# CONTRACTUAL DURESS AND RELATIONS OF POWER

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Consent is one of the pillars of contract law and the subject of much scholarly literature. At the same time, feminist scholarship concentrates on consent to sex and scarcely deals with contractual consent. This Article aims to bridge this scholarly gap. By focusing on duress doctrine in the context of relations of power, it uses feminist insights about consent to examine the liberal notion of consent to contract. The application of feminist scholarship regarding consent shows that duress doctrine is narrow and disregards context and power imbalances between parties. As a result, coercive contracts are enforced, to the economic detriment of aggrieved parties. This Article proposes the development of a broader, more complex duress doctrine that is sensitive to social inequality and context and that includes aggrieved parties' experiences and perspectives.



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## Introduction

> There does not appear to be a traditional legal doctrine dealing with consent that adequately addresses the double binds that women experience when dealing with situations involving sex or love.[1]

Consider the following set of facts taken from a Massachusetts Court of Appeals case:[2] Timothy told Mary that he would marry her only if she signed a prenuptial agreement.[3] His lawyer drafted an agreement based exclusively on information Timothy supplied.[4] Timothy refused to negotiate the agreement, and Mary's lawyer advised her not to sign it.[5] At the time, Mary was thirty-five years old, pregnant with Timothy's child, and had three children from her previous marriage.[6] Two days prior to the wedding, the parties signed the prenuptial agreement.[7] Before signing the contract, Mary was crying, and she told Timothy and his lawyer that she did not want to sign and that she was doing so against the advice of her attorney, who was not present.[8] The prenuptial agreement stated that each party waived his or

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[1] Jane Harris Aiken, *Intimate Violence and the Problem of Consent*, 48 S.C. L. Rev. 615, 637 (1997).

[2] Biliouris v. Biliouris, 852 N.E.2d 687 (Mass. App. Ct. 2006). For further discussion of this case, see *infra* Part IV.A.

[3] *Id.* at 689. According to Mary, Timothy conditioned the marriage upon her becoming pregnant. *Id.* at 692 & n.11. After she became pregnant, Timothy added a second condition: the signing of a prenuptial agreement. *Id.* at 692.

[4] *Id.* at 689.

[5] *Id.* at 689 & n.2.

[6] *Id.* at 689.

[7] *Id.* at 689 & n.1.

[8] *Biliouris*, 852 N.E.2d at 689 & n.2.

her rights to alimony and that each party also retained his or her individual property.[9]

During their marriage, Mary and Timothy had two children.[10] Mary was a stay-at-home mother during part of the marriage, and at the time of their divorce she worked as a part-time teacher.[11] Timothy was a physician.[12] After almost nine years of marriage, Timothy filed for divorce and Mary filed an answer and counterclaim seeking a divorce on the alternative grounds of cruel and abusive treatment or irretrievable breakdown of the marriage.[13] Timothy sought enforcement of the prenuptial agreement,[14] and Mary argued that the agreement should not be enforced because she had signed it under duress.[15] The Court of Appeals rejected Mary's claim of duress and affirmed the trial court's conclusion that the prenuptial agreement was fair at the time of its execution and was thus enforceable.[16] Because most of Timothy's assets could be traced back to before the marriage, the court's decision allowed Timothy to retain assets worth over eighteen times more than Mary's assets.[17]

The Court of Appeals rejected the duress claim based on the following findings: Mary had sufficient time to review the agreement;[18] she obtained legal advice from independent counsel;[19] and she told the notary at the time of the execution of the agreement that she was signing it of her own free will.[20] The court concluded that Mary's pregnancy and Timothy's insistence

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[9] *Id.* at 690 & n.4.

[10] *Id.* at 690.

[11] *Id.* at 690 & n.7.

[12] *Id.*

[13] *Id.* at 691. The trial court rejected Mary's claim regarding cruel and abusive treatment, and the Court of Appeals affirmed. *Id.* at 691, 698–99. Mary raised additional claims regarding her interests in Timothy's medical office building and in their marital home; however, as these claims are not related to duress surrounding the signing of the premarital agreement, they fall outside the scope of this Article.

[14] *Biliouris*, 852 N.E.2d at 691.

[15] *Id.* at 692.

[16] *Id.* at 689. The court emphasized that Mary was not claiming that the prenuptial agreement was unconscionable at the time of its enforcement. This ex-post fairness analysis is different than the ex-ante fairness analysis and will not be discussed here.

[17] *Id.* at 691 & n.8. According to the agreement at the time of its execution, Timothy's premarital assets were worth $986,000 and his gross income per week was $6,400, whereas Mary's premarital assets were worth $100,000 and her gross income per week was $1,675. *Id.* at 689. Mary's income consisted of her salary ($660 per week), Social Security benefits ($500 per week), and worker's compensation benefits ($515 per week) she received on behalf of three minor children from her previous marriage. *Id.* at 689 n.3. After the divorce, Timothy retained his assets worth $1,962,000, and Mary retained her assets worth $105,000. *Id.* at 691.

[18] *Id.* at 693. Mary claimed she was provided with the prenuptial agreement only a week before the wedding, while Timothy claimed he provided her with the agreement two months before the wedding. *Id.* at 689 n.1.

[19] *Id.* at 689.

[20] *Biliouris*, 852 N.E. 2d at 693.

that there would be no marriage unless she signed the agreement did not amount to a threat that would have divested Mary of her free will.[21]

As this case demonstrates, the court's analysis of facts proving consent is limited and lacks consideration of the background circumstances and the power relations between the parties. The court applies an individualistic notion of consent and fails to consider the broader social picture surrounding the agreement. For example, the court did not consider Mary's economic dependency on Timothy, her job prospects as a mother, and her vulnerability at the time she signed the prenuptial agreement as a pregnant woman two days before the wedding.[22] As this Article will demonstrate, a broader examination of consent reveals that what seems to the court to be a consensual agreement is actually the result of a combination of social constraints and economic pressures exploited by the more powerful party. Furthermore, the court's narrow analysis led to the enforcement of a contract that resulted in a great distribution imbalance. For example, during their marriage, Timothy's assets nearly doubled while Mary's assets stayed almost the same.[23] Enforcing the contract meant that Timothy was able to retain all the assets he accumulated during the marriage, even though he benefitted from Mary's financial contributions and non-financial contributions as a stay-at-home mother during the marriage.[24]

The question of what constitutes consent is a fundamental issue in many contract law doctrines and theories; it is a question with which courts and contract law scholars constantly grapple.[25] At the same time, feminists have developed a rigorous scholarship about the notion of consent, concentrating mainly on consent to sex.[26] Feminist literature on nonconsensual sex has provided original and provocative insights into consent in relations of power. Feminist scholars, however, have yet to extend these insights to consent to contract. This Article aims to bridge these two areas of scholarship. Since applying the feminist analysis of consent to contract law is an enormous project, this Article is limited in two ways. First, the following analysis concentrates on the power imbalance between parties in spousal

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[21] *Id.* at 691.

[22] *Id.* at 692–94.

[23] *Id.* at 689, 691.

[24] *Id.* at 691–92. It should be noted that Mary was awarded 80% equity in the marital home due to her contributions. *Id.* at 691.

[25] *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 8–14 (1981); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 291 (1986).

[26] *See, e.g.*, Melanie A. Beres, *'Spontaneous' Sexual Consent: An Analysis of Sexual Consent Literature*, 17 FEMINISM & PSYCHOL. 93, 94 (2007) (offering a critical review of current literature and current understandings of sexual consent); Cheryl Hanna, *Rethinking Consent in a* Big Love *Way*, 17 MICH. J. GENDER & L. 111 (2010) (exploring the notion of consent in intimate relations through a discussion of polygamy and the HBO series *Big Love*).

agreements.[27] Second, the analysis focuses on duress law and on rape law[28]—two areas where (the lack of) consent is a key issue. Exploring the questions of what nullifies consent from a feminist perspective will enrich our understanding of consensual contract. At the same time, it will expand the feminist critique to new areas of law.

The legal concepts of rape and duress might seem unrelated at first glance. There are obvious differences: while rape is a criminal law doctrine, duress is a contract law doctrine; while a rape conviction results in severe punishment, a finding of duress renders a contract unenforceable; while rape deals with sexual intercourse, duress deals with economic transactions. These are only a few of the obvious differences. This Article submits that despite these dissimilarities, the feminist insights developed in the rape context are also valuable in the contract context. Indeed, while some feminists have used contract law to critique rape law,[29] this Article draws from rape law to enrich duress law.[30]

This Article proposes that courts engage in a broader analysis of consent, examining such issues as economic imbalance, relational dynamics between the parties, and other social factors and circumstances that provide a backdrop to the contract. This Article's proposed alternative analysis of consent is relevant not only in the context of spousal agreements, but also in other situations of power inequality between contracting parties.

Duress doctrine is unclear and inconsistent. Part I briefly outlines duress doctrine and provides a useful roadmap for understanding this confusing area of law. To that end, Part I explores the three aspects of duress doctrine: the illegitimate behavior of the coercer, the absence of free will of the aggrieved party, and the unfairness of the contract.

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[27] As used in this Article, the term "spousal agreement" means a contract between spouses or prospective spouses.

[28] While I rely mainly on feminist critique of rape law, one also can find feminist insights regarding consent in feminist literature regarding sexual harassment, pornography, trafficking, prostitution, abortion, and end of life and medical decisions. *See generally* CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY (Rosemary Hunter & Sharon Cowan eds., 2007) [hereinafter CHOICE AND CONSENT] (a collection of essays exploring consent in different contexts such as end of life decisions, maternity leave, and violent relationships).

[29] *See, e.g.*, LINDA HIRSHMAN & JANE LARSON, HARD BARGAINS: THE POLITICS OF SEX 267–94 (1998) (proposing a bargaining model of intimate relations); Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1421–37 (2005) (developing a model for rape law reform based on negotiations); Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 229–37 (1989) (critiquing a contract model of sexual interaction and suggesting a communicative model instead); J.A. Scutt, *Consent Versus Submission: Threats and the Element of Fear in Rape*, 13 U.W. AUSTL. L. REV. 52, 61–64 (1977) (comparing consent to contract and consent to sexual intercourse); Ann T. Spence, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57 (2003) (exploring the difference between free will and coercion in rape law and contract law).

[30] *See generally* Josephine Ross, *Blaming the Victim: 'Consent' Within the Fourth Amendment and Rape Law*, 26 HARV. BLACKLETTER L. J. 1 (2010) (using feminist insights regarding consent to sex to analyze consent to search).

Feminist literature on consent to sex is rich and diverse. Part II explores the feminist insights into consent to sex and the feminist critique of the liberal notion of consent. Each of the three aspects of duress doctrine is analyzed from a feminist perspective. The application of feminist scholarship to the contract context reveals that duress doctrine has been narrowly construed and ignores aggrieved parties' perspectives. Duress doctrine ignores the context in which the contract was written and ignores power imbalance between the parties. Consequently, duress doctrine trivializes and even legitimizes many cases of coercion, resulting in harsh economic consequences for aggrieved parties.

Part III introduces a new approach to duress doctrine that addresses the feminist critique explored in Part II. This alternative takes into account the perspectives of aggrieved parties and the pressures they typically experience. Rather than using set categories, the alternative approach is contextual. It refutes the binary thinking of current duress doctrine, which relies on the dichotomy of consent versus duress. This new approach also considers a broader spectrum of pressures beyond severe coercion. Part III proposes a more complex and nuanced view of duress doctrine that balances consideration of social power dynamics, on the one hand, and respect for autonomy and freedom, on the other.

Part IV demonstrates the application of both the feminist critique of consent and the proposed alternative approach to duress doctrine developed in Parts II–III. An analysis of prenuptial and separation agreements illustrates how the feminist theory would work in practice. Although this Article uses spousal agreements as examples, both the feminist critique and the proposed alternative approach to duress doctrine are also applicable in other contexts of power imbalances between parties, such as employment agreements, consumer agreements, mortgage agreements, loan agreements, insurance agreements, and student-athlete contracts.

## I. Contractual Duress Doctrine

Under contract law, consensual contracts entered into voluntarily and willingly are enforceable. Duress is a defect in the formation process, resulting in an unenforceable contract.[31] Since duress doctrine has been criticized for its confusing nature,[32] Part I presents a structure for understanding this area of law. It suggests that there are three aspects of duress: the illegitimate behavior of the coercive party, the absence of free will of the aggrieved

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[31] Joseph M. Perillo, Calamari & Perillo On Contracts § 9.2 (5th ed. 2003).

[32] *See, e.g.*, Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. Va. L. Rev. 443, 446 (2005) (observing that courts apply doctrine inconsistently); Julie Kostritsky, *Stepping Out of the Morass of Duress Cases: A Suggested Policy Guide*, 53 Alb. L. Rev. 581, 592 (1989) (observing that "[c]onfusion prevails in duress law").

party, and the unfairness of the contract.[33] These aspects can be found in both case law and literature. However, while some scholars and opinions emphasize only one aspect, other academics and judges rely on a combination of two aspects.[34] Based on this diverse literature, this Article argues for a clear and full view of the duress doctrine that integrates all three aspects.

As will be argued throughout this Part, all three aspects of duress are construed narrowly.[35] Courts apply a limited examination of the actions of the coercer, the factors indicating nullification of the will of the aggrieved party, and the fairness of the contract. Courts disregard the dynamics of the relations between the parties and any power imbalance between them, as well as other social circumstances that form the context of the contract.

### *A. The Coercer's Illegitimate Behavior*

The first aspect of duress doctrine is the illegitimate behavior of the coercer. Historically, duress consisted of physical force.[36] Modern contract law also includes threats of illegal or immoral social or economic pressure under the doctrine of duress.[37] According to the Restatement (Second) of Contracts, duress occurs when "a party's manifestation of assent is induced by an improper threat by the other party."[38] The Restatement defines "improper threat" as including threatening a crime or tort, threatening criminal prosecution, threatening in bad faith to use civil process, or threatening a breach of the duty of good faith and fair dealing.[39]

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[33] For duress law theories, see generally MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 79–101 (1993); ALAN WERTHEIMER, COERCION 179 (1987).

[34] *See, e.g.*, WERTHEIMER, COERCION, *supra* note 33, at 29, 179 (developing a two prong definition of duress based on the coercieve proposal that leaves the other party no choice); P.A. Chandler, *Economic Duress: Clarity or Confusion?*, 1989 LLOYD'S MAR. & COM. L.Q. 270, 272–77 (discussing the illegitimate pressure and coercive aspects of duress); Ross McKeand, *Economic Duress—Wearing the Clothes of Unconscionable Conduct*, 17 JCL 1 (2001) (considering the limits of unconscionable conduct and its effect on consent of the aggrieved party as elements of duress); M.H. Ogilvie, *Forbearance and Economic Duress: Three Strikes and You're Still Out at the Ontario Court of Appeal*, 29 QUEEN'S L.J. 809, 818–21 (2004) (discussing the illegitimate pressure and no reasonable alternatives elements of economic duress); Andrew Phang, ECONOMIC DURESS—UNCERTAINTY CONFIRMED, 5 JCL 147, 150–54 (1992) (discussing the overborne will and illegitimate pressure elements of duress); Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175, 181–98 (1997) (discussing both the improper proposal and no reasonable alternative elements of duress).

[35] *See* discussion *infra* Part I.A.–C.

[36] RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981).

[37] *See, e.g.*, Int'l Underwater Contractors, Inc. v. New England Tel. & Tel. Co., 393 N.E.2d 968, 970 (Mass. App. Ct. 1979) (reversing summary judgment because disputed facts, if true, would constitute economic duress).

[38] RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

[39] RESTATEMENT (SECOND) OF CONTRACTS § 176(1) (1981). *See also* FDIC v. White, 76 F. Supp. 2d 736, (N.D. Tex. 1999) (discussing threat of criminal prosecution); Warner v. Warner, 394 S.E.2d 74, 77–78 (W. Va. 1990) (discussing threat to institute criminal proceeding); E. ALLAN FARNSWORTH, CONTRACTS § 4.16–18 (4th ed., 2004) (discussing the elements of duress).

For the threat to be improper, it must be wrongful or illegitimate.[40] Under traditional duress doctrine, the threat needed to be illegal, and typically included threat of physical harm or injury or threat of wrongful detention of goods.[41] But under modern duress doctrine, the threat need not be illegal.[42] For example, a threat to breach the contract might be considered improper.[43]

The behavior of the coercer is relevant not only according to case law, but also according to theories of duress. Rights-based analysis developed a baseline against which threats are measured.[44] This baseline represents a conception of basic rights. It is based on the notion that if a party has a right

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[40] *See* John Dalzell, *Duress by Economic Pressure*, 20 N.C. L. REV. 237, 240 (1942) (discussing duress based on wrongful threat).

[41] FARNSWORTH, *supra* note 39, at § 4.16 ("[T]he early common law imposed a very strict test" for duress).

