities of power in the workplace and between societal actors in general. . . . The inequality in one employment relationship would be continued even after its termination, with the result that the worker looking for a new job would be placed in an even more unequal bargaining position vis-à-vis prospective employers than is normally the case.[103]

The next case of interest is Machtinger v. HOJ Industries Ltd.[104] In that case, two salespeople were dismissed by their employer. Both had written contracts of employment that specified notice periods less than those provided in Ontario's Employment Standards Act (ESA). In the case of one employee, a notice period of zero weeks (no notice) was specified, while for the other employee, two weeks' notice was stipulated. Contracting out of the ESA was expressly forbidden by the legislation, so the question became whether the employees were entitled to reasonable notice at common law or whether the parties' intention to agree to the bare minimum notice permitted by law ought to reduce the notice to the amounts in the ESA.

Justice Iacobucci, for a majority of the court, acknowledged that "the law governing the termination of employment significantly affects the economic and psychological welfare of employees."[105] Later, he stated, "I turn finally to the policy considerations which impact on the issue in this appeal. Although the issue may appear to be a narrow one, it is nonetheless important because employment is of central importance to our society."[106] In his reasoning, Justice Iacobucci ruled,

> The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination. . . . The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers.[107]

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102. KAHN-FREUND ET AL., *supra* note 11 at 18.
103. Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (S.C.C.), para. 16.
104. [1992] 1 S.C.R. 986
105. *Id*. at para. 2.
106. *Id*. at para. 30.
107. *Id*. at para. 31.

In finding that the employees were entitled to reasonable notice, he stated, "Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favored over one that does not."[108]

The next case of interest is Wallace v. United Grain Growers Ltd., in which the Supreme Court annunciated a duty on behalf of employers to act in good faith when dismissing employees.[109] Justice Iacobucci, for a majority of the court, observed, "The contract of employment has many characteristics that set it apart from the ordinary commercial contract,"[110] and cited with approval the following statement from Swinton, ". . . the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does."[111]

Justice Iacobucci went on to establish the duty in the following passage:

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. . . . I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.[112]

More on the duty on employers to dismiss in good faith below.

In Isidore Garon ltée v. Syndicat du bois ouvré de la région de Québec inc.,[113] the Supreme Court of Canada acknowledged the problems freedom of contract played in the employment relationship, stating that the concept

108. *Id*. at para. 32.
109. [1997] S.C.J. No. 94.
110. *Id.* at para 91–92.
111. Katherine Swinton, *Contract Law and the Employment Relationship: The Proper Forum for Reform*, *in* STUDIES IN CONTRACT LAW, 357, 363 (Reiter & Swan eds., 1980), cited in Wallace, [1997] S.C.J. No. 94 at paras. 91–92.
112. Wallace, [1997] S.C.J. No. 94, para. 95.
113. 2006 S.C.C. 2.

"intensified the inevitable imbalance of power that existed when conditions of employment were being established by an employee and an employer."[114]

The following line from an Ontario Court of Appeal decision provides a nice summary of the Supreme Court of Canada jurisprudence:

> [I]n an important line of cases in recent years, the Supreme Court of Canada has discussed, often with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees.[115]

Now, let us turn to examine how that genuine eloquence has influenced legal doctrine.

B. Requirement for "Fresh Consideration"

Canadian common law still generally adheres to the formalist legal requirement of consideration for contracts. In very broad terms, "[t]he doctrine of consideration holds that to be enforceable, a promise must be purchased in the sense of being given in return for something of value provided by the promisee."[116] The law also requires consideration to support modifications to a contract, on the theory that such modifications are, in effect, a contract to modify a contract. This is often referred to as the "fresh consideration" rule.[117] Although this rule has been criticized for being ill-suited to the practical realities of the employment contract, given its relational and evolving nature, the requirement has been regularly applied in that context. This rule has become a convenient public policy tool for courts to use in refusing to enforce a contract modification in situations where the employer attempts to introduce an onerous change against the interests of the employee.[118] The end result is the same for a purported modification that lacks "fresh consideration" as one procured by economic duress: the law will not enforce it.

There have been many trial and appellate decisions which rely on the "fresh consideration" rule to refuse to enforce changes being introduced by the employer in an oppressive manner,[119] but a particularly illustrative one was Hobbs v. TDI Canada Ltd.[120] While still employed by his previous

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114. *Id.* at para 111.

115. Ceccol v Ontario Gymnastic Federation (2001), 55 O.R. (3d) 614, [2001] OJ No 3488 (CA), para. 47.

116. MCCAMUS, *supra* note 7 at 233.

117. Wong, *supra* note 77 at 489.

118. *Id.* at 500–502.

119. *See, e.g.*, Francis v. Canadian Imperial Bank of Commerce (1994), 21 O.R. (3d) 75 (C.A); Holland v. Hostopia.com Inc. 2015 O.N.C.A. 762.

120. 2004 CanLII 44783 (ON CA).

employer, the prospective employee engaged in talks with TDI about a salesperson position with the organization, and a commission structure was discussed. Hobbs was steadfast that he would not resign from his current job without a written job offer. In late December 1999, Hobbs meet with TDI representatives to sign a letter. He pointed out to TDI the fact that the letter did not specify the commission rates that they had agreed upon at the earlier meeting. The TDI representative indicated that the commission rates would be covered in a separate document, which he did not have as yet. The representative assured Hobbs that TDI was a trustworthy company and that things were done on a "handshake," and Hobbs signed the letter. Hobbs assumed the separate document would simply confirm the commission rates previously agreed. He resigned from his previous position and began working at TDI in early January 2000. About a week into his new job, he was given a document entitled "Solicitor's Agreement", told that it was non-negotiable, and informed that he had to sign it in order to be paid. This document set out employment terms far more onerous than those on which Hobbs had agreed to join the company, including an inferior commission structure. Since he had already quit his previous job, however, Hobbs found himself with no choice but to sign. Hobbs resigned from TDI about four months into the new job and sued the firm for outstanding commissions based on the commission structure originally agreed.

Writing the unanimous decision of a three-member panel, Justice Russell Juriansz relied on the "fresh consideration" rule and refused to enforce the Solicitor's Agreement (meaning that the employee was entitled to commissions earned on the basis of the original agreement). He pointed out the importance of the "fresh consideration" rule in providing employees with a manner of protection against onerous unilateral changes foisted on them by the employer:

> The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law recognizes this vulnerability. . . .[121]

Not all Canadian jurisdictions have retained the "fresh consideration" rule. In the Nav Canada[122] case previously discussed, the New Brunswick

121. *Id.* at para. 42.
122. NAV Canada, 2008 N.B.C.A. 28.

Court of Appeal ruled that "fresh consideration" was no longer required to render contractual modifications enforceable, provided they were agreed to in the absence of economic duress. The British Columbia Court of Appeal followed suit in 2018.[123] In Rosas v. Toca, the court ruled, "When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable."[124]

However, the Rosas case was decided in the context of an agreement to modify an outstanding debt. Courts in British Columbia have been resistant to abandon the fresh consideration rule in the employment law context, even after Rosas. This was seen in the subsequent decision of the Court of Appeal in Quach v. Mitrux Services Ltd.[125] In that case, Quach signed a one-year fixed-term contract of employment with Mitrux Services and Ameri-Can Freight Systems Inc. (the "Fixed-Term Contract"). About one month later, a few days before the one-year contract was supposed to begin and after Quach had left his previous full-time employment, Mitrux and Ameri-Can asked the employee to sign an employment contract of an indefinite term, with a one month notice of termination period (the "Second Contract"). A couple of days after having the employee sign the Second Contract, the employers repudiated the contract, claiming they had legal cause to do so. The employee sued for wrongful dismissal, relying on the Fixed Term Contract. The employers defended and relied on the Second Contract. The Court of Appeal ruled in favour of the employee and awarded damages of one year's compensation. In analysis that was somewhat artificial, the Court of Appeal avoided the application of Rosas by finding that the Second Contract was an entirely different contract (unsupported by consideration), rather than a modification. The Quach case shows how the "fresh consideration" rule may serve as a substitute for economic duress, and therefore limit the cases in which the economic duress doctrine is developed and applied. This point is elaborated on below, in the "Whither Economic Duress" section.

C. Employer Duty of Good Faith in Dismissal Process

In the 1997 case of Wallace v. United Grain Growers,[126] previously mentioned, the Supreme Court of Canada introduced the principle that employers have a duty to act in good faith in the dismissal process, a decisive swing towards the "employee rights" paradigm. Previously, the Supreme Court had relied on the English precedent of Addis v. Gramophone Co.

123. Rosas v. Toca 2018 B.C.C.A. 191.
124. *Id.* at para. 183.
125. 2020 B.C.C.A. 25.
126. 1997 CanLII 332 (SCC).

Ltd.[127] and resisted recognizing such a duty.[128] Relying on its developing "employee rights" jurisprudence, the Supreme Court described this duty as follows:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.[129]

Pleadings of bad faith dismissal have become very common in Canadian employment law. Employees have successfully used this principle to hold employers liable in situations where employers have applied coercive pressure in the dismissal process. Both the Supreme Court[130] and lower courts[131] have stressed that, in determining whether this coercive pressure amounts to bad faith, the relevant timeframe for assessing employer misconduct can be very broad and is not just restricted to the date of dismissal. The employer's cumulative behavior relevant to the dismissal can be considered, even if it happened several years before the actual termination.[132] Behavior after dismissal also counts. If the employer adopts an overly aggressive strategy in any litigation ensuing after a dismissal, this can also be relevant in assessing bad faith.[133]

Examples of employers using coercive pressure include deliberately denigrating the employee and stalling their career to induce their resignation;[134] utilizing hardball tactics in negotiating the end of the employment relationship,[135] such as withholding vested entitlements[136] or alleging cause unwarrantedly;[137] pressuring the employee into signing a settlement offer on the spur of the moment and without legal advice;[138] or pursuing "an aggressive and improper litigation strategy, taking advantage of

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127. [1909] UKHL 1, [1909] AC 488

128. Peso Silver Mines Ltd. v. Cropper, 1966 CanLII 75 (SCC), [1966] S.C.R. 673; Vorvis v. Insurance Corporation of British Columbia, 1989 CanLII 93 (S.C.C.), [1989] 1 S.C.R. 1085.

129. 1997 CanLII 332 (S.C.C.), para. 98.

130. Matthews v. Ocean Nutrition Canada Ltd. 2020 S.C.C. 26.

131. Humphrey v. Mene, 2022 O.N.C.A. 531, paras. 71–74; Doyle v. Zochem Inc. 2017 O.N.C.A. 130, para. 39.

132. Matthews, 2020 S.C.C. 26, para. 81

133. *See, e.g.*, Avelin v. Aya Lasers Inc., 2018 B.C.S.C. 2313, para. 56; *see also* Galea v. Wal-Mart Canada Corp., 2017 O.N.S.C. 245, para 276.

134. *See, e.g.*, Galea v. Wal-Mart Canada Corp., 2017 O.N.S.C. 245, para. 274.

135. *See, e.g.*, McGeady v. Saskatchewan Wheat Pool, 1998 CanLII 13714 (SK KB).

136. *See, e.g.*, Antidormi v. Blue Pumpkin Software Inc., 2004 CanLII 30885 (ON SC).

137. *See, e.g.*, DiCarlo v. L.I.U.N.A., Local 1089, [2002] O.J. No. 5676, 33 C.C.E.L. (3d) 143; Karmel v. Calgary Jewish Academy, 2015 A.B.Q.B. 731; Price v. 481530 B.C. Ltd.2016 B.C.S.C. 1940; Humphrey v. Mene Inc., 2022 O.N.C.A. 531.

138. *See, e.g.*, McGeady v. Saskatchewan Wheat Pool, 1998 CanLII 13714 (SK KB).

its superior resources and [the employee's] economic vulnerability."[139] The Supreme Court has been clear that the doctrine of bad faith dismissal also applies in constructive dismissal situations.[140]

Both the duty to dismiss in good faith and economic duress can be used in situations where the employer has applied coercive pressure. A key difference between the doctrines is the remedy. For economic duress, the remedy is rescission. For a finding of a bad faith dismissal, the employee receives damages for harms suffered in addition to failure to provide reasonable notice.[141]

D. Good Faith During the Employment Relationship

The duty to dismiss in good faith was established in Wallace in 1997 and was specific to the employment context. Other specific good faith duties had been developed in the common law both outside employment law and within it. In 2014 in the case of Bhasin v. Hrynew,[142] the Supreme Court of Canada developed some good faith principles of general application governing contract law, and their precise nature and scope are still evolving. In deciding Bhasin, Justice Cromwell, for a unanimous Supreme Court, ruled "that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance." [143] Additionally, he held, "[A]s a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations."[144]

The Court went on to explain that the duty is flexible depending on the context:

> Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to

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139. *See, e.g.*, Avelin v. Aya Lasers Inc., 2018 B.C.S.C. 2313, para. 56; *see also* Galea, 2017 O.N.S.C. 245, para 276.

140. Matthews v. Ocean Nutrition Canada Ltd., 2020 S.C.C. 26. For an example of a finding of bad faith when the employer introduces unfavourable changes to the employment contract in an effort to induce the employee to quit, rather than pay reasonable notice, see Holm v. Agat Laboratories Ltd, 2018 A.B.Q.B. 415.

141. The method of how courts were supposed to assess bad faith damages changed in the case of Honda v. Keays, 2008 S.C.C. 39. Originally, as set out in Wallace, employee damages for a breach of the duty of good faith were awarded as an extension of the notice period. With the case of Honda v. Keays, judges were to engage in an assessment of the actual damages experienced, but the test for bad faith remained the same.

142. 2014 S.C.C. 71.

143. *Id.* at para. 33.

144. *Id.*

> give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange.[145]

Justice Cromwell's call for a context-specific approach with different considerations for a "long-term contract of mutual cooperation" likely suggests that the good faith requirements on the parties in an employment relationship would be on the high end of the scale.

The Supreme Court of Canada wasted little time in applying the principles in Bhasin to the employment context. In 2015, it decided Potter v. New Brunswick Legal Aid Services Commission.[146] That case involved a lawyer, employed as Executive Director by the Legal Aid Services Commission in the province of New Brunswick, being placed on indefinite administrative suspension. He took the position that he was constructively dismissed, and the Supreme Court agreed. The court relied on the general organizing principle of good faith in finding that the suspension was not authorized under the contract of employment. The court found that the employer failed to be "honest, reasonable, candid, and forthright" in the suspension process.[147] There was an "absence of a basic level of communication with the employee", and the Commission failed to provide him with any reason for his suspension.[148] Furthermore, the court noted that the Commission had, at the time of the suspension, hired a permanent replacement and was taking steps to dismiss the employee.

Potter was a case considering the general organizing principle. Another case, Callow v Zollinger,[149] considered the duty to act honestly in the performance of contractual obligations. That case involved a contractor providing maintenance services to a group of condominiums, Baycrest, in a series of fixed-term contracts. Pursuant to a clause in the agreement, the condominium group was entitled to terminate the maintenance agreement during the term with ten days' notice if Callow's services were no longer required. One of the representatives of the condominium board made statements in the spring of 2013 to Mr. Callow suggesting that a renewal of the winter maintenance agreement was likely and that the condominium group was satisfied with his services. During the summer of 2013, Callow performed work over and above what was required for the summer

145. *Id.* at para. 69.
146. 2015 S.C.C. 10.
147. *Id.* at para. 99.
148. *Id.*
149. Callow v Zollinger, 2020 S.C.C. 45.

maintenance contract, which he hoped would act as an incentive for the condominium group to renew the winter maintenance agreement at the end of the following winter. In September 2013, the property manager then gave Callow ten days notice that the winter maintenance agreement was being terminated, despite there being a year left in the two year contract. Callow subsequently sued for breach of contract, alleging that Baycrest acted in bad faith "by accepting free services while knowing Callow was offering them in order to maintain their future contractual relationship".[150] The Supreme Court decided the matter exclusively on the basis of the duty of honest performance. They found that the condominium group had breached this duty. The court found that "Baycrest failed to satisfy its duty not to lie or knowingly deceive Callow about matters linked to the performance of the winter maintenance agreement" by exercising the termination clause in the manner it did.[151]

These cases suggest that the various general "good faith" doctrines have the potential to check repressive employer conduct, in at least four ways. One is to limit the employer's use of discretion in a manner that is oppressive.[152] Second, these doctrines may give a fixed-term employee the ability to challenge the non-renewal of the contract if the employer has acted in a deceptive and/or misleading way.[153] Third, the doctrines may serve to limit an employer's attempt to pressure an employee into resigning by making life unpleasant. Employers already have a duty of civility, decency, respect and dignity that places limits on this gambit,[154] and the good faith jurisprudence may supplement this duty. Lastly, as we saw in Potter, the general organizing principle can be used to support a constructive dismissal when employers have made a unilateral change to the terms of the employment contract. While it is clear that the Supreme Court's developing jurisprudence on good faith is relevant to governing the employment relationship, the exact contours and boundaries are still very much an open question in Canadian law.[155]

E. Unconscionability

Unconscionability has been a recognized equitable doctrine in Canada for at least a century and a half. Like economic duress, it is a recessionary doctrine, giving the victim the choice of whether to vitiate an unfair bargain.

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150. *Id.* at para 15.
151. *Id.* at paras. 31, 36.
152. Brodie, *supra* note 97 at 633–634.
153. *Id.* at 632.
154. Kevin Banks, *Progress and Paradox: The Remarkable Yet Limited Advance of Employer Good Faith Duties in Canadian Common Law*, 32 COMP. LAB. L. & POL'Y J. 547 (2011).
155. Claire Mummé, Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?* 32(1) INT'L J. COMP. LAB. L. & INDUS. RELATIONS 117, 122 (2016).

According to Dawson, the objective of the economic duress doctrine is that of "ensuring the freedom of individual will."[156] The object of unconscionability is not to ensure such freedom and the consequential effective consent to any agreement, for it operates to set aside transactions even though there might have been full and free consent to the terms of the bargain.[157] Instead, its goal is to prevent advantage-taking by a stronger party against weaker, both in commercial settings and in employment relationships.[158] Until recently, "the Supreme Court of Canada had not pronounced authoritatively on unconscionability, leaving lower courts across the country to develop a variety of different tests that operate inconsistently."[159] The Canadian version of the doctrine has been described as "notoriously uncertain" [160] and "a troublesome area . . . for at least 30 years, and according to some writers, for its entire 150-year history."[161] As we shall see, even after the Supreme Court's recent decision in the area, the doctrine remains uncertain and troublesome.

First, a brief history lesson. While there was no recognized uniform test in Canada, two elements commonly recognized by provincial appellate trial courts were inequality of bargaining power and "proof of substantial unfairness of the bargain."[162] However, various appellate courts have formulated different tests.[163] For example, in Cain v. Clarica Life Insurance Company,[164] the Alberta Court of Appeal proposed two additional elements: lack of independent legal or other professional advice for the victim and "other party's knowingly taking advantage of [victim's] vulnerability."[165] The doctrine's conceptual focus has been somewhat unclear.[166] The doctrine has always had a procedural component, "in the sense that the process by which the agreement was achieved [was] defective."[167] This procedural component is related to the "inequality of bargaining power" element and, traditionally, the victim had to be operating on the basis of an "unusual

156. Dawson, *supra* note 73 at 256.
157. Wong, *supra* note 24 at 510.
158. *Id*.
159. Chris Hunt, *Unconscionability in the Supreme Court of Canada:* Uber Technologies Inc. v. Heller, [2021] CLJ 25, 25.
160. *Id*.
161. Marcus Moore, *The Flaws of Magic Bullet Theory: Retraining Unconscionability to Discretely Target Different Contexts of Unfairness in Contracts*, 45 DALHOUSIE L.J. 551, 552 (2022).
162. Morrison v. Coast Finance Ltd (1965), 55 D.L.R. (2d) 710 (B.C.C.A.) at 713. *See also* Knupp v. Bell 1968 CanLII 540 (SK CA); Granville Savings and Mortgage Corp. v. Campbell (1992), 93 D.L.R. (4th) 268 at 290 (Man CA).
163. Harry v. Kreutziger, 1978 CanLII 393 (BC CA); Cain v. Clarica Life Insurance Company, 2005 A.B.C.A. 437; Downer v Pitcher, 2017 NLCA 13 (CanLII).
164. 2005 A.B.C.A. 437.
165. *Id.* at para. 32.
166. *See, e.g.*, Rick Bigwood, *Antipodean Reflections on the Canadian Unconscionability Doctrine* , 84:2 CAN. BAR REV. 171, 173 (2005).
167. McCamus, *supra* note 7 at 465–466.

inability of some kind in protecting their interests in the bargaining processes"[168] and this inability has been frequently described as "arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger."[169] What was a point of greater contestation and uncertainty was the extent to which unconscionability emphasized a substantive component related to the unfairness of the bargain. As McCamus explains,

> If . . . an agreement can be set aside for unconscionability simply on the basis of the unfairness of its terms, the doctrine would have a role in policing the outcome of bargaining processes or the substantive fairness of transactions in a more general way. To the extent that the doctrine may have a substantive role of this kind, it would constitute a more sweeping instrument for the striking down of unfair agreements . . . There is very little evidence in the traditional cases, however, that a more powerful role of this kind was envisaged for the doctrine at common law.[170]

As suggested by this quotation, Canadian courts have historically adopted a relatively conservative approach to unconscionability in the context of employment law.[171] Under this conservative approach, judges have typically required that the employee have an unusual inability as a precondition for a finding of "inequality of bargaining power," and this requirement has obviated the need for courts to deal with the more typical examples of "enormous power differentials between employers and employees."[172] A classic example of this conservative approach was seen in Boisonault v. Block Bros. Realty Ltd.[173] In that case, a real estate salesman agreed to an employment term with his employing firm that stipulated that he was only entitled to 50% of the commissions on sales which closed after he left the firm. The court refused to find that there was inequality of bargaining power, ruling that unconscionability would not be automatically presumed from the inherent power imbalances of the employment relationship. The court required the salesman to demonstrate some specific inability, such as "ignorance, need or distress", and did not find that he had successfully done so.

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168. *Id.* at 468.

169. *See, e.g.*, Morrison v. Coast Finance Ltd (1965), 55 D.L.R. (2d) 710 (B.C.C.A.) at 713; Knupp v. Bell 1968 CanLII 540 (SK CA), para 8; Granville Savings and Mortgage Corp. v. Campbell (1992), 93 D.L.R. (4th) 268 at 290 (Man CA).

170. MCCAMUS, *supra* note 7 at 465–466.

171. BARNACLE ET AL., *supra* note 1 at §7.114.

172. Malhotra, *supra* note 77 at 19.

173. [1987] M.J. No. 364, 47 Man.R. (2d) 148; For another example of this conservative approach by a provincial appellate court, see Toronto-Dominion Bank v. Wallace, 145 D.L.R. (3d) 431, 41 O.R. (2d) 161 (1983).

However, despite the conservative approach to unconscionability, there are numerous cases in which employers have been found to have exploited a demonstrable weakness of employees.[174] One of the few examples to reach an appellate court is Clark v. Optyl (Canada) Ltd.[175] On the basis of unconscionability, the New Brunswick Court of Appeal voided severance agreements signed by the employer with each of three dismissed supervisors. The agreements, which gave each employee only three months' wages in full satisfaction of the company's obligations to him, were signed under protest by the employees. The court ruled that the severance agreements were "harsh" and "unfair" and that Optyl "took undue advantage of the inequality of its bargaining power over its three former employees and of their obvious need for money in obtaining their signatures to the acceptances".[176] The court found that six months was the more appropriate notice period.

1. Uber v. Heller

The Supreme Court of Canada's decision in Uber Technologies Inc. v. Heller,[177] is likely to expand the use of unconscionability even further. Heller provided food delivery services in the Toronto area using Uber's digital platform. Uber required Mr. Heller (and other drivers), before starting work, to digitally agree to a 14-page standard-form service agreement on the "Driver Portal." The service agreement included a mandatory arbitration clause, compelling drivers to submit disputes to arbitration in Amsterdam, Netherlands, with an upfront cost to the driver of about US$14,500. Heller started a class action against Uber, asserting, among other things, that the drivers were employees covered by Ontario's Employment Standards Act, and that the working conditions Uber provided fell below the legislation's requirements. Uber relied on the mandatory arbitration clause, and took the position that the dispute, rather than being capable of adjudication by the courts of Ontario, had to be the subject of arbitration in the Netherlands. One of the main issues before the Supreme Court was whether the services

174. The following examples were provided by BARNACLE ET AL., *supra* note 1, at § 7.115: "persuading an employee to renew her contract on significantly less advantageous terms to save her job when the employer had already decided to fire her anyway (essentially fraud by omission); pressuring an employee to accept a low separation payment in return for dropping his wrongful dismissal claim when the employer knew the employee was anxious and depressed following his termination, was in extremely dire financial need and had not received legal advice; deliberately misleading an intellectually unsophisticated employee into believing that she will be disentitled to receiving benefits under protective legislation and the Employment Insurance Act, unless she signs a disadvantageous severance settlement, at a time when she was in shock at being notified of her termination; and misleading an employee about the reasons for his dismissal in order to induce him to accept a low settlement of his wrongful dismissal suit, combined with advising the employee not to consult legal advice, at a time when the employee was in severe financial and emotional distress." [references omitted]

175. [1985] N.B.J. No. 41, 61 N.B.R. (2d) 377.

176. *Id.* at para. 23.

177. 2020 S.C.C. 16

agreement was unenforceable, either in whole or in part, due to unconscionability.

The justices were divided and rendered three separate sets of reasons. Justices Abella and Rowe, for a majority of seven, called this a "classic case of unconscionability" and voided the mandatory arbitration clause.[178] The majority opinion confirmed that the unconscionability doctrine has two elements commonly recognized under Canadian common law: "inequality of bargaining power, and . . . an improvident transaction."[179] The justices rejected the two additional elements from cases like Cain v. Clarica Life Insurance Company, namely the "victim's lack of independent legal advice or other suitable advice" and "other party's knowingly taking advantage of this vulnerability."[180] For "inequality of bargaining power," they explained that it "exists when one party cannot adequately protect their interests in the contracting process."[181] The majority indicated that the first element envisioned coverage extending beyond the traditional unusual inabilities (*e.g.*, poverty, ignorance, illiteracy, age, mental infirmity, necessity, etc.) to any circumstances characterized by the existence of relative bargaining strength and weakness in general: unconscionability applies to "any contract with. . . . inequality of bargaining power" and "[t]here are no 'rigid limitations' on the types of inequality that fit this description."[182] According to the majority, the test for the second element, an improvident bargain, is whether the contract "unduly advantages the stronger party or unduly disadvantages the more vulnerable"[183] and this "must be assessed contextually."[184] The justices expressly tied the two elements together: "It is a matter of common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power."[185] The majority summed up the required approach to unconscionability thusly:

> Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to "mete out situationally and doctrinally appropriate justice". Fairness, the foundational premise and goal of equity, is inherently contextual, not easily framed by formulae or enhanced by

178. *Id.* at para. 4.
179. *Id.* at para. 62.
180. *Id.* at para. 80.
181. *Id.* at para. 66.
182. *Id.* at paras. 62, 66.
183. *Id.* at para. 74.
184. *Id.* at paras. 75–76 (References omitted).
185. *Id.* at para. 79.

> adjectives, and necessarily dependent on the circumstances.[186]

The court went on to find that the two elements of unconscionability were present in the case at bar. On the first element, the arbitration clause was part of a standard form contract, and Mr. Heller was "powerless to negotiate any of its terms."[187] There was also a "gulf in sophistication" between Heller and Uber[188] and "Uber maintains a vastly superior bargaining position in relation to Mr. Heller."[189] In terms of the second element, the arbitration process required an upfront payment about as large as Heller's annual income, and that didn't include travel expenses, legal representation, or lost wages. These costs were "disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into."[190] The majority of the court decided the arbitration clause may be considered separately from the contract as a whole, and ruled that only that clause was invalid, leaving the rest of the contract intact.

Justice Brown concurred in the result, but he was very critical of the majority's use of unconscionability in this case, instead finding that the arbitration agreement was unenforceable on the basis of public policy. He stated,

> But unreasoned intuition and ad hoc judicial moralism are precisely what will rule the day, in my respectful view, under the analysis of my colleagues Abella and Rowe JJ. In their view, judges applying unconscionability are to mete out justice as they deem fair and appropriate, thereby returning unconscionability to a time when equity was measured by the length of the Chancellor's foot.[191]

He also criticized the majority for applying the doctrine to the mandatory arbitration provisions only, as historically the unconscionability doctrine has been applied to rescind an entire agreement, rather than to invalidate particular terms.

Justice Cote, in dissent, placed a premium on freedom of contract and alternative dispute resolution. She would have upheld the entire agreement between Uber and Heller and required the matter to proceed to arbitration (with Uber paying Heller's arbitration cost). Justice Cote rejected the majority's reformulated test of unconscionability, in part because the

186. *Id.* at para. 78 (References omitted).
187. *Id.* at para. 93.
188. *Id.*
189. *Id.* at para. 134.
190. *Id.* at para. 94.
191. *Id.* at para. 153.

threshold for a finding of inequality of bargaining power is "so low as to be practically meaningless in the case of standard form contracts."[192]

2. Academic Commentary on Uber

Some academics have praised the majority's conceptualization of unconscionability for the flexibility that it provides. McCamus stated, "More generally, this somewhat more expansive view of the role of unconscionability doctrine will enable it to perform as a more effective check on excessive advantage taking on the basis of inequality of bargaining power."[193] Both Gardner and McCamus opined that Uber will help give the courts a freer hand to deal with standard form contracts, particularly those in the digital age being proffered by large sophisticated commercial actors against ordinary people who have no alternative but to click "I Agree."[194]

However, academics have criticized the test for being too vague and unpredictable, which is the flipside of the flexibility coin.[195] Gardner stated, "Despite greatly expanding unconscionability's scope, Abella J. and Rowe J. neither acknowledged the extent of the changes, nor indicated how the doctrine will be controlled in the future."[196] Professor Hunt was even more critical:

> Unfortunately, the majority's approach to the first element of the test for unconscionability is vague, and appears to contemplate a standard so malleable that it may, in certain contexts, be virtually meaningless. . . . As practical matter, the majority's approach threatens to undermine commercial certainty and private ordering, particularly where contracts of adhesion are used. This threat is exacerbated by the lack of concrete guidance offered by the court in relation to the second element of the test, even though it now lies at the heart of the analysis. With the greatest respect, the majority's approach, taken together, may have reduced unconscionability to little more than an appeal to fairness based on 'unreasoned intuition.'[197]

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192. *Id.* at para. 257.

193. MCCAMUS, *supra* note 7 at 474–475.

194. Jodi Gardner, *Being Conscious of Unconscionability in Modern Times:* Heller v Uber Technologies, 84(4) MOD. L. REV. 874, 885; MCCAMUS, *supra* note 7 at 469.

195. *See, e.g.*, Fabien Gelinas & Zackary Goldford, *Re-Thinking Unconscionability: Arbitration Agreements in International Consumer, Employment and 'Gig' Economy Contracts*, 2023 SING. J. LEGAL STUD. 1, 16 (2023); Hunt, *supra* note 159 at 28; Wong, *supra* note 24 at 502.

