

# Bargaining with Consequences: Leverage and Coercion in Negotiation

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## ABSTRACT

Leverage has been called “negotiation’s prime mover,” conferring power to reach agreement “on your terms.” This power, however, is not always benign. When a negotiator has sufficient power to compel a counterparty to accept a set of unfavorable terms, the use of leverage may cross a line into inappropriate or illegal coercion. While coercion has been the subject of rich philosophical investigation, the topic of coercive power has received only cursory treatment in the negotiation literature. This article seeks to fill that gap by analyzing the uses and limits of negotiating leverage, which I define as power rooted in consequences. I identify two types of leverage — positive and negative — and explore the legal and ethical implications of each type, drawing on the political theory of coercion as well as primary and secondary legal sources. I conclude by analyzing the contract doctrines of duress and unconscionability to show how an understanding of leverage can aid in the application of legal rules.

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## I. INTRODUCTION

During the acrimonious federal budget battles of 2013, House Republicans sought to pressure President Barack Obama and Senate Democrats to accede to Republican legislative demands by threatening to block an increase in the federal debt limit — a legislative step necessary for the government to continue meeting its financial obligations.<sup>1</sup> Initially, Republicans demanded equivalent spending cuts

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1. See Michael D. Shear & Jackie Calmes, *Lawmakers Gird for Next Clash, on the Debt Ceiling*, N.Y. TIMES, Jan. 3, 2013, at A1. Without increasing the debt limit, the government would be able to meet its legislatively-enacted spending obligations, as it is required by law to do. For several decades, The House of Representatives had automatically produced a resolution changing the debt limit by the amount recommended in the budget resolution for the next year, so that the government always had the authority to borrow the money necessary to pay for the spending Congress authorized. See U.S. GOV'T ACCOUNTABILITY OFFICE, DEBT LIMIT: DELAYS CREATE DEBT MANAGEMENT CHALLENGES AND INCREASE UNCERTAINTY IN THE TREASURY MARKET (Feb. 2011), available at <http://www.gao.gov/new.items/d11203.pdf>.

in exchange for an increase in the debt limit; later they turned their attention to the President's signature health care law, threatening to deny an increase in the government's borrowing authority unless the President and Senate Democrats agreed to defund the Affordable Health Care Act.<sup>2</sup> During an earlier round of negotiations in the summer of 2011, Democrats had agreed to accept equivalent spending cuts in exchange for an increase in the debt limit.<sup>3</sup> Congressional Republicans considered the debt ceiling to be an effective and a legitimate source of bargaining power. Speaker of the House John Boehner reportedly told President Barack Obama that "everything you want in life comes with a price," suggesting that he viewed a further increase in the debt ceiling as an item of exchange that Republicans could withhold or concede as part of a rational and fair negotiation process.<sup>4</sup>

President Obama responded to the Republicans' invocation of the debt-ceiling by charging them with violating a negotiation norm. With widespread news coverage predicting dire economic and fiscal consequences if the United States were to default on its obligations,<sup>5</sup> Obama declared that "the financial well-being of the American people is not leverage to be used."<sup>6</sup> He explicitly rejected the proposition that the debt ceiling was a legitimate item of exchange: "The full faith and credit of the United States of America is not a bargaining chip."<sup>7</sup> The President equated the invocation of the debt ceiling with a criminal threat and refused to bargain over it, vowing that House Republicans "will not collect a ransom in exchange for not crashing the American economy."<sup>8</sup>

Though President Obama employed "leverage" as an epithet, not all applications of leverage in negotiation are illegitimate. Indeed,

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2. See Zachary A. Goldfarb, *Lawmakers at Odds over Federal Borrowing Limit*, WASH. POST, Jan. 3, 2013, at A4; Peter Baker, *Obama Scorns G.O.P. "Blackmail" on Health Law*, NEW YORK TIMES, Sept. 27, 2013, at A14.

3. *Id.*

4. Shear & Calmes, *supra* note 1, at A1. Senator Mitch McConnell characterized the debt-ceiling tactic as a legitimate form of leverage in an appearance on "Face the Nation": "We have to use whatever leverage we have. And there are some examples of leverage coming along. The debt ceiling is one of them that hopefully would get the president engaged." William Saletan, *The G.O.P.'s Empty Threats*, CHI. TRIB., Jan. 8, 2013, at 15.

5. See, e.g., Mary Williams Walsh, *Debt Ceiling Rises Again as Threat for U.S.*, NEW YORK TIMES, Dec. 22, 2012, at B1.

6. Jackie Calmes & Jonathan Weisman, *Obama and G.O.P. Issue Challenges for Their Conflicting Views on the Debt Limit*, N.Y. TIMES, January 15, 2013, at A15 (emphasis added).

7. *Id.*

8. *Id.*

leverage is often described as “negotiation’s prime mover,”<sup>9</sup> praised for conferring the “power not just to reach agreement, but to obtain an agreement *on your own terms*.”<sup>10</sup> Why was the President able to credibly argue that the Republican strategy had crossed a line from legitimate bargaining to illegitimate “ransom”?<sup>11</sup> What about the Republicans’ invocation of the debt ceiling made it an inappropriate (in the eyes of the President) exercise of “leverage”?

In common parlance, leverage is a synonym for power. Power, however, is a broad and amorphous concept. Robert Dahl, a leading theorist on political power, defines power in these terms: “A has power over B to the extent that he can get B to do something B would not otherwise do.”<sup>12</sup> Power in negotiation may similarly be understood as the ability to affect favorably someone else’s decisions.<sup>13</sup> Negotiating power can take many different forms, including status, knowledge and information, organizational control, personal charisma, and superior alternatives.<sup>14</sup> Leverage is best understood as a

9. See, e.g., H. Lee Hetherington, *Negotiating Lessons from Iran: Synthesizing Langdell & MacCrate*, 44 CATH. U. L. REV. 675, 680 (1995).

10. G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 90 (2d ed. 2006).

11. President Obama was not alone in his reaction to the Republicans’ debt ceiling strategy. See Ruth Marcus, *Which party will blink?* WASH. POST, Jan. 9, 2013, at A15 (“Administration officials point to warnings from former House speaker Newt Gingrich about using the debt ceiling as a negotiating tactic. They note that McConnell shied away from repeating debt-ceiling threats, and that House Speaker John Boehner (R-Ohio), in an interview with the Wall Street Journal, described the debt ceiling as ‘not the ultimate leverage.’”); Shear & Calmes, *supra* note 1, at A1 (quoting David M. Cote, chairman of Honeywell and a Republican member of the 2010 Simpson-Bowles fiscal commission, saying that “[t]he whole idea of using debt ceiling that way or saying ‘I’ll do this horrible thing to all of us unless you give in’ just doesn’t make any sense for anybody.”); Robert M. Solow, *Our Debt, Ourselves*, N.Y. TIMES, Feb. 28, 2013, at A29.

12. Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201–15 (1957), reprinted in *POLITICAL POWER: A READER IN THEORY AND RESEARCH* 80 (Roderick Bell et al., eds. 1969) (collecting essays on the nature of power).

13. See Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAV. SCI. 149 (1983), as reprinted in *NEGOTIATION THEORY AND PRACTICE* 127, 128 (J. William Breslin & Jeffrey Z. Rubin eds. 1991).

14. See *id.* at 130. Roger Fisher, an original proponent of principled negotiation, identifies six categories of power: emphasizing skill and knowledge, good relationships, good alternatives, elegant solutions, legitimacy, and commitment. On the opposite end of the philosophical spectrum, “power negotiating” guru Roger Dawson argues that power comes not primarily from principle, but from status, the ability to reward or coerce, charisma, organizational control over a situation, and information. See ROGER DAWSON, *SECRETS OF POWER NEGOTIATING* 253–82 (2d ed. 2001). Robert Adler and Elliot Silverstein distill those same concepts into four sources of power: personal power, organizational power, information power, and moral power. See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power*

subset of power and, like other sources of power, may be used legitimately or illegitimately.

I use the term leverage to refer to a specific type of power: power rooted in consequences. That is, a party has leverage when it has the ability to influence another party through the threat of or the imposition of consequences on that party. Leverage is distinct from other sources of power, which derive their force from either psychological processes or social norms such as moral principle, charisma, or rank. Leverage encompasses all forms of power based on a party's ability to confer material benefits or impose material costs on a counterparty. President Obama appears to have used leverage in this sense when he chastised House Republicans. The President objected to the use of the debt ceiling as a "bargaining chip," meaning as a benefit to be conferred or a cost to be imposed.

My goal in this article is to explore the use and abuse of leverage — defined as power rooted in consequences — in negotiation. A key ingredient in this effort is the concept of coercion.<sup>15</sup> The ability to impose consequences on a counterparty entails the potential to coerce. Negotiators often feel that they have "no choice" but to agree to a particular deal, either because they have no good alternatives or because the alternative, not agreeing, is too high. By linking leverage and ransom, President Obama suggested House Republicans were attempting to hold him, and the government, hostage. The President claimed that Republicans sought to coerce rather than bargain in good faith. But not every exercise of leverage in negotiation crosses a moral or legal line. Understanding the moral and legal limits on leverage in negotiation requires understanding the social norms surrounding coercion.<sup>16</sup>

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*Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 23–28 (2000). Adler and Silverstein define personal power as "inherent individual traits that a person brings to a negotiation not directly associated with his or her organizational status;" organizational power as "the formal power of a given position and [ ] the actual control a position has within an organization;" information power as the expertise or research that allow a negotiator to "see the context of a given situation clearly and respond accordingly;" and moral power as the ability to "achieve gains through appeals to fairness or morality." *Id.* at 23–24.

15. See Peter Westen, "Freedom" and "Coercion": *Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 560. Westen refers to coercion in terms almost identical to those used by Fisher and Dawson to define power: "Coercion is an interpersonal relation in which one person affects the behavior of another."

16. The topic of coercive power has received surprisingly little consideration in the negotiation literature, even in work that deals explicitly with power. Roger Fisher never assesses coercive tactics such as threats at all, and even Roger Dawson spends only a few pages discussing "coercive power," which he defines as the power to punish. See Dawson, *supra* note at 264–68. The scholarly literature is no more fulsome, with

In this article, I rely on philosophical literature on coercion to distill the normative criteria used to judge the coerciveness of a proposal. Then I connect those insights with negotiation theory and the legal doctrines governing contract formation and avoidance to analyze leverage and its limits in negotiation. I contend that our moral intuitions about coercion can be elucidated by exploring the understanding of leverage that emerges from negotiation theory. I offer a framework for understanding the different forms of leverage and their relative degrees of coerciveness. Finally, I show how these considerations appear in the judicial treatment of negotiation practices through the contract doctrines of duress and unconscionability.

Central to this analysis is a distinction I draw between two forms of leverage, described by Richard Shell as “positive leverage” and “negative leverage.”<sup>17</sup> Positive leverage derives from a party’s ability to satisfy the counterparty’s interests. For example, the logrolling that is a routine, if often lamented, part of the legislative process rests on positive leverage.<sup>18</sup> Legislators bargain to satisfy each others’ interests, trading votes on matters of less importance to them in exchange for other members’ votes on matters of greater importance. The strength of their leverage depends on the value of what they have to offer, measured against the value to them of what the other side offers to trade.

Negative leverage is derived from a party’s ability to impose costs on the counterparty if the counterparty refuses to agree to a set of terms. When President Obama implied that House Republicans were engaged in extortion, he was suggesting that they were improperly using negative leverage. He argued that Congress had an existing obligation to pay the debts it incurred — which it could not do without raising the debt limit — and that the failure to pay those

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virtually no work devoted to retributive or overtly coercive power. See, e.g., Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325. Goodpaster discusses most of the same competitive tactics described by Dawson, and offers only one small paragraph on threats. Other analyses focus almost entirely on the power that comes from having better alternatives than the counterparty. That is the focus, for example, of Daniel Barnhizer’s extensive treatment of inequality of bargaining power and Russell Korobkin’s more cursory analysis of bargaining power as threat of impasse. See generally Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005); Russell Korobkin, *Bargaining Power as Threat of Impasse*, 87 MARQ. L. REV. 867 (2004).

17. See SHELL, *supra* note 10, at 101.

18. See Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1339 (2000). A number of states have tried to curb logrolling through “single subject” rules that require the legislature to confine all acts to a single subject. See Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 805 (2006).

debts would impose unacceptable costs on the country. House Republicans were threatening to impose a cost, one that would entail considerable harm to their own governing interests,<sup>19</sup> if the President did not agree to the spending cuts.

Part II begins with an analysis of the philosophical literature on coercion, focusing on the work of Robert Nozick and Peter Westen. Part III details the distinction between positive and negative leverage, and shows how negative leverage, unlike positive leverage, carries coercive force. It also demonstrates that positive leverage is not always used for good, nor is negative leverage always used for evil. Part IV analyzes contract doctrine in light of the theory of leverage, and explains how this theory can shed light on courts' grounds for relieving parties of their contractual obligations. Although they do not speak in terms of positive and negative leverage, in practice, courts give greater scrutiny to bargaining practices employing negative leverage than to those employing positive leverage. I argue, as a prescriptive matter, that understanding the positive and negative leverage in the bargaining processes can help courts to apply the doctrines of duress and unconscionability in more consistent and rational ways. Abuses of negative leverage ought to be understood as grounds for contract unenforceability under the principle of duress, while abuses of positive leverage should be understood as grounds for contract unenforceability under the principle of unconscionability.

Although the theory of leverage I offer has implications for a variety of negotiation and legal contexts,<sup>20</sup> I focus on a relatively narrow set of issues. Leverage plays a role in almost all negotiations. Social attitudes about the appropriateness of various applications of leverage differ widely across those contexts. This article does not attempt to grapple with all the ramifications this theory entails. Instead, it represents an initial effort to formulate a theory of leverage and demonstrate its utility in commercial disputes, such as arms-

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19. If the United States were to default, its credit rating would worsen, raising its borrowing costs and exacerbating federal budget deficits. See Robert M. Solow, *Our Debt, Ourselves*, N.Y. TIMES, Feb. 28, 2013, at A29.

20. To give just one example, questions about coercion and duress often arise in the criminal law. Duress is a defense to a criminal charge; in such a case, an accused has carried out a criminal act, but asserts duress as a reason to avoid punishment. See MODEL PENAL CODE § 2.09 (providing that duress is an excuse for criminal activity when "a person of reasonable firmness in his situation would have been unable to resist."). I focus on the related but distinct question of duress as a contract defense; in this situation, a contracting party has made a commitment to carry out a legal act, but asserts duress as a reason to avoid that commitment. See ALAN WERTHEIMER, COERCION 152–54 (1987) (contrasting criminal defense of duress and contract defense of duress).

length transactions in which a weaker party seeks to escape contractual obligations on grounds of duress or unconscionability.

## II. COERCION AND THE SOCIAL NORMS LIMITING LEVERAGE IN NEGOTIATION

Within the Western socio-political tradition, coercion is considered a social evil.<sup>21</sup> In the terminology of Peter Westen, "coercion" is a vice word — a word that conveys a derogatory normative judgment.<sup>22</sup> It is contrasted with "freedom," a virtue word conveying a positive normative judgment. Our federal and state constitutions exist in large measure to limit governmental coercion and promote individual freedom of action. A variety of criminal and civil laws proscribe coercion or excuse actions coerced by others in the private sphere. Chief among them are laws prohibiting extortion, the defense of duress to criminal or civil liability,<sup>23</sup> and contract doctrines offering relief from agreements on grounds of duress and unconscionability.<sup>24</sup>

If coercion is a social evil, it is a subtle one. Coercion involves a paradox: coercion is an evil because it robs a person of her freedom of action, yet coercion exists only when the coerced person acts under her own volition.<sup>25</sup> For example, I coerce a person if I threaten to break her arm unless she gives me her money; I do not coerce her if I forcibly remove her wallet from her possession.<sup>26</sup> The difference between the two is that in the first case, the success of my venture depends on her taking a volitional action to give me her money. Even if volitional, however, her action arguably is not voluntary. In the lexicon of *The Godfather*, I made her an offer she could not refuse.<sup>27</sup>

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21. See WERTHEIMER, *supra* note 20, at 4 ("The general assumption is that promises are binding, rights can be waived, and punishment appropriately applied if, but only if, the relevant actions are voluntary.").

