

“SIGN OR DIE!”: THE THREAT OF IMMINENT  
PHYSICAL HARM AND THE DOCTRINE OF  
DURESS IN CONTRACT LAW

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INTRODUCTION

A puts a gun to B’s head, hands B a proposed written agreement, and says to B, “Sign or die!” B, solely because of A’s threat, signs. Has a voidable contract formed, or is the agreement void at inception? The authorities disagree, and even the American Law Institute (ALI)—drafter of the two *Restatements of Contracts* and co-drafter of the Uniform Commercial Code—has given conflicting answers.<sup>1</sup> The traditional view is that the agreement is voidable.<sup>2</sup> The modern trend is that the agreement is void at inception.<sup>3</sup>

The answer is not of mere theoretical interest. Although cases involving threats of imminent physical harm made to induce assent

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1. Compare RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. c, illus. 8 (AM. LAW INST. 1981) (threat to poison other party results in voidable contract), and RESTATEMENT OF CONTRACTS § 493 cmt. a, illus. 1 (AM. LAW INST. 1932) (threat to knock down other party results in voidable contract), with U.C.C. § 3-305 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2017) (“An instrument signed at the point of a gun is void . . .”).

2. See *Fairbanks v. Snow*, 13 N.E. 596, 598 (Mass. 1887); RESTATEMENT OF CONTRACTS § 493 cmt. a, illus. 1 (AM. LAW INST. 1932).

3. See *U.S. for Use of Trane Co. v. Bond*, 586 A.2d 734, 740 (Md. Ct. App. 1991); *EverBank v. Marini*, 134 A.3d 189, 191 (Vt. 2015).

to a contract are rare,<sup>4</sup> the distinction between a void agreement and a voidable contract is significant when they do arise. A voidable contract can be ratified,<sup>5</sup> whereas a void agreement cannot.<sup>6</sup> Also, if the threat was made by a third party and the contract is not void at inception, the victim does not have the power to void the contract if the other party to the transaction in good faith gave value and had no reason to know of the threat.<sup>7</sup> And if the agreement is a negotiable instrument that is assigned to a third party for value, the third party can obtain holder-in-due-course status and take the instrument free of the victim's defense of duress, but only if the agreement is a voidable contract, and not if it is a void agreement.<sup>8</sup>

This Article maintains that a threat of imminent physical harm should result in a voidable contract so that the rules of ratification apply and that those rules govern the contract's enforceability against the person making the threat as well as innocent parties. As will be shown, the rules of ratification are sufficiently flexible to adequately protect the interests of all persons involved.

Part I provides a brief overview of the doctrine of duress in contract law. Part II explains the important distinctions between a void agreement and a voidable contract. Part III discusses the conflicting authority regarding whether a threat of imminent physical harm renders an agreement void or voidable. Part IV sets forth the proposed solution that adequately protects the interests of all persons involved. Part V is a brief conclusion.

## I. DURESS IN CONTRACT LAW

Duress has long been recognized as a defense to the enforcement of a contract,<sup>9</sup> but what facts are sufficient to invoke the defense have

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4. The most common occurrence seems to be a husband threatening his wife. See, e.g., *Bond*, 586 A.2d at 735 (husband physically threatened wife); *Fairbanks*, 13 N.E. at 596 (husband threatened wife that he would kill himself); *EverBank*, 134 A.3d at 192 (husband threatened wife with a pair of scissors). See generally Deborah Waire Post, *Outsider Jurisprudence and the "Unthinkable" Tale: Spousal Abuse and the Doctrine of Duress*, 26 U. HAW. L. REV. 469, 469–83 (2004) (discussing *Bond* and other cases where husbands threatened wives to force contract signings).

5. See RESTATEMENT (SECOND) OF CONTRACTS § 7 (AM. LAW INST. 1981).

6. *Yvanova v. New Century Mortg. Corp.*, 365 P.3d 845, 852 (Cal. 2016); see RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. b.

7. See RESTATEMENT (SECOND) OF CONTRACTS § 175(2).

8. See U.C.C. § 3-305(a)(1)(ii); *id.* at cmt. 1.

9. See KEVIN M. TEEVAN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 183–84 (1990) (noting that duress is “an ancient defense” recognized at common law since at least the time of Bracton (thirteenth century), but also noting

expanded over time.<sup>10</sup> The defense's scope is determined by both (1) the type of actions or threats considered sufficient and (2) whether the will of the victim need only be overcome or whether the actions or threats must have been sufficient to overcome the will of a reasonable person or some other hypothetical person.

Traditionally, the types of actions and threats sufficient to invoke the defense were quite limited. A contract could only be avoided as a result of duress "if the agreement was coerced by actual (not threatened) imprisonment or the threat of loss of life or limb."<sup>11</sup> Coke and Blackstone, following Bracton's lead, stated that even the threat of battery or the burning of one's house was insufficient.<sup>12</sup> The theory was that money could compensate for a battery or the loss of one's house, but not for imprisonment or the loss of life or limb.<sup>13</sup> Further, the threat must have been sufficiently severe to overcome the will of a "constant, or courageous man,"<sup>14</sup> which later relaxed somewhat to "a person of ordinary firmness."<sup>15</sup> Thus, duress was traditionally a difficult defense to establish.

But the boundaries of duress have been expanding for more than a century and a half.<sup>16</sup> In fact, "[f]ew areas of the law of contracts underwent such radical changes in the nineteenth and twentieth centuries as did the law governing duress."<sup>17</sup> For example, in the first half of the nineteenth century, as the focus on the will of the parties became more popular,<sup>18</sup> courts in duress cases began focusing on the will of the victim rather than that of "a person of ordinary firmness."<sup>19</sup> Now, the weight of modern authority is that the will of the actual victim need only have been overcome, rather than "the will of a person of ordinary firmness."<sup>20</sup> Importantly, however, even today a contract is only voidable if the victim lacked any reasonable alternative but to

that before the eighteenth century there were no Assumpsit cases under the doctrine of duress itself because, before then, the issue was treated as an issue of consideration).

10. See John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 253 (1947) (noting the expansion of duress over time).

11. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 273 (6th ed. 2009); see also TEEVAN, *supra* note 9, at 304 ("Bracton, in the mid-thirteenth century, kept a strict focus on the means of the threat, and only fear of loss of life or limb or imprisonment were sufficient for duress.")

12. TEEVAN, *supra* note 9, at 304; PERILLO, *supra* note 11, at 273.

13. PERILLO, *supra* note 11, at 273.

14. *Ellis v. Peoples Nat'l Bank*, 186 S.E. 9, 10 (Va. 1936).

15. PERILLO, *supra* note 11, at 274; TEEVAN, *supra* note 9, at 184.

16. See Dawson, *supra* note 10, at 253.

17. PERILLO, *supra* note 11, at 273.

18. TEEVAN, *supra* note 9, at 183.

19. *Id.* at 184.