196. Gardner, *supra* note 194 at 882.

197. Hunt, *supra* note 159 at 28 (Citations omitted).

Two other academics have also criticized the second element for being too open-ended. McInnes opined that it "resists precise formulation."[198] Brodie was more blunt: "However, by going on to expose the substance of the agreement to judicial scrutiny, it requires that judges articulate what constitutes an unacceptable bargain. Heller offers little that is insightful in this regard . . .subjectivity and consequent inconsistency is a threat here."[199]

Related to the criticism that the majority's test is vague, a number of academics have pointed out that there is a degree of circularity built into it.[200] Specifically, the majority stated that the improvidence of the bargain (the second branch of the test) may be used to establish that the "victim" was particularly vulnerable, and that there was inequality of bargaining power (the first branch of the test): the majority held that "it is a matter of common sense that parties do not often enter a substantially improvident bargain when they have equal bargaining power", thus "proof of a manifestly unfair bargain may support an inference that one party was unable to protect their interests."[201] According to Gelinas and Goldford, "the explicit link that the Court has drawn between the two elements of unconscionability appears to be unique in the common law world."[202]

There are two additional criticisms of the majority's test. First, some have argued that unconscionability should not be used to nullify a specific provision rather than the whole agreement,[203] as that remedy is recognized by the American doctrine of unconscionability but not typically in the Canadian and English style of the doctrines.[204] Second, an important component of unconscionability ought to be the subjective "knowing" component for the advantage-taker, and the court was wrong to reject it.[205]

3. Conclusion

The majority's decision in Uber, with its broad, flexible test, has the potential to dramatically expand unconscionability's use in the employment law setting, for a number of reasons. First, the removal of the traditional requirement for unusual inability to establish "inequality of bargaining power" appears to extend the doctrine to most contractual negotiations between employees and employers.[206] Given this, it is possible that the

198. Mitchell McInnes, *Uber and Unconscionability in the Supreme Court of Canada*, 137(Jan) L.Q.R. 30, 32 (2021).
199. Brodie, *supra* note 97 at 636–637.
200. *See, e.g.*, Gardner, *supra* note 194 at 882; Gelinas & Goldford, *supra* note 195 at 15.
201. Uber v. Heller, 2020 S.C.C. 16, para. 79.
202. Gelinas & Goldford, *supra* note 195 at 15.
203. *See, e.g.*, Brodie, *supra* note 97.
204. Moore, *supra* note 161 at 589.
205. Hunt, *supra* note 159 at 28; Moore, *supra* note 161 at 561–562.
206. Brodie, *supra* note 97 at 635.

common law will, in the foreseeable future, establish a rebuttable presumption of inequality of bargaining power in the employment context. Wong has proposed such a presumption, and explains it as follows:

> [U]pon proof by the employee that the parties are in an employment relationship, the evidentiary burden shifts to the employer to prove that notwithstanding the nature of the relationship, the parties were on equal footing in that they were equally well positioned to advance their own interests when the agreement in question was formed.[207]

Second, the relaxed test for "improvident bargain" will likely enable courts to police the terms of the employment or severance contract for substantive fairness,[208] making the doctrine, in McCamus' words, "a more sweeping instrument for the striking down of unfair agreements." Barnacle and colleagues have indicated this: "The doctrine of unconscionability offers potentially the broadest scope for judicial supervision of the substantive contents of employment contracts."[209] Third, the Supreme Court of Canada has clarified that there is no "knowing" requirement (akin to *mens rea*) for an advantage-taker to be guilty of unconscionability. As previously mentioned, some lower-level courts had ruled that this was a requirement, and it limited the range of situations in which an employee could have successfully established unconscionability. The obviation of such a requirement means that certain kinds of employment agreements that are formed without bargaining by the parties may be more open to challenge, with standard form contracts for gig workers being an obvious example.[210] Fourth, unconscionability now appears to give the victim a choice of whether to seek to invalidate the whole contract, or merely a select clause—previously the only option was to void the entire agreement. This degree of flexibility will be very useful to employees who desire to leave most of the agreement intact because it is generally advantageous, and only wish to void an onerous clause.

IV. WHY THE MOVE FROM THE COURTS?

The significant developments in the "employee rights" paradigm just outlined have occurred at the hands of the judiciary. Why? I will argue that the judicial response is attributable to the changing nature of work, and the failure of employment standards and collective bargaining legislation to adapt to this transformation.

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207. Wong, *supra* note 24 at 527.
208. *See, e.g.*, Brodie, *supra* note 97 at 635–636.
209. BARNACLE ET AL., *supra* note 1 at §7.109.
210. Gardner, *supra* note 194.

A. Changing Nature of Work

Work in Canada is taking place in a far more competitive environment than it once was. The open nature of the Canadian economy, increased global integration, and the rising influence of capital markets have fostered intense price competition and placed an imperative on reducing operating costs, including labor costs.[211] The past forty years have witnessed radical transformations in Canada in the way goods are produced, services provided, and organizations structured. Business has become more time-sensitive, with the need to respond to customers, shorten product cycles, fulfill orders, process information, and monitor suppliers on a continual basis.[212] Additionally, this is an age of economic turbulence for North American markets in terms of rapid technological innovations; changing customer and consumer preferences and tastes; and new, disruptive entrants into market—all of which are creating tumultuous change in the competitive landscape.[213]

This competitive business environment has caused, and is continuing to cause, profound changes to the nature of work in Canada. Through a process that David Weil has called fissuring, "lead firms" are making strategic decisions to have work conducted outside their formal boundaries, relying on the following mechanisms: using workers employed by contractors (or sub-contractors); participating in a network of labor supplied via a global value chain; deploying the services of temporary help agencies; franchising; utilizing the services of gig workers, often on digital platforms; and classifying their workers as being "independent contractors."[214] Fissuring has contributed to a worsening of working conditions, such as lower pay, fewer benefits, lower security of tenure, and increased risk of accidents.[215] Another trend that has had a critical impact on work has been the increasing reliance on labor-saving technologies, not only for manufacturing jobs, but increasingly for managerial, professional and service positions.[216]

The trends just described have led to an erosion of the Standard Employment Relationship (SER) model, which has been defined as follows:

> The SER is best characterized as a continuous, full-time employment relationship where the worker has one

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211. HARRY W. ARTHURS, FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY (2006); BARNACLE ET AL., *supra* note 1 at §1.41; Wanjiru Njoya, *Corporate Governance and the Employment Relationship: The Fissured Workplace in Canada and the United Kingdom*, 37(1) COMP. LAB. L. & POL'Y J., 121, 122 (2015).

212. ARTHURS, *supra* note 211; R.J. TRENT, STRATEGIC SUPPLY MANAGEMENT REVISITED: COMPETING IN AN ERA OF RAPID CHANGE AND DISRUPTION (2018).

213. TRENT, *supra* note 212.

214. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

215. *Id.*

216. BARNACLE ET AL., *supra* note 1 at §1.44.

> employer . . . . Its essential elements include an indeterminate employment contract, adequate social benefits that complete the social wage, the existence of a single employer, reasonable hours and employment frequently, but not necessarily, in a unionized sector.[217]

There is a growing prevalence in short-term, casual, part-time, fixed-term, temporary-help-agency, independent contractor, and gig economy work in Canada, which typically has poor compensation and working conditions.[218] A recent study commissioned by the Ontario Government found that 30 to 32% of workers in Ontario were in precarious, low-wage jobs.[219] Relatedly, there has been growing income inequality in Canada.[220] A further sign that the SER model has eroded is a decline in unionization. In 1981, 37.6 percent of employees were union members. By 2022, that percentage had declined to 28.7, a decrease of 9 percentage points.[221] Although the increased competitiveness has led the judiciary to at times espouse the "efficiency" paradigm, they have, on balance, chosen to focus on the fact that the employees are now more in need of protection due to harsh conditions in the labor market, and have advanced the "employee rights" paradigm.

B. Failure of Employment Standards and Collective Bargaining Legislation to Adapt

The legislative/executive branches of federal and provincial governments have generally failed to modify employment standards and labor relations statutes in a way that is adaptive to the workplace changes just discussed, leaving a vacuum to be filled by the common law. Mummé states, "Although employment standards statutes are frequently amended, they have not been a dynamic or progressive force for shaping the regulation of employment in Canada."[222] In another work, she provides more history, this time including a discussion about labor relations legislation:

> The shifting nature of political ideologies, market structures and production processes have not left the laws of work

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217. Judy Fudge & Leah Vosko, *Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy*, 22:2 ECON. & INDUS. DEMOCRACY 271, 273 (2001).

218. *See, e.g.*, BARNACLE ET AL., *supra* note 1 at §1.44; Claire Mummé, *Unifying the Field: Mapping the Relationship between Work Law Regimes in Ontario, Then and Now*, 43 DALHOUSIE L.J. 543, 566 (2020).

219. C.M. MITCHELL & J.C. MURRAY, THE CHANGING WORKPLACES REVIEW, AN AGENDA FOR WORKPLACE RIGHTS: FINAL REPORT 43–44 (2017).

220. DOOREY, *supra* note 4 at 45; JOHN GODARD, INDUSTRIAL RELATIONS, THE ECONOMY, AND SOCIETY, 398–399(5th ed 2017).

221. Rene Morissette, *Unionization in Canada, 1981 to 2022*, 2 Econ. & Soc. Rep. 1 (2022).

222. Mummé, *supra* note 155 at 118.

> unchanged. In the 1980s and 1990s, governments withdrew their support for labour law and collective bargaining as a central part of labour force policies, in favour of so-called deregulation, efficiencies and individual rights approaches. Private law values re-emerged as the preferred framework for the development of work-related rights. Still, Canadian governments have tended not to eliminate labour and employment laws wholesale. Instead, they simply fail to update the regimes to meet the changing nature of work and production, choosing to leave emerging problems to the economic power of the parties.[223]

The recent experience in Ontario, Canada's most populous province, is illustrative. In 2015, the Liberal Government appointed two "Special Advisors" to conduct an independent assessment of Ontario's employment standards and collective bargaining legislation, called the "Changing Workplaces Review." This review involved extensive consultations with business and labor, and culminated in a final report with 173 recommendations for incremental changes.[224] The governing Liberals adopted many of these recommendations by passing the Fair Workplaces, Better Jobs Act[225] in 2017. Upon coming to power a year later, a populist Conservative government passed legislation called the Making Ontario Open for Business Act[226] that reversed most of these changes.[227] This process of incoming conservative governments reversing any progressive changes has played out repeatedly in Canada across time and geography.[228]

There are several reasons for the failure of the executive/legislative branches to develop progressive labor relations legislation and employment standards. First, Canadian Governments at federal, provincial, and municipal levels have been under pressure from the electorate to reduce spending, with limited autonomy regarding social and economic policy.[229] Many politicians are hesitant to improve employment standards and collective bargaining legislation, because increased administration and enforcement is likely to be expensive.[230] Related to this, in recent decades prevailing Canadian public sentiment has been neo-liberal, and therefore against increased regulation and

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223. Mummé, *supra* note 218 at 567.
224. Mitchell & Murray, *supra* note 219.
225. S.O. 2017, c 22.
226. Making Ontario Open for Business Act, 2018, S.O. 2018, c 14.
227. For a summary of the Changing Workplaces Review process and both pieces of legislation that followed, see Timothy J. Bartkiw, *Regulating Employment Precarity in Ontario Home Care*, 86 Labour/Le Travail 45 (2020); Sara J. Slinn, *Broader-Based and Sectoral Bargaining in Collective-Bargaining Law Reform: A Historical Review*, 85 Labour/Le Travail 13 (2020).
228. Mummé, *supra* note 218 at 567.
229. Godard, *supra* note 220 at 253.
230. *Id.* at 414.

other forms of state intervention in economic affairs.[231] Additionally, based on the perceived need to be responsive to some of the competitive business pressures outlined above, the state has facilitated a relatively favourable investment climate which includes fewer legislative protections for workers.[232] Business actively facilitates this perceived need, and frequently threatens to relocate production (and jobs) to jurisdictions with fewer regulations. Business also periodically endeavors to use political and market influence to lobby legislators for business-friendly amendments to employment standards, labor laws, and corporate statutes.[233]

C. Judicial Response To These Developments

Given the inaction of the executive and legislative branches of government, it has therefore fallen to the judiciary to craft the common law to respond to the changing world of work. As Mummé states,

> . . . innovation in the field of employment law in Canada has largely been left to the courts . . . . [T]he Canadian Supreme Court has been left in charge of adjudicating broad issues of employment policy at common law.[234]

In another piece, she explains, "the common law of employment is not only the residual category for regulating work, it is increasingly the main body of law that governs employment relations."[235]

The judiciary has responded to the task left to them. According to Barnacle and colleagues, "The golden thread in the development of the common law of the employment contract is that the courts are constantly refashioning the rules to suit changing economic conditions, personnel practices and social values as to how work relations ought to be

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231. BARNACLE ET AL., *supra* note 1 at §§1.45–1.46.

232. Godard, *supra* note 220 at 262.

233. A recent relevant example can be seen in the lobbying efforts of app-based transportation and delivery companies such as Uber, Lyft, and DoorDash for legislation permitting its workers to be classified as "independent contractors" in both the United States and Canada. In California, such companies spent over $205 million on campaigns successfully supporting "Proposition 22" in 2020, making it the most expensive ballot measure in California's history. In contradistinction, the California Labor Federation and other labour groups spent a mere $19 million on the "No on Prop 22 campaign." D. Kerr, *Proposition 22, Backed by Uber and Lyft, Passes. Drivers Say They'll Keep Fighting*, CNET (Nov. 4, 2020), https://www.cnet.com/tech/tech-industry/proposition-22-backed-by-uber-and-lyft-passes-drivers-say-theyll-keep-fighting/. Additionally, an "aggressive and relentless government-relations strategy" from Uber recently occurred in Ontario when the status of Uber drivers was being considered by the Ontario Government. The Ontario Legislature subsequently passed the Working for Workers Act (Bill 88) which maintained the status of Uber drivers as independent contractors. V. Subramaniam, *How Uber Got Almost Everything It Wanted in Ontario's Working For Workers Act*, (May 25, 2022), THE GLOBE AND MAIL, B1.

234. Mummé, *supra* note 155 at 118.

235. Mummé, *supra* note 19 at 257.

conducted."[236] Judges are making deliberate choices to develop employment law in response to these changes. Mummé states,

> . . . judicial choices are actively being made as to what the common law will provide in the context of work regulation. Such judicial choices are, moreover, of increasing importance, given that falling trade union density means fewer people are covered by collective bargaining agreements, and the growing prevalence of non-standard work renders more difficult access to minimum employment standards.[237]

Influenced by prominent academics,[238] judicial attitudes to work have changed in response to the societal and economic conditions. The courts have increasingly taken on an industrial pluralism perspective in the past forty years, wherein they are recognizing in their decisions that employers and employees have diverging interests, and that the common law has a legitimate role to play in balancing those interests and protecting employees as a vulnerable group.[239] The Supreme Court of Canada has espoused on numerous occasions the need for the common law to provide a measure of protection to vulnerable employees. The Supreme Court's decisions provide a "window into changing judicial attitudes toward the importance of work to individual well-being and social worth."[240] According to Glasbeek, "Courts have become increasingly eager to show that they respect workers and acknowledge the dignity of work and need for workers to be treated with dignity."[241] He suggests, though, that there may be political motivations for the attitudes judges espouse. Speaking about the Wallace case, he stated,

> By the time the case got to the Supreme Court of Canada, the need to look compassionate and understanding had come to weigh heavily on the judges' minds. A judiciary under siege is eager to prove, as a relatively autonomous institution, it will not allow oppression of the vulnerable in its name. . . . [B]y the 1980s and 1990s, courts had been falling over themselves to trumpet their adherence to the

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236. BARNACLE ET AL., *supra* note 1 at §1.48. Other scholars have made similar observations. *See, e.g.*, Mummé, *supra* note 19 at 257.

237. Mummé, *supra* note 19 at 257.

238. *E.g.*, the Supreme Court has cited the following works on a number of occasions: David M. Beatty, *Labour Is Not a Commodity*, *in* STUDIES IN CONTRACT LAW, 323 (Reiter & Swan eds., 1980); Swinton, *supra* note 111; KAHN-FREUND ET AL., *supra* note 11.

239. DOOREY, *supra* note 4 at 44; Judy Fudge & Eric Tucker, *Introduction*, *in* WORK ON TRIAL: CANADIAN LABOUR LAW STRUGGLES 1, 9 (Fudge & Tucker eds., 2010); Harry Glasbeek, *Afterword: Looking Back*, *in* WORK ON TRIAL: CANADIAN LABOUR LAW STRUGGLES 393, 403 (Fudge & Tucker eds., 2010); Godard, *supra* note 220 at 14.

240. Fudge & Tucker, *supra* note 239 at 7.

241. Glasbeek, *supra* note 239 at 404.

> notion that respect was owed to the dignity of labour and the individuals who provide it.[242]

He goes on to opine that the Wallace case:

> pays attention to the need to mold [the contract of employment] to new understandings about the employer/employee nexus, in particular the politically promoted notion that, in advanced liberal capitalism, it is no longer appropriate for judges to be perceived as approving the characterization of a work-for-wages contract as if it were a mere variant of a contract for the purchase of a tractor.[243]

The Canadian Charter of Rights and Freedoms,[244] proclaimed in 1982, imparted courts with a function in developing the laws governing the employment relationship.[245] It gave judges a policy-making role in evaluating whether legislation, including employment standards and collective bargaining statutes, had contravened the Charter, and in developing and interpreting the common law in a manner consistent with "Charter values."[246] The Charter has consequently increased acceptance, among judges, lawyers, and the general public, of a judicial activism role wherein judges on occasion "make law," rather than merely interpret and apply it.[247] It is important to note that the Charter applies directly to government legislation and government action, and does not apply directly to the terms of individual contracts of employment between private employers and their employees.[248] However, as Barnacle and colleagues explain, "the standards of fairness that are enshrined in the Charter could impact indirectly on private employment contracts in so far as they reflect prevailing community standards which a court could take into account in defining and applying ambiguous employment contract law principles."[249]

Nevertheless, it is important to note that some judicial decisions have advanced the "efficiency" paradigm, and that members of the judiciary, by virtue of being for the most part industrial pluralists, view it as their responsibility to balance "employee rights" with "efficiency." Barnacle and colleagues state as follows:

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242. *Id.* at 405.
243. *Id.* at 406.
244. Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11.
245. Glasbeek, *supra* note 239 at 407.
246. *See, e.g.*, RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (S.C.C), [1986] 2 S.C.R 573;Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (S.C.C.), [1995] 2 S.C.R. 1130.
247. F.L. Morton, *Judicial Review and Civil Liberties*, *in* LAW, POLITICS, AND THE JUDICIAL PROCESS IN CANADA 589, (Morton & Snow eds., 4th ed. 2018).
248. BARNACLE ET AL., *supra* note 1 at §1.28.
249. *Id.*

> [T]he courts have not been immune to these pressures on Canadian employers and many of them have responded by reinterpreting the law of employment contracts in ways that are favourable to employers. . . . The Supreme Court of Canada has even sounded notes of caution.[250]

Along these lines, Mummé notes that "the Supreme Court has assiduously avoided intervening in the day-to-day operations of the workplace and has vigilantly protected the employers' ability to dismiss without cause."[251] Some members of the judiciary are even philosophically pre-disposed to the "efficiency" paradigm. As Glasbeek states, "The judiciary had and still has a large number of visceral anti-working class members amongst its functionaries."[252]

To summarize, the developments in the common law towards the "employee rights" paradigm, including economic duress, have occurred in response to the changes that judges have seen in the Canadian workplace. While they have always been expected to mold the law to be responsive to changes in society, they now have an increased motive and opportunity to do so, given developments in the world of work, given an increased acceptance of judicial activism in employment law, and given the fact that the legislative/executive branches of government have stagnated in their support for employee rights.[253]

V. WHITHER ECONOMIC DURESS IN CANADIAN EMPLOYMENT LAW?

This paper has demonstrated that, on balance, Canadian common law has moved in the direction of the "employee rights" paradigm and away from the "efficiency" paradigm. As previously discussed, economic duress has been used to render an employment or severance agreement void when the employer places coercive pressure on the employee, on the premise that any apparent consent was not the product of full and free will. We have established that the doctrine of economic duress has been seldom used in Canadian employment law, and even more rarely has it been successful. Why? The truth is that the doctrine raises, to use a phrase from Dawson, "complex issues of ethics and economic policy,"[254] ones that courts often wish to avoid.[255] Moreover, the doctrine has the potential to ask

250. *Id.* at §1.47 (Citations omitted).
251. Mummé, *supra* note 155 at 119–120.
252. Glasbeek, *supra* note 239 at 403.
253. *Id.* at 408.
254. Dawson, *supra* note 73 at 289.
255. *See* Guy Davidov, *Non-waivability in Labour Law,* 40(3) OXFORD J. L. STUD. DAVIDOV 482, 487 (2020). He was speaking about labour law theorists, but I believe this also applies to judges.

uncomfortable questions about free will in our capitalist system,[256] and to challenge the theoretical underpinnings of employment law. A number of scholars have applied Kahn-Freund's theories about "submission" and "subordination" being inherent in employment law to the situation in Canada. Of that situation, Fudge has stated,

> Employment is an asymmetrical relationship in which the employee implicitly cedes authority to the employer. Inequality is not just a question of bargaining power; it is an essential institutional feature of employment that the employer has a unilateral and residual right of control and the employee has an open-ended duty of obedience.[257]

According to Malhotra, radical change in the workplace is unlikely to occur using the doctrine of economic duress because "the asymmetrical power relationship between employers and employees is taken as the standard and is simply not questioned" by most judges.[258] In typical cases, judges refuse to acknowledge that market pressures have left the employee with no practical alternative but to capitulate to the employer's demands (such as Stott), and that the pressure related to market forces that an employer applies is "illegitimate."

The application of the "fresh consideration" rule has been far more common than economic duress. For "fresh consideration," judges have often relied on this rule as a convenient way of achieving the same result (voiding the contract) while concomitantly avoiding some of the more uncomfortable evidentiary and philosophical questions raised by the economic duress doctrine. Wong has conducted extensive analysis to demonstrate how the "fresh consideration" doctrine was applied in the Quach case despite the doctrine having been relaxed (if not abolished entirely) in British Columbia, and even though economic duress (or unconscionability) would have also succeeded on the facts.[259] The employers were putting pressure on Quach that left him with no practical alternative but to agree. (He had already left his previous job in the expectation of starting the one-year contract with the employers; the employers told him that, unless he signed the Second Contract, he would not be able to start work.) There is also a good argument that the pressure was illegitimate, as the demand was based on deceit. However, instead of analyzing this issue, the Judges took the road *more* travelled (consideration), not because it was better (it was actually worse), but because it was the better known and more comfortable path. Wong opines

256. For an excellent examination of this topic, see *Id*.

257. Judy Fudge, *The Limits of Good Faith in the Contract of Employment: From Addis to Vorvis to Wallace and Back Again?* 32:2 QLJ 529, 530 (2007).

258. Malhotra, *supra* note 77 at 17–18.

259. Wong, *supra* note 24 at 509–521.

that it is problematic to use the "fresh consideration rule" in situations such as the Quach case, rather than economic duress or unconscionability. Even though the "fresh consideration" rule enabled the judges to reach the right result, it failed to get to the "heart of the matter in Quach to ask about fairness and true contractual freedom."[260] Both economic duress and unconscionability are concerned with matters of fairness in the contractual process, whereas the doctrine of fresh consideration is not. The doctrine of fresh consideration is merely concerned with the binary issue of whether additional consideration is present or not and does not engage in an analysis of whether the consideration is adequate—even a peppercorn will do.[261] The judicial use of the "fresh consideration" rule in such situations obviates the need for judges to consider or articulate the policy reasons for or against enforcement of a contract or its modification. Wong summarizes,

> Economic duress, by openly asking whether pressure was applied that left the person with no real choice but to cave to what was demanded, can better respond to the fairness concerns that impel courts to reach for the fresh consideration rule or else to enchant themselves with illusory consideration when the rule stands in the way of fairness. With economic duress, the fresh consideration rule can by and large retire.[262]

Like economic duress, unconscionability also has an obvious application in the employment context. However, unconscionability has been used more frequently than economic duress in Canadian employment law, even before Uber v. Heller.[263] Why is this so, despite the fact that both doctrines are recessionary? One explanation is that, given the prominent role that "inequality of bargaining power" played in the unconscionability doctrine, the lower courts have been primed to apply it because of the emphasis in the Supreme Court's jurisprudence about how this inequality is a prominent feature of the employment relationship.[264] Another explanation is that, historically, courts have been more comfortable applying the doctrine because of the restrictions that kept it within reasonable, defined parameters: the employee must be under an unusual inability, not merely the victim of the large power imbalances typically at play in the employment relationship; many of the cases made it clear that there had to be "substantial" unfairness in the bargain before the doctrine could be engaged;[265] and, in some

260. *Id.* at 523.
261. MCCAMUS, *supra* note 7 at 244–247.
262. Wong, *supra* note 24 at 517–518.
263. BARNACLE ET AL., *supra* note 1 at §7.108.
264. *Id.* at §7.112.
265. *See, e.g.*, Harry v. Kreutziger, 1978 CanLII 393 (B.C.C.A.).

jurisdictions, the employer had to be *knowingly* taking advantage of the employee's vulnerability.

It is important to acknowledge that the "fresh consideration" rule, economic duress, and unconscionability, while doctrinally distinct,[266] overlap, and all three might apply in a single case. This would occur, for example, where an employer puts pressure on a developmentally disabled employee with few alternative job prospects to agree to forgo entitlement to a bonus by threatening to fire them and charge them criminally for theft from the office (with the allegations being unmeritorious and the employer being fully aware of this) if the employee doesn't agree. This likely runs afoul of the "fresh consideration" rule (the employee is likely not being provided with "new" consideration for agreeing to this), economic duress (extortion makes the pressure illegal) and unconscionability (she is developmentally disabled and this has created inequality of bargaining power; and the bargain is demonstrably improvident). In particular, the lines between the economic duress and unconscionability doctrines blur, [267] because both are used to address oppressive conduct on the part of the employer. Some factors used in the test for unconscionability are also relevant to the factors used to assess economic duress, and vice versa. For example, one can argue in the hypothetical just described that the employee's lack of bargaining power (used in unconscionability) makes her more susceptible to the pressure being put on her by the employer (relevant to economic duress). Similarly, as Wong has argued,[268] the employee in Quach would have been successful on the basis of any of the three doctrines. The fact that economic duress is very closely related to unconscionability is illustrated by a comment by Dawson in his famous article on economic duress.

> The fact situations toward which duress doctrines are directed are, overwhelmingly, situations in which an unequal exchange of values has been coerced by taking advantage of a superior bargaining position.[269]

In his discussion of the duress doctrine, he appears to be describing the two elements of the Canadian version of unconscionability: inequality of bargaining power ("a superior bargaining position) and improvident bargain ("unequal exchange of values").

In some cases, trial and appellate judges have used factors from the unconscionability test to evaluate economic duress, or vice versa, in a hybrid application of the two doctrines.[270] In other cases, employees have

266. BARNACLE ET AL., *supra* note 1 at §7.107.
267. *Id.* at §7.107.
268. Wong, *supra* note 24 at 494–521.
269. Dawson, *supra* note 73 at 287.
270. *See, e.g.*, Toronto-Dominion Bank v. Wallace, 145 D.L.R. (3d) 431, 41 O.R. (2d) 161 (1983), para. 61.

successfully plead both doctrines discretely on the same set of facts, like in the Rouvalis case. Given the interrelationships in the doctrines, Lord Denning in the case of Lloyds Bank v. Bundy[271] proposed a merger of economic duress, unconscionability, and undue influence under the rationalizing principle of "inequality of bargaining power."[272] Many academics have been inspired by Denning's idea, and proposed rationalizing principles of their own,[273] but the Canadian judiciary have refused to collapse the doctrines.[274] Wong believes the doctrines ought to be kept separate:

> Taken together, duress, unconscionability, and undue influence target different types of contractual unfairness. That, not infrequently, a given scenario engages all three may speak less to the doctrines' conceptual overlap than to the reality that an unfair transaction may be unfair in different ways, with multiple contributing factors.[275]

I have dubbed economic duress the little sibling of other doctrines in the "employee rights" paradigm, perpetually in the shadows of its siblings. The doctrine is unlikely to emerge from those shadows anytime soon. Both the "fresh consideration" rule and unconscionability provide the same ultimate remedy. Courts will continue to use the "fresh consideration" rule where possible instead of economic duress—Both are most applicable in situations of contractual modifications, and the "fresh consideration" rule is more straightforward. While the "fresh consideration" requirement has had its wings clipped in some Canadian jurisdictions, specifically British Columbia and New Brunswick, courts will probably continue to find creative ways to evoke it, as the Quach case demonstrates.

Given the flexible, contextual test for unconscionability the majority set out in Uber, it is very likely that unconscionability will become even more dominant in relation to economic duress in Canadian employment law in the foreseeable future. It no longer has the constraints that it once did, including the unusual inability component for the potential victim in the "inequality of bargaining power" element of the test. This is significant, because it suggests the likelihood of a more robust future use of the doctrine in the employment law context, a context in which judges have repeatedly acknowledged that there is an inequality of bargaining power. Some scholars, like Wong, have even suggested the use of a rebuttable presumption of inequality of bargaining power in employment law. Additionally, judges have been given

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271. [1975] QB 326 (CA).
272. *Id.* at 339
273. For an excellent summary of various proposed rationalizing principles, *see* Marcus Moore, *Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle For Duress, Undue Influence and Unconscionability*, 134 (April) L.Q.R. 257 (2018).
274. MCCAMUS, *supra* note 7 at 496–497; Wong, *supra* note 24 at 520.
275. Wong, *supra* note 24 at 521.

a very wide latitude indeed in assessing whether there has been an improvident bargain. According to Barnacle and colleagues, "The doctrine of unconscionability offers potentially the broadest scope for judicial supervision of the substantive contents of employment contracts."[276] Moreover, unconscionability appears to give employees the option of targeting an individual clause for invalidation, rather than the whole agreement, and economic duress does not have that flexibility. As Swan and colleagues indicate, "[t]he doctrine of unconscionability can be regarded as a general tool to be used when more specialized tools cannot be used."[277] Employee counsel will certainly make expanded and creative use of the doctrine as a general tool in the foreseeable future. The ultimate question is how the judiciary will develop this flexible, contextual test for unconscionability, and how much further towards the "employee rights" paradigm the doctrine will swing.

Economic duress also has some younger siblings, and they too are currently overshadowing economic duress. The good faith doctrines are still evolving. They supply results that duress does not, like damages, fetters on discretion, and the interpretation of ambiguous terms in a way that favours employees. Also, the doctrines apply in certain areas where economic duress might not, like when employers unilaterally dismiss employees in bad faith.

In the future, economic duress will still have a role to play in the "employee rights" paradigm. Employees may want to use economic duress rather than unconscionability to nullify an agreement in certain situations—for example, where the employer forces an agreement in a high-handed manner but the "improvident bargain" requirement is lacking. Additionally, economic duress might be used in conjunction with other doctrines. For example, employees might need the assistance of economic duress to nullify their apparent consent if they want to claim constructive dismissal. As well, economic duress might be paired with the doctrine of good faith. If the employer places pressure on an employee to agree to something, the pressure might be framed as a violation of the employer duty of good faith, and this might transform legitimate pressure into pressure of the illegitimate variety. This prospect has been hinted at in a number of cases, such as Stott, Techform, and Rouvalis.

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276. BARNACLE ET AL., *supra* note 1 at §7.109.

277. ANGELA SWAN, JAKUB ADAMSKI & ANNIE Y. NA, CANADIAN CONTRACT LAW, §9.152 (4th ed. 2018).

VI. CONCLUSION

As Dawson has asserted, "In law, as in politics, the control of economic power has emerged as the central problem in modern times".[278] The concept of economic duress is an important one for that control of economic power in Canadian employment law. It has the potential to serve as a check on the employer's use of economic coercion to force employees into agreements against their will. As we have seen, this potential has not been realized, for a number of reasons. Most importantly, economic duress raises difficult and complex philosophical, legal, and evidentiary questions about an employee's free will in a capitalist system, questions that most judges prefer to avoid. Related to this, the doctrine has the potential to challenge the fundamental underpinnings of employment law, which assumes that coercion is an inherent and permissible aspect of the hierarchical employment relationship, and therefore does not view this coercion as illegitimate. Consent in the employment relationship is "a figment of the legal mind,"[279] and judges have a hard time shaking the illusion. As Patrick Atiyah stated, "Some forms of pressure are in conformity with the social and economic system and moral ideas of the community, and others are not."[280] By and large, the pressure that employers apply is viewed by the judiciary as falling in the former category. As well, to prevent the doctrine from veering into more radical territory, judges have introduced a number of formalist requirements into the doctrine which tend to be interpreted strictly and hence reduce the chances that the doctrine will be successfully invoked. Such requirements include a lack of "practical alternatives" for the victim, and the victim acting quickly to disavow the impugned agreement. And, let us not forget that the precise formulation of these formalist requirements is an open question, given the lack of a definitive test for economic duress.

