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Defects in Consent and Dividing the Benefit of the Bargain: Recent Developments

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DEFECTS IN CONSENT AND DIVIDING THE BENEFIT OF THE BARGAIN: RECENT DEVELOPMENTS

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I. INTRODUCTION

Contract law professors, students, attorneys, and judges know that discussions about consent are rarely about consent. This results from three factors. First, it is the *appearance* of consent that is necessary to form a contract.[1] Second, not every manifestation of consent is *sufficient* to create a contract that cannot be avoided.[2] Third, interpretations of consent have the potential to allow courts to intervene when the benefit of the bargain is seen to be unfairly divided or one of the parties is actually worse off as a result of the contract.[3] This Article assesses the extent to which recent court decisions about consent are actually indirect means of addressing unfairness with respect to the terms of the exchange.[4] Part of the reason for focusing on more recent cases is that it is possible that the doctrine of unconscionability has replaced more traditional theories as a means of addressing questions of fairness.

The proposition that questions of consent are not really about consent may seem extreme, but think about various contexts in which consent occurs. First, *A* makes an offer to *B*: "I promise not to harm you if you will hand over your wallet." *B* readily consents because he prefers his health to whatever is in his wallet. Second, *A*, a poorly educated person who grew up in poverty, agrees to buy a car at a price that is $5,000 more than the least that the salesperson would have accepted. *A* consents because he has grown up in a social or racial group of people who have been systematically exploited. He has no idea that a lower price is available and views the price

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[1] Under the so-called "objective" theory of contracts, the parties need not actually consent as long as a reasonable person would regard their actions as signifying consent.

[2] There are a number of doctrines that permit avoidance of a contract. *See infra* Part V.

[3] In this sense it is important to note that contracts typically create a benefit of the bargain. This is the total gain or increase in utility resulting from the exchange. When the parties actually decide on a price, they are deciding how to divide up that benefit. In effect, they both must agree that the gain is divided equitably. *See generally* Paul A. Samuelson, *Consumption Theory in Terms of Revealed Preference*, 15 ECONOMICA 243 (1948).

[4] As will be explained, this effort involves an informal, empirical examination of cases from the last ten years.

as fair because it compares favorably to the prices people he knows have paid.[5] Third, *A*, a well-educated and careful person, buys a smoke alarm at the market price.

All three examples involve "consent." They differ, however, in the factors influencing consent and, thus, whether there is consent for contract formation purposes. What the examples suggest is that, when assessing consent, courts engage in a process of creating rules and boundaries with respect to acceptable forms of persuasion.[6] They legitimize some forms of persuasion and delegitimize others. What is legitimate or not may vary with time.[7] The range of possible outcomes, and the lack of objective limits, have benefits and costs. The costs arise from the instability created by an ever-changing list of what is acceptable or not acceptable. The benefit is the opportunity for courts, which officially do not examine the adequacy of consideration, to do exactly that and respond to substantive outcomes. Thus, whether any manifestation of consent is viewed as "contractual consent" may be a function, ultimately, of the way in which the gains from contract formation are shared. The focus of this Article is to assess the impact of the perceived unfairness of an exchange on decisions that the consent itself was not legitimate.

So-called "defects" in consent, or more accurately a sample of the rules that govern legitimate manifestations of consent, are examined. There are many doctrines available under which defects may be identified. These range from instances in which minors enter into contracts to cases of material misrepresentation and fraud.[8] This Article focuses on three specific possibilities: capacity, duress, and undue influence. These three

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[5] Under the theory of relative deprivation, the satisfaction one feels about an outcome depends on the outcomes of members of specific reference groups. *See* Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 460–62 (1994). *See generally* Faye Crosby, *Relative Deprivation Revisited: A Response to Miller, Bolce, and Halligan*, 73 AM. POL. SCI. REV. 103 (1979); Ted Robert Gurr, *Sources of Rebellion in Western Societies: Some Quantitative Evidence*, 391 ANNALS AM. ACAD. POL. & SOC. SCI. 128 (1970); William H. Panning, *Inequality, Social Comparison, and Relative Deprivation*, 77 AM. POL. SCI. REV. 323 (1983).

[6] *See generally* Orit Gan, *Contract Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171 (2013); Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57 (2012).

[7] The addition of volitional impairment reflects one such change. *See* RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981).

[8] One of the best known cases is *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968), in which a Florida court came to the assistance of what it described as a "a widow of 51 years" who had purchased an excessive number of dance lessons under the theory that there was a misrepresentation by instructors with respect to her ability to become an accomplished dancer. *Id.* at 907–09.

were selected because they seem to afford courts the most flexibility. I concentrate principally on decisions by courts, but in Part VII, I return to the importance of statutory law.[9] In fact, as far as policing the limits of exchanges, statutory law may be more important. The objective here, however, is to assess whether applications of these doctrines in recent cases are *sub rosa* efforts to address concerns about the balance of the bargain. As will be evident in the discussion to follow, a complicating factor is the rise of the use of the doctrine of unconscionability. Reliance on unconscionability has the potential to make claims based on capacity, duress, and undue influence obsolete.

The organization is as follows. Part II provides support for the general belief that contract law can and should be applied to achieve outcomes that are fair, and examines the relationship of this belief to unconscionability. Part III expands on the importance of "consent," describes the informal methodology employed in this Article, and states the hypothesis to be tested. Part IV briefly discusses the difficulty of determining what is meant by consent and the critical connection between consent and preferences. Part V sets out the black letter law with respect to each doctrine as found in the Restatement (Second) of Contracts. Part VI then concentrates on how capacity, duress, and undue influence have been employed in the process of legitimizing and delegitimizing, and more importantly, in placing limits on the terms of an exchange. Part VII summarizes the findings and explores whether much of the work done by investigations of capacity, duress, and undue influence has been taken on by applications of unconscionability. It also notes the importance of statutory measures in terms of achieving distributive goals.

Four preliminary points should be noted. First, the remarks that follow are not intended to suggest that there are "true" cases of incapacity, duress, and undue influence, and then "faux" cases in which they are disingenuously applied to rescue those who find themselves on the unfavorable end of a bargain. It is possibly more generous and correct to say that when a case is a close one with respect to capacity, duress, or undue influence, notions of equity may come into play. Second, the findings and some of the discussion may reflect no more than my own biases and limitations. Except for cases related to specific research

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[9] This law includes cooling-off periods, limits on pricing, and disclosure requirements, to name a few. I do not include the U.C.C. art. 2 (2003) or the United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988). Although "statutory," they do not fit the general description of laws designed to protect the less powerful.

projects,[10] I am personally most familiar with contract cases found in teaching materials. I was surprised at the extent to which the cases in those contexts are often not representative of actual disputes,[11] but this may simply be a result of expectations formed by years of exposure to casebook selections. Third, another surprise was the number of what I thought were "easy" cases that were still appealed or in which a particular argument was made at all.[12] In many instances, if a law student had responded to an exam question by making the same argument, his or her grade would have been low. Finally, as already noted, the relevance of any of the traditional doctrines that address consent—capacity, duress, etc.—may be waning. This is considered at the end of this Article.[13]

II. CONTRACT LAW AS A LEVELING TOOL

It is, of course, no secret that courts use a number of contract doctrines to achieve what are perceived as fair outcomes. One of the starkest reminders of this is found in the comments to section 2-302 of the U.C.C.:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its

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[10] *See generally* Jeffrey L. Harrison, *The Influence of Law and Economics Scholarship on Contract Law: Impressions Twenty-five Years Later*, 68 N.Y.U. ANN. SURV. AM. L. 1 (2012); Jeffrey L. Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law*, 1988 N.Y.U. ANN. SURV. AM. L. 73 (1988).

[11] This is a different matter than whether they are accurate in terms of describing the law or how it should be applied.

[12] There are many examples of what I mean by "easy." One that is simple to explain involves a non-compete clause signed when the employee, the holder of a Master of Science in Construction Science, was hired by an environmental consulting firm. Singh v. Batta Envtl. Assocs., Inc., No. Civ.A. 19627, 2003 WL 21309115, at *1 (Del. Ch. May 21, 2003). It was the same clause agreed to by dozens of other employees. *Id.* at *5. While employed, the employee did, in fact, open his own firm in competition with his employer. *Id.* at *1. When the non-compete clause was raised, the employee claimed that he was under duress when he signed it because if he had not taken the job, he would have had to go back to India. *Id.* at *5. He also claimed that he was unduly influenced because he had a prior relationship with the employer, and it would have been "awkward" not to sign whatever was requested. *Id.* at *6. Both arguments were rejected, but I suspect the attorney still collected his or her fee.

[13] *See infra* Part VII.

unconscionability.[14]

Thus, the inclination of courts to inject notions of fairness into their opinions seems to be a part of the general understanding of how contract law is applied. The actual sections on unconscionability in both the U.C.C. and the Restatement (Second) of Contracts ("Second Restatement")[15] reduce the pressure on courts to interpret more conventional contract rules in order to achieve desired ends.[16] In fact, the two prongs of the unconscionability test—substantive and procedural—seem to fit most cases of defects in consent.[17] As a Pennsylvania court explains:

> [A] contract or term is unconscionable, and therefore avoidable, where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it. The aspects entailing lack of meaningful choice and unreasonableness have been termed procedural and substantive unconscionability, respectively. The burden of proof generally concerning both elements has been allocated to the party challenging the agreement, and the ultimate determination of unconscionability is for the courts.[18]

This view connecting unconscionability to defects in consent is actually quite old. As early as 1889, the United States Supreme Court observed that a contract was unconscionable if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[19]

These comments about unconscionability, while supporting the view that courts do intervene to assist disadvantaged parties, lead to a sticky question for this particular undertaking: Why not have only unconscionability as the safety valve? The procedural requirement of unconscionability would seem to encompass capacity, duress, and undue

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[14] U.C.C. § 2-302 cmt. 1 (2003); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981).

[15] The U.C.C. governs the sale of goods. *See* U.C.C. § 2-102. The Second Restatement represents a summary of the common law rules generally applied by United States courts. *See* RESTATEMENT (SECOND) OF CONTRACTS intro.

[16] *See* U.C.C. § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 178.

[17] *See generally* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

[18] Salley v. Option One Mortg. Corp., 925 A.2d 115, 119–20 (Pa. 2007) (footnote omitted) (citations omitted).