[42] *See* Nicholas Rafferty, *The Element of Wrongful Pressure in a Finding of Duress*, 18 ALTA. L. REV. 431, 432 (1980) (arguing that wrongful pressure can include "a threatened exertion of legal rights."); *see*, *e.g.*, Centric Corp. v. Morrison-Knudsen Co., 731 P.2d 411, 419 (Okla. 1986) (discussing the difference between illegal, unlawful, and wrongful).

[43] *See*, *e.g.*, Applied Genetics Int'l v. First Affiliated Sec., 912 F.2d 1238, 1242 (10th Cir. 1990) (discussing threat to breach an underwriting agreement); Laemmar v. J. Walter Thompson Co., 435 F.2d 680, 682 (7th Cir. 1970) (discussing threat to terminate employment); Austin Instrument Co. v. Loral Corp., 272 N.E.2d 533, 535–36 (N.Y. Ct. App. 1971) (discussing threat to breach a contract by not delivering the contracted goods). *See generally* Oren Bar-Gill & Omri Ben-Shahar, *Threatening an "Irrational" Breach of Contract*, 11 S. CT. ECON. REV. 143 (2004) (discussing the threat to breach a contract and developing an economic analysis of the credibility of the threat); Jack Beatson, *Duress by Threatened Breach of Contract*, 92 LAW Q. REV. 496 (1976) (discussing threat to breach contract cases); Rick Bigwood, *Economic Duress by (Threatened) Breach of Contract*, 117 LAW Q. REV. 376, 376 (2001) (discussing a case involving the threat to breach a contract); Brian Coote, *Duress by Threatened Breach of Contract*, 39 CAMBRIDGE L.J. 40, 44 (1980) (discussing the expansion of duress to include threatened breach of contract); Elizabeth MacDonald, *Duress by Threatened Breach of Contract*, 1989 J. BUS. L. 460 (discussing whether revisions to an existing contract are voidable because they were procured through the threat to breach the existing contract); Gerard McMeel, *Threatened Breach of Contract and Refusal to Supply as Grounds for Duress*, 5 NOTTINGHAM L.J. 120 (1996) (discussing which financial interests should be protected from threat by duress doctrine); M. H. Ogilvie, *Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract*, 26 MCGILL L.J. 289 (1980–81) [hereinafter Ogilvie, *Economic Duress*] (discussing the expansion of duress to include threatened breach of contract); M. E. Palmer & Louise Catchpole, *Industrial Conflict, Breach of Contract and Duress*, 48 MOD. L. REV. 102, 106 (1985) (discussing economic duress and negotiation in the labor context); R. J. Sutton, *Duress by Threatened Breach of Contract*, 20 MCGILL L. J. 554 (1974) (applying duress doctrine to contract modification).

[44] *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 262–65 (1974) (discussing voluntary exchange); Robert Nozick, *Coercion, in* PHILOSOPHY, SCIENCE AND METHOD 440 (Sidney Morgenbesser et al. eds., 1969) (discussing the difference between offer and acceptance). For a critique of Nozick, see MICHAEL TAYLOR, COMMUNITY, ANARCHY, AND LIBERTY 99 (1982); G. A. Cohen, *Capitalism, Freedom, and the Proletariat*, *in* THE IDEA OF FREEDOM 9 (Alan Ryan ed., 1979); G. A. Cohen, *Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty*, 11 ERKENNTNIS 5, 5 (1977); Alan Haworth, *What's So Special About Coercion?,* 19 ECON. & SOC'Y 376, 377 (1990); Daniel Lyons, *Welcome Threats and Coercive Offers*, 50 PHIL. 425, 427 (1975).

to be free from X, then a threat to do Y or to suffer X is coercive.[45] According to rights-based analysis, there is a distinction between an offer and a threat, and only the latter will form an element of a duress claim.[46] An offer increases and a threat decreases the alternatives open to the other party. Therefore, the first is a welcomed opportunity since it makes the other party better off while the latter is a forced choice between two evils (either succumbing to the threat and signing a bad contract, or resisting the pressure and suffering the threatened consequences) that makes the other party worse off. Some commentators have critiqued the offer-threat division, since the proposal includes both an offer (if it is accepted) and a threat (in case it is rejected).[47] Other scholars have introduced the concept of coercive offers by acknowledging that some offers, while they improve the other party's situation, are still morally wrong and coercive.[48] Scholars and philosophers also debate what baseline should be used in order to determine whether the proposal increased or decreased the offeree's options.[49] Some advocate a normative moral baseline,[50] while others advocate an objective neutral baseline.[51]

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[45] *See* NOZICK, ANARCHY, STATE AND UTOPIA, *supra* note 44, at 262.

[46] *See* Nozick, *Coercion*, *supra* note 44, at 447–53.

[47] *See, e.g.*, HAROLD D. LASSWELL & ABRAHAM KAPLAN, POWER AND SOCIETY 97 (1950) (discussing degrees of coercion); Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 55–56 (2002) (discussing whether coercive proposals are threats, offers, or both); Kristjan Kristjansson, *Freedom, Offers, and Obstacles*, 29 AM. PHIL. Q. 63, 68 (1992) (arguing that the threat/offer distinction is inadequate); Peter Westen, *Freedom and Coercion—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 569 (1985) (discussing the semantic underpinnings of offers, threats, and coercion).

[48] *See, e.g.*, Theodore Benditt, *Threats and Offers*, 58 THE PERSONALIST 382, 382–84 (1977). For more discussion of coercive offers, coercive threats, and the differences between the two, see JOEL FEINBERG, HARM TO SELF 229–33 (1986); Craig L. Carr, *Coercion and Freedom*, 25 AM. PHIL. Q. 59, 64–65 (1988); Don DanDeVeer, *Coercion, Seduction and Rights*, 58 THE PERSONALIST 374, 374 (1977) (arguing that coercive offers exist and for a more expansive view of coercion); Joel Feinberg, *Noncoercive Exploitation*, *in* PATERNALISM 201, 208 (Rolf Sartorius ed., 1983); Virginia Held, *Coercion and Coercive Offers*, *in* COERCION: NOMOS XIV 54–57 (J. Roland Pennock & John W. Chapman eds., 1972); Daniel Lyons, *The Last Word on Coercive Offers*, 8 PHIL. RES. ARCHIVES 393, 405 (1983) (discussing formulas for distinguishing coercive offers); Joan McGregor, *Bargaining Advantages and Coercion in the Market*, 14 PHIL. RES. ARCHIVES 23, 38–41 (1988) (analyzing the benefit/sanction distinction); Donald McIntosh, *Coercion and International Politics: A Theoretical Analysis*, *in* COERCION: NOMOS XIV 243–47 (J. Roland Pennock & John W. Chapman eds., 1972) (offering a broad definition of coercion); Robert Stevens, *Coercive Offers*, 66 AUSTL. J. PHIL. 83, 83, 94 (1988) (defending the notion of coercive offers).

[49] WERTHEIMER, COERCION, *supra* note 33, at 206–11.

[50] *See id.* at 217; RICK BIGWOOD, EXPLOITATIVE CONTRACTS 319–44 (2003); FRIED, *supra* note 25, at 97; Berman, *supra* note 47, at 53; Rick Bigwood, *Coercion in Contract: The Theoretical Constructs of Duress*, 46 U. TORONTO L.J. 201, 226–38 (1996); Vinit Haksar, *Coercive Proposals*, 4 POL. THEORY 65, 72 (1976); Jeffrie G. Murphy, *Consent, Coercion and Hard Choices*, 67 VA. L. REV. 79, 86 (1981); Nozick, *Coercion, supra* note 44, at 440; Cheney C. Ryan, *The Normative Concept of Coercion*, 89 MIND 481, 482 (1980); Sian E. Provost, Note, *A Defense of a Right-Based Approach to Identifying Coercion in Contract Law*, 73 TEX. L. REV. 629, 650 (1995).

Although they focus on the acts of the coercer, the rights-based theories are aimed at protecting the rights of the aggrieved party.[52]

The coercer's behavior is also relevant according to relational contract theory because it violates core values of relational contract theory, such as cooperation, solidarity, and mutuality.[53] These values are stronger in fiduciary relations and where there is a long-standing relationship between the parties characterized by trust and respect.[54] Furthermore, some scholars[55] have advocated for assimilating duress doctrine into the doctrine of unconscionability.[56]

The current trend is moving toward expanding duress doctrine and recognizing new forms of duress, such as economic duress, beyond the historically available categories of physical duress and duress of goods. However, courts still narrowly define the circumstances in which the behavior of the coercer will be regarded as illegitimate. Courts will only recognize the existence of duress in extreme cases of pressure, thus leaving much coercive conduct outside the scope of duress doctrine.[57]

### *B. The Absence of the Free Will of the Aggrieved Party*

The second aspect of duress doctrine is the absence of free will of the aggrieved party. The threat discussed above makes the consent invalid since it is not freely and voluntarily given:[58] the aggrieved party's choice is impaired by the threat. While the courts still use the free will terminology,[59]

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[51] *See* Michael Gorr, *Toward a Theory of Coercion*, 16 CAN. J. PHIL. 383, 384 (1986); David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 131 (1981). For a combination of the two baselines, see Westen, *supra* note 47, at 572–89.

[52] TREBILCOCK, *supra* note 33, at 79.

[53] For general discussion of the relational theory of contract, see, e.g., IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980); THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (David Campbell ed., 2001); Robert W. Gordon, *Macaulay, MacNeil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565 (discussing the contribution of relational theory to contract law); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483.

[54] *See* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1230 (1998).

[55] *See, e.g.*, Andrew Phang, *Economic Duress: Recent Difficulties and Possible Alternatives*, 5 RESTITUTION L. REV. 53, 63 (1997) [hereinafter *Recent Difficulties*]; Andrew Phang, *Undue Influence Methodology, Sources and Linkages*, 1995 J. BUS. L. 552, 570.

[56] For the doctrine of unconscionability, see generally discussion *infra* Part I.C.

[57] *See* Giesel, *supra* note 32, at 468.

[58] PERILLO, *supra* note 31, at 316.

[59] *See, e.g.*, Leonard v. Univ. of Del., 204 F. Supp. 2d 784, 788 (D. Del. 2002); Todd v. Blue Ridge Legal Servs., Inc., 175 F. Supp. 2d 857, 863 (W.D. Va. 2001); Krilich v. Am. Nat'l Bank & Trust Co., 778 N.E.2d 1153, 1162 (Ill. App. Ct. 2002); Putz v. Allie, 785 N.E.2d 577, 582 (Ind. Ct. App. 2003); Young v. Anne Arundel Cnty., 807 A.2d 651, 692 (Md. Ct. Spec. App. 2002); *In re* Estate of Davis, 832 So. 2d 534, 538 (Miss. Ct. App. 2001); Hughes v. Pullman, 36 P.3d 339, 343 (Mont. 2001); Lyons v. Lyons, 734 N.Y.S.2d 734, 736–37 (N.Y. App. Div. 2001); Radford v. Keith, 584 S.E.2d 815, 820

this element has been strongly critiqued by scholars,[60] who argue that it is hard to determine when the will was overborne by the threat and that this test is both under-inclusive and over-inclusive.[61] One might argue that a party to a contract always makes compromises and chooses the lesser of two evils (and thus, a decision made under duress is no different than any contractual decision), but one might also claim that parties always contract under restraints, pressures, and demands (so every contract is coerced in some way).[62]

Accordingly, the Restatement (Second) of Contracts does not use the free will test. Instead, it states that in duress cases, the threat "leaves the victim no reasonable alternative."[63] The courts need not examine whether the party felt forced to sign the contract while not truly agreeing. Rather, the test is an objective one, concentrating on his or her reasonable alternatives.

This approach is based on the will theory,[64] according to which a contract is valid only if the parties voluntarily, freely, willingly, and knowingly

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(N.C. Ct. App. 2003), *aff'd*, 591 S.E.2d 519 (N.C. 2004); Chapman's Children Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 443 (Tex. Ct. App. 2000).

[60] *See, e.g.*, Michael D. Bayles, *A Concept of Coercion*, *in* COERCION: NOMOS XIV 16 (J. Roland Pennock & John W. Chapman eds., 1972); A. Bradney, *Duress, Family Law and the Coherent Legal System*, 57 MOD. L. REV. 963 (1994) (discussing subjective and objective tests for duress); Dalzell, *supra* note 40, at 237 (arguing that "no basic difference exists between economic duress and physical duress"); Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) (analyzing freedom in the context of labor and consumption); John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275, 277 (1999) ("coerced acts cannot be distinguished from other acts on the basis of voluntariness or freedom."); Kostritsky, *supra* note 32, at 592 ("The 'will theory,' . . . is defective because it requires courts to ascertain the unknowable: the actual intent of the party alleging duress.").

[61] Hill, *A Utilitarian Theory of Duress*, *supra* note 60, at 279.

[62] Giesel, *supra* note 32, at 471 ("[O]ne must recognize that all choice is constrained in some ways.") For a critique of the will of the aggrieved party test, see P. S. Atiyah, *Economic Duress and the "Overborne Will,"* 98 L. Q. REV. 197, 200 (1982); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 297 (1975) ("It is a mistake to assert that the law of duress is designed to protect 'freedom of the will' without specifying those things from which it should be free."); Rafferty, *supra* note 42, at 434 (under the aggrieved party test, courts must "undertake the difficult task of determining why the plaintiff acted as he did.").

[63] RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981). For courts' application of the no reasonable alternative test, see, e.g., Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1326 (Fed. Cir. 2003); Nasik Breeding & Research Farm, Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 527 (S.D.N.Y. 2001); N. Fabrication Co. v. UNOCAL, 980 P.2d 958, 960 (Alaska 1999); Krantz v. BT Visual Images, L.L.C., 89 Cal. App. 4th 164, 176 (Cal. Ct. App. 2001); Nobel v. White, 783 A.2d 1145, 1149 (Conn. App. Ct. 2001); Primary Health Network, Inc. v. State, 52 P.3d 307, 312 (Idaho 2002); Dunes Hospitality, L.L.C. v. Country Kitchen Int'l, Inc., 623 N.W.2d 484, 492 (S.D. 2001); Berardi v. Meadowbrook Mall Co., 572 S.E.2d 900, 906 (W. Va. 2002); *In re* Yannalfo, 794 A.2d 795, 797 (N.H. 2002).

[64] For a discussion of the will theory of contract law, see Roscoe Pound, *The Role of Will in Law*, 68 HARV. L. REV. 1 (1954) (exploring the role of individual will in the law); Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 347 (1915) (establishing free will as a recognized interest).

consent to it.[65] The will theory is based on a moral premise that a person should be bound only by contracts he took upon himself willingly. Duress is an excuse; that is, a person should not be held accountable by a contract that was imposed on him against his free will.[66] Under this theory, duress is one exception to the freedom of contract rule (along with other defects in the formation of the contract, such as misrepresentation, mistake, or undue influence).

Freedom of contract is a fundamental premise of contract law, and duress doctrine provides a narrow exception to this grand rule.[67] Only in rare and extreme cases will courts conclude that the threat left the aggrieved party with no reasonable alternative, and that he or she did not freely and voluntarily consent to the contract.[68] Consequently, in many cases that are less extreme the aggrieved party will not be protected under the doctrine of duress.

### *C. The Unfairness of the Contract*

The third aspect of duress doctrine is the unfairness of the contract. Although there are other contract law doctrines that specifically deal with this issue, such as unconscionability, an unfair, one-sided contract may be the result of duress.[69] Put differently, the unfairness of the contract may indicate duress, as the threat may be the reason for a person signing a bad contract.[70] While courts examine separately the duress claim and the

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[65] For duress theory based on the will theory, see FRIED, *supra* note 25, at 93; Giesel, *supra* note 32, at 475 (arguing that a person still exercises free will under duress; "that will is simply limited significantly by the choices available."); Zimmerman, *Coercive Wage Offers*, *supra* note 51, at 121 (discussing coercion and will in the capitalist labor market). *But see* Atiyah, *supra* note 62, at 200 (repudiating the overborne will theory); P. S. Atiyah, *Duress and the Overborne Will Again*, 99 L. Q. REV. 353, 356 (1983) ("[T]he law is not searching for overborne wills, but for improper and unacceptable threats."); David Tiplady, *Concepts of Duress*, 99 L. Q. REV. 188, 194 (1983) (emphasizing the limitations of the overborne will theory).

[66] *See also* Hill, *A Utilitarian Theory of Duress*, *supra* note 60, at 318 (arguing that punishing the coerced party for acts committed under duress has no utilitarian purpose and results in further harms).

[67] *See* Giesel, *supra* note 32, at 465 (suggesting that claims of duress are often unsuccessful because of "the courts' inherent belief in the value of the freedom of contract.").

[68] *Id.* at 468.

[69] *See, e.g.*, Peter Benson, *Abstract Right and the Possibility of Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1090 (1989) (market price as a reference point); F. H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33, 34 (1990) (arguing that substantive fairness norms are efficient); James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1628 (1981) (discussing disproportion in price as evidence of duress); Robert L. Hale, *supra* note 60, at 621 (the test of duress is not compulsion but the quantitative reasonableness of the terms of the contract); Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C.L. REV. 315, 319–20 (2008) (proposing a model that would pose a duty not to take advantage of the other party's distress or demand above normal price).