Moreover, there are other "employee rights" doctrines that have been used more robustly, and this robust use has had the effect of crowding out economic duress and leaving its development stunted. Some doctrines, such as the "fresh consideration" rule, can accomplish the same result with fewer evidentiary and philosophical difficulties, while still others can provide different remedies, such as those related to good faith. One doctrine that seems particularly poised to "eat the lunch" of economic duress is unconscionability. The doctrine of unconscionability, which has historically provided the same remedy as economic duress and often applied on the same set of facts, threatens to further eclipse economic duress due to the Uber

278. John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345, 345 (1936–1937).

279. KAHN-FREUND ET AL., *supra* note 11 at 18.

280. PATRICK ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 436 (1979).

decision. The Supreme Court of Canada has annunciated a broadly expanded test for unconscionability that seems custom-built for its jurisprudence on employment law, because of the common emphasis on "inequality of bargaining power." Not only that, but unconscionability seems to provide a more flexible remedy, in that a victim can choose to invalidate the entire agreement, or merely an onerous clause. The exact impact of the revised doctrine of unconscionability will depend on the extent to which the judiciary is willing to make bold use of it. It remains to be seen whether they will do so. Despite being the neglected little sibling of the family of "employee rights" doctrines, economic duress will remain an important part of employment law—There will be future occasions where it will be necessary, either on a stand-alone basis or in conjunction with other doctrines.

It is advisable to take a systems approach to the common law, examining how the various doctrines within the integrated whole interact with each other in a dynamic fashion to govern the employment relationship.[281] The fact that economic duress has a marginal role in the common law is not necessarily a problem if other doctrines can achieve the policy objective of protecting employees from unacceptable oppressive conduct of employers. The other doctrines we have discussed, such as the "fresh consideration" rule, those related to good faith, and unconscionability seem to have achieved that protective function in the past, at least in part, and seem poised to take on an even more prominent role in the future. It is also important to realize that the list of other doctrines provided in this paper is not meant to be exhaustive. Other doctrines in the common law also play an important function in protecting employees, such as the *contra proferentem* rule; doctrines about restraint of trade that limit the reach of restrictive covenants; and a duty to treat employees with civility, decency, respect, and dignity.

However, even if the system of doctrines does in theory provide employees with some protection against employer oppression, there is an issue with access to justice under the common law. The vast majority of employees have real difficulty funding litigation in order to assert these doctrines, be they economic duress or many of the others we have mentioned.[282] For example, a study by the Ontario Bar Association concluded that common law claims were not accessible to low and average income-earners.[283] This speaks to the need to assist employees press their common law rights, by expanding the reach of legal aid programs and clinics in Canada[284] and implementing a myriad of other proposals to increase access

281. DOOREY, *supra* note 4 at 20–25.
282. BARNACLE ET AL., *supra* note 1 at §1.21.
283. ONTARIO BAR ASSOCIATION, OBA TASK FORCE ON WRONGFUL DISMISSAL LITIGATION 7 (2009).
284. MICHAEL TREBILCOCK, ANTHONY DUGGAN & LORNE SOSSIN, MIDDLE INCOME ACCESS TO JUSTICE (2012).

to justice.[285] The other two regimes in Canada, the regulatory regime and the labor relations regime, have their own issues when it comes to access to justice. Both of them leave many workers uncovered (such as independent contractors), either because they are expressly excluded from coverage, or, in the case of the labor relations regime, because the proportion of workers covered is dwindling over time.[286] As well, both of these other regimes inadequately enforce the employee rights provided under them.[287] While economic duress may be the little sibling in the family of common law employee rights, and, as Fudge argues, the regulatory regime may be the little sibling of the labor relations regime, all three regimes have challenges to overcome in order to reach adulthood and appropriately protect vulnerable employees from oppressive actions by employers.

285. *See, e.g.*, ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, ACCESS TO CIVIL & FAMILY JUSTICE: A ROADMAP FOR CHANGE (2013).

286. For additional discussion about these issues, see Mitchell & Murray, *supra* note 219.

287. *Id*.

ECONOMIC PRESSURE AND GERMAN LAW

Prof. Dr. Martin Löhnig[†]

Prof. Dr. Philipp S. Fischinger[††]

I. INTRODUCTION

German civil law is characterized by the idea of private autonomy. The individual should be given the opportunity to shape his or her legal relationships with free self-determination. The legal system recognizes the autonomous regulation of one's own living conditions in principle[1] and 4provides the state judiciary to enforce it.[2] Problems arise, however, when a contractual agreement that is formally autonomous is actually concluded by one party under conditions that can no longer be described as an exercise of free self-determination. The private law as "social private law"[3] also has the task of granting protection to the weaker participants in legal transactions. This applies not only to labor law (see II.), whose regulations are based on the assumption that the employee is in a weaker position, but also to German contract law as a whole. Thus, German private law basically assumes, as Schmidt-Rimpler[4] does, that a "guarantee of correctness" is inherent in the free contractual agreement of the parties. However, it also recognizes the fact that certain functional prerequisites must be met for the exercise of private autonomy and that in the case of a "structural imbalance"[5] of the contracting parties, the contract can turn from an instrument for the exercise of freedom into an instrument for the gagging of a contracting party. In this way, German

† University Regensburg

†† , LL.M. (Harvard) University Mannheim

1. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 26/84, Feb. 7, 1990, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 81, 242, 254 (Ger.); BVerfG, 1 BvR 12/92, Feb. 6, 2001, BVerfGE 103, 89, 100 f (Ger.).

2. *Cf.* Werner Flume, § 14 *Selbstbestimmung und Fremdbestimmung im Recht der Personengesellschaft*, *in* ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS.(1979).

3. For further details, *see* Martin Löhnig, *Liberales vs. Soziales Privatrecht in der Weimarer Republik*, *in* Bürgerliches Recht im nachbürgerlichen Zeitalter - 100 Jahre Soziales Privatrecht in Deutschland, Frankreich und Italien Vol. I: From Liberal to Social Private Law? - Der französisch-italienische Obligationenrechts-Entwurf von 1927, 227, 227-54 (2021).

4. Walter Schmidt-Rimpler, *Grundfragen einer Erneuerung des Vertragsrechts*, AcP 147 (1941), 130 ff, 156 f (Ger.).

5. *See* BVerfGE, 81, 242 (Ger.).

private law protects the economically "squeezed" person who, due to his or her weakness, is not able to act in a self-determined manner.

For example, the conclusion of a contract based on deception or threat is not binding for the deceived or threatened party. Although the contract is effective, the deceived or threatened party can annul the contract ex tunc by way of annulment (§§ 123, 142 German Civil Code [BGB]). Services already exchanged must be returned (§§ 812 et seqq. BGB). The legal regulation of annulment is based on weighing the interests of the contracting party who wants to annul the contract and the other contracting party. This balancing is in favor of the deceived or threatened contracting party because in such a case the deceiving or threatening contracting party cannot rely on the validity of the contract entered into in this way. However, this rule alone does not generate sufficient protection for a structurally inferior contracting party.

II. CORRECTNESS OF THE CONTRACT VS. STRUCTURAL IMBALANCE IN CONTRACT LAW

Starting in the 1980s, courts became more and more aware that § 123 BGB is not enough to protect the inferior party to a contract. They referred to § 138 BGB which declares contracts void that violate public policy.

1. Commercial Agents

The starting point was the case of a commercial agent.[6] His contract contained a non-competition clause that was to apply after the termination of the contract if the contract was terminated for a reason for which the commercial agent was responsible. The commercial agent was prohibited from working for a competing company for a period of two years. He could not claim any compensation. After the termination of the contract for which he was responsible, the commercial agent claimed that the clause forcing him to be inactive and depriving him of any possibility of earning money was invalid. He had probably only accepted the clause because otherwise, he would not have been able to carry out the desired activity in the first place. The Federal Constitutional Court considered this clause as an inadmissible restriction of professional freedom and, therefore, invalid. The restriction of the activity reached an extent that affected the commercial agent's livelihood. In addition, the conditions for free self-determination had not been met, because commercial agents were legally independent, but often could not act on an equal footing with economically superior companies. The principle of freedom of contract therefore often works to their disadvantage. If the entrepreneur made the conclusion of the contract dependent on the

6. *Id.*

commercial agent submitting to a competition protection clause, the commercial agent had hardly any room for negotiation.

2. Guarantees of payments of loans

Other cases involved guarantees of payments of loans by close relatives. Until the 1990s, German banks always secured loans to small and medium-sized entrepreneurs through guarantee agreements with members of the borrower's family. This was the case even if these family members had no assets and/or income of their own. Such a case was brought before the Federal Constitutional Court in 1993.[7] The guarantor in question had been ordered to pay under the guarantee by the civil courts and had lodged a constitutional complaint against this. The guarantor was the daughter of an estate agent, 21 years old, and had no assets of her own. She had not completed vocational training and was accordingly frequently unemployed. Therefore, she could not even cover the interest from the guarantee obligation with her income. The bank employee had significantly downplayed the risk of the guarantee to the daughter. In the end, the daughter had only guaranteed for her father because she wanted to help him and not disappoint him and because, moreover, due to her inexperience, she had believed that the guarantee would not have any disadvantages for her. According to the Federal Constitutional Court, for reasons of legal certainty, a contract could not be called into question or corrected retrospectively every time the balance of negotiations was disturbed. However, a correction was required if a typical case existed which showed the structural inferiority of one party to the contract and the consequences of the contract were unusually burdensome for the losing party. The circumstances of the conclusion of the contract had had to be examined and how the superior contracting party had behaved. In addition to the factual inferiority, the bank employee's insistence and the social pressure due to the guarantor's attachment to her own father had added to this.

3. Prenuptial agreements

The third group of cases concerns prenuptial agreements. The leading decision of the Federal Constitutional Court[8] is based on the following facts: In the summer of 1976, a 26-year-old woman who had a five-year-old child to care for from her first marriage and had been living with a new partner for two years discovered that she was pregnant. When she told her partner, he reminded her of his declaration at the beginning of their relationship that he did not want to have children and did not want to marry. The woman urged

7. BVerfG, 1 BvR 567, 1044/89, Oct. 19,1993, BVerfGE, 89, 214 (Ger.).
8. BVerfG, 1 BvR 12/92, Feb. 6, 2001, BVerfGE, 103, 89 (Ger.).

marriage before the child was born so that the child would be born in wedlock (the family law of the time still discriminated significantly against illegitimate mothers and their children). The man's reservations about marriage stemmed from the fear of the woman's alimony claims in the event of a divorce. He, therefore, had a prenuptial agreement drawn up and declared that he would not marry without signing it. In the event of a divorce (which actually took place in 1989), the contract excluded all alimony claims on the part of the future wife. The Federal Constitutional Court saw this as an inadmissible overreaching of the wife and declared the waiver invalid. In the end, the wife had only signed the contract because she had to assume that otherwise, she would have to live as a legally and socially discriminated illegitimate mother. The Federal Constitutional Court stated that a situation of inferiority is regularly assumed when an unmarried pregnant woman is faced with the alternative of either being solely responsible for and caring for the expected child in the future, or of involving the child's father in this responsibility through marriage, albeit at the price of a prenuptial agreement that places a heavy burden on her. Her negotiating position was weakened here by the actual situation in which she found herself due to her pregnancy, by her legal status as an unmarried mother, and in particular by her efforts to secure her own existence and that of the expected child.

4. Common ground

In all the cases described, one of the two parties regretted the conclusion of the contract and wanted to cancel it because the contract had turned out to be highly disadvantageous. In principle, such deliberations do not have to be of legal significance: It follows from the principle of private autonomy that the contracting parties must abide by the contract even if it should turn out to be disadvantageous. Moreover, in all cases, they were adults with full legal capacity. However, the exercise of private autonomy is in turn bound by fundamental rights, because the fundamental rights of the constitution must also be observed as objective value decisions in civil law.[9] In this context, the general clauses of the Civil Code, in particular, the aforementioned § 138 of the Civil Code, are of central importance[10] because the values of fundamental rights are to be taken into account when applying these general clauses. The civil courts must therefore pay particular attention to ensuring that contracts do not become a means of foreign determination.

9. Constant case law since, BVerfG, 1 BvR 400/51, Jan. 15, 1958, BVerfGE, 7, 198, 205 (Lüth) (Ger.).
10. BVerGE, 89, 214 (Ger.).

III. PROTECTION OF EMPLOYEES AS WEAKER CONTRACTING PARTIES

In labor law, the question of balancing a formally understood freedom of contract on the one hand and the need to prevent the employee from being treated unfairly and disadvantageously is particularly urgent and frequent. That is because the employee is typically inferior to the employer in contract negotiations as there are usually more applicants than open positions. In addition, the employee is dependent on getting and keeping a job to earn his living and, therefore, is in an economically inferior position. Furthermore, the employer is in many cases better skilled and/or advised on labor law and thus has an information advantage in addition to the position of economic strength. This applies with regard to the original employment contract, any amendment contracts in the course of the employment relationship as well as termination agreements for the mutual termination of the contractual relationship. German civil and labor law contains a number of mechanisms to protect the employee from the superior bargaining power of the employer. The most important of these are discussed below, especially against the background of economic pressure situations.

1. General-terms-and-conditions-control („AGB-Kontrolle")

Checking the general terms and conditions („AGB") based on §§ 305 et seqq. BGB plays a very important role, especially when concluding employment and amendment contracts. This is all the more true as the employee is viewed by the prevailing legal opinion as a "consumer".[11] This has important consequences: First of all, because of § 310 III No. 1, 2 BGB the vast majority of employment contracts are subject to the general-terms-and-conditions-control, even if the employer plans to use the specific clause only in this one case. Secondly, according to § 310 III No. 3 BGB the specific and individual circumstances of the individual conclusion of the contract must be taken into account while ascertaining the validity of the general terms and conditions. That makes it possible to take into account the specifics of the concrete situation in which the contract is concluded (e.g. taking the applicant or employee by surprise in contrast to previous detailed instruction and granting a reasonable period of time for reflection) as well as special personal characteristics of the applicant or employee that affect his bargaining power;[12] the latter should make it possible to take into account,

11. BVerfG, Nov. 23, 2006, 1 BvR 1909/06, NZA 2007, 85, 86; Bundesarbeitsgericht [BAG] [Federal Labour Court], May 25, 2005, 5 AZR 572/04, AP Bürgerliches Gesetzbuch [BGB] [Civil Code], § 310 Nr. 1 (Ger.); BAG, Aug. 31, 2005, 5 AZR 545/04, AP ArbZG § 6 Nr. 8 (Ger.); ErfK/*Preis*, BGB § 611a, Rn. 182; Staudinger/*Schlosser*, § 310, Rn. 48; *Meier*, SpuRt 2012, 229, 230 (Ger.); Staudinger/*Kannowski*, § 13, Rn. 53; *Annuss*, NJW 2002, 2844 (Ger.).

12. BAG, Aug. 31, 2005, 5 AZR 545/04, AP ArbZG § 6 Nr. 8 (Ger.); BGB/*Richters*, § 310, Rn. 176 (Ger.); MüKo-BGB/*Basedow*, § 310, Rn. 81 (Ger.).

too, whether the employee or applicant was under particular economic pressure and therefore accepted clauses that were unfavorable to him.

At the heart of the general-terms-and-conditions-control is § 307 I BGB, according to which a contractual provision is void if it "unreasonably disadvantages" the contractual partner of the user contrary to good faith. Since the introduction of the general-terms-and-conditions-control, a large number of clauses in labor law have fallen victim to this provision (in 2002).

However, an important restriction applies to the general-terms-and-conditions-control: According to § 307 III 1 BGB, the main performance obligations of a contract are excluded from the general-terms-and-conditions-control – and thus in particular from the control for a possible unreasonable disadvantage according to § 307 I BGB. In employment law, this is of great importance in two respects: (i) With regard to *employment* contracts, the wage agreement and thus the wage amount is not to be measured on the basis of § 307 I BGB. (ii) As far as *termination* agreements are concerned, it follows that the termination of the employment relationship as such cannot be measured on the basis of § 307 I BGB either. The resulting gaps in protection are to be closed using other mechanisms: In the case of wage agreements, a public-policy-control is carried out (see III. 3) and with regard to termination agreements, the Federal Labor Court applies the so-called duty to fair bargaining (see III. 4).

2. Annulment („Anfechtung")

The above-mentioned possibility of contesting contracts due to fraudulent deception or unlawful threats (§ 123 BGB) can also be relevant in the context of employment relationships. In this respect, however, a further distinction has to be made:

a) Annulment of the Employment Contract

As far as the employment contract for the establishment of the employment relationship is concerned, the employee usually has neither a right nor an interest in an annulment.

To start with, there is typically no right to annul the contract because there is no reason to contest it: It is hard to imagine that an employer could trick an applicant into concluding the employment contract through fraudulent deception; it is, therefore, not surprising, that such cases have not yet been the subject of legal disputes. The possibility that the employer forces an applicant by an unlawful threat to conclude the employment contract at all seems also rather far-fetched; and even if the employer—exceptionally—exerts pressure or threats in the negotiation process to establish certain clauses that favor him, this can better be dealt with by the above-mentioned

general-terms-and-conditions-control instead of annulling the employment contract.

Apart from these considerations, the employee generally has no interest in annulling his employment contract. That is because in such a case he would be without an employment contract and the employment relationship would end immediately leaving him jobless.[13]

b) Annulment of Termination Agreements

The situation is very different with regard to termination agreements. Insofar as employees often do have an interest in being able to withdraw from the (perhaps prematurely entered into) contract by annealing it.

A challenge due to fraudulent deception (§ 123 BGB) is conceivable, for example, if the employer pretends to the employee that he or she does not enjoy any protection against dismissal anyway and that because of that the employee does not lose any rights by signing the termination agreement. Another example was on the basis of a Federal Labor Court decision.[14] In this case, the employer presented to the employee that the establishment will have to be shut down soon and that because of that he would dismiss the employees anyway. He argued that, given this, it would be better if the employees signed a termination agreement because he would then pay them a small severance payment. In truth however, the employer planned to to sell the plant to a company that wanted to continue the business; in such a case, a so-called transfer of business takes place with the result, that the employment relationships of all employees employed by the seller are transferred from the seller to the buyer by law (§ 613a I 1 BGB). By keeping this secret from the employee before the termination agreement was signed, the employer fraudulently deceived the employee so that the employee could annul the termination agreement.

Of even greater practical importance are cases of annulling termination agreements due to unlawful threats by the employer (§ 123 BGB). This is, in particular, true for cases in which the employer threatens to dismiss the employee if the employee does not sign the offered termination agreement. However, in this context, the question of whether the employee was in a difficult economic situation is not directly relevant. Instead, the question of whether the threat is unlawful solely depends on whether a reasonable employer in the situation in question should have seriously considered dismissing the employee or if the threatened dismissal would have been

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13. However, the mutual performances of employer and employee that were already exchanged in the past would not be reversed. This prevents the so-called theory of the defective employment relationship (*cf.* Staudinger/Fischinger § 611a mn. 696 et seqq (Ger.)).

14. BAG, Nov.23, 2006, 8 AZR 349/06, NZA 2007, 866 (Ger.).

obviously invalid.[15] When examining the validity of dismissals, the economic situation of the employee typically plays no or at most a very minor role; however, the Federal Labor Court takes into account possible obligations to support children or spouses[16] as well as job opportunities on the labor market[17] and thus also draws on economic factors to a certain extent.

3. Public Policy

Another instrument of contract control is stipulated in § 138 BGB, according to which contracts are void, that contravene public policy (sittenwidrig). In principle, this provision is, of course, also applicable to contracts regulating the employment relationship.

a)Relevance for employment contracts

With regard to employment contracts, however, § 138 BGB is large of no practical significance insofar as the general-terms-and-conditions-control with its check for "unreasonable disadvantage" already (cf. III. 1.) establishes an even stricter control for most contractual provisions as § 138 BGB could do. Therefore, § 138 BGB is applicable to employment contract provisions only if, exceptionally, the specific provision is a real individual agreement, so that a general-terms-and-conditions-control does not take place. This presupposes that the contractual provision in question was negotiated individually between the employer and the employee and that the employee actually had the opportunity to influence the content of this provision. In day-to-day work, this is rarely the case.

As already mentioned, there is, however, one important exception in which the public policy control is of great practical importance: Wage agreements are not subject to the general-terms-and-conditions-control and are therefore measured solely on the basis of § 138 BGB. Put simply, a wage agreement violates public policy if there is a noticeable disproportion between the objective value of the work performance promised by the employee and the wages promised by the employer.[18] In order to determine whether this is the case, the labor courts compare the wage agreed by the contracting parties with the usual market wage for the specific job. The following applies: In general, the wage agreement is considered to violate public policy if the agreed wage is less than two-thirds of the usual market

15. BAG, Nov. 27, 2003, 2 AZR 135/03, NJW 2004, 2401, 2402 (Ger.); BAG, Dec. 15, 2005, 6 AZR 197/05, NZA 2006, 841, 843 f. (Ger.); BAG, Nov. 28, 2007, 6 AZR 1108/06, NZA 2008, 348, 353 (Ger.); Staudinger/*Fischinger*, § 138, Rn. 537 (Ger.); Staudinger/*Singer/v. Finckenstein*, § 123, Rn. 79 (Ger.).

16. BAG, June 9, 2011, 2 AZR 381/10, NZA 2011, 1027, 1029 (Ger.); BAG, Sept. 2, 2011, 2 AZR 955/11, NZA 2013, 425, 428 (Ger.).

17. BAG, Jan. 29, 1997, 2 AZR 292/96, AP BGB § 626 Nr. 131 (Ger.).

18. Staudinger/Fischinger § 138 mn. 542 (Ger.).

wage.[19] However, this is only a rule of thumb and not a rigid rule, so deviations up and down are possible and all circumstances of the individual case are to be taken into account. Correspondingly, within the scope of the public policy control, e.g. a special economic hardship of the employee can be taken into account with the result, that a wage agreement that provides for a wage of e.g. 70% of the market wage can also be regarded as contravening public policy.[20] If the wage agreement violates § 138 BGB, the employment contract as such remains effective, but the wage agreement is void. As a result, the employee is entitled to the usual market wage.[21]

b) Relevance for termination agreements

From a theoretical starting point, § 138 BGB could play a major role in the control of termination agreements. This is because termination agreements are often entered into under circumstances which, according to general civil law principles, constitute good arguments for a violation of public policy (e.g. the employee's economic dependence on his job; the pressure exerted by the employer upon the employee to sign the contract; the termination agreement unilaterally favors the employer; the lack of time to re-think the contract or the impossibility of consulting a lawyer before signing the contract).

However, the Federal Labor Court has always acted with extreme reluctance when reviewing the compatibility of termination agreements with public policies. In particular, it did not hold the termination agreement invalid only because the employer had taken the employee by surprise (ie granted neither a period of reflection nor rights of rescission or revocation). The same was true even if the termination agreement unilaterally favored the employer at the expense of the employee.[22]

Nowadays, the importance of § 138 BGB in relation to termination agreements in case law is likely to be even less. That is because in the two most recent decisions, the Federal Labor Court did not even mention § 138 BGB, although the facts of the case had suggested a violation of public policy. Instead, the Federal Labor Court is now resorting to its newly developed doctrine of the duty to fair bargaining. As will be shown sub III. 4. b), this path taken by the Federal Labor Court is not convincing. § 138 BGB is the appropriate instrument provided by law for checking the

19. BAG, NZA 2009, 837, 838 (Ger.); BAG, NZA 2012, 978, 979 (Ger.); BAG, NZA 2012, 1307, 1311 (Ger.); BAG, Mar. 18, 2014, 9 AZR 694/12 (Ger.).

20. *Cf.* BAG NZA 2009, 837, 838; BAG, AP Nr 63 zu § 138 (Ger.).

21. BAG, AP Nr 2 zu § 138 (Ger.); BAG, NZA 2006, 1354, 1357(Ger.); BAG, NZA 2016, 494, 497 (Ger.); BAG, May 24, 2017, 5 AZR 251/16 [juris Rn 39] (Ger.).

22. BAG, DB 1994, 279 (Ger.); BAG, NZA 1996, 811, 812 (Ger.); LAG Hessen, Aug. 25, 2014,16 Sa 143/14 [juris Rn 20] (Ger.); LAG Rheinland-Pfalz, Jan. 28, 2016, 5 Sa 398/15 [juris Rn 16] (Ger.).

formation and content of termination agreements. In the context of § 138 BGB, it could be taken into account, for example, whether the employee was in a difficult economic situation and therefore agreed to a termination agreement that unilaterally benefited the employer.

4. Duty to fair bargaining

a) Starting Point: Federal Labor Court 2019

With its decision of February 7th, 2019, the Federal Labor Court for the first time[23] resorted to the so-called duty of fair negotiation order to control the validity of a termination agreement.[24] The decision was based on the following facts (whereby in the statement of the plaintiff employee, which was partly disputed in the proceedings, is assumed to be true): The employee was employed by the defendant as a cleaning help. On February 15, 2016, the defendant's employer visited the employee, who had been in bed ill, at around 5:00 p.m. in her apartment. The employer explained to the employee that he would not support her laziness and presented her with a termination agreement. According to this contract, the employment relationship was terminated by mutual agreement on February 15, 2016, without payment of a severance payment. The plaintiff signed the termination agreement but asserted that she had not been fully in control of her senses because she was taking painkillers and therefore only realized afterward what she had done.

Instead of checking the termination agreement against § 138 BGB and, thus, public policy, the Federal Labor Court took this case as an opportunity to derive and justify the duty to negotiate fairly for the first time. The court derives this obligation from the general contractual obligation to take care of the rights, objects of legal protection and interests of the other contractual partner (§ 241 para. 2 BGB). It ruled that a breach of the duty to negotiate fairly can be considered in particular in the following four constellations:

Firstly, the creation or exploitation of a *psychological pressure situation* could justify the accusation of unfair negotiation. However, the BAG emphasized that this weakness must be of some importance. It ruled that it is necessary that this pressure situation "makes a free and well-considered decision by the contractual partner considerably more difficult or even impossible". This is underlined by the following sentence, which talks about "creating particularly unpleasant framework conditions that are considerably distracting or even arouse the instinct to flee".

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23. This duty was mentioned before in other decisions by the Federal Labor Court but never put in practice.

24. BAG, Feb. 7, 2019, 6 AZR 75/18, NZA 2019, 688 (Ger.).

Secondly, the Federal Labor Court considers it sufficient if an objectively recognizable *physical weakness* of the employee is exploited. Here, too, it should be emphasized that this weakness must be suitable for making the free and well-considered decision of the employee considerably more difficult or impossible. Therefore, a mere mild cold, a moderate headache and - of course - any form of physical impairment that does not affect the mental abilities either directly or by means of numbing painkillers (e.g. a leg cast) must not be enough.

Thirdly, the Federal Labor Court mentions the exploitation of *insufficient language skills*. Naturally, this applies primarily to foreigners who do not speak German. However, this can also be relevant for Germans, at least if the termination agreement is written in a foreign language.

Fourth and finally, the use of an *element of surprise* should also be able to justify the unfairness of the negotiations. The latter should be considered, for example, if the contract negotiations take place at an unusual time and/or in an unusual place. Negotiations during regular working hours and in the employer's company can generally not be regarded as unusual, as this is the born place and time for the conclusion of workplace-related legal transactions. But even negotiations outside of the company and/or individual working hours do not automatically justify the accusation of unfair negotiations. This applies in particular if the employee has been explicitly informed of the employer's proposed topic of conversation in good time in advance so that he/she can adequately adjust and prepare for them. But even if he "only" had to reckon with the fact that the conversation could be about his employment because of the circumstances (e.g. because it is customary in the company concerned to hold separation talks in law firms), this speaks against the element of surprise and, thus, a violation of the duty to fair bargaining.

As one can see, the court does not primarily focus on a possible *economic predicament* or at least the difficult economic situation of the employee. However, it seems at least possible that one might take such a situation into account under the topic of psychological pressure situation. That is because one might argue that if an employee that is in economic difficulties is in a weaker negotiating position than an employee who is economically well off. Even if one were to see it that way (and it must be emphasized that the court has not expressly stated this so far), according to what has been said above, however, this would only be relevant if, during the negotiations, the employer was indeed aware of the employee's economic problems and the resulting psychological pressure.

If one or several of these conditions are met and, therefore, the duty to negotiate fairly is violated, the Federal Labor Court held the termination agreement automatically invalid. It should be emphasized in particular that

according to the court, the content of the termination agreement should not matter at all; accordingly, for a violation of the duty to negotiate fairly, it is not necessary to examine whether the termination agreement unilaterally serves the interests of the employer and thus disadvantages the employee. This means that the obligation to negotiate fairly strives not to check the content of the contract, but solely the "way to the conclusion of the contract", i.e. the circumstances of the conclusion of the contract.

b)Reception in the Law Literature

The newly developed instrument of the duty of fair negotiation has met with some approval in the literature.[25] However, the majority of commenters reject this new approach[26] – for good reason. First of all, there is absolutely no need to establish a new control mechanism, since § 138 BGB already establishes a dogmatically secured control instrument provided by the legislator, with which cases such as the case decided by the BAG can be "handled". Due to the highly insecure and vague standard of "fairness," it is also to be expected that termination agreements will be subjected to much more extensive control which is not in line with the systematics of the German Civil Code. Its basis is the freedom of contract, which can only be restricted in the cases provided for by law - such as in particular fraudulent misrepresentation, unlawful threats or immorality. The duty to negotiate fairly threatens to undermine this legislative assessment. There is a risk that courts will use the duty of fair negotiations as an instrument to fall short of the legal requirements for contract control stipulated in the German Civil Code. This can be exemplified by comparing the duty to fair negotiations and the control for public policy (§ 138 BGB): The accusation of acting unfairly is much easier to make and is raised much more quickly than that of a breach of public policy - all the more so if one, following the BAG, completely refrains from checking the content of the termination agreement. By this, however, the duty to fair negotiations threatens to disturb the well-balanced equilibrium between contractual freedom on the one hand and protection of the weaker contracting party on the other, thus contradicting the provisions of the German Civil Code.

c) Further decisions

The fact that these fears are not unfounded is demonstrated by a decision of the State Labor Court Mecklenburg-Western Pomerania, in which a termination agreement was declared invalid because of a violation of the duty

25. *Plum*, MDR 2020, 69, 70 (Ger.); *Bachmann/Ponßen*, NJW 2019, 1970; *Schmidt*, AP § 620 BGB Aufhebungsvertrag Nr. 50 (Ger.); *Fischer*, jurisPR-ArbR 23/2019 Anm. 5 (Ger.).

26. *Fischinger*, NZA 2019, 729 (Ger.); *Holler*, NJW 2019, 2206, 2209 (Ger.); *Bauer/Romero*, ZfA 2019, 608, 614 (Ger.); *Hamann*, jurisPR-ArbR 30/2020 Anm. 4 (Ger.); *Boemke*, JuS 2019, 1204, 1206; *Schwarze*, JA 2019, 789, 790; HWK/*Kliemt*, Anhang § 9 KSchG, Rn. 30b (Ger.).

to negotiate fairly, primarily because one day before the termination contract was concluded the employee's supervisor had criticized employee's services.[27] Although the criticism was correct in terms of content, factual and in a non-disparaging manner, the court ruled that the employer had created and exploited a psychological pressure situation as the criticism had built up „massive pressure on the plaintiff, who […] then had to doubt himself and his abilities." This decision is obviously neither convincing nor compatible with the provisions of the German Civil Code. The termination agreement could neither be annuled following § 123 BGB (as there was no threat at all and certainly not an unlawful threat) nor did it violate public policy (§ 138 BGB). The factual expression of criticism that is correct in terms of the content does not constitute a legally relevant psychological pressure situation that would justify declaring a termination agreement to be invalid.[28]

The BAG, too, recognized that by inventing the duty to negotiate fairly it created the danger of a potentially too far-reaching control instrument. As a safeguard against the duty to negotiate fairly becoming a super weapon, it has emphasized from the outset that this duty is only violated if the psychological pressure situation makes the free and well-considered decision of the contractual partner "significantly more difficult or even impossible".[29] In its most recent decision on the subject, the BAG once again emphasized this by making it clear that this obligation should only ensure a "minimum level of fairness".[30] In addition, it rightly decided that an employer's threat of (extra-)ordinary termination, which is not illegal according to the traditional principles within the meaning of § 123 German Civil Code, can not be used as an argument that the employer violated its duty to negotiate fairly.

One might hope that this decision is only the first step towards a further restriction of this control instrument. As it can hardly be reconciled with the legal provisions of the German Civil Code it should, in the opinion of the authors of this paper, be abandoned. Instead, termination agreements should be measured solely against the statutory provisions of the German Civil Code, i.e. in particular § 123 and § 138 of the German Civil Code.

III. CONCLUSION

Private autonomy presupposes self-determination. On a formal level, the necessity of two corresponding declarations of will to enter into a contract guarantees this self-determination, in general civil law as well as in labor law.