[19] Hume v. United States, 132 U.S. 406, 411 (1889) (quoting Earl of Chesterfield v. Janssen, (1750) 28 Eng. Rep. 82 (Ch.) 100; 2 Ves. Sen. 125, 155).

influence. And, to the extent courts intervene on the basis of outcomes, the substantive element of unconscionability would apply. In short, unconscionability has the potential to replace all of the traditional methods of assessing consent. What this means is that a modern assessment of capacity, duress, and undue influence is incomplete without some attention to unconscionability. One of the findings of this Article is that unconscionability may be gradually eliminating the need for application of the older doctrines.

III. THE QUESTION THROUGH AN ECONOMIC LENS AND THE HYPOTHESIS TESTED

It may be useful to think about the question raised here in the context of an everyday contract. Suppose Tom is willing to sell his car but for no less than $5,000. Jane is willing to buy it but will pay no more than $7,000. Economists would say a contract curve exists between $5,000 and $7,000.[20] To a contracts professor there is a $2,000 benefit of the bargain. At any price between $5,000 and $7,000, both parties will be better off. A necessary part of making this contract is to strike a bargain about how to divide the $2,000.[21] It is as though the parties, having $2,000 in front of them, must agree on how to split the $2,000 before the exchange can be "approved." One's curiosity is piqued if Jane ends up paying very close to $7,000 or Tom takes an amount a few pennies more than $5,000. Some of the reasons for this may be entirely legitimate. Others may not be. For example, Jane may be quite wealthy, averse to shopping or haggling, or drawn to something special about this particular car.

On the other hand, Tom may say: "Pay $7,000, or I will tell your employer that you have been stealing." Here Jane may pay $7,000, or even more, and a red flag is raised. Why would Jane pay this amount if she has any leverage at all or unless she is buying something other than the car? In this case, she would be buying the car and Tom's silence. In short, ultimately what is at issue is why one party would agree to an exchange that results in a very small share of the benefit of the bargain, or that even leaves him or her worse off.[22] When the Janes of the world do end up with very little of the benefit of the bargain or are actually worse off, the outcomes do not conform to what one would expect from a fully functioning, rational,

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[20] *See* Harrison, *supra* note 5, at 473–74.

[21] *See* Samuelson, *supra* note 3, at 243–45.

[22] *See* Harrison, *supra* note 5, at 449 (discussing the possibility that self-esteem and relative deprivation play a role in cases of unequal outcomes).

and self-interested adult. Issues of capacity, duress, and undue influence immediately come to mind.

These ideas lead to the following hypothesis: In recent reported cases, courts are more likely to find a lack of capacity, the presence of duress, or an exertion of undue influence when an exchange seems excessively to favor one party over another or over a third party.[23] It is important to note that this hypothesis also stands for the proposition that courts are unlikely to find a defect in consent when there appears to be no unfairness in the exchange. I have attempted to apply a very informal methodology in which I examine cases decided in the period from 2002 to mid-2013. I selected cases in which courts cite the sections of the Second Restatement that bear on each of these matters.[24] This is a small sample, and there are certainly cases that address these issues without including a Second Restatement citation. Still there is no *a priori* reason why these cases would not be representative of, or serve as a useful proxy for, all cases.

Nevertheless, the effort must be viewed as subjective and informal because an objective standard for acceptance or rejection of the hypothesis cannot be formulated. There is no way to quantify how much a court is influenced by reservations about distributive matters or whether it is influenced at all. In addition, how does one weigh five cases involving small possible inequities in which a court does not intervene against one involving an obvious inequity in which the court does intervene? Also, it is impossible to know if the perceived inequity was *necessary* for the finding. After all, assigning causation when it can only be inferred is risky. Thus, the results of this Article, as is common in legal scholarship, are impressions more than anything else, and the discussion is designed to explain those impressions.

One limitation of the methodology cannot be avoided and should be noted. Because all the data were drawn from reported and unreported cases, the individuals claiming capacity, duress, or undue influence sensed injustice and were knowledgeable enough to consult attorneys. No doubt there are many contracts that divide the benefit of the bargain unevenly and that involve capacity, duress, and undue influence that are never challenged. For a variety of reasons, ranging from ignorance to financial hardship,

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[23] It is important to note that in many of the following cases, the party appealing to the court is not a party to the contract. In these instances, the third party is arguing that one party to the contract was impaired and, but for that impairment, the third party would have benefited.

[24] RESTATEMENT (SECOND) OF CONTRACTS §§ 15, 174, 177 (1981) are those relevant sections. There are instances beyond those cited here in which a section is cited but really has no significant role in the decision. These cases were not examined closely.

litigation is not pursued. Consequently, there is a socioeconomic bias within the sample. Courts do not select the cases or the parties, and without the "right" parties distributive goals cannot be achieved and rules about acceptable forms of persuasion cannot be formulated.[25] In short, from this survey it is not possible to generalize about how courts would react to cases brought by those less likely to litigate. Nor should any inferences be drawn about the frequency of capacity limitation, duress, or undue influence.[26]

IV. CONSENT AND PREFERENCES

Although this effort is about "defects" in consent, it is useful to contextualize those defects by noting other limitations on matching what people do with what they really want. Knowing that individuals have *manifested* consent is not the same as knowing what that means or how important it is. Ideally, rational, fully-informed people consent as a way to express their preferences when faced with a choice. If this applies across the board, general welfare rises.[27] As it turns out though, the connection between consent and preference is fragile.[28] That connection depends on a number of assumptions, facts, and personal traits.[29] Moreover, if the link between consent and preference is sometimes weak, the moral rationale for deference to consent also weakens.

One personal story expresses this aptly, and perhaps every reader has experienced something similar. As a younger professor I was chatting with an office neighbor, and the conversation turned to yearly salary increases. He indicated that each year when he received his letter indicating what his salary would be the next year, he always felt good about even a modest increase. He was even foolish enough to thank the dean. In fact, you could say that he consented to the new arrangement. For the sake of this story, assume that the increases were 3% per year. After several years, and completely by accident, he discovered that his neighbor at the time was

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[25] *See* Harrison, *supra* note 5, at 464–65. This is, however, likely to be an inefficient and incomplete response. More promising, perhaps, are statutory responses.

[26] Except, perhaps, to infer that these influences are far more frequent than the small number of cases here suggest.

[27] This provides an economic and moral basis for contracts—Pareto efficiency. If both parties are better off and no one is worse off, overall utility is increased and there should be little in the way of moral objection.

[28] *See* THOMAS F. COTTER & JEFFREY L. HARRISON, LAW AND ECONOMICS: POSITIVE, NORMATIVE AND BEHAVIORAL PERSPECTIVES 133–41 (3d ed. 2013); Amartya Sen, *Behaviour and the Concept of Preference*, 40 ECONOMICA 241, 242 (1973).

[29] *See* Sen, *supra* note 28, at 241.

receiving 4% increases. He was angry and, although hardly in a position to resign, his consent, in terms of feeling he had made a choice that he was pleased with, was gone. When he complained to the dean, the dean was quick to point out that he had always been grateful for the raise.

His consent was contingent on not knowing a tiny piece of information. In fact, all our decisions and our consents are based on what we know, and whether we like it or not, what we do not know. Consent may reflect a preference, but often that preference is a very "thin" one, resting on incomplete or even inaccurate information.[30]

Consider another problem, which is closer to the focus of the Article. If you have young children, you know that supermarkets sometimes put candy at the child's eye level in the checkout lanes. The child may pick up the candy and insist on having it bought. The parent, wanting to avoid a scene, may buy it. Has the parent consented to purchase the candy? Evidently so. On the other hand, does that reveal the preference of the parent? Perhaps not if the preference of the parent is not to have been forced to make the choice in the first place. In fact, this may simply be a case of extortion. Of course, the parent may not give in to the child. One could say he or she was not coerced; does it make a difference? The preference was not to have had to make the choice.

As these examples suggest, a number of factors create a wedge between preferences and consent. Perhaps an ideal system of contract law would respond to all of these factors. Reliance on doctrines ranging from capacity to undue influence can close the gap between choices and preferences. Nevertheless, reconciling consent with actual preferences remains a puzzle.

V. THE BLACK LETTER LAW

Defects in consent may arise from characteristics of the party seeking to avoid a contract or the actions of those with whom he or she contracts. In the first category are issues that relate to capacity. Section 15 of the Second Restatement reads as follows:

> (1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect
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> (a) he is unable to understand in a reasonable manner the nature and

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[30] *See generally* Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1 (1997); Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4 (1994).

> consequences of the transaction, or
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> (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.[31]
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> (2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.[32]

Section 15 employs the common standard of "reasonableness" and clearly opens the door to a battle of the experts with respect to capacity. It also identifies two types of capacity—cognitive and volitional.[33] Interestingly, it includes some of its own guidelines with respect to when the fairness of the bargain is relevant. For example, volitional impairment allows avoidance by one party only if the other party had reason to know of the impairment.[34] Thus, even the person who is not fully able to express his or her preferences accurately by manifesting consent will not be able to avoid the contract in the absence of advantage-taking. In addition, there is protection "as justice requires" for parties who have partially performed.[35]

Two sections of the Second Restatement focus on the influence that contracting parties have on each other. The first, section 175, concerns duress: "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."[36] The Second Restatement also lists instances when a threat is improper.[37] These examples are of limited use

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[31] This is called the volitional test and is a newer standard than the cognitive test found in RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(a) (1981). Not all states have adopted the volitional test. It is possible for the outcome of an assessment of capacity to depend on the standard adopted in a particular state. *See, e.g.*, *In re* Marriage of Davis, 89 P.3d 1206, 1207 (Or. Ct. App. 2004) (per curiam).

[32] RESTATEMENT (SECOND) OF CONTRACTS § 15.

[33] *See id.*

[34] *Id.* § 15(1)(b). Avoidance is also permitted in situations of impairment due to the use of alcohol or other drugs. *Id.* § 17.

[35] *Id.* § 15(2).

[36] *Id.* § 175(1). Under the other subsection, a threat by a third party may also make the contract voidable, but not if the contracting party acts in good faith and without reason to know of the threat and gives value or materially changes position. *Id.* § 175(2).