[70] *See* Gordley, *supra* note 69, at 1628.

unconscionability claim, they may also reject a duress claim if the contract is mutually beneficial to both parties or deem the terms of the contract unfair if the contract is entered into under duress.[71] Thus, the fairness of the contract is not only the subject of a separate doctrine, but also an aspect of the duress doctrine.[72]

The Restatement (Second) of Contracts incorporates the fairness of the contract into the improper threat element of duress by including the following:

> A threat is improper if the resulting exchange is not on fair terms, and
> (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
> (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
> (c) what is threatened is otherwise a use of power for illegitimate ends.[73]

Support for this aspect of duress doctrine is found not only in case law but also in contract theories. Some scholars argue for fairness evaluation of the contract as part of the duress analysis.[74] The substantive fairness theory[75] focuses on the contract itself rather than the parties to the contract or the bargaining process.[76] Thus, contracts are subject to substantive scrutiny

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[71] For a discussion of combining coercion and unconscionability, see Phang, *Recent Difficulties*, *supra* note 55, at 63.

[72] Margaret Ryznar & Anna Stepien-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 39 (2009) ("[I]f the substance of the agreement appears fair to the court, defects in the bargaining process may be of lesser importance. However, if the agreement seems particularly unfair to one spouse, courts may examine the procedures surrounding its execution more closely.").

[73] RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (1981). For courts' application of this section, see, e.g., Richards v. Allianz Life Ins. Co., 62 P.3d 320, 328 (N.M. Ct. App. 2002); Boud v. SDNCO, Inc., 54 P.3d 1131, 1137 (Utah 2002); Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293, 1298 (M.D. Ala 1999).

[74] *See* John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 282 (1947) (arguing that the purpose of duress doctrine is to prevent unjust enrichment); *see also* John P. Dawson, *Duress Through Civil Litigation: I*, 45 MICH. L. REV. 571, 577 (1947).

[75] *See* Lawrence Kalevitch, *Contract, Will & Social Practice*, 3 J.L. & POL'Y 379, 418–423 (1995) (arguing for "a substantive line-drawing contract law."). *But see* Giesel, *supra* note 32, at 486 (arguing against a substantive fairness analysis in duress doctrine).

[76] Some scholars distinguish between exploitation (substantive scrutiny of the fairness of the contract) and duress (procedural scrutiny of the bargaining process). *See, e.g.*, ALAN WERTHEIMER, EXPLOITATION 26–28 (1996) (distinguishing among coercion, fraud, and exploitation); John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 660 (1994) (arguing that exploitation is distinguished from coercion or duress because it generally involves "an offer that represents an additional alternative"); Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 896 (1997) ("Exploitation and coercion appear to have different foci. Whereas coercion refers to the for-

based on theories of justice.[77] According to the substantive fairness theory of contract law, duress will result in the unjust distribution of contractual benefits.[78] For example, if a contract deviates from market terms then it might be considered coercive.[79]

Like substantive fairness theories, economic theories generally focus on the contract (and specifically on the contract's efficiency) rather than the parties. The common economic analysis focuses on ex post allocative efficiency. The assumption that voluntary choices increase the well-being of the parties is rebutted when the behavior results from duress. Duress undermines the allocative efficiency guaranteed by voluntary exchange.[80] Another argument made by law and economics scholars is that if coercive threats were legal, parties would be driven to spend resources on precautions that would protect them against such threats, or on finding opportunities to make coercive threats.[81] Accordingly, duress doctrine aims to discourage the making of threats and to reduce the need to invest in private anti-coercion measures.[82] An additional argument is that "hard" bargaining can lead to an inefficient breakdown in negotiations, and setting aside such bargains can enhance efficiency by discouraging hard bargaining strategies. A final economic approach to duress doctrine is the theory of credible threats, which focuses on ex ante incentives.[83] According to this concept, relief should be granted to

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mation of an agreement, exploitation seems to always include reference to the *substance* or *outcome* of an agreement.") (emphasis in original). *But see* David Zimmerman, *More on Coercive Wage Offers: A Reply to Alexander*, 12 PHIL. & PUB. AFF. 165, 165 (1983) ("[C]oercion generally and perhaps always at least incorporates exploitation.").

[77] *See* Gordley, *supra* note 69, at 1588–90 (applying Aristotle's corrective justice theory); *see also* Benson, *supra* note 69, at 1147–53 (applying Hegel's autonomy theory); Buckley, *supra* note 69, at 34 (claiming economic efficiency considerations support substantive review of contracts).

[78] Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 582 (1982) ("[T]he decision maker's choices in the definition of voluntariness can have substantial distributive effects."); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 495 (1980) [hereinafter Kronman, *Contract Law*] (arguing that contract law should be structured with distributional conseqences in mind).

[79] *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 479 (1923) (discussing labor market value); Hale, *supra* note 60, at 624 (discussing deviation from market value as indication of duress); Robert A. Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 882 (1979) (discussing inadequacy of consideration as indication of duress); Lifshitz, *supra* note 69, at 319–20 (proposing a distress exploitation contracts doctrine that would prohibit exploiting the distress and over charging the distressed party).

[80] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 115–118 (7th ed. 2007) (analyzing duress doctrine from an economic perspective); TREBILCOCK, *supra* note 33, 82–84; Kronman, *Contract Law*, *supra* note 78, at 480 (arguing that allowing "advantage-taking" like duress has severe distributional consequences); Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 421–24 (1977) (discussing contract modification and duress).

[81] POSNER, *supra* note 80, at 115.

[82] *Id.*

[83] Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 720 (2005) ("[W]hether a proposal is classified as a legitimate offer or as a coercive threat

the coerced party based on the motivation of the threatening party.[84] Thus, remedies should be granted only when the threat was credible (meaning the threatening party was ready and willing to carry out the threat in the event that the threatened party did not acquiesce and was not merely bluffing).[85]

The fairness test of duress doctrine is narrow and only includes extreme cases of economic coercion. Furthermore, duress doctrine is limited to economic aspects of contracts and ignores their intangible aspects. This limited fairness analysis not only leaves outside the scope of duress doctrine many unconscionable contracts, but also legitimates these contracts.

## II. Feminist Theories of Consent

Part II relies on rigorous feminist literature on rape law to analyze duress law. While there are obvious differences between coerced contracts and coerced sexual intercourse, feminist analysis of non-consensual sex can be used to enrich our understanding of contractual duress. Feminist literature on rape has dealt thoughtfully with the issue of consent under circumstances of social inequality and constraints, which is applicable to cases of power imbalances between parties to a contract.

The following does not purport to be a comprehensive description of the rich and diverse feminist literature on rape and on consent to sex. Part II focuses on scholarship by Catharine MacKinnon, Robin West, and Jill Hasday to highlight the main insights of the innovative feminist literature on consent to sex and rape. Part II is divided into the same three sections as Part I, as the feminist scholarship is applied to each aspect of duress doctrine. The theme that cuts across these three aspects is the narrowness of duress doctrine and its exclusion of women's experiences. As will be discussed in detail, the coercer's illegitimate behavior prong of duress doctrine is limited to extreme cases of coercion and ignores the social constraints and inequities that women face. The absence of free will of the aggrieved party prong of duress doctrine is similarly limited and disregards pressures typical to women's lives that vitiate their consent. Finally, the unfairness of the contract prong of duress doctrine is also restricted and overlooks women's sufferings, which results in legitimizing painful contracts as consensual.

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should depend on its credibility" and whether "it is in the interest of the proposing party to carry out the adverse consequence."); Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, 33 J. Legal Stud. 391, 392 (2004).

[84] Bar-Gill, *Credible Coercion*, *supra* note 83, at 720.

[85] *Id.*

### *A. The Coercer's Illegitimate Behavior and Men's Dominance*

Catharine MacKinnon suggests that rape is an act of the subordination of women to men rather than nonconsensual sex.[86] She defines rape in the context of the power dynamics between men and women in society.[87] Thus, from a woman's perspective, rape is but one manifestation of men's sexual domination, alongside prostitution and trafficking, domestic violence, and pornography.

> The more feminist view to me, one which derives from victims' experiences, sees sexuality as a social sphere of male power of which forced sex is paradigmatic. Rape is not less sexual for being violent; to the extent that coercion has become integral to male sexuality, rape may be sexual to the degree that, and because, it is violent.
>
> The point of defining rape as "violence not sex" or "violence against women" has been to separate sexuality from gender in order to affirm sex (heterosexuality) while rejecting violence (rape). The problem remains what it has always been: telling the difference. The convergence of sexuality with violence, long used at law to deny the reality of women's violation, is recognized by rape survivors, with a difference: where the legal system has seen the intercourse in rape, victims see the rape in intercourse. The uncoerced context for sexual expression becomes as elusive as the physical acts come to feel indistinguishable.[88]

This is indeed a radical view, which paints women as subordinated, powerless, and incapable of consent.[89] According to MacKinnon, what the law sees as consent is, in fact, women surrendering to power and suc-

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[86] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 182 (1989) [hereinafter MACKINNON, FEMINIST THEORY] ("What is wrong with rape . . . is that it is an act of subordination of women to men. It expresses and reinforces women's inequality to men. Rape with legal impunity makes women second-class citizens.").

[87] Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 646 (1983) [hereinafter MacKinnon, *Feminism*]. For similar discussions of rape, see generally ANDREA DWORKIN, INTERCOURSE (1987) (exploring women's experience of "Intercourse in a Man-made World"); Carole Pateman, *Women and Consent*, 8 POL. THEORY 149 (1980) (discussing the relationship between gender and consent in liberal democracies); Victor Tadros, *Rape Without Consent*, 26 OXFORD J. LEGAL STUD. 515 (2006) (arguing for a differentiated definition of rape).

[88] MacKinnon, *Feminism, supra* note 87, at 646. *See also* Jeffrey Gauthier, *Consent, Coercion and Sexual Autonomy*, *in* A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 74 (Keith Burgess-Jackson ed., 1990) (discussing the history of rape law and rape as coerced sex).

[89] *See, e.g.*, KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR AND FEMINISM 51–112 (1994) (critiquing radical feminism for victimizing and infantilizing women and advocating that women take responsibility for their own sexual wishes); NAOMI WOLF, FIRE WITH FIRE: NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21ST CENTURY 191–97 (1994) (advocating for definitions of sexual harassment that leave "mental space to imagine girls and women as sexual explorers and renegades").

cumbing to social constraints.[90] Women do not consent after exercising their free choice but because they have little choice under social pressures. MacKinnon concludes that rape law should abandon consent as a key component of the offense of rape.[91]

MacKinnon defines patriarchy as a system by which men as a group dominate women as a group.[92] She claims that by viewing a rapist as a deviant perpetrator, the criminal system normalizes the violence that men inflict on women. She places consent in a larger social context of social oppression of women, which changes our understanding of the rapist's behavior.[93] Looking at the social context of power dynamics will result in a broader rape law that includes instances of women succumbing to pressures. As a result, rape law will not be limited to extreme cases of forcible sex.[94]

Duress doctrine is similarly narrow. Like rape law, duress law focuses only on individual threats, and systemic economic constraints remain outside of its scope. Duress doctrine does not protect parties from systemic economic inferiority in society and is limited to personal constraints on and impediments to the will of the party. While some scholars advocate that duress doctrine should also cover social pressures,[95] duress doctrine currently excludes these pressures. Applying MacKinnon's insight to duress doctrine yields interesting conclusions. Understanding duress as part of a system that allows powerful parties to exercise many forms of economic pressure leads to the conclusion that by limiting duress doctrine only to extreme cases of economic coercion, contract law legitimizes cases of more modest but still pervasive economic compulsion. Isolating duress from the

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[90] For discussion of the dichotomy between the liberal notion of consent and the radical view of impossibility of consent, see Jody Freeman, *The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY WOMEN's L.J. 75 (1989–90); Allison Moore & Paul Reynolds, *Feminist Approaches to Sexual Consent: A Critical Assessment*, *in* MAKING SENSE OF SEXUAL CONSENT 29 (Mark Cowling & Paul Reynolds eds., 2004). For the sexual subordination and sex positive dichotomy see generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, & Desire*, 101 COLUM. L. REV. 181 (2001).

[91] For the feminist debate on whether to rethink or reinterpret consent or to replace with a different concept, see generally CHOICE AND CONSENT, *supra* note 28.

[92] MacKinnon, *Feminism*, *supra* note 87, at 635 ("Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other. This is the social meaning of sex and the distinctively feminist account of gender inequality.").

[93] MACKINNON, FEMINIST THEORY, *supra* note 86, at 172 ("In feminist analysis, a rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjection, like lynching.").

[94] *Id.* at 173 ("Rape cases finding insufficient evidence of force reveal that acceptable sex, in the legal perspective, can entail a lot of force. This is both a result of the way specific facts are perceived and interpreted within the legal system and the way the injury is defined by law. The level of acceptable force is adjudicated starting just above the level set by what is seen as normal male sexual behavior, including the normal level of force, rather than at the victim's, or women's, point of violation.").

[95] *See, e.g.*, WERTHEIMER, COERCION, *supra* note 33, at 251 (discussing critiques of Nozick).

context of social and economic inequalities normalizes more subtle exploitations of economic vulnerability. Duress is viewed as the misbehavior of the coercer rather than part of a systemic economic oppression and exploitation. However, MacKinnon's insights take the focus away from the illegitimate behavior of the coercer to the larger social context—to how one's place in society influences his or her ability to negotiate and contract. Accordingly, her definition of rape focuses on social inequality rather than on personal constraints. Thus, MacKinnon shifts the focus from the individual vulnerability of the victim of duress to the social system to which she is subject.

One can evaluate rights-based analysis[96] of duress in light of MacKinnon's insights regarding social power dynamics. When there is a power disparity between the parties, they obviously do not negotiate on equal footing. Thus, even an objectively harsh proposal by the powerful party might be deemed an offer rather than a threat due to the unequal starting point at negotiations. Since the baseline is important in determining whether a proposal is a welcomed offer or a coercive threat, one needs to take into account social inequality between parties.

Consider two examples debated in the philosophical literature. In the seducing chairman case, a department chairman offers a graduate student an assistantship if and only if she sleeps with him.[97] In the lecherous millionaire case, a mother does not have the money to pay for her child's expensive surgery; without the surgery her child will die.[98] A millionaire proposes to pay for the surgery if the mother agrees to become his mistress.[99] When analyzing these two cases, one has to take into account women's sexual vulnerability in order to set the baseline. The commodification of sex and the social acceptability of trading sex for money is a relevant factor in setting the baseline, and in understanding the problematic nature of such proposals. The same is true for quid pro quo sexual harassment and prostitution cases. Due to women's sexual vulnerability at the workplace, this is hurtful, coerced sex rather than a harmless, consensual sexual adventure. According to MacKinnon, the women in these examples are not freely trading their sexuality but are forced to do so.[100]

As these examples show, the offer/threat division is problematic when applied in cases of social power imbalance between parties to the contract. Rights-based theories not only ignore this social inequality but also legitimize coercive threats by categorizing them as offers. Instead, rights-based analysis should take into account the social constraints under which parties operate when setting the baseline.[101]

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[96] S*ee* discussion of rights-based analysis *supra* Part I.A.

[97] WERTHEIMER, COERCION, *supra* note 33, at 225.

[98] *Id.* at 229.

[99] *Id.*

[100] MACKINNON, FEMINIST THEORY, *supra* note 86, at 175.

[101] The philosophical literature in this field offers two ways to analyze these problematic offers. One is to acknowledge coercive offers by accepting that some proposals are

Duress law, like rape law, is narrowly construed and excludes social pressures and constraints. In both contexts, the consenter and the person to whom consent was given are treated as two individuals unaffected by social circumstances. As MacKinnon's insights suggest, rather than adopting an individualistic notion of consent, courts should incorporate factors such as power dynamics, relations between the parties, social systemic constructs, and social inequalities when evaluating the validity of consent.

### *B. The Absence of the Free Will of the Aggrieved Party and Women's Suffering*

Some scholars view consent as physical, behavioral, and an act; others view consent as mental, psychological, and an attitude.[102] In other words, consent is seen either as an objective performance[103] or as a subjective state of mind.[104] Rather than focusing on the nature of consent, some feminists highlight the pain and suffering that consensual sex causes women. According to Robin West, consent does not necessarily increase women's happiness:

> [I]t may be that women generally *don't* consent to changes *so as to* increase our own pleasure or satisfy our own desires. It may be that women consent to changes so as to increase the pleasure or satisfy the desires of *others*. . . . If it is—if women "consent" to transactions not to increase our own welfare, but to increase the welfare of others—if women are "different" in this psychological way—then the liberal's ethic of consent, with its presumption of an essentially selfish human (male) actor and an essentially selfish consensual act, when even-handedly applied to both genders, will have disastrous implications for women. For if women consent to changes so as to increase the happiness of others rather than to

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illegitimate and coercive though they improve the position of the offeree. *See supra* note 48. The second is to choose a normative baseline by setting a moral standard as a baseline. *See supra* note 50.