27. LAG Mecklenburg-Vorpommern, May 19, 2020, 5 Sa 173/19 (Ger.).
28. Fischinger, NZA-RR 2020, 516 (Ger.).
29. BAG, Feb. 7, 2019, 6 AZR 75/18, NZA 2019, 688 (Ger.).
30. BAG, Feb. 24, 2022, 6 AZR 333/21, NJW 2022, 1970 (Ger.).

On the substantive level, however, self-determination is subject to a wide variety of impairments. This finding is initially irrelevant for law because no human being makes his decisions completely uninfluenced by external factors. The question posed by German law is rather when such impairments are so strong that they justify calling into question the binding nature of contractual regulations. This is the case when the contract concluded is the result of considerable inequality between the contracting parties, i.e. one contracting party was significantly more impaired in its self-determination than the other. Here, too, it is true that very few contracts are concluded by two equally powerful, economically strong, well-informed contracting parties. However, this (in)equality cannot be measured or quantified exactly. Therefore, the German legal system works with groups of cases in which, as a rule, there is an obviously quite considerable imbalance, a "structural" imbalance. § 123 BGB is based on this idea: A person who is threatened or deceived is regularly quite significantly impaired in his self-determination, either because he exercises his self-determination on an insufficient factual basis and this circumstance is attributable to the contractual partner, who thus acquires a position of superiority. Or because he cannot act in a self-determined manner because he otherwise has to fear considerable negative consequences, and this circumstance is to be attributed to the contractual partner, who thus acquires a position of superiority. Even if it should be different in the individual case: It is a typical and therefore legally typified situation of imbalance and the contract can (but does not have to) be dissolved for this reason.

However, this regulation cannot be generalized and has remained a well-founded exception for a long time. This is because German civil law, with its codification that came into force on January 1, 1900, is based on a liberal conception of man and a social model, and is thus the product of an epoch that is coming to an end, the long, bourgeois 19th century. It is a clear and simple normative model, based on freedom and equality, better: on equal legal freedom, that underlies the BGB. The individual is postulated as a free, self-responsible, mature person who obtains information and makes reasonable decisions based on them for his own good. Accordingly it is his own fault if he does not do so. Ideally, this is based on a person who uses the market and can influence it together with other sovereign consumers against the background of free competition between suppliers. On the level of law, 1.) the principle of formal-abstract equality of all legal subjects, 2.) private autonomy with the declaration of will as an instrument to give legal validity to one's own free will, and 3.) the binding nature of concluded contracts rebus sic stantibus, to which 4.) the conclusion in the procedure of private autonomous conclusion gives the guarantee of correctness. It has therefore taken decades for evaluations such as those underlying § 123 BGB to be made

fruitful in the area of the control of general terms and conditions. The contractual partner who bases the conclusion of the contract on these conditions is better advised and thus better prepared for the conclusion of the contract than the other contractual partner. As a rule, he will only be prepared to conclude the contract if the validity of the conditions favoring him is ensured. Other suppliers from the same sector will use conditions that are largely identical in content as a basis. There is therefore often a considerable imbalance. For this reason, first case law and later the legislator established a retrospective review of content, which is intended to prevent the user of general terms and conditions from deviating too much from the dispositive law and thus to his own advantage. This legal rule, too, is based on the typical situation and, therefore, applies even if in an individual cases the contractual partner of the user of the terms and conditions is more powerful, richer and better advised than the latter. A legislator will never be able to regulate all constellations of such a structural imbalance.

For this reason, case law has made use of the general clause of § 138 BGB and considered the non-existence of a significant imbalance of self-determination as an element of "good morals". In order not to endanger the confidence of the legal community in the validity of contracts, case law works with groups of cases in which there is typically a significant imbalance: prenuptial agreements or guarantees of payment of loans for close relatives, for example, whereby this is based on the assessment that self-determination is typically impaired in personal relationships of proximity much more than in contact with third parties. On the other hand, the aim is not to provide comprehensive protection for the weaker party in the specific contracting situation (according to whatever criteria); this would eliminate the functional conditions of liberal private law. This must also apply to labor law, where the case law of the BAG with the construct of the duty to bargain fairly has meanwhile exceeded the limits of the concept described, leading to legal uncertainty. In addition, in view of the massive shortage of labor in Germany, which will be increasingly felt in the coming years, the traditionally assumed power imbalance between employer and employee could possibly weaken in some areas.

ECONOMIC DURESS IN U.S. EMPLOYMENT

Jonathan F. Harris*

INTRODUCTION

Eight decades after the legal realist and comparativist John Dawson documented the beginning of an evolution of the doctrine of duress in U.S. employment, I have been charged with answering two questions: (1) whether, as Dawson predicted, the doctrine has transitioned from a more restrictive psychological duress standard to a more expansive economic duress standard and (2) if so, why the courts have appeared to be the prime movers.[1] Neither question has a concise answer. As for the first, I have canvassed cases and

* Associate Professor of Law, LMU Loyola Law School Los Angeles. Senior Fellow, Student Borrower Protection Center. Grantee, University of California Student Loan Law Initiative. I thank Matthew W. Finkin for the invitation to contribute to this collection. For helpful comments, I thank Rachel Arnow-Richman, Hugh Collins, Jeffrey M. Hirsch, Kaiponanea Matsumura, and participants in the SEALS New Scholars Workshop. For exceptional research, I thank Makalie Johnson, Elizabeth Machado, Brennan O'Boyle, Shannon Skrzynski, Anne Tewksbury, and Chelsea Viola.

[1] *See* John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345, 346 (1937) [hereinafter Dawson TULANE] (citing Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704, 728 n.49 (1931)) ("The reluctance of American courts to extend the scope of economic duress in private law cases has frequently been commented upon. And yet decisions have in fact gone much further in this direction than is generally believed, far enough to reveal latent possibilities that the future may develop."); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 257 (1947) [hereinafter Dawson MICHIGAN] (describing a shift among twentieth century U.S. courts from more restrictive psychological duress tests toward "tests phrased in the adequacy of alternative remedies" (i.e. economic duress)).

determined that the doctrine has nominally evolved, but most courts have refused to follow along, with only the occasional judge finding for an employee claiming duress. As for the second, the rare judge who finds the possibility of duress has done so only by exploiting ambiguities in the doctrine, perhaps out of a fundamental sense of fairness or due to legislative inaction. The doctrinal confusion, among other reasons, points to the need for courts to universally adopt the more expansive and realist economic duress test, looking to whether a party had no reasonable alternative but to consent.[2] But, at least until courts universally embrace that test, it is generally a good thing that some courts are exploiting duress's doctrinal inconsistencies to rule for workers in especially dire circumstances.

Throughout the employment timeline, employees may claim that they signed contracts under duress. At the beginning of the timeline, employees may allege that they were under duress when assenting to adhesion contracts such as noncompete agreements, training repayment agreement provisions (TRAPs),[3] confidentiality agreements, or arbitration agreements with class waivers. In the middle of the timeline, incumbent employees may argue that having to sign one of these agreements under threat of termination constitutes duress. And at the end of the timeline, employees may claim that they assented under duress to waivers of legal claims in exchange for severance pay.

Regardless of the point in the timeline when the employee claims duress, U.S. courts apply a two-part test, asking whether a threat was improper and, if so, whether the threat had a particularly harmful effect on the assenting party.

Judges have long viewed the doctrine of duress unfavorably, especially economic duress in the employment context. These courts typically treat duress as a last-ditch defense to contract enforcement when a party has no other colorable claims or defenses. This is not a surprise in a nation that so strongly clings to freedom of contract and at-will employment.[4] Courts continue to embrace the adage that duress cannot exist when a party threatens to do something it has a legal right to do, such as firing an employee.[5] Likewise, federal, state, and local lawmakers have been wary to touch duress in the employment context, with only a few major statutes prohibiting

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[2] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. L. INST. 1981).

[3] *See* Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 725–26 (2021) ("A TRA[P] requires an employee to pay the employer a fixed or pro rata sum if the employee received on-the-job training and quits work or is fired within a set period of time.").

[4] *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 107 (1997).

[5] *See, e.g.*, Tate v. Woman's Hosp. Found., 56 So. 3d 194, 198 (La. 2011).

conditions approaching duress in work settings.[6]

Yet despite the virtual uniformity of courts' rejection of workers' duress defenses, there is a surprising non-uniformity in the ways that courts treat the doctrine. Scholars have remarked on the haphazard manner in which courts have attempted to fashion and apply a coherent test for duress.[7] This is so even with two attempts by the Restatement of Contracts to fashion a cognizable and practical rule, moving from a "no free will"[8] standard in the Restatement (First) to a more realist "no reasonable alternative" standard in the Restatement (Second).[9] In short, there is no consistent rule and courts frequently jumble elements from the tests and even insert elements from other contract defenses. Economic duress is the most common type of duress presented in the employment context and is the most frequently mangled by courts.

Courts often conflate duress with the doctrines of undue influence, unconscionability, and the duty of good faith and fair dealing. In addition, judges routinely evaluate factors more appropriately applied to other contractual tests, such as by considering the existence of a cooling off period after the contract's execution (undue influence), the presence of counsel for the worker (undue influence), and ratification through continued work (laches). Whereas duress focuses on the conditions of the contract's formation, the aforementioned doctrines and factors assess the parties' capacity or the contract's substantive terms or performance.

With such misunderstandings of duress, particularly economic duress, many courts have applied something akin to U.S. Supreme Court Justice Potter Stewart's test for obscenity: "I know it when I see it."[10] This approach rewards workers with duress defenses only when the facts are particularly egregious.

On a larger scale, the defense of duress, whether psychological or economic, remains largely out of reach for parties seeking to preclude enforcement of a contract. This is especially true for employees attempting to escape unfavorable terms of work. Adding insult to injury, if the employer did not directly cause the circumstances putting the employee in economic

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[6] *See infra* Part III (discussing the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. §§ 623, 626, 630, and the Trafficking Victims Protection Act (TVPA), 18 U.S.C. §§ 1589, 1590, 1595).

[7] *See* Dawson MICHIGAN, *supra* note 1 at 289; Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 444 (2005).

[8] *See* RESTATEMENT (FIRST) OF CONTRACTS § 492(b) (AM. L. INST. 1932).

[9] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. L. INST. 1981). Such a shift is consistent with other realist changes to the Restatement (Second), inspired by its chief reporter Arthur Corbin. *See* Susan Lorde Martin, *Kill the Monster: Promissory Estoppel as an Independent Cause of Action*, 7 WM. & MARY BUS. L. REV. 1, 19 (2016); Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook That Never Was*, 72 FORDHAM L. REV. 595, 599 (2003) (citing WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 26–40 (1973)).

[10] Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

dire straits, courts will generally find no duress.

Nevertheless, U.S. courts' conflation of duress with other contractual defenses and ad-hoc application of factors, though doctrinally impure, has in some rare instances permitted judges to use duress to decline summary judgement for employers seeking to enforce a contract or even to deny enforcement of a contract. This is consistent with some courts' moves toward at least a nominally greater recognition of economic—not just psychological—duress, as Dawson had predicted in 1937.[11] It is too soon to call this a trend, but anomalous decisions have appeared with more frequency in recent years. As Dawson would likely argue if he were alive today, the doctrinal ambiguity that permits the occasional court to rule for an employee is a positive development that points to the need for adoption of the Restatement's (Second) economic duress "no reasonable alternative" test.[12]

This inquiry proceeds as follows. Part I traces the nominal and scholarly evolution of the duress doctrine in U.S. employment from psychological to economic duress. Part II explains how this evolution and duress's conflation with other defenses to employment contract enforcement have created a jumble of duress standards that are essentially useless to courts. Part III shows how this doctrinal disarray, while commonly dissuading courts from wading into duress claims, has in some instances allowed courts to acknowledge the possibility of economic duress for workers by fashioning elements out of duress and other contractual defenses. Part IV attempts to explain the rationale for some courts' moves from psychological to economic duress in arguing that courts should universally adopt the "no reasonable alternative" standard.

I. FROM PSYCHOLOGICAL TO ECONOMIC DURESS

A party may raise a duress defense to a contract's enforcement when assent was induced by an improper threat.[13] The doctrine has broadened over time; the traditional case was a contract signed under threat of physical harm, but threats of economic harm now constitute the majority of duress claims. A contract signed under duress is voidable by the assenting party.[14] In analyzing duress, the court must distinguish an "improper" threat from one that is acceptable in the bargaining process and then evaluate the pressure

[11] *See* Dawson TULANE, *supra* note 1, at 346.

[12] *Cf.* Dawson MICHIGAN, *supra* note 1, at 281 ("Confused as it is, the language of these [duress] cases contains a large element of truth, which may appear more clearly through a reformulation: an extreme disproportion in values in a bargain transaction requires explanation . . . . If inequality in values is thus traced to its source in the conditions or the relations of the parties, the grant of judicial remedies seems no longer to endanger the economic foundations of an individualistic society.").

[13] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (AM. L. INST. 1981).

[14] RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (AM. L. INST. 1981).

imposed by that threat.[15] This two-step process is where uniformity in courts' treatment of duress ends.

The first step of the analysis is mired in uncertainty, with some courts requiring that the threatened act—or the threat itself—be unlawful to be "improper" and others allowing for more leeway. Some courts strictly require an illegal act, while others evaluate whether the threatened act is "shocking" or "oppressive."[16] Traditional duress involves a threat of physical violence, which is obviously illegal, but courts later found wrongful seizure or detention of goods to constitute duress.[17]

The second step of the analysis is even more uncertain but has gradually shifted to account for the different ways that threats can coerce an assenting party. Traditionally, courts have looked to whether a party was deprived of choice in the psychological sense (i.e. free will) and have required a showing of fear-based impairment of the assenting party's decision-making capacity. This is the approach of the Restatement (First) of Contracts, which defines duress as an improper threat that "precludes [the assenting party] from exercising free will and judgement."[18] Signing a contract at gunpoint is the quintessential example.[19]

There has been a nominal evolution of the second step of the duress analysis from such a rigid standard of deprivation of a party's free will to one of an absence of reasonable alternatives. In its Restatement (Second) of Contracts, the American Law Institute (ALI) rejected the Restatement's (First) strict rule due to its "vagueness and impracticability."[20] Indeed, the extent that a threat deprives a victim of "the quality of mind essential to the making of a contract"—the old standard—is more of a capacity test than a constrained choice test.[21] It is also a subjective test, considering the mental state of the assenting party, rather than an objective test.[22] But the more

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[15] *See id.* at §§ 175(1), 176.

[16] *See* Davis v. A.I.J.J Enterprises, Inc., No. 2:21-CV-02829-JDW, 2022 WL 196284, at *2 (E.D. Pa. Jan. 21, 2022) (requiring an illegal act); Vail/Arrowhead, Inc. v. Dist. Ct. for the Fifth Jud. Dist., Eagle Cnty., 954 P.2d 608, 613 (Colo. 1998) ("an improper threat is one that is so shocking that the court will not inquire into the fairness of the resulting exchange") (internal citation omitted).

[17] RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a (AM. L. INST. 1981).

[18] RESTATEMENT (FIRST) OF CONTRACTS § 492(b) (AM. L. INST. 1932).

[19] Some argue, however, that a party signing a contract under psychological duress still makes a choice using free will. *See* Giesel, *supra* note 7, at 471–72 (citing ALAN WERTHEIMER, COERCION 33–35 (Princeton University Press 1987)) ("When a party signs an agreement at gunpoint, that party is responding to two alternatives and making a rational choice between the two . . . . the part[y] consent[s]."); John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 239 (1942) [hereinafter Dalzell, *Economic Pressure I*] (commenting that one is "free" to select the lesser of two evils when signing a contract at gunpoint).

[20] RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (AM. L. INST. 1981).

[21] Giesel, *supra* note 7, at 470 (quoting Alexander v. Standard Oil Co., 423 N.E.2d 578, 582 (Ill. App. Ct. 1981)).

[22] Scholars have commented that, while the objective theory of contract has largely gained favor

severe a threatened harm, the more likely a perfectly clear-headed and rational person with intact capacity would take extreme measures to avert the harm; this is not an issue of reduced capacity or one's subjective mental state, but rather one of limited choice.[23] If anything, the harsher the alternative to consent, the more likely such consent is true and unambiguous.[24] Therefore, the "no free will" psychological test is an ill fit for duress.[25]

To constitute duress under the newer and more pragmatic and expansive test, a threat must leave the victim "no reasonable alternative" but to assent.[26] This is deprivation of choice in a broad sense: making refusal so costly as to effectively remove it as an option. The newer standard allows for more objective analyses of claims because it concerns the circumstances of the threat, especially the assenting party's socioeconomic circumstances, rather than the assenting party's state of mind. It is also a more sensible framework that mirrors the choice constraint present in duress.

Although the ALI made the change to the Restatement in 1981, courts have been slow to adopt the "no reasonable alternative" test. Many courts still cling to the old "no free will" standard.[27] Other judges either incorporate "no reasonable alternative" as an additional factor in their otherwise psychological analysis or reject both Restatements' tests.[28] In recent years, more courts appear to be accepting of the Restatement's (Second) "no reasonable alternative" standard, at least nominally.[29]

Studies and my own canvassing of cases reveal that, regardless of the test used, courts rarely find that employment contracts were entered into under duress.[30] Instead, judges either dispose of the matter without addressing the defense or, if necessary, quickly treat the defense with one of multiple

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with courts, the subjective will still plays an important part. *See, e.g.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1042 (1985).

[23] *See* Giesel, *supra* note 7, at 470.

[24] *See* Dalzell, *Economic Pressure I*, *supra* note 19, at 240.

[25] One professor of biology and neurology even argues that humans never act out of free will. *See* ROBERT SAPOLSKY, DETERMINED: A SCIENCE OF LIFE WITHOUT FREE WILL 6 (2023).

[26] RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (AM. L. INST. 1981).

[27] *See* Giesel, *supra* note 7, at 460–61; *see infra* Part II.B (collecting cases).

[28] *See* Giesel, *supra* note 7, at 461 (collecting cases).

[29] *See infra* Part II.B (collecting cases).

[30] While I focus on duress in employment, duress claims typically fail across all of contract law. *See* Giesel, *supra* note 7, at 463–64 ("In only nine of the eighty-eight cases [in state courts from 1996-2003] did the court decide the matter in favor of the duress claim," only two of which were actually affirming a finding of duress, with the others just remanding for further proceedings on the issue); Danielle Kie Hart, *In and Out—Contract Doctrines in Action*, 66 HASTINGS L. J. 1661, 1673 (2015) (finding only one case in the federal and state courts of the Seventh and Ninth Circuits from 2000–2014 where contract performance was discharged on the basis of duress). Some scholars distinguish "mainstream contract law" from "employment contract law." *See* Rachel Arnow-Richman & J.H. Verkerke, *Deconstructing Employment Contract Law*, 75 FLA. L. REV. 897, 914 (2023) (asserting that employment contract law "deviate[s] profoundly from mainstream contract law in both explicit and implicit ways," such as the at-will employment default that "misapplie[s] principles of consideration and assent"). I do not observe, however, that the distinct contexts cause material differences in the ways that courts analyze duress claims.

possible reasons for its failure. Judges largely view economic duress as a long-shot defense that parties assert when they have no other viable defenses to contract enforcement.[31]

In sum, while a theoretical shift has taken place from psychological to economic duress, the shift has not inspired most courts to find even the possibility of economic duress in employment contracting. And, confusingly, judges have applied the older and stricter psychological duress standard in nearly all employment cases where the duress defense was not immediately rejected.[32]

II. ECONOMIC DURESS'S DISARRAY

Starting with John Dawson in the 1930s and 40s, observers have commented that courts' application of the duress doctrine is unpredictable and fairly useless as precedent.[33] Almost 80 years later, Dawson's reflections remain true. As with all U.S. contract law, the economic duress defense starts from the background virtue of freedom of contract and the primacy of choice. Indeed, contracts scholars have remarked that, "when courts choose to enforce a contract, or pick a particular default rule as the basis for bargaining, or adopt a damages limitation, they are in effect sending out a message about which (of a competing set of values) our political-legal order privileges."[34]

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[31] *See, e.g.,* Perez v. Uline, Inc., 68 Cal. Rptr. 3d 872, 876 (Cal. Ct. App. 2007) (remarking that courts are hesitant "to set aside settlements and will apply 'economic duress' only in limited circumstances and as a 'last resort'"); Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293, 1299 (M.D. Ala. 1999) (quoting Ralls v. First Fed. Sav. & Loan Ass'n of Andalusia, 422 So. 2d 764, 766 (Ala. 1982) ("The doctrine applies only to special, unusual, or extraordinary situations . . . ")).

[32] *See In re* RLS Legal Sols., LLC, 156 S.W.3d 160, 165 (Tex. App. 2005) (finding duress on the basis that "the withholding of her compensation for work already performed defeated [plaintiff's] free agency"), *subsequent mandamus proceeding sub nom*. 221 S.W.3d 629 (Tex. 2007); Standard Coffee Serv. Co. v. Babin, 472 So. 2d 124, 127 (La. Ct. App. 1985) (finding the plaintiff employee was deprived of free will because he "was faced with being deprived of his economic security, although a healthy male and able to earn a living . . . under this set of circumstances, a reasonable person with the subjective characteristics of [plaintiff employee] would have felt forced into signing the employment contract"); Battle-ABC, LLC v. Soldier Sports, LLC, 401 F. Supp. 3d 873, 882 (D. Neb. 2019) (denying employer's summary judgement motion on duress claim and stating that duress requires pressure that "compels a person to go against that person's will and takes away that person's free agency, destroying the power of refusing to comply with the unjust demands of another"); Garage Sols., LLC v. Person, 201 So. 3d 962, 966 (La. Ct. App. 2016) (holding that plaintiff employee's "consent was vitiated," when the employer threatened to withhold the paycheck if the employee did not sign the agreement).

[33] *See* Dawson MICHIGAN, *supra* note 1, at 289 (writing that the "history of generalization in this field [of duress] offers no great encouragement for those who seek to summarize results in any single formula. The direct conflict in decisions, on facts substantially identical, makes it likewise impossible to formulate any general proposition that could now achieve anything like universal acceptance."); Note, *Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis*, 53 IOWA L. REV. 892, 895 (1968) ("The theoretical confusion surrounding the duress area is reflected in the judicial decisions."); Giesel, *supra* note 7, at 444 ("Even after the passage of half a century since Dawson's observations, the duress doctrine remains largely unusable, though courts frequently attempt to use it.").

[34] David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 207 (2019).

Generally, there is a "deference to bargained-for choice."[35] This deference to choice and contract enforcement immediately creates an uphill battle for putative duress victims, even if one could reasonably argue that duress precludes true bargained-for choice.

With this gloss in place, courts vary widely in their applications of both the "improper threat" step and the "effect on the victim" step of the duress analysis, but, regardless, typically conclude for the employer. This Part reveals some of the most common categories of non-uniformity among courts.

A. Improper Threats

In determining whether duress was present, a judge's first step is to decide if the claimed threat was improper, as opposed to regular bargaining behavior.[36] Courts use differing standards for a wrongful threat. Some strictly require unlawful action, while others look for "oppressive" or "shocking" threats.[37] On one end of the employment timeline, a threat to withhold pay for work already completed is one of the few employer actions that typically, though not universally, falls within the realm of impropriety.[38] This is because refusing to pay for work already performed is unlawful.[39] On the

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[35] *Id*. at 208.

[36] *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a (AM. L. INST. 1981). ("An ordinary offer to make a contract commonly involves an implied threat by one party, the offeror, not to make the contract unless his terms are accepted by the other party, the offeree. Such threats are an accepted part of the bargaining process.").

[37] *Compare* Davis v. A.I.J.J Enterprises, Inc., No. 2:21-CV-02829-JDW, 2022 WL 196284, at *2 (E.D. Pa. Jan. 21, 2022) (internal citation omitted) (holding that, under "Pennsylvania law, economic duress exists 'whenever one person, by the unlawful act of another, is induced to enter into contractual relations under such circumstances as to indicate that he has been deprived of the exercise of free will'"), *with* Panetta v. Chesapeake Energy Corp., No. CIV.A. 2:10-CV-00278, 2010 WL 1930160, at *3 (S.D.W. Va. May 12, 2010) (finding that conditioning continued employment on an arbitration agreement does not constitute "wrongful, oppressive, or unconscionable conduct"), *and* Vail/Arrowhead, Inc. v. Dist. Ct. for the Fifth Jud. Dist., Eagle Cnty., 954 P.2d 608, 613 (Colo. 1998) (internal citation omitted) (ruling that "an improper threat is one that is 'so shocking that the court will not inquire into the fairness of the resulting exchange,' or a threat 'in which the impropriety consists of the threat in combination with resulting unfairness.'"). In Colorado, the court also may inquire into the underlying fairness of the substantive terms. *See* discussion *infra* Part II.C.

[38] *See, e.g.,* Garage Sols., LLC v. Person, 201 So. 3d 962, 966 (La. Ct. App. 2016) (finding training repayment agreement provision (TRAP) requiring repayment from employee who quit within a set period of time had been signed under duress because earned wages were withheld to repay TRAP debt); Battle-ABC, LLC v. Soldier Sports, LLC, 401 F. Supp. 3d 873, 884 (D. Neb. 2019) (denying employer's motion for summary judgement against duress claim because "[manager's] statement to [employee] that he had to sign the Assignment as written if he 'wanted a f---ing paycheck' can be reasonably interpreted as [manager] threatening to withhold pay [employee] already earned").

[39] *But see* Krupczak v. DLA Piper LLP, No. CV WMN-16-23, 2016 WL 4013640, at *6 (D. Md. July 27, 2016) (rejecting duress claim and finding the following email "merely informational, without any coercive tone or threat": "In order to receive a paycheck on May 30, I will need the signed agreement no

other end of the employment timeline, any duress defense based on a threat of refusal to hire is essentially a loser per se.[40] Separation agreements face a similar obstacle but on the tail end of the employment timeline: conditioning a severance package on a noncompete agreement or claim release is interpreted as ordinary offer and acceptance.[41] This is even more concerning for incumbent workers considering such contracts because they have become more economically dependent on the employer than they were before employment commenced.

Threats that lie in between these two poles of the employment timeline are where the bulk of the case law falls and where the contorting of the economic duress doctrine is highly apparent. Some courts explicitly proclaim that termination of employment is an action within an employer's legal right and a widely accepted part of the employment system.[42] On this rationale, many courts strictly hold that "threatening an employee's position, as a matter of law, cannot meet the stringent 'duress' standard."[43]

Other courts are more flexible. For instance, the Ninth Circuit has held that while wrongful threats must "make a mockery of freedom of contract and undermine the proper functioning of our economic system[,]" they need not be unlawful or tortious acts.[44] Wrongful threats, however, do not include "arrangements that 'serve a practical business function.'"[45] In sum, according to the Ninth Circuit, wrongful threats "must involve actions taken for a

later than Tuesday, May 27. You obviously have longer than that to consider the agreement, but you wouldn't receive a paycheck until we have the executed document."); Shang Zhong Chen v. Kyoto Sushi, Inc., No. 15CV7398, 2017 WL 4236556, at *5 (E.D.N.Y. Sept. 22, 2017) (holding that "if [the employer] unlawfully withheld wages, Plaintiffs would have recourse under both federal and state law" and that this was "fatal" to the duress claim).

[40] *See, e.g.*, AMS Staff Leasing Inc. v. Taylor, 158 So. 3d 682, 687 (Fla. Dist. Ct. App. 2015) (enforcing employment contract that plaintiff who did not have his reading glasses was given five minutes to sign: "The only evidence of a 'threat' in this case was the threat that the plaintiff's services were not needed if he did not sign the employment contract. This is insufficient to constitute duress.").

[41] In one case, the court found no duress because the employer "did not say, 'release your claims . . . or you will be fired.' Instead, plaintiff was informed of her termination, or impending termination, and had two choices [i.e., resign or be fired]." Ruffin v. Allstate Ins. Co., Civ. No. 15-501 (NLH/AMD), 2016 WL 5745118, at *7 (D.N.J Oct. 3, 2016) (stating that the difference between a threat and a choice hinged on whether the offeror preferred one outcome over the other).

[42] *See, e.g.*, Tate v. Woman's Hosp. Found., 56 So. 3d 194, 198 (La. 2011) (stating that "the [Louisiana] jurisprudence has uniformly held the threat of being discharged from at-will employment does not constitute duress"). *See generally* Dawson MICHIGAN, *supra* note 1, at 287 ("No single formula has achieved so wide a circulation in the duress cases as the statement that 'It is not duress to threaten to do what there is a legal right to do.'").

[43] *Ruffin*, 2016 WL 5745118, at *6.

[44] Martinez-Gonzalez v. Elkhorn Packing Co., 25 F.4th 613, 621 (9th Cir. 2022) (internal quotation marks omitted).

[45] *Id*. The Ninth Circuit's stated examples of wrongful threats include "the assertion of a false claim, a bad faith threat to breach a contract, and a threat to withhold payment of an acknowledged debt," as well as "bad faith threatened use of civil process; threats which are a breach of the duty of good faith and fair dealing under a contract with the recipient; threats which would harm the recipient without significantly benefitting the party making the threat; or threats where 'what is threatened is otherwise a use of power for illegitimate ends.'" *Id.* (internal citation omitted).

'coercive purpose' or 'in bad faith.'"[46] Likewise, a federal court has observed that, "[u]nder Illinois law, it may be possible for a threat to terminate to constitute moral duress, even for an at-will employee . . . . Moral duress 'consists in imposition, oppression, undue influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weaknesses of another.'"[47]

B. No Free Will vs. No Reasonable Alternative

The second step in the analysis—the effect that the improper threat has on the victim—is even more uncertain than the first step's definition of an improper threat. Many courts continue to hew closely to the old "lack of free will" standard from the Restatement (First) of Contracts.[48] In Florida, as in many states, the party claiming duress must prove "that the act [of signing] was effected involuntarily and was not an exercise of free choice or will."[49] Other courts nominally adopt the modern and more expansive "no reasonable alternative" standard from the Restatement (Second) but still consistently refuse to find the possibility of duress. For example, in one case challenging a resignation agreement on duress grounds, the judge acknowledged that the teacher's only alternative to resignation was termination, but nonetheless denied the duress claim because the teacher had months to choose and was represented by counsel.[50] Some courts even require the worker to satisfy both

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[46] *Id*.

[47] Collins v. Comdisco Inc., No. 05 C 2894, 2007 WL 952021, at *5 (N.D. Ill. Mar. 26, 2007) (citing Golden v. McDermott, Will & Emery, 702 N.E.2d 581 (Ill. App. Ct. 1998)). *See also* Gilkerson v. Neb. Colocation Ctrs., LLC, 859 F.3d 1115, 1118 (8th Cir. 2017) (agreeing with the Nebraska District Court that there was a genuine issue of fact as to whether a threat to fire for cause was unlawfully coercive); Battle-ABC, LLC v. Soldier Sports, LLC, 401 F. Supp. 3d 873, 883-84 (D. Neb. 2019) (internal citation omitted) (stating that "the Nebraska Supreme Court has not foreclosed the proposition that threats of termination may support a claim for duress").

[48] *See* RESTATEMENT (FIRST) OF CONTRACTS § 492(b) (AM. L. INST. 1932).

[49] AMS Staff Leasing Inc. v. Taylor, 158 So. 3d 682, 687 (Fla. Dist. Ct. App. 2015). *See also* Krupczak v. DLA Piper LLP, No. CV WMN-16-23, 2016 WL 4013640, at *5 (D. Md. July 27, 2016) (holding that duress is defined by "a state of mind in which the complaining party was overwhelmed by fear and precluded from using free will or judgment"); Bazylevsky v. VR Advisory Servs. (USA) LLC, 2020 N.Y. Misc. LEXIS 2418, at *6 (N.Y. Sup. Ct. May 27, 2020) ("[a] contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will."); Davis v. A.I.J.J Enterprises, Inc., No. 2:21-CV-02829-JDW, 2022 WL 196284, at *2 (E.D. Pa. Jan. 21, 2022) (using lack of free will standard); Zabota Cmty. Ctr., Inc. v. Frolova, No. 061909BLS1, 2006 WL 2089828 (Mass. Super. Ct. May 18, 2006) (reiterating the Restatement (First) of Contracts definition of duress and finding that a noncompete agreement, on its own, does not make such an agreement unenforceable).