[37] The Second Restatement provides, in pertinent part:

> (1) A threat is improper if

since they are inclusive enough to allow a finding of impropriety whenever a court deems it appropriate.[38] Interestingly, the fairness of the exchange can be a consideration when deciding if a threat is improper and, thus, whether duress was applied.[39]

In the case of undue influence, the Second Restatement rule is: "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."[40] Further assistance in understanding how the concept is applied is found in the Second Restatement's commentary, which indicates that factors to be considered include "the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded."[41]

Together these rules describe circumstances under which consent is the product of illegitimate factors. Central to all of the rules is the notion of compulsion—whether from within or without. The rules also have few

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(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.

Id. § 176.

[38] *See id.*

[39] *Id.* § 176(2).

[40] *Id.* § 177(1). The relationship leading to undue influence is often termed "confidential." *See, e.g.*, Russo v. Miller, 559 A.2d 354, 357–58 (Me. 1989). When the undue influence is applied by a third party, it is more difficult to avoid the contract: "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 undue influence either gives value or relies materially on the transaction." RESTATEMENT (SECOND) OF CONTRACTS § 177(3).

[41] RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. b. The comment goes on to say that these factors alone are not controlling. *Id.*

limiting principles. An improper threat is what a court says it is. Capacity issues lead to a battle of the experts, since there is no objective notion of having or lacking capacity other than, perhaps, a lack of consciousness. Similarly, no one can identify the point along the influence continuum at which influence becomes "undue." Most interestingly, all of the Second Restatement sections invite courts to examine the fairness of the exchange in determining whether to apply the doctrines of capacity, duress, or undue influence.[42]

VI. THREE DOCTRINES OF LEGITIMACY

A. Capacity

Using the search term described above,[43] I found twenty recent cases discussing capacity in the context of contractual avoidance.[44] In terms of setting rules for influence or persuasion, the rules with respect to capacity work in a fashion similar to strict liability. No means of persuasion are safe or acceptable when the opposite party lacks capacity.[45] The Second Restatement captures the breadth of authority courts have to determine capacity or allow it to be determined: "Proof of irrational or unintelligent behavior is essential; almost any conduct of the person may be relevant, as may lay and expert opinions and prior and subsequent adjudications of incompetency."[46]

Perhaps the best known American case in which a judicial perception of unfairness influenced a finding that a contracting party lacked capacity is *Ortelere v. Teachers' Retirement Board*.[47] Admittedly it also shaped my expectations and, consequently, rejection or acceptance of the hypothesis identified earlier. Ortelere, a retired teacher, elected to accept her pension pay-out in the form of a higher periodic payment for the rest of her life as

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[42] *See id.* §§ 12, 176–177.

[43] WESTLAW CLASSIC, http://web2.westlaw.com (search "restatement /3 contracts /3 s15 & capacity & after 2002") (last visited Jan. 23, 2014).

[44] *See, e.g.*, Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003); Schmidt v. Shah, 696 F. Supp. 2d 44 (D.D.C. 2010); Biggs v. Eaglewood Mortg., LLC, 582 F. Supp. 2d 707 (D. Md. 2008), *aff'd per curiam*, 353 F. App'x 864 (4th Cir. 2009); Steward Mach. Co. v. White Oak Corp., 462 F. Supp. 2d 251 (D. Conn. 2006); Belcher v. Queen, 39 So. 3d 1023 (Ala. 2009); Indus. Commercial Elec., Inc. v. McLees, 101 P.3d 593 (Alaska 2004); *In re* Estate of Marquis, 822 A.2d 1153 (Me. 2003); Spicer v. Balt. Gas & Elec. Co., 831 A.2d 472 (Md. Ct. Spec. App. 2003); Sparrow v. Demonico, 960 N.E.2d 296 (Mass. 2012); *In re* Marriage of Davis, 89 P.3d 1206 (Or. Ct. App. 2004) (per curiam).

[45] RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. d.

[46] *Id.* § 15 cmt. c.

[47] Ortelere v. Teachers' Ret. Bd., 250 N.E.2d 460 (N.Y. 1969).

opposed to a smaller payment that would extend through the life of herself or her husband, whichever would be longer.[48] Shortly after the election, she died, meaning that payments ceased.[49] A few hundred dollars had been paid from a retirement reserve in excess of $60,000.[50] Her husband asked to have her election avoided based on her incapacity due to volitional impairment, and the court agreed.[51]

It is difficult *not* to see the holding as resting primarily on the fact that many years of expected payments were, in effect, forfeited. Ortelere made what amounted to a bet and lost. She appeared to have understood what she was doing, and the family finances at the time made the election seem reasonable.[52] Faced with the fact that she had asked questions that indicated a high degree of rationality, the court opted to use volitional impairment as the basis for its judgment.[53] The precise basis for a finding that she lacked control of her actions is not clear but, again, the decision itself seems to be governed by the loss of expected pension payments. Volitional impairment is particularly well suited to reactions based on perceived unfairness. In fact, according to another court, the key to volitional impairment is whether "the transaction in its result is one which a reasonably competent person might have made."[54] In effect, competency can be inferred from the substance of the exchange. This policy is noted more recently in a Delaware case in which the court explained that "in certain circumstances, courts have considered the adequacy of consideration as an indicium of mental incompetence."[55]

If this interpretation of *Ortelere* is correct,[56] then the question for the purposes of this analysis is whether *Ortelere* is representative of a more general policy of allowing avoidance based on perhaps weak evidence of a true lack of capacity when a party has simply made an unfortunate choice that means suffering by way of forfeiture.[57] A survey of recent cases

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[48] *Id.* at 461.

[49] *Id.*

[50] *Id.* at 463.

[51] *Id.* at 466.

[52] *Id.* at 466–68 (Jasen, J., dissenting).

[53] *Id.* at 464–66 (majority opinion).

[54] Sparrow v. Demonico, 960 N.E.2d 296, 303 (Mass. 2012) (quoting Krasner v. Berk, 319 N.E.2d 897, 900 (Mass. 1974)) (internal quotation mark omitted).

[55] Bettis v. Premier Pool & Prop. Mgmt., LLC, No. 6858-VCN, 2012 WL 4662225, at *3 (Del. Ch. Sept. 26, 2012) (footnote omitted).

[56] Although a casebook favorite, *Ortelere* has been rarely cited outside of New York.

[57] *Ortelere* is distinguished in *Marston v. United States*, Civil Action No. 10-10437-GAO, 2012 WL 4529940 (D. Mass. Sept. 30, 2012), in which a party attempted to avoid a settlement agreement. The court noted the reasonableness of the settlement, given that there may have been no recovery at all. *Id.*

indicated that the policy of considering the fairness of the outcome is more pronounced in *Ortelere* than it is generally.[58] This is very likely explained in part by the facts of *Ortelere*. There the advantaged party was a state agency, and the disadvantaged party was supporting a spouse.[59] The possibility that courts are more likely to find a defect in consent when an agency or organization is involved is generally supported by other recent cases.[60]

For example, far more common than the *Ortelere* fact pattern are disputes between family members concerning the actions by a mother or father.[61] This is not surprising because, all other factors being equal, the elderly are most prone to capacity issues. Interestingly, in these recent cases, courts seem less likely to find a defect in consent.[62] For example, in *Dubree v. Blackwell*, the executor and beneficiary of a will (and nephew of the testator) challenged the *contractual* capacity of the decedent when it was discovered that she had deeded her house and bank accounts to her brother-in-law prior to her death.[63] Expert witnesses testified on both sides of the case, and the jury found against the executor with respect to the question of capacity.[64] On appeal, the court affirmed, noting that the beneficiary of the contracts had been a lifelong friend and had cared for the decedent for nearly ten years.[65]

Cases like *Dubree* illustrate the difficulties of interpretation. For example, perhaps the case is as simple as it appears on its face—the deceased did not lack capacity. On the other hand, it may represent a battle between private parties for whom the funds involved would have been a windfall. Unlike *Ortelere*, there would be no obvious reason for favoring one, as a distributive matter, over the other.[66] Finally, and in a manner that

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at *24.

[58] *See Marston*, 2012 WL 4529940, at *24 (remarking on the reasonableness of the settlement); *Bettis*, 2012 WL 4662225, at *3 (noting that some courts do consider the fairness of consideration when determining mental capacity); *Sparrow*, 960 N.E.2d at 306 (finding no evidence that the settlement was unreasonable or that a competent person would not have agreed to it). Part of the danger is that opinions may reflect only the conclusion that a party has made sufficient allegations to survive a motion to dismiss or for summary judgment. This is an imperfect indication of the actual policy.

[59] Ortelere v. Teachers' Ret. Bd., 250 N.E.2d 460, 461–62 (N.Y. 1969).

[60] *See, e.g.*, Duke v. Kindred Healthcare Operating, Inc., No. W2010-01534-COA-R3-CV, 2011 WL 864321, at *8–10 (Tenn. Ct. App. Mar. 14, 2011) (holding that an arbitration agreement with a nursing home was invalid due to patient's incapacity when signing power of attorney).

[61] *See, e.g.*, Dickson v. Long, No. M2008-00279-COA-R3-CV, 2009 WL 961784, at *2–7 (Tenn. Ct. App. Apr. 8, 2009) (involving a step-mother's capacity to sign power of attorney agreement and convey land to step-daughter instead of step-son).

[62] *See* cases cited *supra* note 44. This is not to say there has been a change.

[63] Dubree v. Blackwell, 67 S.W.3d 286, 288 (Tex. App. 2001).

[64] *Id.* at 288–90.

[65] *Id.* at 288.

[66] *Compare* Ortelere v. Teachers' Ret. Bd., 250 N.E.2d 460 (N.Y. 1969), *with Dubree*, 67 S.W.3d 286.

would be consistent with the hypothesis posed here, perhaps the court (and the jury at the trial court) felt that injustice would result if the caretaker for ten years were deprived of the payment that he received.[67] Again, it is dangerous to infer causation, but the pattern suggests that without unfairness, the doctrine of lack of capacity is less likely to be successful.