[102] *See, e.g.*, Beres, *supra* note 26, at 99–101 (discussing the the debate over whether consent is a psychological act or a physical act); Patricia Kazan, *Sexual Assault and the Problem of Consent*, *in* VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES 27–42 (Stanley French et al. eds., 1998) (critiquing both the attitudinal and the performative accounts of consent).

[103] *See, e.g.*, DAVID ARCHARD, SEXUAL CONSENT 4 (1998) ("Consent is an act rather than a state of mind."); H.M. Malm, *The Ontological Status of Consent and its Implications for the Law on Rape*, 2 LEGAL THEORY 147 (1996) (discussing consent as "the signification of a particular mental state, rather than as the mental state itself."); Emily Sherwin, *Infelicitous Sex*, 2 LEGAL THEORY 209, 209–10 (1996) (stating that "consent is a social act"); Alan Wertheimer, *What is Consent? And is it Important?*, 3 BUFF. CRIM. L. REV. 557, 557 (2000) (discussing consent as performance or action).

[104] *See, e.g.*, David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 373 (2000) (discussing subjective nonconsent); Donald Dripps, *For a Negative, Normative Model of Consent, with a Comment on Preference-Skepticism*, 2 LEGAL THEORY 113, 114 (1996) ("[C]onsent is, at least in part, either a psychological state or some conduct that is presumed to provide evidence of a psychological state.").

> increase our own happiness, then the ethic of consent, applied even-handedly, may indeed increase the amount of happiness in the world, but women will not be the beneficiaries.[105]

What appears as consent in the eyes of the law is something different in women's reality:

> [A] woman will define herself as a "giving self" so that she will not be violated. She defines herself as a being who "gives" sex, so that she will not become a being *from whom sex is taken*. In a deep sense (too deep: she tends to forget it), this transformation is consensual: she "consents" to being a "giving self"—the dependent party in a comparatively protective relationship—for self-regarding liberal reasons; she consents in order to control the danger both inside and outside of the relationship, and in order to suppress the fear that danger engenders. Once redefined, however, and once within those institutions that support the definition, she becomes a person who gives her consent *so as to ensure the other's happiness* (not her own), so as to satiate the *other's* desires (not her own), so as to promote the *other's* well-being (not her own), and ultimately so as *to obey the other's commands*.[106]

In a similar way, Jill Hasday examines how the marital rape exception is harmful to women.[107] In the nineteenth century, the marital rape exception was explained by a theory of irretractable consent.[108] A woman's original agreement to marry justified a legal presumption of permanent and irretractable consent to sex. However, nineteenth-century feminists argued against the marital rape exception, emphasizing wives' right to their own person and their right to refuse to have sex with their husbands.[109] These early feminists also stressed wives' lack of alternatives to submission to their husbands' sexual demands, which made marriage similar to legalized prostitution.[110] Indeed, various nineteenth-century feminists voiced a provocative and comprehensive attack on consent:

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[105] Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis. Women's L.J. 81, 96–97 (1987) (emphasis in original) [hereinafter West, *Hedonic Lives*]. For critiques of West, see, e.g., Drucilla Cornell, Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law 25–26 (1991) (critiquing West for essentializing female identity and overemphasizing the link between body and identity); Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 Wm. & Mary J. Women & L. 273, 277–79 (1999) (discussing essentialist critiques of West).

[106] *See* West, *Hedonic Lives*, *supra* note 105, at 96–97.

[107] Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev. 1373, 1377 (2000) [hereinafter Hasday, *Contest and Consent*].

[108] *Id.* at 1397.

[109] *Id.* at 1413.

[110] *Id.* at 1427.

> When feminists elaborated their understanding of consent, they made it clear that they would not be satisfied with legal reform recognizing a wife's right to herself. Instead, they argued that a wife could only freely consent to marital intercourse under circumstances in which she had both the legal right to refuse and realistic alternatives to submission. This was a structural understanding of consent that considered how the structure of the marital relation, rather than simply the behavior of individual husbands, shaped women's opportunities as a class. Feminists noted, and attacked, the tremendous legal, social, and economic pressures that pushed women into marriage and kept them there.[111]

This nineteenth-century feminist critique is relevant today as modern marital rape defenders fail to see women's sufferings:

> One of the most remarkable characteristics of the modern defense of the marital rape exemption . . . is that it presupposes the aligned interests of husband and wife. The two arguments that modern defenders of the exemption have chosen to stress most prominently are that the law protects marital privacy and promotes marital harmony and reconciliation. These claims are slightly different, but they have a common project, which is to explain how the exemption advances the shared concerns of men and women, benefitting both. Indeed, contemporary supporters of the exemption go beyond that contention. Their assumption of conjoined interests in marriage is so absolute that proponents do not concede that a marital rape exemption might inflict harm on wives. Their argument assumes that a wife's interests, like her husband's, are always and wholly served in a marital relationship where her husband cannot be prosecuted for raping her. In the exemption's modern defense, the potential harm of marital rape is rendered invisible.[112]

Feminists highlight the circumstances in which women give consent: the harm the consensual act causes her, the relation between the consenting woman and the man to whom consent is given, the reason she consents, her alternative options, and the consequences of withholding consent. This contextualized analysis is relevant to duress doctrine: the court's analysis is too narrow and concentrates on parties' reasonable alternatives. However, to examine whether valid, voluntary, and free consent was given, the court needs to examine more than that. The court should ask: did the aggrieved party really have the option to reject the agreement? What would the consequences of such a rejection be? Did both parties negotiate or did one party initiate and impose the contract?

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[111] *Id.* at 1427–28.
[112] *Id.* at 1485.

Another feminist insight is the importance of looking at duress doctrine from the aggrieved party's perspective. Feminists argue that there is a difference between men's and women's experiences of pain and suffering.[113] Women's suffering may have no male equivalent or may be experienced to a greater degree or frequency; prostitution,[114] forced marriage,[115] and sexual harassment[116] are examples. However, the law mainly reflects men's realities and rarely incorporates women's experiences. Classic rape law reflects men's experience of sexual intercourse rather than women's experience of nonconsensual sex. The force and resistance requirements,[117] the concentration on vaginal penetration,[118] the focus on how the man understood the woman's reaction,[119] and the way consent in the past is used to prove consent to a later sexual act[120] are all ways in which rape law reinforces men's perspective.

Women's advocacy has lead to inclusion of women's point of view and interests into rape law.[121] However, duress doctrine generally acknowledges pressures and constraints that are predominantly endured by men, such as the threat of physical harm, threat to damage goods, threat to breach a contract, and other economic threats.[122] Duress typically excludes women's perspectives and experiences and ignores pressures unique to women's lives.[123] For example, the typical duress analysis of the sexual harassment examples discussed earlier disregards women's sexual vulnerability.[124] Most men are not subject to sexual or social gender-based oppression; excluding these so-

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[113] West, *Hedonic Lives*, *supra* note 105, at 81.

[114] *See, e.g.*, Melissa Farley, *Sex for Sale: Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109 (2006) (describing the experiences of female prostitutes).

[115] *See, e.g,* Yunas Samad, *Forced Marriage Among Men: An Unrecognized Problem*, 30 CRITICAL SOC. POL'Y 189, 189 (2010) (explaining that most victims of forced marriage are women but that there are a small number of male victims).

[116] *See generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (analyzing victims' experiences and arguing that sexual harassment is a form of discrimination based on sex).

[117] MACKINNON, FEMINIST THEORY, *supra* note 86, at 173.

[118] *Id.* at 127; MacKinnon, *Feminism*, *supra* note 87, at 647.

[119] MacKinnon, *Feminism*, *supra* note 87, at 653. *See also* Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L. J. 2687, 2688 (1991) (discussing the reasonable belief that victim consented as a defense to rape); Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact about Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815 (1996) (discussing mistake of fact as a defense to rape).

[120] *See, e.g.*, Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1540 (2003) (proposing a reformed rape law statute); Lani Guinier, *Acquaintance Rape and Degrees of Consent: "No" Means "No," But What Does "Yes" Mean?*, 117 HARV. L. REV. 2341, 2342 (2004); *see also* Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599 (1991) (discussing use of evidence of prior relationship in nonstrangers rape cases).

[121] *See infra* note 153 and accompanying text.

[122] *See* discussion *supra* Part I.A.

[123] *See* Hila Keren, *Consenting Under Stress* (Feb. 27, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012013, 31–33.

[124] MACKINNON, FEMINIST THEORY, *supra* note 86.

cial pressures and focusing solely on individual pressures also reflects a male perspective. The result is that women's experiences of threats mostly remain outside the scope of duress doctrine.[125] Only in rare cases will the courts acknowledge that pressures experienced by women amount to duress. As Robin West explains:

> The reason the legal culture tends to dismiss women's gender-specific sufferings is that women don't matter. Those in power ignore women's suffering because they don't care about the suffering of the disempowered . . . . If the pain women feel is in fact discontinuous from—different than—what is experienced by men, then it is not really surprising that the injuries we sustain are trivialized or dismissed by the larger male culture.[126]

Furthermore, contract law is based on freedom of contract. Consensual contracts are the norm, and duress, like other defects in the formation of the contract, is the narrow exception to the general rule.[127] Under freedom of contract theory both parties negotiate on equal footing to the end result of a mutually beneficial contract. Duress doctrine deals with the rare and extreme cases where this assumption does not apply. Hence, duress doctrine aims at protecting parties in cases of severe threats and pressures, where the general rule of freedom of contract is no longer relevant.

However, when looking at freedom of contract from the aggrieved party's perspective, one must take into account power imbalance between parties. For example, feminist literature shows that married men enjoy a powerful position over their wives.[128] Thus, some spousal agreements are negotiated under conditions of inequality and power imbalance between the parties, which impede women's consent. Many women are victims of discrimination and experience a world dominated by men.[129] Rather than enjoying freedom, equality, and autonomy, many women suffer from violence, harassment, inequality, subordination, and oppression. Therefore, traditional duress doctrine, which is based on freedom of contract and equality of the parties, does not reflect the reality of women's lives.[130] Duress doctrine re-

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[125] *See* discussion *infra* Parts IV.A.1, IV.B.1.

[126] West, *Hedonic Lives*, *supra* note 105, at 84–85. ("Men's conception of pain—of what it is—is derived from a set of experience which *excludes* women's experience. When women and men talk about pain (and to a lesser extent, about pleasure) we are employing vastly different experiential referents.") (emphasis in original). *Id.* at 144.

[127] Giesel, *supra* note 32, at 465.

[128] *See* Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future Egalitarian Marriage?*, 84 VA. L. REV. 509, 512 (1998) (arguing that women and men are unequal in marriage).

[129] *See*, *e.g.,* CAROLE PATEMAN, THE SEXUAL CONTRACT 4 (1988) (exploring patriarchal domination in modern society).

[130] *See* Simeone v. Simeone, 581 A.2d 162, 168 (Pa. 1990) (holding that wife's claim for alimony was barred by the prenuptial agreement because she did not make a sufficient showing of duress); *see also id.* (Papadakos, J. concurring) ("If you want to know about equality of women, just ask them about comparable wages for comparable work. Just ask

flects men's perspective and privilege. Duress doctrine is based on men's experience of autonomy and freedom and on men's rare experiences of pressures and excludes women's experiences and point of view. Thus, duress doctrine is gendered not only in reflecting men's reality in terms of what types of coercion are included in duress doctrine but also in contract law's core values and basic assumptions. As a result, the law fails to protect women from oppression typical to their lives.

When looking at women's consent to spousal agreements, the courts do not take into account social patterns that vitiate consent. Consent in cases of familial intimacy is a complicated issue since women are socialized to behave in ways that work to their detriment[131] and since women consent to enhance other's happiness rather than their own.[132] The law disregards these harms and sees women as freely consenting. As Jane Aiken explains:

> There does not appear to be a traditional legal doctrine dealing with consent that adequately addresses the double binds that women experience when dealing with situations involving sex or love. Traditional doctrines vitiate consent when the immediate circumstances indicate a necessity. Such doctrines are grounded in the same notions of individual autonomy that render the effects of intimacy so opaque. Traditional doctrines typically arise when the evidence suggests something that shocks the conscience, some extreme disparity in bargaining power, or excessive pressure used on someone who is particularly vulnerable due to a lack of full vigor. None of these doctrines take into account the complex social phenomena that affect human relationships. Again, these doctrines assume the autonomy model; they posit an individual motivated by self-interest and unaffected by general, rather than particularized, social forces.[133]

Duress law, like rape law, is narrow and leaves out many circumstances that vitiate aggrieved parties' consent. The courts should engage in much broader and more thorough investigation of parties' social constraints and limited choices in society that influence their ability to consent. This will mean incorporating aggrieved parties' experiences, suffering, and alternative options in order to evaluate their consent. It will lead to understanding what consent to the contract meant from the aggrieved party's perspective and to situating consent in a broader context of social inequality. The result will be

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them about sexual harassment in the workplace. Just ask them about the sexual discrimination in the Executive Suites of big business. And the list of discrimination based on sex goes on and on.").

[131] Aiken, *supra* note 1, at 639.

[132] West, *supra* note 105.

[133] Aiken, *supra* note 1, at 637. Though Aiken's article does not mention consent to contract, it generally deals with consent in familial intimate relations, and her critique of consent is applicable to duress in spousal agreements.

a broadening of the meaning of the "no reasonable alternative" prong of duress doctrine, in order to ensure parties give true and meaningful consent.

### *C. The Unfairness of the Contract and the Morality of Consensual Agreements*

Some scholars view consent as morally transformative, meaning consent makes an action legally permissible.[134] Consent turns surgery into permissible medical procedure (as opposed to battery); labor into permissible employment (as opposed to slavery); transaction into permissible contract (as opposed to theft); and sexual intercourse into permissible sex (as opposed to rape). In other words, consent is a normative permission-giving act, which alters the "prevailing pattern of rights and obligations between the parties" and changes the normative situations of individuals.[135] Economic analysis of the law takes this perception of consent as morally transformative one step further. For example, Richard Posner claims that wealth-maximizing transactions are morally justified because they support autonomy.[136] Wealth-maximizing transactions are transfers to which all affected parties, even the apparent losers, have given their consent. Robin West critiques Posner's economic analysis that justifies these transactions. Using Kafka's stories, she argues that consent does not morally legitimize wealth-maximizing transactions:

> Posner's hypothetical legal actors expressly, impliedly, and hypothetically consent to changes in their circumstances with a view toward the improvement of their own welfare, whereas Kafka's protagonists expressly, impliedly, and hypothetically consent because of a felt compulsion to legitimate the will of an authority . . . . If we are motivationally complex, then we cannot delegate to any ambiguously motivated human act such as consent the task of moral legitimation. We cannot infer that a consensual world leaves every individual better off (and is therefore morally superior) simply because all affected parties have consented to it, unless everyone was trying to improve his individual welfare when consenting to change—and succeeding.[137]

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[134] *See, e.g.*, ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 119–20 (2003); Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 165 (1996); Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 124 (1996).

[135] Nathan Brett, *Sexual Offenses and Consent*, 11 CAN J. L. & JURISPRUDENCE 69, 69 (1998).

[136] Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 385 (1985) [hereinafter West, *Authority, Autonomy, and Choice*] (citing Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979)).

[137] West, *Authority, Autonomy, and Choice*, *supra* note 136, at 425–26; *see also id.* at 386.

Kafka's stories help West demonstrate why consensual bargains are problematic:

> Kafka's depictions of commercial, employment, and sexual transactions illustrate a simple truth: the consensual bargain that underlies commerce, labor, and sex may save those transactions from being theft, slavery, or rape, but it hardly accords them positive moral value. Consensual acts of commerce, labor, or sexual intercourse are not morally good simply because they are not coerced: a bad trade is still bad, even if it is not theft; a bad job is still bad, even if it is not slavery; and bad sex is still bad, even if it is not rape. The morality of any of these consensual transactions depends upon the value of the worlds they create, which in turn depends in part upon the worth of the relationships they contain. A sexual transaction between an authoritarian employer and a submissive woman does not typically create a morally good relationship, even if it is not rape. The consensual contract between a sadistic employer and a submissive employee is not a morally good relationship, even if the employee would have worked for less. Relationships such as these are harmful for both the submissive and the dominant party. It is immoral to participate in such consensual transactions and immoral for the community to tolerate them.[138]

Like Posner's notion of morality, the courts' fairness analysis is too narrow. It focuses on the financial aspects of the contract, and neglects other aspects which, as West shows, are also related to fairness. Focusing on market terms, and especially on market price, results in a partial evaluation of the contract. The courts' analyses leave non-economic aspects of the contract outside of the scope of the fairness analysis. According to West, our view of contracts should be broader, looking not only for wealth-maximization but also other important social aspects like joy and suffering.[139]

Furthermore, the limited nature of the fairness analysis is reflected in the courts' use of formal equality rather than substantive equality.[140] Courts assume equality in the bargaining power of parties and, except in extreme cases, disregard power imbalances between parties; as West points out, submission to authority is perceived as consent.[141] However, contracts that pass muster under formal equality might still be unfair. When parties do not negotiate on equal footing, applying the contract equally to both does not mean egalitarian application of the contract. Treating as equal two parties who are

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[138] *Id.* at 399.