20. PERILLO, *supra* note 11, at 274.

assent, thereby retaining an objective element.<sup>21</sup> The nineteenth century focus on the free will of entrepreneurs also played a role in precluding—for the time being—the expansion of the duress doctrine from threats of physical harm to threats of economic harm.<sup>22</sup>

That expansion—the inclusion of economic threats—was left to the twentieth century. The origins of the modern economic duress doctrine came from three sources.<sup>23</sup> First were “duress of goods” cases, in which the victims were compelled to enter into contracts to recover goods that the other party wrongfully refused to release.<sup>24</sup> Second were the Chancery cases invoking equitable notions to cancel contracts where there was both “a shocking inadequacy of consideration” and unequal bargaining power or oppression.<sup>25</sup> Third were the cases granting restitution for payments of overcharges to public utilities.<sup>26</sup> These precedents, however, struggled to develop into a broader, general notion of economic duress because of the emergence in the mid-nineteenth century of a competing emphasis on individual consent.<sup>27</sup> But the underlying idea of economic duress never completely disappeared in the United States, and in the mid-twentieth century, the concept of economic duress emerged.<sup>28</sup> Now, any improper threat can constitute duress, including economic threats.<sup>29</sup> Importantly, however, because a contract is only voidable if the victim lacked any reasonable alternative, a case of economic duress will typically be more difficult to establish than a case of physical duress.<sup>30</sup>

The defense of duress can be justified under any of the principal rationales for contract law that have been advanced by scholars.<sup>31</sup> With respect to the variety of bases focusing on the will of the promisor—including the sovereignty of the human will, the sanctity of the promise, and private autonomy—each is premised on a promise

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21. *See id.*

22. *Id.*

23. *See* TEEVAN, *supra* note 9, at 304.

24. *Id.* The seminal case was the English case of *Astley v. Reynolds*, 93 Eng. Rep. 939 (KB 1732).

25. TEEVAN, *supra* note 9, at 304.

26. *Id.*

27. *Id.*

28. *Id.* at 305–06. The classic case recognizing economic duress is *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 131–32 (N.Y. 1971).

29. *See* PERILLO, *supra* note 11, at 274.

30. *See id.*

31. *See id.* at 5–11 (discussing the philosophical foundations of contract law).

constituting an act of free will.<sup>32</sup> Duress is justified as a defense under these theories because “[t]oday the general rule is that any wrongful threat which overcomes the free will of a party constitutes duress.”<sup>33</sup> Similarly, the law of duress—particularly duress involving a threat of physical harm—can be justified as respecting the victim’s autonomy. For example,

the condemnation of intentional violence is . . . firmly rooted in moral notions of respect for persons and the physical basis of personality. The right to be free of such violence expresses the judgment that our persons (and thus our physical persons) are not available to be used by others against our will.<sup>34</sup>

Thus, enforcing a contract that was entered into against the free will of a party is inconsistent with such will theories.

With respect to those who believe contract law’s foundation is a party’s reliance on the contract,<sup>35</sup> reliance on a promise induced by an improper threat would seem to be unjustified. And even if justified, it would not seem to be the type of reliance such theorists would deem worthy of protection. This would be particularly true with respect to a threat of imminent physical harm.

With respect to economic theories, it is argued that one of contract law’s principal purposes is to promote mutually beneficial exchanges.<sup>36</sup> Such exchanges provide a net increase in social welfare, even if the parties simply swap that which each already owns.

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32. *Id.* at 6–8. The principal modern-day advocate of the will theory is Professor Charles Fried. See generally CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

33. PERILLO, *supra* note 11, at 274.

34. FRIED, *supra* note 32, at 99.

35. See PERILLO, *supra* note 11, at 8 (“Proponents of the reliance theory of contracts profess to see the foundation of contract law not in the will of the promisor to be bound but in the expectations engendered by, and the promisee’s consequent reliance upon, the promise.”). The principal modern-day advocate of the reliance theory is Professor P. S. Atiyah. See P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 1–7 (1979).

36. See E. ALLAN FARNSWORTH, CONTRACTS 5–9 (4th ed. 2004) (discussing the role of contract law in a market economy); see also PERILLO, *supra* note 11, at 8 (“Some students of the law urge that contract law is based upon the needs of trade, sometimes stated in terms of the mutual advantage of the contracting parties, but more often of late in terms of a tool of the economic and social order.”). The principal modern-day advocate of the economic theory is Richard A. Posner. See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).

Consider the following example:

S agrees to sell Blackacre for \$200,000 because S values that sum more than S values Blackacre. S would prefer to have the money than to have the land. B agrees to pay that sum because B values Blackacre more than the value B places on the \$200,000. B would rather have the land than the money.<sup>37</sup>

Society has an interest in encouraging such transactions. As explained by Professor Anthony Kronman and (then) Professor Richard Posner:

[I]f voluntary exchanges are permitted—if, in other words, a market is allowed to operate—resources will gravitate toward their most valuable uses. If *A* owns a good that is worth only \$100 to him but \$150 to *B*, both will be made better off by an exchange of *A*'s good for *B*'s money at any price between \$100 and \$150; and if they realize this, they will make the exchange. By making both of them better off, the exchange will also increase the wealth of society (of which they are members), assuming the exchange does not reduce the welfare of nonparties more than it increases *A*'s and *B*'s welfare. Before the exchange—which, let us say, takes place at a price of \$125—*A* had a good worth \$100 to him and *B* had \$125 in cash, a total of \$225. After the exchange, *A* has \$125 in cash and *B* has a good worth \$150 to him, a total of \$275. The exchange has increased the wealth of society by \$50 (ignoring, as we have done, any possible third-party effects).<sup>38</sup>

If, however, a contract is entered into because of an improper threat, this assumption of mutual gain does not exist.<sup>39</sup> As stated by the late Professor Joseph M. Perillo:

[If] *B*'s preference or apparent preference may have been expressed at the point of a gun . . . [t]he assumption of mutual gain from the transaction is a false one. It is false, not because

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37. PERILLO, *supra* note 11, at 273.

38. ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1–2 (1979).

39. See ERIC A. POSNER, *CONTRACT LAW AND THEORY* 100 (2011) (“[T]here is certainly no reason for courts to think that the exchange is ex ante jointly welfare enhancing . . .”).

one party's judgment was unsound, but because the party's judgment was distorted by wrongful conduct of the other.<sup>40</sup>

Also, if such contracts were enforced it would encourage improper threats, thereby diverting resources into making such threats and gaining protection from them, lowering the net social product. As explained by Richard Posner:

Duress is a defense to an action for breach of contract. In its original sense duress implies a threat of violence. A points a gun at B saying: "Your money or your life"; B accepts the first branch of this offer by tendering his money. But a court will not enforce the resulting contract. The reason is not that B was not acting on his own free will. On the contrary, he was no doubt extremely eager to accept A's offer. The reason is that the enforcement of such offers would lower the net social product by channeling resources into the making of threats and into efforts to protect against them. We know this class of "contracts" is nonoptimal because *ex ante*—that is, before the threat is made—if you asked the B's of this world whether they would consider themselves better off if extortion flourished, they would say no.<sup>41</sup>

Thus, there is surely a consensus that a threat of imminent physical harm that induces assent should be a defense to the legal enforcement of an agreement. Authorities are divided on the remaining issue of whether that agreement is void or voidable. The next section discusses the important distinctions between a void agreement and a voidable contract.

## II. VOID VS. VOIDABLE

Merely because the law recognizes a particular defense to an action for breach of contract does not resolve whether the defense—if successful—means that no contract was ever formed (a so-called void agreement) or that a voidable contract was formed. This section

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40. PERILLO, *supra* note 11, at 273.

41. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 115 (6th ed. 2003); *see also* E. POSNER, *supra* note 39, at 100 ("[P]eople will take self-protective measures if the courts do not protect them from such behavior. These self-protective measures are a social waste; people would be better off if they were not necessary.").

addresses the distinctions between a void agreement and a voidable contract, and demonstrates the distinctions' importance.

A void agreement is one in which no right to performance ever arises in either party.<sup>42</sup> Although such an agreement is often called a "void contract," it is not a contract at all because it has no legal effect.<sup>43</sup> An agreement is only a contract if the law gives a remedy for its breach, or if the law in some other way recognizes a duty of performance.<sup>44</sup>

There are three general situations in which an agreement is void at inception. The first is when one of the elements of contract formation is lacking. For example, the formation of a contract requires two or more parties with at least partial legal capacity.<sup>45</sup> Thus, an agreement is void if one of the parties had total incapacity to contract, such as a person whose extreme physical or mental disability or intoxication prevents a manifestation of assent to the contract,<sup>46</sup> or a person whose property is under guardianship because of an adjudication of mental illness.<sup>47</sup> Similarly, an agreement is considered void if there is no consideration for it.<sup>48</sup> Of course, if the missing element is a manifestation of mutual assent, there is not even an agreement,<sup>49</sup> so referring to the transaction as a "void agreement" is not truly accurate.<sup>50</sup>

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42. See RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. a (AM. LAW INST. 1981); see also JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 39 (5th ed. 2011) ("[A] 'void contract' never was a contract since there was never any legal obligation. It was void from the inception (*void ab initio*)."); PERILLO, *supra* note 11, at 18 ("A contract is void . . . when it produces no legal obligation.").

43. See RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. a (AM. LAW INST. 1981); see also MURRAY, *supra* note 42, at 39 (noting that the phrase "void contract" is a contradiction); PERILLO, *supra* note 11, at 18 (noting that the phrase "void contract" is a "contradiction in terms").

44. See RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

45. See RESTATEMENT (SECOND) OF CONTRACTS § 12(1) (AM. LAW INST. 1981) ("No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties."); see also RESTATEMENT OF CONTRACTS § 19(a) (AM. LAW INST. 1932).

46. See RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. a (AM. LAW INST. 1981); *id.* § 16 cmt. a.

47. See *id.* § 13.

48. See PERILLO, *supra* note 11, at 18 ("An exchange of promises that lacks consideration is frequently said to be a void contract."); see also *Yvanova v. New Century Mortg. Corp.*, 365 P.3d 845, 852 (Cal. 2016).

49. See RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981) ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

50. For example, there is no agreement—rather than a void agreement—if a party misrepresents the character or essential terms of the proposed contract and if the other party, who appears to manifest assent, neither knows nor has a reasonable

The second is when the agreement violates public policy. Although an agreement might have a provision that is unenforceable while the remainder is enforceable, the entire agreement is often considered void.<sup>51</sup> The third is when the element of existing impracticability or existing frustration of purpose exists, and each of the parties' duties never arose.<sup>52</sup>

Unless one of the elements of contract formation is lacking, deciding whether an agreement is void at inception or merely voidable is ultimately a policy choice. As stated by Justice Stephen Breyer:

To determine whether a contract is voidable or void, courts typically ask whether the contract has been made under conditions that would justify giving one of the parties a choice as to validity, making it voidable, e.g., a contract with an infant; or whether enforcement of the contract would violate the law or public policy irrespective of the conditions in which the contract was formed, making it void, e.g., a contract to commit murder.<sup>53</sup>

Thus, the agreement must typically be against public policy to be considered void at inception. As stated by one court: "In general, the difference between void and voidable contracts is whether they offend public policy. Contracts that offend an individual, such as those arising from fraud, misrepresentation, or mistake, are voidable. Only contracts that offend public policy or harm the public are void ab initio."<sup>54</sup> This makes sense because if an agreement is against public

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opportunity to know of the contract's character or its essential terms. *Id.* § 163. In such a situation (known as fraud in the factum or fraud in the execution), the apparent manifestation of assent is ineffective. *Id.* § 163 cmt. a. Thus, there would not even be an agreement.

51. See *id.* § 178; PERILLO, *supra* note 11, at 731.

52. See RESTATEMENT (SECOND) OF CONTRACTS § 266(1)–(2); PERILLO, *supra* note 11, at 464.

53. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 431–32 (1998) (Breyer, J., concurring); see also *Koby v. United States*, 47 Fed. Cl. 99, 104 (2000) (quoting Justice Steven's language); *Griffin v. ARX Holding Corp.*, 208 So. 3d 164, 170 (Fla. Dist. Ct. App. 2016) (same), *denying review*, No. SC17-26, 2017 WL 1833182, at \*1 (Fla. May 8, 2017); *Life Ins. Co. of N. Am. v. Reinheimer*, 497 F. Supp. 2d 254, 258–59 (D. Mass. 2007) (same).

54. *Ockey v. Lehmer*, 189 P.3d 51, 56 (Utah 2008); see also *PHL Variable Ins. Co. v. Hudson Valley, EPL, LLC*, No. 13-1562-SLR-SRF, 2014 WL 4635454, at \*5 (D. Del. Sept. 16, 2014) (quoting *Ockey*), *report and recommendation adopted*, Civ. No. 13-1562-SLR/SRF, 2014 WL 5088854, at \*1 (D. Del. Oct. 8, 2014); *New Testament Baptist Church Inc. of Miami v. State Dep't of Transp.*, 993 So. 2d 112, 116 (Fla. Dist. Ct. App. 2008) (same).

policy, neither party should have the option to make it legally enforceable; but if the agreement simply offends one of the parties, that party should have the option to make it legally enforceable.

One commentator, however, has argued that the distinction between void and voidable is ultimately based on the degree of offensiveness of the behavior: "A contract induced by physical compulsion is void. If the duress involves only threats, the contract is voidable and subject to ratification. The latter type of duress, closely resembling normal bargaining conduct, which typically involves implied threats, is less offensive, and courts give it a lesser sanction."<sup>55</sup>

In contrast to a void agreement, a voidable contract is where one or more of the parties have the power to either void it and thus avoid any legal relations created by the contract or ratify it and make it enforceable by either party.<sup>56</sup> In contrast to a void agreement, which is void at inception, a voidable contract "is valid and has its usual legal consequences until the power of avoidance is exercised."<sup>57</sup> Examples of voidable contracts are ones entered into by persons with only partial capacity to contract, such as minors,<sup>58</sup> and persons capable of manifesting assent but suffering from a mental illness<sup>59</sup> or intoxication,<sup>60</sup> or ones entered into as a result of mistake,<sup>61</sup> misrepresentation,<sup>62</sup> duress by threat,<sup>63</sup> or undue influence.<sup>64</sup>

The most important consequence of deeming an agreement voidable rather than void at inception is the fact that a void contract can be ratified by the aggrieved party. A ratification is essentially a waiver of the power to void the contract.<sup>65</sup> Ratification can result from affirmation or delay, but it can only occur after the defect giving rise to the voidable nature of the contract ceases to exist.<sup>66</sup>

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55. Jonathan E. Breckenridge, *Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements*, 1991 ANN. SURV. AM. L. 925, 946 (1992).

56. RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981); PERILLO, *supra* note 11, at 18-19.

57. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. e (AM. LAW INST. 1981).

58. *Id.* § 14.

59. *Id.* § 15.

60. *Id.* § 16.

61. *Id.* §§ 152-53.

62. *Id.* § 164.

63. *Id.* § 175.

64. *Id.* § 177.

65. *See, e.g.*, *Augusta Motor Sales Co. v. King*, 137 S.E. 102, 103 (Ga. Ct. App. 1927) (equating ratification with a waiver).

66. RESTATEMENT (SECOND) OF CONTRACTS §§ 380-381 (AM. LAW INST. 1981).

Affirmation occurs when the party with the power of avoidance “manifests to the other party [an] intention to affirm it.”<sup>67</sup> For example, a party affirms the contract when she indicates a willingness to go forward with the transaction.<sup>68</sup> Affirmation can also occur through conduct.<sup>69</sup> For example, affirmation occurs when a party “acts with respect to anything that [s]he has received in a manner inconsistent with disaffirmance,”<sup>70</sup> such as continuing to use any property received under the contract as if it were her own.<sup>71</sup> Affirmation also usually occurs if a party continues with performance of the contract.<sup>72</sup>

A ratification can also occur through a mere delay in disaffirming, even if the party has not exercised dominion during the relevant time period over anything received from the other party.<sup>73</sup> This will occur when the party with the power of avoidance fails to disaffirm within a reasonable time.<sup>74</sup> The reasonable time period, however, does not begin until ratification is possible.<sup>75</sup> Relevant factors in determining what is a reasonable time include the following: whether the party with the power of avoidance was able to speculate at the other party’s risk (for example, a delay disaffirming until facts arose other than those providing the power of avoidance that made the contract unfavorable to the party seeking to disaffirm); whether the delay resulted in justifiable, detrimental reliance by the other party or third parties; whether the power of avoidance was the result of either party’s fault; and whether “the other party’s conduct contributed to the delay.”<sup>76</sup>

The power to ratify is not, however, the only important consequence of a contract being voidable rather than void at inception. The distinction is also important (with respect to duress) when the improper threat is by a person who is not a party to the transaction. In such a situation, the contract is not voidable by the victim if the other party to the transaction, at the time of entering into the contract, had no reason to know of the duress.<sup>77</sup> Although this exception requires that the other party in good faith give value or rely

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67. *Id.* § 380(1).

68. *Id.* § 380 cmt. a.

69. *Id.* cmt. b.

70. *Id.* § 380(1).

71. *Id.* § 380 cmt. b.

72. *Id.* cmt. b, illus. 2.

73. *Id.* § 381.

74. *Id.*

75. *Id.* cmt. b.

76. *Id.* § 381(3).

77. *Id.* § 175(2).

materially on the transaction,<sup>78</sup> “[v]alue’ includes a performance or a return promise that is consideration . . . so that the other party is protected if he has made the contract in good faith before learning of the duress.”<sup>79</sup> This rule, which protects an innocent party from third-party duress, “is analogous to the rule that protects against the original owner the good faith purchaser of property from another who obtained it by duress.”<sup>80</sup> The *Restatement* provides the following two illustrations:

A . . . induces B by duress to contract with C to sell land to C. C, in good faith, promises B to pay the agreed price. The contract is not voidable by B.<sup>81</sup>

[The facts otherwise the same], C learns of the duress before he promises to pay the agreed price. The contract is voidable by B.<sup>82</sup>

Importantly, however, if no contract was ever formed, the contract cannot be enforced by the other party even if he had no reason to know of the third-party duress.<sup>83</sup>

Inasmuch as this rule is analogous to the rule protecting a good-faith purchaser of property, it is useful to consider the rationale for that doctrine to provide insight into the rationale for the contract doctrine. The rationale for protecting good-faith purchasers of personal property (goods) has been explained as follows:

U.C.C. § 2-403 and § 9-307(1) [U.C.C. § 9-320 [Rev]] manifest the policy of the Code of protecting a buyer “who does not, in fact, expect, or should not be expected, to foresee and guard against the particular risk involved.”

U.C.C. § 2-403 was intended to determine the priorities between two innocent parties: (1) the original owner who parts with its goods through fraudulent conduct of another and; (2) an innocent third party who gives value for the goods to the perpetrator of the fraud without knowledge of the fraud. *By favoring the innocent third party, the Code endeavors to*

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78. *Id.*

79. *Id.* § 175 cmt. e.

80. *Id.*

81. *Id.* cmt. e, illus. 10.

82. *Id.* cmt. e, illus. 11.

83. *See id.* cmt. e.

*promote the flow of commerce by placing the burden of ascertaining, and preventing, fraudulent transactions on the one in the best position to prevent them, the original seller.*

The objective of the voidable title rule is to encourage the flow of trade.<sup>84</sup>

A similar issue arises when the contract is voidable and the party who makes the threat assigns his contract rights to a third party. The general rule is that an assignee takes contract rights subject to any defenses that the obligor could assert against the assignor/obligee.<sup>85</sup> In other words, the assignee typically steps into the shoes of the assignor/obligee and acquires no greater rights than the assignor/obligee had against the obligor. An important exception, however, is the holder-in-due-course doctrine. A third party who is a holder in due course is only subject to the obligor's so-called real defenses and takes free of the obligor's so-called personal defenses.<sup>86</sup> A holder in due course is, in effect, a "Superplaintiff."<sup>87</sup>

To attain holder-in-due-course status, the assignee must have been assigned a negotiable instrument and must have given value for it in good faith and without actual or constructive notice of the defense.<sup>88</sup> For something to be a negotiable instrument, "it must be an unconditional promise or order to pay a fixed amount of money . . . on demand or at a definite time."<sup>89</sup> A party has notice of a defense if she "(a) has actual knowledge of it; (b) has received a notice or notification of it; or (c) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists."<sup>90</sup>

The doctrine's principal purpose is "to increase the transferability and liquidity of negotiable instruments . . . effectively turn[ing them] into a replacement for currency by [reducing concern about] defenses the makers might have had."<sup>91</sup> The justification for the doctrine is

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84. 3A LARRY LAWRENCE, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-403:8 (3d ed. 2009) (emphasis added) (footnotes omitted).

85. See RESTATEMENT (SECOND) OF CONTRACTS § 336(2) (AM. LAW INST. 1981).

86. U.C.C. § 3-305 (AM. LAW INST. & UNIF. LAW COMM'N 2017); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 733-34 (6th ed. 2010).

