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Duress and Undue Influence in Contract Law as Cognitive Trespass

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I. INTRODUCTION

Much of contract law concerns how to treat instances in which one party is vulnerable to advantage-taking by another. The cases fall into two groups. In some, the advantage taker just happens upon the vulnerable party and has no part in creating that vulnerability. This has been labeled "pure advantage-taking."[1] In other cases, specifically duress and undue influence, the advantage taker is responsible to some degree for creating that vulnerability. This is "active advantage-tak-

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1. Rick Bigwood, *Contracts by Unfair Advantage: From Exploitation to Transactional Neglect*, 25 OXFORD J. LEGAL STUD. 65, 65 (2005).

ing."[2] In all cases, contract law takes a permissive approach by limiting the remedy to avoidance and restitution.[3] This Article argues that the permissive approach is inappropriate, particularly in cases in which the vulnerability is created.[4] Its position is that these are cases of cognitive trespass that should be treated as torts, thus leading to the availability of punitive damages. The analysis breaks with the tradition of viewing duress and undue influence through the lenses of free will,[5] impairment of bargaining power,[6] or the fairness of the bargain.[7] Instead, it argues that illegitimate pressure *alone* is a harm that should be addressed regardless of the contractual outcome.

The approach currently taken is labeled "permissive" for two reasons. First, even when a contract is successfully avoided, the parties are returned, as much as possible, to their ex ante positions.[8] This means there is little incentive not to take maximum advantage of vulnerable parties, even if it means investing in creating that vulnerability. This is particularly obvious in the case of repeat players. For example, take the case of an auto dealer that makes a habit of pressuring elderly or uneducated customers. Even if a handful of those contracts are avoided by customers, the net expected gain to the dealer is positive unless every disadvantaged party brings an action or the activity is penalized. The idea that every contract made under suspect conditions would be challenged is, if course, unsupportable. People who are vulnerable in the context of contract-making are probably less likely to assert a legal action in the first place or are simply ignorant of their rights. Moreover, to the extent the vulnerable party is also less affluent, such an action involves a substantial risk. The repeat advantage taker has an expected net positive outcome from exercising not just maximum leverage, but from actually making improper

2. Perhaps a more apt label would be "impure advantage-taking" since the advantage taker is fully aware of the nature of his or her effort. "Active," though, also captures what is happening.
3. *See infra* notes 8–20 and accompanying text.
4. This is not to say there are not sound arguments for a more aggressive approach in all cases of knowing advantage-taking. *See* Bigwood, *supra* note 1.
5. *See, e.g.*, Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 357–59 (1915). *See generally* M.H. Ogilvie, *Wrongfulness, Rights and Economic Duress*, 16 OTTAWA L. REV. 1 (1984); M.H. Ogilvie, *Economic Duress in Contract: Departure, Detour or Dead End?*, 34 CANADIAN BUS. L.J. 194 (2000); Note, *Economic Duress After the Demise of Free Will Theory*, 53 IOWA L. REV. 893 (1968). As Dan Dobbs notes, "[N]o satisfactory means of gauging free will has been found." DAN B. DOBBS, 2 DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 655 (2d ed. 1993).
6. John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 266–67 (1947); Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); *see* Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175, 241 (1997).
7. Dawson, *supra* note 6, at 287.
8. Avoidance is typically accompanied by restitution, if possible.

threats like those enumerated in the Restatement (Second) of Contracts.[9] More worrisome is that this net positive outcome encourages research and investment in activities designed to create duress and undue influence.[10]

Even for the non-repeat player the net expected outcome is likely to be positive. The likelihood the disadvantaged party will bring an action is far less than 100%. Thus, the probabilities favor keeping the profits from the exchange. And even if avoided, the result is loss of those ill-gotten gains without further consequence. Consequently, for the advantage taker, it is a bit like gambling, except your money is returned if you lose.

The second manifestation of the permissiveness of the current approach is that the remedy of avoidance only extends to those who were unable to resist the pressure exerted. Oftentimes the party upon whom pressure is applied does resist and no contract is made, or one is made on fair terms. If fact, he or she may not want to avoid the contract because it ultimately reflects a fair outcome as a result of resisting illegitimate pressure. Under these circumstances, even an acceptable bargain is achieved at an unnecessary cost.

Studies of brain circuitry indicate that threat-making and the resulting stress activate a series of chemical reactions that are physically harmful to the disadvantaged party.[11] If one is said to own oneself and the processes that take place in one's brain, the threat-maker or one creating undue influence is an unwanted intruder regardless of whether the target is able to resist. There is no logical reason why intrusion is viewed as any less physical than more conventional intrusions on private property. In fact, it is noteworthy that the origins of actions based on duress were in the context of

9. The Restatement (Second) of Contracts provides:

> (1) A threat is improper if
> (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
> (b) what is threatened is a criminal prosecution,
> (c) what is threatened is the use of civil process and the threat is made in bad faith, or
> (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
> (2) 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.

RESTATEMENT (SECOND) OF CONTRACTS § 176 (AM. LAW INST. 1981).

10. Perhaps the only factor offsetting this is a risk of reputational harm.

11. *See infra* text accompanying notes 66–79.

"physical assault, exerted or threatened, by means of which transfer[s] . . . were extorted."[12]

Contract law's policy of effectively incentivizing engagement in duress and undue influence is unsupportable as an economic and philosophical manner. Deterrence is the appropriate policy, but contract law has no teeth in this regard. Deterrence calls for punitive damages and can be drawn from tort law. The proposed solution is that duress and undue influence be regarded as torts with the desired consequences that (1) parties who are taken advantage of are more likely to bring vindicating actions in part because legal assistance will be more readily available, and (2) those who do take advantage will have negative expected outcomes. Treating duress and undue influence as torts is not much of a leap for two reasons. First, the fact that parties already have a right avoid contracts made under conditions of duress or undue influence suggests very strongly that there already is a soft duty not to engage in these activities. Second, the test of whether a duty has been violated is whether one party has forced another to enter into a contract that a court now finds voidable.[13] In other words, no additional judicial analysis is necessary to determine if the duty has been violated.

Part II explains why this effort is limited to instances of duress and undue influence and why they are joined together. Part III addresses why the current posture of the law with respect to advantage-taking cannot be justified by economics or moral philosophy. It analogizes duress and undue influence to instances of theft in the sense that they involve the taking of another's capacity. Part IV compares information, offers, and threats. Part V is a brief summary of the scientific literature supporting the view that placing people in stressful situations is a physical intrusion. Part VI is a survey of the scattered but useful literature with respect to treating active advantage-taking as a tort. Part VII examines the law as it applies to viewing duress and undue influence as torts. It notes that some courts appear to treat duress as a tort. An exhaustive search, however, did not find any cases in which undue influence, in the contract law context, was treated as a tort. Part VIII contains concluding remarks focusing on the problems of adopting the approach advanced here.

Before beginning, a quick qualification is in order. Although the theme of this Article is that contract law actually condones advantage-taking by limiting remedies for the vulnerable to avoidance of the contract, it does not take issue with the classes of vulnerability as identified in the Restatement (Second) of Contracts. The basic categories in

12. Dawson, *supra* note 6, at 254.

13. This does not, however, provide a remedy for those who successfully resist coercive efforts. It is likely, though, that taking a punitive approach to overreaching, as proposed here, would decrease the instances in which resistance is necessary.

the Restatement seem correct. In that context, vulnerability involves being susceptible to harm by reason of capacity,[14] duress,[15] undue influence,[16] or material misrepresentation.[17] Because unconscionability seems to take on both a procedural and a substantive element,[18] it too can be treated as a case of vulnerability; but that possibility is not explored here because the advantage-taking party is not always the source of the weaker party's disability.[19] Finally, vulnerability, as treated here, does not involve instances in which one party simply has better information than another.