[50] *See* Guy v. Bd. of Educ. Rock Hill Loc. Sch. Dist., No. 1:18-cv-893, 2021 WL 1146111, at *5–6 (S.D. Ohio Mar. 25, 2021) (granting employer's motion for summary judgement). In Part II.C, I explain why it is improper in a duress analysis to consider as factors the amount of time to decide or the presence of counsel.

the "no free will" and "no reasonable alternative" standards.[51] This almost insurmountable task predictably leads to defeat of the employee's duress defense.[52]

Fewer courts have considered the economic circumstances of the assenting party, despite a comment in the Restatement (Second) suggesting such a consideration: "[s]ince alternative sources of funds are ordinarily available, a refusal to pay money is not duress, *absent a showing of peculiar necessity*."[53] Instead, the availability of alternative source of funds has been used to support employer threats of terminating employment, since the employee could theoretically obtain alternative sources of funds through other employment.[54] For example, a tenured professor sued his university employer for breach of contract regarding compensation, but the university asserted that the professor had signed a claim release.[55] The professor contended that this agreement had been executed under duress: the university had explicitly threatened him with termination to obtain his signature.[56] Nevertheless, the court held that the requirements of duress were not satisfied because the professor "had several alternatives to signing the new agreement: (1) he could have invoked the faculty handbook procedures governing termination; (2) he could have filed suit asking a court to enjoin his termination until the requisite handbook procedures were followed; or (3) he could have quit and sought employment elsewhere."[57]

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[51] *See* Giesel, *supra* note 7, at 474–75 (collecting cases); Korn v. Franchard Corp., 388 F. Supp. 1326, 1333 (S.D.N.Y. 1975) (explaining that "[a] crucial element of coercion or duress is lack of free choice," and that "[t]he circumstances involved must be such that the party asserting the defense had no practical alternative open to him").

[52] *See, e.g.*, Hyman v. Ford Motor Co., 142 F. Supp. 2d 735, 744–45 (D.S.C. 2001) (applying a deprivation of free will standard where the party must be "'bereft' of the quality of mind essential to the making of a contract," and continuing that "the [employee] still cannot establish he had no reasonable alternative but to sign the release").

[53] RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (AM. L. INST. 1981) (emphasis added).

[54] Nevertheless, new research has revealed that alternative employment may not be as realistic as judges believe. Much has been written on the prevalence of labor monopsony, which could provide a basis for a duress defense when alternative employment may not be available. *See, e.g.*, Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion* 2 (The Hamilton Project, Policy Proposal No. 2018-05, 2018) (defining labor monopsony as "the exercise of employer market power in labor markets"); Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 552–53 (2018) (describing harms of labor monopsony). This is similar to courts' findings of economic duress in the late nineteenth century when monopolist common carriers like railroads refused to release cargo until the user agreed to pay a fee higher than the set rate. *See* Dawson MICHIGAN, *supra* note 1, at 259 ("Inequality of bargaining power, the inevitable product of state-conferred monopoly, was used to justify this extension of the doctrine of economic duress.").

[55] Osborne v. Howard Univ. Physicians, Inc., 904 A.2d 335, 338 (D.C. 2006).

[56] *Id.* at 342.

[57] *Id*. at 341. The court did signal that it might be willing to find an exception to the principle of obtaining alternate employment if there were a showing of "particularized economic harm that would result from choosing termination (and litigation) over signing the contract." *Id.* at 340. Similarly, other courts have held that seeking new employment is a reasonable alternative but have left the door open for

In addition, many courts insist that the employer must have caused the employee's dire economic circumstance, while others do not. A Pennsylvania federal court, for instance, has required such causation, using the example of an employer manipulating an employee's finances but proclaiming that "[a]n employer's threat to a job does not create duress just because the employee needs the job to support her family."[58] Such a requirement eviscerates the equity-based rationale underlying economic duress because the second step of the duress analysis requires courts to evaluate the threat's effect on the victim by assessing the economic circumstances of the assenting party.

In contrast to the Pennsylvania federal court, a Utah federal court has not insisted that the employer have caused the employee's dire economic situation, writing that "under some circumstances, pecuniary necessity, when coupled with an improper threat, may constitute duress."[59] In that case, an employee successfully argued that she had no reasonable alternative to signing a claim release in exchange for severance pay, saying that she "would not [have] been able to get a small U–Haul trailer to take our remaining basic belongings without receiving my checks."[60] Furthermore, she testified that "we were broke, and I felt that if I refused to sign the release form, my family and I would be homeless because we would be unable to get to California where we would be able to stay with our family."[61] The judge held that "when there is 'a showing of peculiar necessity,' a refusal to pay money may leave one with no reasonable alternative."[62]

Lurking in the background is the firmly entrenched and uniquely U.S. at-will employment rule, which makes duress defenses even harder to prove. This is so because, aside from a defined set of statutorily prohibited discriminatory reasons,[63] an employer may fire an employee—and an

proof of specific hardship. *See, e.g.*, Cavelli v. N.Y.C. Dist. Council of Carpenters, 816 F. Supp. 2d 153, 164 (E.D.N.Y. 2011) (rejecting a duress claim where the employer had threatened to withhold medical benefits, holding that to prevail, the plaintiffs needed to have "present[ed] some admissible evidence (not conclusory assertions) showing how they would have been unable to obtain work or medical benefits elsewhere if they refused to sign the releases").

[58] Davis v. A.I.J.J Enterprises, Inc., No. 2:21-CV-02829-JDW, 2022 WL 196284, at *2 (E.D. Pa. Jan. 21, 2022). *See also* Hopkins v. NewDay Fin., 643 F. Supp. 2d 704, 716 (E.D. Pa. 2009) ("[T]he pressures to support one's family, to dress properly for a job or general financial pressures are not caused by [the former employer] and do not amount to duress under the law.").

[59] Sheedy v. BSB Props., LC, No. 2:13-CV-00290-JNP, 2016 WL 6902513, at *3 (D. Utah Mar. 1, 2016).

[60] *Id.* at *4.

[61] *Id.*

[62] *Id.* at *3.

[63] *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151–169 (prohibiting discrimination based on union membership or concerted activity to improve working conditions); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (prohibiting discrimination based on race, color, religion, sex, or national origin); Civil Rights Act of 1866, § 1, 42 U.S.C § 1981 (prohibiting discrimination based on race); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (prohibiting discrimination based on age).

employee may quit—for "a good reason, a bad reason, or no reason at all."[64] Under this theory, neither a threat to fire or refuse to hire can be unlawful (the first step of duress analysis), nor can such threats undermine an assenting employee's free will or preclude reasonable alternatives (the second step).[65]

C. Conflation with Other Doctrines

As if widespread disagreement on the duress test were not confusing enough, courts freely borrow from other contractual defenses, inserting new factors into their duress analyses to assist in reaching the desired outcome.

Most commonly, courts routinely assess the substantive terms of the contract, even though the duress doctrine considers only the circumstances surrounding the contract's formation.[66] This is frequently done by applying an unconscionability standard to the duress analysis.[67] While procedural unconscionability could mirror duress, as they both address the contract's formation, substantive unconscionability certainly considers the fairness of the underlying contract's terms.

The Restatement (Second) itself adds to this doctrinal conflation by suggesting that an improper threat constituting duress can include a threat

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[64] William R. Corbett, *Finding A Better Way Around Employment at Will: Protecting Employees' Autonomy Interests Through Tort Law*, 66 BUFF. L. REV. 1071, 1074 (2018). *See also* Goydos v. Rutgers State Univ., No. CV1908966MASDEA, 2021 WL 5041248 (D.N.J. Oct. 29, 2021) (finding no duress because employee failed to allege any facts indicating the employee was constructively discharged by coercion or by misrepresentation of material fact); Guy v. Bd. of Educ. Rock Hill Loc. Sch. Dist., No. 1:18-CV-893, 2021 WL 1140224, at *5 (S.D. Ohio Mar. 25, 2021) ("The mere fact that an employee is forced to choose between resignation and termination does not alone establish that a subsequent choice to resign is involuntary, provided that the employer had good cause to believe there were grounds for termination."); Boston Sci. Corp. v. Mabey, 455 F. App'x 803, 805 (10th Cir. 2011) (finding that noncompete agreements supported only by continued employment were not void for lack of consideration); Psota v. New Hanover Twp., No. 20-5004, 2021 WL 6136930, at *13 (E.D. Pa. Dec. 29, 2021) (granting employer's motion to dismiss when an officer claimed he was forced to retire); Errington v. City of Reading, No. 5:21-CV-00118, 2021 WL 6062245 (E.D. Pa. Dec. 22, 2021) (granting employer's motion to dismiss despite employee's claim that he was forced to retire due to employer's harassment).

[65] *See* Vines v. Gen. Outdoor Advert. Co., 171 F.2d 487, 491 (2d Cir. 1948) (L. Hand, J.) ("[Plaintiff] had no more right to continue on the job, than he had to get it, when he first came to the defendant; and the defendant was free to set any new terms it pleased upon future services as it had been to fix the original ones. On this view it merely offered him an option; the debt, without the new job, or the new job, without the debt. The choice was his.").

[66] *See, e.g.*, Gilkerson v. Neb. Colocation Ctrs, LLC, 859 F.3d 1115, 1118 (8th Cir. 2017) (quoting City of Scottsbluff v. Waste Connections of Neb., Inc., 809 N.W.2d 725, 745 (Neb. 2011) ("To be voidable because of duress, an agreement must not only be obtained by means of pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal.")); Vail/Arrowhead, Inc. v. Dist. Ct. for the Fifth Jud. Dist., Eagle Cnty., 954 P.2d 608, 613 (Colo. 1998) (stating that "an improper threat is one . . . 'in which the impropriety consists of the threat in combination with resulting unfairness'") (internal citation omitted).

[67] *See, e.g.*, Panetta v. Chesapeake Energy Corp., No. CIV.A. 2:10-CV-00278, 2010 WL 1930160, at *3 (S.D.W. Va. 2010) (finding that conditioning continued employment on an arbitration agreement does not constitute "wrongful, oppressive, or *unconscionable* conduct") (emphasis added).

resulting in unfair substantive terms.[68] In addition, the Restatement (Second) asserts that a breach of the duty of good faith and fair dealing establishes an improper threat sufficient for duress, and uses an at-will employment illustration:

> 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.[69]

While courts have not frequently turned to these Restatement (Second) provisions,[70] legal scholars have referenced the duty of good faith and its potential use for workers to claim economic duress and otherwise obtain workplace improvements.[71]

Undue influence also frequently finds its way into economic duress analyses, despite being a separate doctrine.[72] Grace Giesel, arguing against the conflation of these two doctrines, notes that "[t]he common traditional duress paradigm is that the bargainer, with full ability to comprehend and evaluate the situation, including the alternate choices or the absence of such, must decide to assent or not when a lack of assent may not be a reasonable choice."[73] Giesel continues that, "[i]f decision-making capacity factors [from the undue influence test] are included in the definition of the duress doctrine,

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[68] RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (AM. L. INST. 1981)

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

(emphasis added). *See also* Giesel, *supra* note 7, at 475 (suggesting that courts are further repelled from engaging in a duress analysis because of the Restatement's (Second) Section 176(2) call for substantive analysis of the contract).

[69] RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. e, illus. 11 (AM. L. INST. 1981).

[70] In recent years, only one case has relied on this Restatement (Second) example of breach of the duty of good faith constituting an improper threat sufficient for duress. *See* Lincoln Benefit Life Co. v. Edwards, 45 F. Supp. 2d 722, 750 (D. Neb. 1999) (finding duress where employee, under threat of termination, signed an agreement to pay employer a debt he did not owe).

[71] *See* Matthew W. Finkin, *Hard Bargains: Economic Duress in German, French, and the U.S. Employment Law*, FESTSCHRIFT FÜR WERNER F. EBKE ZUM 70. GEBURSTAG at 9, 12 n.53 (September 22, 2021), https://ssrn.com/abstract=3928718; Sabine Tsuruda, *Good Faith in Employment*, 24 THEORETICAL INQUIRIES L. 206, 207, 213 (2023) (arguing that implementing the duty of good faith in employment contracts would provide benefits to workers, including protections for speech and reasonable refusals to work).

[72] *See* Giesel, *supra* note 7, at 478–83 (collecting cases).

[73] *Id.* at 479.

many traditional duress situations would no longer constitute duress."[74] Put differently, duress can still exist even when a party has complete capacity to decide, so the psychologically-based undue influence test is inapplicable.

In their analyses of economic duress defenses, courts likewise apply factors from other contractual defenses that have little to do with the elements of either the psychological or the economic duress test.[75] For instance, courts will examine the amount of time a party had to sign a contract, as if, with the passage of time, reasonable alternatives to assenting would appear.[76] Relatedly, many courts hold that meeting with counsel vitiates the duress defense.[77]

Again, however, meeting with counsel does not inevitably expand a party's range of options or make it more likely that either a threat was proper or that an assenting party acted with free will. Both factors could be relevant to other defenses to contract enforcement, such as undue influence. Indeed, a waiting period or advice of counsel might cure some cognitive defect or capacity constraint. But these factors do not apply to economic duress.

Perhaps most confusing, some courts have applied a version of the laches doctrine to deny an economic duress claim because they deemed an

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[74] *Id.* at 479–80.

[75] *See, e.g.*, Goydos v. Rutgers State Univ., No. CV1908966, 2021 WL 5041248, at *11 (D.N.J. Oct. 29, 2021) (internal citations omitted) (setting out factors typical of other contractual defenses in determining whether there was a constructive discharge equivalent to duress: "(1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice [h]e was given; (3) whether the employee had a reasonable time in which to choose; (4) whether the employee was permitted to select the effective date of resignation; and (5) whether the employee had the advice of counsel.").

[76] *See* Gouldstone v. Life Invs. Ins. Co., 514 S.E.2d 54, 57 (Ga. Ct. App. 1999) (asserting that a party did not assent under duress because she had over a week to decide and could have consulted counsel); DeLuca v. Bear Stearns & Co., 175 F. Supp. 2d 102, 114, 115 (D. Mass. 2001) (ruling against duress defense because, in part, party had two days to sign and could have consulted counsel). There are, however, sound arguments that reasonable notice of termination can be beneficial to workers. *See* Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1514 (2014) ("Establishing a reasonable notice obligation will grant terminated workers paid transition time to seek new employment and develop new skills."). Laws requiring notice of termination, such as the federal Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101–2109, requiring 60 days' notice of a mass layoff, have been criticized for not providing sufficient notice. *See* Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1867–68 (1993). Some scholars nonetheless assert that such laws could be more beneficial with a longer (six-to-twelve-month) notice requirement and retraining and relocation assistance. *See* Ann M. Eisenberg, *Just Transitions*, 92 S. CAL. L. REV. 273, 328–29 (2019).

[77] *See, e.g.*, Forrester v. Solesbury Twp., No. CV 20-4319, 2021 WL 662290, *5 (E.D. Pa. 2021) (citing Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 893 (3d Cir. 1975)) (applying the rule that "under Pennsylvania law[,] where the contracting party is free to come and go and to consult with counsel, there can be no duress in the absence of threats of actual bodily harm"); Olmsted v. Saint Paul Pub. Schs., 830 F.3d 824, 829 (8th Cir. 2016) (applying Minnesota law to reject duress claim on the basis that plaintiff "had full knowledge of all the facts, advice from an attorney, and ample time for reflection").

employee's continued work to have constituted ratification of the contract.[78] This is illogical because the duress defense concerns the conditions of the contract's formation, not what happens months or years later when a party contests the contract's enforcement. It is particularly concerning for employment contracts, where many types of offending contracts like arbitration or noncompete agreements would be unlikely to provoke immediate legal challenge.[79] Economic duress defenses to enforcement of separation agreements frequently fail for this same reason, putting an employee in a Catch-22. That is, the employee may feel coerced into resigning because the threatened termination would deprive the employee of both future wages and a severance payment, but accepting the severance payment would constitute ratification of the agreement.[80]

III. DOCTRINAL INCONSISTENCY MAY HELP EMPLOYEES

Although courts in the U.S. may find that the current state of economic duress leaves unworkable precedent, employees have occasionally benefitted from the doctrinal chaos and courts' tendency to conflate duress with other defenses.[81] Even in the 1940s, John Dawson noted this disorder, remarking that "many decisions have already shifted a considerable distance beyond the limits defined by conventional statements of doctrine and [] further shifts are to be expected."[82] He continued that "change has been broadly toward acceptance of a general conclusion that . . . restitution is required of any excessive gain that results, in a bargain transaction, from impaired bargaining

[78] *See, e.g.*, Wright v. Foreign Ser. Grievance Bd., 503 F. Supp. 2d 163, 175 (D.D.C. 2007) (enforcing a settlement agreement signed with limited time for consideration and under threat of termination because "plaintiff ratified [the agreement] by continuing his [employment] at full salary and subsequently collecting retirement benefits, [and] he cannot now seek to have the agreement declared void on account of duress."); Curtis v. Cafe Enters. Inc., No. 515CV00032RLVDSC, 2016 WL 6916786, at *7 (W.D. N.C. Nov. 21, 2016) (dismissing a claim of duress on the basis that "[b]y working for two additional weeks and receiving four weeks' pay, Plaintiff performed pursuant to the [agreement] and accepted the benefits of the transaction [thereby ratifying it]"), *aff'd* 715 F. App'x 268 (4th Cir. 2017).

[79] *See, e.g.*, Abreu v. Fairway Mkt. LLC, No. 17-CV-9532 (VEC), 2018 WL 3579107, at *2 (S.D.N.Y. July 24, 2018) (enforcing arbitration agreement because "the Plaintiffs continued his or her employment for years after signing the Arbitration Agreements thereby 'intentionally accepting' the 'benefits' of that contract") (internal citation omitted).

[80] *See, e.g.*, Gupta v. Headstrong, Inc., No. 17-CV-5286(RA), 2019 WL 4256396, at *5 (S.D.N.Y. Sept. 9, 2019) (dismissing a defense of duress because the [severance] agreement had not been challenged for 21 months).

[81] *See, e.g.*, First E. Mortg. Corp. v. Gallagher, No. 943727F, 1994 WL 879546, at *1 (1994) (quoting Century Ins. v. Firnstein, 442 N.E.2d 46, 47 (Mass. App. Ct. 1982)) (denying employer's motion for preliminary injunction that sought to enforce a noncompete agreement because "the agreement was imposed upon the employee under what might be found to be 'practical duress,'" without defining "practical duress"); IKON Off. Sols., Inc. v. Belanger, 59 F. Supp. 2d 125, 132 (D. Mass. 1999) (denying employer's motion for preliminary injunction because the agreement was not negotiated and employees had to enter the agreement on a "take-it-or-leave-it" basis).

[82] Dawson MICHIGAN, *supra* note 1, at 289.

power, whether the impairment consists of economic necessity, mental or physical disability, or a wide disparity in knowledge or experience."[83] Many decades later, Matthew Finkin similarly observed that some U.S. states now require "procedural conscionability" mirroring an economic duress analysis.[84]

Nebraska law appears to be some of the most sympathetic to workers experiencing economic duress and cases applying the state's law reveal how duress's doctrinal haziness can allow for employee-friendly rulings.[85] In *Gilkerson v. Nebraska Colocation Centers, LLC*, for instance, the Eighth Circuit denied an employer's motion for summary judgement on a duress claim where the employer had the employee, under threat of termination, sign a contract rescinding an earlier more beneficial employment contract.[86] In that case, the company president had "pointed out that it 'would be tough' for [the employee] to be unemployed, in part because [the employee] had health problems and couldn't afford to lose his insurance."[87] The president's comment spoke to the second step of an economic duress analysis: the threat's effect on the victim, given the victim's particular economic vulnerability. In support of its ruling for the employee, the *Gilkerson* court also noted the substantive unfairness of the rescission contract, which removed just-cause termination protections, a retirement bonus, opportunities for commissions, and a more favorable job title that were all part of the original contract.[88] The evaluation of the rescission contract's substantive terms, while not part of a pure economic duress analysis, helped the court find the possibility of duress.

Additionally, Louisiana law, while leading to quite varied outcomes in judicial decisions, appears to support economic duress claims more than most

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[83] *Id*.; *accord* Dawson TULANE, *supra* note 1, at 346. ("[D]ecisions have in fact gone much further in this direction [of economic duress] than is generally believed, far enough to reveal latent possibilities that the future may develop.").

[84] *See* Finkin, *supra* note 71, at 11–12, 70 (suggesting that that "economic duress is inherent in the very institution" of waged labor).

[85] *See, e.g.*, Gilkerson v. Neb. Colocation Ctrs., LLC, 859 F.3d 1115, 1119–20 (8th Cir. 2017) (reversing summary judgment for employer on employee's economic duress claim); Battle-ABC, LLC v. Soldier Sports, LLC, 401 F. Supp. 3d 873, 883–84 (2019) (citing Lincoln Benefit Life Co. v. Edwards, 45 F. Supp. 2d 722, 750 (D. Neb. 1999)) (finding that evidence of threats to terminate employment and withhold pay were sufficient to preclude employer's summary judgement motion on duress claim and stating that "the Nebraska Supreme Court has not foreclosed the proposition that threats of termination may support a claim for duress").

[86] *See Gilkerson*, 859 F.3d at 1118–20.

[87] Gilkerson v. Neb. Colocation Ctrs., LLC, No. 8:15-CV-37, 2016 WL 3079705, at *2 (D. Neb. May 31, 2016), *rev'd and remanded sub nom. Gilkerson*, 859 F.3d 1115 (8th Cir. 2017).

[88] *See Gilkerson* 859 F.3d at 1118–19 (citing City of Scottsbluff v. Waste Connections of Neb., Inc., 282 N.W.2d 725, 745 (Neb. 2011)) (observing that, to constitute economic duress, Nebraska law requires "that the agreement [] be unjust, unconscionable, or illegal").

states' laws.[89] This, perhaps, could be because of the unique Louisiana Civil Code and influences from the French Civil Code, the latter of which interprets economic duress or "*violence économique*" more expansively than U.S. law.[90] The Louisiana Civil Code furthers doctrinal ambiguity by mixing the traditional psychological and economic duress tests.[91] For instance, in *Standard Coffee Service Co. v. Babin*, the court determined that forcing salesmen to sign arbitration agreements under threat of termination was duress under the Louisiana Civil Code.[92] The court observed that the employee "was faced with being deprived of his economic security, although a healthy male and able to earn a living [, and] . . . under this set of circumstances, a reasonable person with the subjective characteristics of [the employee] would have felt forced into signing the employment contract."[93]

One recent decision has convincingly demonstrated how courts can rely on doctrinal chaos to find the possibility of economic duress, in this case by considering factors from other contractual defenses. In *Herrnson v. Hoffman*, an employee had notified his employer that he was in a legal dispute with his landlord involving payment of back rent.[94] The employer had remarked that he "view[ed the employer's workplace] as the place to be for the remainder of [the employee's] career" and gave the employee a check for $16,000 with "Loved" written on the memo line.[95] The employee deposited the check in escrow pending resolution of the rent dispute but, two months later, the employer fired the employee.[96] The employer then contacted the escrow agent to freeze the $16,000 and refused to allow the agent to release the funds until the employee signed a release of Age Discrimination in Employment

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[89] *See, e.g.*, Garage Sols., LLC v. Person, 201 So. 3d 962, 966 (La. Ct. App. 2016) (finding duress when employer refused to pay employee earned wages until employee signed training repayment agreement provision (TRAP) requiring employee to repay training costs at time of departure).

[90] *See* Finkin, *supra* note 71, at 5–7, 10; Muriel Fabre-Magnan & Pascal Lokiec, *The Defect of "Duress" in French Employment Law*, 42 COMPAR. LAB. L. & POL'Y J. (forthcoming) (manuscript on file with author). *See generally* Mitchell Franklin, *Some Observations on the Influence of French Law on the Early Civil Codes of Louisiana*, *in* LIVRE-SOUVENIR DES JOUNEES DU DROIT CIVIL FRANCAIS 833 (1936).

[91] *See* LA. CIV. CODE ANN. art. 1959 (2008) ("Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation. Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear.").

[92] 472 So. 2d 124, 127 (La. Ct. App. 1985) ("The law governing the reci[s]sion of contracts because of consent induced by threats (or violence) is found in Articles 1850 and 1851 of the Louisiana Civil Code of 1870."). A subsequent amendment to the Louisiana Civil Code reenacted Articles 1850 to 1852 as Article 1959 and altered some language but "was not intended to change the law." Causey v. State Farm Mut. Auto. Ins. Co., No. CV 16-9660, 2017 WL 7050671, at *4 n.3 (E.D. La. Dec. 12, 2017), *report and recommendation adopted*, No. CV 16-9660, 2018 WL 537453 (E.D. La. Jan. 24, 2018) (citing LA. CIV. CODE ANN. art. 1959 cmt. (b) (1985)).

[93] *Babin*, *supra* note 92, at 127.

[94] No. 19-CV-7110 (JPO), 2021 WL 3774291, at *2 (S.D.N.Y. Aug. 24, 2021).

[95] *Id.*

[96] *Id.*

Act of 1967 (ADEA) claims.[97]

Despite recognizing the high bar that the economic duress standard sets, the *Herrnson* court opined that "the threat of eviction is the kind of pressure that can give rise to duress" and voided the ADEA claim release.[98] The court applied factors from other contractual defenses to find that the employee had not ratified or acquiesced to the agreement, that he had promptly repudiated it by filing an ADEA claim, that he received nothing from the release other than funds that were already given to him, and that the gift was irrevocable.[99]

In cobbling together factors to rule for workers on grounds of economic duress, judges may be influenced by statutes that reflect principles underlying the economic duress defense. For instance, courts that consider the existence of a cooling off period or the assistance of counsel could be drawing from statutes like the Older Workers Benefit Protection Act (OWBPA).[100] The OWBPA requires that employers give older workers: (1) 21 or 45 days to sign a release of ADEA claims, (2) notice that consulting an attorney is recommended, and (3) seven days to retract an employee's assent.[101]

Likewise, civil causes of action under the Trafficking Victims Protection Act contain elements mirroring duress, such as coercion.[102] For example, a Filipina immigrant nurse survived a motion to dismiss her civil claim that she was trafficked by her former employer, based on a requirement that she pay $20,000 if she quit before working an impossibly large number of hours.[103] Much of her claim was based on her inability to pay the amount for reasons unrelated to her employment, including that she had to borrow the $20,000 from her boyfriend.[104] These are the background economic conditions that the economic duress defense is concerned with.

In conclusion, courts continue to overwhelmingly reject economic duress defenses in employment contract cases. The above cases, however, show that sometimes courts have taken advantage of the non-uniformity of the doctrine or patched together factors from other contractual defenses to find the possibility of economic duress.[105]

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[97] *Id*.

[98] *Id.*

[99] *Id*. at *2–3.

[100] 29 U.S.C. §§ 623, 626, 630.

[101] 29 C.F.R. § 1625.22.

[102] 18 U.S.C. §§ 1589, 1590, 1595. *See also* Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1564 (2015) ("Modern day anti-human trafficking laws prohibit the use of nonphysical coercion including threats of financial, reputational, or psychological harm, acknowledging that these are subtle yet equally effective means of forcing labor.").

[103] *See* Carmen v. Health Carousel, LLC, No. 1:20-CV-313, 2023 WL 5104066, at *14-15 (S.D. Ohio Aug. 9, 2023).

[104] *See id.* at *4.

[105] *See* Julie Kostrisky, *Stepping out of the Morass of Duress Cases: A Suggested Policy Guide*, 51 ALB. L. REV. 583, 593 (1989) ("Because the theories of coercion offer little help, courts manipulate the doctrinal elements [of duress], sometimes dispensing with or ignoring one or more of them.").

IV. TOWARD UNIVERSAL ADOPTION OF THE "NO REASONABLE ALTERNATIVE" TEST

If courts continue to lack motivation to engage the economic duress doctrine, the question remains why at least a few jurisdictions have begun moving from a psychological to an economic duress standard. It is possible that judges simply feel compelled to act when presented with particularly egregious facts, like those of the above-described *Herrnson* case.[106] Lacking guidance from precedent or an abundance of statutes, some courts have constructed ad hoc economic duress tests that provide flexibility, even if the tests are doctrinally incoherent. In other words, the uncertainty regarding the duress defense has allowed judges to take an "I know it when I see it"[107] approach that, though typically resulting in a win for the employer, occasionally rewards the employee. In this way, the non-uniformity of the economic duress test is better for employees than if courts consistently applied the old "no free will" standard from the Restatement (First).[108] A first-best approach, however, would be to consistently apply the Restatement's (Second) "no reasonable alternative" test.[109]

A fundamental problem with the "no free will" standard is its inability to consider structural bargaining power disparities between the contracting parties.[110] For this reason, some courts have felt the need to take into account those power disparities when ruling in favor of a duress claim.[111] In the mid-1930s, Congress explicitly attempted to alleviate disparities in bargaining power in the workplace with the passage of a collective workers' rights law, the National Labor Relations Act (NLRA).[112] A decade later, however,

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[106] *See* Herrnson v. Hoffman, No. 19-CV-7110 (JPO), 2021 WL 3774291, at *2 (S.D.N.Y. Aug. 24, 2021).

[107] Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[108] *See* RESTATEMENT (FIRST) OF CONTRACTS § 492(b) (AM. L. INST. 1932).

[109] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. L. INST. 1981).

[110] *See* Note, *supra* note 33, at 894 ("The free will concept, however, has serious shortcomings. Because both normal contracts and those formed under duress result from a choice between alternative evils, it is impossible to distinguish one situation from the other on the basis of any difference in the freedom of the consent."); *id.* at 894 n.17 (quoting Union Pac. R. Co. v. Pub. Serv. Comm'n of Mo., 248 U.S. 67, 70 (1918) (Holmes, J.)) ("It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."); *id.* at 894 n.16 (citing Robert Hale, *Coercion And Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474–77 (1923)).

[111] *See* Dawson MICHIGAN, *supra* note 1, at 289–90 ("The shift in emphasis [from psychological to economic duress] that is now proposed involves the assumption that our courts cannot remain indifferent, in fact are not indifferent, to excessive and unjustified gains that are directly traceable to disparity in bargaining power.").

[112] 29 U.S.C. §§ 151–169. *See* Jonathan F. Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the*

Dawson noted how the courts continued to perpetuate bargaining power disparities through the retention of older standards for duress.[113] Today, the asymmetries in workplace bargaining power remain and are possibly even more extreme than before.[114]

Contract law is not an intuitive tool to remediate these bargaining power asymmetries between employers and employees. If anything, contract law begins from the premise that parties conduct arms-length transactions with mostly equal access to information.[115] Nevertheless, many scholars have recently described how contract law can provide relief for employees who otherwise have few options.[116] I, for example, have proposed unconscionability as an approach to rein in one-sided contracts in the workplace, focusing on Training Repayment Agreement Provisions (TRAPs) that require departing workers to reimburse employers for the cost of their training.[117] Courts' widespread adoption of the more realist economic duress test that considers the existence of any economically viable alternatives to assent would more adequately contemplate bargaining power disparities. This is a necessary step for contract law's ability to resolve disputes in the modern workplace.

Another problem with the "no free will" standard is its subjective nature and the arduous task of determining the duress victim's state of mind.[118] Technically, all contracts are assented to according to one's free will, save those contracts in which one's hand is guided by force to sign.[119] Such a subjective standard is unwieldy and incapable of creating reliable precedent. Indeed, the Restatement (First) itself acknowledged this shortcoming by including a comment that, "[a]s a practical matter it is obvious that there is no line of absolute demarcation between fear that deprives a person of free

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NLRA's Future, 13 N.Y.C. L. REV. 107, 107 (2009). The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219, was also passed in the 1930s, though it was less focused on bargaining power disparities than on setting minimum substantive standards of work. *See id.* at 107–08.

[113] *See* Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1250 (2022) (citing Dawson MICHIGAN, *supra* note 1, at 281–82); Dawson MICHIGAN, *supra* note 1, at 287.

[114] *See* Teresa Ghilarducci, *Worker Power Is Weakening, Indicators Show*, FORBES (Sept. 14, 2022), https://www.forbes.com/sites/teresaghilarducci/2022/09/14/worker-power-is-weakening-indicators-show/?sh=67cc735f5325.

[115] *See* Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1, 24 (2024).

[116] *See, e.g.*, Tsuruda, *supra* note 71, at 207–13 (arguing for the implementation of the duty of good faith in employment contracts); Sarah Dadush, *Prosocial Contracts: Making Relational Contracts More Relational*, 85 L. & CONTEMP. PROBS. 153, 158–59 (2022) (noting that "prosocial" contracts can support workers in international supply chains).

[117] *See* Harris, *supra* note 3, at 750.