22. See Westen, *supra* note 15, at 547-48.

23. See generally John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275 (1999).

24. See *infra* Part IV.

25. See Hill, *supra* note 23, at 286-87.

26. See Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440, 440 (Sidney Morgenbesser et al. eds., 1969) ("If I lure you into an escape-proof room in New York and leave you imprisoned there, I do not coerce you into not going to Chicago though I make you unfree to do it.").

27. Alan Wertheimer refers to this condition as "constrained volition." See WERTHEIMER, *supra* note 20, at 9. Wertheimer also explains the different ways of understanding "choice," and what we mean when we say a person has "no choice" but to take some action. *Id.* at 192-201.



Complicating the concept of coercion is the distinction between threats, predictions, and warnings.<sup>28</sup> Coercion implies that the party making the proposal has the power to carry out the proposed course of action. For example, if a negative turn of events is likely to happen as a natural consequence of a counterparty's action, and I tell the counterparty that he can avoid the consequence by refraining from the action, and he does refrain from the action, I have not coerced him.<sup>29</sup> Rather, I have made a prediction or a warning. Coercion requires more than this. It requires that I have the ability (or apparent ability) to *cause* the negative consequence, that my counterparty understands this, and that my counterparty declines to take an action he would otherwise take in order to avoid the consequence.<sup>30</sup>

Coercion claims rest on two related moral duties tied to the value of liberty: First, the moral duty not to take advantage of another's vulnerability to override that person's will (this is a violation of the Kantian maxim not to use others as a means to one's own ends);<sup>31</sup> and second, the moral duty not to harm.<sup>32</sup> All coercion involves the violation of both these principles, albeit in particular ways that make the definitional endeavor so taxing.

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28. See Hill, *supra* note 23, at 292–96 (critiquing theories distinguishing threats from offers). The typical formulation posits that threats promise to make the recipient worse off than he would otherwise be in relation to some baseline (often the recipient's expectations), while offers promise to make the recipient better off than he would otherwise be in relation to that baseline. See Westen, *supra* note 15, at 571–73; WERTHEIMER, *supra* note 20, at 204–11; Vinit Haksar, *Coercive Proposals*, 4 POLITICAL THEORY 65, 66 (1976) (“Threats worsen your position compared to what you can expect, whereas (non-coercive) offers do not.”). Expectations also seem to play a key role in Kent Greenawalt's definition of manipulative threats. Greenawalt argues that threats are illegally coercive only if they are “situation-altering,” by which he means the threatened action is not what would take place in the “normal” (expected?) course of events. See Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 Nw. U. L. REV. 1081 (1983).

I avoid this semantic tangle by focusing not on whether a proposal is a threat or an offer, but on whether it satisfies either party's interests.

29. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 453 (1974).

30. See Westen, *supra* note 15, at 569. Westen defines coercion as:

A constraint or promise of constraint, Y, that X[1] knowingly brings to bear on X in order that X choose to do something, Z[1], that X would not otherwise do and that X does not wish to be constrained to do, where X knows that X[1] is bringing or promising to bring Y to bear on him for that purpose, and where the constraint renders X's doing Z[1] more eligible to X than it would otherwise be.

31. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 38 (Mary Gregor ed. & trans., 1998) (“[A]ct that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”).

32. See Haksar, *supra* note 28, at 69 (“[F]or a proposal to be coercive, it is necessary that the proposal should involve a wrong to the recipient.”).

### A. Nozick on Coercion and Free Will

As detailed above, coercion is normally considered a social evil, in part because it renders actions that appear to be volitional involuntary. It violates norms favoring freedom of the will.<sup>33</sup> The difficulty is that we impair each other's freedom of action all the time. Every action we take changes the world and, as a consequence, constricts the range of possible actions for others. To understand the social limits on leverage in negotiation, we need a way to distinguish inappropriate infringements on others' freedom of action from mundane and unobjectionable consequential actions of daily life.<sup>34</sup>

Robert Nozick addresses this dilemma with his theory of voluntary exchange. This theory distinguishes between facts of nature and willful acts of others. A person's actions are voluntary if limited by facts of nature. For example, I cannot fly due to physical laws, but this does not render my decision to walk involuntary.<sup>35</sup> On the other hand, if another person takes an action that limits my options, whether my decision is voluntary or involuntary depends on whether the other person had the right to act as he did. An action is voluntary even if constrained by another person so long as the other person had the right to act in the way she did.<sup>36</sup> When a person makes the choice between accepting a particular job at a particular wage or starving, his choice is voluntary as long as all the other people whose actions resulted in that constraint were acting within their rights.<sup>37</sup>

Nozick's approach to voluntariness raises the question of what it means to "act within one's rights." Clearly a person does not act within his rights if he engages in illegal conduct, such as physical violence. But that is not typical. Coercion usually involves more subtle means, and often the threatened conduct would be legal examined

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33. These norms have deep roots in the western tradition. In the *Nichomachean Ethics*, Aristotle took pains to distinguish voluntary from involuntary actions for purposes of defining virtue: "On some actions praise indeed is not bestowed, but pardon is, when one does what he ought not under pressure which overstrains human nature and which no one could withstand." Aristotle, *Ethica Nichomachea*, in INTRODUCTION TO ARISTOTLE 349, 349 (Richard McKeon ed., 1947).

34. See Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1557 (1996) (analyzing Kant's theory of rights and duties) ("Any obligation that a person bears must be presented as part of a system of mutual respect among all persons, not merely as an artifact of one person's demands. People are entitled to assume in the state of nature that their external freedom will be limited only to the extent necessary to harmonize their freedom with that of everyone else in accordance with a universal law . . .").

35. See NOZICK, *supra* note 29, at 262.

36. See also WERTHEIMER, *supra* note 20, at 217.

37. See NOZICK, *supra* note 29, at 262.

apart from the context. This is the "paradox of blackmail." In the words of James Lindgren, "[i]n blackmail, the heart of the problem is that two separate acts, each of which is a moral and legal right, can combine to make a moral and legal wrong."<sup>38</sup> Asking someone for money is not wrong; telling the police that a crime has been committed is also not wrong. But threatening to tell the police that a crime has been committed, while asking for money, is a crime.<sup>39</sup>

Nozick articulates a theory of "productive activities" that helps to resolve this conundrum. For Nozick, the central problem with blackmail is that it is not a productive activity. Productive activities are "those that make purchasers better off than if the seller had nothing *at all* to do with them."<sup>40</sup> If one party pays another not to harm him, there has not been a productive exchange. Blackmail is unproductive because the purchaser (the person being blackmailed) is not made better off after the transaction than he would have been had the blackmailer never entered his life.<sup>41</sup>

Voluntary exchanges occur where both parties are the recipients of productive activities. But there is an important caveat. Nozick considers an exchange voluntary even though it does not confer a net benefit on the purchaser if the purchaser is compensating the seller for forgoing a productive exchange with a third party.<sup>42</sup> So, if a writer is offered money by a publisher to publish a book containing damaging secrets about A, A's payment to the writer to forgo publishing the damaging secrets "counts" as a productive, and hence voluntary, exchange. But the seller of silence may "legitimately charge only what he forgoes by silence," and "[w]hat he forgoes does not include the payment he could have received to abstain from revealing his information, though it does include the payments others would make to him to reveal the information."<sup>43</sup> In other words, he cannot demand more than the actual loss to him from forgoing publication.<sup>44</sup>

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38. James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 670 (1984).

39. *Id.*

40. NOZICK, *supra* note 29, at 84 (emphasis in original).

41. *Id.* Nozick notes an exception for cases in which the paying party deserves to be harmed by the other. *Cf.* Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1962 (1993) (arguing that blackmail threatening to disclose criminality might confer overall economic benefits to society by deterring crime).

42. NOZICK, *supra* note 29, at 86.

43. *Id.* at 85.

44. James Lindgren criticizes Nozick's theory as failing to account for certain types of exchanges that do not constitute blackmail but seem to be unproductive in Nozick's terms. Lindgren uses the example of a person injured by a falling tree who threatens to sue the property owner where the tree stood unless paid compensation.

Nozick's theory of voluntary exchange suggests an important distinction between forms and uses of leverage. When a negotiator employs the leverage that comes from her ability to satisfy the other party's interests or from her willingness to pursue an alternative means of satisfying the negotiator's interests, she is engaged in productive activity in Nozick's formulation. As long as the negotiator proposes to pursue only alternatives that genuinely satisfy her interests, then the most she can request (in the sense of the maximum force her leverage has) is to be compensated for forgoing those alternatives.<sup>45</sup> She is acting within her rights. So imagine that *A*, a homeowner, is concerned that her neighbor *B*'s dog will enter her property and damage something of value. *A* can solve the problem by putting up a fence, or *B* can address the problem by leashing the dog. *A* says to *B*, "I'm planning to put up a fence, but I'll hold off if you agree to leash your dog." *B* wants neither option to come to pass. To the extent *A* is proposing to put up a fence that satisfies her interests, however, she is proposing a voluntary exchange.

On the other hand, an involuntary exchange occurs when a party proposes to impose costs on the counterparty for pursuing the counterparty's alternatives, through actions that do not satisfy the party's interests. What the party proposes to forgo in such a case is not something that entitles him to compensation. If *A* proposes to build an unnecessarily high and unattractive fence (one that even she does not desire), she has no right to be compensated for forgoing that fence. *A* is not acting within her rights, and so, she is not proposing a voluntary exchange. She is attempting to coerce *B*.<sup>46</sup>

Nozick's theory of voluntary exchange provides a valuable starting point for identifying negotiating behaviors that are coercive. However, more work needs to be done to explicate the social norms that regulate leverage in negotiation. Some proposals are morally unacceptable though they result in productive activity in Nozick's sense. By the same token, some proposals that impose costs on a counterparty without satisfying the proposer's interests are morally

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See Lindgren, *supra* note 38, at 699. But that is precisely the case Nozick accounts for by saying a party can fairly ask to be compensated for forgoing an activity that would benefit him. The injured passerby has the right to sue for his injuries, and is merely offering to forego that right in exchange for fair compensation.

45. Wertheimer seems to have a similar conception in mind with his focus on whether the offeror had a preexisting plan to engage in the conduct proposed; that would suggest that the proposal would satisfy the offeror's interests. See WERTHEIMER, *supra* note 20, at 220.

46. Ronald Coase suggests that coercion of this type is equivalent to blackmail. See Ronald Coase, *Blackmail*, 74 VA. L. REV. 655, 657-58 (1988).

acceptable. Nozick does not fully account for these apparent anomalies.<sup>47</sup>

### B. *Westen on the Moral Limits of Coercion*

Peter Westen's attempt to identify the features of a proposal that make it coercive extends Nozick's theory to better encompass moral concerns. Westen attempts to distinguish "threats," which impose "burdens," from "offers," which confer "benefits." He distinguishes threats/burdens from offers/benefits along two axes: the expectations of the parties and the moral standards of society. We can assess whether a proposal is coercive by asking what state of affairs the recipient of the proposal would have expected in the absence of the proposed course of action and what state of affairs the recipient is entitled to expect given society's moral standards. To be coercive, a proposal must leave the recipient "worse off *either* than he otherwise expects to be *or* than he ought to be for refusing to do the proponent's bidding."<sup>48</sup> Westen measures the conditions that "ought" to obtain in terms of legal and moral obligations — in other words, in terms of social norms.<sup>49</sup>

Westen's normative criterion — how a party "ought" to be left — helps to explain why certain exercises of leverage are considered unacceptable even though they involve voluntary exchange in Nozick's sense. For example, a person in urgent need of medical care but with no insurance and very little cash appears at a private hospital. The hospital refuses to provide care unless the person can demonstrate an ability to pay a reasonable fee. The leverage in this situation arises out of the hospital's ability to satisfy the person's interests. The exchange the hospital proposes is productive in Nozick's terms — it would leave the person better off than if the hospital had never existed. It offers a voluntary exchange, which in Nozick's terms is non-coercive. Yet most people in our society would find the refusal to treat a person in dire need of care morally indefensible.<sup>50</sup> In modern

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47. See Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 478 (1980) ("defining voluntariness in [Nozick's] way conflicts with deeply entrenched notions of moral responsibility").

48. Westen, *supra* note 15, at 587–88 (emphasis in original).

49. *Id.* at 586.

50. See, e.g., Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. EMTALA requires hospitals to provide treatment to anyone needing emergency care regardless of ability to pay. *Id.* It reflects the broad societal consensus that it is morally indefensible to refuse medical treatment to a person in severe distress simply because that person lacks financial resources.

America, there is a broad social consensus that people in need of medical care "ought" to be cared for, and Westen's framework accounts for this kind of situation.

Westen's descriptive criterion — whether a proposal would leave a party worse off than she expects — is less well defined. Westen says that we measure what a party "expects" by reference to some baseline, but he never explains how that baseline is identified. The baseline must have an objective reference point, because people may have radically different and irrationally self-serving expectations for what they deserve. Westen gives little guidance on that essential question. I will return to the question of expectations in discussing the legal limits on leverage in Part IV.

### C. *A Note on Distributive Justice and Leverage in Negotiation*

Nozick's conception of voluntariness rests on a view of social norms emphasizing liberty and strong notions of private property over other values. Voluntary exchanges occur when individuals act rationally and within the legal parameters to satisfy their interests. As scholars of law and economics persuasively argue, many common-law rules work to promote wealth-maximization through strong property rights.<sup>51</sup> From a legal standpoint, an emphasis on liberty backed by strong notions of private property is arguably justified as a descriptive matter.<sup>52</sup> As a prescriptive matter, the libertarian test of voluntariness has elegance and the relatively straightforward application that characterizes powerful economic arguments. But many members of our society find the distributive consequences of the libertarian emphasis on strong private property rights unacceptable.

In his influential work on distributive justice and contract law, Anthony Kronman argues that, even for libertarians, contract law should work to promote distributive justice by limiting the ability of a party to "take advantage" of others by exploiting "superior information, intellect, or judgment, in the monopoly he enjoys in regard to a particular resource, or in his possession of a powerful instrument of violence or a gift for deception."<sup>53</sup> He offers a "paretian" limiting principle, one that "forbids us to grant the possessor of an advantage the exclusive right to exploit it for his own benefit unless those excluded

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51. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 357–58 (1990).

52. *Id.* at 359 ("It is probably no accident . . . that many common law doctrines assumed their modern form in the nineteenth century, when laissez-faire ideology, which resembles wealth maximization, had a strong hold on the Anglo-American judicial imagination . . .").

53. Kronman, *supra* note 47, at 480.

from its ownership are thereby made better off than they would be if no one were given a greater right to the advantage than anyone else.”<sup>54</sup> By focusing on the welfare of all those excluded from the advantage, and not just on the individuals involved in a particular transaction, Kronman seeks to promote overall social welfare.<sup>55</sup> His formula requires that “the welfare of *most people* who are taken advantage of in a particular way be increased by the kind of advantage-taking in question.”<sup>56</sup>

Kronman’s theory provides a test for assessing whether contract law promotes distributive justice at a societal level. But contract law operates on a case-by-case basis as courts interpret and enforce, or decline to enforce, specific contractual terms. Individual parties likely have little concern for whether judicial decisions in cases like theirs promote overall social welfare. They are likely to judge the distributive justice of contract law in relation to their own cases. Perhaps the best way to determine whether a minimal threshold of distributive justice has been met in a particular case is to ensure that basic standards of procedural justice are enforced. Empirical negotiation research shows that perceptions of procedural justice contribute directly to perceptions of distributive justice.<sup>57</sup> Parties that believe the process has been fair are more likely to be satisfied with the outcome, and to comply with it, even if the outcome is not objectively favorable.<sup>58</sup> Fortified with the knowledge that parties who believe the process was just tend to believe their outcomes are distributively just, advocates of distributive justice may best achieve their goals by ensuring that contract law promotes procedural justice in bargaining.

Most procedural justice research focuses on process involving third-parties, such as mediation, arbitration, and adjudication.<sup>59</sup> Recently, however, several studies of procedural justice in negotiation have been undertaken.<sup>60</sup> They show that many of the same factors

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54. *Id.* at 493.

55. *See id.* at 487.

56. *Id.* at 487 (emphasis in original).