II. PURE AND ACTIVE ADVANTAGE-TAKING

This Article addresses active, as opposed to pure, advantage-taking. An explanation for focusing on discouraging active advantage-taking is in order because there also may be very sound reasons to discourage pure advantage-taking. Good examples of pure advantage-taking are instances in which a contracting party is volitionally or cognitively impaired. The law presumes impairment in cases of minors. In the case of pure advantage-taking, the advantage taker may or may not be ignorant of his or her counterpart's weakness. In instances in which the advantaged party does not know about the other party's weakness or has no reason to know, punishment is not likely to change behavior or it may change it in unwelcome ways. Specifically, assigning liability in these instances could lead to intrusion into all parties' statuses. In each instance, the potential advantage taker would be motivated to delve into the personal characteristics of each contracting party. In this regard, it is useful to distinguish minors from adults who are impaired. It is probably not intrusive to ask for proof of age from a minor. Examining an adult's mental health before contracting with him, on the other hand, seems unduly intrusive.

When the advantage taker knows or should know of vulnerability, punishment may be appropriate, just as in the case of active advantage-taking. This is a closer call than when the advantage taker has no reason to know. After all, as in the case of active advantage-taking, the quality of consent falls below that necessary to guarantee that both parties benefit as a result of the contract. However, there is a problem. The advantage taker may know or should know about the cognitive limitations of the contracting partner. This does not mean the party will know the weakness is so severe and continuing that the

14. RESTATEMENT (SECOND) OF CONTRACTS §§ 12–16 (AM. LAW INST. 1981).
15. RESTATEMENT (SECOND) OF CONTRACTS §§ 174–75 (AM. LAW INST. 1981).
16. RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. LAW INST. 1981).
17. RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981).
18. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (AM. LAW INST. 1981).
19. *See* Rick Bigwood, *Undue Influence, 'Impaired Consent,' or 'Wicked Exploitation'?*, 16 OXFORD J. LEGAL STUD. 503, 514 (1996).

weaker party cannot make a rational, self-interested choice. A general rule, backed up by punitive damages, that one must not contract with those who are impaired might work to harm the impaired by impinging on their autonomy.

Minors exemplify this point. Age itself is not a reliable indication of minors' abilities to act in their self-interest. So too, the cognitively impaired may be able to make well-informed decisions. Almost certainly, a more nuanced approach than the one proposed here for active advantage-taking is warranted. Perhaps some version of a duty to care leading to a negligence standard is appropriate.[20] In any case, the treatment of instances in which the contracting party knows of the impairment but has no part in creating it certainly deserves more attention in the form of further research. It does appear, though, that this version of possible advantage-taking can be distinguished in a principled way from instances in which the advantage taker has essentially set a trap for the contracting partner.

This may lead to the question of why duress and undue influence are treated together in this effort. Duress requires a specific threat that leaves no reasonable alternative.[21] Undue influence, on the other hand, suggests a more general dominance over someone in a weakened state and use of that dominance to "force" the disadvantaged party into contracts on terms to which they would not otherwise agree.[22] In both cases, the advantage-taking party actually intrudes on the thinking of the victim. It is true that the party who is unduly influenced may already be in a weakened state, but without the dominance of the advantage taker and its use, the decision making would be different.[23]

One might also ask why fraud and misrepresentation are not included in this analysis. Neither involve an actual intrusion into the reasoning process. Both are akin to providing incorrect data but, arguably, they do not cause an impairment. Both effectively cause the contracting party to make a mistake because of that data. Plus, in the case of fraud, a tort remedy is already available.[24]

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20. *See* Bigwood, *supra* note 1.

21. RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 1981).

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

23. *See, e.g.*, Odorrizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 543 (Cal. App. 1966); Neill v. Brackett, 126 N.E. 93, 94 (Mass. 1920); Howe v. Palmer, 956 N.E.2d 249, 254 (Mass. App. 2011).

24. JOHN D. CALAMARI & JOSEPH M. PERILLLO, THE LAW OF CONTRACTS 325–26 (4th ed. 1998).

This Article treats duress and "economic duress" alike. Duress initially involved physical harm or threats to do physical harm.[25] Economic duress is the term used to distinguish other types of threats from physical threats.[26] Initially the term referred to duress of goods, refusals to provide service, and threats of physical prosecution.[27] It is this Article's position that there is no meaningful distinction between physical duress and economic duress.[28] Ultimately, putting someone under duress or applying duress, whether physically or economically, has a physical impact. Therefore, physical threats and so-called economic threats should be treated alike.

Tort law already includes an action based on intentional infliction of emotional distress.[29] Why not simply argue that it should be expanded to include the distress caused by duress and undue influence? People under duress or subject to undue influence are injured, but in many cases these injuries are temporary. If the tort of infliction of emotional distress was expanded to include all injuries of that nature—not just those in the context of contracts—it would be difficult to contain and would likely trivialize a cause of action that is already subject to multiple uncertainties.[30] Specifically, a general expansion of what it means to intentionally inflict emotional distress would open the door to claims having nothing to do with contracts and based on simple day-to-day difficulties. In addition, it is not clear that the people who act aggressively in the contracts context possess the necessary intent to cause harm.[31] Perhaps those actually harming others in the context of contracts could be regarded as negligent. However, courts have generally required the distress to be severe before finding that emotional distress has been negligently caused.[32] Most importantly, in the case of duress and undue influence it is unnecessary to become entangled in the tort of intentional infliction of emotional distress. A contract will be avoidable or not. If it is avoidable on one of these bases, no further analysis is necessary.

This means some injuries will not be addressed. As noted in Part I, some people, despite coercive efforts, do resist. For instance, in the high-pressure car salesperson example, perhaps the consumer does not give in and buy the car. Or perhaps the consumer buys a car on much better terms than first offered. The psychic cost of resisting these efforts is a form of injury. Ideally, the people who are happy with

25. Dawson, *supra* note 6, at 254.
26. *Id.*
27. *Id*. at 255–56.
28. *See* Ogilvie, *Wrongfulness, Rights and Economic Duress*, *supra* note 5, at 33.
29. *See generally* DAN B. DOBBS, THE LAW OF TORTS 821–52 (2000).
30. *Id.* at 823–24.
31. They do, however, possess the necessary intent to place someone under duress or apply undue influence.
32. DOBBS, *supra* note 29, at 835–39.

the outcome but had to undergo illegitimate pressures would be among those who could recover. If so, the area of protection proposed here could be extended to all contracts that are voidable due to duress or undue influence and all those that would have been made if the subject of those pressures had given in. A choice was made not to include the latter group. First, as a matter of practicality, assessing the ability to avoid unmade contracts is likely impossible. Second, if tort remedies are available when actual contracts are made under conditions of undue influence or duress, it seems very likely that there would be a disincentive to apply those pressures at all, meaning concerns about the hypothetically avoidable contract become less pressing.

III. ARE THERE JUSTIFICATIONS FOR THE PERMISSIVE APPROACH?

A. The Economics

1. Efficiency and Investment in Advantage-Taking Strategies

i. A Paretian Standard

Most people value making good deals, regardless of whether they generally benefit society. To understand why contracts made under conditions of duress or undue influence are never good deals from a social standpoint, think about the costs associated with options available to the party who is vulnerable and enters into a contract, whether it is a case of pure or active advantage-taking. That party may do nothing and, in effect, ratify the transaction. The vulnerable party can refuse to perform and use one of several arguments for avoiding the contract, or may ask for a declaratory judgement. The last two options are costly and risky to a party who may already be at a disadvantage vis-à-vis the other contracting party. In many instances, the contracts formed by those who are vulnerable are carried forth and performed because of ignorance of the law, risk aversion, or financial reasons.