[139] *Id.* at 428.

[140] For different models of equality, *see* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1291–301 (1987) (discussing symmetrical and asymmetrical models of sexual equality).

[141] West, *Authority, Autonomy, and Choice*, *supra* note 136, at 427–28.

not similarly situated results in unjust and inequitable distribution of contractual benefits.

Under the doctrine of unconscionability, the courts will only acknowledge unfairness when there is a great disparity between the parties.[142] Less extreme disproportionate allocation does not cross the line drawn by contract law to distinguish legitimate contracts from illegitimate contracts. As a result, parties are protected only from extreme unfairness. This limited application of the law legitimizes many cases of coercive contracts with damaging economic results for aggrieved parties.[143] This result should bother us, West teaches. While Posner advocates for state nonintervention in consensual wealth-maximizing transactions,[144] West's analysis demonstrates why this is problematic:

> Posner teaches us that when the risk of a loss is voluntarily assumed, the ultimate suffering of that loss is consensual and we consequently need concern ourselves no more with losers in the market than with those in a lottery. Kafka's stories tell a different tale. In Kafka's stories, the community's refusal to intervene and come to the aid of the market's losers is revealed as a breakdown of community and brotherhood, not a legitimate response to a morally satisfactory state of affairs. The human attraction to winners and revulsion toward losers do not serve as reliable guides to moral conduct, but instead carry the seeds of tragedy.[145]

As West shows, courts should intervene. Contract law should not be limited as Posner advocates. Rather, courts should more broadly examine the distributive aspects of the contract. Not only in extreme cases of unconscionability and grave disparity between the parties should the courts play a more active and protective role, but also in more moderate cases of economic imbalance between the parties.

## III. An Alternative Approach to Duress Doctrine

The previous Parts have set the groundwork for the alternative approach to duress doctrine proposed in Part III. While the feminist critique of the

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[142] *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (remanding to determine whether a contract between a poor woman and a retail furniture store was unconscionable).

[143] For a feminist call for redistributive justice, see generally Nancy Fraser, *Rethinking Recognition*, 3 New Left Rev. 107 (2000); *see also* Nancy Fraser, *Mapping the Feminist Imagination: From Redistribution to Recognition to Representation*, 12 Constellations 295 (2005).

[144] Richard A. Posner, *Ethical Significance of Free Choice: A Reply to Professor West*, 99 Harv. L. Rev. 1431, 1432 (1986).

[145] West, *Authority, Autonomy, and Choice*, *supra* note 136, at 409; *see also* Robin West, *Submission, Choice, And Ethics: A Rejoinder to Judge Posner*, 99 Harv. L. Rev. 1449 (1986) (West's response to Posner's critique).

liberal notion of consent has challenged duress doctrine's application and interpretation as well as its core values and basic assumptions, Part III advocates a cautious and moderate change in duress doctrine, limited to cases of power imbalance between parties and highlighting spousal agreements as a prime example. Thus, it is not applicable to contracts between two equal and sophisticated parties. Part III proposes neither a working definition of consent nor a new duress doctrine, but only preliminary thoughts on what duress would look like from a feminist perspective. The purpose is to enrich the discussion regarding duress doctrine by adding a new perspective on consent. Additionally, the alternative perspective focuses on the court's analysis rather than on the end result. Thus, in some cases duress claims might be rejected under both the current duress doctrine and the proposed alternative duress doctrine. However, the difference is in the reasoning leading to the result.

Furthermore, the suggested changes in duress doctrine follow existing trends in duress doctrine and in critical analyses of contract law more generally. As this Article will discuss in more detail, the current trend is to extend duress doctrine beyond physical injury or threat of physical harm and to include also duress of goods and economic duress.[146] Some contract law scholars refute binary thinking and deconstruct hierarchies.[147] Other scholars critique how contract law promotes power imbalances and reinforces privilege and call for remedying inequalities and for protecting underprivileged parties.[148] Finally, other scholarship uses contextual analysis and takes into account power differences between parties.[149] The alternative suggested in this Article would apply this critical analysis to duress doctrine. Thus, while the proposed alternative duress doctrine challenges current duress doctrine, in a broader sense it adds to current trends in contract law by proposing a broader, contextualized duress doctrine that refutes binary thinking and includes aggrieved parties' perspectives.

### *A. Including Aggrieved Parties' Perspectives in Duress Doctrine*

Feminists critique rape law for reflecting men's life experiences and disregarding women's.[150] They show how rape law protects men's interests and sexual access to women rather than women's interests and autonomy.[151]

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[146] *See infra* Part III.D.
[147] *See infra* Part III.B.
[148] *See infra* Part III.A.
[149] *See infra* Part III.C.
[150] *See supra* Part II.B.
[151] *See, e.g.*, Joan McGregor, *Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law*, 2 LEGAL THEORY 175, 176 (1996) (arguing that rape laws employ assumptions and standards that fail to account for women's perspectives). *See also* MACKINNON, FEMINIST THEORY, *supra* note 86, at 180 ("The crime of rape is defined and adjudicated from the male standpoint, presuming that forced sex is sex and that consent to a man is freely given by a

Feminists also expose the gender stereotypes on which consent is based. For example, the conventional assumption is that men ask and women give consent; thus, while men are active and initiate sex, women are passive and react to men's sexual advances.[152] Feminists advocate for including women's perspective in rape law, for incorporating women's experience into the notion of consent and for protecting women's sexual autonomy.[153] Some feminists advocate an egalitarian model of consent that aims at fostering equality between the sexes.[154] The paramount goal of the egalitarian view is to afford women the power to form and maintain noncoercive sexual relationships, both within and outside of marriage.[155] It prescribes sexual autonomy and sexual equality for men and women, rather than a sexually coercive society.[156]

These feminist insights should be applied to duress doctrine. Duress doctrine should include pressures that are typical in aggrieved parties' lives. It should take into account aggrieved parties' experiences of constraints due to social inequality, and not only in limited and extreme situations. Duress doctrine should not see submission to coercion as consensual in a world where aggrieved parties face inequality and discrimination. Rather, duress doctrine should strive to mitigate power imbalances between the parties and aim at an egalitarian model of consent.

In divorce cases, taking aggrieved parties' experiences into account means considering power dynamics between men and women. The literature

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woman. Under male supremacist standards, of course, they are. Doctrinally, this means that the man's perceptions of the women's desires determine whether she is deemed violated.").

[152] Beres, *supra* note 26, at 96.

[153] *See, e.g.*, Lynne N. Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41 (1993) [hereinafter Henderson, *Getting to Know*] (offering a critique of rape law by a rape survivor); Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193 (1988) (reviewing Susan Estrich's *Real Rape* and discussing rape based on the author's experience as a rape survivor); Pineau, *supra* note 29, at 221 (advocating a criterion of consent based on women's point of view); Spence, *supra* note 29, at 83 (arguing that rape law should measure coercion from the victim's perspective and experience).

[154] *See, e.g.,* Martha Chamallas, *Consent, Equality and the Legal*, 61 S. CAL. L. REV. 777, 835 (1988) (developing an egalitarian view of sexual conduct); *see also* Anderson, *Negotiating Sex*, *supra* note 29, at 1421 (advocating a Negotation Model of rape law).

[155] Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory In Rape Law is Turned on its Head*, 11 WIS. WOMEN'S L.J. 37, 41 (1996) (arguing that men must acquire affirmative consent from women because of the gendered power imbalance); Malm, *supra* note 103, at 155 (developing an affirmatively expressive notion of consent). *See also* Katharine K. Baker, *Rape, Sex & Shame*, 8 DEPAUL J. HEALTH CARE L. 179, 214 (2004) (advocating extra-legal shame inducing sanctions to eradicate acquaintance rape); Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. R. 1321, 1345 (2005) (advocating for affirmative consent standard); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 64 (2000) (suggesting that procedural reforms in the area of rape law supplement recent substantive reforms in order for courts to better enforce a model of communicative sexuality).

[156] *See* Lani Anne Remick, Note, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1144 (1993).

on divorce supports the conclusion that there is inequality of power between divorcing spouses.[157] By adopting the feminist view of power relations, contract law will reflect women's reality in society. However, acknowledging women's reality does not mean condemning them for their choices. Courts should be careful not to blame the victim in rape law or in contract law.[158]

Some scholars have argued that duress doctrine is aimed at correcting power imbalance or inequality of bargaining power.[159] Accordingly, duress doctrine prohibits the powerful party from taking advantage of his superior bargaining position to extract a one-sided contract.[160] Scholars have critiqued contract law for maintaining and even privileging power imbalances and for protecting the interests of the privileged parties.[161] However, most scholars employ a narrow definition of power imbalance. This scholarship is mainly gender blind since it ignores the power imbalance between women and men in society. Feminist theory, on the other hand, focuses on social power dynamics and defines power relations more broadly, presenting a more comprehensive analysis. For example, as scholars have shown, spousal agreements work to the economic detriment of women.[162] Many women end up in poor economic states after divorce,[163] partly due to separation and pre-

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[157] *See, e.g.*, Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1169 (1999) [hereinafter Bryan, *Women's Freedom*] (describing the hardships women and children experience after divorce).

[158] For a discussion on blaming the victim, see generally Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998).

[159] *See, e.g.,* Dawson, *An Essay in Perspective*, *supra* note 74, at 253; Ogilvie, *Economic Duress*, *supra* note 43, at 289.

[160] Dawson, *An Essay in Perspective*, *supra* note 74, at 282; Ogilvie, *Economic Duress*, *supra* note 43, at 311.

[161] *See, e.g.* Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 198 (2009); Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 65 (2011). *But see* Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 880 (1999).

[162] *See, e.g.*, Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 494 (2005) (arguing that legal regulation of economic exchange within intimate relations systematically perpetuates distributive inequality and injustice for women and the poor); Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 404–05 (2007).

[163] For a discussion of women's economic conditions after divorce, see generally Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989) (developing a theory of alimony that would compensate women for their lost earning capacity during marriage); *see also* Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485, 489 (1985) (showing that "[d]ivorce and separation clearly impose greater economic costs on women than men."); Ross Finnie, *Women, Men, and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data*, 30 CAN. REV. SOC. & ANTHROPOLOGY 205, 218 (1993) (presenting evidence that women's incomes decline more quickly and permanantly after divorce); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 534 (1996) (presenting evidence that the standard of living after divorce decreases by 27% for women and increases by 10% for men).

nuptial agreements that enable men to retain the property acquired during marriage rather than share it with their ex-wives.

While using duress as a way to police and mitigate power imbalance between parties is not a novel idea, these ideas do not go far enough. Applying feminist insights about consent under conditions of dominance will enrich and further this discussion. The courts' definition of duress should include situations in which privileged parties take advantage of their superior social position in order to exploit the other party. Thus, the proposed alternative adds to existing trends and takes them a step further.

### *B. Deconstructing Dichotomies in Duress Doctrine*

Duress doctrine is based on binary thinking. Courts classify the case before them as belonging to either the "contract under duress" category or the "consensual contract" category.[164] The contract is either valid or unenforceable due to duress. These are the only two available options, and a claim that the contract was neither signed under duress nor was consensual will not be heard. Under rights-based theories a proposal is either a threat or an offer.[165] Courts view the aggrieved party as either an agent who made his or her autonomous decision voluntarily freely and willingly, or as a victim of duress who succumbed to extreme pressures.

In contrast, feminists see consent as a complicated and nuanced concept. Many reject the consent/coercion dichotomy.[166] Human behavior is complex and often cannot be classified as either duress or consent; there are many intermediate situations in which hesitation or ambiguity occurs, which the current law does not recognize. Parties might experience hesitations, conflicted feelings, subtle pressures, stress, or constraints. They might feel obligated, pressured, stressed, exploited, or compelled. All of these intermediate feelings fall in between the two extremes of either consent or duress.

Duress doctrine should address this spectrum of situations rather than adhere to the consent/duress dichotomy: consent should be viewed as a continuum, ranging from voluntary consent to coercion and duress, with many gray areas in between.[167] Furthermore, contract law should acknowledge that there are different forms of coercion, different types of threats, and different degrees of pressure. Consent calls for a delicate balance between state inter-

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[164] *See* discussion *supra* Part I.B.

[165] *See* Nozick, *Coercion*, *supra* note 44, at 447–53.

[166] *See, e.g.*, Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1227 (1999) (critiquing the consent/coercion duality in the context of prostitution); Brian Donovan, *Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion in the Early-20th Century*, 30 LAW & SOC. INQUIRY 61, 62 (2005) (critiquing the consent/coercion binary in seduction trials).

[167] *See* Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17, 34–35 (2010) (illustrating many gradations of consent beyond "yes" or "no"). *See generally* CHOICE AND CONSENT, *supra* note 28.

vention on the one hand,[168] and individual autonomy and freedom of contract on the other.[169]

Contrary to the law's binary analysis, feminists argue that the reality is more complex and nuanced. Human beings are neither complete agents nor complete victims.[170] They are neither absolutely irrational, vulnerable, and incapable of consent, nor fully responsible for their choices. They are atomistic but also relational; they are autonomous individuals, but at the same time they are part of a web of relationships. Parties' lives are mixed with oppression and agency, dominance and resistance, victimhood and autonomy.[171] Duress doctrine should not categorize the aggrieved party as either a free agent or a complete victim but should rather acknowledge that autonomy and dependency, subordination and constraints, are all part of every person's life.[172] Duress doctrine should honor parties' autonomy and decisions but at the same time acknowledge their constraints.[173] Duress doctrine need not be too protective and paternalistic, but at the same time duress doctrine need not be inconsiderate of social inequality. Rather than either

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[168] For a discussion of paternalism in contract law, see, e.g., Kennedy, *supra* note 78, at 624–49; Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 764–65 (1983).

[169] *See* Hanna, *supra* note 26, at 121–25 (using human rights law to explore feminist tension with state intervention); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1238 (1998) (discussing the "dilemma of choice"); Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749, 754–55 (2010) (discussing the ramifications on subordinated social groups of pleading for special protection).

[170] *See* Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1442–44 (2011) (critiquing liberal feminism for its focus on the individual); Rosemary Hunter & Sharon Cowan, *Introduction*, *in* CHOICE AND CONSENT, *supra* note 28, at 2 ("[A]ll subjects are unstable, contingent, and intersubjectives constructed rather than bounded, monolithic, sovereign agents."); *see also* Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865, 866 (2008) (asserting the existence of a good/bad complainant dichotomy in rape law).

[171] *See, e.g.*, Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theories*, 95 COLUM. L. REV. 304, 305–06 (1995) (describing the possibility of constrained agency); Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 795 (1990) ("Feminist scholars and activities need . . . forms of discourse that acknowledge the possibility that women may be influenced by the internalization of the very ideology that has subordinated them."); Elizabeth Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 390 (1993) (discussing battered women as both victims and agents).

[172] *See supra* note 171 and accompanying text.

[173] For an argument in favor of protecting women's sexual autonomy through rape law, see STEPHEN J. SCHULHOFER, UNWANTED SEX 274–82 (1998); *see also* Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1785–92 (1992) (exploring sexual autonomy and discussing its role in rape statutes); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 36 (1992). *But see* Brenda M. Baker, *Understanding Consent in Sexual Assault*, *in* A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 49, 63–64 (Keith Burgess-Jackson ed., 1999) (arguing that mutuality is a better model for education and social initiatives, but is not suitable for criminal law).

ignoring social inequality (as does current duress doctrine) or suspecting women's consent as submission to authority (as does radical feminism) the alternative duress doctrine suggests a balance.

Finally, consent is not static, but dynamic and changing. It is an ongoing process rather than a moment frozen in time.[174] Accordingly, a court should look at consent not only at the time of contract formation. Rather, the court should consider a larger timeframe that includes negotiation, signing, and performance. The court should consider the background circumstances leading to the negotiation and the circumstances following the contract's execution—the pre-bargaining as well as the post-bargaining conditions.

Feminists and post-modernists reject binary thinking and hierarchies in contract law, such as private-public, objective-subjective, and form-substance;[175] rather, they deconstruct dichotomies. By breaking from dichotomies, the proposed alternative duress doctrine adds to this line of contract law analysis.

### *C. Contextualizing Duress Doctrine*

Duress doctrine is based on abstract categories; the context of social inequality does not figure in the courts' analyses. In contrast, feminists advocate a contextualized notion of consent to sex.[176] They suggest that one should take into account the circumstances in which consent was given and especially power imbalance between the parties. In addition, they stress the importance of relations in women's lives and the complexity of human emotions as important to understanding women's consent. Thus, women's experiences and values serve as an important background to evaluating consent, which is socially constructed and changing.[177]

These feminist insights should be applied when analyzing duress. The courts should pay close attention to the circumstances in which consent was given and to the power dynamics between the parties. For example, the court

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[174] Hanna, *supra* note 26, at 137 (discussing unique aspects of consent to relationships); Chamallas, *supra* note 154, at 841.

[175] For feminist critiques of dichotomies in contract law, see generally Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. J. 997 (1985); Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1991); Hila Keren, *Textual Harassment: A New Historicist Reappraisal with Gender in Mind*, 13 AM. U. J. GENDER SOC. POL'Y & L. 251 (2005).