57. *See* E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL RESPONSIBILITY OF PROCEDURAL JUSTICE* 205 (1988); *see also* Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 388 (2010); Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 761 (2004).

58. *See* E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224 (1993); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 73–74 (1975).

59. *See, e.g.*, Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 792–93 (2001).

60. *See* Hollander-Blumoff, *supra* note 57, at 413.

parties in third-party processes use to assess procedural fairness also apply in negotiation. Specifically, parties in negotiation judge the process to be just when they feel they have been able to express themselves, believe they can trust the other party, and feel they have been treated with courtesy and respect.<sup>61</sup>

The relative absence of rules governing these features of negotiation in the rules of professional conduct for lawyers is evidence of our social reticence to police negotiations to ensure that procedural justice is delivered.<sup>62</sup> The marketplace is expected to regulate procedural justice in negotiation. There is some evidence that market-based solutions work: people "punish" negotiators who treat them unjustly by avoiding future negotiations with those unfair bargainers.<sup>63</sup>

Contract law promotes procedural justice, and in so doing helps promote distributive justice by regulating coercion. Coercion undermines the trust and perception of respect essential for parties to feel they have received procedural justice. While it is true that a test for coercion rooted in a libertarian understanding of voluntariness fails to capture all the factors contributing to distributive and procedural justice, we are unlikely to find a more fulsome test that would work in practice. My modest goal is to identify workable legal standards for assessing exercises of leverage in negotiation to ensure that parties are neither coerced nor taken advantage of in ways that violate basic social norms. As I argue in the next Part, Nozick's libertarian voluntariness principle, as modified by Westen's addition of criteria accounting for non-libertarian views of distributive justice, can effectively ground that effort.

### III. LEVERAGE AND THE STRUCTURE OF NEGOTIATION

The philosophical literature on coercion offers important insight into the circumstances in which proposed exchanges are perceived as inappropriately coercive. Proposals suggesting a voluntary exchange are presumptively not coercive. They may violate norms against overreaching, however, if they leave a party in a position worse than it ought to be in or should reasonably expect to be in. Proposals threatening an action that is not productive are presumptively coercive. They may be acceptable if they would leave a party in a position that it ought to be in or reasonably should expect to be in.

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61. See *id.* at 418.

62. See *id.* at 401-02 ("The rules for negotiation are few and far between, and difficult to enforce.").

63. See *id.* at 415.



The distinction that Nozick draws between productive and unproductive activities suggests a distinction between two different types of leverage. Leverage that operates through the satisfaction of interests, and therefore proposes a voluntary exchange, is normatively different from leverage that operates through the imposition of costs without benefit to either party. Richard Shell seems to have had a similar distinction in mind with his categories of “positive” and “negative” leverage.<sup>64</sup> In Shell’s formulation, positive leverage comes from knowledge of the other side’s interests and the ability to satisfy them.<sup>65</sup> Negative leverage involves threats to take away something the other party has.<sup>66</sup>

In this Part, I use this basic distinction to explore the concept of leverage from the perspective of negotiation theory. I offer definitions of positive and negative leverage that rest on Nozick’s distinction. Although I cannot be certain that I have precisely the same understanding of these terms as Shell,<sup>67</sup> I retain Shell’s terminology

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64. See SHELL, *supra* note 10, at 101–05. Shell actually identifies three types of leverage: positive, negative, and normative. Normative leverage, in Shell’s formulation, derives from the invocation of norms or criteria that the other party feels constrained to accept. *Id.* at 44. Normative leverage arises out of social norms and utilizes principled argument. A negotiator uses normative leverage, for example, when she makes a reasoned argument for why her position is fair under accepted social norms. The pressure her counterparty feels in that situation is rooted in the counterparty’s own sense of moral obligation, backed by social expectations.

By defining leverage as power rooted in consequences, I exclude the pressure created by social expectations from the category of leverage. The pressure of normative leverage is generated internally, deriving from an individual’s need to conform his behavior to his perceptions of himself. It is not a product of the imposition or threat of imposition of consequences generated externally by the negotiating partner. As such, it raises very different legal and ethical issues from those raised by consequential leverage. An application of normative leverage will either succeed or fail, depending on the social force of the norms invoked and the degree to which the counterparty subscribes to those norms. But outside of the potential for misrepresentation, the use of normative leverage rarely carries the risk of legal or ethical sanction. In contrast, when parties impose or threaten to impose consequences on other parties, their actions can trigger a variety of legal and ethical considerations, from extortion to duress to unconscionability, as well as uncovering more subtle moral dilemmas. For these reasons, I exclude normative factors from the category of leverage, and focus entirely on leverage rooted in consequences.

65. See *id.* at 102.

66. See *id.* at 102–03.

67. There may be areas in which our uses of these terms do not quite match. For example, Shell refers to negative leverage as “threat-based” leverage tied to taking away something the other side has. See *id.* at 102. As I define negative leverage, however, it does not necessarily involve taking something away that the other side already has. More often it involves the threat to impose a future cost on the other side for pursuing its alternatives to a negotiated agreement.

because I believe it captures an important conceptual distinction between leverage tied to the satisfaction of interests (positive) and leverage tied to the imposition of costs (negative). I then draw on Westen's criteria to analyze cases in which positive leverage is inappropriate and, conversely, cases in which negative leverage is appropriate.

### A. *The Structure of Negotiation*

Roger Fisher, William Ury, and Bruce Patton showed how the intersecting concepts of *interests* and *alternatives* help to explain negotiation in their groundbreaking book *Getting to Yes*.<sup>68</sup> Interests — our needs, desires, concerns, and fears — are what motivate us.<sup>69</sup> Interests can involve material goods as well as intangible goods, from the bare necessities of food and shelter to luxury and leisure items, to dignity, love, and status.<sup>70</sup> In non-state societies, people often use violence to satisfy their interests. They acquire both material and psychological goods by raiding neighboring peoples.<sup>71</sup> In market-based, liberal societies, people are likely to satisfy their interests through exchange. People negotiate trades in which they give things of value to others in exchange for things they value.

Some interests are non-negotiable, however, in the sense that they are not available for trade. For example, human beings have deep-seated needs for recognition and respect. Recognition and respect are *conditions* for negotiation; they are rarely *subjects* of negotiation. When I agree to negotiate with someone, I implicitly recognize that person's autonomy and worth. When I offer someone money or threaten a person with harm, I may be able to procure acquiescence or even subservience, but I can never know whether I have actually gained respect.<sup>72</sup>

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68. ROGER FISHER ET AL., *GETTING TO YES* 100 (2d ed. 1991).

69. See *id.* at 40–41.

70. For an early attempt to map out a hierarchy of basic human needs, see generally Abraham H. Maslow, *A Theory of Human Motivation*, 50 *PSYCHOL. REV.* 370 (1943).

71. See STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 46–47 (2011).

72. See Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 *GEO. J. LEGAL ETHICS* 739, 756 (2001).

Those sorts of non-negotiable psychological interests have undeniable importance. They can be powerful motivators of human behavior,<sup>73</sup> conferring a different type of leverage than the material interests that are the subject of exchange. When Nozick refers to productive activities leading to voluntary exchange, he refers to trades of negotiable goods. The interests that a negotiator proposes to satisfy or to forego in a voluntary exchange must be interests for which the negotiator can be compensated by the counterparty. Normally, these will be material interests. Proposals that satisfy either the offeror's or the offeree's compensable, material interests are normally not coercive.

By identifying and ranking interests (whether available in trade or not), a potential negotiator can make rational choices about the various alternative courses of action open to him. The negotiator begins by identifying the courses of action available to satisfy his interests. The alternative course of action that best satisfies the negotiator's interests is his "best alternative to a negotiated agreement" ("BATNA.") A negotiator's BATNA is the alternative the negotiator would resort to if he fails to reach agreement with the other party to the negotiation. For example, if I am considering purchasing a house, my alternatives include all the other options I have for finding a residence. Those alternatives might include staying in my current residence, purchasing any of several other houses, or renting. I identify my best alternative by prioritizing my interests — cost, location, size, amenities, etc. — and assessing the alternatives to find the one that best satisfies my interests.

After identifying a BATNA, a negotiator can then attempt to determine a "reservation point" ("RP"), which is the point at which the negotiator should walk away from the table rather than reaching agreement.<sup>74</sup> In the home-buying scenario, my RP is the value (or cost) to me of the best alternative living arrangement available to me. If a comparable home to the one I am considering is available for \$250,000, I would not want to spend more than that on the one I am considering.<sup>75</sup> My reservation point is \$250,000. RP is thus roughly

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73. See ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 15 (2005) (describing "core concerns," including appreciation, affiliation, autonomy, status, and role, that motivate negotiators).

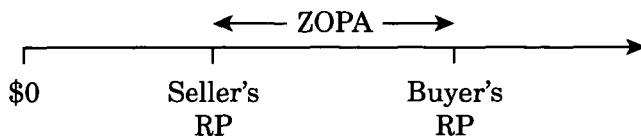
74. See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791–92 (2000).

75. I assume for purposes of simplicity that the two homes satisfy all my non-monetary interests identically.

equivalent to a "bottom line." It represents the point at which a proposed agreement better satisfies my interests than my best alternative to that agreement.<sup>76</sup>

Rational negotiators should prepare for a negotiation by identifying their BATNAs and then determining their RPs based on those BATNAs.<sup>77</sup> They should also attempt to estimate the other side's RP. In a negotiation in which the parties are sufficiently adverse to resist complete transparency, much of the bargaining process consists of attempts to acquire information to locate the other party's RP, while conveying the impression that a party's own RP is more favorable than it really is.<sup>78</sup> Arguments about the likelihood of successful litigation, or the availability of a comparable house at a lower price, represent attempts to persuade the counterparty that a negotiator has better alternatives than the counterparty has acknowledged.<sup>79</sup> Eventually, after exchanging information and arguments about the alternatives available to them, the parties gain a sense (which may or may not be accurate) of the parameters of a possible agreement.

A simple, zero-sum negotiation, such as a negotiation in which sales price is the only issue, can be visually depicted as a series of points on a line. The point at the far left represents a price of zero, and the point at the far right represents the highest possible price. The Buyer's RP is the price at which the Buyer could purchase the item from an alternative source, and the Seller's RP is the price the Seller could obtain from an alternative buyer. If the Buyer would pay more to obtain the item from an alternative source than the Seller could obtain from an alternative buyer, then a positive bargaining zone, sometimes referred to a Zone of Possible Agreements ("ZOPA") exists. This situation can be depicted as follows:



76. Because non-quantifiable interests often trump quantifiable interests, reservation points are rarely susceptible to precise calculation. The concept of a reservation point has greatest utility in commercial negotiations and other contexts involving trades of quantifiable items.

77. See ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 22-23 (2000).

78. See Korobkin, *supra* note 74, at 1793.

79. See *id.* at 1799.

In such a negotiation, both parties are better off reaching a deal with each other than they would be going with their alternatives. The Buyer should be willing to pay some amount above the Seller's RP and the Seller should be willing to accept some amount below the Buyer's RP. They should be able to reach agreement, provided they can agree on how to divide the cooperative surplus represented by the ZOPA.<sup>80</sup> For instance, in the home-buying example, if a comparable house is available for \$250,000 (my RP) and the seller has only one other potential purchaser, who is willing to pay no more than \$225,000, then a positive ZOPA of \$25,000 exists. We should settle on a price somewhere between \$225,000 and \$250,000.<sup>81</sup>

Negotiation involves two conceptually distinct activities. To use the familiar metaphor, the parties first determine the size and composition of the pie, then decide how to split it.<sup>82</sup> Russell Korobkin labels these the "zone-definition" stage and the "surplus allocation" stage.<sup>83</sup> In the zone-definition stage, the parties exchange information and make arguments in order to determine the ZOPA. Assuming a positive bargaining zone exists, so both parties are able to offer the other a deal better than the other's RP, the parties must divide the resulting cooperative surplus. They make offers and concessions in an attempt to arrive at a mutually-agreeable deal point.<sup>84</sup> The parties might split the cooperative surplus evenly or divide it with one party capturing more than the other. A variety of methods may be employed to allocate the cooperative surplus, including reference to objective criteria such as market prices,<sup>85</sup> invocation of norms such as fairness,<sup>86</sup> and reliance on power tactics such as claiming a lack of

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80. See MNOOKIN ET AL., *supra* note 77, at 18–21.

81. In practice, negotiations always involve both interests and emotions that cannot be reduced to a point on a line. The diagram is simply a useful model to understand the concept of cooperative surplus.

82. Other negotiation scholars have used different terminology to capture this same basic structure. David Lax and James Sebenius, among others, distinguish attempts to create value from attempts to claim value. DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 30–33 (1986). Charles Craver refers to the two steps as the "information stage" and the "distributive stage." CHARLES B. CRAVER, *SKILLS & VALUES: LEGAL NEGOTIATION* 30, 38 (2009).

83. See Korobkin, *supra* note 74, at 1791.

84. *Id.*

85. See FISHER ET AL., *supra* note 68, at 85; SHELL, *supra* note 10, at 42–43.

86. See Nancy Welsh, *Perceptions of Fairness*, in *THE NEGOTIATOR'S FIELDBOOK* 165 (Andrea K. Schneider & Christopher Honeyman eds., 2006) ("Negotiators rely upon their assessments of distributive and procedural fairness in making offers and demands . . ."); Korobkin, *supra* note 74, at 1821.

authority to agree to settlement points beyond a particular threshold.<sup>87</sup>

Leverage can operate at the zone-definition stage and the surplus-allocation stage. Parties begin bargaining only if they each have something that satisfies at least one interest of the other. The ability to satisfy the counterparty's interests gives a party leverage over the counterparty. The value of that leverage is the compensation the party can demand in exchange for satisfying the counterparty's interests. The minimum value is simply the party's RP, and it is determined by the available alternatives to the negotiated agreement. In this way, leverage sets the bargaining zone. If a party is in a position to impose a cost on the counterparty, it can threaten to harm the counterparty if they do not agree to particular terms, choosing to pursue their BATNA instead. In that way, leverage can be used to establish a deal point, and may even be used to push a deal point outside the bargaining zone.

### B. *Defining Positive and Negative Leverage*

The distinction between positive and negative leverage is the distinction between the ability to satisfy the other party's interests and the ability to impose costs on the other party in retaliation for the other party pursuing its BATNA. In Nozick's terms, positive leverage involves trades of productive activities, and produces voluntary exchange, while negative leverage involves threats of unproductive activities.<sup>88</sup>

#### 1. *Positive Leverage: Consequences Rooted in Interests*

Positive leverage operates through the satisfaction and refusal to satisfy interests. A party possessing something valuable in trade can vary proposed terms of exchange to induce the counterparty to add value to the proposed exchange. If *A* possesses three items that *B* values, *A* might open bargaining by offering only the first, and as bargaining progresses *A* might propose to add the second and third in exchange for additional concessions from *B*. Similarly, if *B* needs the

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87. See MNOOKIN ET AL., *supra* note 77, at 213-14.

88. In many cases, the distinction between positive leverage and negative leverage is roughly equivalent to the distinction between "carrots" and "sticks" in the common negotiation metaphor. But some common examples of positive leverage, such as strikes, appear to inflict harm on the counterparty and so do not comfortably fit within the carrots-and-sticks metaphor. To avoid confusion, I also avoid the metaphor.

items quickly, A might offer to speed delivery in exchange for concessions. By adjusting factors such as quantity, quality, time, price, and other conditions of exchange, A uses B's interests to extract value from the exchange. These are examples of positive leverage, because they depend on A's ability to satisfy B's interests.

If a party has the means to satisfy the interests of another, then it also has the power to deny satisfaction of the other's interests. A party with something of value can exercise positive leverage by withholding agreement. Positive leverage can be wielded in ways that have negative consequences for the counterparty. If B is dying of thirst and A has the only water around, A has tremendous positive leverage over B. By withholding the water, A can force B to give up a great deal in exchange for satisfying B's interest.

Which party has greater positive leverage is determined primarily by BATNAs — the best option available to a party other than the options put forward by a negotiating counterparty. If the thirsty B is surrounded by water vendors, then he has many alternatives to dealing with A. He has a good BATNA, and so A's leverage declines. If B has shelter and A is on the verge of dying from exposure to the sun, B has leverage over A. The extent of his leverage depends on the extent to which A has other alternatives for finding shelter.