What then is the character of those deals that are left undisturbed? There are two possibilities. One is that the vulnerable party is actually worse off after the contract than before. The other is that the vulnerable party is better off after making the contract. Take the easy case first. Your elderly uncle is no longer fully able to understand all the things he needs to ask about a car and is pressured to buy a car. The salesperson makes a great deal, having sold a clunker for which he paid $2,000 to your uncle for $5,000. Your uncle, on the other hand, has paid $5,000 for car that only runs for a week or so and has a resale value of $2,000. From a Pareto efficiency point of view,[33] this cannot

33. Under Pareto standards of efficiency, a change is viewed as efficient or Pareto-superior if at least one person is better off and no one is worse off. Changes that

be regarded as beneficial to society, yet contract law is structured to condone similar bargains unless one believes that every instance of high pressure sales tactics applied to a vulnerable party is addressed by the ability to avoid the contract. The fact that both parties are not better off is just one cost. The other cost is the investment advantage takers make in developing new ways to target various vulnerable groups. This cost is a loss to society. It produces nothing—it just reallocates what exists.

A harder case occurs when both parties are better off. Your uncle is again pressured to buy a car, but this time the fair market value of the car is $5,000. Your uncle is not worse off; he has swapped $5,000 for a car worth $5,000. On the other hand, had he fully understood his options and not been pressured, he could have negotiated a better deal. Perhaps he would have bought another car or talked the salesperson into selling the car for $4,500. Here, although both parties are presumably better off, there are two costs. One is in the form of the opportunities your uncle lost. They were effectively "taken" by the salesperson. The second may be more serious from a social standpoint. Again, as long as the sales tactic is a "winner" there will be investment in developing it. From an economic point of view, this investment does not create anything—it merely has a distributive effect. Society is actually worse off.

ii. Kaldor-Hicks and Selling Your Will

The rise of the economic analysis of law led to the use of wealth maximization, or Kaldor-Hicks measures of efficiency, as a substitute for Pareto efficiency.[34] The theory is that involuntary transfers are efficient if those gaining could compensate those who lose. The notion has been repeatedly criticized as being inconsistent with any generally accepted goals.[35] More to the point, it is useful, if at all, when

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leave one or more parties worse off are Pareto-inferior. A Pareto-optimal allocation is one from which there can be no changes without making someone worse off. *See also* Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1 (1997) (examining the distributive consequences of the psychological and social factors that influence agreements). *See* THOMAS F. COTTER & JEFFREY L. HARRISON, LAW AND ECONOMICS 45–46 (3d ed. 2013).

34. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 88–115 (1981); *see also* Richard A. Posner, *The Ethical and Political Basis of Efficiency Norms in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) (distinguishing the Kaldor-Hicks measure of efficiency from the Pareto-superiority measure of efficiency); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) (arguing wealth maximization serves as a firmer basis for a normative theory of law compared to utilitarianism).

35. Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980).

exchanges cannot occur because of high transaction costs.[36] In the instance of vulnerable people, transaction costs are not a problem. The real problem is illustrated by considering that there are two transactions. One is the obvious situation in which there is an exchange. To understand the second one, take a fairly well-known case of undue influence, *Odorizzi v. Bloomfield School District*.[37] Odorizzi was essentially badgered into resigning from a teaching position because he was a homosexual.[38] He was in a weakened state when this occurred.[39] To determine whether the advantage-taking was wealth maximizing, one would have to imagine Odorizzi before he was badgered and before any threats were made. At that point he would be asked how much he would take to sell his capacity. In other words, what would it take to get him to consent to being placed in a position in which he could not say no? Although it is technically an empirical question, it seems unlikely that many people would sell their free will. In fact, the price the Odorizzis of the world would ultimately charge for, in this case, their resignation would have to be the summation of what they would charge for their autonomy plus what they would charge for the resignation if in a weakened state.[40] Those desiring his resignation would have to be willing to pay more.

iii. Advantage-Taking as Theft

The thesis of this Article is that duress and undue influence are comparable to trespass; they are unwelcome intrusions into peoples' property-like right to think for themselves. As an economic matter, advantage-taking can also be viewed as a type of theft in the sense that it is taking without permission. First, it is important to recognize

36. When transaction costs are low, it is not necessary to engage in the largely theoretical question of whether those made better off could compensate those made worse off. The parties can do that directly.

37. Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123 (1966).

38. *Id.* at 537–38.

39. *Id.*

40. Although this Article concerns only cases in which the advantage-taking party is responsible for the weakness of the other party, some of the argument's logic can be carried over to cases of pure advantage-taking. In these instances, the advantage-taking party is not in a position to "sell" or "buy" the weakened party's capacity. For example, in *Knoll v. Merrill Corp*. an employee made a claim of wrong discharge and then signed a release. *See* Knoll v. Merrill Corp., 2003 WL 22682271, at *1 (S.D.N.Y. 2003). He later complained that he lacked capacity but not as a result of the employer's actions. One could argue that the outcome was wealth-maximizing as long as the employer came out ahead by more than employee was made worse off. In this case, one could view the employer as owning the right to take advantage of the weakened party's capacity. The problem is that, although not "owned" by the weakened party, capacity has some value and he might be willing to pay more to retain that capacity than the least the employer was willing to take. If so, it is hard to see this transaction as wealth-maximizing.

why we punish those who steal. Suppose you see a car you really like but are unable to locate the owner right away. You look up the fair market value of the car and, instead of obtaining the owner's permission, you simply take the car and leave behind a sack of money containing cash equal to the market value. Arguably this is efficient because you now have the car and the owner has cash equal to its value. The problem is that we do not know if the owner would have sold the car at fair market value. In fact, if she would not have, you have made the car owner worse off. The only way to ensure that the exchange enhances social welfare (i.e., both parties are better off) is for a voluntary transaction to take place. Plus, in this case, transaction costs are likely to be low and a face-to-face transaction would be relatively easy. At the most basic level, we punish theft because we do not want one party making decisions that potentially misallocate resources even from a Kaldor-Hicks perspective. In the case of vulnerable people, the same is true. The advantage taker, like the thief, is effectively making a decision for both parties because, by definition, one of the parties is in a weakened state.[41]

iv. The Opportunistic Avoidance Issue

There is a more-or-less open economic question stemming from the proposal of this practice. First, think of the making of a contract as a "positive." A true positive exists when a deal is struck that increases the welfare of both parties without increasing investments in advantage-taking. A false positive occurs when parties agree, but one is vulnerable and actually made worse off or denied better off opportunities and investment in creating duress or undue influence is encouraged.[42] As noted, today's contract law encourages exactly these types of investments because the remedy of avoidance only makes them relatively risk free.

Too permissive an approach to allowing parties to avoid contracts, including incentivizing avoidance by adopting the tort approach offered here, means that some contracts that were true positives may be undone by opportunistic parties who simply have a change of heart. In effect, they will seek to portray true positives as false positives. This leads to a trade-off of two costs: limiting investments in advantage-taking strategies while also discouraging opportunistic avoidance. The current approach leads to the former and the tort approach arguably

41. The theft analogy is useful to understand why even pure and impure advantage-taking should be treated alike. The pure advantage taker finds the vulnerable person just as the thief might reach through an open window to take something valuable. The impure advantage taker pries the window open in order to reach what is valuable. In criminal law we have different terms for these offenses but both are punishable, just as they should be in the context of contract formation.