Family disputes were also involved in *Duke v. Kindred Healthcare Operating, Inc.*,[68] but here the presence of an organization may have played a role, as it did in *Ortelere*. In this case, a person with Alzheimer's disease was admitted to a long-term care facility.[69] The admissions documents were signed by the patient's sister, who had power of attorney.[70] These documents provided for arbitration.[71] When a lawsuit was filed by the patient's wife claiming neglect and abuse by the healthcare facility, the defendants moved to compel arbitration.[72] The wife objected claiming that the patient lacked capacity when he signed the documents granting his sister power of attorney.[73] Here the court, without discussing the financial consequences of the decision, found that there was overwhelming evidence of a lack of capacity.[74] Were the consequences of the actual contract relevant? Although there was no direct discussion of it, it is possible that the opinion was influenced by a generally negative view of compulsory arbitration.[75] From that perspective, the case has an *Ortelere*-like quality, in that the disadvantaged party was pitted against an organization without any obvious fairness-based arguments to support its position. The decision can be viewed as supporting the hypothesis that other factors were likely at work.

Dickson v. Long lends some support to the idea that the individual-versus-organization context is more likely to result in a finding of a lack of capacity.[76] The case involved the grant of power of attorney to, and the

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[67] The court also upheld the decision that there was no undue influence. *Dubree*, 67 S.W.3d at 291.

[68] Duke v. Kindred Healthcare Operating, Inc., No. W2010-01534-COA-R3-CV, 2011 WL 864321 (Tenn. Ct. App. Mar. 14, 2011).

[69] *Id.* at *1.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at *8–10.

[75] *See infra* Part VII.A.

[76] Dickson v. Long, No. M2008-00279-COA-R3-CV, 2009 WL 961784 (Tenn. Ct. App. Apr. 8, 2009); *see also* Carpenter v. Sims, No. E2007-0622-COA-R3-CV, 2007 WL 4963008 (Tenn. Ct. App. Nov. 7, 2007) (finding that the deceased seller of a condominium was mentally competent and the sale should not be set aside as requested by the beneficiaries of the will); Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291 (Tenn. Ct. App. 2001) (finding that the decedent was mentally competent

subsequent sale of property by, a stepson, which the natural son unsuccessfully challenged.[77] Under the terms of the appointment by the deceased, the sale could only be made to a daughter.[78] There was conflicting evidence with respect to the mother's capacity, but the court ruled that she was competent.[79] At the risk of reading too much into the opinion, the court may have been influenced by the fact that the dispute was ultimately between two siblings, and that the signing took place in the presence of a notary, which the court viewed as offering some protection for the mother.[80] Again, although it may be best to take these decisions at face value, it is noteworthy that the dispute was ultimately one in which there was no clear inequity affecting the party whom allegedly lacked capacity.[81]

As one would expect, when indications of a lack of capacity are extreme, it does not matter whether a relatively impersonal organization is involved. A case in point is *In re Estate of Marquis*.[82] Prior to her death, the decedent had changed the beneficiary of various annuities from her estate to a grandnephew in recognition of his regular visits and willingness to run errands.[83] Before the change, the proceeds would have gone to twelve family members as well as two charities.[84] Her personal representative claimed that she lacked capacity to change the annuity beneficiary, even though the change came after an extended discussion with a financial advisor who testified that she was "well spoken."[85] The court relied on substantial testimony that the decedent had demonstrated a decreasing sense of awareness and found a lack of capacity.[86] Bills were left unpaid, and the decedent had delusions that her dog had nursed her to health and that her television was talking to her.[87] This may be a simple instance of a court applying a standard of competence when there was no inequity to influence it either way. The only thing that casts some doubt on the face value interpretation is that courts have consistently noted that one can have cognition problems as long as those problems are not in effect

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when she changed her life insurance beneficiary from her estranged husband to her brother).

[77] *Dickson*, 2009 WL 961784, at *1.

[78] *Id.*

[79] *Id.* at *4, *7.

[80] *Id.* at *7.

[81] *See id.* at *11–12.

[82] *In re* Estate of Marquis, 822 A.2d 1153 (Me. 2003).

[83] *Id.* at 1155. A change in beneficiary is, in effect, a change in a contract and requires contractual capacity. *Id.* at 1156.

[84] *Id.* at 1155.

[85] *Id.* at 1155–56.

[86] *Id.* at 1158.

[87] *Id.* Evidently these beliefs were found to be untrue.

when the contract sought to be avoided was made.[88] In this case, the evidence available suggested that she did understand the contract modification that she was making.[89] In fact, it is hard to square the notion of a "lack of capacity" with a decision to change the beneficiary to a specific family member.[90]

A relatively rare case in which family members are not contesting the contracts made by a deceased relative is *Knoll v. Merrill Corp.*, in which an employee, Knoll, made a claim of wrongful discharge.[91] Later, he signed a release, and then claimed that he lacked capacity to sign the release.[92] In actuality, the discharged employee had been depressed and confided in his employer.[93] Eventually, the discharge stemmed from this condition or efforts to treat it.[94] Relying on *Ortelere*, the court held that there was a question of fact with respect to whether the plaintiff's condition led to volitional impairment.[95] The court noted that, like *Ortelere*, the mere fact that Knoll understood enough to ask questions did not settle the question of capacity.[96] It is worth noting that here again the individual-versus-organization pattern is present.

In contrast to *Ortelere* and *Knoll*, two recent cases have rejected claims of incapacity in the context of settlements following mediation.[97] In neither case did the settlement appear to result in a substantially one-sided outcome, and the parties were represented by counsel.[98] This is consistent with the policy of favoring settlement of disputes.[99] In addition, the outcomes may be understood by noting that, whether or not the parties had capacity as a medical matter, both were supervised or cared for in a way that maintained procedural fairness.[100]

A few tentative conclusions follow from these cases and others that were examined in the time period. Whether viewed as evidence of a lack of

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[88] *See id.*

[89] *See id.* at 1155–56.

[90] *Id.* at 1156.

[91] Knoll v. Merrill Corp., No. 02 Civ.566 CSH, 2003 WL 21556942, at *1 (S.D.N.Y. July 9, 2003), *vacated pursuant to settlement* (S.D.N.Y. Nov. 10, 2005).

[92] *Id.* at *9.

[93] *Id.* at *2.

[94] *Id.*

[95] *Id.* at *11–12.

[96] *Id.* at *11.

[97] Marston v. United States, Civil Action No. 10-10437-GAO, 2012 WL 4529940, at *24 (D. Mass. Sept. 30, 2012); Sparrow v. Demonico, 960 N.E.2d 296, 297 (Mass. 2012).

[98] *See Marston*, 2012 WL 4529940, at *12–14; *Sparrow*, 960 N.E.2d at 300–01.

[99] *See, e.g.*, Williams v. First Nat. Bank, 216 U.S. 582, 595 (1910).

[100] *See generally Marston*, 2012 WL 4529940; *Sparrow*, 960 N.E.2d 296.

capacity or not, some cases suggest that the balance of the exchange does influence the decision to apply the doctrine.[101] On the other hand, two factors that cut in different directions seem also to influence the outcome of the cases. When the advantaged party is an organization, as opposed to a private party, courts seem more willing to find that the contracting party lacked capacity.[102] The underlying notion is that the consequences are less onerous to the losing party when that party is an organization. On the other hand, relatives or other individuals who feel disadvantaged by contractual decisions seem to have less luck with their claim that the contracting party lacked capacity.[103] This makes sense because, in most instances, the relatives are squabbling over a windfall, and it would be difficult to claim that one side or the other is more deserving or has suffered an injustice by virtue of the distribution made. In fact, the party who supposedly lacked capacity has no interest at this point, and the relatives are simply arguing over the "spoils."

B. Duress

Using the search term for duress[104] yielded eleven cases.[105] Section 175 of the Second Restatement recognizes that unfairness in the outcome of the bargain is part of the duress analysis.[106] This reflects the generally held view. For example, in 1947, John P. Dawson wrote: "For it is through duress and related ideas that private law has dealt most directly with problems raised by inequality in bargaining power."[107] And, in 1953, an Idaho court noted that to be "voidable because of duress, an agreement must not only be obtained by means of the pressure brought to bear, but the

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[101] *See supra* notes 47–55 and accompanying text.

[102] *See supra* notes 76–81, 91–96 and accompanying text.

[103] *See supra* notes 61–74 and accompanying text.

[104] WESTLAW CLASSIC, *supra* note 43 (search "restatement /3 contracts /3 s174 & duress & after 2002").

[105] *See, e.g.*, D'Antuono v. Serv. Road Corp., 789 F. Supp. 2d 308 (D. Conn. 2011); Wright v. Foreign Serv. Grievance Bd., 503 F. Supp. 2d 163 (D.D.C. 2007), *aff'd per curiam*, No. 07-5328, 2008 WL 4068606 (D.C. Cir. Mar. 17, 2008); Sw. La. Healthcare Sys. v. MBIA Ins. Corp., No. 05-1299, 2007 WL 979933 (W.D. La. Mar. 29, 2007); Weinberg v. Interep Corp., Civil No. 05-5458(JBS), 2006 WL 1096908 (D.N.J. Apr. 26, 2006); Bakos v. Bakos, 950 So. 2d 1257 (Fla. Dist. Ct. App. 2007); Schultz v. Schultz, 867 So. 2d 745 (La. Ct. App. 2003); *In re* Estate of Rosasco, 927 N.Y.S.2d 819, 2011 WL 1467632 (Sur. Ct. 2011) (unpublished table decision); Dall. Cnty. Cmty. Coll. Dist. v. Bolton, 185 S.W.3d 868 (Tex. 2005). Because the sample is small, an additional sample from 1996 to 2001 was examined. WESTLAW CLASSIC, *supra* note 43 (search "restatement /3 contracts /3 s174 & duress & after 1995 & before 2002"). That sample did not suggest that the cases reported here were atypical.

[106] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

[107] John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 253 (1947).

agreement itself must be unjust, unconscionable, or illegal."[108] Given that there appears to be a long-running consensus that duress is a response to unequal bargaining power resulting in unfair outcomes, it is interesting to examine cases for the purpose of determining if this "ideal" is the reality.[109] What a survey of recent cases suggests is that courts are far from anxious to find duress. If anything, the opposite is true: Courts seem more inclined to disassemble duress claims and find little or no basis for them.