87. WHITE & SUMMERS, *supra* note 86, at 689.

88. See U.C.C. § 3-302; see also WHITE & SUMMERS, *supra* note 86, at 691.

89. WHITE & SUMMERS, *supra* note 86, at 694-95 (parentheses omitted); see also U.C.C. § 3-104.

90. WHITE & SUMMERS, *supra* note 86, at 714.

91. Kurt Eggert, *Held Up in Due Course: Codification and the Victory of Form Over Intent in Negotiable Instrument Law*, 35 CREIGHTON L. REV. 363, 366 (2002); see also Gregory E. Maggs, *The Holder in Due Course Doctrine as a Default Rule*, 32 GA.

thus to facilitate different types of transactions.<sup>92</sup> For example, it encourages large lenders to use their capital to buy consumer paper from individual lenders, which in turn encourages individual lenders and merchants to do business with consumers.<sup>93</sup> It also facilitates the transfer of checks, making the recipient more willing to accept them knowing that she can take them free from defenses that might exist between the parties to the underlying transaction.<sup>94</sup>

The holder-in-due-course doctrine divides defenses into two types: real defenses and personal defenses.<sup>95</sup> Real defenses are those that apply even against a holder in due course.<sup>96</sup> The real defenses include duress but only when it nullifies the obligation “under other law” (i.e., state common law).<sup>97</sup> Thus, whether duress is a real defense depends on whether the type of duress, under state common law, results in a void agreement or a voidable contract. The Code’s Official Comment states:

If under the state law the effect is to render the obligation of the instrument entirely null and void, the defense may be asserted against a holder in due course. If the effect is merely to render the obligation voidable at the election of the obligor, the defense is cut off.<sup>98</sup>

This incorporation of state common law and its distinction between a void agreement and a voidable contract does, however, create some difficulties. As discussed, the decision under state common law as to whether an agreement is void or voidable is typically based on whether the elements of formation are lacking, whether the agreement is injurious to the public or just one of the parties, and whether a party should have the power to ratify the agreement. The holder-in-due-course doctrine, however, is about protecting innocent purchasers for value by placing the risk on the

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L. REV. 783, 784–85 (1998) (“The standard justification for immunizing a holder in due course from claims and defenses is that the immunity will encourage beneficial commercial transactions.”).

92. See WHITE & SUMMERS, *supra* note 86, at 690.

93. See *id.*

94. See *id.*

95. See *id.* at 733–34.

96. See *id.* at 733.

97. *Id.* at 733, 737; see also FARNSWORTH, *supra* note 36, at 255 n.2 (“Duress that ‘nullifies the obligation of the obligor’ is a *real* defense to an asserted obligation on a negotiable instrument, i.e., a good defense even when the instrument is in the hands of a good faith purchaser (known as a *holder in due course*). UCC § 3-305(a)(1),(b).”).

98. U.C.C. § 3-305 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2017).

innocent person best able to prevent the defect and by facilitating the assignment of instruments, thus implicating different policy choices from those involved in the void versus voidable choice.

How the authorities have treated an agreement entered into because of a threat of imminent physical harm—as either a void agreement or a voidable contract—is the subject of the next section.

### III. THE AUTHORITIES

The traditional rule has been that a threat of imminent physical harm renders a contract voidable, rather than resulting in a void agreement. The first notable case to address whether a threat of imminent physical harm resulted in a void agreement or a voidable contract, and which set forth the traditional rule, was *Fairbanks v. Snow*, an opinion decided by the Supreme Judicial Court of Massachusetts in 1887 and written by Justice Oliver Wendell Holmes, Jr.<sup>99</sup>

In *Fairbanks*, the plaintiff sued the defendant on a promissory note signed by the defendant and her husband, and which was secured by property of the defendant.<sup>100</sup> The defendant argued that she signed the note because her husband threatened to commit suicide unless she signed it.<sup>101</sup> There were, however, actions by the defendant that could arguably have served as her ratification of the agreement.<sup>102</sup> For example, after the alleged threat she went with her husband to an attorney's office and signed the note and a mortgage covering her property, without disclosing the threat.<sup>103</sup> Also, after the note had been delivered and one installment paid, she went to the plaintiff and offered to pay the balance, recognizing the note as binding on her.<sup>104</sup>

The plaintiff argued that he was an innocent holder against whom the defense of duress could not be asserted.<sup>105</sup> The defendant countered that “[a] contract, to be binding, must be the result of the free assent of the parties,” and asked the trial judge to rule that if the note was obtained under duress, it was immaterial whether the

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99. *Fairbanks v. Snow*, 13 N.E. 596, 596, 598 (Mass. 1887). Before sitting on the U.S. Supreme Court, Justice Holmes was a justice on the Supreme Judicial Court of Massachusetts, serving from 1882 to 1902. THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 272 (Roger K. Newman ed., 2009).

100. *Fairbanks*, 13 N.E. at 596–97.

101. *Id.* at 597.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

plaintiff was unaware, at the time he received the note, of the duress.<sup>106</sup> The defendant also argued that “[t]he subsequent actions of the defendant, relative to arrangements for paying the note, are not a ratification or confirmation of the note, as it does not appear that what she did was with such intent, or with a knowledge of the invalidity of the note.”<sup>107</sup> The trial judge, however, refused to rule that lack of notice to the plaintiff of the duress was irrelevant and then found that the plaintiff had no knowledge of it.<sup>108</sup> The trial judge then ruled for the plaintiff on the basis that, regardless of whether there was duress, the defendant had ratified the note.<sup>109</sup>

The defendant only appealed the trial court’s refusal to make the requested ruling regarding the irrelevance of lack of notice to the plaintiff.<sup>110</sup> Justice Holmes, writing for the court, stated as follows:

No doubt, if the defendant’s hand had been forcibly taken and compelled to hold the pen and write her name, the signature would not have been her act, and if the signature had not been her act, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not . . . . But duress, like fraud, only becomes material, as such, on the footing that a contract or conveyance has been made which the party wishes to avoid. *It is well settled that when, as usual, the so-called “duress” consists only of threats, and does not go to the height of such bodily compulsion as turns the ostensible party into a mere machine, the contract is only voidable . . . .* This rule necessarily excludes from the common law the often recurring notion . . . and much debated by the civilians, that an act done under compulsion is not an act, in a legal sense.<sup>111</sup>

The court therefore held that the defendant’s requested instruction was not supported by the law.<sup>112</sup>

Thus, the court in *Fairbanks* held that the husband’s threat to kill himself unless his wife assented to the agreement resulted in a voidable contract, not a void agreement, and that the defense of duress could not be asserted against an innocent party who gave value without notice of the threat. Holmes made it clear that this

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106. *Id.* at 598.

107. *Id.*

108. *Id.* at 596–97.

109. *Id.* at 598.

110. *Id.*

111. *Id.* (emphasis added).

112. *Id.* at 599.

result was dictated by the objective theory of contract, noting that “[a] party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence.”<sup>113</sup>

Professor Samuel Williston, in his treatise published in 1920, was concerned about the difficulty of line drawing, and followed Holmes’s lead:

It is not infrequently stated as the reason why an instrument obtained under duress may be avoided, that the duress has deprived the person subjected to it of the capacity to consent, and that any writing which he may have signed is not in fact his contract, though courts making such statements would not be likely to carry them to their logical conclusion. If they did they would hold void every instrument obtained under duress. It could not be ratified and could only have effect in favor of innocent third persons where an estoppel could be proved. It could make no difference whether the means of coercion were rightful or wrongful. The only inquiry would relate to contractual capacity. The truth of the situation, however, is expressed by Holmes, J. [in *Fairbanks v. Snow*]: “Duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists of only threats, the contract is only voidable.

“This rule necessarily excludes from the common law the often recurring notion just referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. *Tamen coa ctus volui*.” It follows that only the party suffering from duress can set it up. Neither the party exercising coercion, nor third persons can do so.<sup>114</sup>

But, Williston noted, “[i]f a man by force compels another to go through certain indications of assent, as by taking his hand and forcibly guiding it, there is no real expression of mutual assent for the act is not that of him whose hand was guided. He is a mere

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113. *Id.* at 598–99.