42. "Worse off" here means both immediately and prospectively.

could give rise to the latter. Which cost approach is lower is an empirical question, but it seems likely that opportunistic avoidance would be relative rare. Many of those who engage in duress or undue influence, like the high-pressure salesperson described here, are repeat players. Successful efforts to enter into false positives can be part of an overall strategy in which the investment leads to multiple profitable transactions. On the other hand, individuals may find it profitable to repeatedly claim they were subject to duress or undue influence. It seems unlikely, though, that claims of being repeatedly duped by several different merchants would be attractive given litigation costs and the possibility that punitive damages might be unavailable to known repeat complainants.

B. Philosophical Questions

If there are no economic justifications for the current permissive approach to advantage-taking, might there be support in the realm of moral philosophy? Although this Article cannot survey such a broad field, Kantian values, utilitarian goals, and a Rawlsian approach do not provide that support. The basic Kantian idea is that if all men of are of equal moral worth, then it is irrational to favor oneself over others.[43] More succinctly, people should not use others as a means to an end. In many ways, contract law seems to embrace this view superficially. Contract law has a long list of instances in which one party may not advance his or her own goals by taking advantage of others.[44] The problem, though, is with the remedy and the reality of how often instances of advantage-taking are addressed. Currently, contract law in the cases of duress and undue influence actually makes using another to achieve one's own ends attractive. Indeed, as noted in Part I, it provides an incentive for these undertakings.

From the standpoint of utilitarianism, there is also is no basis for permitting advantage-taking of those who are vulnerable. The central problem with utilitarianism is that we simply do not and cannot know what maximizes utility, although we can probably make reliable guesses. For example, if it were possible to create a situation in which Bill Gates is held up by a pauper who demands $20, it is likely that the utility gains to the pauper would outstrip the loss to Bill Gates. In the current context, though, we would have to be able to conclude that advantage takers enjoy more utility by their actions than the level of disutility suffered by their victims. In our earlier example, the advan-

43. *See also* Alan H. Goldman, *Rights, Utilities, and Contracts*, 3 CANADIAN J. PHIL. 121 (Supp. 1977); Mark Sagoff, *At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic*, 23 ARIZ. L. REV. 1283 (1981). *See* JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 75 (1970).

44. RESTATEMENT (SECOND) OF CONTRACTS §§ 12–15, 175, 177, 208 (AM. LAW INST. 1981).

tage-taking car salesperson would be overjoyed and your uncle would be only mildly annoyed. Nevertheless, as a general matter, we cannot make interpersonal comparisons of utility. Therefore, utilitarianism cannot provide any direction. As already noted, the law and economics version of utilitarianism—wealth maximization—leads to indeterminate outcomes and, for that and other reasons, cannot be squared with Kantian or utilitarian goals.

A third alternative is to consider a Rawlsian outcome. Rawls imagines rational people behind the "veil of ignorance."[45] Behind that veil they cannot know what position they will hold in society.[46] For example, they will not know if they will be rich or poor, highly intelligent, or able bodied. Behind the veil they make rules that will be applied when out from behind the veil.[47] Everyone has an equal probability of being gifted or not and, for purposes of this Article, they will not know how or when their vulnerability might arise. They cannot know what their position will be in society. Behind the veil, according to Rawls, decision makers are likely to adopt his famous difference principle: "social and economic inequalities are to be arranged so they are both (a) reasonably expected to be everyone's advantage . . . and (b) attached to positions and offices open to all."[48] More specifically for the issues at hand, one should ask, "What would contract law rules look like behind the veil?" Given that one would not know if one was more or less vulnerable, the outcome would be to protect the vulnerable.[49] Interestingly, contract law appears to do this. However, the problem indicated throughout this Article is that contract law expresses the right values but does not enforce them. In a Rawlsian world, it is likely that exploitation of those who are vulnerable would be unacceptable, as opposed to unacceptable only sometimes.

IV. INFORMATION, OFFERS, AND THREATS

There is a distinction between fraud and misrepresentation on one hand and duress and undue influence on the other. Fraud and misrepresentation are versions of incorrect data that may lead even a smoothly functioning mind to make a mistake. It is also possible to see threats as a form of information that may actually be true. "Your money or your life" may be truthful. The difference is that "your money or your life" is not harmful because it may lead to a mistaken decision. It is harmful because simply hearing the information itself is harmful. Duress, regardless of one's ability to resist, is unwelcome.

45. JOHN RAWLS, A THEORY OF JUSTICE 136–41 (1971).
46. *Id.*
47. *Id.*
48. *Id.* at 60.
49. Here Rawls makes the assumption that people are largely risk averse.

Legal philosophers have spent a great deal of effort defining the essence of duress. Alan Wertheimer undertook one of the more painstaking efforts in *Coercion*.[50] According to Wertheimer, "A coerces B to do X if and only if (1) A's proposal creates a choice situation for B such that B has no reasonable alternative but to do X and (2) it is *wrong* for A to make such a proposal to B."[51] This is effectively a two- pronged test and is captured by the Restatement (Second) of Contracts § 175.[52] Wertheimer refers to the first step as the choice prong and the second as the proposal prong.[53] Both prongs are necessary. Under this standard, even an unwelcome choice proposed by someone who has every right to present that choice is not applying duress.

Professor Rick Bigwood suggests the order of inquiry should be reversed from that offered by Werthimer: without an improper threat, it is unnecessary to examine the existence of a reasonable alternative.[54] Bigwood's approach is a more useful way to view the issue for the purposes of the arguments made here. This is because it is the threat, as opposed to the choice, that is of primary importance in intruding on one's right to his or her own thinking process. In any case, the hard decision is what it means to make a wrongful threat. Here again the Restatement (Second) of Contracts provides a list.[55] The relatively simple part is that the threat is illegitimate if it is unlawful. The problem is creating boundaries around threats that although not technically unlawful are sufficiently, to use the Restatement's terminology, "improper."[56]

The Restatement deals with this problem by dividing improper threats into two categories based on the intrusiveness of the threats. First, in the most intrusive cases, the contract can be avoided regardless of the fairness of the terms. In the second category, avoidance is only permitted if the outcome of the bargain is unfair. Included in the

50. ALAN WERTHEIMER, COERCION (1987).

51. *Id.* at 172 (emphasis in the original).

52. The Restatement provides:

> (1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.
>
> (2) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 1981).

53. WERTHEIMER, *supra* note 50, at 172.

54. Rick Bigwood, *Coercion in Contract: The Theoretical Constructs of Duress*, 46 U. TORONTO L.J. 201, 213–14 (1996).

55. *See supra* note 9.

56. RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 1981).

second category are instances of spiteful acts[57] or threats that are compelling because of some prior unfair dealing.[58] The problem is that every contract involves a threat not to provide an outcome that one party prefers. For example, a late arrival at an airport may find only one cab available that charges far more than the traveler would like to pay. Nevertheless, the traveler hires the cab because there is no reasonable alternative. Of course, this begs the question of what it means for an alternative to be reasonable or not. For example, consider "Pay me $30,000 or you cannot have the title to this car," or "Pay me $50 or you may not golf on this course." To a person who greatly desires the car or to the avid golfer, there is only one reasonable choice. In effect, the no reasonable alternative prong does not get us very far in identifying isolated improper intrusions. Every contract involves a choice of options and in many, if not most of them, one party will seem to have more leverage.

What it means to trespass or to take one's autonomy requires distinguishing between threats and offers.[59] Consider these three possibilities:

(1) I will not sell this boat to you unless you give me $30,000.
(2) I will not deliver the goods I promised unless you pay me an additional $30,000.
(3) Resign your position as a teacher or I will report your misdeeds to the newspapers.