Positive leverage thus operates through the intersection of interests and alternatives. I have positive leverage if I possess something that my counterparty wants or needs, and I have more leverage if my counterparty has limited alternatives for satisfying that interest. I can deploy that leverage by offering to satisfy my counterparty's interests, or by withholding satisfaction of his interests to extract concessions.

Many common negotiation strategies involve positive leverage though they appear at first to operate through negative consequences.<sup>89</sup> For example, labor strikes are an example of positive leverage. When a union negotiates with management over a collective bargaining agreement, it negotiates the terms under which it will provide its labor to management. Its leverage derives from its ability to satisfy the employer's need for its labor. A strike is simply the withholding of that labor. The power of a strike derives from the power to withhold something the other side values.

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89. See, e.g., Rebecca Ford & Mary A. Blegen, *Offensive and Defensive Use of Punitive Tactics in Explicit Bargaining*, 55 Soc. PSYCHOL. Q. 351, 352 (1992) (describing labor strikes as a punitive tactic).

Strikes are an example of the most elemental ways of exercising positive leverage: patience. A negotiator with an actually or apparently strong BATNA can simply refuse to agree until the counterparty makes concessions. Patience is especially potent where the parties have different time preferences. For example, where one party needs funds quickly to satisfy some other need that party's RP will diminish in value as time passes. The other party can favorably shift the bargaining zone by holding out and refusing to make concessions.<sup>90</sup>

Commitment tactics are another common way of exercising positive leverage. Most commitment tactics are designed to truncate the ZOPA by establishing that the negotiator will not accept terms worse than a particular threshold, even if some worse terms would be superior to her RP. One common commitment tactic involves emphasizing the reputational cost of agreeing to a deal that concedes a significant portion of the bargaining zone. For example, insurance companies sometimes refuse reasonable settlement offers even where liability is clear, in order to gain or reinforce a reputation for intransigence that will discourage future claims.<sup>91</sup> In the labor relations context, a union negotiator may pledge to his membership not to accept terms worse than a certain benchmark, thereby committing himself to achieving that benchmark lest he incur the wrath of the members.<sup>92</sup> Similarly, Agents negotiating on behalf of absent principals will often claim — either accurately or falsely — to have limited authority to negotiate a deal beyond a certain amount.<sup>93</sup>

A third method of exercising positive leverage — one that operates much like commitment tactics — is irrationality. Like commitments, irrationality represents an attempt to truncate the bargaining zone at a point superior to the negotiator's RP. A negotiator may convince a counterparty that he is willing to walk away and accept an

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90. See Korobkin, *supra* note 74, at 1810. Korobkin characterizes the use of patience in this way as a form of commitment. *Id.*

91. See Jay M. Feinman, *Incentives for Litigation or Settlement in Large Tort Cases: Responding to Insurance Company Intransigence*, 13 ROGER WILLIAMS U. L. REV. 189, 191–92 (2008).

92. See FISHER ET AL., *supra* note 68, at 142.

93. See DAWSON, *supra* note 14, at 47. Russell Korobkin characterizes commitment tactics as attempts to alter the bargaining zone, and thus as tactics aimed at the zone-definition stage. Korobkin, *supra* note 74, at 1808. As he acknowledges, though, they can also be understood as attempts to claim value in the surplus allocation stage. *Id.* at 1817 n.79. Either way, commitment tactics gain force from positive leverage: the negotiator offers to satisfy the counterparty's interests at a level superior to the counterparty's alternatives, while threatening to walk away and resort to the negotiator's own alternatives if the counterparty presses for additional value.



inferior alternative by demonstrating strong emotions, such as anger.<sup>94</sup> Emotions may be deeply felt or feigned. Or a negotiator may simply refuse to acknowledge the weakness of her BATNA, despite all evidence or rational argument, to capture a greater share of the cooperative surplus than norms of fairness or objective factors would indicate.

All of these tactics involve attempts to capitalize on positive leverage. Their efficacy comes from changing the counterparty's perceptions of the value of the alternatives available to the parties. The distinguishing feature of these uses of positive leverage is that they cannot compel a party to enter into a deal that is worse than the party's RP. They may change a party's perception of the value of its BATNA — thereby changing its calculation of its RP — and they may lead a party to accept a deal that concedes most or all of the cooperative surplus to the other, but they cannot force a party to accept a deal worse than its RP.

This does not mean positive leverage is always benign. Negotiators have fairly wide latitude to “bluff” and “puff” about their alternatives,<sup>95</sup> but misrepresentations about material facts can constitute fraud. In one frequently cited case, a commercial landlord negotiating with a tenant over a rent increase falsely claimed that another potential tenant was willing to pay the requested increase and threatened eviction if the current tenant did not agree to the increased rate.<sup>96</sup> In this way, the landlord fabricated positive leverage. The tenant agreed to the landlord's terms, but later discovered the falsehood and sued for deceit.<sup>97</sup> The court found the misrepresentation actionable.<sup>98</sup>

In cases of extreme disparities in bargaining power, positive leverage can be used in ways that impose what non-libertarians generally consider to be unacceptable hardship on a counterparty. The example of a hospital demanding payment from a low-income patient in dire need of care demonstrates that point.<sup>99</sup> The patient needs treatment and has no real alternative to get it. His RP is effectively

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94. See Korobkin, *supra* note 74, at 1809.

95. See MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2012) (“Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily [not taken as statements of material fact.]”).

96. *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 103 N.E.2d 692, 692–93 (Mass. 1952).

97. *Id.* at 693.

98. *Id.* at 695.

99. See Francis J. Serbaroli, *The Federal “Patient Dumping” Prohibition*, N.Y. L.J., Dec. 3, 1993, at 3.

everything he can pay. The hospital can demand that the patient exhaust his resources and it will still be proposing a voluntary exchange because it will be offering a benefit better than the patient's BATNA. But society does not condone that outcome.

This is where Westen's normative criteria for coercion — what a party "ought" to get — come into play. Social norms dictate that a person in acute need of care should get care, regardless of ability to pay. The hospital is not acting within its rights to demand that the patient exhaust his resources, even though that option is better than the patient's alternatives. I return to this topic later in my discussion of the doctrines of duress and unconscionability to show how the law protects against overreaching deployments of positive leverage.

## 2. *Negative Leverage: Consequences Rooted in Costs*

Negative leverage, like positive leverage, is tied to the concept of alternatives, but in a different way. Negative leverage arises out of the ability to impose retributive costs on a counterparty if the counterparty pursues its BATNA. In its most crude form, negative leverage could involve a threat to do bodily harm. In my example above, *A* could threaten to kill *B* if *B* does not buy *A*'s water instead of buying water from another vendor. Here *A*'s interest is in selling his water and *B*'s interest is in receiving water at the most reasonable price. *A*'s proposed course of conduct — killing *B* — serves the interests of neither. Its sole purpose is to impose a cost on *B* to discourage *B* from pursuing his BATNA.<sup>100</sup>

In practice, people use negative leverage more often than negotiation literature tends to acknowledge. Some uses of negative leverage are considered benign, while others raise serious moral and legal concerns. Consider the case of Anthony Digati. Digati, a former insurance agent with New York Life, believed he had been misled into paying \$49,500 in premiums for a variable life insurance policy he didn't want.<sup>101</sup> He demanded that the company refund his premiums, and when it declined, he decided to escalate matters. He created a website called NewYorkLifeProducts.com, on which he attacked New

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100. *A* might also have an irrational desire to harm *B*. See MNOOKIN ET AL., *supra* note 77, at 166 (noting that "emotions cloud a party's judgment and make it more difficult to reach agreement" and that "anger, resentment, and revenge may motivate litigants more than rationality"). Following most negotiation models, I exclude the possibility of *A*'s irrational desire to harm *B* from my analysis of *A*'s legitimate interests. See *id.* at 174–75 (advocating that lawyers adopt problem-solving strategies to encourage rational value-creation).

101. See Alison Gendar, *Anthony Digati Arrested for Allegedly Threatening New York Life with Email Spam Attack*, N.Y. DAILY NEWS, March 8, 2010.

York Life for misleading the public. Then he sent a series of e-mails to New York Life officers demanding \$198,303.88, or quadruple his paid premiums. He told the officers that if they did not pay that amount by a given date, he would launch an e-mail spam campaign against the company, sending out two million negative e-mails every day for three weeks.<sup>102</sup>

Digati was subsequently arrested in California, a federal magistrate judge finding probable cause to believe he engaged in extortion.<sup>103</sup> His attempt at leverage failed because he crossed a relatively bright line. Spamming of the type Digati contemplated is illegal, and so is a threat to engage in spamming.<sup>104</sup> But had he stopped short of his spam threat and simply created a website on which he aired his grievances with New York Life, he probably would have provoked little reaction from New York Life and none from the local prosecutor's office. Assuming he did not post false information, posting complaints about the company would have been an unremarkable activity. Dozens of websites exist for the sole purpose of allowing customers to post complaints about companies. A consumer who threatens a business with a bad review on Angie's List unless the business redresses a legitimate grievance has done nothing wrong, as long as the review is not defamatory.<sup>105</sup> If the business owner agrees to redress that grievance to avoid the bad review, no court will void the agreement.

Negative leverage is a regular and unremarkable feature of labor negotiations. I explained above why a labor strike is an example of positive leverage — it operates by withholding the thing that the other side values. In contrast, picketing is an example of negative leverage. The picketing is designed to generate community pressure on the recalcitrant employer. Its purpose is to impose an exogenous cost on the employer if the employer resorts to its alternative, which

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102. See Warren Richey, *How a Client Tried to Extort an Insurance Giant — And Failed*, CHRISTIAN SCI. MONITOR, April 22, 2010. Digati told New York Life that if his deadline passed without payment, his demand would increase to \$3 million. "I am going to cause you millions of dollars in lost revenue, good faith and general trust in your company," he said in the e-mail. "I have absolutely nothing to lose or any fear of retaliation, no judge in the world is going to rule for a 200 billion dollar company when there is a lonely customer that you stole from." *Id.*

103. *Id.*

104. See Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. § 7701 (2012).

105. See Shauna L. Spinoso, *Yelp! Libel or Free Speech: The Future of Internet Defamation Litigation in Massachusetts in the Wake of Noonan v. Staples*, 44 SUFFOLK U. L. REV. 747, 754–55 (2011) (citing cases in which online reviewers have been sued for defamation).

is typically either to stop work entirely or to employ replacement workers.

The distinguishing feature of negative leverage is its detachment from the satisfaction of negotiable interests. Picketing is not something that the employer desires in trade, and standing alone, it does not satisfy the union's interests in attaining particular working conditions. Except for the pressure it can put on the employer, picketing serves no material purpose for the union members, and in fact involves a cost to them (they must spend their time walking a picket line instead of engaging in other productive activity). At most, the picketing allows the employees to express their frustration in a public way. Its only benefit to them — again, divorced from its potential to influence the employer's conduct — is the psychological benefit that union members may feel of standing up for themselves and taking retaliatory action, and whatever deterrent benefit they get from retribution.

A proposal employs negative leverage if the proposed conduct, standing alone, does not serve the offeree's interests and serves no interests of the offeror other than (non-negotiable) psychological interests and the deterrent effects of retribution. Consider a different picketing example related in *Getting Past No*. Ury describes a negotiation in which a group of tenants attempted to persuade their landlord to repair their broken plumbing. When the landlord refused, the tenants picketed in front of his suburban home, causing his neighbors to pressure him to take action to mollify the tenants and stop the picketing.<sup>106</sup>

Ury cites this as an example of effective use of an alternative — the tenants' alternative to negotiating being picketing. That suggests this is an example of positive leverage. While picketing was an 'alternative' for the tenants, it was not an alternative in the BATNA sense. A BATNA is a course of action that a party would take to satisfy her interests if she is unable to reach agreement with the other party. It is the substitute for the proposed agreement. In Ury's example, the tenants' interest is having a place to live with working plumbing. Their alternatives for achieving that interest include pursuing judicial or administrative processes that could legally compel the landlord to fix the plumbing, taking other action such as fixing it themselves, or moving to a different building.

If the tenants had numerous other apartments available to which they could move, or a very strong legal case, they would have

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106. See WILLIAM URY, *GETTING PAST NO* 147 (1991).

good alternatives and positive leverage. Picketing the landlord's home, in contrast, is a pressure tactic used in conjunction with the negotiation to compel the landlord to reach agreement on terms favorable to the tenants. Standing alone, it satisfied neither the landlord's nor the tenants' material interests. Picketing benefited the tenants solely because it allowed them to impose a cost on the landlord for pursuing his best alternative, which was to do nothing. It constituted negative leverage because the leverage was rooted in costs imposed rather than interests satisfied.

In sum, the purpose of negative leverage is to compel the other side to agree on terms that are not dictated either by the available alternatives or by other factors, such as charisma, fairness or objective criteria. It increases the costs of not reaching agreement. A party may become willing to accept terms that are worse for that party than the deal points that would otherwise guide resolution. To the extent that negative leverage benefits the party employing it, the benefits are psychological and/or indirect, in the form of deterrence.

Psychological benefits are hardly unimportant. They routinely take precedence over material interests. Game theory studies show that people will decline material benefits when they feel they are being treated unfairly. For example, in ultimatum games two players are offered an amount of money. One player in the dyad is given the authority to propose a division of the money between them. If the other accepts the proposed division, both players get the money. But neither gets any money unless the other agrees to the proposed division.<sup>107</sup> In these games, people often reject a proposed division — thereby depriving themselves *and* the other party of a windfall benefit — if they feel that the proposed division is unfairly one-sided.<sup>108</sup>

People often attach similar importance to retribution or revenge.<sup>109</sup> They feel a need to punish one who they feel has harmed

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107. See Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 753 (2004).

108. See Paul Pecorino & Mark van Boening, *Fairness in an Embedded Ultimatum Game*, 53 J. LAW & ECON. 263, 263 (2010) (summarizing results of laboratory ultimatum games in which recipients routinely refuse offers of less than one-third of the surplus).

109. See Noreen Stuckless & Richard Goranson, *The Vengeance Scale: Development of a Measure of Attitudes Towards Revenge*, 7 J. SOC. BEHAV. & PERSONALITY 25, 26 (1992) (distinguishing between retribution and revenge).

them, and they get psychological satisfaction from doing so.<sup>110</sup> In addition to the psychic benefits it offers through the assertion of autonomy and defense of honor, retribution serves an important deterrent function. Retaliation in response to an attack makes clear to both the attacker and the world that future hostile action will entail costs for the initiator.<sup>111</sup> Parties who fail to retaliate against attacks may encourage further attacks, costing them in the long run.<sup>112</sup>

Beyond immediate psychic and deterrence benefits to those who employ them, exercises of negative leverage can have important social benefits. "Altruistic punishment" is critical to successful human cooperation.<sup>113</sup> The willingness of individuals to punish others, even at a cost to themselves, for uncooperative behavior helps to promote cooperation generally.<sup>114</sup> Negative leverage is not necessarily bad. In fact, it appears to be essential in some contexts.

However, many exercises of negative leverage violate social norms against coercion. In Westen's terms, a person should not be left worse off than she would have expected to be in the absence of the proposal employing the leverage.<sup>115</sup> So what does a party have a right to expect? At a minimum, she has a right to expect that, at the end of the negotiation, she will not be worse off than she would have been if the negotiation had not taken place at all. If she had never negotiated with the other party, she would have pursued her best available alternative. Her expectations are tied to her BATNA. A party is entitled to expect a bargain that is no worse than its best alternative to a proposed agreement. A party should not be coerced into accepting a deal worse than its RP would be in the absence of the costs imposed by the counterparty through the use of negative leverage. A deployment of negative leverage that merely pressures the counterparty to accept a deal point within the ZOPA can transgress a variety of social norms, but it does not rise to the level of coercion.<sup>116</sup>

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110. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 309 (1831) ("Every kind of satisfaction, as it is a punishment to the offender, naturally produces a pleasure of vengeance to the injured party.").

111. See Ford & Blegen, *supra* note 89, at 352.

112. See ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 29-37 (1988).

113. See Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 *NATURE* 137, 138-39 (2002).

114. *Id.* at 137-38.