As these cases are examined, a cautionary note bears repeating.[110] In these reported and unreported cases, few if any of the parties claiming to have experienced duress appear to be from lower and less educated socioeconomic classes. Ironically, parties who may have the best chance to present a compelling case are likely to be the same people who either do not feel that they were under duress, may not have aspirations to be treated more fairly, or are not even aware that some form of legal recourse may exist.[111]

Attempting to discern any concern for equity by a court under the rubric of duress is difficult, in part because duress requires the party attempting to avoid the contract to clear a number of hurdles. Not only must the threat be improper, it must leave no reasonable alternative.[112] The threat must also be the cause of the consent.[113] In addition, the person claiming duress may be viewed as ratifying the agreement if he or she waits too long before raising the issue.[114] Further, if the threat comes from a third party, duress is unavailable if the advantaged party did not know of the threat, acted in good faith, and either gave value or relied on the consent.[115] Finally, in recent cases duress is most often raised when a party to the settlement of a legal claim later regrets the outcome and attempts to avoid the agreement, or in the context of a divorce.[116] Courts do not seem

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[108] Newland v. Child, 254 P.2d 1066, 1072 (Idaho 1953).

[109] No effort is made here to distinguish economic duress from other forms of duress. Both deal with the issue of illegitimate uses of power. *See generally* Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171 (2013). For a discussion of the role of stress in duress cases, see Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679 (2013).

[110] *See supra* notes 25–26 and accompanying text.

[111] *See* Harrison, *supra* note 5, at 469–80.

[112] RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

[113] *Id.* § 175 cmt. c.

[114] *See, e.g.*, Barnette v. Wells Fargo Nev. Nat. Bank of S.F., 270 U.S. 438, 443–44 (1926) (holding that when a contract is made under duress, it is voidable by the contracting party, and failure of that party to disaffirm effectively waives the right to bring a duress claim).

[115] RESTATEMENT (SECOND) OF CONTRACTS § 175(2) & cmt. e.

[116] *See infra* notes 117–22, 125–33, 151–58, 174–75 and accompanying text.

especially receptive to duress claims in these circumstances.[117] Considerations of equity may conflict with the goal of encouraging settlement.

A representative example is *Biliouris v. Biliouris*, in which a divorced wife attempted to show that she was under duress when signing an antenuptial agreement.[118] At the time of the marriage, she was thirty-five years old, had three children, and was pregnant with the child of the future spouse.[119] The agreement was presented to her one week before the marriage.[120] She signed against the advice of counsel and was crying at the time.[121] Evidently, the threat was that the husband would not marry her unless the agreement was signed.[122] Under the terms of the agreement, there was to be no alimony, and each party would keep the property that they brought to the marriage.[123] In finding no duress, the court noted that the agreement was fair at the time it was made, that the wife did have time to consider it, and that

> [t]he wife was an educated professional who had a demonstrated earning capacity at the time she executed the agreement in 1992. Although the parties agreed that the wife would leave her job in order to be a "stay-at-home" mother, there is nothing in the record to suggest that the wife would be incapable of working and earning income to support herself in the event of a divorce in the future.[124]

It is also important to note that the wife retained $100,000 of her own assets, received child support payments, and held 80% of the equity in the home.[125]

The terms of the contract and the background of another disappointed settling party were evidently relevant in *Gascho v. Scheurer Hospital*.[126] Mrs. Gascho was an employee of a hospital at which her husband also worked.[127] He was having an affair with a supervisor at the hospital.[128]

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[117] *See infra* notes 123–24, 134–39, 159–60, 176–81 and accompanying text.
[118] Biliouris v. Biliouris, 852 N.E.2d 687, 689 (Mass. App. Ct. 2006).
[119] *Id.*
[120] *Id.* at 689 n.1.
[121] *Id.* at 689 & n.2.
[122] *Id.* at 689.
[123] *Id.* at 690.
[124] *Id.* at 695.
[125] *Id.* at 691–92, 696.
[126] Gascho v. Scheurer Hosp., 400 F. App'x 978 (6th Cir. 2010) (Sutton, J.).
[127] *Id.* at 979.
[128] *Id.* at 980.

This eventually led to an altercation between Mrs. Gascho and the supervisor, and the offer of a severance package for Mrs. Gascho.[129] Under the terms of the agreement, Mrs. Gascho agreed to resign and release any claims, including those under Title VII.[130] She was given twenty-one days to consider the proposal.[131] During that period, her husband evidently made a number of threats to "destroy [her] life" if she did not sign.[132] She eventually signed in what was characterized as a "civil" meeting.[133] A year later, she sought to avoid the agreement.[134]

In finding a lack of duress, the court noted that Mrs. Gascho had been a nurse for thirty years and, at times, had managerial duties.[135] More importantly, the court found no improper threat.[136] The agreement was with the hospital, which had not threatened her and which seemed to have acted in good faith.[137] The court viewed her claim to be that she had no choice because she did not want to risk turning down the offer, and therefore losing the benefits if her potential lawsuit was unsuccessful.[138] According to the court, "that is not how it works."[139] The risk of economic hardship is, according to the court, part of the bargaining process.[140]

Both *Gascho* and *Biliouris* suggest that status and education are relevant.[141] Another example is *Samuelson v. Covenant HealthCare System*.[142] There, a registered nurse was fifty-seven years old at the time that she stopped working and began collecting short-term disability benefits.[143] She had worked for the same employer for twenty-five years.[144]

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[129] *Id.* at 980–81.

[130] *Id.* The Title VII claim related to sexual harassment, but the report of the case does not elaborate on the basis for that claim.

[131] *Id.* at 982.

[132] *Id.* at 980 (alteration in original) (internal quotation marks omitted).

[133] *Id.* at 981 (internal quotation marks omitted).

[134] *Id.*

[135] *Id.*

[136] *Id.* at 983.

[137] *Id.* at 983–85. She claimed that the improper threat existed by virtue of the fiduciary relationship she had with her husband, but the court noted that the husband was not a party to the case. *Id.* at 984. The threat of a third party may be the basis for avoidance, but there are exceptions. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(2) & cmt. e (1981); *see also* Travelers Indem. Co. v. Claywell Elec. Co., No. HHD-CV-05-4015464, 2008 WL 2039145, at *3–4 (Conn. Super. Ct. Apr. 23, 2008).

[138] *Gascho*, 400 F. App'x at 983.

[139] *Id.*

[140] *Id.*

[141] *See generally id.*; Biliouris v. Biliouris, 852 N.E.2d 687 (Mass. App. Ct. 2006).

[142] Samuelson v. Covenant HealthCare Sys., No. 10-13422-BC, 2011 WL 5143156 (E.D. Mich. Oct. 31, 2011).

[143] *Id.* at *2.

[144] *Id.* at *1.

When the disability benefits ran out, she began collecting retirement payments.[145] By retiring when she did, she was entitled to $36,000 for healthcare expenses.[146] Later, she was informed that because of her early retirement, some of her benefits offset each other.[147] She objected, claiming that she elected to retire when she did due to duress resulting from the fact that had she not retired, she would have lost the $36,000 payment.[148] The court noted that she was simply forced to make a choice; nothing deprived her of her free will.[149] The court also devoted much of the opinion to describing why her decision was economically beneficial.[150] The implication is that the fairness of the exchange was influential.[151]

As *Biliouris* suggests, marital issues often give rise to claims of duress.[152] In *Hardey v. Metzger*, the husband sought to avoid a property settlement agreement with his wife, arguing that it was the result of extortion.[153] The source of the dispute was a $200,000 loan that the husband had obtained by using as collateral the property owned solely by the wife.[154] She was unaware of this, as he had forged her signature.[155] The debt became an issue in the context of their divorce.[156] He promised to pay the debt directly, and she signed papers recognizing the debt and extending the due date.[157] In the period leading up to the signing, her attorney threatened to commence civil proceedings against the husband.[158] She also told the husband she would "send [him] to jail."[159] The court found that the husband had not proven duress because he was unable to prove "contractual causation"—that he signed because of the threats.[160] Again, on its face, the actual agreement appears to have been a fair one.[161]

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[145] *Id.* at *3.
[146] *Id.*
[147] *Id.*
[148] *Id.* at *5, *7.
[149] *Id.* at *6–7.
[150] *Id.* at *7.
[151] *See id.* at *6–8.
[152] *See generally* Biliouris v. Biliouris, 852 N.E.2d 687 (Mass. App. Ct. 2006).
[153] Hardey v. Metzger, Record No. 2628-07-4, 2008 WL 3895686, at *1 (Va. Ct. App. Aug. 26, 2008).
[154] *Id.*
[155] *Id.*
[156] *See id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* (alteration in original) (internal quotation marks omitted).
[160] *Id.* at *5.
[161] *See id.*

Settlements associated with employment termination or a threatened termination also lead to claims of duress. For example, in *Wright v. Foreign Service Grievance Board*, Wright was a foreign service officer who filed a grievance in response to low performance rankings.[162] When he still had the right to appeal an adverse decision, the Service offered to employ him until he reached the twenty-year mark and expunge his record if he would drop all further claims.[163] The extension amounted to a few months of additional employment.[164] Wright was given five days to decide.[165] He later attempted to avoid the agreement on the basis of duress.[166] He complained of the short time period for his decision and the fact that he was threatened with immediate dismissal and a loss of retirement benefits.[167] Here, the court reasoned that by working until his retirement and then collecting retirement benefits, Wright had ratified the agreement.[168] As a general matter, waiting too long before raising a duress claim almost certainly means that it will fail.[169]

A claim of duress was also rejected on the basis of the presence of a reasonable alternative in *Osborne v. Howard University Physicians, Inc*.[170] The case involved a tenured university physician who signed a new employment contract that effectively reduced his earnings.[171] His employer, Howard University, explained that it was forced to alter the payment structure for university physicians due to financial problems.[172] The threat was that the employee would lose his position if he did not sign the new contract under which he also relinquished any claims under the original contract.[173] The court listed a number of alternatives including finding alternative employment or filing an action asking a court to enjoin his termination.[174] Here again, the sophistication of the party likely played a role.