[118] *See* Kostrisky, *supra* note 105, at 592 ("it requires courts to ascertain the unknowable: the actual intent of the party alleging duress"); *cf.* Giesel, *supra* note 7, at 481 (describing the "no free will" standard that examines the "quality of mind essential" to contracting, an issue of capacity foreign to the duress doctrine).

[119] *See* Giesel, *supra* note 7, at 472 ("As long as the bargainer chooses between options by means of rational thought, the bargainer exercises free will.")

will and judgment, and lesser degrees of fear."[120] For this reason, much of contract law has moved away from such subjective standards and toward objective ones.[121] The duress standard seems to be lagging as a practical matter. But the unworkability of the "no free will" psychological duress standard shows why it should be completely retired in favor of the Restatement's (Second) "no reasonable alternative" economic duress test.[122]

Proponents of freedom of contract may present a jurisprudential challenge to the Restatement's (Second) more expansive "no reasonable alternative" test based on the test's tendency toward paternalism and the risk of government overreach in matters of private contracting. Two responses to that timeless challenge are in order. First, contract law is not a wholly private law doctrine but instead relies on a public infrastructure—namely the courts—for its legitimacy.[123]

Second, almost three hundred years of English court precedent reveals a history of government intervention in private contracts where one party is subject to "excessive economic pressure" with no reasonable alternative.[124] In the midst of the *Lochner*[125] era, Judge Learned Hand observed that it was too late for proponents of "a strict laisse[z] faire" to argue that the government had no right to interfere in employment contracting.[126] Moreover, even during the *Lochner* era, the U.S. Supreme Court upheld government regulation of employment standards meant to address workers' constrained choice and "place the employer and employee upon equal

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[120] RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. e (AM. L. INST. 1932).

[121] *See* Dalton, *supra* note 22, at 1042. Not all scholars have agreed, however, that a shift toward an objective standard is better for the victim of duress. *See* John Dalzell, *Duress by Economic Pressure II*, 20 N.C. L. REV. 341, 379–81 (1942) ("If we test the adequacy of the remedy [to determine economic duress] by its effectiveness to meet the needs of the particular individual in question, it becomes very personal and subjective; and that is exactly what better decisions do."); Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175, 211 (1997).

[122] *See, e.g.*, John P. Dawson, *Duress Through Civil Litigation*, 45 MICH. L. REV. 571, 572 (1947) ("[I]t is often necessary to look beyond the pressure inherent in the process itself to the conditions which give it special weight and multiply its effect. It is in fact the reluctance of courts thus to extend the range of inquiry that has chiefly restricted the growth of duress doctrines . . . . "); *but see* Kostrisky, *supra* note 105, at 593 (arguing that the Restatement (Second) approach is also ambiguous and offers little predictability).

[123] *See* Aditi Bagchi, *Interpreting Contracts in A Regulatory State*, 54 U.S.F. L. REV. 35, 85 n.96 (2019) (citing Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933) (arguing that the state ultimately decides the enforceability of a contract, and this is why contract law is always public law)); *cf.* Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REG. 211, 215 (2015) (noting that though contracts is commonly considered a private law subject, the laws regulating private exchange also encompass public law).

[124] *See* Dalzell, *Economic Pressure I*, *supra* note 19, at 241 (citing Astley v. Reynolds, 2 STRANGE 915, 93 ENG. REP. 939 (K B. 1732)) (describing the doctrine of "duress of goods" and the inadequacy of remedy).

[125] Lochner v. New York, 198 U.S. 45 (1905) (holding that state statutory restriction on maximum bakery workers' hours violated the U.S. Constitution's Contracts Clause).

[126] *See* Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 502 (1908).

ground."[127] Therefore, the state has and should continue to intervene when a party to the labor contract faces economic duress with no reasonable alternative to assenting because of its weakened bargaining power in the market.[128]

CONCLUSION

Traditionally, "coerced labor is associated with nonpecuniary forms of pressure and free labor with pecuniary forms of pressure."[129] But this dichotomy is illogical because both forms of pressure can present extremely disagreeable alternatives.[130] The duress doctrine as articulated by courts in the U.S. is likewise illogical.

Any transition from a psychological to an economic duress standard in courts at times seems ineffectual, even if the Restatement (Second) of Contracts has nominally announced the shift. Nevertheless, a limited number of courts, in their own ways, are using duress's doctrinal disarray to rule for workers. A main case used by contract law professors to teach economic duress, *Alaska Packers' Association v. Domenico*, [131] is paradoxically one in which the employer successfully claimed the defense against its employees.[132] At a minimum, the defense should be equally available to workers who experience duress much more than employers due to the bargaining power asymmetries inherent in wage labor. It is thus time for U.S. courts to unequivocally and universally embrace the Restatement's (Second) "no reasonable alternative" economic duress standard. Until that happens, however, workers facing tough economic circumstances may be marginally better off with the current doctrinal ambiguity than under the old "no free will" psychological duress standard.

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[127] *See, e.g.*, Harbison v. Knoxville Iron Co., 53 S.W. 955, 956, 960 (Tenn. 1899), *aff'd sub nom.* Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901) (upholding state wage law requiring that miners be timely paid in U.S. currency rather than bushels of coal and commenting that "by holding back [the miners'] wages, such a motive power is brought to bear upon their freedom of choice as to practically amount to coercion"). *See also* MATTHEW W. FINKIN, AMERICAN LABOR AND THE LAW 26 (2019).

[128] *See* Hand, *supra* note 126, at 506 ("[f]or the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is [a] proper legislative function").

[129] ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 309 (2001).

[130] *See id.*

[131] *See* 117 F. 99, 101, 106 (9th Cir. 1902) (ruling for salmon cannery employer that, due to its precarious economic position, had no reasonable alternative but to assent to fishermen employees' demand for a higher salary).

[132] *See* Debora L. Threedy, *A Fish Story: Alaska Packers' Association v. Domenico*, 2000 UTAH L. REV. 185, 187, 197 (2000) ("The traditional reading of *Alaska Packers'* is [] one of the wily fishermen taking calculated and unfair advantage of the vulnerable cannery, conduct coming close to if not actually constituting economic duress.").

THE DEFECT OF "DURESS"[1] IN FRENCH EMPLOYMENT LAW

Muriel Fabre-Magnan and Pascal Lokiec†

Violence permeates our contemporary societies and especially the workplace. Not so much physical violence as another kind of violence, no less brutal even if it is more latent and less direct, and which results from the rut in which the weakest are kept, constrained by circumstances and by their misery. It would be hopeless to think that the law does not contain some resources to remedy it and, in fact, several recent legal provisions make it possible to apprehend it, even if some additions are needed.

Violence is repeatedly condemned in the French Penal Code, mainly in the form of attacks on the physical integrity of the person. It is rather the meaning of civil law that will be considered here, even if certain situations envisaged may also fall under the criminal law. The French Civil Code refers several times to the notion of violence, in the context of marital or family violence, or in the context of property. Violence is also, and above all, defined and theorized by contract law as one of the three defects of consent leading to the possible annulment of the contract, along with mistake (**'***erreur'*) and fraud (**'***dol'*). Like the defect of duress in Common Law, the French defect of **'**violence**'** can be both physical and moral (for example pressure or threats), the essential being that these acts lead to coercion of consent. Unlike the other two French defects of consent (mistake and fraud), the person whose consent is vitiated by violence is not mistaken: he/she knows that it is not in his/her interest to enter into the contract, but he/she has no choice and is forced to do so.

This defect has remained of modest application until today. Throughout the twentieth century and until the 2016 reform of contract law, the major judgments on defects in consent mainly concerned mistake and fraud. Mistake was used and developed a great deal in relation to the sale of works of art (see the famous *Poussin*, *Fragonard* and *Boulle* judgments), but fraud has largely taken over, especially since the latter has included, alongside deception and lies, fraudulent concealment of information (see the no less famous *Vilgrain* and *Baldus* judgments). The defect of violence, on the other

1. In French Law, we speak of 'violence'.

† Professors at the Sorbonne Law School (University of Paris 1 Panthéon-Sorbonne)

hand, has remained more marginal. In order to induce a person to conclude a contract, it is certainly generally easier and more discreet to deceive him/her than to coerce him/her (physically, but also morally), especially if it is sufficient not to disclose relevant information.

Nevertheless, when one looks at the case law on violence prior to the entry into force of the 2016 reform, it becomes clear that several of the hypotheses relate precisely to the work context.

Thus, in a famous decision of July 5, 1965[2], The Court of Cassation approved the Court of Appeal's decision to annul a contract with a company to sell its products as a self-employed worker on the grounds of moral violence, just after it had renounced a more favorable first contract. The judgment had found that, "at the time of his resignation, Maly, who had to leave Paris and move to Grenoble with a sick child, was in urgent need of money, that his employer refused to carry out the obligations resulting from the initial contract, that he found himself in the alternative of either starting a lawsuit which could be long or accepting to receive an immediate reduced sum, by agreeing to continue his activity under draconian clauses, with a considerable reduction in the rate of commission, renunciation of social benefits, etc, one of which was illegal and all of which was unfair".

Similarly, in a judgment of October 30, 1973[3], the Court of Cassation dismissed the appeal against a judgment ruling that the early termination of an employee's employment contract was attributable to the employer and that it was the employer's fault, since it had been found that the employer had put pressure on the employees by threatening to stop paying them if they refused, and that they had therefore agreed to sign a new contract under pressure.

Thanks to its extension by the reform of contract law, the defect of violence could again find a favorite field in labor relations in order, according to the well-chosen expression of Article L. 1237-11 of the Labor Code in relation to contractual termination, to "guarantee the freedom of consent of the parties." Some countries have also developed specific provisions. In Australia, the Fair Work Act provides that if an employer forces his employee to sign a new contract by threatening to dismiss him, demote him or modify his employment contract, the latter may lodge a complaint with the Fair Work Commission for illegal conduct on the part of the former[4] Another provision of this text states that an employer must not exert undue influence or pressure on an employee in order to obtain the latter's decision on a number of points,

2. Cour de cassation [Cass.] [supreme court for judicial matters] soc., July 7, 1965, Bull. civ. IV, No. 545 (Fr.).

3. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Oct. 30, 1973, No. 73-40.233.

4. *Fair Work Act 2009* s 343 (Austl.).

such as agreeing to an individual flexibility clause or breaking the employment contract[5]

In the absence of specific provisions in French employment law, it is precisely to the common regime of contracts that one must turn. As stated in Article L. 1221-1 of the Labor Code, **"**the employment contract is subject to the rules of ordinary law,**"** even if additional guarantees provided for certain types of agreement, such as termination by mutual agreement, may be added to this common rules.

The Court of Cassation does not hesitate to apply the general rules relating to contracts, in particular those relating to consent, whether it be the existence of consent[6] or defects in consent, particularly fraud[7]

Will judges be able to give full scope to the defect of violence in a relationship of subordination and, beyond that, in all relationships of dependence? Because with the reform of contract law of February 10, 2016, the legislator introduced a small revolution in French law by enshrining what is akin to a defect of economic duress. In doing so, the legislator has though simply enshrined the case law of the Court of Cassation, which had already allowed a contract to be annulled on the grounds that one of the contracting parties had abused the economic dependence of its co-contractor.

One may legitimately ask why it is the judges who have made such an evolution in the first place and not the legislator. The main reason is political: even if there is currently a revival of contractual freedom[8], it is nevertheless accepted in France that the protection of weaker parties (consumers or employees) justifies a control and, if necessary, an annulment of the contract. One may add that the judges having to deal with concrete cases, they are faced with the injustice resulting from the fact that one party takes advantage of the weakness of the other. As a consequence, they try to contrive new remedies. We will see that this is precisely in the context of a contract of employment, that the defect of violence has been widened by the Court of Cassation, this broadening of violence coming after the considerable broadening of error and then fraud.

The reform of contract law goes even further by extending the scope to other forms of dependence. However, the law is probably not yet definitively settled on these issues. On the defect of violence in general, and on economic violence in particular, case law still has a major role to play in making effective these provisions, the great potential of which has not been sufficiently explored, particularly in the field of employment law.

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5. *Fair Work Act 2009* s 344 (Austl.).
6. Cour de cassation [Cass.] [supreme court for judicial matters] soc., July 8, 2020, No. 18-22.068.
7. Cour de cassation [Cass.] [supreme court for judicial matters] soc., June 7, 1995, No. 91-44.294.
8. It would thus be necessary to update Patrick Atiyah's famous book on "The Rise and Fall of Freedom of Contract" (P. S. Atiyah, *The Rise and Fall of Freedom of Contract*, OUP, 1979), because we are rather back in a phase of rise again.

I. THE EXTENSION OF THE DEFECT OF VIOLENCE: THE CONSECRATION OF THE ABUSE OF DEPENDENCE

Traditionally, 'there is violence when a party undertakes a commitment under pressure of a constraint which inspires him with the fear of exposing his/her person, his/her fortune or those of his/her relatives to considerable harm' (new Article 1140 of the Civil Code, but which takes up the classic definition).

According to the Civil Code, such violence, consisting of serious and disturbing threats or pressure, had to be committed by a person, whether the contracting party or a third party. It was therefore only violence and coercion that was both created and exercised by someone.

However, it can happen that a person is in a state of duress as a result not of the direct action of another person, but of a combination of circumstances. This situation is even very common since coercion is basically defined as the restriction of a person's possible choices. Indeed, it is known that in the case of induced mistake (what the Civil code names "dol") or fraud, a person's consent is not informed: he or she enters into the contract because he or she has been deceived spontaneously or knowingly by someone else. In the defect of violence, on the other hand, the person has not been deceived but coerced: he or she knows most of the time[9] that it would not be in his/her interest to conclude the contract, but he/she has no choice but to do so anyway.

It is very often the circumstances that deprive a person of the possibility to choose. Because of a lack of money, work or anything else necessary to satisfy his or her needs or those of his or her relatives, he or she has no choice but to accept what is offered to remedy the situation, in particular the contract or the clauses proposed. In these cases, the situation of duress has not been created by the contracting party but only exploited by him.

Certain branches of law already classically envisaged such a hypothesis. The most famous example is that of maritime law, where it has long been considered in French law that a contract of assistance concluded when the assisted person was in a situation of peril and had no other choice but to accept the proposed assistance may be annulled when the rescuer has abused the situation.[10] The Transport Code now states that "a contract or certain of its clauses may be annulled or modified, if the contract has been concluded under improper pressure or under the influence of danger and its clauses are

9. Only if she has been given substances that cloud her consciousness (e.g. drugs), which is a form of physical violence, could she have acted contrary to her interests without being aware of it; however, this would probably be more radically a lack of consent rather than a defect in consent.

10. Req., 27 April 1887, *Lebret c/ Fleischer*.

not fair; or if the payment agreed under the contract is much too high or much too low for the services actually rendered."[11]

The solution has gradually made its way into general contract law. It was enshrined in a decision of the First Civil Chamber of the Court of Cassation of 3 April 2002. An employee of the Larousse-Bordas publishing company had recognized, by an agreement for valuable consideration, that her employer had full ownership of all the exploitation rights to a dictionary for which she had provided additional work as part of her employment contract. Following her dismissal, she sued her employer for nullity of the transfer on the grounds of violence having vitiated her consent, prohibition of further exploitation of the work, and search by an expert for the remuneration of which she had been deprived. The Court of Appeal upheld her claims on the grounds that her status as an employee had placed her in a situation of economic dependence on her employer, forcing her to accept the agreement without being able to refute those terms that she considered contrary to both her personal interests and the provisions protecting copyright. The appeal judges had noted in particular that a refusal by the employee would necessarily have weakened her situation, given the risk of dismissal inherent in the social context of the company at the time, a press clipping from August 1984 revealing the prospect of a reduction in staff within the company, even though her employer had never made any specific threats in this regard. The Court of Cassation censured this decision, but without condemning the theoretical innovation proposed by the Court of Appeal. According to the Supreme Court, "only the abusive exploitation of a situation of economic dependence, made in order to take advantage of the fear of an evil directly threatening the legitimate interests of the person, can vitiate his consent by violence". The principle of economic violence was therefore accepted, but the appeal judges had not characterized the conditions of application in this case, and in particular had not noted that, at the time of the transfer, the employee was herself threatened by the redundancy plan or that the employer had exploited this circumstance to convince her.

The 2016 reform of contract law confirmed this change of direction by adding, in the new article 1143 of the Civil Code, that 'there is also violence when a party, abusing the state of dependence in which his co-contractor finds himself, obtains from him a commitment which he would not have entered into in the absence of such constraint and derives from it a manifestly excessive advantage'. The text even broadens the solution of the Court of cassation since it refers to the abuse of the state of dependence of the co-

11. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] Art. 5132-6 (Fr.); *see also* Art. 7 International Convention on Salvage, 1989.

contractor without further specification. The dependence that can be abused can therefore be economic as well as emotional or psychological.

The doctrine is divided on the exact analysis of this new legal mechanism, in particular on the point of knowing whether it is a defect of consent (thus a subjective defect), or a defect of the contract (thus an objective defect). Some argue that this defect is autonomous from violence and that "the so-called 'economic violence' is a provoked lesion, as fraud is a provoked or induced mistake"[12] In fact, there is clearly a form of violence in taking advantage of the weakness of others, and the center of gravity of economic violence lies in the coercion of consent.

The context of employment relations seems to be favorable to this new form of violence[13], in particular to remedy the 'forcing' of consent by employees who are often unable, because of their subordination, to resist clauses that they know are contrary to their interests[14]

An abuse of dependence could potentially, in all these hypotheses, be retained.

II. DEPENDENCY IN EMPLOYMENT RELATIONSHIPS

Two conditions have to be met for the new defect of violence to be applicable. The first is the existence of a state of dependence.

The 2002 Bordas decision showed that the status of employee was not, in itself and without other circumstances, sufficient to characterize a state of economic dependence, which was in line with the Court of Cassation's rejection in the 1930s of economic dependence as a criterion of the employment contract[15]

12. Th. Revet, *La "violence économique" dans la jurisprudence ["Economic Violence" in Case Law*], in *La violence économique à l'aune du nouveau droit des contrats et du droit économique* [*Economic Violence in The Light of New Contract Law and Economic Law*] 23, (Tome XXI/Perpignan, ed., 2017).

13. G. Loiseau, *La violence économique, du vice à la vertu* [*Economic Violence, From Vice to Virtue*], *CAH. SOC.* 215 (2015); M. Fabre-Magnan, *La réforme du droit des contrats: quelques contre-feux civilistes à la déréglementation du droit du travail* [*The Reform of Contract Law: Some Civilian Counter-Fires to the Deregulation of Labor Law*], 1715 SEMAINE SOCIALE LAMY [LAMY SOCIAL WEEK] 5 (2016).

14. *See* Muriel Fabre-Magnan, *Le forçage du consentement du Salarié* [*Forcing Employee Consent*], 459 DROIT OUVRIER (2012).

15. See the classical approach of Cuche, described in *Du rapport de dépendance élément constitutif du contrat de travail* [*Dependency Relationship, Constituent Element of the Employment Contract*], REVUE CRITIQUE [CRITICAL REVIEW] 412 (1913); V.P. Cuche, *La définition du salarié et le critérium de la dépendance économique* [*The Definition of The Employee and The Criterion of Economic Dependence*], DALLOZ HEBDOMADAIRE [DALLOZ WEEKLY] 101 (1932). On this debate, see Alain Supiot, *Les juridictions du travail, in* TRAITÉ DROIT DU TRAVAIL [LABOR LAW TREATY] 233, 246 (G. H. Camerlynck ed., 1987).

The new Article 1143 of the Civil Code having extended the new form of violence to all types of state of dependence[16], the question nevertheless arises as to whether legal subordination might not now make it possible to characterize the first condition[17]

There is certainly a chronological difficulty. The relationship of subordination is in fact the consequence of the employment contract, whereas the new form of violence necessarily predates the conclusion of the employment contract if it is to have constituted a defect in the employee's consent, in other words to have forced the latter to conclude the contract. This does not, however, prevent the existence of another state of dependence, prior to the conclusion of the contract. Above all, the obstacle is removed when it comes to challenging the validity of subsequent amendments to the contract, new clauses or ancillary contracts concluded in the context of the employment relationship (as in the *Bordas* case), or the termination of the contract.

At the time of the ratification of the reform, the Senate had sought by all means to cut back on the innovations in terms of social justice[18] and obtained on this point, by way of compromise, an addition to article 1143 according to which dependence must be characterized 'with regard to' the contracting partner. The aim was in fact to limit this new form of violence by requiring that the co-contractor who abuses the situation be the one in relation to whom the dependence exists, when one could have thought of also sanctioning the one who takes advantage of a dependence on a third person and even of a general situation of vulnerability of the co-contractor. Some conclude that this should exclude, for example, the nullity of a contract concluded by a subsidiary which has illegitimately taken advantage of the economic dependence of its co-contractor on the parent company or on another subsidiary of the group[19] However, the new wording would not prevent a judge from deciding that the need to conclude the contract proposed by the subsidiary also constitutes dependence on the subsidiary. In any event, there will be no difficulty if the abuse emanates from a manager, an executive and not directly from the head of the undertaking, the co-contractor being the

16. This is confirmed by the Report to the President of the Republic that accompanies the 2016 reform, which states that the new text is broad, "and is not limited to economic dependence . . . . In fact, all hypotheses of dependence are covered, which allows for the protection of vulnerable persons and not only companies in their relations with each other."

17. On the different forms of dependance and subordination, GILLES AUZERO, DIRK BAUGARD AND EMMANUEL DOCKÈS, DROIT DU TRAVAIL, 200 (Précis Dalloz, 35th ed., 2022); PASCAL LOKIEC, DROIT DU TRAVAIL 110, 118 (PUF, coll. Thémis, 3rd ed., 2022).

18. *See* Muriel Fabre-Magnan, *Droit des obligations [Obligation rights]: Contrat et engagement unilateral [Contract and unilateral commitment]*, (6th ed. 2021), §61 and §589.

19. Hugo Barbier, *La violence par abus de dépendance* [*Violence by abuse of dependency*], 15 JCP ED. G 421.

employer, i.e. generally the legal person. The new article 1142 of the Civil code provides that 'violence is a cause of nullity whether it was exercised by a party or by a third party', and there is no reason why this text should not also apply to economic violence. It therefore allows the retention of coercion exercised by a person to induce the conclusion of a contract with a third party[20]

More generally, moreover, when the employee is forced by an external circumstance (he has serious financial difficulties, for example), it could be said without excess that the employee who absolutely needs this contract depends on his potential employer to get him out of trouble. Dependence "on him" would thus be characterized. This shows that, despite the many attempts to restrain judges as much as possible, the future of the new contract law is not written, as judges can still steer it in one direction or another[21]

This first condition could also be characterized in the case of economically dependent workers, in particular those on digital platforms, who are all the more in need of the resources of ordinary contract law as they do not currently enjoy any protective status worthy of the name. In these cases, the constraint arising from the state of dependence could easily be characterized, as soon as it is proven that the person, whether employed or self-employed, needs the contract to ensure her subsistence. The notion of need becomes crucial here. According to the judges, economic violence can be ruled out when it is found that the employee, "having other employers, the fear of being dismissed is not such as to place him/her in a state of economic dependence on his/her [first] employer"[22] On the other hand, in the case of a single or main employer, the fear of being dismissed would undoubtedly be a constraint, as was stated in the *Bordas* case.

The new form of violence could also be of great use in labor relations, as trade unions or other groups often find themselves in a position of dependence when concluding collective agreements. So far, physical violence (e.g. sequestering[23]) has rarely led to the annulment of an agreement, but the new form of violence opens up new possibilities in this respect,

20. FRANCOIS CHÉNEDÉ, LE NOUVEAU DROIT DES OBLIGATIONS ET DES CONTRATS [THE NEW LAW OF OBLIGATIONS AND CONTRACTS] 65 (Dalloz, 2nd ed., 2018).

21. Paul Gaiardo, LES THÉORIES OBJECTIVE ET SUBJECTIVE DU CONTRAT: ÉTUDE CRITIQUE ET COMPARATIVE (DROITS FRANÇAIS ET AMÉRICAIN) [OBJECTIVE AND SUBJECTIVE CONTRACT THEORIES: CRITICAL AND COMPARATIVE STUDY (FRENCH AND AMERICAN LAW)], (LGDJ ed., 2020) (showing the oscillation between the French tradition (respect of the given word) and the orientation of American contract law (importance of the economic exchange operated by the contract)).

22. Cour d'appeal [CA] [regional court of appeal] Montpellier, 4th ch., Sept. 16, 2015, RG 13/08549.

23. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Mar. 14, 1973, Cah. Prud'h. 1973. 104; Paris, March 4, 1975, Cah. Prud'h. 1975, 187; Douai, June 16, 1982; JCP 1983 II 20035, note R. Jambu-Merlin.

particularly in the case of collective performance agreements[24], which are often unbalanced and concluded in a situation of threat to employment. The admission of violence is all the more conceivable in the case of draft agreements validated by the employees in very small companies, for which the impact of the economic dependence of the employees is not tempered by the fact that the agreement is negotiated and concluded by staff representatives with a protective status that limits, at least in part, the possibility of pressure from the employer. However, economic violence may be considered even in the presence of such representatives, as long as the new form of defect does not require threats and pressure, but an objective situation of economic constraint. Diffuse threats about job cuts or relocations would easily constitute the necessary coercion "against" the employers, and violence would be constituted if the latter abuse of their position to obtain disproportionate benefits, in particular to convince the employees' representatives to conclude collective agreements drastically reducing the latter's benefits.

It is then, more precisely, the abuse of the state of dependence that must be examined, namely the second condition of the new form of violence.

III. ABUSE OF THE STATE OF DEPENDENCE

The new form of violence requires that the strong party has exploited, to his advantage, the state of need of his co-contractor, in other words that he has abused it. According to the Civil Code, violence presupposes that the party, 'abusing the state of dependence in which his co-contractor finds himself, obtains from him an undertaking which he would not have entered into in the absence of such constraint and derives a manifestly excessive advantage from it'.

The lawyers are divided on the consistency of this second element. The new defect expressly presupposes, and this is not discussed, the characterization of an objective element, since it requires a concrete examination of the content of the contract: the manifestly excessive advantage which the abuser derives from it. On the other hand, the question arises as to the conduct required of the abuser, which in reality amounts to a question of both the nature of the coercion and the awareness of the abuse.

24. A collective performance agreement ("Accord de performance collective" or APC) is a specific type of collective agreement, which makes it possible to modify, in favor or against employees, the employee's remuneration or working hours, or to organize the employee's geographical or functional mobility. This collective agreement must be justified by the safeguarding or creation of jobs, or by the needs of the company's operations. An employee who refuses the change provided for in the collective performance agreement may be dismissed without the possibility of contesting the cause of his dismissal. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 2254-2 (Fr.).

It is therefore in reality three elements that must be analyzed.

1) The manifestly excessive advantage

For the new form of violence to be characterized, the new article 1143 expressly requires that the abuser obtains a commitment which the weaker party would not have entered into in the absence of such coercion, and derives a manifestly excessive benefit from it.

The first part of the sentence is a simple restatement of the condition common to all defects of consent, namely that the defect is decisive. As expressed in Article 1130 of the Civil Code, in order to render a contract (or more generally a juridical act) null and void, the defect must be 'of such a nature that, without it, one of the parties would not have contracted or would have contracted on substantially different terms'.

Specific to the new form of violence, however, is the fact that one of the parties has obtained 'a manifestly excessive advantage' by coercing the other's consent. While the court does not in principle review the balance of benefits, the situation is different when the will of one of the parties has been coerced.

It is obvious that excessive advantage is much broader than the significant imbalance in the new Article 1171 of the Civil Code, which allows, in a contract of adhesion, to deem unwritten "any non-negotiable clause, determined in advance by one of the parties, which creates a significant imbalance between the rights and obligations of the parties to the contract".

Based on the model of unfair terms in consumer law, the text provides that "the assessment of the significant imbalance does not relate to the main subject matter of the contract or to the adequacy of the price to the good or service". The aim here is not to check the balance of the goods or services exchanged by the contract (for example, the thing and the price, or the work and the salary), but only the ancillary clauses that may upset the overall balance of the services (typically, a clause limiting liability).

Economic violence, on the other hand, allows the judge to broaden his control and check that the salary is not manifestly insufficient in relation to the work promised. In other words, the manifestly excessive advantage may relate to all elements of the contract, including the main subject matter of the contract and the adequacy of the price for the service. In collective agreements, for example, judges may consider whether the overall sacrifices required of employees are not excessive in relation to the benefits they are expected to receive.

2) The constraint

The core of the defect of violence, old or new formula, is the constraint exercised on consent: the employee has no choice but to accept what is proposed to him (a contract, an amendment, a reduction in remuneration, various clauses, a termination, etc.).

Even before the admission of the extended form of violence, all forms of blackmail or threats could characterize such a constraint. The case law shows numerous hypotheses in which judges have admitted that such behavior could characterize moral violence. It can be a threat of dismissal for serious misconduct[25], harassment[26] (it is now considered that harassment is not sufficient to invalidate the termination agreement, which generally leads the victim of such conduct to argue that it is violence), repeated sanctions to destabilize the employee[27], devaluation or degradation of his or her working conditions, or a signature extorted under particular circumstances, for example at ten o'clock in the evening, after a particularly tiring work day and in a context of strong psychological fragility[28], or in intimidating and precipitating conditions[29]

Among all these pressures, blackmail is a major one. While the mere threat of dismissal is not always sufficient to characterize violence, for example in the case of acceptance of a geographical mobility clause[30], particular circumstances may characterize the fear of "considerable harm". For example, the violence suffered by an employee, a foreign national, who was faced with a dilemma - either to lose her job in the company or to keep it, but under less favorable conditions - was accepted, as this situation could inspire her with the fear of being unemployed and thus exposing her resources to a considerable loss in the event of refusal of the new contract[31] Violence was also admitted in the case of the "fear of losing her job" having determined an employee to agree to a variation of her employment contract under the threat of a new assignment, with a change of place of work when she did not have a means of transport, a circumstance known to the

25. Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 14, 2002, No. 00-42.884.

26. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Jan. 30, 2013, No. 11-22.332.

27. Cour de cassation [Cass.] [supreme court for judicial matters] soc., July 8, 2020, No. 19-15.441.

28. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Dec. 20, 2017, No. 16-19.609.

29. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Nov. 13, 1986, No. 84-41.013.

30. Paris, May 17, 1985, JurisData 1985-024224.

31. Cour d'appeal [CA] [regional court of appeal] Paris, Pôle 6, Oct. 25, 2017, RG No. 14/09927.

employer[32] Blackmail of the reputation can also be retained, when the employer has threatened the employee that if she did not conclude an amicable termination, the continuation of her professional career would be tarnished because of her errors and failings[33]

According to the classic rule recalled today by article 1141 of the Civil Code, only "the threat of legal action … does not constitute violence", except "when the legal action is diverted from its purpose or when it is invoked or exercised to obtain a manifestly excessive advantage". The mere threat of legal action against an employee who has finally resigned is therefore not sufficient, in the absence of abuse by the employer[34]

The lawyers are divided as to whether, in order to characterize the new form of violence, it is always necessary to demonstrate, in addition to the two elements mentioned above (the state of dependence and the manifestly excessive advantage taken by one of the parties), a third element, which would be the active and reprehensible behavior of the perpetrator, which seems to be suggested by the term abuse[35]

In our opinion, the answer must be nuanced.

This new form of violence implies an exploitation of the dependence of others and especially of the constraint exerted on them by events. The term therefore clearly and necessarily means that it is not necessary for the abuser to have created the situation of constraint himself, otherwise we would be in the case of classic violence. There is therefore no need for the perpetrator to have made any particular scheming, and the new extended defect must therefore be retained even if the employer does not directly engage in blackmail or threats, all of which are required in the current case law. It is obvious that the new defect of violence would not be expanded in any way if it were still necessary to establish these active elements on the part of the employer, to which it would now be necessary to add the condition of a manifestly excessive advantage. It is therefore sufficient that the abuser, in this case the employer in the broad sense (i.e. in the sense of including the person who hires the services of a self-employed person), has exploited the

32. Cour d'appeal [CA] [regional court of appeal] Metz, May 11, 2011, RG No. 09/01798. *See also* Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 19, 2009, No. 07-41.084.

33. Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 23, 2013, No. 12-13.865.

34. Cour de cassation [Cass.] [supreme court for judicial matters] soc., April 25, 1984, No. 82-40.801; Cour de cassation [Cass.] [supreme court for judicial matters] soc., Nov. 22, 1979, No. 78-41.413.