115. See *supra* note 28 and accompanying text.

116. See Ford & Blegen, *supra* note 89, at 352 (discussing offensive and defensive uses of punitive negotiation tactics). In some situations, such as the case involving the striking tenants, a party uses negative leverage to level the playing field against a

I do not mean to suggest that a formalist algorithm built to spot RPs will precisely determine the moment when an exercise of negative leverage crosses a line into inappropriate coercion. The values we attach to our interests and alternatives are far too variable.<sup>117</sup> Furthermore, the concept of a stable RP falls apart in multi-party negotiations.<sup>118</sup> Particularly in commercial cases, however, RPs are often available in the form of market prices. Even in more complex cases, conceptualizing limits on negative leverage in terms of BATNAs and RPs can help both ethical and legal evaluators make judgments about when the use of negative leverage should be considered illegitimate. I argue when discussing the contract doctrine of duress that courts make these judgments, whether or not they consciously apply this methodology.

### C. *The Borderland Between Positive and Negative Leverage*

Because both positive and negative leverage are linked to the value of the parties' alternatives, many uses of leverage involve positive and negative elements. Litigation is an example. Negotiation texts commonly refer to litigation as a BATNA because settlement and litigation are the alternative ways for the plaintiff to receive compensation for his injuries.<sup>119</sup> From an economic standpoint, a litigation settlement is a sales transaction in which the plaintiff "sells" his cause of action to the defendant.<sup>120</sup> In theory, the parties work out a

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negotiating partner who she perceives to be employing power tactics to gain a disproportionate share of the cooperative surplus. "Fighting fire with fire" in that way would not violate the party-expectation norm because the counterparty has no right to expect any particular outcome within the zone of possible agreements.

117. See Noah Susskind, *Wiggle Room: Rethinking Reservation Values in Negotiation*, 26 OHIO ST. J. ON DISP. RESOL. 79, 88 (2011) (explaining difference between "decided" and "revealed" reservation values). Fisher, Ury, and Patton, who created BATNA, never used the term "reservation point," even in their revised edition with Bruce Patton, though the term was in wide circulation at that time. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 769 (1984).

118. See RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 308 (2d ed. 2009).

119. See Korobkin, *supra* note 16, at 868.

120. See STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* 239 (2d ed. 2007).

settlement with reference to the value of the cause of action, measured in terms of the expected recovery and the costs of pursuing adjudication.<sup>121</sup> The defendant can affect the costs of pursuing adjudication by defending more or less vigorously. Since the pursuit of litigation is the defendant's BATNA, as well as the plaintiff's, this is a form of positive leverage. On the other hand, the potential exists for the defendant to engage in litigation conduct that would be unnecessary for the effective maintenance of its defense and pursued solely to increase the costs to the plaintiff of pursuing litigation. This is an example of negative leverage.<sup>122</sup>

For litigation, the line between positive and negative leverage is hazy. A minimum level of litigation activity is both required and expected when parties contest disputed claims. Judicial decisions are required, discovery taken, motions filed, and experts hired and prepared. These activities cost money for all parties. Accordingly, some reasonable litigation cost must always be factored in when determining the "value" of the claim that is the subject matter of the negotiation between the plaintiff and the defendant.

Simply by asserting its right to pursue a claim or defense, a party changes the value of the cause of action being sold by the plaintiff and bought by the defendant. Litigation activity in this sense is a form of positive leverage. At the opposite end of the spectrum, the pursuit of frivolous claims or defenses constitutes negative leverage. To the extent no genuine claim or defense is at stake, settlement negotiations do not involve anything of actual value to either party. The sole purpose of frivolous litigation is to impose a cost on a party for pursuing its litigation alternative.<sup>123</sup> Much litigation conduct falls

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121. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

122. See WERTHEIMER, *supra* note 20, at 42 (discussing frivolous litigation as an instance of contractual duress).

123. See Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1849 (2004) ("Civil litigants often exploit the litigation process strategically for private gain at the expense of social welfare. One of the most troubling abuses concerns 'frivolous' litigation, and particularly litigation aimed at obtaining a 'nuisance-value settlement.' To employ a nuisance-value strategy, a litigant asserts a plainly meritless claim or defense in order to extract a payoff based on the cost the other party would incur to have the claim or defense dismissed by the court under a standard dispositive motion, like summary judgment.") For an examination of the incentives at work in nuisance suits, see Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988).



between those extremes, and it can be difficult to tell whether litigation conduct is necessary for the assertion of a claim or defense or is frivolous overkill. Litigation conduct in that middle band carries elements of both positive and negative leverage.<sup>124</sup>

The line between positive and negative leverage can also be nebulous in many bargaining situations outside of litigation. Richard Shell gives as an example of effective negative leverage a bargaining ploy Donald Trump used when he was seeking to build his Trump Tower in New York City.<sup>125</sup> Trump needed the air rights over the building occupied by Tiffany & Co. Tiffany did not want to sell. Trump presented Tiffany's ownership with two options. If granted the air rights, he promised to build an attractive building melding with the original architecture. If he was not granted the air rights, he claimed he would be forced by zoning regulations to build a monstrously ugly building overshadowing Tiffany. Tiffany granted the air rights.

If constructing the ugly building was Trump's best alternative to the proposal including air rights — then this was an example of positive leverage. The proposal Trump offered was his alternative means of satisfying his interests. On the other hand, if Trump concocted the story — if the ugly building he described would not have satisfied his interests because other, better options were available — it was an example of negative leverage. The sole purpose of the proposal was to impose a cost on Tiffany for pursuing its alternatives. Constructing the ugly building would not benefit either Trump or Tiffany.

Though positive and negative leverage are not separated by a bright line, the distinction is important from both a moral and a legal perspective. Because negative leverage can be used to pressure a party to accept a deal worse than its RP, negative leverage carries coercive power that positive leverage does not. Positive leverage carries a different set of risks, primarily the risk of abuse of power. In the next Part, I will show how the contract doctrines of duress and

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124. Counterclaims often appear to be instances of negative leverage. For example, in the late-1990s intellectual property battle between Digital Equipment Corp., a computer manufacturer, and Intel, a maker of processors, Digital sued Intel, alleging patent infringement. Intel counterclaimed, asserting that Digital misappropriated Intel's technology. It seems unlikely that Intel would have brought an independent action against Digital for misappropriation, because that claim was tenuous at best. But asserting the counterclaim increased Digital's costs of pursuing its litigation alternative, conferring negative leverage on Intel. See *MNOOKIN ET AL.*, *supra* note 77, at 243–45 (describing dispute between Digital and Intel).

125. SHELL, *supra* note 10, at 103.

unconscionability have evolved to place different legal strictures on these two types of leverage.

#### IV. LIMITS ON LEVERAGE IN THE LAW OF CONTRACT: DURESS AND UNCONSCIONABILITY

As a legal matter, negotiations are regulated primarily after the fact by contract law. Rules of professional responsibility dictate certain minimal requirements for the conduct of negotiations — no misrepresentations of material fact,<sup>126</sup> no threats of criminal prosecution in the negotiation of civil disputes<sup>127</sup> — but these rules offer very little specific guidance and apply only to lawyer-negotiators. The criminal law provides some limits on the use of threats and blackmail,<sup>128</sup> but it leaves the vast majority of negotiation behaviors unregulated. Negotiators typically learn their bargaining practices violated a legal norm only when a court intercedes to declare an agreement unenforceable — because it was reached on the basis of fraud, mistake, duress, unconscionability, or undue influence<sup>129</sup> — or to impose an obligation in the absence of formal agreement based on the doctrine of promissory estoppel.<sup>130</sup>

In the law of contracts, the two doctrines that most directly regulate the use of power in negotiation are the doctrines of duress and unconscionability.<sup>131</sup> In general, courts enforce contracts even where

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126. See MODEL RULES OF PROF'L CONDUCT R. 4.1 (1983).

127. See NEW YORK RULES OF PROF'L CONDUCT R. 3.4(3) (2009).

128. See MODEL PENAL CODE § 223.4 (1962).

129. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 273–341 (6th ed. 2009).

130. See *id.* at 218–36.

131. Duress and unconscionability are by no means the only doctrines used to regulate behavior in contract negotiation. Undue influence is another doctrine that protects weaker parties against overreaching. See *id.* at 286–91. Undue influence claims typically involve disparities in capacity, with the stronger party taking advantage of the weaker party's reduced capacity. They often involve special duties. For example, many legal relationships, such as principal-agent, trustee-beneficiary, or guardian-ward, carry special obligations on the dominant party that do not apply in arms-length transactions. See RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981). I focus on duress and unconscionability because they most directly relate to improper uses of bargaining power in arms-length negotiations where no special duties are present.

substantial disparities in bargaining power result in one-sided agreements.<sup>132</sup> The doctrines of duress and unconscionability are exceptions to that rule. They give courts a legal justification to refuse enforcement of negotiated agreements on the basis of abusive bargaining tactics.

The doctrines of duress and unconscionability developed separately along parallel tracks — duress in the courts of law and unconscionability in equity. Up through the eighteenth century, duress was a defense to contract only if an agreement was coerced by threats of actual, serious physical harm, such as imprisonment or loss of life or limb.<sup>133</sup> Threats of less serious harms, such as economic harms, were not grounds for relief.<sup>134</sup> By the end of the nineteenth century, however, courts allowed parties to escape contractual agreements on grounds of purely economic duress.<sup>135</sup> In a leading case, Justice Holmes famously described the test of duress as follows: “If a party obtains a contract by creating a motive from which the other party ought to be free, and which in fact is and is known to be sufficient to produce the result, it does not matter that the motive would not have prevailed with a differently constituted person, whether the motive be a fraudulently created belief or an unlawfully created fear.”<sup>136</sup>

Unconscionability emerged in equity as an all-purpose vehicle for protection against oppressive bargains.<sup>137</sup> The doctrines of undue influence, misrepresentation, and mistake were initially conceived in equity as particularized applications of a more general concept of unconscionability.<sup>138</sup> As these principles migrated into contract law as

132. See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 144 (2005) (“Courts rarely overturn contracts on the basis of . . . doctrines explicitly employing inequality of bargaining power as an element, and inequality of bargaining power alone is not a sufficient justification for judicial intervention into contract disputes.”).

133. See PERILLO, *supra* note 129, at 273; WERTHEIMER, *supra* note 20, at 23 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND).

134. See PERILLO, *supra* note 129, at 273; WERTHEIMER, *supra* note 20, at 23 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND).

135. John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 241 (1942).

136. *Silsbee v. Webber*, 50 N.E. 555, 556 (Mass. 1898).

137. See *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3rd Cir. 1948) (“That equity does not enforce unconscionable bargains is too well established to require elaborate citation.”).

138. In the 1970s, the English courts briefly attempted to fuse these various legal and equitable doctrines — duress, unconscionability, undue influence, etc. — into a single contractual defense based on “inequality of bargaining power.” See Barnhizer, *supra* note 132, at 145. In the words of Lord Denning, “[T]he English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or

free-standing doctrines, unconscionability remained a hazy concept until it was codified in the Uniform Commercial Code.<sup>139</sup> It has since been incorporated into the law of contracts generally.<sup>140</sup> As the comment to U.C.C. § 2-302 states, "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."<sup>141</sup>

The tests of duress and unconscionability share an underlying impulse — protecting a weaker party from overreaching by a stronger party — but they emphasize different considerations. Duress focuses on the reasons why the weaker party accepted a particular deal and the nature of the threatened conduct. It requires the weaker party to prove that it acted in fear of some unjustified action.<sup>142</sup> Unconscionability focuses on the relationship between the parties and the reasonableness of the bargain. It relieves a weaker party of grossly unfair obligations where the weaker party either did not understand the terms or had no real choice but to accept because it had no better alternatives.<sup>143</sup> For duress, the emphasis is on

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desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other." *Lloyd's Bank Ltd. v. Bundy*, [1975] Q.B. 326 (C.A.) 339 (Lord Denning M.R.).

139. See generally Arthur Allen Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). U.C.C. § 2-302 provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (1977).

140. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

141. Professor Leff, whose analysis has shaped judicial interpretations of U.C.C. § 2-302 for decades, criticized this section for its failure to adequately define unconscionability. See Leff, *supra* note 139, at 487. ("If reading this section makes anything clear it is that reading this section alone makes nothing clear about the meaning of 'unconscionable' except perhaps that it is pejorative.")

142. See *Rubenstein v. Rubenstein*, 120 A.2d 11, 15 (N.J. 1956) ("[D]uress is tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim.")

143. See *Hume v. United States*, 132 U.S. 406, 411 (1889) (describing an unconscionable contract as one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other"). *Id.*

whether the agreement was coerced; for unconscionability, the emphasis is on whether the agreement was unfair.<sup>144</sup>

On this distinction, Alan Wertheimer offers a useful contrast between *causing* the counterparty's lack of options and *taking advantage* of the counterparty's lack of options.<sup>145</sup> Duress requires coercion. A party engages in coercion when it *causes* the counterparty's dilemma by taking improper action to increase the cost to the counterparty of pursuing an otherwise available alternative. When the counterparty lacks options because of forces beyond the control of either party, no coercion is involved, although the party in the superior position may *take advantage of* the other's weakness in unacceptable ways. It may be unconscionable to take advantage of another's weakness, but it does not seem like duress.

Neither the case law nor the drafters of the *Restatement* maintain a precise distinction between duress and unconscionability along the lines I suggest because unconscionability has only crystallized as a contract law defense in the last half-century.<sup>146</sup> Most case law before the last few decades treated all contract defenses based on improper use of leverage as duress.<sup>147</sup> The modern development of these doctrines suggests an understanding of the different circumstances in which leverage can be misused that is consistent with my approach. I argue that duress is best understood as the misuse of negative leverage and that unconscionability is best understood as the misuse of

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144. See WERTHEIMER, *supra* note 20, at 21–22. Consistent with court decisions prior to the last few decades of the twentieth century, Wertheimer analyzes both contract defenses based on improper conduct in the negotiating process and contract defenses based on the unfairness of the resulting bargain under the rubric of duress. My argument that the former should be placed under the rubric of duress and the latter under the rubric of unconscionability is based on recent case law and reflect an attempt to bring logical consistency to the doctrines.

145. See WERTHEIMER, *supra* note 20, at 39–40.

146. Some courts mix duress and unconscionability in the same analysis. In *United States v. Bedford Assocs.*, 491 F. Supp. 851, 865 (S.D.N.Y. 1980), the court found a contract voidable using this reasoning:

By misrepresenting the extent of competition, by threatening in bad faith to exercise the second option, by misleading Bedford as to the availability of further negotiations, and by engaging in other wrongful acts, the Government placed Bedford in an extremely precarious position financially and deprived Bedford of any real choice of action. Under these circumstances, the Government's conduct constituted duress. The Government's wrongful actions during the negotiations taken in conjunction with the one-sidedness of the terms of the alleged new lease render the alleged new lease unconscionable and therefore unenforceable.

147. See WERTHEIMER, *supra* note 20, at 23–28 (collecting cases raising duress defenses from 1881–1978).

positive leverage. A contract is void due to misuse of negative leverage either where the threatened conduct is itself wrongful or where a party uses negative leverage to pressure the other party into an unfair agreement. A contract is void due to misuse of positive leverage where a stronger party forces a party with no real alternatives to accept an agreement that violates social norms.

### A. *Duress: The Improper Use of Negative Leverage*

Under the doctrine of duress a party may avoid its contractual obligations by showing it was improperly coerced into entering the agreement.<sup>148</sup> In the words of the *Restatement (Second) of Contracts*, "[i]f a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."<sup>149</sup> The *Restatement* formulation incorporates two key features: a party's choices must be unreasonably constrained, and the proposal constraining the party's choices must be improper.

Wertheimer, analyzing the parallel language from the first *Restatement of Contracts*,<sup>150</sup> refers to these as the "proposal" prong and the "choice" prong.<sup>151</sup> The proposal prong recognizes that a person's choices are often constrained by the actions of others in legitimate ways. A person should be able to escape the consequences of her volitional acts only when "improper" pressure has left her with no reasonable alternatives.<sup>152</sup> The choice prong arises out of the fundamental principle of duress: a person does not act under duress if she had reasonable alternatives to the course of action she took, but declined to pursue them.