114. SAMUEL WILLISTON, WILLISTON ON CONTRACTS 2856 (1920) (footnotes omitted) (quoting *Fairbanks v. Snow*, 13 N.E. 596, 598 (Mass. 1897)).

automaton.”<sup>115</sup> Absent such an exceptional case, however, duress renders the transaction merely voidable, Williston concluded.<sup>116</sup>

Thereafter, the *Restatement of Contracts*, published in 1932 by the ALI with Williston as its Reporter,<sup>117</sup> made it clear that it subscribed to Holmes’s distinction between physical compulsion and a threat of bodily harm, by providing the following illustration:

A is a bona fide purchaser for value of an automobile stolen from B, and when B demands the machine A becomes violent and threatens to knock B down. In an angry conversation then ensuing A says, “I will agree to pay you \$100 for your claim, and you will release here and now all right to this machine.” B, *induced by fear of physical violence* if he refuses, signs the release presented to him. The transaction is *voidable*.<sup>118</sup>

Thus, there came to be recognized two different types of duress: physical compulsion and threat,<sup>119</sup> with only the former rendering an agreement void at inception.

The *Restatement (Second) of Contracts*, published in 1981 by the ALI, maintained the distinction set down by Holmes, Williston, and the first *Restatement*, explaining it as follows:

In one, a person physically compels conduct that appears to be a manifestation of assent by a party who has no intention of engaging in that conduct. The result of this type of duress is that the conduct is not effective to create a contract. In the other, a person makes an improper threat that induces a party who has no reasonable alternative to manifesting his assent. The result of this type of duress is that the contract that is created is voidable by the victim. This latter type of duress is in practice the more common and more important.<sup>120</sup>

115. *Id.* at 2854.

116. *Id.*

117. See RESTATEMENT OF CONTRACTS ix (AM. LAW INST. 1932).

118. *Id.* § 493 cmt. a, illus. 1 (emphasis added).

119. See FARNSWORTH, *supra* note 36, at 255; MURRAY, *supra* note 42, at 511.

120. RESTATEMENT (SECOND) OF CONTRACTS ch. 7, topic 2, intro. note (AM. LAW INST. 1981); see also FARNSWORTH, *supra* note 36, at 255 (“Under the general principles of contract law relating to assent, if a victim acts under physical compulsion . . . by signing a writing under such force that the victim is a ‘mere mechanical instrument,’ the victim’s actions are not effective to manifest assent.”) (footnote omitted) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. a (AM. LAW INST. 1981) and citing *Fairbanks v. Snow*, 13 N.E. 596 (Mass. 1887) (dictum by Holmes J.)).

With respect to duress by physical compulsion, the *Restatement (Second)* provides the following rule: “If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.”<sup>121</sup> As noted by Professor Perillo, “[t]hese situations involve the absence of consent rather than coerced consent.”<sup>122</sup> Without a manifestation of assent, an essential element of contract formation is missing.<sup>123</sup>

The comment to this *Restatement (Second)* section states that it is an application of “the general principle [that] a party’s conduct is not effective as a manifestation of his assent if he does not intend to engage in it.”<sup>124</sup> For example, “[a] ‘manifestation’ of assent is not a mere appearance; the party must in some way be responsible for that appearance. There must be conduct and a conscious will to engage in that conduct.”<sup>125</sup>

The comment further states that “[t]his Section involves an application of that principle to those relatively rare situations in which *actual physical force* has been used to compel a party to *appear to assent* to a contract.”<sup>126</sup> It continues: “The essence of this type of duress is that a party is compelled by physical force to do an act that he has no intention of doing,” and it is sometimes said that the victim is “a mere mechanical instrument.”<sup>127</sup> When there is physical compulsion, “there is no contract at all, or a ‘void contract’ as distinguished from a voidable one.”<sup>128</sup> The following illustration is then provided:

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121. RESTATEMENT (SECOND) OF CONTRACTS § 174 (AM. LAW INST. 1981). This rule was also included in the *Restatement (First) of Contracts*. See RESTATEMENT OF CONTRACTS § 494 (AM. LAW INST. 1932) (“Where duress by one person compels another to perform physical acts manifesting apparent assent to a transaction the transaction does not affect his contractual relations if the party under compulsion . . . is a mere mechanical instrument without directing will in performing the acts apparently indicating assent.”).

122. PERILLO, *supra* note 11, at 284.

123. See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981) (“[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”).

124. *Id.* § 174 cmt. a.

125. *Id.* § 19 cmt. c.

126. *Id.* § 174 cmt. a.

127. *Id.*

128. *Id.*

A presents to B, who is physically weaker than A, a written contract prepared for B's signature and demands that B sign it. B refuses. A grasps B's hand and compels B by physical force to write his name. B's signature is not effective as a manifestation of his assent, and there is no contract.<sup>129</sup>

In contrast to duress by physical compulsion, duress by threat exists when "a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative. . . ."<sup>130</sup> The *Restatement (Second)* includes a threat of physical harm within the doctrine of duress by threat, rather than duress by physical compulsion. A comment to the duress by threat section notes that the threat can be a threat involving the loss of life, and gives the following example of an implied threat of imminent physical harm: "[I]f one person strikes or imprisons another, the conduct may amount to duress because of the threat of further blows or continued imprisonment that is implied."<sup>131</sup> The *Restatement (Second)* provides a comment defining threats as improper

if the threatened act is a crime or a tort, as in the traditional examples of threats of physical violence and of wrongful seizure or retention of goods. Where physical violence is threatened, it need not be to the recipient of the threat, nor even to a person related to him, if the threat in fact induces the recipient to manifest his assent.<sup>132</sup>

The *Restatement (Second)* gives the following illustration:

A is a good faith purchaser for value of a valuable painting stolen from B. When B demands the return of the painting, A threatens to poison B unless he releases all rights to the painting for \$1,000. B, having no reasonable alternative, is induced by A's threat to sign the release, and A pays him \$1,000. The threatened act is both a crime and a tort, and the release is *voidable* by B.<sup>133</sup>

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129. *Id.* § 174 cmt. a, illus. 1.

130. *Id.* § 175(1).

131. *Id.* § 175(1) cmt. a.

132. *Id.* § 176 cmt. b (internal reference omitted).

133. *Id.* § 176 cmt. b, illus. 1 (emphasis added).

The *Restatement (Second)* thus draws a line between the use of force and the threat to use force.<sup>134</sup>

This distinction has been followed by some courts. For example, in *Cox v. Cox*, the plaintiff alleged that she was coerced into signing a separation agreement with her husband as a result of his threats of physical harm, but the court held that an issue was whether she ratified the agreement,<sup>135</sup> indicating the contract was merely voidable. Similarly, in *Seay v. Dodge*, the court held that the victim of alleged threats of physical violence ratified the agreements.<sup>136</sup> In *Goodwin v. Webb*, the court held that a wife ratified an agreement that she had signed after the husband threatened to “beat the hell out of her.”<sup>137</sup>

The ALI, however, in the official comments to Article 3 of the U.C.C., published in 1951, took a different position. The defense of duress was specifically discussed in the Official Comment to the holder-in-due-course section. Despite the rule itself incorporating state common law, the comment took the position that an instrument signed at gunpoint would be void:

Duress . . . is a matter of degree. *An instrument signed at the point of a gun is void*, even in the hands of a holder in due course. One signed under threat to prosecute the son of the maker for theft may be merely voidable, so that the defense is cut off. . . . If under that law the effect of the duress . . . is to make the obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise it is cut off.<sup>138</sup>

Although the official comments are not binding unless enacted by the state legislatures that adopt the U.C.C., they are persuasive authority in interpreting it.<sup>139</sup> In fact, one court, following the Official Comment,

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134. See *EverBank v. Marini*, 134 A.3d 189, 199 (Vt. 2015) (“To the extent that the Restatement does address this sort of potentially lethal conduct, it appears to consider it within the realm of conduct that would render an agreement voidable, but not void.”).