In the case of the boat, the speaker creates an opportunity for the offeree to increase her utility and provides information about how to do that. The second and third examples involve choices between maintaining the status quo and being made worse off by actions of the offeror. If given her druthers, the recipient in the second two categories prefers not to have heard of the choice at all. This raises the baseline issue: What is one's entitlement *not* to hear of a choice? In the case of an offer, the offeree has no right to the boat. In the sale of goods example, the buyer is contractually entitled to on time delivery. In the resignation case, although the offeree may not be entitled not to have his misdeed reported, the threatening party does not threaten to report because it is the right thing to do. It is merely to weaken the position of the offeree. Go back to the *Odorizzi* case in which school officials threatened to expose Odorizzi's homosexuality if he did not resign

57. RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(a) (AM. LAW INST. 1981). *See generally* Jeffrey L. Harrison, *Spite: Legal and Social Implications*, 22 LEWIS & CLARK L. REV. 991 (2018).

58. RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(b) (AM. LAW INST. 1981).

59. Bigwood, *supra* note 54, at 212.

from his teaching position.[60] If that were in fact the right thing to do in the interest of public welfare, the officials were free to do it. What they should not be permitted to do is use the threat to achieve some self-serving end.

In short, threats parties should be entitled *not* to hear fall into one of two categories. One is comprised of instances in which a person is legally or contractually obligated and threatens to violate that duty in order to coerce the threatened party. The second category is undoubtedly more controversial. It involves actions the threatening party may legally take to increase public welfare. On the other hand, if those same actions are not taken to benefit others, but rather to advance self-serving goals while making the threatened party worse off, that falls inside the area of threats one is entitled not to hear. In a nutshell, these two categories include efforts to make oneself better off only by making another worse off.[61]

This is not meant to imply that these general guidelines are easy to apply. Take two extremes. A representative example is *Biliouris v. Biliouris*,[62] where a divorced wife attempted to show she was under duress when signing a prenuptial agreement with a man to whom she was engaged. At the time of the agreement, she was thirty-five years old, had three children, and was pregnant with the fiancé's child.[63] The agreement was presented to her one week before the marriage. She signed against the advice of counsel and was crying at the time.[64] Evidently, the threat was that the husband would not marry her unless the agreement was signed.[65] Under the terms of the agreement, there was to be no alimony, and each party would keep the property they brought to the marriage.[66] Although the court found there was no duress,[67] there should have been. Aside from the fact that the future spouse was breaching a promise, he was legally permitted to call off the marriage. However, the threat and its timing were designed to coerce the future wife. It fits the description of a lawful threat one is entitled not to hear. He sought to make himself better off only by making the other party worse off.

Consider a different example. Sam goes into a store that sells athletic shoes. The store is well lit, there is pleasant music playing, and

60. *See supra* note 37.
61. Included in this category are spiteful actions in which the only benefit to the party acting coercively is observing the suffering of the other party. *But cf.* Sian E. Provost, *A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law*, 73 TEX. L. REV. 629 (1995).
62. 852 N.E.2d 687 (Mass App. Ct. 2006).
63. *Id.*
64. *Id.* at 689.
65. *Id.*
66. *Id.* at 690.
67. *Id.* at 695.

the salesperson approaches Sam and asks where he got that cool shirt he is wearing. He then asks Sam if he went to the game on Saturday and they begin talking about the last-minute touchdown that meant the home team won. This sales tactic is sometimes referred to as the salesperson becoming a five-minute friend.[68] The salesperson then shows Sam some shoes that "just came in" and would look great with the shirt he is wearing. Actually, Sam thinks they would look good too. But does Sam feel that way because of the characteristics of the shoes or because his new salesperson friend who Sam now does not want to disappoint and who will not be his pal if he rejects the shoes? Sam buys the shoes only to see his "pal" immediately rush off to another customer and compliment her on her shorts. Sam then decides the shoes are really not to his liking and wishes he had not bought them. He feels he was more persuaded by the sales technique than by the quality of the shoes. In both cases, although it is hard be sympathetic to Sam, one party is better off only if the "coerced" party is worse off.

In both cases, the undesired alternative is created by the person doing the persuading and one party is made better off but only by issuing—even implicitly—a threat that will mean the other party will be or feel worse off. How can we distinguish, as a matter of principle, "I will not marry you" from "I will no longer be your buddy?" Tort law provides an easy answer. To some extent, we expect people to be careful and watch out for themselves. In the case of shoe buyer, one senses that Sam should have known better given the context and the goals of the salesperson.[69] In effect, Sam contributed to the problem. Thus, even though duress and undue influence should be tortious, they should be accompanied by something akin to contributory negligence.[70]

V. THE SCIENCE

Trespass is typically associated with intrusions on the property of another. If one accepts that we own our bodies and, thus, our thoughts and reasoning, then it is a short step to the idea that interfering with those processes is a form of trespass. This is not an analogy or philosophical possibility. It is physical. Specifically, when a party is subjected to a threat that there is no contractual or legal right to make or when a person is given a choice that makes another better off at his or

68. A former student who had been a salesperson at a well-known sports shoe outlet told me this. The strategy was also described by an acquaintance who was a sales representative at store selling high-end audio equipment.

69. John Dawson notes that in the early development of duress, the threat had to be strong enough to "overcome a 'constant' man." Dawson, *supra* note 6, at 255.

70. *See generally* DOBBS, *supra* note 29, at 494.

her expense, the result is to place the person under stress.[71] Stress is one form of discomfort.[72] Although we tend to think of stress as a source of mental discomfort, that feeling is set off by a number of physical reactions. Just as much as the bruising of a physical blow is an uncontrollable physical reaction, threats in in the form of duress or undue influence also result in an uncontrollable physical reaction.

For years scientists have understood the physical impact of stress.[73] There are several overlapping systems that complement each other in the process of reestablishing homeostasis.[74] Initially chemicals are released that have different functions.[75] For example, dopamine helps with decision making and risk assessment.[76] Serotonin, on the other hand, serves as a post-stress anxiety reducer.[77] This is only the first step in a chain reaction of effects, all of which "orchestrate" the body's effort to adapt to change.[78] Along the way, various parts of the brain become involved, including the amygdala, the prefrontal cortex, and the hippocampus.[79]

The negative effects of stress have been well-documented. The signaling from the brain affects nearly every organ.[80] Researchers have also linked stress to diseases including depression, upper respiratory

71. Stress has been defined as "real or anticipated disruption of homeostasis or an anticipated threat to well-being." *See* Yvonne M. Ulrich-Lai & James P. Herman, *Neural Regulation of Endocrine and Autonomic Stress Responses*, 10 NATURE REV. NEUROSCIENCE 397 (2009).

72. Stress can affect decision making but that is not this Article's focus. *See* Catherine A. Hartley & Elizabeth A. Phelps, *Anxiety and Decision Making*, 72 BIOLOGICAL PSYCHIATRY 113 (2012); Katherine M. Kowalski & Charles Vaught, *Judgment and Decision Making Under Stress: An Overview for Emergency Managers*, CTR. FOR DISEASE CONTROL (Jan. 1, 2003), https://stacks.cdc.gov/view/cdc/9731 [https://perma.unl.edu/YY45-YE35].

73. *See, e.g.*, Francisco Mora et al., *Stress, Neurotransmitters, Corticosterone, and Body-Brain Integration*, 1476 BRAIN RES. 71 (2012); *See* Yvonne M. Ulrich-Lai & James P. Herman, *Neural Regulation of Endocrine and Autonomic Stress Responses*, 10 NATURE REV. NEUROSCIENCE 397 (2009); Marian Joëls & Tallie Z. Baram, *The Neuro-symphony of Stress*, 10 NATURE REV. NEUROSCIENCE 459 (2009).