#### 1. *The Proposal Prong*

Under the proposal prong, threats support a duress defense only if they are "improper." The second *Restatement* lists two categories of

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148. See PERILLO, *supra* note 129, at 274 ("Today the general rule is that any wrongful act or threat which overcomes the free will of a party constitutes duress.").

149. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

150. See RESTATEMENT OF CONTRACTS § 492 (1932).

151. See WERTHEIMER, *supra* note 20, at 30 (arguing that duress as defined in the *Restatement* involves a two-prong analysis that focuses on the voluntariness of the recipient's choices and the moral legitimacy of the proposal).

152. See *id.* John Dalzell makes this point when he argues that duress consists of two necessary and sufficient elements: "1) the transaction must be induced by a wrongful threat, 2) for which the law offers no adequate remedy, that is, no remedy which (by practical layman's standards, not those of the common-law or even of equity) is really sufficient to compensate for the wrong suffered if the threat should be carried out." Dalzell, *supra* note 135, at 240.

improper threats. First, the *Restatement* provides that a threat is improper if the proposed course of action is itself illegal or otherwise so shocking that no inquiry into the fairness of the resulting bargain is required.<sup>153</sup> Second, a threat can be improper even if the threatened conduct is not inherently wrongful, as long as the resulting bargain is “not on fair terms.”<sup>154</sup>

Duress of the first type seems to require analysis under the proposal prong without consideration of the choice prong. That is true where a proposal threatens the commission of a crime or tort, such as perpetrating physical violence or property damage. Threats to engage in conduct that is itself illegal or inherently improper constitute negative leverage because a bargain based on such a threat does not constitute a voluntary exchange. Little analysis is required to conclude that an agreement entered into under threat of criminal conduct should not be enforced. Negative leverage that employs such threats violates norms against coercion without the need to evaluate the terms of the resulting bargain.<sup>155</sup>

But certain instances of the first type of duress in fact require assessment of the terms of the deal because they incorporate criminal laws that depend in part on a showing of financial harm. Most notably, threats to engage in conduct that meets the test of extortion under applicable criminal law constitute the first type of duress.<sup>156</sup> Extortion statutes typically require that the threatening conduct be employed for the purpose of obtaining the “property” of the victim.<sup>157</sup> For example, the Hobbs Act defines extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”<sup>158</sup> In *United States v. Enmons*,<sup>159</sup> the United States Supreme Court held that extortion under the Hobbs Act “consists of the use of wrongful means to achieve a wrongful objective.”<sup>160</sup> Even if the threatened conduct is not itself illegal, the use of fear to obtain property constitutes extortion when “the alleged extortionist has no lawful claim” to the property.<sup>161</sup>

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153. See RESTATEMENT (SECOND) OF CONTRACTS § 176(1) (1981).

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

155. See PERILLO, *supra* note 129, at 276.

156. See RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. b (1981).

157. See MODEL PENAL CODE § 223.4 (1962) (“A person is guilty of theft if he purposely obtains property of another by threatening to” engage in enumerated acts).

158. 18 U.S.C. § 1951(b)(2) (2012).

159. 410 U.S. 396 (1973).

160. *Id.* at 400.

161. *Id.*

Federal courts have applied that section to assess deployments of leverage in negotiation. In *Viacom Int'l Inc. v. Icahn*,<sup>162</sup> corporate raider Carl Icahn purchased a number of shares in Viacom and then threatened a hostile takeover unless Viacom purchased those shares back at a price higher than market value.<sup>163</sup> Viacom agreed to Icahn's terms and then sued to recover the difference between the price it paid Icahn and the market value.<sup>164</sup> Noting that this sort of "greenmail" is not inherently unlawful, the court held that "[w]hat converts otherwise lawful business activity into 'wrongful means' is the use of that activity to obtain property to which defendants have no lawful claim."<sup>165</sup> The court used this test to distinguish between "hard bargaining" and extortion:

In a "hard-bargaining" scenario the alleged victim has no pre-existing right to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant, but in an extortion scenario the alleged victim has a pre-existing entitlement to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant."<sup>166</sup>

In other words, to be deprived of "property" by "wrongful means" is to be pressured into an agreement that concedes value that the threatened party could not have been required to concede in the absence of the threatening proposal. A party should not be pressured, by threats of force, violence, or fear, into accepting a deal worse than it could have gotten by pursuing its best alternative to an agreement with the threatening party. So even though the *Restatement* indicates that proposals that are extortionate under the relevant criminal law are improper without consideration of the fairness of the resulting deal, the test of extortion can require analysis of the terms of the resulting deal.<sup>167</sup>

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162. 747 F. Supp. 205 (S.D.N.Y. 1990).

163. *Id.* at 207.

164. *Id.* at 209. Viacom sued under the civil Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C. § 1962. To prevail under RICO, Viacom had to prove that Icahn engaged in an illegal predicate act. *Id.* It alleged both securities fraud and extortion under the Hobbs Act. *Id.* at 210.

165. *Id.* at 211-12.

166. *Id.* at 213 (internal citations omitted).

167. *See id.* The court in *Viacom* found no extortion because the plaintiff had no right to be free of a takeover by Icahn. "Here, plaintiff received something of value in return for its consideration: Plaintiff's transfer of property to defendants enabled plaintiff to receive an eleven year standstill covenant from defendants and 3,498,200 shares of common stock, thereby assuring that Viacom would be relieved of its fear of



The second type of duress provided for in the *Restatement* rests on similar principles. Under that test, conduct that is not inherently wrongful is improper if the resulting bargain is “not on fair terms.”<sup>168</sup> This language appears to ignore the proposal prong entirely. But in context, the *Restatement* language suggests something else is intended.<sup>169</sup> Specifically, the section provides that the circumstances in which a bargain is not on fair terms includes cases where “the threatened act would harm the recipient and would not significantly benefit the party making the threat.”<sup>170</sup> This is a description of negative leverage. Negative leverage arises out of proposals that impose costs on the counterparty for pursuing its alternatives without offering any material benefit to the party making the proposal. Negative leverage involves proposals that “would harm the recipient and would not significantly benefit the party making the threat.”<sup>171</sup>

Duress, like its criminal counterpart, extortion, depends on a demonstration of coercion.<sup>172</sup> I argue that only negative leverage is coercive, and the tests for both extortion and duress are consistent with that view. These tests require either that threatening conduct be inherently wrongful or that it harm the threatened party without

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suffering damage caused by the threat of a takeover by defendants.” *Id.* Icahn was engaging in positive leverage; there was no coercion and no extortion.

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

169. In practice, courts have not relied on section 176(2) to police the substantive fairness or unfairness of agreements. See Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 485 (2005). Professor Giesel describes section 176(2) as a failed experiment for that reason. *Id.* If section 176(2) is understood in the way I suggest, however, it makes sense as a description of much of the case law, even if courts do not invoke it.

170. RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(a) (1981). The additional listed grounds are where “(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.” *Id.* § 176(2)(b)–(c). In my analysis, these categories are better understood as misuses of positive leverage and so are better considered examples of unconscionability.

171. See RESTATEMENT (SECOND) OF CONTRACTS, § 176(1) (1981).

172. See MODEL PENAL CODE § 223.4 (1962). Many state extortion statutes incorporate language to the *Restatement* test for duress. New York’s extortion statute, for example, provides that “a person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will” take one of nine enumerated actions, including causing physical injury, engaging in other conduct constituting a crime, accusing a person of a crime, or “perform[ing] any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.” See N.Y. PENAL LAW § 155.05 (McKinney 2012).

benefitting the threatening party. Since not all uses of negative leverage are improperly coercive — picketing and posting negative online reviews being two commonly accepted examples — the test for duress must distinguish between acceptable and unacceptable uses of negative leverage. This is where the choice prong comes into play.

## 2. *The Choice Prong*

In applying the choice prong, courts historically required that the party seeking relief demonstrate an “overborne will.”<sup>173</sup> The problem with this formulation is that, in the absence of physical coercion, the threatened party manifestly made a choice to accept the proposed bargain.<sup>174</sup> It exercised volition in choosing among bad options. Most modern commentators, including the *Restatement*, take the position that a better analysis asks whether the threatened party had a reasonable alternative to agreement.<sup>175</sup> Even courts nominally applying the overborne will standard often focus on the irrationality of the bargain. In *Gallagher v. Robinson*, for example, the court defined duress as being “tantamount to compulsion which is an impulse or feeling of being irresistibly driven toward the performance of some irrational action.”<sup>176</sup>

Duress cases involve allegations of undue pressure put on a negotiator to accept a particular set of terms. The threatened party accepted a particular set of terms instead of choosing to go with its BATNA. In the context of negotiation, a decision to accept a particular set of terms is irrational — it is not what a reasonable person would do — when that set of terms is worse than the negotiator’s RP. By definition, a RP is the point at which a rational negotiator walks away from the table because the proposed bargain is worse than the BATNA. The choice prong of duress captures cases in which the threatened party agreed to terms worse than its RP. In effect, the evidence of an “overborne will” is precisely that: an agreement to terms worse than the negotiator’s RP.<sup>177</sup>

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173. See Giesel, *supra* note 169, at 469–71.

174. *Id.* at 471.

175. See Meredith R. Miller, *Revisiting Austin v. Loral: A Study in Economic Duress, Contract Modification and Framing*, 2 HASTINGS BUS. L.J. 357, 440 (2006); WERTHEIMER, *supra* note 20, at 36; P.S. Atiyah, *Economic Duress and the “Overborne Will”*, 98 L. Q. REV. 197, 201 (1982); RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

176. *Gallagher v. Robinson*, 232 N.E.2d 668, 670 (Ohio Mun. Ct. 1965).

177. As I suggested in discussing extortion under the proposal prong, extortion also seems to require a showing that the threatened party agreed to terms worse than its reservation point. See, e.g., *Cooper v. Austin*, 750 So. 2d 711 (Fla. Dist. Ct. App. 2000). In *Cooper*, during the course of a mediation, the wife sent the husband a note

### 3. Application of the Doctrine

The doctrine of duress has been criticized for lacking consistency and clarity.<sup>178</sup> A coherent duress doctrine emerges if the proposal prong is understood to capture exercises of negative leverage and the choice prong is understood to capture agreements that fall outside the ZOPA. Duress entails negative leverage used to extract a deal worse than the threatened party's BATNA.

The *Restatement* gives the following illustration that conforms to that understanding:

A makes a threat to B, his former employee, that he will try to prevent B's employment elsewhere unless B agrees to release a claim that he has against A. B, having no reasonable alternative, is thereby induced to make the contract. If the court concludes that the attempt to prevent B's employment elsewhere would harm B and would not significantly benefit A, A's threat is improper and the contract is voidable by B.<sup>179</sup>

The above illustration is based on *Perkins Oil v. Fitzgerald*,<sup>180</sup> although the facts of *Fitzgerald* are slightly different. Fitzgerald was an employee of Perkins Oil. He was injured on the job, as a result of which injury both of his arms were amputated.<sup>181</sup> Perkins offered him \$5000 in compensation, which was the maximum of the company's insurance coverage. At the same time, Perkins threatened to fire and then blackball Fitzgerald's father-in-law, also an employee and the family's main bread-winner, if Fitzgerald did not accept the \$5000 offer and release Perkins from further liability. Facing the financial ruin of his entire family, Fitzgerald accepted the offer and signed a release. He then sued Perkins for negligence, whereupon Perkins raised the release as a defense. The case went to a jury,

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in which she threatened to disclose to the police a photograph her husband had taken of a nude, and apparently underage, woman. Shortly thereafter, the parties reached an agreement giving the wife \$128,000 of marital assets and the husband \$10,000. A Florida Court of Appeals voided that agreement, calling the wife's threat extortion. *Id.* at 712. After the settlement was consummated, the husband learned that the woman had been legal age at the time the photograph was taken and challenged the agreement. *Id.* Implicit in the decision is a conclusion that the husband would have done better had he gone forward with his litigation alternative in the absence of the threat. Joseph Livermore argues that the most courts can do in assessing alleged extortion in a litigation context is ask whether the settlement is worse than the reasonably calculable value of litigation — which is to say, the reservation point. See Joseph M. Livermore, *Lawyer Extortion*, 20 ARIZ. L. REV. 403, 407 (1978).

178. See Giesel, *supra* note 169, at 463 (noting that commentators over the years have noted that the courts make an absolute mess of applying the duress doctrine).

179. RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. f, illus. 12 (1981).

180. 121 S.W.2d 877 (Ark. 1938).

181. *Id.* at 879.

which found Perkins negligent, rejected the defense of release, and awarded Fitzgerald \$45,000.

The Arkansas Supreme Court affirmed the judgment, including the determination that the release was executed under duress. The court approved of the portion of the jury instructions defining duress as follows:

You are instructed that releases and contracts, to be valid, must be voluntarily made, and, where executed under such circumstances as would enslave the will, the release or contract is void; because consent is of the essence of the contract or release, and where there is compulsion, there is not consent, for this must be voluntarily.<sup>182</sup>

The jury instructions then provided that "[d]uress, by threats, exists not wherever a party has made a release under the influence of a threat, but only where such a threat excites a fear of some *grievous wrong*."<sup>183</sup> The Arkansas law emphasized the overborne will of the weaker party. The Supreme Court said virtually nothing about why Perkins's threat to exercise its legal right constituted duress.

Despite the lack of analysis, the facts of the case support the conclusion that negative leverage, when used to coerce a negotiating partner into accepting a deal worse than his RP, triggers a defense of duress.<sup>184</sup> Perkins apparently had no business reason to fire Fitzgerald's father-in-law, who was a supervisor for the company.<sup>185</sup> Perkins' sole purpose in threatening to fire him was to impose a cost on Fitzgerald for pursuing his BATNA of litigation. Further, the settlement Perkins extracted seemed well inferior to Fitzgerald's RP. The jury returned a judgment worth almost ten times the settlement, and

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182. *Id.* at 885.

183. *Id.* (emphasis added).

184. See PERILLO, *supra* note 129, at 275. Perillo notes that, while courts seldom articulate this rationale in their decisions, the facts of the duress cases support the proposition that duress normally requires that the threatened party agree to an unfair bargain. "Duress will generally not be found to exist unless the party exercising the coercion has been unjustly enriched." *Id.* He cites *Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477, 482 (D.N.J. 1999) for the principle that "where there is adequacy of consideration, there is generally no duress." *Id.* In other words, duress exists only where a party has been coerced into accepting a deal worse than its reservation point; otherwise consideration would be adequate.

185. *Fitzgerald*, 121 S.W.2d at 879.

in evaluating the plaintiff's damage claim for excessiveness, the Supreme Court expressly stated that the award was reasonable given the life-altering injuries Fitzgerald suffered.<sup>186</sup>

In a case raising similar issues, *Laemmar v. J. Walter Thompson Co.*,<sup>187</sup> the plaintiffs were at-will employees of defendant Thompson. They had purchased stock in Thompson subject to a provision that Thompson could repurchase the stock if plaintiffs' employment was terminated for any reason.<sup>188</sup> Thompson demanded that plaintiffs resell Thompson their stock and threatened to fire them if they refused. Plaintiffs complied, but later brought suit to rescind the sale on grounds of duress. The Seventh Circuit held that the plaintiffs stated a claim for duress, even though Thompson would have been within its rights to fire them for any reason.<sup>189</sup> The court held that whether the agreement to resell the stock was the product of duress was a question of fact, but it gave no clear guidance on the proof required other than that plaintiffs had to show the threatened termination "deprived them of their free will."<sup>190</sup>

Like *Fitzgerald*, *Laemmar* appears to be an example of a negotiating party accepting an agreement worse than its RP due to the use of negative leverage by the other side. Plaintiffs and Thompson were negotiating over the sale of plaintiffs' stock. Plaintiffs obviously believed the terms Thompson was offering were inferior to their RP. Thompson had no real desire to fire plaintiffs, since it was happy to keep them if it could retrieve its stock and did retain them after they agreed to resell it. Thompson used a threat to perform an action that did not advance its interests in order to coerce plaintiffs into accepting a deal worse than their RP.