35. See, for example, against such an additional requirement: FRANCOIS CHÉNEDÉ, LE NOUVEAU DROIT DES OBLIGATIONS ET DES CONTRATS [THE NEW LAW OF OBLIGATIONS AND CONTRACTS] §123.177, 66, (Dalloz, 2nd ed., 2018). *See also* Marc Mignot, *Commentaire article par article de l'ordonnance du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* [*Commentary article by article of the order of February 10, 2016 reforming contract law, the general system and proof of obligations*], 116b4 LES PETITES AFFICHES [SMALL POSTERS] 5, 7 (2016); Hugo Barbier, *La violence par abus de dépendance* [*Violence by Abuse of Dependency*], JCP 2016, 421.

state of constraint of another person. Thus, for example, one who hires a legally independent but economically highly dependent worker by making him accept miserable conditions would clearly fulfil the new requirements. Similarly, latent threats to employment or objective risks of dismissal would now be sufficient to characterize such a constraint resulting from the circumstances.

Conversely, if there are threats, blackmail or harassment, i.e. positive and active behavior on the part of the employer, the employee (or more generally the worker) will always be able to invoke "classic" violence, i.e. simple moral violence, which does not require the demonstration of additional conditions, and in particular of a manifestly excessive advantage. As we have seen, this is what judges had already frequently held in judgments prior to the reform. The new defect of violence thus makes it possible to annul acts even though the author of the abuse has done nothing more than exploit a state of affairs existing independently of him. The state of economic distress or urgent need[36] of a contractor creates a dependence "on" the person who proposes a contract which will enable him to get out of it, and economic violence may be characterized as soon as the terms are abusive.

3) Awareness of abuse

On the other hand, the notion of abuse, in other words the exploitation of the dependence of others, undoubtedly presupposes that the perpetrator is aware of what is going on.

The issue is not so much a question of substance as a difficulty of proof. In general, the obstacle of proof constitutes a classic and particularly acute difficulty in employment law, which is due both to the relationship of subordination and to the fact that the employer, as the owner of the means of production, is generally the sole holder of the evidence. However, according to the general rules of the law of evidence, it is up to the person claiming violence to prove that its legal requirements are met, in particular the constraints or threats suffered[37]

French law always equates illegitimate ignorance with knowledge, and it will therefore be sufficient to show, as the Common Frame of Reference says precisely in relation to the unfair exploitation of another's weakness, that "the other party knew or could reasonably have known".

36. This is the formula of unfair exploitation provided for by the European Common Frame of Reference, which is inspired by the notion of "economic duress" in English law.

37. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 4, 1992, No. 88-44.543.

Proof of knowledge of the exploitation of the other party's weakness can often be easily deduced from the totality of the circumstances of the case. Where there is a state of dependence, and the contract concluded is manifestly unbalanced, it can easily be assumed that the abuser was aware of the situation.

The Court of Cassation does not hesitate to establish presumptions of knowledge in this area, particularly in the case of parties in an unequal situation[38] as employment relationships most often are. English law already uses this technique, where, in the presence of certain types of relationships (parent/child, patient/doctor, lawyer/client, but also certain relationships of trust between employers and employees), the defect of undue influence is presumed[39]

IV. EXPANDING THE RANGE OF SANCTIONS

One difficulty concerns the applicable sanction. The traditional sanction for defects in consent is the nullity of the contract (with damages if the harm caused is not sufficiently compensated by the retroactive disappearance of the contract), a sanction which is hardly desirable for the employee who wishes to keep his job.

The French reform of contract law also upgrades the sanction of "caducité" (a non-retroactive nullity), which is now placed on the same level of importance as nullity. The point is to affirm that control of the conditions of validity of the contract continues when the contract begins to be performed. This sanction could be revived, particularly in employment relationships[40], although it has the same disadvantage for the employee as nullity, namely the disappearance of the employment contract.

However, these sanctions become very effective again when the employee challenges a modification of his or her employment contract (which, as we know, requires the agreement of both parties, unlike a simple change in working conditions), the addition of certain clauses (a mobility clause, a non-competition clause, a clause requiring the employee to have a personal vehicle, a clause transferring the rights of an employee to his or her employer, concluded in fear of a reduction in the workforce), or even a breach of contract (a resignation, a contractual termination, or a transaction). Nullity would also be appropriate when it is a question of destroying collective labor agreements unfavorable to employees, which is now a frequent hypothesis.

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38. See the presumption of knowledge of defects on the part of the professional seller, which is classic in French law.

39. *Royal Bank of Scotland plc v Etridge* (No 2) [2001] *UKHL* 41.

40. Helene Cavat, *La caducité en droit du travail* [*Lapse in Labor Law*], 3 REVUE DE DROIT DU TRAVAIL [LABOR LAW REVIEW] 164 (2021).

These sanctions would be particularly appropriate for eliminating certain abusive acts and reviving old agreements, if necessary. The cancellation of clauses or endorsements leading to a reduction in remuneration would thus make it possible to obtain back pay. The cancellation of the contractual termination (including in the controversial but nonetheless accepted case of the termination agreement concluded during a period of suspension of the contract, since the Court of Cassation expressly refers to fraud or lack of consent as an exception[41]) could also benefit the employee, even if its effects are derogatory, since it does not entail the right to reinstatement but produces the effects of a dismissal without just cause. The annulment of the collective agreement, whose retroactive effect can be set aside or modulated by the judge since 2017[42] (which is now the regime of "caducité"), could still allow employees to receive compensation for past sacrifices made without consideration.

In any event, civil lawyers have on several occasions considered the possibility of introducing other types of sanctions which would not involve the annulment of the contract. Thus, article 900 of the Civil Code traditionally provides that in any *inter vivos* or testamentary arrangement, conditions which are impossible or contrary to law or morality shall be deemed not to be written. For the same reasons as in an employment contract, the donee would not hesitate to denounce them if the gift itself were to be annulled as a result. The sanction of partial nullity, reduced to a clause of the contract or even to a portion of a clause, is thus often a timely and effective sanction. In fact, the contract is rebalanced, as is made possible, for example, by the mechanism of unfair terms.

Other, more innovative, sanctions may be relevant in employment relationships. One such sanction is the variation of the contract[43], which maintains a clause rather than annihilating it, while reducing its excesses. Successfully applied to non-competition clauses that are excessive in time or space, this sanction is not unknown in employment law. Judges will uphold the clause in principle but reduce the excessive part of it, for example by limiting the geographical area of its validity, or by giving it a shorter duration than that provided by the parties. The same reasoning could be applied to the mobility clause or to the variable remuneration clause.

41. Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 28, 2014, No. 12-28.082; Bernadette Lardy-Pélissier, REVUE DE DROIT DU TRAVAIL [LABOR LAW REVIEW] 622 (2014); G. Loiseau, JCP S 1302 (2014).

42. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 2262-15 (Fr.).

43. *See* K. de la Asuncion Planès, *La réfaction du contrat* [The revision of the contract], LGDJ, (2006); Ch. Albiges, *Le développement discret de la réfaction en droit des contrats* [The discrete development of the reduction in contract law], in *Mélanges Michel Cabrillac* [Mixtures Michel Cabrillac] 3(Dalloz-Litec, 1999).

Despite the fierce opposition of the supporters of a liberal vision of the contract, which makes it within the exclusive power of the parties and where any intrusion by the judge is viewed with dread, the reform has in fact admitted, in one of its most innovative provisions, a power of judicial revision of the contract. Thus, the new article 1195 of the Civil Code, devoted to the unforeseeability of contracts, provides, as a last resort in the absence of a possible agreement between the parties within a reasonable time, for the power of the judge to revise the contract at the request of only one of the parties.

This sanction could obviously be particularly appropriate in employment relationships, especially as it has already been envisaged for economic violence or, more generally, for abuse of dependence. Thus, the Principles of European Contract Law of the Lando[44] and also the Common Frame of Reference[45] provide that the main sanction for abuse of dependence is the re-establishment by the court of the contractual balance. A former French draft had also provided that "where a contracting party, by exploiting the other party's state of necessity or dependence or his situation of marked vulnerability, derives a manifestly excessive advantage from the contract, the victim may ask the court to restore the contractual balance. If this restoration proves impossible, the judge shall declare the contract null and void".

Still other methods allow judges to impose on the parties a certain content to their contract. They can thus "force" the contract to introduce obligations not expressed by the parties but which are "consequences given to them by equity, usages or the law"[46] They may also, as the Court of Cassation did in an important decision of July 10, 2002 concerning non-competition clauses, consider that the employee may only agree to limit one of his freedoms (in this case, the free exercise of a professional activity) on the condition that a counterparty is provided in his favor[47]

These various methods of intervention by the judge to rebalance the content of the contract could be used in cases of violence that have forced the contracting party to accept excessively unfavorable conditions.

The economic context puts vulnerable people in such a position of need and dependence that some employers take advantage of it to offer them disproportionate contracts or clauses. The expansion of the defect of violence by the 2016 Contract Law Reform Order could then breathe new life into the application of defects in consent in the field of employment relations,

44. Art. 4:109: Excessive Benefit or Unfair Advantage.
45. II. — 7: 207: Unfair exploitation.
46. CODE CIVIL [C. CIV.] [CIVIL CODE], art. 1194 (Fr.).
47. Cour de cassation [Cass.] [supreme court for judicial matters] soc., July 10, 2002, No. 00-45.135.

protecting not only the integrity of consent but also and above all the freedom to consent. This evolution is reinforced by the ratification in progress of the ILO Convention n°190 on violence and harassment of 2019, which provides that the expression "violence and harassment" in the field of work also means a set of unacceptable behaviors and practices that are intended to cause, cause or are likely to cause economic harm to workers.

Indeed, labor relations today are marked not so much by mistake and fraud as by violence, the violence of forcing a person to consent to arrangements contrary to his or her interests because he or she has no choice.

Freedom is fundamentally defined by the ability to choose[48] In this sense, there is no more violent formula than "There is no alternative".

48. *See* Simone Weil, *L'Enracinement. Prélude à une déclaration des devoirs envers l'être humain* [*Rooting. Prelude to a declaration of duties towards human beings*] *in* ŒUVRES [WORKS] 1033 (1999) ("La liberté, au sens concret du mot, consiste dans une possibilité de choix" qui soit "une possibilité réelle") ["Freedom, in the concrete sense of the word, consists in a possibility of choice" which is "a real possibility"]; *see also* Muriel Fabre-Magnan, *L'institution de la liberté* [*The Institution of Liberty*], PUF (2018).

ECONOMIC DURESS IN LABOR RELATIONS: FREE WILL DOCTRINE IN JAPANESE LABOR LAW

Ryoko Sakuraba*

I. INTRODUCTION

Labor relationships are based on labor contracts: contracts continuous in character with changing terms and conditions and other developments that are inevitably required over the long-term life of the contracts. Termination of contracts, the ultimate expression of developments in continuous contracts, may also be expected. The changes and developments of contracts should be based on agreements between the parties. [1]

When considering the validity of agreements between employers and employees or acts on the employee side, we should consider the requirements that should be met, especially in regard to labor contracts, since disparities in the negotiation power between an employer and employees come to the fore. Questions as to the validity of agreements or unilateral acts of the employees regarding the termination of labor contracts must be considered. Did the employees agree with or accept the termination of labor contracts of their own free will, or were they coerced by the employer? The word "termination" in labor contracts can be replaced by other terms, such as "demotion," "waiver of wage claims," "changes of contract terms for the future," etc. In these cases, too, the question of whether the employees were coerced or not can become an issue. Furthermore, if a case involves a waiver of statutory labor rights, another issue arises: is the employee's acceptance considered invalid as contravening compulsory labor laws, or are they respected as a manifestation of the autonomy of the contracting parties? The former position seems natural from the perspective of traditional labor law theory as labor laws rectify inequality in the negotiation power between the contracting parties and thus should be mandatory in character. On the other hand, this theory is not suitable to address all labor relation situations.

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*Professor, Hitotsubashi University

[1] Otherwise unilateral acts by the employers are needed and such unilateral acts are subject to substantive and/or procedural regulations, which may invalidate such acts or cause the employer liability for damages if changes are not in accordance with the regulations. Typically, in a case where an employer wishes to terminate a labor contract with an employee but the employee has not accepted the employer's offer for termination, the employer needs to dismiss the employee but in accordance with regulations on dismissals. From an employer's viewpoint, the success of the termination agreement is key in the sense that, with the acceptance of the employee, termination is not based on dismissal and thus the employer can terminate employment without being subject to dismissal regulations.

Legally speaking, in cases as described above, whether the agreements or declarations of the employees should be invalidated on the basis of civil law provisions is a primary issue. If they are valid from a civil law perspective, one must also ask whether any other standards of validity should be applied to labor contracts. If the agreements involve waiving statutory labor rights, we must consider whether special consideration may be needed in deciding the validity of such agreements.

The theme of this article, "economic duress," is an issue arising from cases where it is doubtful whether an employee's agreement or unilateral declaration is actually based on their free will or whether some prior economic consideration given by the employer has had an effect. In these cases, the validity of the agreements or declarations should be examined from the perspectives mentioned above, i.e., whether their manifestation of intention is null and void or can be revoked based on contract and/or labor law, as well as whether the agreements or declarations are contrary to labor law norms. The expression "economic consideration" can encompass many forms, but here, it is used to signify pressure, possibly physical but often psychological, which is exerted by an employer presenting possible financially disadvantageous treatments, such as payment of reduced wages, prospects of termination of employment, etc., in cases where employees do not agree.

In the following, aspects of "economic duress" will be described associated with the legal issues mentioned above. Part II addresses civil law provisions. Part III addresses standards of labor law and ways of addressing the waiver of statutory labor rights. Finally, Part IV answers why such legal developments have been based on case law rather than statutory law.

II. CIVIL LAW

A. Legal provisions and requirements

As mentioned above, the concept of agreements or declarations by employees is key in discussing issues of economic duress. In Japanese law, agreements are made when one party offers and the other party accepts, and the agreement's validity depends on the validity of the "manifestation of intention" to both offer and accept. Similarly, the validity of the declaration on the employee's side is discussed as the validity of the manifestation of intention. An agreement is a type of juridical act, meaning an act that causes changes to a person's rights and duties. For example, an employee's declaration of termination of employment, although a unilateral act, is a type of juridical act that changes a person's rights and duties.

Under the Civil Code,[2] such juridical acts can be invalidated either through rescission or declaration of nullity of manifestation of intention. If a manifestation of intention to accept the employer's offer is invalidated, the agreement would also be invalidated. As grounds for such invalidation of juridical acts, four provisions of the Civil Code apply.

The first is "concealment of true intention." According to Article 93 Paragraph 1, the validity of a manifestation of intention is not considered impaired in cases where the person making it knows it does not reflect that person's true intention. Second, "fictitious manifestations of intention," as found in Article 94, Paragraph 1, are void. Fictitious manifestations of intention differ from concealment of true intention as a fictitious manifestation of intention is made when the person making it colludes with another person. In cases involving an aspect of economic duress as depicted, the person making the manifestation of intention has no intention of making an untrue manifestation. So, these two provisions of the Civil Code are somewhat outside the scope of our theme.

Two other provisions in the Civil Code concerning the manifestation of intention are more relevant. One, the third provision, is "mistakes." According to Article 95, manifestation of intention is voidable if (i) it is based on either (a) or (b) of the following mistakes and (ii) the mistake is "material" in light of the "purpose" of that juridical act and the "common sense in the transaction." The two types of mistakes are: (a) a mistake wherein the person lacks the intention that corresponds to the manifestation of intention, or (b) a mistake wherein the person making the manifestation of intention holds an understanding that does not correspond to the truth with regard to the circumstances which the person has taken as the basis for the juridical act (the juridical act, in this context, is agreements between employers and employees or employees' unilateral acts, as described above).

In cases of economic duress, the first type of mistake is not of concern as employees are supposed to have the intention corresponding to their manifestation. Thus, we should focus on the second type of mistake. In this case, one of the requirements for invalidation is (iii) the causal link between the mistake and the output as agreement (or employee's offer) as indicated by the employee, since Article 95, Paragraph 2 states that a manifestation of intention under the provisions of item (b) of the preceding paragraph may be rescinded only if it has been indicated that the circumstances in question are being taken as the basis for the juridical act. Further, there should be no gross negligence on the employee side, according to Paragraph 3. In short, the voidable "mistakes" of an employee are considered to happen where the

[2] Minpo [Civil Code], Act No. 89 of 1896, amended by Act No. 44 of 2017 (Japan).

following requirements are met: (i) the employee accepts the employer's offer or declares on the employee's side on the basis of a misunderstanding of the truth; (ii) that the misunderstanding is considered to be material in light of the purpose of the agreements or declaration and common sense; (iii) that the employee indicates the misunderstanding as a cause of the acceptance or offer and; (iv) that there is no gross negligence on the employee's part.

"Fraud or duress" is another main concern of our theme.[3] According to Article 96, Paragraph 1, a manifestation of intention based on fraud or duress is voidable. Manifestation of intention based on fraud is considered to happen where: (i) one party deceives the other party through some concealment or fabrication of truth; (ii) that deception is unlawful; (iii) that deception causes the other party's mistakes; (iv) as a result of mistakes, the other party makes that manifestation of intention and; (v) the party intentionally causes the other party's mistakes and manifestations of intention, according to an established understanding (the requirements are not stipulated in the Article).

Manifestation of intention based on duress is similarly, according to an established understanding, considered to happen where: (i) one party induces fear in the other party by illegally suggesting possible harms; (ii) that duress is unlawful; (iii) that duress causes the other party's dread; (iv) as a result of dread, the other party makes that manifestation of intention; and (v) the party intentionally makes the other party dread and manifestations of intention (the requirements are also not stipulated in the Article).

Typical cases where "mistakes" provided in Article 95 happen in labor relations are the rescission of the employee's manifestation of intention to resign after the employee misunderstood that they would lawfully suffer disciplinary or ordinary dismissal otherwise. Looking at cases where such allegations were accepted in the courts, the employers had no justifiable grounds for disciplinary dismissals, and, thus, the suggestions of dismissal were considered untrue.[4] By contrast, in a case where the employee was convinced that disciplinary action would be taken against the employee and there was a justifiable ground for such action,[5] the employee's manifestation of intention to resign was not invalidated as "duress."[6]

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[3] Regarding requirements for fraud and duress, see RONTEN TAIKEI HANREI MINPO(1) [ISSUES AND CASES IN CIVIL LAW(1)] 265–66, 271 (Yoshihisa Nomi & Shintaro Kato eds., 3rd ed., 2019).

[4] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Mar. 30, 2011, 2009 (Wa) 44305, 1028 RODO HANREI [ROHAN] 5 (Japan) (Fuji Zerox Case).

[5] Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Apr. 9, 2002, 2000 (Wa) 16174, 829 ROHAN 56 (Japan) (Sony Case).

[6] *Id.* at 64.

B. Limitations

Having described the three frames providing for the invalidation of an employee's manifestation of intention as outlined above, *i.e.*, mistakes, fraud, and duress, these frames still may not be useful to restore employees who suffer from economic duress.

First, the mistakes and frauds that can invalidate an employee's manifestation of intention are limited to cases involving "misunderstanding" on the part of the employee. In cases of economic duress in labor relations, as defined in this paper, possible disadvantageous treatment is not always untrue. For example, if employees turn down an employer's offer to change the terms and conditions of employment, employers may not successfully execute a merger and there is a certain possibility of failure, would it be possible to say the employer's statement was untrue? In this situation, even if the employer suggests this while persuading the employee to agree to changes in the terms of employment and the employee's agreement did not originate from the wishes of the employee, there is no "mistake" in the process of the employee's decision to agree to the change of terms. In such a case, the claim of "fraud" would not be accepted as the requirement of "deception through fabrication of truth" is lacking and the requirement of "mistakes caused by that deception" is also not met.

The lack of requirements for mistakes or fraud is the same in cases involving the termination of employment. Suppose an employer suggests dismissal to an employee if they turn down the employer's offer to terminate the employment contract. If the employer can lawfully dismiss the employee or dismissal would not absolutely be unlawful, the possibility of dismissal is valid or at least, not untrue. Thus, neither mistakes nor fraud are grounds for invalidation of an employee's manifestation of intention.

Further difficulty in meeting the requirements for mistakes or fraud is seen in the two cases set above. If the employer just said there is a "possibility of" merger or dismissal and it is true, there is no "misunderstanding of the truth" as a requirement for "mistakes." In such a situation, it is an undeniable reality that, without adequate ability to access correct information on how certain the failure of a merger would be or how certain the legality of dismissal of the employee would be, there is no basis of information for the employee to make their decision. Therefore, this is deception through omission or failure to act in a sense. Nevertheless, is this always true? Can we always say that such a deficit in explanation of the information on the employer's side constitutes "deception of the other party through some concealment of truth" as a requirement of "fraud?" Can we say every employer knows how certain the failure of the merger would be or how certain the legality of the dismissal of the employee would be? According to

established interpretations of the Civil Code, silence cannot be construed as an unlawful deception unless explanation is required by statutory provisions or the principle of good faith (Article 1 Paragraph 2 of the Code).[7] There is no doubt that the principle of good faith applies to employers,[8] but it is not clear what specific norms can be derived from the principle of good faith in this context. What and how much information should be given by an employer in such a situation can never be known for certain.

Moreover, in such situations, we cannot be sure whether the requirements for "duress" are met. Can possible dismissal or possible failure of mergers constitute "illegal notification of possible harms?" Can we say there is unlawful duress? Intuitively, unless there is a physically dreadful environment, we would have to answer no to both questions. Such economically disadvantageous situations would not constitute "harms." Such notifications of possibilities would not be considered to constitute an employer's "unlawful" duress. Therefore, employees in such situations would not be rescued from unwanted situations, although their decisions are made with the possibility of disadvantageous situations in their minds and thus cannot be considered to have acted based on their perfectly freely made will.

Actually, according to civil law scholars, fraud and duress are strictly interpreted, and there have only been a relatively few number of cases where courts have revoked a manifestation of intention under fraud or duress.[9] It is said that interpretations of fraud and duress have been influenced by the concepts of fraud and intimidation in criminal law (Articles 246 and 222 of the Penal Code[10]) and, according to the traditional theory of civil law, the motivation that leads to the intention is formed at one's own peril, and civil law pays it no heed. So, it has been pointed out that the concepts of fraud and duress should be expanded when one party to the contract is in an inferior position in terms of information and bargaining power, or that the concept of duress can change, such as to include cases of "economic duress."[11]

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7 NOMI & KATO, *supra* note 3, at 265–66.

8 Rodo Keiyaku Ho [Labor Contract Act], Act No.128 of 2007, art.3, para.4 (Japan).

9 ATSUSHI OMURA, KIHON MINPOU [BASICS IN CIVIL CODE] 45, 57–59 (Yuhikaku, 3rd ed. 2007).

10 Keiho [Penal Code], Act No.45 of 1907 (Japan).

11 OMURA, *supra* note 9, at 58–59; KAZUO SHINOMIYA & YOSHIHISA NOMI, MINPO SOUSOKU [GENERAL PROVISIONS IN CIVIL CODE] 277ff (Kobundou, 9th ed., 2018).

C.Case

Let us look at a concrete case,[12] where an employee resigned and took the case to court to rescind the manifestation of intention to resign. The employee submitted a notification document to resign after the bosses suggested that the employee may be subject to disciplinary actions, possibly even dismissal, and the amount of retirement allowance would be lower than if the employee retired voluntarily. According to the court, the possibility of disciplinary dismissal was not untrue; therefore, there was no duress.[13] At the time of notification, only several days remained before the employee would have used up paid leave. According to the workplace rules, three weeks of absence from work without good reason was cause for dismissal. At the time, the employee was not yet recognized by a doctor as having an illness that would justify absence from work. Therefore, the employee may be legally dismissed in cases where the employee used up paid leave. In addition, the company rules provide for lower retirement allowances in cases of ordinary resignation than in cases of induced resignation. In this sense, too, the employer's suggestion was not untrue. Thus, there was no "notifying possible harms illegally," a requirement for duress.[14]

However, the employee also argued that there was fraud.[15] As we saw, the period of leave the employee had taken was already akin to the maximum period of leave set by the company's work rule, which was true. There was another possibility of sick leave, and the employer did not notify the employee. The employee argued that the employer should have explained this possibility as the employee had told the employer that the employee was dizzy. Although the employer was not kind enough to explain when and why the employee may not be able to continue working and what the company's rule concerning extended sick leave was and this seems to have made the employee concerned about the dismissal, the court did not accept the employee's statements that the employer should have explained more and thus it was a cause for mistakes and requirement for fraud was not met.[16]

This incompleteness in the Civil Code provisions, which appears in cases of economic duress in labor relations, is overcome in part by an

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12 Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Sept. 12, 2016, 2014 (Gyo U) 354, 423 HANREI CHIHO JICHI [HANJI] 63 (Japan).

13 *Id*. at 67.

14 *Id*.

15 *Id*. at 67-68.

16 *Id*. at 68.

employee, a contracting party inferior to an employer, or another contracting party. That is a free will doctrine, as we see in the following.

III. FREE WILL DOCTRINES AS LABOR LAW MODIFICATIONS

A. Changes of terms and conditions of employment

Terms and conditions of employment can be changed but only by mutual agreement between employer and employee; otherwise, such changes are just breach of contract. Here, it should be noted that, in Japan, terms and conditions of labor contracts are normally set by "work rules," a kind of employee handbook that an employer is mandated by law to set for each of the employer's business branches with ten or more workers (Article 89 of the 1947 Labor Standards Act[17]).[18] The validity of work rules, especially the changes in work rules, have been discussed in courts and also among academic labor lawyers over many years. In 1968, the Supreme Court, in the Shuhoku Bus Case[19], held that work rule changes, although written and notified unilaterally by employers, apply to the branch's workers so long as the changed provisions are considered reasonable.[20] Their validity does not depend on whether employees had known about the changes or whether the employees had given consent.[21] This legal rule developed by case law is now codified in Articles 9 and 10 of the 2007 Labor Contract Act.[22] The Articles and the preceding provision, Article 8, are as follows:

> Article 8: a worker and an employer may, by agreement, change any working conditions that constitute the contents of a labor contract.
>
> Article 9: an employer may not change any of the working conditions that constitute the contents of a labor contract in a manner disadvantageous to a worker by changing the rules of employment unless an agreement to do so has been

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[17] Rodo Kijun Ho [Labor Standards Act], Act No 49 of 1947 (Japan).

[18] TADASHI HANAMI, FUMITO KOMIYA & RYUICHI YAMAKAWA, LABOUR LAW IN JAPAN 58–61 (Kluwer, 2nd ed. 2015).

[19] Saiko Saibansho [Sup.Ct.] Dec. 25, 1968, 1965 (O) 145, 22(13) SAIKO SAIBANSHO MINJI HANREISYU [MINSHU] 3459 (Japan) (Shuhoku Bus Case).

[20] *Id.* at 3463-3464.

[21] *Id.* at 3463.

[22] Rodo Keiyaku Ho [Labor Contract Act], Act No. 128 of 2007 (Japan).

> reached with the worker; provided, however, that this does not apply to the cases set forth in the following Article.
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> Article 10: when an employer changes the working conditions by changing the rules of employment, if the employer informs the worker of the changed rules of employment and if the change to the rules of employment is reasonable in light of the extent of the disadvantage to be incurred by the worker, the need for changing the working conditions, the appropriateness of the contents of the changed rules of employment, the status of negotiations with a labor union or the like, or any other circumstances pertaining to the change to the rules of employment, the working conditions that constitute the contents of a labor contract are to be in accordance with such changed rules of employment.

With these provisions, a legal issue arose. If an employee gives consent to unfavorable changed wages, including retirement allowances, through work rule changes, could the employee's consent give effect to the changes of terms and conditions stipulated in the work rules, regardless of whether the changes were considered reasonable in accordance with Article 10? The Supreme Court posed this question in the Yamanashi Prefecture Credit Union Case[23] and held that, on the basis of the agreement principle found in Articles 8 and 9, the validity of changed work rules with an employee's consent could be accepted without screening for reasonableness. On the other hand, the Supreme Court required objective and reasonable grounds to endorse that the employee gave consent on the basis of the employee's free will.[24]

According to the Supreme Court, considering the limitation of employees concerning the ability to access information and the position of employees as subject to employers' orders, careful considerations are needed in accepting the existence of employees' consent given to their employers concerning changed work rules.[25] To do this, other than the existence of some seemingly accepting acts by the employee, especially, the process and manner concerning the employee's acceptance and the contents of

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[23] Saiko Saibansho [Sup.Ct.] Feb. 19, 2016, 2013 (Ju) 2595, 70(2) MINSHU 123 (Japan) (Yamanashi Prefecture Credit Union Case).

[24] *Id*. at 130-131.

[25] *Id*. at 130.

information and/or explanation given by an employer as well as the contents and extent of disadvantages incurred by the employee should be considered.[26]

In the Yamanashi Prefecture Credit Union Case, changes of work rules were made by the employer (a credit union) at the opportunities of mergers with other credit unions. The changes involved reduction or even no payment of retirement allowances for employees. An information session was held to explain the coming changes in retirement allowances to the concerned employees. A week after, another meeting was held and documents for consent were given to the employees, which they immediately signed and submitted to the employer.[27]

According to the High Court[28] required by the above Supreme Court decision to examine the case again, valid consent was not given by the employees concerning the reduced amount of retirement allowance in the work rules.[29] When the employees signed, they were not given correct information as to the extent of the reduction in the amount of retirement allowances, and especially for those employees who would be given no retirement allowance at all. Nevertheless, the employees were not correctly informed about the change in retirement allowances when they signed the document.[30] Also, the employer told the employees in the information session that their agreement was needed to have the merger succeed; otherwise, the merger would fail.[31] Therefore, according to the court, there were no objective and reasonable grounds endorsing that the employees had given their consent on the basis of their free will.

We can see this free will doctrine as a means of overcoming limitations found in the Civil Code. Actually, in the preceding decisions of the lower courts regarding the same case, invalidation of agreements based on the Civil Code was maintained by the employees but was rejected by the courts.[32] The Kofu District Court rejected the invalidation of "concealment of true intention" on the grounds that the employees had true intentions to give

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[26] *Id*. at 131.

[27] *Id*. at 125ff.

[28] Tokyo Koto Saibansho [Tokyo High Ct.] Nov. 24, 2016, 2013 (Ju) 2595, 1153 ROHAN 5 (Japan) (Yamanashi Prefecture Credit Union Case).

[29] *Id*. at 19.

[30] *Id.* at 16-19.

[31] *Id.*

[32] Kofu Chiho Saibansho [Kofu Dist. Ct.] Sept. 6, 2012, 2013 (Ju) 2595, 70(2) MINSHU 150 (Japan) (Yamanashi Prefecture Credit Union Case); Tokyo Koto Saibansho [Tokyo High Ct.] Aug. 29, 2013, 2013 (Ju) 2595, 70(2) MINSHU 182 (Japan) (Yamanashi Prefecture Credit Union Case).

consent to the changes of retirement allowances.[33] According to the Kofu District Court, the employer's explanation that the allowance changes would be necessary for the realization of the mergers and consent documents should be signed on the same day did not constitute "unlawful duress" nor "the employee's dread," the second and third "duress" requirements.[34] Further, the invalidation based on mistakes was rejected as the Kofu District Court did not accept the employees' argument that the employees did not understand how disadvantageous the changes would be.[35]

As we have seen, the Supreme Court has taken a different approach than the lower court. The Supreme Court did not use Civil Code provisions to invalidate the consent given by the employees; rather, they established a new doctrine of invalidation, which will be specifically applied to cases of labor relations, including economic duress by employers.

In the future, I expect another issue will be raised. Should this free will doctrine regarding wages be applied in every case involving an employee's manifestation of intention, *i.e.*, an employee's consent as a response to the employer's offers or unilateral declaration of intention, such as declaration of termination of employment, even if work rules are not changed? The author thinks it probable that this will be applied to other cases of changes to the terms and conditions of employment,[36] as the Supreme Court mentioned in Article 8, which generally provides for agreement in principle concerning changes of working conditions. Also, limitations of employees' ability to gather information and the low positions of employees being subject to an employer's order, which the Supreme Court described as a basis for holding that objective and reasonable grounds should exist to endorse an employee's free will, are commonly found in cases involving changes of working conditions, regardless of whether they are made through changes of work rules.

One may question the basis for such a special judicial doctrine to be seen as permissible. In other words, why, in cases of labor relations, can economic duress be rectified through special doctrines made by judges rather than an interpretation of the Civil Code or special legislation?