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[162] Wright v. Foreign Serv. Grievance Bd., 503 F. Supp. 2d 163, 166–67 (D.D.C. 2007).
[163] *Id.* at 168–69.
[164] *Id.* at 166–67, 169.
[165] *Id.* at 175 n.7.
[166] *Id.* at 174–75.
[167] *Id.* at 174.
[168] *Id.* at 175; *see also* Schmidt v. Shah, 696 F. Supp. 2d 44, 64 (D.D.C. 2010) (finding that a government employee was barred from litigating a duress claim after accepting a settlement).
[169] *See, e.g.*, Cabot Corp. v. AVX Corp., 863 N.E.2d 503, 515–16 (Mass. 2007). *But see* Burd v. Antilles Yachting Servs., Inc., 57 V.I. 354, 362 (V.I. 2012) (reversing a finding of ratification on appeal).
[170] Osborne v. Howard Univ. Physicians, Inc., 904 A.2d 335, 341–42 (D.C. 2006).
[171] *Id.* at 336–38.
[172] *Id.* at 337.
[173] *Id.* at 337–38.
[174] *Id.* at 341–42.

Another instance of "settlement regret" is *Nathan v. Calco Duct & Vent Cleaning*.[175] There, a party settled a tort claim for $250,000.[176] She then alleged that her agreement was the result of duress applied by her attorney.[177] Two stumbling blocks were evident here. First, the threat was from a third party to the contract.[178] As already indicated, this makes the claim of duress significantly harder to successfully employ.[179] She testified that she agreed because she was concerned about the expenses of litigation and the possibility that her attorney would withdraw.[180] She also consulted other attorneys.[181] The court noted that the party with whom she settled did not know of any possible duress and had relied on her agreement to settle.[182] Second, the court found that she had effectively ratified the agreement by waiting five weeks to raise her objections.[183]

One recent case in the sample that deviates from this trend of rejecting duress claims is *Dorale v. Dorale*.[184] There, a former wife agreed to sell an interest in property she had received under the divorce agreement back to her ex-husband.[185] The court found there was duress by virtue of her prior domestic abuse and fear of physical harm.[186] The agreement was reached after a contentious, four hour meeting in which a third party also urged her to agree.[187] Although not raised in the case, the fact pattern may have been better suited for the label of undue influence.[188] In any event, it appears that the court was influenced by the fact that the selling price was about $50,000 less than the appraised value of the property.[189] *Dorale* is not technically a settlement case, and that may explain the court's greater openness to a duress claim. Interestingly, unlike the prior cases, there was no mention of the former wife's educational background or experience level.[190]

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[175] Nathan v. Calco Duct & Vent Cleaning, No. X09CV065005942, 2009 WL 3416440 (Conn. Super. Ct. Sept. 29, 2009).

[176] *Id.* at *1.

[177] *Id.*

[178] *Id.* at *2–3.

[179] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(2) & cmt. e (1981).

[180] *Nathan*, 2009 WL 3416440, at *4.

[181] *Id.*

[182] *Id.* at *3.

[183] *Id.* at *4.

[184] Dorale v. Dorale, 771 N.W.2d 651, 2009 WL 1211969 (Iowa Ct. App. 2009) (unpublished table decision).

[185] *Id.* at *1.

[186] *Id.* at *3–4.

[187] *Id.*

[188] *See infra* Part VI.C.

[189] *Dorale*, 2009 WL 1211969, at *3.

[190] *See generally id.*

Perhaps indicative of a recent trend to reject claims of duress are two prison cases. In *Smith v. Cain*, a prisoner claimed that her constitutional rights were infringed by the prison.[191] She filed a civil rights claim under 42 U.S.C. § 1983, but eventually entered into a settlement agreement.[192] Six months later she sought to disavow the settlement and claimed that she was under duress because the prison warden threatened to have her killed if she did not sign.[193] The court denied the plaintiff's request to reinstate the lawsuit on the basis of duress.[194] The court found the claim of a physical threat not credible and also noted that the prisoner had enjoyed the benefits of the settlement for six months before complaining.[195] Similarly, in *Reed v. Gallegos*, a prisoner who had been abused by guards contracted to relinquish his civil rights claims in exchange for a promise to be transferred.[196] His request to avoid the contract was denied since the abuse was not designed to encourage him to sign the contract.[197] Instead, the guards administering the abuse evidently had other motives.[198]

If the cases in this survey are representative, a hypothesis that courts in the United States are quick to use the concept of duress to alter substantive outcomes would have to be rejected. It bears noting, however, that the parties involved in the cases studied were generally not ignorant or deprived, nor did the benefit of the bargain obviously favor one party at the expense of the other. As already suggested, *bringing* a case based on duress requires at least some level of sophistication. Ironically, perhaps, the more sophisticated the party, the less likely the claim will be successful.[199] The outcomes of these cases are not inconsistent with a tendency to respond to unfairness when appropriate. But, then again, courts have no control over which parties appeal for their assistance. In fact, for the disadvantaged in the United States, problems in the bargaining process that are similar to duress are most likely addressed by statutory law or fall under the doctrine of unconscionability.[200]

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[191] Smith v. Cain, Civil Action No. 09-0322-JJB-DLD, 2012 WL 4051855, at *2–3 (M.D. La. Aug. 22, 2012), *adopted by* 2012 WL 4051947 (M.D. La. Sept. 13, 2012).

[192] *Id.* at *1.

[193] *Id.* at *2.

[194] *Id.* at *10.

[195] *Id.*

[196] Reed v. Gallegos, C.A. No. C-07-190, 2008 WL 2714082, at *1 (S.D. Tex. July 9, 2008).

[197] *Id.* at *5.

[198] *Id.* at *3.

[199] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. c (1981).

[200] *See infra* Part VII.

C. Undue Influence

The search term used here for "undue influence"[201] produced twenty-two cases.[202] Not all of the cases involve fact patterns that would make it possible for a court to apply a corrective touch based on unfairness. For example, in some instances, the parties appear to be distributing what would be a windfall to either one.[203] In other instances, although perhaps not a windfall, it would be difficult to clearly identify the injustice.[204] Finally, in some instances, "undue influence" is invoked in the context of facts that are not remotely close to those described in the Second Restatement. For example, whatever the vices of predatory lending, a person applying for such a loan is not likely to be under the undue influence of the lender.[205]

A casebook favorite that illustrates the concept and fits nicely into the Second Restatement guidelines is *Odorizzi v. Bloomfield School District*.[206] Odorizzi was a school teacher who resigned his position after he was arrested on criminal charges of homosexual activity.[207] He later attempted to avoid the contract on the basis of undue influence.[208] The contract was signed after a considerable time without sleep, in the evening, in his home, and in the presence of his superiors who were threatening him with broader

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[201] WESTLAW CLASSIC, *supra* note 43 (search "restatement /3 contracts /3 s177 & 'undue influence' & after 2002").

[202] *See, e.g.*, Commercial Recycling Ctr., Ltd. v. Hobbs Indus., Inc., 228 P.3d 93 (Alaska 2010); Elias Real Estate, LLC v. Tseng, 67 Cal. Rptr. 3d 360 (Ct. App. 2007); Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 3 A.3d 535 (N.J. Super. Ct. App. Div. 2010); Black v. Powers, 628 S.E.2d 546 (Va. Ct. App. 2006); *In re* Estate of Jones, 287 P.3d 610 (Wash. Ct. App. 2012); Comeau v. Nash, 233 P.3d 572 (Wyo. 2010).

[203] I have not, for example, pursued the line of cases in which a transfer-on-death agreement or the contents of a will are challenged based on the assertion that the beneficiaries unduly influenced the testator, either in preparing a will or by virtue of a contract prior to death. In these instances, the equities between the parties over the "spoils" are difficult to identify. *See, e.g.*, *Comeau*, 233 P.3d. at 572.

[204] For example, the search located *Barba v. Seung Heun Lee*, No. CV 09-1115-PHX-SRB, 2009 WL 8747368 (D. Ariz. Nov. 4, 2009), but there the record available was not sufficient to determine facts with respect to undue influence. The case, however, does have interesting implications, as the parties claiming to have been unduly influenced voluntarily attended a Yoga school in which they underwent severe deprivation and were told to donate all their belongings to the organization. *Id.* at *1–2.

[205] *See* Storie v. Household Int'l, Inc., Civil Action No. 03-40268-FDS, 2005 WL 3728718, at *6 (D. Mass. Sept. 22, 2005); *see also* Gengaro v. Local 3144, No. CV54009789S, 2008 WL 2068254, at *2–5 (Conn. Super. Ct. May 2, 2008), *aff'd sub nom.* Gengaro v. City of New Haven, 984 A.2d 1133 (Conn. App. Ct. 2009). Similarly, a partner at Ernst & Young is unlikely to portray herself as an "unsophisticated school girl." United States v. Fletcher, No. 06 C 6056, 2008 WL 162758, at *11 (N.D. Ill. Jan. 15, 2008), *aff'd*, 562 F.3d 839 (7th Cir. 2009) (Easterbrook, J.).

[206] Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533 (Dist. Ct. App. 1966).

[207] *Id.* at 537.

[208] *Id.*

exposure.[209] The court found that there was enough evidence of undue influence to merit a trial on the issue.[210] As a general matter, undue influence involves the domination of one person that results in a choice that the subordinate party would not otherwise make.[211] With its somewhat more flexible definition than duress and capacity, the potential use of the doctrine to extract individuals from bargains that seem unfair is obvious.[212]

Since undue influence typically applies, if at all, when the disadvantaged party is in a weakened state, it might be expected that it would be generally found alongside a claim based on lack of capacity.[213] This is not the case. Similarly, since capacity issues are often raised by third parties who stand to benefit from voiding the contract, corresponding claims for undue influence might be expected. In practice, though, it appears that parties to a contract are more likely to invoke undue influence and third parties more likely to rely on capacity. The reason for this difference is not clear. One possibility is that an assertion by a party that he or she lacked capacity might be stigmatizing and might require possibly embarrassing or intrusive medical testimony. Further, undue influence is temporary and situational.[214] It is possible that it is a more comfortable

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[209] *Id.* at 537–38. The court found that Odorizzi had stated a cause of action. *Id.* at 543. It provided the following list of undue influence indicators:

> (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys. If a number of these elements are simultaneously present, the persuasion may be characterized as excessive.

Id. at 541.

[210] *Id.* at 543.

[211] *Id.* at 540–41.

[212] As an aside, *Odorizzi* itself has rarely been cited outside of California.