In *Gallagher Drug Co. v. Robinson*,<sup>191</sup> Robinson admitted to stealing from his employer, Gallagher.<sup>192</sup> Robinson agreed to repay the \$2000 he stole, apparently in exchange for an agreement not to prosecute. Robinson paid part of the money and then refused to pay

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186. *Id.* at 885–86. To put the numbers in perspective, \$5000 in 1935 would be roughly \$84,000 in 2012 dollars. \$45,000 would be over \$750,000 in 2012 dollars. Bureau of Labor Statistics CPI Calculator, available at <http://www.bls.gov/cpi/cpicalc.htm>.

187. *Laemmar v. J. Walter Thompson Co.*, 435 F.2d 680 (7th Cir. 1970).

188. *Id.* at 681.

189. *Id.* at 682.

190. *Id.*

191. 232 N.E.2d 668 (Ohio Mun. Ct. 1965).

192. *Id.* at 670.

the balance, whereupon Gallagher sued him to collect. Robinson argued that he agreed to pay the debt under duress. The court disagreed. It defined duress as "tantamount to compulsion which is an impulse or feeling of being irresistibly driven toward the performance of some irrational action." It then found that Robinson "was a free agent, that he had a choice, that is, he had freedom in exercising his will in signing the written agreement or note herein sued upon by the plaintiff."<sup>193</sup>

The court's focus in *Gallagher* on "irrational action" is critical. A key difference between *Fitzgerald* and *Laemmar*, on the one hand, and *Gallagher*, on the other, is that the plaintiffs in *Fitzgerald* and *Laemmar* were coerced into accepting a bargain that was worse than their RP. In *Gallagher*, however, Robinson agreed to repay only what he owed. Had the employer brought suit against him to recover what he stole, that is the minimum he would have been required to pay. He was not coerced into accepting a bargain worse than his RP. He did nothing irrational.<sup>194</sup>

Cases in which courts find duress fail Nozick's test of productive exchange<sup>195</sup> and meet Westen's test of coercion.<sup>196</sup> The employers in *Fitzgerald* and *Laemmar* proposed actions that satisfied neither their nor their employees' interests, standing alone, which is to say they involved the application of negative leverage. The resulting bargains were worse than the employees had reason to expect, given their RPs. In the language of the *Restatement*, the employers' proposals "did not benefit the offeror" and "were not on fair terms."<sup>197</sup>

193. *Id.*

194. See WERTHEIMER, *supra* note 20, at 33.

195. See *supra* notes 40-43 and accompanying text.

196. See *supra* notes 48-50 and accompanying text.

197. The *Restatement* cites another case fitting this pattern in an illustration relating to § 176(1)(d), which is the section dealing with inherently improper threats. RESTATEMENT (SECOND) OF CONTRACTS § 176(1)(d) cmt. e, illus. 11. In *Wolf v. Marlton Corp.*, 154 A.2d 625 (N.J. Super. 1959), a couple put down a deposit with a builder to buy a new home, but sought to escape the contract after marital strife developed. They demanded the return of their deposit, threatening the builder that they would sell to an undesirable purchaser if forced to complete the transaction. The builder refused to return the contract, but also refused to complete the sale. The purchasers sued for breach of contract to recover the deposit. *Id.* at 628. The court found duress, concluding that:

[W]here a party for purely malicious and unconscionable motives threatens to resell such a home to a purchaser, specially selected because he would be undesirable, for the sole purpose of injuring the builder's business, fundamental fairness requires the conclusion that his conduct in making this threat be deemed 'wrongful,' as the term is used in the law of duress.

*Id.* at 630.

### B. *Unconscionability: The Improper Use of Positive Leverage*

Because negative leverage can be coercive, it poses a special set of concerns. Courts deal with inappropriate uses of negative leverage in relatively consistent ways, even if they have not always recognized the intuitions that seem to guide the decisions or used consistent terminology. Deployments of negative leverage that involve threats of illegal conduct or threats that coerce a party into a bargain worse than its RP consistently meet judicial disapprobation.

Positive leverage does not have the same coercive power as negative leverage. Consequently, it is less proscribed than negative leverage. Assuming a negotiator does not make material misrepresentations and no special duties exist, she is largely free to drive a hard bargain by holding out for the best possible terms. She is under no legal obligation to concede any portion of the available bargaining zone. Moreover, under most circumstances, a negotiator can freely lead a counterparty into a "bad" deal, in the sense of a deal worse than the counterparty's RP. Freedom of contract is a powerful current in Anglo-American law, and the freedom to contract is understood to mean the freedom to bargain hard as well as the freedom to enter into bad deals.<sup>198</sup> Courts normally will not review the adequacy of the consideration to ensure that agreements are fair.<sup>199</sup>

An example of this principle is *Remco Enterprises, Inc. v. Houston*.<sup>200</sup> A consumer with a ninth-grade education entered into a rent-to-own agreement for a television that obligated her to pay more than

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The case is unusual, in that duress was used to defend a decision not to consummate a contract, rather than to escape a contractual obligation. The implication of the opinion, though, is that the builder would have acted under duress had it agreed to refund the deposit, and that seems to be the way the *Restatement* uses the case. In my view, the case does not belong in the category of inherently wrongful threats. What made this threat "wrongful" was that it used negative leverage in an attempt to coerce the builder into accepting a deal worse than his reservation point.

198. See *Ewert v. Lichtman*, 55 A.2d 671 (N.J. Ch. 1947). The court enunciated a view of leverage consistent with a robust view of freedom of contract:

Enmeshed in the entanglements of some unfortunate dilemma, many individuals and corporations have found it imperative to buy their emancipation from an obligation which they voluntarily assumed, or to dispose of some of their assets at a loss. Perhaps they did so under the weight of adversity or misadventure and were thus the victims of some stress, yet I think this court in such cases should act with supreme caution in abrogating and countermanding such dealings. The qualities of the bargain which the litigant once regarded as expedient and pragmatical ought not to be reprocessed by the court into actionable duress.

*Id.* at 674.

199. See PERILLO, *supra* note 129, at 334.

200. 677 P.2d 567 (Kan. Ct. App. 1984).

twice the retail value of the television.<sup>201</sup> The court enforced the agreement, emphasizing that the consumer received certain benefits from the rent-to-own plan that she would not have gotten had she paid cash and that she had read the agreement and "knew how to multiply."<sup>202</sup> The court noted case law from other jurisdictions suggesting that a contract price 2 ½ times greater than retail value created a suspicion of unconscionability but concluded that her deal at only twice the retail value did not "shock the conscience" sufficiently to void the contract.<sup>203</sup>

Despite courts' traditional reluctance to upset contractual agreements in the absence of fraud or coercion, beginning in the nineteenth century, courts began to void or modify contractual obligations where positive leverage was used in an overreaching way. Because unconscionability has been widely recognized as a contract defense at law only for a relatively short time, the early decisions relied on a variety of other doctrines to police unfair bargains. In Joseph Perillo's words,

The law courts searched for and found (even though not present under ordinary rules) failure of consideration, lack of consideration, lack of mutual assent, duress or misrepresentation, inadequacy of pleading, lack of integration into a written contract or a strained interpretation after finding ambiguity where little or no ambiguity existed.<sup>204</sup>

The result was an incoherent body of law that has only begun to crystallize since the codification of unconscionability in the U.C.C.<sup>205</sup>

The U.C.C. provides that a court may refuse to enforce a contract if it finds the contract was unconscionable at the time it was made, but it does not precisely define unconscionability.<sup>206</sup> Nor does the *Restatement (Second) of Contracts*, which contains unconscionability

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201. *Id.* at 570.

202. *Id.* at 573.

203. *Id.*

204. See PERILLO, *supra* note 129, at 334.

205. See Barnhizer, *supra* note 132, at 194 ("Since adoption of U.C.C. § 2-302 (and the subsequent publication of *Restatement (Second) of Contracts* § 208), inequality of bargaining power has been strongly linked with unconscionability.").

206. See U.C.C. § 2-302 (1977).

Unconscionable contract or Term.

(1) If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.



language modeled on the U.C.C. provision.<sup>207</sup> Typical judicial formulations of the doctrine state that unconscionability may be invoked to avoid contractual liability “only on a finding of both imperfections in the bargaining process, known as ‘procedural unconscionability,’ and an unfairly one-sided term, referred to as ‘substantive unconscionability.’”<sup>208</sup> Procedural unconscionability includes cases in which a party is unfairly surprised by the terms in the agreement as well as cases in which the agreement was not truly “voluntary.”<sup>209</sup>

### 1. *Procedural Unconscionability*

The “unfair surprise” form of unconscionability does not address the misuse of leverage. These cases typically involve unsophisticated consumers who enter into contracts of adhesion with onerous terms buried in fine print. The problem in these cases is not that a party was forced to agree to unfavorable terms — a use of positive leverage by the stronger party — but that a party *did not know* that it was agreeing to unfavorable terms.<sup>210</sup> The weaker party can get relief only if it would not have agreed had it known the terms.<sup>211</sup> These are cases in which the straightforward application of positive leverage would not have produced an agreement on those terms.<sup>212</sup>

A different line of cases protects weaker parties from involuntary agreements reached as a result of the misuse of positive leverage.

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(2) If it is claimed or appears to the court that the contract or any term thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

207. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

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.

208. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1256 (2003).

209. *Id.* at 1257.

210. In general, courts enforce contracts of adhesion irrespective of whether the non-drafting party read them, understood them, or even knew they existed. See *id.* at 1204.

211. See RESTATEMENT (SECOND) OF CONTRACTS § 211(c) (1981). Section 211(c) addresses form contracts. It provides that a lack of knowledge of contract terms can indicate lack of assent “[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term.” *Id.*

212. But see James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L. Q. 315, 348–49 (1997). Professor White analyzed twenty-five Arizona cases applying *Restatement* section 211(c) and concluded that in many of the cases, either the terms were not hidden or a reasonably informed weaker party would have expected them.

Many of the early cases used the language of duress, not unconscionability. For example, in *News Publishing Co. v. Associated Press*,<sup>213</sup> a publisher had contracted with United Press to provide it syndicated news reports. When United Press went out of business, the publisher had no choice but to seek the same service from its only rival, Associated Press. Associated Press demanded that the publisher pay \$10,000 more than other publishers were required to pay for the same service and surrender certain valuable guarantees. With no other access to the news it needed to survive, the publisher agreed. It then brought suit in tort against Associated Press and its officers for an unlawful combination and conspiracy.<sup>214</sup> The court found that Associated Press had an obligation to the public that required it to provide its services to this publisher "upon the same terms and conditions that it rendered like service to other newspaper publishers throughout the country."<sup>215</sup> It held that the publisher was not bound by the agreement because it had agreed to the increased rate under duress, having no real choice but to acquiesce.<sup>216</sup>

*News Publishing* is emblematic of a long line of cases, most involving common carriers, in which courts use the language of duress to describe situations in which a party uses positive leverage to extract unfair terms. The cases typically date from before unconscionability entered contract law as a free-standing defense.<sup>217</sup> In many of

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213. 114 Ill. App. 241 (Ill. App. 1st Dist. 1904).

214. *Id.* at 242-43.

215. *Id.* at 251.

216. *Id.* at 256.

The payment by appellant and the surrender of the said guaranties, as we think the evidence tends to show, being under duress, because of the necessities of its business, and not voluntary, there may be a recovery, for the reason that the Associated Press was under the same obligation to furnish to appellant news reports without discrimination, as the railroad companies in the cases referred to were bound to carry freight without extorting illegal and oppressive rates from the shipper.

*Id.*

217. In some of the early duress cases, the courts actually refer to the unconscionability of the bargain. In *Beckwith v. Guy Frisbie & Sons*, the Vermont Supreme Court, in affirming that economic pressure alone can provide a defense of duress, stated:

To make the payment a voluntary one the parties should stand upon an equal footing. Then there is the free exercise of will, and compromise or payment is voluntary and binding. But where one has the advantage of the other, where delay or a resort to the law is indifferent to the one, but may produce serious loss and injury to the other, it is unconscionable to press such advantage to the obtaining payment of unjust demands. That is extortion.

*Beckwith v. Guy Frisbie & Sons*, 32 Vt. 559, 566 (1860).

the cases, a utility or railroad used its monopoly position to demand rates in excess of the amount prescribed by law.<sup>218</sup>

The *Restatement* puts these cases in the category of duress. It classifies them as examples of “the use of power for illegitimate ends.”<sup>219</sup> The illustrations in the comments to the rule give the following example:

A, a municipal water company, seeking to induce B, a developer, to make a contract for the extension of water mains to his development at a price greatly in excess of that charge to those similarly situated, threatens to refuse to supply to B unless B makes the contract. B, having no reasonable alternative, makes the contract. Because the threat amounts to a use for illegitimate ends of A’s power not to supply water, the contract is voidable by B.<sup>220</sup>

In this example, A uses positive leverage — its power to satisfy and refuse to satisfy B’s interests. B has no alternative source for water, so A’s leverage is very potent. But A overreached, pushing for a deal that is patently unfair to B.

Unconscionability is a better fit than duress for these overreaching exercises of positive leverage.<sup>221</sup> The weaker party has not been coerced in a moral sense. The more powerful party has taken advantage of a vulnerability caused by external events, but it has not created that situation. No threat of reprisal looms in the event that the weaker party chooses to pursue an alternative to an agreement with the stronger party. In practice, courts today are more likely to invoke unconscionability than duress when addressing the misuse of positive leverage in cases like the old common-carrier examples.

Under modern contract doctrine, misuses of positive leverage in these ways can rise to the level of procedural unconscionability. An agreement may be procedurally unconscionable where a party’s acceptance of terms was not truly voluntary.<sup>222</sup> Courts look at a variety of factors to assess voluntariness:

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218. See *Newland v. Buncombe Turnpike Co.*, 26 N.C. 372 (1844); *Mobile & M. R. Co. v. Steiner, McGehee & Co.*, 61 Ala. 559 (1878); *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 32 N.E. 311 (Ind. 1892).

219. RESTATEMENT (SECOND) OF CONTRACTS § 176(c)(2) (1981).

220. *Id.* § 176 cmt. f, illus. 16.

221. Basing his analysis primarily on English common law rather than U.S. law, Professor John Phillips has also argued that many forms of duress are better understood as instances of unconscionability. See John Phillips, *Protecting Those in a Disadvantageous Negotiation Position: Unconscionable Bargains as a Unifying Doctrine*, 45 WAKE FOREST L. REV. 837, 849–52 (2010).

222. Alternatively, procedural unconscionability can arise from unfair surprise. See *Bank of Indiana, Nat’l. Ass’n. v. Holyfield*, 476 F. Supp. 104, 109–10 (S.D. Miss.

A lack of voluntariness is demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.<sup>223</sup>

*Associated Press v. Southern Arkansas Radio Co.*<sup>224</sup> presents a factual scenario strikingly similar to the one in *News Publishing*, but relies on unconscionability rather than duress. The owner of a small radio station in Arkansas had a contract with United Press International to supply it with syndicated news.<sup>225</sup> When United Press International stopped doing business in Arkansas, the station had no choice but to go to Associated Press. Under the terms of the agreement Associated Press demanded, the station was liable for exorbitant "lost revenues" in the event of a breach.<sup>226</sup> The station ultimately breached the contract and Associated Press sued to recover its lost revenues. The court held that the lost revenue term was unconscionable and unenforceable, concluding that "[t]he agreement is a preprinted form; the provision relating to loss of future revenue is harsh in its operation; the contract was signed at a time when the [station] was already in default under its terms; and there appears to be a substantial disparity in the relative bargaining power of the parties."<sup>227</sup>

The key consideration in cases of this type is the presence (or absence) of meaningful alternatives.<sup>228</sup> A party can lack meaningful alternatives either because it is dealing with a monopolist, as in the common-carrier cases, or because situation-specific circumstances

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1979) ("The indicators of procedural unconscionability generally fall into two areas: (1) lack of knowledge, and (2) lack of voluntariness.").

223. *Id.* See also Korobkin, *supra* note 208, at 1258-69 (analyzing factors including adhesive nature of contracts, unequal bargaining power, lack of sophistication, and unfair surprise).

224. 809 S.W.2d 695 (Ark. Ct. App. 1991).

225. *Id.* at 695.

226. *Id.*

227. *Id.* at 697.