74. Homeostasis is defined as "the tendency of a system, [especially] the physiological system of higher animals to maintain internal stability, owing to the coordinated response of its parts to and situation or stimulus tending to disrupt its normal condition or function." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (1996).

75. Joëls & Baram, *supra* note 73.

76. *Id.* at 460.

77. *Id.*

78. *Id.*

79. *Id.* at 459.

80. *See Stress Effects on the Body*, AM. PSYCHOL. ASS'N, https://www.apa.org/helpcenter/stress-body [https://perma.unl.edu/Z97F-EXVD] (last visited July 18, 2019).

tract infections, herpes viral infections, autoimmune diseases,[81] and cardiovascular problems.[82] As one would expect, acute or short-term stress can be less harmful than chronic stress. Even short-term stress, however, can affect memory learning,[83] digestion, blood sugar, asthma, and blood pressure,[84] and result in negative emotions.[85] This evidence leads us to question why contract law permits, and arguably encourages, the imposition of stress by those who make threats or unduly influence contracting partners.

VI. SURVEY OF THE LITERATURE

There are few things in law that have not been addressed and the possibility of making duress and undue influence less attractive is no exception. One of the most compelling arguments is found in a 1913 treatise, *The Law of Quasi Contracts*,[86] which noted the similarity between duress and fraud. According to author Frederic Woodward:

> [T]here ought to be recognized a universal obligation not to exercise duress over another to his damage, just as there is not to mislead another to his damage by false representations. For in both cases the duty is essentially the same—to refrain from injuring another by wrongfully creating a motive for action. If such were the law, the exercise of duress, like that of fraud . . . would not give rise to a quasi-contract but would constitute a tort.[87]

Similarly, a note published by the *Harvard Law Review* over ninety years ago makes a truncated case for treating duress as a tort.[88] Again, the author compares duress and fraud:

> In duress, as in fraud, the outstanding fact is that the victim's will has been coerced by reprehensible means into a consent he would otherwise not have given or into acts which he would otherwise not have done. The only difference is as to the method employed by the wrongdoer in effectuating his purpose.[89]

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81. Sheldon Cohen, Denise Janicki-Deverts & Gregory E. Miller, *Psychological Stress and Disease*, 298 J. AM. MED. ASS'N 1685, 1687 (2007).
82. *See, e.g.*, Joel E. Dimsdale, *Psychological Stress and Cardiovascular Disease*, 51 J. AM. COLL. CARDIOLOGY 1237 (2008); Jean-Christophe Chauvet-Gelinier & Bernard Bonin, *Stress, Anxiety and Depression in Heart Disease Patients: A Major Challenge for Cardiac Rehabilitation*, 60 ANNALS PHYSICAL & REHAB. MED. 6 (2017).
83. U.C. Irvine, *Short-Term Stress Can Affect Learning and Memory*, SCIENCEDAILY (Mar. 13, 2008), www.sciencedaily.com/releases/2008/03/080311182434.htm [https://perma.unl.edu/B5RA-UC4T].
84. Kristen Hicks, *The Many Negative Effects of Stress on Health*, SENIORADVISOR.COM, https://www.senioradvisor.com/blog/2016/08/the-many-negative-effects-of-stress-on-health/ [https://perma.unl.edu/KGF8-LEVX] (last visited July 19, 2019).
85. *See* Pamela J. Feldman et al., *Negative Emotion and Acute Physiological Responses to Stress*, 21 ANNALS BEHAV. MED. 216 (1999).
86. FREDERIC CAMPBELL WOODWARD, THE LAW OF QUASI CONTRACTS (1913).
87. *Id.* at 336–37.
88. Note, *Duress as a Tort*, 39 HARV. L. REV. 108 (1925).
89. *Id.* at 109.

The proposal in this 1925 note was backed by the reasoning that contract remedies will not always be adequate.[90] The current Restatement (Second) of Contracts carries forward the example that author cited. Suppose A is coerced into entering into a contact with B, but the actual coercion is from C. Under § 175 of the Restatement:

> If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.[91]

In short, there is a gap in the law that exists today as it did in 1925. In the hypothetical, there appears to be no remedy against C based on contract law. The wrong goes unaddressed unless there is a tort remedy.

The most compelling case, perhaps only by inference, for treating duress as a tort was made fifty years ago in an *Iowa Law Review* note:

> The duty which arises . . . is an obligation to exercise superior bargaining power reasonably. This duty is breached if the stronger party threatens an action which cannot be justified, under a standard of commercial reasonableness, by the weaker party's refusal to meet the contractual demand. Cause in fact depends on a showing that the victim would not have acquiesced . . . if the wrongful threats had not been issued.[92]

It is not completely clear, however, whether the author proposes treating duress as an actual tort or is suggests applying a tort-like analysis in the context of traditional contract law and the remedies it affords.[93]

Although not calling for a new tort,[94] perhaps the closest to the proposal found here is a very broad one offered by Australian law professor Rick Bigwood. Professor Bigwood coined the phrase "pure advantage-taking"[95] to refer to those instances in which the advantage taker does not participate in whatever events or activities resulted in the state of the weaker party.[96] He proposes the notion of "transactional neglect," which would carry with it a duty to take "reasonable precautions"[97] to ensure that a party has been "adequately protected"[98] from external and internal forces. He contrasts this with cases in which the more powerful party actually causes the imbalance. He regards those as cases of strict liability.[99]

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90. *Id.*
91. RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (AM. LAW INST. 1981).
92. Note, *supra* note 5, at 924. This note included citations to a very limited group of cases in which duress, in the setting of a contract, was classified as a tort. *See id.* at 900-01.
93. For an example of the source of this reader's confusion, see the concluding comments. *Id.*
94. Bigwood, *supra* note 1, at 67.
95. *Id.* at 65.
96. *Id.*
97. *Id.* at 67.
98. *Id.* at 95.
99. *Id.* at 66.

In all of these instances, the analysis focuses on the possibility of the use of pressure to force a choice the disadvantaged party would not have otherwise made, as opposed to the harm caused by the threat itself. As a general matter, the possibility of treating duress as a tort has received limited commentary[100] and this author was unable to discover any previous writing that applying pressure *alone* should be the basis of lability.

VII. THE STATE OF THE LAW

A. Duress

The state of the law with respect to duress as a tort is inconsistent and confusing. There are, however, a number of cases that seem to recognize that putting another party under duress can be a tort. On the other hand, it is difficult to reconcile these cases even when they are within the same jurisdiction and it would be inaccurate to say there is a discernable movement toward recognizing either duress or undue influence as a tort. A number of jurisdictions have rejected or avoided ruling on whether duress can be a standalone tort.[101]

A few examples of this uncertainty in Wisconsin, Texas, and New York are useful. In *Wurtz v. Fleischman*,[102] a 1979 Wisconsin opinion greatly influenced by the above *Iowa Law Review* note,[103] the court noted that "economic duress is not only available as a defense to a suit on a contract, but also may be a separate cause of action or counterclaim. In such cases, the damages shall be the damages generally available for intentional torts."[104] In the tort context, duress was identified as the unreasonable use of superior bargaining power.[105] The

100. There are some minor exceptions. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 121 (5th ed. 1984); DOBBS, *supra* note 29, at 236; JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 328-29 (5th ed. 2003); RESTATEMENT (SECOND) OF CONTRACTS ch 7 introductory note (AM. LAW INST. 1981).