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[33] *Id.* at 157-158.

[34] *Id.* at 158.

[35] *Id.* at 158-164.

[36] In some recent lower court cases, the validity of employees' consent for demotion, conversion from an indefinite-term labor contract to a fixed-term labor contract, etc. have been denied on the basis of the free will doctrine. See Tokyo Chiho Saibansho [Tokyo Dist. Ct.] May 31, 2017, 2015 (Wa) 23613, 1166 ROHAN 42 (Japan) (Chubb General Insurance Case); Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] Feb 20, 2018, 2016 (Wa) 595, 1193 ROHAN 52 (Japan) (Welfare Corporation Katokukai Case).

One possible reason is that, in the case described above, agreement in principle as a basis for the Supreme Court's decision is stipulated specifically in Articles 8 and 9 of the 2007 Labor Contract Act. Thus, the Supreme Court could establish this as a labor law norm rather than an interpretation of the Civil Code that may possibly be applied generally and thus broadly (not limited to cases of labor relations) and would cause heated arguments among academics of civil law as well as labor lawyers.

Historically, in the fields of labor law, other special doctrines of labor relations have been established by judges, including the abusive exercise of dismissal rights (Article 16 of the 2007 Labor Contract Act) and disciplinary action rights (Article 15 of the 2007 Labor Contract Act). Work rule doctrine discussed here (Article 9, 10; and Article 7) is also originally a creation of the Supreme Court, as we have looked. All are now codified in the 2007 Labor Contract Act, but such a process itself shows how often judicial laws precede legislation in the field of labor law.

B. Waiver of wage claims and derogation from labor law norms

Actually, judicial laws to remedy the economic duress of employees has been seen in another context. The first issue was whether the employees' wage claims could be lawfully waived and such manifestation of intentions to waive should be endorsed by the courts. This issue was taken up in the context of non-payment of retirement allowances in a case where an employee was suspected of having misappropriated company money despite his position as a department director and subsequently retired after being offered by the employer not to receive retirement allowance. [37] The employee gave consent. This waiver of claims of retirement allowances raised an issue of illegality as well since the principle of full payment of wages provided in Article 24 of the 1947 Labor Standards Act was concerned. The standard shown by the Supreme Court in this case was: whether the employee had given consent based on free will.[38] Considering the circumstances mentioned above, the Supreme Court held that the consent was given freely.[39]

C. Curative agreements concerning illegality

Demotion on the grounds of being pregnant or having taken maternity or parental leave is considered unlawful if there are no other justifying

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[37] Saiko Saibansho [Sup.Ct.] Jan.19, 1973, 1969 (O) 1073, 27(1) MINSHU 27 (JAPAN) (Singer Sewing Machine Case).

[38] *Id.* at 29-30.

[39] *Id.* at 158.

grounds. If the demoted employee gave consent, does the consent convert that demotion into a lawful act? This is a question raised in a Supreme Court case involving the demotion of a pregnant employee engaging in rehabilitation work who visited homes but requested to work in clinics as an accommodation measure for pregnant workers based on Article 65, Paragraph 3 of the 1947 Labor Standards Act.[40]

The Supreme Court held that such demotion, *i.e.*, one caused by pregnancy, confinement, or accommodation taken for pregnancy, should be considered unlawful since Article 9 of the Equal Employment Opportunities Act of 2006[41] prohibits such unfavorable treatment on the grounds of pregnancy, confinement, or accommodation taken for pregnancy.[42] However, exceptions should be acknowledged where there are special circumstances, such as an employer's special business needs or if the employee has given consent to the demotion on the basis of free will.[43] In the latter case, the Supreme Court held it should examine whether there were objective and reasonable grounds endorsing the employees' free will, considering the process, including any explanation given to the employee, the contents and extent of advantages and disadvantages, the employee's wishes, etc.[44]

In this particular case,[45] the employer could not show any reason for having the employee take a lower position during the period of pregnancy accommodation and then keep her in that position after the accommodation measure was ended.[46] In addition, the employee was not told how long the employee would be in that lower position.[47] The employee did not clearly object but did not show any positive attitude toward the demotion.[48] The employee was concerned about stressful work environments, which would, in cases of the employee's objection, continue and not be good for

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40 Saiko Saibansho [Sup.Ct.] Oct. 23, 2014, 2012 (Ju) 2231, 68(8) MINSHU, 1270 (Japan) (Hiroshima Central Health Cooperative Case).

41 Koyo No Bunya Ni Okeru Danjo No Kinto Na Kikai Oyobi Taigu No Kakuho To Ni Kansuru Horitsu [Act on Equal Opportunity and Treatment between Men and Women in Employment], Act No. 113 of 1972, amended by Act No.82 of 2006 (Japan).

42 68(8) MINSHU, 1275.

43 *Id*. at 1276-1277.

44 *Id*.

45 Hiroshima Koto Saibansho [Hiroshima High Ct.] Nov. 17, 2015, 2014 (Ne) 342, 2284 HANREIJIHO [HANJI] 120 (Japan) (Hiroshima Central Health Cooperative Case).

46 *Id*. at 132-135.

47 *Id*. at 132.

48 *Id*. at 131.

pregnancy.[49] Therefore, the employee's consent concerning demotion was not considered to have been given on the basis of free will.[50] This case shows how and under what circumstances employees' manifestation of intention in labor relations cases are invalidated where there is some force to give consent to employers' proposals as they are concerned about future disadvantageous treatment or environment toward them.

IV. CONCLUSION - JUDICIARY V LEGISLATURE FOR ECONOMIC DURESS

In cases of economic duress occurring between employers and employees, case law has been developed to scrutinize the validity of employees' manifestation of intention by looking at whether the employees' intentions were based on free will or not. Case laws have developed as it was necessary to remedy employees who may not be able to collect information on their own and are subject to an employer's orders. Since there have already been several very important judicial laws in the field of labor law, as we have seen, the important role that courts play in checking whether employees' consent is based on free will is familiar to Japanese labor lawyers. While such developments of judge made laws seems natural, another question arises. Why do judges rather than legislators play this role? There seem to be two main reasons.

First, in the field of labor law, since the interests of the actors, i.e., employers and employees, often conflict, consensus is apparently difficult and sometimes impossible. Judge-made laws, although issues of deficiency in democracy and explication are concerned, have the merit of giving remedy to employees immediately without solving issues of adjusting the conflicting interests, which are almost impossible but are needed for issues regarding labor relations.

Judicial doctrines, and the 2007 Labor Contract Act which codifies those doctrines, are a prime example of this. In fact, in the legislative process of the 2007 Labor Contract Act, a discussion was made to introduce a new norm which neither the existing legislature nor judicial law provided. However, the attempt was unsuccessful since the harmonization of the conflicting opinions of each side involved in labor relations ran into difficulties. So, on enactment, mandatory provisions were only those

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[49] *Id*.

[50] *Id*. at 132.

codifying existing case laws, including Articles 9 and 10 regarding work rules.[51]

In this regard, one should note that the Japanese Supreme Court has declared actions of legislature and administration unconstitutional in cases mainly related to family and sexuality, a field where the adjustment of opinions is difficult due to divisions in opinions.[52] Looking back, the 1981 Supreme Court ruling in the Nissan Motor Company case, [53] outlawing a gender gap in the company's retirement age, preceded the enactment of the Equal Employment Opportunity Act of 1985, which was highly controversial legislation at that time.[54]

To take a more recent example, in 2023, there was a landmark Supreme Court decision that ruled it was illegal to restrict a person with gender identity disorder from using their desired restrooms in the workplace,[55] even though legislation aimed at eliminating discrimination based on sexual orientation has only been loosely enacted (2023 LGBTQ Understanding Promotion Act[56]). Looking at these examples, one can see how advanced the 2000 Consumer Contract Act[57] actually was. It protects the vulnerable by allowing consumers to revoke of the manifestation of intention.[58] It is suggestive to note that the Act which is basically apolitical, was already enacted in 2000.

Daniel Foote, who analyzed positive involvement of the Japanese judiciary in lawmaking based on Rubin and Feeley,[59] argued that the courts

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51 TAKASHI ARAKI, KAZUO SUGENO & RYUICHI YAMAKAWA, SHOSETSU RODO KEIYAKU HO [DETAILS OF LABOR CONTRACT ACT] 26–27, 64 (Kobundo, 2nd ed., 2014).

52 Saiko Saibansho [Sup.Ct.] Jun. 4, 2008, 2006 (Gyo-Tsu) 135, 62(6) MINSHU 1367 (Japan) (discussing restrictions on the acquisition of nationality by children of illegitimate birth); Saiko Saibansho [Sup.Ct.] Oct. 25, 2023, 2020 (Ku) 993, 1841/1842 Chingin To Shakai Hosyo 99 (Japan) (discussing sterility requirements in sex reassignments).

53 Saiko Saibansho [Sup.Ct.] Mar. 24, 1981, 1979 (O) 750, 35(2) MINSHU 300 (Japan) (Nissan Motor Company Case).

54 RYOKO AKAMATSU, KINTO HO WO TSUKURU [LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT] 34ff (Keiso Shobo, 2003).

55 Saiko Saibansho [Sup.Ct.] Jul. 11, 2023, 2021 (GYO HI) 285, 77(5) MINSHU 1171 (Japan).

56 Seiteki Shiko Oyobi Identity No Tayosei Ni Kansuru Kokumin No Rikai No Zoshin Ni Kansuru Horitsu [Act on Promotion of Public Understanding of Diversity of Sexual Orientation and Gender Identity], Act No.68 of 2023 (Japan).

57 Shohisha Keiyaku Ho [Consumer Contract Act], Act No.61 of 2000 (Japan).

58 Under the Consumer Contract Act, a consumer may rescind the manifestation of intention in certain cases, including those where a trader (a) conveys something that diverges from the truth with regard to an important matter; (b) provides a conclusive assessment of matters where changes in the future are uncertain; (c) does not convey an important matter that would be advantageous to the consumer to know and fails to convey facts regarding important matters that would be disadvantageous to the consumer, either intentionally or with gross negligence and so on.

59 Edward L. Rubin and Malcolm M. Feely, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617 (2003).

were involved in policymaking when more appropriate institutions, such as the legislature, were not expected to act in the future whereas courts are able to do so.[60] It seems that the theme of this paper, economic duress in labor relations, is better tackled by the courts than by legislators, especially in the early stages.

Secondly, even if attempts to introduce legislation were to be successful, it would be difficult to stipulate what should be explained and what should be left unsaid to prevent employers from engaging in economic duress. The contents of explanations are by nature very case dependent, so possible statutory provisions could not help but be abstract and general using general clauses and concepts. Considering this, judge-made free will doctrines would not be so different from potential statutory provisions. However, since this is a rather technical issue, it is possible that in the future, the free will doctrine described above will be established after many court judgments accumulate and will finally be stipulated in the Labor Contract Act so as to provide a remedy for economic duress in labor relations, just as the judiciary law regarding work rules was established and finally codified in the 2007 Labor Contract Act.

[60] DANIEL H. FOOTE, SAIBAN TO SHAKAI [JUDICIARY AND SOCEITY] 278–84 (NTT Publisher, 2006).

BOOK REVIEW

Exit, Voice, and Solidarity by Virginia Doellgast's (2022)

Blandine Emilien[1]

In *Exit, Voice and Solidarity*, Virginia Doellgast thoroughly depicts multiple strategies enacted by labor unions in response to increased precarity for workers in the US and European telecommunications industries. She examines these strategies in an array of companies whose headquarters are located respectively in no less than ten countries and places her case examples in international comparison with each other. She argues that it is still possible for labor unions to circumvent or at least moderate the dire economic and social consequences-for workers-of market-oriented actions henceforth envisaged more casually by employers, under the neoliberal regime. In order to succeed, labor unions would have to manoeuvre and respond adequately with repertoires that they may build within the area of an identified triangle: employer *exit*, worker collective *voice* and union *solidarity*.

Her conceptual proposal owes its Inspiration to Hirschman's (1970) book, *Exit, Voice, and Loyalty: Response to Decline in Firms, Organizations and States*.[2] Doellgast does echo Hirschman's thesis by examining the 'dynamic tension between market and society'.[3] In the industrial context that she chooses to investigate, her focus on employer exit leads to a thorough and empirically based examination of employer discourses that serve restructuring endeavors and take the shape of managerial action such as downsizing, (often coercive) performance appraisal, and outsourcing. She mindfully replaces Hirschman's 'loyalty' by solidarity to capture the real

[1] associate professor, ESG-UQAM, Canada

[2] A. O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[3] V. DOELLGAST, EXIT, VOICE, AND SOLIDARITY: CONTESTING PRECARITY IN THE US AND EUROPEAN TELECOMMUNICATIONS INDUSTRIES20 (2022).

though distinct attempts by collective voice to respond to employer threats to job security and quality.

A RELEVANT CASE SELECTION

To be sure, this book constitutes an ambitious project that Doellgast fulfills by affording space for much contextualization for each case and each sub-comparative exercise that she undertakes across the ten countries. While her introduction takes a friendly tone that clearly contributes to the attractiveness of her depiction of specific organizational dilemmas and geographical contexts, she makes sure that the reader later gets a decent idea of the distinct institutional legacies of each country, company or union considered in her study. This is even truer for the in-depth case studies of five of the companies examined throughout the book. By doing so, she allows multiple nuances and at times unexpected *rapprochement*-for example between two unions originally known for their ideological divide- to emerge from her empirical findings and thus provides new insights on the capabilities and resourcefulness of labor unions as social actors. The variegated manners in which she presents her thematic analysis, that is by exit, voice and solidarity enactments, by company and cluster of companies, or by country, would allow the reader to choose where to focus to make the most of specific sections or cases of the book. As a younger scholar who enjoys the explorative study of a variety of organisations and industries with a multi-level lens, there is no doubt that Doellgast has convinced me of her contribution to reflections at the crossroad of employment relations, human resource management and the sociology of work. In addition, the book has raised further questions mainly about three aspects on which I elaborate below.

STRUCTURAL AND IDEATIONAL PERSPECTIVES IN EMPLOYMENT RELATIONS

In the realms of employment relations (ER), scholars may have taken in their research either an ideational perspective or what Carstensen et al. [4] identify as a more materialist-institutionalist perspective. The former would bear a more significant focus on how unions mobilize beliefs, theories or discourses to (re-)construct their perceptions and actions in addressing

M. C. Carstensen, C. L. Ibsen & V. A. Schmidt, *Ideas and power in employment relations studies*, 61 IND. REL. J. ECON. & SOC'Y 3–21 (2022).

specific struggles,[5] while the latter would imply studies of institutional work or concrete experimentation by labor unions in their attempts to contribute actively to the (re-)regulation of work.[6] Doellgast's book comes as a reminder or an emphasis for ER scholarship: she did not make a drastic choice between one of these perspectives to the potential detriment of the other. The book provides adequate and relevant accounts of how solidarity in its various forms requires both structural and ideational consolidation in order for labor unions to expand their range of proactive or reactive initiatives amid the exacerbation of both employment uncertainty for workers, and normalized percolation of employers' ideational power.

By covering collective bargaining conditions and enactments, union revitalization initiatives and human resource management constraints among many other sub-themes, the book provides a comprehensive view of the realities of one specific industry at the international level, and in so doing it still encompasses not few but a significant array of ER phenomena. I would argue that the book provides an important selection of conceptual dimensions from which other researchers can tap to build analytical frameworks in the advent of future studies on either the same industry in other settings or other industries with comparable threats to decent work. In fact, earlier, Doellgast and colleagues[7] made a call for an expansion of perspectives in ER scholarship. It is important, they argue, to take into account key factors that go beyond class/ material perspectives and that one can no longer eschew in mobilization projects. Amid these factors, one may find identity, gender, and race to name only a handful. Perhaps Doellgast opened an even bigger box than planned, regarding the concept of inclusive solidarity.

THE PROBLEM OF INCLUSION

In her comparative proposal, Virginia Doellgast both describes how in various cases, coverage (and therefore inclusion) of more precarious workers' fate in bargaining endeavours were leveraged by context-specific structural opportunities and constraints. To be sure, s*tructural inclusive solidarity* versus *structural exclusive solidarity* constitute solid ground for

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[5] V. A. Schmidt, *Discursive institutionalism: The explanatory power of ideas and discourse*, ANNU. REV. POLIT. SCI. 303–326 (2008). Also cited in Carstensen et al., *supra* note 4.

[6] G. Murray, C. Lévesque, G. Morgan & N. Roby, *Disruption and re-regulation in work and employment: from organisational to institutional experimentation*, 26 TRANSFER: EUR. REV. LAB. & RES. 135–156 (2020).

[7] DOELLGAST, *supra* note 3.

further studies of the formation, decline or revitalization of solidarity. However, the 'inclusion box' opened by Doellgast sparked in me a research-relevant desire to learn more about the workers studied in her cases. Amid a multi-level approach to understanding the impact of employer austere action upon the social wellbeing of workers, I ask how the individual (or identified groups of individuals) and their life stories and history are taken into account in such a project. For want of a less mundane expression, I argue that it becomes henceforth important to provide further contextualization to help the reader 'put a face' onto the groups of workers concerned by the situations depicted in such a comprehensive study. Doellgast does mention that a significant number of the precarious workers were minorities, migrants or lived in less favorable conditions than those of the average citizens of the geographical and social contexts selected. More specifically, however, who are they? To what extent are their distinct realities understood, discussed and prioritized in the (re)structuring of beliefs, discourses and actionable interests of unions? What are the implications of such (intense) structural and ideational inclusion for the specific labor unions studied in this book, given their legacies and at times rigid traditions? To be sure, it is clear that Doellgast's work joins recent calls to flesh out loopholes such as race and identity erasures in ER analyses.[8] However, one could point to the absence of this extra-contextualization in Doellgast's book. That said, the long journey presented in this book and which started before these calls for more inclusion provides pertinent foundations for future research avenues that will need to embrace intersectionality in a more integrated manner.

A CASE FOR 'IMPLICIT ETHNOGRAPHIES'

The book depicts a long research journey, indeed. I remember reading Doellgast's work when I started my PhD in 2010. At the time, I had yet to learn both about the telecommunications industries and work deregulation that epitomized the neoliberal project as vividly as these industries did. This book pays justice to the incremental and collegial work undertaken by Doellgast with different colleagues and the maturity of her analysis of the single cases or of their comparative insights is irrefutable. Once again, her introduction does tell the reader how involved she has been in the understanding and examination of these cases. The book is not a mere *collage* of different cases. Instead, it constitutes a well-articulated account and

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T. L. Lee & M. Tapia, *Confronting race and other social identity erasures: the case for critical industrial relations theory*, 74 ILR REV. 637–662 (2021).

analysis of one major ethnography of work (de)regulation in the telecommunications industries and concomitantly of small but thick 'implicit ethnographies'.[9]

However, when one witnesses such an outcome in the shape of this book, one cannot help but wonder: why then has academia turned into an epitome of a 'hostile political economy' (ibid) that demands rapid scientific production to its researchers? The combination of Virginia Doellgast's previous publications with this more comprehensive outcome does demonstrate the relevance of concomitant documentation of ongoing research on one side, and comprehensive material that can only come more slowly and from longer experience, on the other. Yet, this book's thick description, intensive comparative scrutiny and clear articulation of an important amount of data convinced me about Almond and Connolly's manifesto for slow comparative research in the realms of work and employment. Along these lines, this book may incite young scholars to take bold methodological initiatives that may imply breathing through and between single cases, finding the courage to afford time to take steps backwards where applicable and producing scholarly work inspired by Doellgast's book, which I perceive as a major, timely and comprehensive contribution.

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BOOK REVIEW

Your Boss is an Algorithm: Artificial Intelligence, Platform Work and Labour,

Antonio Aloisi and Valerio De Stefano, 2022, (Oxford/London/New York/New Delhi/Sydney, Hart)

reviewed by Tonia Novitz[*]

There has been an explosion of literature relating to issues of algorithmic control in the platform economy,[1] including a significant International Labour Organization (ILO) report in 2021 on "The Role of Digital Labour Platforms in Transforming the World of Work."[2] In this context, the authors of this book, Antonio Aloisi and Valerio De Stefano, have emerged deservedly as leading international and European experts in this field. [3] Their longstanding collaboration enables this co-authored book to make a compelling contribution to what has become a lively and many-faceted debate. *Your Boss is an Algorithm* draws together various strands of their previous research, and subjects to rigorous scrutiny emerging arguments and evidence regarding automation, Artificial Intelligence (AI), and algorithmic control.

The book is written in a way which brings to life various issues and dilemmas raised by work in a digital era. These are given careful and detailed attention. Some are dismissed convincingly (and great aplomb), such as the claim that regulating technology at work will stifle innovation and job

[*]Professor of Labour Law, University of Bristol Law School and Centre for Law at Work: tonia.novitz@bristol.ac.uk.

1. For example, other recent comparable publications include Jeremias Adams-Prassl, *What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work*, 41 COMP. LAB. L. & POL'Y J. 123 (2019); TAMAS GYULAVÁRI & EMANUELE MENEGATTI (EDS), DECENT WORK IN THE DIGITAL AGE: EUROPEAN AND COMPARATIVE PERSPECTIVES (2022); EVA KOCHER, DIGITAL WORK PLATFORMS AT THE INTERFACE OF LABOUR LAW: REGULATING MARKET ORGANISERS (2022); ANTONIO LO FARO (ED.), NEW TECHNOLOGY AND LABOUR LAW (2023) to which Antonio Aloisi has also contributed.

2. ILO WORLD EMPLOYMENT And SOCIAL OUTLOOK (WESO) REPORT, THE ROLE OF DIGITAL LABOUR PLATFORMS IN TRANSFORMING THE WORLD OF WORK (2021), available at: https://www.ilo.org/global/research/global-reports/weso/2021/WCMS_771749/lang—en/index.htm.

3. Two seminal articles in the same special issue were Valerio De Stefano, *The Rise of the "Just-in-time Workforce": On-demand work, crowdwork and labour protection in the "gig-economy"*, 37.3 COMP. LAB. L. & POL'Y J. 471 (2016); Antonio Aloisi , *Commoditized Workers: Case study research on labor law issues arising from a set of "on-demand/gig economy" platforms*, 37.3 COMP. LAB. L. & POL'Y J. 653 (2016). *See also* VALERIO DE STEFANO & ANTONIO ALOISI, DIGITAL AGE: EMPLOYMENT AND WORKING CONDITIONS OF SELECTED TYPES OF PLATFORM WORK – NATIONAL CONTEXT ANALYSIS, ITALY (2018); Antonio Aloisi & Valerio De Stefano, *Regulation and the future of work: The employment relationship as an "innovation facilitator"*, 159.1 ILREV 47 (2020); Antonio Aloisi & Valerio De Stefano, *Essential Jobs, remote work and digital surveillance. Addressing the Covid19 pandemic panopticon*', 161.2 ILREV 289 (2022).

production.[4] The complexity of other concerns are thoughtfully reviewed, such as the power dynamics of "working under the Algorithmic boss."[5] The aim of the authors is to expose the social, political, and legal choices which can be made in response to digital initiatives and they do not shy away from presenting arguments as to how these choices should be exercised. The language used is powerful and evocative, such as the description of those at work "caged in the virtual assembly line."[6]

There are four significant chapters in this book. Chapter 1 sets out the "Uncharted Waters" which are now being navigated, such as full automation potentially replacing human work, with reference to both the "Robotoclypse" and the importance of recognizing a "Human in Command." This is of necessity a briefer overview of the issues than that offered at greater length recently by Cynthia Estlund.[7] Here, the findings of the authors remain that pessimistic predictions should not be regarded as an inevitability. Rather, their conclusion is that "the digital is political," such that its introduction and adaptation of work practices can be controlled by social, legal, and political institutions which have important choices to make. "We can let our fears define us. Or we can make our aspirations prevail."[8]

More significant is the "Changing Labour Market" identified in a longer Chapter 2. This chapter explores the "consequences for the 'Jobs that Remain'" with reference to the changes in work that are occurring, as service providers seek to exploit the potential for digital work. For example, the "workplace" is no longer a single site but is potentially "everywhere."[9] In the rapidly evolving field of technology at work, added controls and forms of surveillance can be contemplated which reinforce or even create a strict regime of hegemonic control by managers.[10] Hidden labour (which may be hired across the globe) has become a new norm,[11] including those quietly doing the "dirty work" of the web, "cleaning" offensive content on low pay.[12] Notably, recruitment with reference to social media can be overly intrusive into private lives but also based on predictive factors which have discriminatory effects (if not intentions).[13] Algorithmic control over work would now

4. ANTONIO ALOISI & VALERIO DE STEFANO, YOUR BOSS IS AN ALGORITHM: ARTIFICIAL INTELLIGENCE, PLATFORM WORK AND LABOUR, 113–24 (2022).

5. ALOISI & DE STEFANO, *supra* 4, at 58–71.

6. *Id.*, at 73.

7. CYNTHIA ESTLUND, AUTOMATION ANXIETY: WHY AND HOW TO SAVE WORK (2021), which is referred to alongside other recent analysis of the implications of such technological developments.

8. Aloisi & De Stefano, *supra* 4, 19.

9. *Id.*, at 27. Cf. On the environmental issues associated with this observation, see Paolo Tomassetti, *Labor Law and Environmental Sustainability*, 40 COMP. LAB. L. & POL'Y J. 61, 63 (2018).

10. Aloisi & De Stefano, *supra* 4, 33.

11. *Id*., at 36–42, 52–65.

12. *Id.*, at 66–71.

13. *Id.*, at 43–49.

seem to be expanding beyond the sphere of platform work, becoming more acceptable and generic. This raises alarm bells for, as Ruth Dukes and Wolfgang Streeck have recently observed, there are observable dangers in the ways in which privacy at work has been undermined, such that communication between workers is monitored and discouraged, and subcontracting leads to a lack of work-related relationships, fostering competition rather than cooperation through algorithmic targets and responses.[14] These factors can undermine freedom of association and collective bargaining. Dukes and Streeck, like Aloisi and De Stefano, regard this as a larger societal issue reflecting employer and government choices regarding the design of work rather than necessary to the use of digital tools in the workplace.[15]

The role of Article 22 of the EU General Data Protection Regulation (GDPR) in reducing the scope for automated decision-making processes is highlighted in Chapter 2, which becomes important for the arguments made later by Aloisi and De Stefano where they advocate "Negotiating the Algorithm."[16] Collective bargaining does require a sentient bargaining partner that can be held to account. Brishen Rogers has also recently powerfully made the case for addressing workplace privacy to promote the associational power of workers,[17] another precondition for the policy solutions which Aloisi and De Stefano advocate later in their book.

Chapter 3 probes the relevance of "Social Rights in the Digital Age," examining the demographics of those caught in low-paid, precarious, casualized "gig" jobs associated with digital work. What emerges is that the "double-speak" language of the so-called "sharing economy" and "self-entrepreneurship" does not reflect the realities.[18] The results of digital work to date include discriminatory downgrading of terms and conditions of employment. But, again, the authors are adamant that this need not be the case. This chapter goes on to examine attempts to regulate at the national level through statutory intervention (with mixed results) as well as European Union (EU) and ILO initiatives to date. The EU has taken incremental regulatory steps, building on the European Pillar of Social Rights, adopting a Directive on "transparent and predictable" working conditions, and contemplating a Directive "to improve working conditions for platform workers."[19] The significance of

14. RUTH DUKES & WOLFGANG STREECK, DEMOCRACY AT WORK: CONTRACT, STATUS AND POST-INDUSTRIAL JUSTICE 72–88 (2023).

15. *Id.*, at 88–106.

16. *Id.*, at 155.

17. BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK: ADVANCED INFORMATION, TECHNOLOGIES, LABOR LAW AND THE NEW WORKING CLASS ch 4 (2023).

18. Aloisi & De Stefano, *supra* 4, 90–96.

19. *Id.*, at 106. Although the content of the latter still remains at issue and the subject of political debate as at Mar. 1, 2023, the time of writing, for which see: https://www.euractiv.com/section/gig-economy/news/eu-council-tries-again-to-close-in-on-platform-work-rules/.

European Commission Guidelines adopted in 2022 which enable collective bargaining for some of the 'solo-self employed' (who might include digital platform workers), are discussed in the following chapter.[20] The promise of a "Universal Labour Guarantee," as proposed by the ILO Global Commission on the Future of Work is also considered, but the ILO response does seem weak at present. In this regard it may be of interest that, since this book was published, the ILO Governing Body has agreed to place on the agenda for the 2025 annual International Labour Conference an item on "decent work in the platform economy".[21] This could realise some of De Stefano's longstanding policy ambitions evident in his early ILO working papers.[22]

The final Chapter of the book seeks to "Future-Proof Labour Law,"[23] being intent on "Saving the Digital Transformation from Itself."[24] Indeed, Aloisi and De Stefano have often focussed on the specific policy implications of digital work. They begin their book with an anecdote which recalls organizing a conference session on platform work at the ILO and presenting their research later that month to the European Parliament in Brussels. This book continues in that vein. For example, they make a strong case for enabling "Collective Voice versus Digital Despotism," the preconditions for which would include information rights.[25]

The authors further offer a "short" (which is actually a rather long) list of proposals relating to, not only "trade unions for non-standard workers" and "negotiating the digital transformation" but also: introduction of "standard form contracts," "a code of conduct for digital players," "clear rules on payments for online work," "obligations for those who want to outsource," "protections and rights beyond employment," "guaranteed minimum hours," "stable rights" (despite flexible jobs), "data portability and interoperability," "universal benefits and less conditionality in welfare" and "bringing algorithmic bosses to account."[26] These recommendations are hard to fault, although

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20. Aloisi & De Stefano, *supra* 4, at 157.

21. International Labour Organization, *Draft Minutes of the ILO Governing Body Committee*, (Mar., 2023), https://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-relconf/documents/meetingdocument/wcms_875359.pdf.

22. See, for example, VALERIO DE STEFANO, THE RISE OF THE 'JUST-IN-TIME WORKFORCE': ON-DEMAND WORK, CROWDWORKAND LABOUR PROTECTION IN THE 'GIG-ECONOMY' (2016) available at: https://www.ilo.org/wcmsp5/groups/public/—-ed_protect/—-protrav/—-travail/documents/publication/wcms_443267.pdf; and VALERIO DE STEFANO, 'NEGOTIATING THE ALGORITHM': AUTOMATION, ARTIFICIAL INTELLIGENCE AND LABOUR PROTECTION (2018) available at: https://www.ilo.org/wcmsp5/groups/public/—-ed_emp/—-emp_policy/documents/publication/wcms_634157.pdf.

23. Aloisi & De Stefano, *supra* 4, 148.

24. *Id.*, at 164.

25. *Id.*, at 155–64. See further on collective bargaining in relation to platform work, ANTHONY FORSYTH, THE FUTURE OF UNIONS AND WORKER REPRESENTATION: THE DIGITAL PICKET LINE (2022).

26. Aloisi & De Stefano, *supra* 4, 166–68.

they may be difficult to operationalize. They certainly open future debates on the specifics of their implementation.

The list could also be further supplemented. There may be more for these authors and their fellow researchers to explore, even beyond these proposals. For example, it may be possible to further probe not just issues of privacy and information, but the relevance of freedom of speech in this context, which must be a crucial precondition also for freedom of association and collective bargaining, as observed by Dukes and Streeck.[27] It may also be timely to investigate the relationships between "digital" and "green" transitions, with both currently being actively promoted by the EU as if they are entirely compatible.[28] It will be interesting to see what Aloisi and De Stefano make of these concerns in the future, but for now they have done as much as could be expected in this book.

There remains a popular fascination and perhaps an over-preoccupation with new technology, with which this and other recent books, engage. However, Aloisi and De Stefano are not content to let that fascination override an awareness of the regulatory choices available. They close by saying that "labour is not a technology"[29] and aim to make the human elements of work and regulatory choices visible even in a digital setting. As a "dispatch from the work front,"[30] this is a compelling read. This book offers an engaging overview of vital issues arising in the wake of digital change, and seems likely to facilitate meaningful deliberation, which the authors would want to be inclusive of all those at work and their collective representatives.

27. Dukes & Streeck, *supra* 14, 121 on 'informal communication'.

28. SILVIA RAINONE & PHILIPPE POCHET, THE EU RECOVERY STRATEGY: A BLUEPRINT FOR A MORE SOCIAL EUROPE OR A HOUSE OF CARDS? (2022).

29. Aloisi & De Stefano, *supra* 4, 169.

30. *Id*., at 7.