135. 330 S.E.2d 506, 507 (N.C. Ct. App. 1985).

136. No. 95 C 3643, 1998 WL 460273, at \*3 (N.D. Ill. July 27, 1998).

137. 568 S.E.2d 311, 313 (N.C. Ct. App. 2002); see also *Goodwin v. Webb*, 577 S.E.2d 621 (N.C. 2003) (adopting dissenting opinion of lower court).

138. U.C.C. § 3-305 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2017) (emphasis added).

139. LARRY LAWRENCE, ANDERSON ON THE UNIVERSAL COMMERCIAL CODE § 1-102:33 (3d. ed. 2003).

held that a victim was not liable for her withdrawal of funds from her bank account when forced to do so at knifepoint by a kidnapper.<sup>140</sup>

Two recent court opinions have also disagreed with the traditional rule set forth in *Fairbanks* and the *Restatements*, thus establishing a modern trend to find such agreements void at inception. In *United States for Use of Trane Co. v. Bond*, decided in 1991, the defendant signed a payment bond as surety to cover labor and materials expended by persons on a construction project.<sup>141</sup> When the principal and her husband (who was also a surety) filed petitions in bankruptcy, the U.S., as plaintiff for the use of The Trane Company, sued the defendant to recover on the payment bond.<sup>142</sup> The defendant raised the defense of duress, arguing that she signed the bond because of her husband's physical threats.<sup>143</sup> She did not, however, argue that her husband actually picked up her hand and physically forced her to sign, or that the plaintiff knew of the threats.<sup>144</sup>

The plaintiff argued that because it had no knowledge of the duress and the defendant had not been physically forced to sign, the defense of duress could not be raised against it.<sup>145</sup> The court, answering a certified question from a federal district court, extended the doctrine of physical compulsion to threats of imminent physical harm:

To the extent that the second Restatement suggests in § 174 that only physically applied force to directly compel the victim to execute the document will suffice to vitiate a contract as to innocent third parties, we reject such an inflexible rule. Rather . . . a contract may be held void where, in addition to actual physical compulsion, *a threat of imminent physical violence is exerted upon the victim of such magnitude as to cause a reasonable person, in the circumstances, to fear loss of life, or serious physical injury, or actual imprisonment for refusal to sign the document.* In other words, duress sufficient to render a contract void consists of the actual application of

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140. *Reynolds v. Dime Sav. Bank*, 467 N.Y.S.2d 971, 973, (N.Y. Civ. Ct., 1983).

141. 586 A.2d 734, 734 (Md. Ct. App. 1991).

142. *Id.* at 734–35.

143. *Id.*; see also Post, *supra* note 4, at 481 (“In affidavits submitted in two other suits brought by surety companies for indemnity on bonds issued on behalf of Mech-Con Corporation, a construction company owned by Albert Bond, Lorna Bond stated that her husband threatened her. ‘If I didn’t move fast enough or do as he said, he would physically attack me, break up household items, threaten to throw me out of the house.’”).

144. *Bond*, 586 A.2d at 735.

145. *Id.*

physical force that is sufficient to, and does, cause the person unwillingly to execute the document; as well as the threat of application of immediate physical force sufficient to place a person in the position of the signer in actual, reasonable, and imminent fear of death, serious personal injury, or actual imprisonment.<sup>146</sup>

The court then held that it was for the federal district court to determine whether, under the rule announced, the agreement was void at inception or merely voidable.<sup>147</sup>

A recent opinion by the Supreme Court of Vermont, *EverBank v. Marini*, reached a similar conclusion. *EverBank* arose out of Gary and Caroline Marini's 2005 purchase of a house in Middlebury, Vermont.<sup>148</sup> In early 2009, Gary wanted to borrow money against the house.<sup>149</sup> Caroline opposed the idea, but Gary told her he would mortgage the house regardless, and he completed a loan application with a lender.<sup>150</sup> In early April, Gary told Caroline that a notary was coming to the house that weekend to witness her signature on the mortgage documents.<sup>151</sup> When the notary called the house to confirm the appointment, Caroline told the notary she disagreed with the loan and would not sign the documents.<sup>152</sup> The lender then sent Gary an email stating Caroline had cancelled the transaction and that under Vermont law her signature on the documents was necessary.<sup>153</sup>

Gary became extremely angry and brought Caroline and two of their children (ages eight and nineteen) into the kitchen and made them sit at the table.<sup>154</sup> He berated Caroline, stating she was incompetent and that their children were no longer to consider her an adult, and that he was going to divorce her.<sup>155</sup> He then removed a pair of large scissors from a drawer and waved them around while continuing to berate her.<sup>156</sup> Caroline, who was frightened for her and her children's physical safety, told Gary she would sign the documents if he would leave the children alone.<sup>157</sup> The following evening she

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146. *Id.* at 740 (emphasis added).

147. *Id.*

148. *EverBank v. Marini*, 134 A.3d 189, 191 (Vt. 2015).

149. *Id.*

150. *Id.* at 191–92.

151. *Id.* at 192.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

signed them.<sup>158</sup> When the notary asked her if she was signing of her own free will, she replied, “It is what it is.”<sup>159</sup> The lender then assigned the mortgage to Bank of America, and in November 2009, when Caroline became aware of the assignment, she contacted Bank of America, explaining to the representative that she had disagreed with the loan and that what had been done was wrong.<sup>160</sup>

In 2011, the Marinis defaulted on the loan, and Bank of America initiated foreclosure proceedings.<sup>161</sup> Caroline asserted duress as a defense.<sup>162</sup> Thereafter, Bank of America assigned the mortgage to EverBank,<sup>163</sup> and EverBank was substituted for Bank of America.<sup>164</sup> The trial court then granted summary judgment in Caroline’s favor, holding that the undisputed facts showed that, as a result of duress, the mortgage was void as to her, not simply voidable, and that even if the mortgage was simply voidable, EverBank offered no evidence Caroline ratified the contract.<sup>165</sup> The court also noted that EverBank was also at least on constructive notice of the defense and was thus not a bona fide purchaser who could avoid the defense.<sup>166</sup>

On appeal, the issue before the Supreme Court of Vermont was whether the undisputed facts demonstrated that the agreement was void at inception (and thus never a contract) or whether a voidable contract was formed.<sup>167</sup> Resolution of the issue was important because if the agreement was void at inception, it was not subject to ratification by Caroline, whereas if a contract formed and it was voidable, it was subject to ratification and the defense could also be lost if EverBank was a good faith purchaser of the mortgage without notice of the defense.<sup>168</sup> The parties agreed that “physical compulsion” renders an agreement void at inception, but the issue before the court was whether the undisputed facts constituted physical compulsion.<sup>169</sup>

The court, disagreeing with the *Restatement (Second) of Contracts*, stated:

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158. *Id.*

159. *Id.*

160. *Id.* at 192–93.