101. *See, e.g.*, Coyer v. Hemmer, 901 F. Supp. 872, 890-91 (D.N.J. 1995); Williams v. Boeing Military Aircraft Co., 1991 WL 75571, at *3-4 (D. Kan. 1991); Bennett Enters. Inc. v. Domino's Pizza Inc., 794 F. Supp. 434, 438 (citing *In re* Ashby Enters., 47 B.R. 394, 398 (D.D.C. 1985), Blake Constr. Co. v. C.J. Coakley Co., 431 A.2d 569 (D.C. 1981)); Country Corner Food & Drug, Inc. v. First State Bank & Tr. Co., 966 S.W.2d 894, 899 (Ark. 1998); Cahaba Seafood, Inc. v. Central Bank, 567 So. 2d 1304, 1306 (Ala. 1990); NN Inv'rs Life Ins. Co. v. Prof'l Grp., Inc., 468 So. 2d 532, 533 n.1 (Fla. Dist. Ct. App. 1985); Leventhal v. Dockser, 282 N.E.2d 680, 681 (Mass. 1972); Cimarron Pipeline Constr., Inc. v. U.S. Fid. & Guar. Ins. Co., 848 P.2d 1161, 1163-64 (Okla. 1993).

102. Wurtz v. Fleischman, 278 N.W.2d 266 (Wis. Ct. App. 1979), *rev'd*, 293 N.W.2d 155 (Wis. 1980).

103. *Id.* at 269 (citing Note, *supra* note 5, at 892-96).

104. *Wurtz*, 278 N.W.2d at 273.

105. *Id.* at 271.

Wisconsin Supreme Court reversed the case on appeal a year later,[106] but the observation that duress could be a tort did not seem the be the reason for reversal.[107] In fact, at least one court noted the case was reversed on other grounds.[108] Federal courts in Wisconsin have taken a different view. In *Verfuerth v. Orion Energy Systems, Inc.*, the court opined that "absent some clear guidance from the Wisconsin courts . . . [it would] not conclude that economic duress exists as a stand-alone tort."[109] The next year it stated in *Braeger Chevrolet v. Ally Financial, Inc*. that it was unclear whether the Wisconsin Supreme Court's reversal of *Wurtz* left intact the "creation of the tortious cause of action for economic duress."[110]

Texas has been more direct in establishing duress as a tort. In *Housing Authority of City of Dallas v. Hubbell*, a court explained:

> Duress is a tort. It often arises in connection with breach of contract, but it is nevertheless a tort, and it is not necessary that there should have been privity of contract between the parties as a prerequisite for such a tort action. One who sustains damage as a result of being subjected to duress may sue as plaintiff against the wrongdoer.[111]

Thus, in Texas, a tort action is also available when the duress is applied by a third party.[112]

As in Wisconsin, however, it is not clear that the Texas courts are consistent with respect to whether duress exists as an independent tort. In a 1989 Court of Appeals decision, the court observed:

> The appellant argues in her brief that duress is a recognizable tort, and she is, therefore, entitled to recover the damages as awarded by the jury. However, we need not answer the question of whether duress is an independent, recognizable tort. Even if duress is an independent tort cause of action, and the

106. Wurtz v. Fleischman, 293 N.W.2d 155 (Wis. 1980).

107. Reversal seemed to be based on the appellate court's findings of fact. *Id.* at 159.

108. *See* Troutman v. Facetglas, Inc., 316 S.E.2d 424, 426 (S.C. Ct. App. 1984).

109. Verfuerth v. Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 650–51 (E.D. Wis. 2014). The court cited *Mancini v. Mathews*, 743 N.W.2d 167 (Wis. Ct. App. 2007), a Wisconsin lower court opinion indicating that duress could not be a stand-alone tort. *Id.*

110. Braeger Chevrolet, Inc. v. Ally Fin., Inc., 2015 WL 1523906, at *3 (E.D. Wis. 2015).

111. Housing Auth. v. Hubbell, 325 S.W.2d 880, 902 (Tex. Civ. App. 1959); s*ee also* U.S. v. Hubbell, 323 F.2d 197 (5th Cir. 1963) (citing the lower court opinion in subsequent interpleader action); King Constr. Co. v. W.M. Smith Elec. Co., 350 S.W.2d 940, 944 (Tex. Civ. App. 1961) (recognizing duress as a tort); Leal v. Bank of America, 2012 WL 1392089, at *5 (S.D. Tex. 2012) (reiterating that Texas courts have recognized duress as an independent cause of action). *But see* Kinsel v. Lindsey, 526 S.W.3d 411, 411 n.3 (Tex. 2017) (a more recent decision holding that undue influence, which is closely related to duress, cannot be the basis of a tort action); NN Inv'rs Life Ins. v. Prof'l Grp., 468 So. 2d 532, 533 n.1 (Fla. Dist. Ct. App. 1985) (rejecting the idea of duress as a tort, the court observed that *Hubbell*, "[t]he Texas case first recognizing the tort . . . contains no reasoning and, of course, relies on no decided cases.").

112. *See* King v. Bishop, 879 S.W.2d 222, 224 (Tex. App. 1994).

> appellant was entitled to recover on these facts, we find that she failed to properly plead duress as a cause of action.[113]

On the other hand, a more recent Fifth Circuit opinion stated:

> This Court has held that under Texas law the tort of economic duress exists only if the following factors are shown: (1) there is a threat to do something which a party threatening has no legal right to do; (2) there is some illegal exaction or some fraud or deception; and (3) the restraint is imminent and such as to destroy free agency without present means of protection.[114]

This version of duress as a tort seems to deviate from a pure notion of duress as a tort in that it requires an "illegal exaction, or some fraud, or deception."[115] In fact, the same court observed that "few Texas cases have awarded recovery on this 'tort.'"[116] Nevertheless, Texas courts have sporadically viewed duress as a tort.

New York has a similar pattern of inconsistency. A 1990 case, *Bank Leumi Tr. Co. of N.Y. v. D'Evori Int'l Inc.*, explained, "We do not believe that the doctrine of economic duress, which is traditionally used as a defense to an action, has any place in a cause of action seeking money damages."[117] This accords with a 1993 case, *Nice v. Combustion Engineering, Inc*., which noted, "There is no substantive cause of action for duress and undue influence."[118] These cases seem inconsistent with a 1985 case that suggested duress is a cause of action "known to the law."[119] Similarly, in *Ippisch v. Moricz-Smith* in 1955, a New York court found that "[a] threat of unlawful conduct intended to prevent and which does prevent another from exercising free will and judgment[ ] falls within the definition of duress," citing the Restatement of the Law of Torts.[120] In an even earlier New York case, *30 East End Inc. v. World Steel Products*,[121] the court held that "duress, analogous to deceit, may be brought as a tort action."[122]

Similarly, New Mexico has noted that duress can be a tort[123] but has more recently expressed ambivalence, reasoning in one case:

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113. Campbell v. McCrory Corp., 1989 WL 28390, at *2 (Tex. App. 1989). A different view is taken by other Texas courts. *See* Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472-73 (Tex. App. 1985); State Nat'l Bank v. Farah Mfg. Co. 678 S.W.2d 661, 682 (Tex. App. 1984).
114. Lee v. Wal-Mart Stores, Inc., 34 F.3d 285, 288 (5th Cir. 1994) (internal quotation marks omitted) (citing Beijing Metal & Minerals v. Am. Bus. Ctr., 993 F.2d 1178, 1184-85 (5th Cir. 1993)); *see also In re* Artho, 587 B.R. 866, 883 (Bankr. N.D. Tex. 2018) (reiterating the elements of the tort of economic duress under Texas law).
115. *Lee*, 34 F.3d at 288.
116. Lee v. Wal-Mart Stores, Inc., 943 F.2d 554, 560 n.11 (5th Cir. 1991).
117. Bank Leumi Tr. Co. v. D'Evori Int'l, Inc., 163 A.D.2d 26, 31 (N.Y. App. Div. 1990).
118. Nice v. Combustion Eng'g, Inc., 193 A.D.2d 1088, 1089 (N.Y. App. Div. 1993).
119. Ressis v. Mactye, 108 A.D.2d 960, 961 (N.Y. App. Div. 1985).
120. Ippisch v. Moricz-Smith, 144 N.Y.S.2d 505, 508 (N.Y. Sup. Ct. 1955).
121. 30 East End, Inc. v. World Steel Prods. Corp., 110 N.Y.S.2d 754 (N.Y. Sup. Ct. 1952).
122. *Id.* at 758.
123. Terrel v. Duke City Lumber Co., 524 P.2d 1021, 1040 (N.M. Ct. App. 1974).