[176] CHOICE AND CONSENT, *supra* note 28, at 2; Beres, *supra* note 26, at 106; Hanna, *supra* note 26, at 137.

[177] *See, e.g.*, William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 58 (1995) (discussing consent as a construction of social power); Nina Philadelphoff-Puren, *Contextualising Consent: The Problem of Rape and Romance*, 20 AUST. FEMINIST STUD. 31 (2005) (analyzing the discourse of rape and romance in law and literature); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 382 (1993) (arguing that consent is a social construct); George C. Thomas III & David Edelman, *Consent to Have Sex: Empirical Evidence about 'No'*, 61 UNI. PITT. L. REV. 579 (2000) (presenting an empirical study of cultural views on consent to sex).

should not be satisfied with the fact that the aggrieved party had legal counsel or at least had the opportunity to have legal counsel, or had sufficient time to review the agreement. The court should ask questions such as: did the aggrieved party have *adequate* representation? Why did she sign the contract against the advice of her lawyer? Did she feel that she really had no other choice but to sign the contract (even though she understood signing the contract was against her legal interests)? Did she mistakenly think that the same lawyer could represent both parties? What negotiations preceded the execution of the contract? Could the aggrieved party make changes to the contract? How do social constraints and dynamics of inequality affect the parties' relations and respective bargaining power?

Similarly, the court should examine the circumstances prior to execution of the contract and at the time of execution beyond the mere declaration before the notary or court that the contract is signed willingly and freely. The court should study the subject matter of the contract in addition to the negotiation. Taking into account the meaning of contractual obligations, the court should ask: is the contract fair? How does the contract influence the parties? How does the contract distribute benefits and risks among the parties?

Some contract law scholars advocate contextual analysis of contract law.[178] Especially among feminists, there is a call for such an analysis that is sensitive to the life situations of women.[179] In addition, relational theory of contract law calls for special attention to the relations between the parties.[180] Contextualizing the proposed alternative duress doctrine adds to this line of contract law scholarship.

### *D. Broadening Duress Doctrine*

Duress doctrine is a narrow exception to the conventional rules of contract enforcement, which are generally based on freedom of contract and on respecting the parties' autonomies and choices. Giving parties control over the terms of their agreements also means that generally, courts should not intervene and police contracts. The state should maintain a passive role as contract enforcer and usually refrain from actively rewriting the contract for the parties. As demonstrated in detail,[181] the limitations of duress doctrine are apparent in its three aspects. First, duress doctrine takes a narrow approach to the pressures that are considered coercive and to the behavior that

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[178] For an example of contextual analysis of contract law, see Larry A. DiMatteo & Blake D. Morant, Symposium, *Contract in Context and Contract as Context*, 45 WAKE FOREST L. REV. 549 (2010) ("The rules of contract seemingly eschew contextual realities that affect bargaining."). *See also* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 147 (1998) (arguing for contextualization of premarital agreements when deciding whether they should be enforced).

[179] Threedy, *supra* note 169, at 749–50.

[180] *See* Gordon, *supra* note 53, at 569.

[181] *See* discussion *supra* Parts I, III.

is considered illegitimate, and it only covers extreme acts of coercion. Second, courts take a restricted view on what circumstances makes consent involuntary, invalid, and unfree, and only extreme cases where the aggrieved party has no reasonable alternative will nullify consent. Third, only extremely unconscionable contracts will be regarded as unfair.

In contrast, many feminists offer a broader account of defective consent and a richer definition of coercion; such an extended notion of consent includes subtler pressures and milder constraints.[182] These feminists reject the limited account of coercion that includes only extreme compulsions.[183] For example, some feminists advocate including date rape, acquaintance rape, and marital rape under rape laws.[184] They also advocate a broader rape law that would cover nonviolent cases.[185]

Duress law, like rape law, is narrow and excludes many pressures; it applies only to extreme cases of coercion, thus leaving many types of coercion, oppressive acts, pressures, and misuse of power outside the scope of the law. Therefore, duress doctrine's protection is limited to the highest degrees of coercion, and neglects more subtle and mundane types of pressure. Although duress doctrine is currently expanding beyond its traditional bounds, it is still limited to rare cases of severe coercion.[186] Economic pressures that are not intense or excessive enough will not be protected under duress doctrine because these day-to-day pressures are assumed not to affect

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[182] *See, e.g.*, Daphne Edwards, Comment, *Acquaintance Rape & the "Force" Element: When "No" is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 242 (1996).

[183] *See, e.g.*, *id.;* SUSAN ESTRICH, REAL RAPE 27 (1987); JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 59 (2005); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1179 (1986); Spence, *supra* note 29, at 61; Robin West, *A Comment on Consent, Sex and Rape*, 2 LEGAL THEORY 233, 233 (1996).

[184] *See, e.g.*, Lisa R. Eskow, *The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 703 (1996) (arguing for legislative reform to produce more effective prosecution of marital rape); Dini Rosenbaum, *Strict Liability and Negligent Rape: Or How I Learned to Start Worrying and Question the Criminal Justice System*, 14 CARDOZO J.L. & GENDER 731, 733 (2008) (advocating for negligent and strict liability standards in date rape cases); Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 352 (1995) (arguing for complete abolition of the marital rape exception). *See generally* DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW (Leslie Francis ed., 1996) (collection of essays discussing date rape).

[185] *See supra* notes 182, 183, 184.

[186] *See, e.g.*, Crocker v. Schneider, 683 S.W.2d 335, 338–39 (Tenn. Ct. App. 1984) ("Economic duress has been defined as: imposition, oppression, undue influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another; the theory under which relief is granted being that the party profiting thereby has received money, property or other advantage, which in equity and good conscience he ought not to be permitted to retain."). *See also* Cumberland & Ohio Co. of Texas v. First Am. Nat'l Bank, 936 F.2d 846, 850 (6th Cir. Tenn. 1991) ("The alleged coercive event must be of such severity, either threatened, impending or actually inflicted, so as to overcome the mind and will of a person of ordinary firmness."); Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293, 1299 (M.D. Ala. 1999) (the doctrine of economic duress "applies only to special, unusual, or extraordinary situations . . . .").

the parties' will. However, the courts' disregard of such pressures trivializes and legitimizes them.

Duress doctrine's protection should not be limited to extreme cases; the law should also cover the oppression and coercion typical in many women's lives. Indeed, duress claims rarely prevail, and most duress claims are rejected by the courts.[187] The feminist critique adds the gender dimension to this claim. Many women's daily experiences narrow their options, limit their choices, and constrict their consent, yet they are beyond the scope of duress doctrine.[188] Duress doctrine already recognizes duress of goods, and economic duress; it is no longer limited to physical force or threat of physical injury.[189] This Article advocates continuing this trend by proposing a further expanded alternative duress doctrine to meet feminist ends.

This proposed alternative duress doctrine would give greater power to the courts and less freedom to the parties. But, in reality, freedom of contract often means freedom of the more powerful party. Refraining from policing the terms of the contract means leaving aggrieved parties unprotected and perpetuating their vulnerability. Courts' scrutiny of the contract should not be viewed as intervening in the equilibrium set by the contract, but rather as correcting any imbalance of power. By allowing the aggrieved party to rescind the contract, the court not only corrects power imbalances but also provides protection against exploitive contracts. A broader duress defense would enhance rather than negate the autonomy of aggrieved parties, thus empowering them.

This Article does not argue for a radical and paternalistic rule according to which contracts entered into under conditions of imbalance of power are by definition invalid such that, for example, spouses cannot contract with one another. Nor does this Article argue for a general presumption of women's inferiority and thus need for protection via court intervention in their favor. This Article advocates expanding duress doctrine with caution so as not to lose the advantages of freedom of contract; it does not propose making duress the rule and enforcement of the contract the exception to that rule. Such an extreme position would result in powerful parties refusing to contract with unsophisticated parties, knowing the contracts might be rescinded because of duress.

Rather, the alternative duress doctrine acknowledges the importance of parties' autonomy and their ability to contract with others and to make difficult decisions affecting their lives. However, duress doctrine should also acknowledge aggrieved parties' vulnerability and disadvantages in negotiations. If there are power imbalances between the parties, contract law

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[187] Giesel, *supra* note 32, at 444. Similar to duress, the conviction rate for rape is also low. *See, e.g.*, Henderson, *Getting to Know*, *supra* note 153, at 41.

[188] *See generally* CHOICE AND CONSENT, *supra* note 28 (collection of essays discussing constraints on women's choices in different contexts of consent).

[189] RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 71:1–49 (4th ed. 2003); PERILLO, *supra* note 31, at 315.

should adequately protect aggrieved parties. The goal of the proposed alternative duress doctrine is to cautiously balance between parties' autonomy on the one hand, and to protect them from oppression on the other. Duress doctrine should maintain parties' freedom to contract, but at the same time take notice of their inferior position at negotiation.[190] It should be the tool to protect aggrieved parties from situations in which the other party takes advantage of their vulnerabilities in order to extract a harsh agreement. For example, rather than treating spousal agreements as enforceable or unenforceable, the proposed alternative duress doctrine offers a more balanced and nuanced scrutiny of spousal agreements.

## IV. Duress in the Context of Relations of Power

Part IV demonstrates both the feminist critique and the proposed feminist alternative discussed in the previous Parts. It uses prenuptial[191] and separation[192] agreements to illustrate the theoretical feminist analysis in practice. As will be further demonstrated, courts disregard power imbalances between parties and the substantive unfairness of the contracts they evaluate. They engage in a narrow and individualistic examination of consent and fail to see the larger social picture. Rather than such a limited concept of consent, the courts should take into account social dynamics in order to examine consent in a particular case. While this Article primarily uses spousal agreements as examples, the alternative approach to duress doctrine is applicable to power inequality between parties to other types of contracts, such as employment agreements,[193] consumer agreements,[194] mortgage agree-

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[190] *See supra* note 169.

[191] For a discussion of fairness and duress in prenuptial agreements, see Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 Stan. L. Rev. 887, 909–10 (1997).

[192] For a discussion of fairness and duress in separation agreements, see Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word Of Caution On Contractual Freedom*, 132 U. Pa. L. Rev. 1399, 1428–41 (1984).

[193] *See, e.g.*, Canales v. Performance Team Triangle W., No. B155659, 2003 WL 361242, at *3 (Cal. Ct. App. Feb. 20, 2003); Singh v. Batta Envtl. Assocs., No. Civ. A. 19627, 2003 WL 21309115, at *5 (Del. Ch. May 21, 2003); Osborne v. Howard Univ. Physicians, Inc., 904 A.2d 335, 339 (D.C. 2006); Naqvi v. Computers Assocs. Int'l, Inc., No. 100875/06, 2008 N.Y. Misc. LEXIS 7512, at *7 (N.Y. Sup. Ct. Dec. 31, 2008); Cummings, Inc. v. Dorgan, 320 S.W.3d, 330–31 (Tenn. Ct. App. 2009); Lopez v. Garbage Man, Inc., No. 12-08-00384-CV, 2011 WL 1259523, at *8 (Tex. Ct. App. Mar. 31, 2011); Pittard v. Great Lakes Aviation, 156 P.3d 964, 975 (Wyo. 2007); Blubaugh v. Turner, 842 P.2d 1072, 1074–75 (Wyo. 1992).

[194] *See* Donna M. Bates, *A Consumer's Dream Or Pandora's Box: Is Arbitration A Viable Option For Cross-Border Consumer Disputes?*, 27 Fordham Int'l L.J. 823, 854 (2004) (discussing duress in cases of consumer arbitration agreements).

ments,[195] loan agreements,[196] insurance agreements,[197] and student-athlete contracts.[198]

Although some may believe that family law should address spousal agreements, they are actually governed by contract law.[199] Family law acknowledges power imbalances between men and women; this Article's contribution is in applying this sensitive analysis to contract law. This Article not only refutes the binary thinking in duress doctrine,[200] but also attempts to relax the boundaries between contract law and family law.[201]

### *A. Prenuptial Agreements*

The *Biliouris* decision, which dealt with the facts presented in the Introduction,[202] is a typical prenuptial agreement case.[203] *Biliouris* highlights the unequal power relations between a husband and his wife, and the gendered distributive aspects of contract law. It is not an extreme case of duress, nor

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[195] *See, e.g.*, R. F. Daddario & Sons, Inc. v. Shelansky, 3 A.3d 957, 966 (Conn. App. 2010); 767 Third Ave., LLC v. Orix Capital Mkts., LLC, No. 601047/04, LEXIS 204, at *9 (N.Y. Sup. Ct. July 26, 2005); Benefit Mortg. Co. v. Leach, No. 01AP-737, 2002 WL 926759, at *14 (Ohio Ct. App. May 9, 2002).

[196] *See, e.g.*, *In re* Olde Prairie Block Owner, LLC, 441 B.R. 298, 302 (Bkrtcy. N.D. Ill. 2010); *In re* Laudani, 401 B.R. 9, 39 (Bkrtcy. D. Mass. 2009); *In re* Nat'l Steel Corp., 316 B.R. 287, 49 (Bkrtcy. N.D. Ill. 2004).

[197] Srein v. Soft Drink Workers Union, Local 812, 93 F.3d 1088, 1095 (2d Cir. 1996); Jones v. Bank of Am., No. CV 09-2129-PHX-JA, 2009 U.S. Dist. LEXIS 119350, at *29–31 (D. Ariz. Dec. 3, 2009); S & W Seed Co. v. Mutual Serv. Cas. Ins. Co., No. F04377, 2005 Cal. App. Unpub. LEXIS 11723, at *12 (Cal. App. Dec. 20, 2005).

[198] *See* Thomas A. Baker III, John Grady & Jesse M. Rappole, *Consent Theory as a Possible Cure for Unconscionable Terms in Student-Athlete Contracts*, 22 MARQ. SPORTS L. REV. 619, 626 (2012) (discussing duress in student-athlete contracts).

[199] *See, e.g.,* Biliouris v. Biliouris, 852 N.E.2d 687, 692 (Mass. App. Ct. 2006) ("An antenuptial agreement must also, of course, comport with the rules governing the formation of all contracts, for example, . . . the absence of fraud, misrepresentation, and duress.") (quoting DeMatteo v. DeMatteo, 762 N.E.2d 797, 805 & n.16 (Mass. 2002)).

[200] *See supra* Part III.B.

[201] For the interconnectedness of family law and contract law, see generally Hila Keren, *Can Separate Be Equal? Intimate Economic Exchange and the Cost of Being Special*, 119 HARV. L. REV. F. 19 (2006) (arguing that economic exchanges and the intimate sphere are intertwined and that the law should reconsider its segregation and differential treatment of intimacy).

[202] *See supra* Introduction.

[203] *See* Williams v. Williams, 617 So. 2d 1032, 1035 (Ala. 1992); Kilborn v. Kilborn, 628 So. 2d 884, 885 (Ala. Civ. App. 1993); *In re* Marriage of Dawley, 551 P.2d 323, 331 (Cal. 1976); Falchuk v. Falchuk, No. CN99-06059, 2000 WL 33149320, at *7 (Del. Fam. Ct. Feb. 1, 2000); Francavilla v. Francavilla, 969 So. 2d 522, 524 (Fla. Dist. Ct. App. 2007); Herrera v. Herrera, 895 So. 2d 1171, 1173, 1175 (Fla. Dist. Ct. App. 2005); Mallen v. Mallen, 622 S.E.2d 812, 815–16 (Ga. 2005); DeLorean v. DeLorean, 511 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 1986); Hamilton v. Hamilton, 591 A.2d 720, 721 (Pa. Super. Ct. 1991); Holler v. Holler, 612 S.E.2d 469, 474–76 (S.C. Ct. App. 2005); Osorno v. Osorno, 76 S.W.3d 509, 511 (Tex. App. 2002). *See generally* J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83 (2011) (describing the Uniform Premarital Agreement Act and proposing changes to increase notice and opportunity to retain counsel and revise agreement).

does it concern extreme dependency or poverty, which can be found in cases of undue influence. Mary was not subject to harsh threats or compelling pressure. Instead, the coercion was more subtle; she was an educated professional in a desperate situation at the time she signed the agreement.[204] Although the court concluded that the wife's economic loss and emotional stress did not amount to duress, limiting duress doctrine in this way allows men to misuse their dominant economic position to force women to waive their legal rights upon divorce. Consequently, duress doctrine has harsh economic consequences for divorced women. The following subsections will examine Timothy's behavior, Mary's will, and the fairness of their prenuptial agreement.

### 1. *The Coercer's Illegitimate Behavior and Women's Perspectives*

The court assumed that it was legitimate for women to waive their rights upon divorce.[205] Only in extreme circumstances would the waiver be deemed unfair.[206] As this is the starting point against which Timothy's proposal is measured, it could be seen as putting Mary in a better position according to the rights-based theory.[207] As Mary's waiver was legitimate as a matter of law, Timothy made an offer rather than a threat. However, this assumption is a problematic baseline because it conflicts with the purpose of divorce laws aimed at protecting women upon divorce.[208] As a default rule, legitimizing a woman's waiver of rights allows men to contract around these protective laws.[209] Studies show that women are in a weaker position than their husbands upon divorce.[210] Thus, protecting women upon divorce is justified and will improve their economic condition.