228. See Barnhizer, *supra* note 132, at 202-08. Barnhizer separates out "meaningful alternatives" and "opportunity for negotiation" as separate tests of oppressive bargaining power. *Id.* at 201-02. But he also notes that courts conflate the distinction. *Id.* at 208. In my view, the distinction does not convey a genuine difference, and that is why courts appear to conflate the two concepts. Parties lack a meaningful opportunity to negotiate *because* they lack meaningful alternatives to a negotiated agreement.

limit its options.<sup>229</sup> In *Sosa v. Paulos*,<sup>230</sup> the defendant doctor performed knee surgery on the elderly plaintiff. Less than one hour before the surgery, after the plaintiff had been dressed and prepped for the procedure, she was presented with a "Physician-Patient Arbitration Agreement" requiring her to consent to arbitration of any claims arising out of her care.<sup>231</sup> She signed the agreement and later brought suit against the doctor for medical malpractice. The court refused to enforce the arbitration agreement on grounds of unconscionability. The court concluded that the plaintiff did not enter into the agreement voluntarily, emphasizing the timing and finding that the plaintiff felt "rushed and hurried."<sup>232</sup> The court held that "[u]nder these circumstances, we cannot conclude that the arbitration agreement was negotiated in a fair manner and that the parties had a real and voluntary meeting of the minds. Nor can we conclude that Ms. Sosa had a meaningful choice with respect to signing the agreement."<sup>233</sup> With surgery imminent, Sosa did not have a realistic option of seeking care from another medical provider. The lack of a meaningful alternative was sufficient to show procedural unconscionability.

## 2. Substantive Unconscionability

These cases involve situations in which a stronger party imposes terms on a particularly vulnerable counterparty. The weaker party acquiesces because it believes it has no other way of meeting its needs. The weaker party did not agree to a deal worse than its perceived RP: because of a lack of good alternatives, it simply has a very poor RP.<sup>234</sup> Although courts speak about a lack of voluntariness,

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229. See Korobkin, *supra* note 208, at 1264. Korobkin describes a situation-specific monopoly in these terms: "In the typical situation, a seller operating in a competitive environment publicizes a product's price and/or some other visible features, which encourages a potential buyer to make an investment in time or money in preparing to purchase the product. Then, after the buyer's investment of time or money has been made, the seller presents a set of adhesive form terms that the buyer must sign or forfeit his initial investment." *Id.*

230. 924 P.2d 357 (Utah 1996).

231. *Id.* at 359.

232. *Id.* at 362-63. The court found the agreement substantively unconscionable because it would have required her to pay the doctor's legal expenses if he prevailed in the arbitration. *Id.* at 362.

233. *Id.* at 363.

234. See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). In *Henningsen*, one of the seminal unconscionability cases, the plaintiff's wife was injured in a car accident. The plaintiff had purchased the car under a standard form sales contract promulgated by the Automobile Manufacturer's Association and used by all the major manufacturers. Under the agreement, the manufacturer's liability was limited

there is no coercion in a moral sense.<sup>235</sup> The wrong these cases seek to redress is the use of bargaining power to impose unfair terms. For an exercise of leverage to be sufficiently unconscionable to void a contractual obligation, it must be coupled with an agreement that is substantively unconscionable.

Substantive unconscionability has been couched in a variety of ways. In one widely-cited early case interpreting U.C.C. § 2-302, the United States Court of Appeals for the D.C. Circuit described substantive unconscionability in these terms:

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. . . . Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place."<sup>236</sup>

That sounds like an attempt to define a standard for the application of Peter Westen's "ought" criterion for overreaching exercises of leverage.<sup>237</sup> Whether coerced or not, there are certain ways people *ought* to be treated in a just society. Courts allow parties to drive hard bargains up to the point at which the resulting bargain is so unfair that it violates broadly accepted social norms. Not surprisingly, it is exceedingly difficult to find language that precisely delineates the outer limits of hard bargaining. In the years since § 2-302 was adopted, no single test of substantive unconscionability has emerged.<sup>238</sup> Instead, courts use imprecise terms to label agreements that they deem inappropriate, describing them as "overly harsh," "one-sided," or "shocking to the conscience."<sup>239</sup> That degree of specificity is probably the most that can be expected.

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to replacement of defective parts. *Id.* at 78-79. The court held the agreement unconscionable because of the "gross inequality of bargaining position" between the parties and the absence of a meaningful opportunity to find better warranty terms with other manufacturers. *Id.* at 87.

235. See WERTHEIMER, *supra* note 20, at 233. Wertheimer refers to these cases as involving "hard choices" rather than coercion. *Id.*

236. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965). Section 2-302 was not yet in effect in Washington, D.C. at the time of the decision, but the court applied the statutory test. See Leff, *supra* note 139, at 551.

237. See *supra* notes 48-49 and accompanying text.

238. See Korobkin, *supra* note 208, at 1273.

239. See *id.*

*C. Borderland Cases: The Contract Modification Problem*

Thus far, I have deliberately avoided the class of cases that has most bedeviled courts and fueled scholarly criticism of duress and its offshoots: cases involving threats to breach a contract unless a party in a disadvantaged position agrees to new terms more favorable to the stronger party. In these cases, circumstances leave the weaker party dependent on the stronger party, whereupon the stronger party refuses to fulfill its existing contractual obligations absent a new promise of additional compensation. These cases involve parties who take advantage of a situation rather than creating it, and they involve the refusal to satisfy interests rather than the imposition of some exogenous cost. In addition, the weaker party accepts the proposed modification precisely because that is a better option than its alternatives of finding other bargaining partners or seeking compensation for the breach. For these reasons, the cases appear to be exercises of positive leverage. But courts and commentators tend to treat them as examples of duress.

Probably the most famous case of this type is *Alaska Packers' Ass'n. v. Domenico*.<sup>240</sup> In *Alaska Packers'*, a group of fishermen contracted with Alaska Packers to fish for salmon at a wage of \$50 for the season plus two cents for each salmon caught. Once the fisherman arrived in Alaska at the start of the season, they refused to work unless Alaska Packers agreed to pay them \$100 for the season plus two cents for each salmon. With the fishing season about to begin, Alaska Packers had no time to recruit new fisherman or to go to court to compel its recalcitrant group to work at the agreed rate. So Alaska Packers agreed to the \$100 demand. At the end of the season, the company refused to pay anything beyond the original amount and the fishermen brought suit to recover the difference. The Ninth Circuit held that the revised contract was not enforceable: "[T]he party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes unjustifiable advantage of the necessities of the other party."<sup>241</sup> The court did not use the term duress, justifying its decision instead on the absence of consideration. Modern scholars, led by Richard Posner,<sup>242</sup> have characterized the decision as one applying duress, and a number of cases cite it in holding that the use of positive leverage can constitute duress where a

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240. 117 F. 99 (9th Cir. 1902).

241. *Id.* at 102.

242. See *Trompler, Inc. v. NLRB*, 338 F.3d 747 (7th Cir. 2003).

party exploits a temporary monopoly (as the fisherman had over Alaska Packers) to extract concessions not warranted by any changed circumstances.<sup>243</sup>

The contract modification cases in the *Alaska Packers'* line are difficult because the existence of an agreement, and with it the obligation to satisfy the interests of the other party through performance, complicates the leverage calculus.<sup>244</sup> Alaska Packers had a legal right to expect the seamen to fulfill their contractual obligations. To the extent the seamen had an alternative to performance, it was to breach the contract, which they had no legal right to do. Thus, their threatened conduct — breaching the agreement by refusing to work — seems less like an exercise of positive leverage than appears at first glance.

In the absence of changed circumstances, their proposal did not appear to involve a voluntary exchange in Nozick's terms. Again assuming that circumstances did not change for the seamen in *Alaska Packers'*, their refusal to work absent a pay increase was purely opportunistic. They had no reason to refuse to work except to exploit the weak position of Alaska Packers. Stuck in Alaska and without other employment opportunities readily available, they stood more to gain from working than not working. Neither they nor Alaska Packers stood to gain from their remaining idle, and they had no right to demand additional compensation for performing the pre-existing agreement. Alaska Packers could legitimately feel coerced, even though the resulting bargain was better than its alternative of foregoing the voyage and suing the seamen for breach.

On the other hand, if circumstances had changed, the analysis might be different. Assume conditions at sea turned out to be much worse than the parties initially expected. The seamen might rationally conclude that the contemplated work was not worth the risks involved, and that their interests would genuinely be served by refusing to work and accepting whatever costs they would bear by way of

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243. See also John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 258 (1942).

244. See also *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971). *Loral* is a favorite of contracts textbook authors. It involved a government contractor whose subcontractor refused to deliver parts unless the contractor agreed to price increases and additional orders. The contractor acquiesced because it could not find another subcontractor to supply the parts in time to meet its deadline. The New York Court of Appeals voided the modification on duress grounds. *Loral* is another case in which the modification was not justified by any change in circumstances.



Alaska Packers's breach of contract lawsuit.<sup>245</sup> In that scenario, the demand for a wage increase would arguably be productive in Nozick's sense, because it would compensate them for pursuing an interest that breach would have satisfied.

Most of the modern commentary on contract modification argues that changed circumstances can justify a threatened breach.<sup>246</sup> At least some courts have adopted that view.<sup>247</sup> The *Restatement (Second) of Contracts* adopts that test as well, stating that "[a] promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . . ." <sup>248</sup>

Changed circumstances also change the nature of the leverage involved. Where changed circumstances mean that a party is better off breaching and accepting the consequences of breach than performing, the threat of breach is a noncoercive exercise of positive leverage. In such a case, the renegotiated terms should be enforced. But when the threat of breach is merely opportunistic, and breach is not in the threatening party's interests, the threat has elements of both positive and negative leverage and is much more coercive. Consequently, the renegotiated terms should not be enforced. Whether courts use the rubric of duress or that of unconscionability to justify the refusal to enforce the modified terms is less important than that they focus on the coercive force of the leverage used to extract the modification.<sup>249</sup>

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245. See Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 757 (2005). The authors argue that the seamen's refusal to work absent greater compensation may have been justified, based on speculation that they had been misled about prevailing wages and the working conditions they could expect. *Id.*

246. See Jason Scott Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335, 339-40 (1993); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 308 (1992); Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 422-23 (1977).

247. See *Angel v. Murray*, 322 A.2d 630, 636 (R.I. 1974).

248. RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981). See also U.C.C. § 2-209 cmt. 2 (1977) (providing that "matters such as a market shift, which makes performance come to involve a loss," may provide a reason for a modification).

249. A powerful economic argument can be made for focusing on changed circumstances. See Bar-Gill & Ben-Shahar, *supra* note 245, at 753-54. The reason is that the threatened party should be given the option of accepting modified terms in order to procure performance, since that may be the best option available. If the law will not enforce the modified bargain, then the threatening party will simply walk away, leaving the weaker party stranded. But that is a risk only where the threatening party has a genuine incentive to breach and accept the consequences. *Id.*

*D. Leverage and the Law of Contract: Concluding Thoughts*

I have shown that courts assessing claims of overreaching leverage focus on the same considerations that underlie social proscriptions against coercion. Courts generally enforce parties' bargains where there is no evidence of misrepresentation, subterfuge, or diminished capacity to indicate that a party did not truly understand what it had agreed to.<sup>250</sup> There are exceptions, however, that turn on two factors: the nature of the proposals that led to the agreement and the terms of the resulting bargain.

Where a proposal consists of inherently wrongful conduct, such as a threat of illegal action, the resulting terms are largely irrelevant. A party does not act within its rights when it engages in illegal conduct, so an agreement reached as a result of such a threat cannot be enforced. Those are rare and uninteresting cases.

Where threatened conduct is not inherently wrongful, the first step in determining whether an agreement procured as a result is enforceable is to ask whether the proposal involves negative leverage, with the concomitant risk of coercion. A proposal involves negative leverage if the threatened conduct benefits neither the proposing party nor the counterparty. Because not all uses of negative leverage are inappropriate, however, a thorough analysis must continue. An agreement reached as a result of the application of negative leverage is voidable only if the resulting terms are worse than the threatened party's BATNA. The best practical evidence that negative leverage was employed is when a party agreed to terms worse than its best alternative. Positive leverage cannot force a party into an agreement worse than its BATNA, so if a party agreed to terms worse than its RP, negative leverage must have been used.

If the proposal involves positive rather than negative leverage, the agreement is presumed valid and enforceable. Positive leverage cannot coerce. Positive leverage can be used to take advantage, however, and under some circumstances positive leverage is used to extract agreements that violate social norms to such a degree that they are voidable. The legal tests for when an agreement is unfair to the point that it is unenforceable are notoriously imprecise. In the absence of deception, trickery, or diminished capacity, only the rare agreement will succumb under the applicable standards. Parties are

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250. These cases are beyond the scope of my analysis because they do not involve the use of leverage to procure an agreement. The leverage in these cases is hidden or fabricated. The bargain is suspect because one party claims it would not have acquiesced had it not been misled.

largely free to use positive leverage to drive hard bargains that produce one-sided deals.

Beyond clarifying the relationship between leverage and coercion and the role leverage plays in judicial decisions regulating contract negotiations, my goal was to demonstrate how two related contract doctrines, duress and unconscionability, can be applied more consistently if they are understood to address negative and positive leverage, respectively. A more nuanced concept of leverage may be of value in understanding and applying other legal doctrines beyond the scope of this work, like claims of prosecutorial abuse in plea bargaining.<sup>251</sup>

## V. CONCLUSION

As the first federal budget battle of 2013 lurched from winter into spring, Congressional Republicans backed away from the debt ceiling stand-off and turned their attention to the package of budget cuts known as the sequester.<sup>252</sup> The sequester, enacted as part of the 2011 budget deal, stipulated across-the-board cuts in discretionary spending, on everything from after-school programs to defense.<sup>253</sup> Both parties had agreed on the package of sequestration cuts because they believed that the threat of across-the-board cuts would force them to negotiate for a more rational package of cuts that might better satisfy the interests of each.<sup>254</sup> When the sequestration cuts came due, however, the two sides dug in again. President Obama demanded further increases in revenue and Congressional Republicans refused to contemplate any tax changes that would bring in more revenue. The cuts went into effect.<sup>255</sup>

President Obama continued to blame Republicans for the impasse, but he used very different language than when he attacked Republicans over the debt-ceiling threat. He described the sequester as “not smart” and accused Republicans of being out of touch with middle class voters.<sup>256</sup> He predicted dire consequences, which he

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251. See generally H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011).

252. See Doyle McManus, *The GOP's Tactical Retreat*, THE LOS ANGELES TIMES, Jan. 27, 2013, at A20. Republicans quietly agreed to suspend the debt ceiling for five months. *Id.*

253. See Jonathan Tamari, *Congress Seems Resigned to Sequestration*, THE PHILADELPHIA INQUIRER, Mar. 3, 2013, at A1.

254. *Id.*

255. *Id.*

256. See Paul Harris, *US Faces Huge Job Losses as Obama Orders \$85bn Cuts*, THE OBSERVER, Mar. 2, 2013, at 29.

sought to lay at Republicans' feet.<sup>257</sup> But he did not charge anyone with hostage-taking or using leverage inappropriately.

The difference in the characterization of the debt-ceiling threat and the sequester intransigence reflects differences in the types of leverage employed. The threatened refusal to raise the debt ceiling constituted negative leverage — neither side would have benefited. The sole purpose was to impose a cost on the President — really a cost on the entire government — for refusing Republican demands on budget cuts. That is why it appeared coercive and why President Obama could credibly charge Republicans with hostage-taking. But Republicans were acting within their rights when they chose their alternative — the sequester — to agreeing to further tax increases. They were exercising positive leverage. Not coincidentally, the President's attacks focused on the reasonableness of the Republicans' proposals.

I've analyzed the uses and limits of leverage in negotiation by measuring different forms of leverage against the yardstick of coercion. I have shown how social norms against coercion can be explained in negotiation terms, and have used these insights to help elucidate some common but problematic legal categories. Identifying an exercise of leverage as positive or negative, however, does not answer the question of whether that use of leverage is good or bad. Negative leverage can be used in appropriate ways and positive leverage can be used in inappropriate ways. Ultimately, those assessments are grounded in social norms that are not easily defined. But a better understanding of the forms and uses of leverage can help negotiators and courts think more clearly about why certain uses of leverage seem to cross social and legal boundaries.

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257. *Id.*