"There are circumstances in which a claim of economic duress has been analyzed as a tort . . . although, in its traditional sense, duress is not in and of itself a recognized tort."[124] Yet, another case states: "The torts of economic duress and interferences with contractual relations have their own potential to interfere with freedom of contract. But they were recognized in response to inappropriate behavior in the economic realm."[125]

Other instances in which duress has been treated a tort tend to be more isolated.[126] For example, in the 1946 case *Furman v. Gulf Insurance Co.*,[127] the plaintiff sold his insurance agency to a third party after insurance companies to which he was indebted threatened to take over his business.[128] The Eighth Circuit Court of Appeals, citing the Restatement of Torts[129] and interpreting Missouri law, opined that "[t]he obtaining of the transfer of any form of property by duress is now recognized as tortious."[130] Similarly, it has been argued that in California, the tort of duress exists when one compels another to pay money to avoid the wrongful threat of a civil action.[131]

B. Undue Influence

Although courts have nibbled around the edges of the rule that duress is generally not a tort, the same cannot be said of undue influence. In the 2014 edition of *Contracts*, Professor Perillo noted that "[we] know of no case in which undue influence has been deemed to constitute a tort."[132] This is consistent with Dan Dobbs' statement that "there is no tort of undue influence."[133] Similarly the Restate-

124. First Nat'l Bank v. Sanchez, 815 P.2d 613, 616 (N.M. 1991) (citing DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 10.2 (1973)).
125. Beaudry v. Farmers Ins. Exch. Farmers Grp., Inc., 388 P.3d 662, 686 (N.M. Ct. App. 2016), *rev'd*, 412 P.3d 1100 (2018). The West Virginia Supreme Court has also expressed some receptivity to the tort of duress. Mach. Hauling, Inc. v. Steel of W. Va., 384 S.E.2d 139, 143 (W. Va. 1989).
126. For example, a Georgia court refers to "the tort of duress" evidently linking duress to a version of fraud. Edwards v. Robinson-Humphrey Co., 298 S.E.2d 600, 602 (Ga. Ct. App. 1982); *see also* Peavy v. Bank South, 474 S.E.2d 690, 693 (Ga. Ct. App. 1996) (discussing tortious duress as applied in situations involving threatened criminal prosecution).
127. Furman v. Gulf Ins. Co., 152 F.2d 891 (8th Cir. 1946).
128. *Id.* at 892–93.
129. RESTATEMENT OF TORTS § 871 (1939).
130. *Furman*, 152 F.2d at 894.
131. Fuhrman v. Cal. Satellite Sys., 179 Cal. App. 3d 408, 414 (Cal. Ct. App. 1986). However, the California Supreme Court case relied on for the proposition, while labeling duress as a form of fraud, seems to limit recovery to money paid while under duress as opposed to traditional tort damages. Leeper v. Beltrami, 347 P.2d 12, 16 (Cal. 1959).
132. JOSEPH M. PERILLO, CONTRACTS 304 (7th ed. 2014). The "we" refers to former coauthor John D. Calamari. *Id.*
133. DOBBS, *supra* note 5, at 658.

ment (Second) of Contracts points out that "duress and undue influence . . . are not generally of themselves actionable torts."[134] This author conducted further research using Westlaw in the summer of 2019, entering the search term "'undue influence' /10 & contracts." Using this term yielded no contract cases in which a plaintiff using an undue influence rationale successfully invoked a tort theory for recovery.[135]

VIII. CONCLUDING COMMENTS AND PROBLEM AREAS

This Article proposes that those who place others under duress or apply undue influence resulting in avoidable contracts be liable in tort.[136] The ability to avoid the contract is a bright line test of whether a duty has been violated. The principal support for this position is the ambivalence found in contract law in cases of duress and undue influence. Contract law allows contracts made under these conditions to be voidable but provides no motivation for advantage takers not to repeat their actions. In fact, the incentives are the opposite.

This Article is, hopefully, a preliminary step in exploring this possibility. Like any new idea, the proposal would benefit from refinement. There are problem areas, none of which should block an effort to advance a policy of discouraging active advantage-taking. One area that can be dealt with fairly simply is when a party is liable. The intersection of contract law and tort law provides guidance. Contract law allows parties who are the victims of undue influence or duress to avoid the contract. The suggestion here is to put some teeth into that outcome by adding that the person who has applied the undue influence or duress has committed a tort.

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134. RESTATEMENT (SECOND) OF CONTRACTS ch 7 introductory note (AM. LAW INST. 1981). Interestingly, this introductory note is followed by, "But see Comment *f* to Restatement, Torts § 871," which states,

> If the plaintiff seeks damages in a tort action, the cases do not yet show a similar expansion of the concept of duress. When the question is one of invalidation of the consent for the purpose of permitting a tort action upon the basis that the consent is no consent, the remedy has thus far been granted only in cases involving use or threat of force against the person consenting or the members of his immediate family or his valuable property.

RESTATEMENT (SECOND) TORTS § 871 cmt. f (AM. LAW INST. 1979).

135. Courts have at least considered making duress a tort even though few do. Undue influence is a different matter. Why is there a difference? The answer possibly lies in the fact that duress requires finding an actual threat, meaning that the risk of error, in terms of allowing opportunistic avoidance, is lower. Undue influence, on the other hand, requires a vaguer examination of whether someone's free will is thwarted. The risk of error, in terms of allowing opportunistic behavior, is higher.

136. Contract law itself would be the preferable route but seems to adhere to a hard rule prohibiting punitive damages.

One issue concerns those who resist duress or undue influence and enter into a contract that is voidable but which they prefer not to avoid. This Article makes the point that harm is still done in these instances. Should the party who is satisfied with the bargain, but not the process of arriving at the outcome, be permitted to recover? No doubt this would strike many as an odd outcome. Recovery would, however, be consistent with the policy of discouraging active advantage-taking. On balance, it is probably best not to allow those who do not wish to avoid their contracts to recover. There are two reasons for this. First, this practice creates the moral hazard of claims by people who actually felt little or no discomfort but who are ultimately happy to clog the courts with questionable claims. More importantly, it is not necessary. Punitive damages awarded to those who do avoid avoidable contracts should provide a sufficient level of deterrence for all those inclined to overstep what are acceptable methods of persuasion.

This leaves the issue of damages. In contract law, the general remedy is to allow avoidance of the contract and restitution. Actual damages are unavailable in part because there is no breach of contract. This, as argued in this Article, leaves a tort remedy for compensatory and, more importantly, punitive damages. Proof of compulsion sufficient to allow avoidance should be enough to establish actual harm. This is a different matter from putting a dollar value on that harm. That may be impossible to establish but does not rule out an award of nominal damages as a way to award punitive damages sufficient for a deterrent effect.