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[204] *Biliouris*, 852 N.E.2d at 689.

[205] *See id.* at 695 (citing Austin v. Austin, 839 N.E.2d 837, 841 (Mass. 2005)); Osborne v. Osborne, 428 N.E.2d 810, 815 (Mass. 1981)).

[206] Mary made another argument concerning the fairness of the agreement and the legitimacy of Timothy's behavior: Mary argued that Timothy conditioned the marriage upon her becoming pregnant, which she did. *Id.* at 692 & n.11. She asserted that adding a second condition, namely, signing the agreement, was coercive in itself. *Id.* at 692. However, Timothy denied making such a precondition, and the court rejected Mary's argument. *Id.* at 693. The court held that a man had no obligation to marry a pregnant woman, so if he conditioned the marriage upon signing a prenuptial agreement his behavior would be legitimate. *Id.* at 693–94.

[207] *See, e.g.,* Nozick, *Coercion*, *supra* note 44, at 447–53.

[208] *See, e.g.,* Julia Halloran McLaughlin, *Should Marital Property Rights Be Inalienable? Preserving the Marriage Ante*, 82 NEB. L. REV. 460, 471–72 (2003) (arguing that marital property laws are designed to protect the economic security and personal liberty of the dependent spouse upon divorce).

[209] Some states do not enforce waivers of spousal support on the grounds that they violate public policy. *See, e.g.*, Sanford v. Sanford, 694 N.W.2d 283, 293 (S.D. 2005); *In re* Marriage of Spiegel, 553 N.W.2d 309, 319 (Iowa 1996).

[210] *See* Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 233 (1994); Bryan, *Women's Freedom*, *supra* note 157, at 1173; Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 148 (1996); Elizabeth Steiner, Note, *Why are Divorced*

Further, duress doctrine leaves threats typical to women outside of its scope, and leaves women with no protection against threats like Timothy's. The court failed to recognize the pressure Mary was under due to her pregnancy—a pressure unique to women—and the stigmatizing prospect of being a single mother. The *Biliouris* court concluded that the unique pressure Mary faced did not amount to duress.[211] The threats of canceling the wedding at the last minute, of being an unmarried mother, and of separation were trivialized by the court. However, from the female perspective these are serious harms.

Only in extreme cases will courts recognize as a threat the demand that a prenuptial be signed as a precondition to marriage.[212] The court examines the prenuptial agreement outside of the context of men's economic domination, isolating it from its social circumstances. In so doing, the court fails to understand the contract in the face of economic inequalities women face in the job market, and in both marriage and divorce. As MacKinnon teaches, we must look at social power dynamics between men and women in order to understand the interaction between a particular man and woman.[213] This step puts into context the baseline relationship necessary to understand the prenuptial agreement. Such examination reveals that Timothy exploited his superior bargaining power and economic position to extract a one-sided contract.

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*Mothers Economically Disadvantaged? And What Can be Done About It?*, 17 TEX. J. WOMEN & L. 131, 133 (2007).

[211] 852 N.E.2d at 689.

[212] Courts invalidated prenuptial agreements in the following extreme cases: A.E.S. v. S.N.S., No. CN01-07370, 2006 WL 2389314, at *1 (Del. Fam. Ct. May 9, 2006) (finding invalid prenuptual agreement because husband gave an ultimatum that if to-be wife did not sign it she would have to go back to Russia); Vakil v. Vakil, 849 N.E.2d 233, 236 & n.7 (Mass. Ct. App. 2006) (finding the prenuptual invalid on the basis that the husband had abused his wife throughout their marriage and had threatened to take their son to Iran and prevent his wife from seeing him); *In re* Estate of Hollett, 834 A.2d 348, 353 (N.H. 2003) (invalidating prenuptual due to vast disparity in bargaining power between husband and wife); Azarova v. Schmitt, No. C-060090, 2007 WL 490908, at *4 (Ohio Ct. App. Feb. 16, 2007) (finding no valid prenuptual because the "mail order bride" was presented with the agreement shortly before visa was to expire, and she had limited knowledge of English, no knowledge of state property division law, and no practical opportunity to consult a lawyer); Holler v. Holler, 612 S.E.2d 469, 475 (S.C. Ct. App. 2005) (finding no valid prenuptual agreement when a foreigner who only married her husband to avoid deportation had not understood the agreement nor had sufficient money to retain a legal counsel or a translator).

[213] MACKINNON, FEMINIST THEORY, *supra* note 86, at 172 ("In feminist analysis, a rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjection, like lynching.").

### 2. *The Absence of the Free Will of the Aggrieved Party and Dichotomies*

The court found it relevant that Mary was an educated professional who had a demonstrated earning capacity.[214] It would seem to follow from the court's analysis that duress is limited to poor and passive victims. Mary's agency contradicted her claim of duress, which is reserved for the helpless.[215] However, even educated, middle class professionals may fall into situations of distress. Although Mary was a teacher, she found herself facing the dilemma of signing the agreement or becoming an unwed mother. Yet, the court saw Mary as a free agent, not a victim of duress.[216] That Mary was not passive and dependent but an educated working mother worked to her disadvantage.

Disregarding that the burden of child rearing is not evenly distributed among men and women has devastating economic consequences on women. While the court declared that Mary had earning capacity, it did not take into account the difficulties of a mother working full-time and taking care of five children.[217] Rearing the children affected Mary's ability to work while leaving Timothy's capacity intact.[218] While he invested in his earning capacity, Mary invested in the family, which had no value in the job market.[219] Failing to take this reality into consideration put Mary at a serious disadvantage. Parenting widened an already existing gap between the respective earning capacities of a physician and a part-time teacher.

Furthermore, the court expected Mary to work, even though according to the prenuptial agreement, the couple had agreed that Mary would be a

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[214] *Id.* at 695; *see also* Brown v. Brown, 26 So. 3d 1222, 1227 (Ala. 2009) (finding consent in part because the "wife was not unsophisticated or illiterate but that before the marriage she had been employed as a real-estate professional"); Ducharme v. Ducharme, 316 Ark. 482, 486 (Ark. 1994) (finding consent in part because the "wife was an experienced businesswoman and real estate broker").

[215] The unconscionability doctrine is also reserved for helpless, weak individuals. *See* Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 90 (1993).

[216] *Biliouris*, 852 N.E.2d at 694.

[217] In addition to the general difficulties mothers face in the job market, Mary specifically claimed in her brief that she was not able to return to work because her teaching certificate had expired, and in any event there were no jobs available in her field. Brief for Defendant-Appellant at 3, Biliouris v. Biliouris, 852 N.E.2d 687 (Mass. App. Ct. 2006).

[218] For how parenting affects mothers' and fathers' ability to work in different ways, see Mary E. Corcoran, *Work, Experience Labor Force Withdrawals, and Women's Wages: Empirical Results Using the 1976 Panel of Income Dynamics*, in WOMEN IN THE LABOR MARKET 216, 216 (Cynthia B. Lloyd et al. eds., 1979); Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. FAM. STUD. 1, 3 (2012); Elizabeth Scott, *A World without Marriage*, 41 FAM. L.Q. 537, 555–56 (2007); Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 758 (2012).

[219] On family and work, see generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (1999) (exploring the effect of gender on family work and market work).

stay-at-home mother and Timothy the income earner. The court's message, however, is that women should not rely on such contracts and should instead be economically independent. Women who choose a traditional family model, under which the father is the breadwinner and the mother is the homemaker, will be left economically deprived upon divorce. While encouraging women to work outside the home is a worthy cause, the law should not leave women in traditional marriages unprotected.[220]

While enforcing other terms of the contract (like the alimony waiver), the court disregarded the part of the agreement stating that Mary would be a stay-at-home mother. Rather than treating the term that defined their spousal relations as the basis of their agreement, the court deemed it an irrelevant factor. In addition to refraining from selectively enforcing the agreement, the court should have examined the prenuptial agreement based on the parties' stated expectations.

The court viewed Mary's choice as dichotomous. The court indicated that if Mary had not been satisfied with the terms of the agreement she could have chosen not to marry Timothy.[221] According to the court Mary had only two options: marry Timothy on his terms or not marry him. The court, relying on this binary thinking, disregarded a third option: negotiating a prenuptial agreement to both parties' satisfaction. By not considering this option, the court reinforced the power inequality between Mary and Timothy and legitimized Timothy's misuse of his greater bargaining power to essentially force Mary to sign a one-sided prenuptial agreement.[222] According to the court, Mary chose her preferred option: she accepted the bad terms of the prenuptial agreement over being a single mother. The court saw this as a fair deal and not as an ultimatum, even though Timothy forced the issue right before the wedding, when the pregnant Mary was most vulnerable. Timothy put Mary in an either/or situation and would not negotiate the contract, leaving her little choice but to agree to his terms. Rather than condemning Timothy for his exploitation, the court viewed this scenario as a legitimate demand resulting in a valid contract.

The situation in this case is much more complex than the court's binary analysis allows. The court disregarded Mary's testimony that Timothy told her he would only marry her if she became pregnant. After she became pregnant, he raised a second demand, namely, signing the prenuptial agreement.

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[220] *See* Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 37 (1998) (proposing premarital security agreements that protect the homemaker).

[221] *Biliouris*, 852 N.E.2d at 696. The same is true for Timothy; he could have chosen not to marry Mary if she had refused to sign the prenuptial agreement.

[222] For a discussion of inequality in traditional marriage, see generally Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 520 (1998); Martha Albertson Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995); Jyl J. Josephson & Cynthia Burack, *The Political Ideology of the Neo-Traditional Family*, 3 J. POL. IDEOLOGIES 213, 222 (1998).

The court ignored the social reality that women and men often attach different value, meaning, and importance to marriage, children, and family.[223] The court also failed to take into account the financial and emotional consequences of canceling a wedding only two days in advance. The conclusion that Mary should have not married Timothy amounts to blaming the victim for her weaker bargaining position, rather than acknowledging the inherent injustice of the situation.

The court's analysis is blind to situations that fall between consent and duress, between free agent and victim. As West and Hasday explain, women's experiences are complex and do not fit within the court's categories.[224] According to them, women are not happy consenters benefitting from wealth-maximizing contracts, and they do not control the economic terms of the contract.[225] This view allows us to expand duress doctrine to new situations of coercion, to better understand contractual consent, and to empower women. It recognizes the combination of psychological and economic pressures Mary faced, and it creates serious doubts about whether she freely consented to the prenuptial agreement.

3. *The Unfairness of the Contract and Context*

The court rejected Mary's duress claim because Mary had sufficient time to review the prenuptial agreement, she obtained legal advice from independent counsel, and at the time of the execution of the agreement she told the notary that she was signing the agreement of her own free will.[226] However, a contextualized analysis of the facts belies the court's assumption that these circumstances resulted in valid consent. The court ignored that the agreement had been presented to Mary a short time before the wedding,[227] leaving insufficient time to adequately review the contract. According to Mary's brief, she had not provided the information regarding her assets, and she had not had an opportunity to verify the assets stipulated in the agree-

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[223] *See* Judith E. Owen Blakemore, Carol A. Lawton, & Lesa Rae Vartanian, *I Can't Wait to Get Married: Gender Differences in Drive to Marry*, 53 SEX ROLES 327, 327 (2005). For a discussion regarding the pressure women face to get married, see, e.g., F.W. Kaslow, *Thirty-Plus and not Married*, *in* GENDER ISSUES ACROSS THE LIFE CYCLE 77 (Barbara Rubin Wainrib ed., 1992); Karen Gail Lewis & Sidney Moon, *Always Single and Single Again Women: A Qualitative Study*, 23 J. MARITAL & FAM. THERAPY, 115, 122 (1997).

[224] *See* discussion *supra* Part II.B.

[225] *See* West, *Hedonic Lives*, *supra* note 105, at 96–97.

[226] *Biliouris*, 852 N.E.2d at 693.

[227] *Id.* at 689. For situations where courts have held equally short time frames valid, see Brown v. Brown, 26 So. 3d 1222, 1223 (Ala. 2009) (holding valid prenuptial agreement presented to to-be wife a day before the wedding); *In re* Yannalfo, 794 A.2d 795, 797 (N.H. 2002) (same); Howell v. Landry, 386 S.E.2d 610, 617 (N.C. Ct. App. 1989) (finding valid prenuptial agreement presented to wife night before the wedding); Zawahiri v. Alwattar, No. 07AP-925, 2008 WL 2698679, at *615 (Ohio Ct. App. July 10, 2008) (holding valid a mahr agreement presented and signed two hours before the wedding).

ment as hers and Timothy's before signing.[228] As the contract was presented to her in a "take it or leave it" manner, the option of reviewing the contract was meaningless.

According to the court, the very existence of an opportunity to obtain independent legal advice was a factor negating duress.[229] Thus, even if a woman does not seize such an opportunity, the opportunity itself precludes duress. There are multiple problems with this standard. Sometimes a prospective wife does not have the funds to retain a lawyer, which makes the opportunity to have legal representation meaningless. She might not seek legal counsel because she trusts her future husband, because she erroneously thinks her future husband's lawyer represents them both, or for a number of other reasons. The court did not examine the reasons Mary rejected her lawyer's advice or whether this was a result of duress. The court was satisfied with the mere fact that she had an independent counsel's advice, while it ignored the following deficiencies in the quality of her representation: Timothy's lawyer had drafted the agreement on the basis of information received from Timothy; Timothy's lawyer had not spoken to either Mary or her attorney; and Mary's attorney was not present at the time the agreement was executed.[230] The court's analysis not only limits the scope of duress doctrine but further empowers the already powerful party, usually the man.

The court also ignored that prior to meeting the notary, Mary had met Timothy and his lawyer at a restaurant where she had cried and told them that she did not want to sign the agreement and that her lawyer was also advising her not to sign it.[231] The court also did not see fit to explain Mary's change of heart and eventual signature on the agreement.

The court stated that as each spouse would retain his or her premarital assets, the agreement was fair. However, this gender-neutral language disguises asymmetrical economics.[232] A contextual analysis will show that Mary's premarital assets hardly changed during the marriage[233] while

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[228] *Biliouris*, 852 N.E.2d at 694, n.14.

[229] *Id.* at 691; *see also* Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990) ("To impose a *per se* requirement that parties entering a prenuptial agreement must obtain independent legal counsel would be contrary to traditional principles of contract law, and would constitute a paternalistic and unwarranted interference with the parties' freedom to enter contracts.").

[230] *Biliouris*, 852 N.E.2d at 689.

[231] *Id.* at 689 & n.2; *see also* Barnhill v. Barnhill, 386 So. 2d 749, 752 (Ala. Civ. App. 1980) (concluding that wife voluntarily signed the agreement even though she was reluctant, signing it only after the to-be husband informed her that he would not marry her unless she signed); *In re* Marriage of Shanks, 758 N.W.2d 506, 512 (Iowa 2008) (holding that an ultimatum where a to-be husband informed his to-be wife he would not get married again without a prenuptial agreement is not unlawful as to-be wife had a reasonable alternative of canceling the wedding).

[232] The *Biliouris* decision states that neither party had exercised coercion. *Biliouris*, 852 N.E.2d at 689. This neutral language ignored that the two parties were not similarly situated. The prenuptial agreement did not reflect the wishes of both parties but the interests of Timothy alone.

[233] Mary's assets increased in value from $100,000 to $105,000. *Id.* at 689, 691.

Timothy's assets nearly doubled.[234] Mary had a lesser earning capacity as a part-time teacher (relative to a physician), and had fewer assets than Timothy when she entered the marriage.[235] However, the central cause of the asset gap was Timothy's ability to segregate the assets that he acquired during their marriage so that they remained in his name only. In view of the division of functions, the agreement was neither fair nor just. Its distributive results favored the breadwinning partner who hoarded separate assets rather than sharing with his partner. Since Mary and Timothy chose a traditional marriage model, enforcing the prenuptial agreement's separatist regime in which each spouse retains his or her assets is unfair.

It is worth noting that while Timothy insisted that he retain his premarital assets (and he kept the medical office building in his name only), shortly after the marriage Mary conveyed her home where they had both lived with her children to herself and Timothy.[236] In addition, although Mary was a stay-at-home mother, she contributed eighty percent of the household expenses while Timothy, who earned $200,000–$400,000 a year, contributed only twenty percent. According to Mary, the parties had agreed that they would use her money for household expenses and his salary for the children's education.[237] Under these circumstances, alleged by Mary but disregarded by the court, enforcement of the letter of the separation agreement resulted in unfair distribution of assets.

The *Biliouris* case highlights the harsh distributive aspects of contract law for women. Studies show that women's economic conditions deteriorate after divorce;[238] the poor economic condition of divorced women is partially due to the fact that men can contract around divorce law.[239] If Mary had not signed the prenuptial agreement, she would have been awarded more money. The prenuptial agreement worsened her economic position at divorce, while benefitting Timothy.