[213] The close relationship of undue influence to unconscionability is suggested by the Second Restatement:

> [G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

[214] *See Odorizzi*, 54 Cal. Rptr. at 540.

admission to make. A third party might, on the other hand, feel more free to make assertions about someone else's capacity.

Before examining whether courts appear to be advancing distributive goals, two reminders are in order. First, if courts do seem to pursue these goals in the context of undue influence more than in claims of capacity, it could be because, as noted above, these cases more frequently involve an actual party to the contract in question. Second, as in duress, when the pressure leading to the consent is not applied by a party to the contract, avoidance is more difficult.[215] The point is that if courts respond to distributive outcomes under the rubric of undue influence, one would expect the claim to be made by a sympathetic person who was a party to the contract and that the pressure came from the party who was unfairly advantaged.

This combination was not frequently found in recent cases and, for the most part, the outcomes are quite predictable. Two cases illustrate the importance of the source of the undue influence. In *Chai v. Commissioner*, a taxpayer claimed to be unduly influenced to agree to extend the limitations period with respect to a tax assessment.[216] He had not consulted an attorney and was advised to agree by a business associate who was also the husband of a cousin.[217] The undue influence allegedly flowed from this relative.[218] The court noted that even if the associate had the necessary domination, there was no evidence that it was used in a way that interfered with the judgment of the contracting party.[219]

A similar pattern with, perhaps, a more sympathetic party is found in *Stoudmire v. U.S. Xpress, Inc*.[220] Stoudmire, a truck driver, without assistance of an attorney, settled a worker's compensation case.[221] Included in the settlement was an agreement to release all claims that he may have against the employer.[222] In fact, at that time, he had a civil rights claim pending and had hired counsel for that claim.[223] Because he felt the release was likely to apply to the civil rights claim, the attorney advised him,

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[215] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(2) & cmt. e.

[216] Chai v. Comm'r, 102 T.C.M. (CCH) 520, 521 (T.C. 2011).

[217] *Id.*

[218] *Id.*

[219] *Id.* at 521–22. Undue influence by someone who is not a party to the contract is less likely to result in avoidance. *See supra* Part V.

[220] Stoudmire v. U.S. Xpress, Inc., No. 2:12cv1055-MHT, 2013 WL 1363484 (M.D. Ala. Apr. 3, 2013).

[221] *Id.* at *1.

[222] *Id.*

[223] *Id.*

evidently quite forcefully, to settle the civil rights claim for a very small amount.[224] Stoudmire asked to have the settlement avoided on the basis of the undue influence applied by his attorney.[225] The court denied the request noting that facing an overbearing attorney did not rise to the level of undue influence.[226] What these cases suggest, if anything, is that courts will not "reach" to affect a different distributive outcome unless all the necessary components of undue influence are present.

Undue influence is most successful as a method of avoiding a contract when the parties have a confidential relationship.[227] This finding shifts the burden to the party accused of exerting undue influence to show that none existed.[228] Burden shifting has a huge substantive effect, and the decision to make that shift may itself be a function of perceived unfairness. An example of this is seen in *Ross v. Hodge*, another instance in which the fairness of the bargain played a role in the outcome of the case.[229] There, a relatively unsophisticated business owner, Hodge, hired Bracy to assist in applying for federal contracts.[230] Hodge eventually purchased a house for Bracy to live in.[231] The owners were Hodge, Bracy, and Bracy's girlfriend, Ross.[232] Eventually, Hodge and Bracy signed their ownership interest over to Ross, who, through a series of transactions, sold the property and kept the proceeds.[233]

Hodge complained that he was led to believe that the property was bought for his employees generally and that Bracy and Ross were not authorized to have their names listed as co-owners.[234] The undue influenced flowed from Ross to Hodge.[235] The court was obviously swayed by the fact that Hodge allegedly could not read,[236] and ended up buying the

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[224] *Id.* at *2.

[225] *Id.* at *3. Yet another case in which an attorney is accused of undue influence is *Kayla P. v. Morgan C.*, No. 1 CA-JV 09-0190, 2010 WL 987071 (Ariz. Ct. App. Mar. 18, 2010).

[226] *Stoudmire*, 2013 WL 1363484, at *3.

[227] *See* RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. a (1981).

[228] *See, e.g.*, Haynes v. First Nat. State Bank of N.J., 432 A.2d 890, 897–98 (N.J. 1981); Howard v. Nasser, 613 S.E.2d 64, 68–69 (S.C. Ct. App. 2005); *In re* Estate of Duebendorfer, 721 N.W.2d 438, 446–47 (S.D. 2006). *But see* Estate of Reichel, 400 A.2d 1268, 1270 (Pa. 1979) (explaining that Pennsylvania law requires more than proof of a confidential relationship before the burden shifts).

[229] Ross v. Hodge, 58 V.I. 292 (V.I. 2013).

[230] *Id.* at 296.

[231] *Id.*

[232] *Id.* at 296–97.

[233] *Id.*

[234] *Id.* at 297–98.

[235] *Id.* at 304.

[236] This was disputed. *Id.* at 305.

house but having no equity in it.[237] In addition, he had become close friends with Ross.[238] The court noted that Hodge was subservient to Ross and that a confidential relationship existed.[239] At that point the burden shifted to Ross to show there was no undue influence—a test she failed.[240] The dissent correctly noted that the lower court and the majority had not adhered to the undue influence standards.[241] There was no evidence that Hodge's will was overcome nor of any specifics about how and when the actual pressure was asserted.[242] In effect, it appears the court, shocked by the underhandedness of Ross, used "undue influence" as a method of correcting an injustice.[243]

Similarly, in *LeSure v. Andrus*, a couple separated after living together for ten years.[244] During this time, the female half of the couple, Andrus, incurred nearly all the expenses associated with the home.[245] After a year and a half, though, she made the male, LeSure, a co-owner of the property.[246] After the separation, LeSure sought to assert his half ownership interest, and the response was that the transfer was a result of undue influence.[247] The court noted that a confidential relationship existed at the time of the transfer and then found that LeSure had been unable to prove the absence of undue influence.[248] It is quite possible that the court was also influenced by the fact that all payments associated with the property were made by Andrus, that she owned the property prior to the relationship, and that she had yearly earnings significantly below those of LeSure.[249] Obviously, the existence of a familial relationship can influence the finding of a confidential relationship, but it does not always follow.[250]

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[237] *See id.* at 304–05.

[238] *Id.* at 298.

[239] *Id.* at 304.

[240] *Id.* at 304–06.

[241] *Id.* at 312–14 (Hodge, C.J., concurring in part and dissenting in part).

[242] *Id.* at 313.

[243] *See id.* In reality, the case seems more suited for fraud or misrepresentation since Bracy and Ross misled Hodge about the consequences of the transactions. *See id.* at 313–14.

[244] LeSure v. Andrus (*In re* Andrus), Bankruptcy No. 09-13123, Adversary No. 09-01264, 2010 WL 4809114, at *1 (Bankr. W.D. Wash. Aug. 13, 2010).

[245] *Id.*

[246] *Id.*

[247] *Id.* at *2.

[248] *Id.* at *4.

[249] *See id.* at *6.

[250] *See, e.g.*, Pires v. Pires, Nos. 02 MISC. 282083(CWT), 02E 033 PP(CWT), 0433 CV 0547(CWT), 02-SP-00569, 2009 WL 3067070 (Mass. Land Ct. Sept. 25, 2009), *aff'd in part, vacated in part, remanded in part*, 2011 Mass. App. Div. 23 (Dist. Ct. 2011).

The combination of a confidential relationship and advantage taking also played a role in the Michigan case of *Fick v. Fick*.[251] Plaintiff, the wife, and defendant, the husband, were married in 1994.[252] The wife was severely injured in 1996, and the husband assumed responsibility for her financial transactions.[253] Eventually the husband influenced her to sign both a mortgage agreement and quitclaim deed resulting in his sole ownership of their home.[254] He also divorced her without her knowledge.[255] Although there was no direct evidence of the type found in *Odorizzi*, the confidential relationship and the deception by the defendant were enough to establish undue influence.[256]

Just as a perceived unfairness may influence a court to find that undue influence is involved, the opposite is also true: Perceptions of fairness seem to defeat the same claims. In *In re Estate of Jones*, daughters of a deceased couple claimed that, after the husband's death, the couple's sons had used undue influence to convince the widow to enter into agreements that favored the sons at the expense of the daughters.[257] It was determined that the relationship between the mother and sons was confidential.[258] Here, however, the court found that the existence of a confidential relationship was *not* enough to shift the burden to the sons to show there was no undue influence.[259] Principally, the court noted that the exchange between the sons and their mother was a "fair bargain."[260]

In a recent case involving a completely different context—child custody—it appears that fairness also played a role.[261] Here the mother complained that undue influence resulted in an agreement to joint custody.[262] The agreement was a result of voluntary mediation during which the mother consulted with her sister, who was a family law attorney.[263] Nevertheless, it was clear that she was subjected to repeated

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[251] Fick v. Fick, Docket No. 274284, 2008 WL 3540257 (Mich. Ct. App. Aug. 14, 2008) (per curiam).
[252] *Id.* at *1.
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.* at *1–2.
[257] *In re* Estate of Jones, 287 P.3d 610, 611 (Wash. Ct. App. 2012).
[258] *Id.* at 616 n.7.
[259] *Id.* at 615–18.
[260] *Id.* at 616.
[261] *In re* Alden, 159 Wash. App. 1008, 2010 WL 5298828 (2010) (unpublished table decision).
[262] *Id.* at *3.
[263] *Id.*

phone calls by the husband insisting that she sign.[264] There was no suggestion that the father was unfit to have custody.[265] More importantly, the agreement awarded the mother significantly more custody than the father.[266] Neither the process of reaching the agreement nor the outcome suggested that her will was overpowered.[267]

Finally, in *Kenton v. Foster*, the seller of a home became unhappy with the contract once she found a buyer willing to pay more.[268] In addition to the sales price, she was also to receive a "place to live for the earlier of seven years or until she received her next installment from the California lottery."[269] She claimed that she agreed to the original sales price as a result of undue influence.[270] She was evidently under some financial pressure while waiting for her lottery payment.[271] There was no confidential relationship between the buyer and seller, nor was there any evidence of domination.[272] Finally, the court observed, although the selling price may have been below market value, the reasons for accepting that price were clear.[273]

Undue influence actually seems to be a more viable method of addressing inequities between the parties than either capacity or duress. Unlike capacity, there is typically not a medical condition involved.[274] And, unlike duress, there are not several individual elements that must be proven.[275] Plus, although it is not clear why this is the case, undue influence appears to give rise to less discussion about the sophistication of the party seeking to avoid the contract. One possibility is that duress hinges on the lack of a reasonable alternative, which can be viewed as a question of what the party should have known to consider, while this is not part of

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[264] *Id.* at *1, *5.