The court's fairness analysis is limited and disregards context. The analysis veils noneconomic aspects of the contract and justifies the unequal distribution resulting from the agreement. As West shows, what the court sees as consensual agreement is in fact submission to authority.[240] As the power-

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[234] Timothy's assets increased in value from $986,000 to $1,962,000. *Id.* at 691.

[235] *Id.* at 689–91.

[236] *Id.* at 690, n.5.

[237] *Id.* at 699.

[238] For the best-known research on this topic, *see* LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 327–29 (1985). This research's methodology and statistical analysis have been heavily criticized. For one such critique, see Richard R. Peterson, *Statistical Errors, Faulty Conclusions, Misguided Policy: Reply to Weitzman*, 61 AM. SOC. REV. 539 (1996). But see Weitzman's response in Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537 (1996). For other studies supporting Weitzman's findings, see, e.g., Brod, *Premarital Agreements and Gender Justice*, *supra* note 210, at 248.

[239] Steiner, *supra* note 210, at 141.

[240] *See* West, *Hedonic Lives*, *supra* note 105, at 96–97.

ful party, Timothy can enforce the one-sided contract. Accordingly, West claims courts should look beyond the economic terms of the contract and intervene in contracts in order to correct social inequalities.[241] A contextual and richer analysis results in a broader conception of fairness. As the prenuptial agreement largely deviates from an egalitarian distribution of the couple's assets and ignores the social context of the contract, it is fundamentally unfair.

### *B. Separation Agreements*

After reviewing prenuptial agreements in the previous section, this section reviews separation agreements. *Mesiti v. Mongiello*[242] provides an example of a separation agreement case. I will begin with its basic facts. Anna and Anthony divorced after twenty-one years of marriage.[243] Anthony filed an application seeking sole custody of the couple's two children.[244] Shortly before the hearing upon that application, the couple signed a separation agreement.[245] At the hearing, Anna's attorney informed the court that Anna signed the agreement against his advice and he withdrew as her counsel.[246] The court gave Anna ten days to seek advice of a new counsel.[247] When the court reconvened, the judge asked Anna if she needed additional time to reconsider the agreement, but she responded that she was "just going to take the agreement and just end all this."[248] The court then accepted the separation agreement and incorporated it into the judgment of divorce.[249] Later, Anna argued that she signed the separation agreement under duress: prior to the court hearing "the husband and his attorneys threatened her, without [her] counsel present, that unless she signed the agreement and advised [the court] that she did so by her own free will, her children would be taken from her."[250] The court rejected her duress claim.[251]

*Mesiti* is a typical separation agreement case,[252] just as *Biliouris* is a typical prenuptial agreement case. Like *Biliouris*, *Mesiti* is not an extreme

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[241] West, *Authority, Autonomy and Choice*, *supra* note 136, at 425–26.
[242] Mesiti v. Mongiello, 84 A.D.3d 1547 (N.Y. App. Div. 2011).
[243] *Id.* at 1547.
[244] *Id.*
[245] *Id.* at 1547–48. The separation agreement consisted of a "Separation and Property Settlement Agreement" and a "Child Support and Custody Settlement." *Id.*
[246] *Id.* at 1548.
[247] *Id.*
[248] *Mesiti*, 84 A.D.3d at 1548.
[249] *Id.*
[250] *Id.* at 1549.
[251] *Id.* at 1550.
[252] For similar separation agreement cases, see Cosh v. Cosh, 45 A.D.3d 798, 799–800 (N.Y. App. Div. 2007); Morand v. Morand, 2 A.D.3d 913, 914 (N.Y. App. Div. 2003); Lyons v. Lyons, 289 A.D.2d 902, 903–04 (N.Y. App. Div. 2001); Grow v. Grow, No. 2755-98-4, 2000 WL 84438, at *1 (Va. Ct. App. Jan. 27, 2000).

duress case: Anna received substantial assets upon divorce[253] and she was not facing severe physical threats.[254] As will be further discussed, the decision in *Mesiti* reflects the narrow application of duress doctrine and its gendered tendency to exclude and erase the power dynamics between the parties and pressures typical in women's lives. As discussed in the previous section regarding prenuptial agreements, these issues have distributional consequences that are detrimental to women. The following subsections will examine Anthony's behavior, Anna's will, and the fairness of their separation agreement.

### 1. *The Coercer's Illegitimate Behavior and Women's Perspectives*

In *Mesiti*, the court did not consider the significance of the threat. As a mother, the threat that custody of Anna's children would be taken away from her was devastating. The court should have considered the unique value of motherhood to women rather than ignoring the special nature of the threat.[255] Even today, taking care of children is largely the mother's, rather than father's, responsibility.[256] Additionally, mothers' relationships with their children are often more intense than fathers'.[257] The court fails to acknowledge these realities. According to the court, Anna should have fought for custody in court, and no significance was accorded to the subject matter of the hearing and to its consequences.[258] Examining the threat in the context of the centrality of motherhood in women's lives would enable the court to explore whether Anna truly consented. For example, studies show that in negotiating divorce many women agree to a lesser portion of the marital estate in exchange for custody of the children.[259] By ignoring this reality, the court

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[253] *Mesiti*, 84 A.D.3d at 1550. Anna received "the marital home worth approximately $891,700, a distributive award of $1,000,000 payable at the rate of $100,000 per year for 10 years, a cash payment in the amount of $273,000, health insurance coverage for 10 years, child support of $500 per week, and $5,000 towards her legal fees." *Id.* She "was also relieved of all debts and obligations from the parties' business." *Id.* Anthony "further assumed full health insurance coverage for the parties' children and agreed to pay 100% of their unreimbursed medical and dental expenses." *Id.*

[254] *Id.* at 1549.

[255] For a discussion of this special value, see Julia McQuillan, et al., *The Importance of Motherhood Among Women in the Contemporary United States*, 22 GENDER & SOC'Y 477 (2008) (examining the attitudes about the importance of motherhood among mothers and non-mothers).

[256] *See* SUZANNE M. BIANCHI ET AL., CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 62–65 (2006) (measuring time parents spend with their children); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 137 (1992) (noting that primary caregivers tend to be women).

[257] Becker, *supra* note 256, at 137 ("[A] conspiracy of silence forbids discussion of what is common knowledge: mothers are usually emotionally closer to their children than fathers.").

[258] *Mesiti*, 84 A.D.3d 1547.

[259] *See* Scott Altman, *Lurking in the Shadow*, 68 SO. CALIF. L. REV. 493, 495 (1995); Penelope Eileen Bryan, *Vacant Promises?: The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Circumstances of Women*, 8 DUKE J. GENDER L.

failed to see under what constraints women consent and at what cost. Threats that women experience as significant are too often excluded from duress doctrine, resulting in harsh economic consequences for women.

Moreover, the court disregarded the importance of relationships in women's lives. Custody is not only a legal responsibility, but reflects parent-child bonding. Women are interconnected and relational, typically more so than men;[260] family and familial ties in particular are central to women.[261] Thus, separation from children is a devastating threat for women. While losing custody does not necessarily mean separating from the children, the court should understand the threat of losing custody in the context of the family breakup. Like *Biliouris*, where the threat of canceling the wedding put Mary and Timothy's relationship at risk, the threat of losing custody is devastating to the mother-child relationship. Anna could have fought the custody battle in court, but she chose not to take the risk of losing, preferring to "take the agreement and just end all this."[262]

As MacKinnon suggests, understanding the social background to women's consent is important.[263] The court, however, treated custody as a legal procedure and ignored the social background and women's perspective on motherhood and relations. This perspective and background could have shed light on women's consent and enabled the court to better understand women's choices.

### 2. *The Absence of the Free Will of the Aggrieved Party and Dichotomies*

The court clearly distinguishes between economic and emotional pressures; it accepts the former but rejects the latter as grounds for duress. The emotional stress Anna faced—the fear of losing custody of her children—is left outside the scope of duress doctrine. Like the *Biliouris* court,[264] the *Mesiti* court engaged in hierarchical thinking favoring economic coercion over emotional stress. While economic duress is part of duress doctrine (although the courts did not find it in Mary's and Anna's cases) emotional du-

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& POL'Y 167, 168 (2001) [hereinafter Bryan, *Vacant Promises*] ("Many mothers trade away their financial rights at divorce in order to maintain custody of their children.").

[260] *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 169 (1982). Whether women's connectedness is biological or cultural, inherent or social does not matter for sake of this Article's premise that women are relational. Any discussion concerning the roots of this phenomenon goes beyond the scope of this Article.

[261] *Id.* at 169.

[262] *Mesiti*, 84 A.D.3d at 1548.

[263] *See supra* note 92.

[264] The *Biliouris* court rejected the economic duress claim and concluded that the premarital agreement was fair since each spouse retained his or her assets and since Timothy promised to support their child even if they had not married. The court also concluded that Mary's stress caused by Timothy's ultimatum was a subjective feeling not amounting to duress. Biliouris v. Biliouris, 852 N.E.2d 687, 693 (Mass. App. Ct. 2006).

ress is considered a subjective feeling not deserving of the court's protection under contract law.[265] The *Mesiti* court examined the financial distributions of the separation agreement but neglected to address the emotional stress Anna was under, concerned that Anthony would win sole custody of their children.

A broader view, based on stress studies in other disciplines, not only refutes this binary thinking but also provides contract law with a better understanding of consent. These studies show not only how stress nullifies one's consent but also that stress is "*not* merely a subjective feeling."[266] Consequently, courts should broaden duress doctrine to include cases of stress.[267] The narrow scope of duress doctrine left Anna vulnerable to Anthony's threats since they were neither economic nor physical. Even though the issue of custody is very sensitive to many women, duress doctrine disregards such threats. This economic-emotion binary is refuted by studies in other disciplines, and causes courts to misunderstand the complex nature of consent.[268]

The *Mesiti* court, like the *Biliouris* court, also maintains a consent/duress dichotomy. Situations of coercion and pressure that in fact affect consent may not amount to duress. The court does not see these gray areas. As demonstrated by *Mesiti* and *Biliouris*, the unique pressures women experience often fall into these gray areas and are not covered by duress doctrine. This binary analysis limits the protection of duress doctrine and legitimizes pressures that are not as extreme as duress. As West and Hasday suggest, consent is not truly binary.[269] The consent-duress dichotomy makes submission to power and to stressors look like legally valid consent. Courts should break from this binary thinking and understand that consent is not simply lack of coercion but rather more complex; they should engage in nuanced examination of the gray areas in between consent and duress.

### 3. *The Unfairness of the Contract and Context*

The court rejected Anna's duress claim because she stated, under oath, that she had read and understood the agreement, that she was not coerced into executing the agreement, and that there was full disclosure of all marital property.[270] Like in *Biliouris*, a contextual analysis reveals a more complex story. The court ignored Anthony's threat to take full custody of the chil-

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[265] *See* Keren, *Consenting Under Stress*, *supra* note 123, at 5 ("Most courts do not view stress that leads a person to accept an injurious contract, as a sufficient reason for relief from that contract.").

[266] *Id.* at 17–18 (emphasis in original).

[267] *Id.* at 44 (stating that, based on Keren's analysis of the various stress studies, it is "imperative to re-examine both the role of consent and the notion of fault in light of the understanding of stress").

[268] *Id.* at 5.

[269] *See* discussion *supra* Part II.B.

[270] Mesiti v. Mongiello, 84 A.D.3d 1547, 1548–550 (N.Y. App. Div. 2011).

dren.[271] According to Anna, the threat not only led her to sign the contract but also forced her to declare to the court that she was not coerced to do so.[272] The court also failed to consider Anna's statement that she signed the agreement "just to end all this."[273] Rather than indicating her consent, this statement should be interpreted as expressing Anna's wish to neutralize the threat. This interpretation is supported by the fact that Anna signed the separation agreement shortly before the custody application hearing, and that she requested rescindment of the separation agreement just four days after the court hearing.[274] Anna wanted to eliminate Anthony's threat by signing the contract and stating to the court that she did so willingly. But as soon as the threat was gone, Anna was in a position to tell the court that she was forced to sign the separation agreement and to ask for the court's assistance in rescinding the contract. Like in *Biliouris*, the threat was made at a moment of vulnerability.

The court also applied a narrow and limited fairness analysis. The court rejected the contention that "the mere presence of [the husband's] witnesses in the courtroom in anticipation of a hearing on that application constitutes duress."[275] However, Anna claimed she was threatened with losing custody of her children, not that she would be confronting the witnesses. The threat related to the hearing's result, not to its proceedings. Anna chose not to take this risk, accepting the terms of the agreement instead.

Moreover, the court added that Anna ratified the agreement by accepting its benefits for more than a year.[276] However, the court did not consider that four days after the execution of the agreement, Anna wrote to the court requesting its assistance in retracting her signature on the agreement.[277]

The court was satisfied that Anna rejected her counsel's advice not to sign the agreement and that she was provided an opportunity to seek another lawyer but chose not to do so.[278] According to the court, "under these circumstances, the wife's election to proceed without counsel does not compel invalidation of the agreements."[279] The court failed to ask why Anna signed the agreement against her lawyer's advice, why her lawyer advised her not to sign the contract, why her lawyer resigned, or why Anna chose to end the hearing quickly instead of postponing it to seek other counsel. Rather than brushing Anna's statements aside, the court should have investigated these signs that Anna was under pressure.

Anna's claim that the agreement was unconscionable was also rejected by the court, which found that the separation agreement was not "so one-

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[271] *Id.* at 1549.
[272] *Id.*
[273] *Id.* at 1548.
[274] *Id.*
[275] *Id.* at 1549–50.
[276] *Mesiti*, 84 A.D.3d at 1551.
[277] *Id.* at 1548.
[278] *Id.* at 1548–49.
[279] *Id.* at 1550.

sided as to shock the conscience."[280] Like the *Biliouros* court, the *Mesiti* court's analysis was narrow and it justified distributive inequality.[281] According to the court, a proposed unequal division of the marital property does not amount to duress or unconscionability unless it is extreme.[282] An agreement will be set aside only if a party can show "overreaching, fraud, duress or a bargain so inequitable that no reasonable and competent person would have consented to it."[283]

In Anna's case, her role as a mother and her desire for custody played a large role in her legal choices. Courts should be sensitive to studies showing that women trade economic terms for custody.[284] Such background makes for a better understanding of why Anna accepted the terms of the contract. The court should not be satisfied with the absence of economic duress, but instead should investigate the terms of the contract further.

As West suggests, a consensual contract is not necessarily fair.[285] Rather, what a court perceives as a wealth-maximizing transaction may be, in reality, submission to power. For this reason, courts should take into account the context of power relations when examining consent.

## Conclusion

This Article uses feminist legal theory to critique the liberal notion of consent in duress doctrine and to propose an alternative analysis of duress doctrine in cases of a power imbalance between parties. The narrow nature

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[280] *Id.*

[281] *Id.* According to the *Biliouris* court, the agreement will only be unconscionable if it causes the wife to become a public charge. "It is only where the contesting party is essentially stripped of substantially all marital interests, and indeed, the terms of the agreement essentially vitiate the very status of marriage, that an agreement is not fair and reasonable." Biliouris v. Biliouris, 852 N.E.2d 687, 695 (Mass. App. Ct. 2006); *see also* Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981) (finding that an agreement "may be modified by the courts in certain situations, for example, where it is determined that one spouse is or will become a public charge"); MacFarlane v. Rich, 567 A.2d 585, 591 (N.H. 1989) ("[W]hen the status of a spouse would change so dramatically as a result of divorce that enforcement of an antenuptial agreement would result in the spouse becoming a public charge, we believe that the State's interest in protecting the welfare of the spouse, and mitigating the hardship occasioned by divorce, compels judicial reformation of the contract."); Bassler v. Bassler, 593 A.2d 82, 87 (Vt. 1991) ("An agreement which would leave a spouse a public charge or close to it, or which would provide a standard of living far below that which was enjoyed both before and during the marriage would probably not be enforced by any court.").

[282] *Mesiti*, 84 A.D.3d at 1550.

[283] *Id.* at 1548.

[284] *See* Altman, *supra* note 259, at 494 ("Law's most famous shadow is cast by unpredictable child custody standards, which enable some divorcing men to tell their wives 'give me a good financial settlement, or else I will litigate custody.' Some divorcing women capitulate hoping to avoid the risk, pain, cost, and delay of litigation."); Bryan, *Vacant Promises*, *supra* note 259, at 168 ("Many mothers trade away their financial rights at divorce in order to maintain custody of their children.").

[285] West, *Authority, Autonomy, and Choice*, *supra* note 136, at 386.

of current duress doctrine is insensitive to inequality between the parties and has devastating distributive ramifications for aggrieved parties. The limited scope of duress doctrine allows many coercive practices to be employed during negotiations. Further, by enforcing these contracts, courts legitimize these practices and maintain power imbalances. This Article advocates for a broader view of duress doctrine that will prohibit a larger spectrum of coercive acts, take into account the imbalance of power between parties, and include pressures typically experienced by aggrieved parties. This Article calls for a balanced duress doctrine that preserves parties' autonomy and freedom while at the same time protecting weaker parties from being unfairly disadvantaged.