[265] *See id.* at *1–2.

[266] *See id.* at *1 ("The agreed upon residential schedule gave [mother] custody 114 hours and [father] 54 hours on some weeks and, on alternating weeks, gave [mother] 93 hours and [father] 75 hours."). *But see id.* at *5 ("[T]he residential schedule roughly divides residential time equally between the parties . . . .").

[267] *See id.* at *3–4.

[268] Kenton v. Foster, No. CV-04-2005-PCT-PGR, 2008 WL 4700626, at *1–4 (D. Ariz. Oct. 23, 2008).

[269] *Id.* at *1.

[270] *Id.* at *8.

[271] *Id.*

[272] *Id.*

[273] *Id.* Sewage had filled the "downstairs" of the home, and there were no utilities when she sold the house to the original buyer for less than market value. *Id.* at *1, *8.

[274] *See* RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981); *see also supra* Part VI.A.

[275] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175; *see also supra* Part VI.B.

the undue influence analysis.[276] Perhaps most important is the finding of a confidential relationship. If a person enters into a confidential relationship, the idea of an arms-length bargain does not apply.[277] In a sense, the influenced party has a right to expect the contracting party not to seek most or all of the benefit of the bargain.[278] Nevertheless, it would be incorrect to infer that, at least in recent decisions, courts are anxious to invoke undue influence. In this sample, however, it was more likely to be relied on than capacity or duress.

VII. OTHER CONSIDERATIONS: UNCONSCIONABILITY AND STATUTORY MEASURES

Based on this survey, it is safest to say that imbalance in the benefit of the bargain plays only a minor role in cases based on capacity, duress, and undue influence. Courts are more inclined to look for relatively objective evidence.[279] In some cases, status and background may be as influential as the actual bargain. Perhaps wary of running afoul of the rule that adequacy of consideration is not required, courts consider even a very uneven distribution of the benefit of the bargain as only *evidence* that there was a problem with consent.

Does this mean that distributive matters are unimportant in American contract law? Probably not. In fact, it may be that what would be considered under the doctrines of capacity, duress, and undue influence are today dealt with by the doctrine of unconscionability or by statutory measures.

A. Unconscionability

In Part I, it was noted that contracts which reflected unfairness are more likely to be assessed under the doctrine of unconscionability. Given the lack of significant evidence that courts use capacity, duress, and undue influence to actively address distributive issues, this possibility seemed

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[276] *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 175 (duress), *with id.* § 177 (undue influence).

[277] *See, e.g.*, Frowen v. Blank, 425 A.2d 412, 416 (Pa. 1981) ("When the relationship between the parties to an agreement is one of trust and confidence, the normal arm's length bargaining is not assumed . . . .").

[278] *See id.* ("[O]verreaching by the dominant party for his benefit permits the aggrieved party to rescind the transaction. This is so because the presence of a confidential relationship negates the assumption that each party is acting in his own best interest." (citations omitted)).

[279] *See supra* Part VI.

more promising. In order to test this explanation, I compared instances in which the Second Restatement sections on capacity, duress, and undue influence were cited to instances in which section 208 of the Second Restatement and section 2-302 of the U.C.C., which address unconscionability, were cited. In the period from 2003 to mid-2013, there were fifty-five cases that cited the Second Restatement sections on capacity, duress, or undue influence.[280] In the same period, the unconscionability sections of the Second Restatement and the U.C.C. were cited 236 times.[281]

Without a period for comparison, it cannot be concluded that unconscionability has replaced capacity, duress, and undue influence. Consequently, the period from 1980 through 1989 was selected for comparison. Using the same database and search terms, the Second Restatement sections on capacity, duress, and undue influence were cited eighty-two times.[282] On the other hand, citations to the relevant sections on unconscionability were cited seventy-five times.[283] The *absolute* numbers probably tell us little, and any inferences should be made only with great caution. Nevertheless, one interpretation of the *relative* numbers is that unconscionability may be replacing the traditional doctrines of capacity, duress, and undue influence.

If this were the whole story, the ascendency of unconscionability seems obvious. Complicating matters, however, is that many of the unconscionability cases arise in the context of compulsory arbitration. Of the 236 citations to unconscionability in the most recent period, 89 were in conjunction with arbitration clauses.[284] This is approximately 38%. In the earlier period, eleven cases cited unconscionability in the context of arbitration.[285] This is but 15%. The general distrust of arbitration by courts has been well documented,[286] although recent events indicate that this is not a position shared by the United States Supreme Court.[287]

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[280] *See supra* Part VI.

[281] WESTLAW CLASSIC, *supra* note 43 (search "unconscionable & contract & restatement & s208 & after 2002" and "unconscionable & contract & UCC & s2-302 & after 2002").

[282] *Id.* (search "capacity & contract & restatement & s15 & after 1979 & before 1990," "duress & contract & restatement & s175 & after 1979 & before 1990," and "'undue influence' & contract & restatement & s177 & after 1979 & before 1990").

[283] *Id.* (search "unconscionable & contract & restatement & s208 & after 1979 & before 1990" and "unconscionable & contract & UCC & s2-302 & after 1979 & before 1990").

[284] *Id.* (search "unconscionable & contract & restatement & s208 & after 2002"; then filter the results for "arbitration"; and search "unconscionable & contract & UCC & s2-302 & after 2002"; then filter the results for "arbitration").

[285] *Id.* (search "unconscionable & contract & restatement & s208 & after 1979 & before 1990"; then filter the results for "arbitration"; and search "unconscionable & contract & UCC & s2-302 & after 1979 & before 1990"; then filter the results for "arbitration").

[286] *See* Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract*

There are a number of possible interpretations. Although causation cannot be established, it is clear that the growth in arbitration is correlated with increased attempts to invoke unconscionability. Does this, in itself, signal that courts are now more willing to address unfairness under the banner of unconscionability in general? This seems likely, but one would have to separate the impact of increased reliance on arbitration as a variable from other factors that may explain the rise in reliance on unconscionability more generally.[288] Nevertheless, more research on this point is warranted.

B. Statutory Measures

This study has focused on case law and the responsiveness of courts to contracts in which the benefit of the bargain favors one party over another to an extreme degree. This is hardly a complete picture of the methods used in American law to respond either to defects in consent or directly to unfairness. For example, an alternative to duress and undue influences is a federally established "cooling-off" period for some sales made in a person's home.[289] The goal is to allow reflection after the conclusion of what may have been a high-pressure sales pitch.[290] This is hardly a pervasive safeguard and, in fact, would not be applied in any of the cases encountered in this project.

At the outset, this Article discussed the gap between consent and preferences and how that relates to defects in consent. A great deal of statutory law is designed to respond to the gap through disclosure requirements, which can assist in more rational decision making. Disclosures can range from warnings about health hazards to loan terms and nutritional information.[291] These requirements increase the amount of available information and lower the costs for contracting parties seeking to discover information. With this information, manifestations of consent may be more aligned with actual preferences.

Unconscionability, and Agreements to Arbitrate, 2006 J. DISP. RESOL. 469; Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009).

[287] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[288] The existence or non-existence of unconscionability is a decision for the court.

[289] Possibly the best known "cooling-off" period is that applied by the Federal Trade Commission to door-to-door sales. *See* FTC Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429.1(a) (2015). It allows consumers to change their minds within three days. *Id.*

[290] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 706 (1992) (Kennedy, J., concurring in judgment).

[291] *See, e.g.*, DEL. CODE ANN. tit. 5, § 2235A (Supp. 2014); ME. REV. STAT. tit. 22, § 2500-A (Supp. 2014).

In many instances, rather than address consent as such, the law goes directly to what concerns us about defects in consent—the actual outcome. For example, in some states, price ceilings are placed on certain goods during times of emergency.[292] Again, the purpose is to avoid an extreme imbalance in the division of the benefit of the bargain when one party has little bargaining power.[293] Usury laws that place limits on the interest rates that may be demanded by lenders also tend to directly offset what some would regard as exploitation flowing from unequal bargaining power.[294] Required warranties and the potential for tort claims based on product liability can also be seen as part of the process of encouraging fair terms in exchanges.

VIII. CONCLUDING COMMENTS

What can ultimately be said about American law and defects in consent? First, aside from statutory law, defects are only addressed when individuals ask for them to be addressed, and it is likely that there is a socioeconomic bias with respect to who does ask. When questions of capacity, duress, or undue influence do make it before a court, perceived unfairness is one way in which the benefit of the bargain can influence the outcome. On the other hand, the sample drawn here composed of relatively recent cases suggests that courts are reluctant to intervene on the basis of any of these theories, especially if the background or status of the complaining party suggests that they were capable of resisting the pressures. The principal exceptions are those in which the parties have a confidential relationship. Intervention, when it does occur, seems more likely to fall under the rubric of unconscionability.

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[292] *See* Rebecca H. Benavides, *Summary of State "Price Gouging" Statutes and Regulations*, ABA (Mar. 31, 2006), http://apps.americanbar.org/antitrust/at-committees/at-fe/pdf/programs/spring-06/price-gouging-statutes.pdf.

[293] Interestingly, in some instances provisions for excessive liquidated damages are not enforced, in part, because they may reflect unequal bargaining power. *See, e.g.*, *In re* DirecTV Early Cancellation Litig., 738 F. Supp. 2d 1062, 1089 (C.D. Cal. 2010) (discussing California's "fundamental policy of protecting consumers with unequal bargaining power by presumptively voiding liquidated damages clauses in consumer contracts").

[294] *See, e.g.*, Ghirardo v. Antonioli, 883 P.2d 960, 969 (Cal. 1994) ("[T]he purpose of the usury law . . . is to protect the necessitous, impecunious borrower who is . . . forced by his economic circumstances to resort to excessively costly funds to meet his financial needs.").