161. *Id.* at 193.

162. *Id.*

163. *Id.*

164. *Id.* at 194.

165. *Id.*

166. *Id.*

167. *Id.* at 195–96.

168. *Id.* at 196.

169. *Id.*

[U]nder Vermont law improper conduct sufficient to render a contract void, as opposed to voidable, consists of the actual application of physical force that is sufficient to, and does, cause a victim to appear to assent to the execution of a document, *as well as the threat of immediate application of physical force sufficient to place a person in the position of the signer in actual, reasonable, and imminent fear of death or serious personal injury.*<sup>170</sup>

Nevertheless, the court held that the undisputed facts did not constitute physical compulsion even under its expanded definition because Caroline signed the documents the day after Gary brandished the scissors.<sup>171</sup> Thus, the contract was voidable, not an agreement void at inception, and could be ratified by Caroline.

The court then held that the evidence before the trial court was insufficient for the court to determine if she had ratified the contract because neither party had addressed this issue.<sup>172</sup> The court also held that EverBank was not a bona fide purchaser because it had at least constructive notice of the duress defense since it acquired the mortgage seven months after Caroline raised the defense of duress in her answer.<sup>173</sup>

Commentators have expressed agreement with this modern trend. The late Chancellor John Edward Murray asserted that “where [the victim] signs at gunpoint or another physical threat, it is clear that the signature does not manifest assent since the signer had no intention of performing the act. . . . If a check is signed at gunpoint, the check is void . . . .”<sup>174</sup> The modern edition of Williston on Contracts also categorizes a threat of imminent physical harm under the doctrine of physical compulsion for a similar reason:

A similar outcome [to physically compelling assent] should occur where the physical force or compulsion is somewhat more remote, though no less compelling, as where the victim is forced to sign a document reflecting a bargain at gunpoint; here, too, although the act appears to be that of the victim, it is no more voluntary or intentional than where the coercing party actually manipulates the victim’s arm.<sup>175</sup>

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170. *Id.* at 200 (emphasis added).

171. *Id.* at 201.

172. *Id.* at 202.

173. *Id.*

174. MURRAY, *supra* note 42, at 511.

175. RICHARD A. LORD, WILLISTON ON CONTRACTS § 71:1 (4th ed. 2003).

The late Professor Marvin A. Chirelstein likewise stated that assent obtained through threat of violence renders an agreement void.<sup>176</sup> Professor Perillo took a middle path, arguing that physical compulsion would include “where a party is made to sign an instrument at gun point *without knowledge of its contents*,”<sup>177</sup> tracking the rule with respect to a misrepresentation of a contract’s terms (fraud in the factum).<sup>178</sup>

One commentator has argued that duress should render an agreement void to prevent a conflict with the rule that a person who acquires property by theft cannot transfer title to a bona fide purchaser for value.<sup>179</sup> Theft includes obtaining goods by threat or deception.<sup>180</sup> One court that addressed this argument, however, held that the U.C.C. rule, which permits title to pass, applied rather than the state’s stolen property statute because the former was enacted later and was more specific than the latter.<sup>181</sup>

#### IV. ANALYSIS

There is no doubt that pressure to enter into a contract, applied by a threat of imminent physical harm, should be discouraged as serving no useful purpose under any of the competing theories of contract law. That recognition, however, does not resolve whether the resulting agreement should be void or voidable. Any choice should seek to be internally consistent with other doctrines and be supported by good policy. This Section analyzes whether such a threat should result in a void agreement or a voidable contract.

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176. MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 81–82 (6th ed. 2010).

177. PERILLO, *supra* note 11, at 284 (emphasis added).

178. See RESTATEMENT (SECOND) OF CONTRACTS § 163 (AM. LAW INST. 1981). This Article assumes the victim was aware of the agreement’s contents or was not prevented from becoming aware of them.

179. D. J. Lanham, *Duress and Void Contracts*, 29 MODERN L. REV. 615, 618–19 (1966); see also 77A C.J.S. SALES § 411 (“If goods are stolen or otherwise obtained against the will of the owner, only void title can result. Thus, a thief only has void title to the goods. A thief or one who has acquired goods by theft cannot pass valid title to the stolen goods to a purchaser, even if the purchaser is a good-faith purchaser or a bona fide purchaser.”) (footnotes omitted).

180. See *West v. Roberts*, 143 P.3d 1037, 1040 (Col. 2006) (citing C.R.S. § 18-4-401(1)(a) (2006)).

181. *Id.* at 1044.

A. *Does the Victim Manifest Assent?*

The first issue that must be addressed is whether the victim in such a situation manifests assent to the agreement. If the victim has not assented, then there cannot be a voidable contract because a manifestation of mutual assent is an essential element of a contract.<sup>182</sup> The transaction would be considered void.

It has been argued that a person who agrees to a contract under a threat of imminent physical harm has not consented to the deal:

[I]n all contracts it is essential that there should be consent, or at least the appearance of consent. Not even the officious by-stander would care to testify that a person with a gun to his head appeared to consent to the transaction in hand, whatever kind of contract was involved. American law draws a line between cases where there is no consent (e.g., where A grasps B's hand, forcing it to make a mark or signature signifying B's consent) and cases where there is apparent consent. Into the latter category the gun-to-the-head situation is placed. It does not appear to whom consent in the second situation is apparent—certainly not to anyone present. If the test is persons not present, then consent may be apparent in both types of case. The American position does not seem tenable except on the view that in the latter type of case the law has been content to evaporate out of contract all notion of consent.<sup>183</sup>

Professor Chirelstein's support of the modern trend was likewise apparently based on the notion that there is no assent:

Promises extorted by violence or threat of violence are obviously not enforceable. Formation of a contract requires "assent" on the part of each of the contracting parties, and while a gun to the head will almost always compel an affirmative response from the victim, the law, for reasons too plain to require discussion, treats the resulting agreement as "void".<sup>184</sup>

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182. See RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981) ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

183. Lanham, *supra* note 179, at 619 (footnote omitted).

184. CHIRELSTEIN, *supra* note 176, at 81–82.

In contrast, the *Restatement's* approach is based on the notion that a person who manifests assent in response to a threat of imminent physical harm has still consented to the transaction, even if the choice was not a fair one. As recognized by Professor Charles Fried, "the response to a threat is a volitional one,"<sup>185</sup> noting that "[t]he shrewd and brave man who hands his wallet over to an armed robber makes a calculated decision."<sup>186</sup> Fried later provides the following example:

[W]hen parents pay a kidnapper to save their daughter's life, they may be expressing "the most genuine, heartfelt consent." The consent is real enough; the vice of it is that it was coerced in a manner that society brands as wrongful and is therefore not deemed the product of free will.<sup>187</sup>

To argue that the victim is not responsible for the manifestation of assent—as argued by some who support the modern trend—is to misapply that concept. A manifestation of assent occurs as long as the appearance of assent is either intentional or negligent.<sup>188</sup> When the victim assents because there is a gun to his head, his appearance of assent is quite intentional; his goal is surely to create the appearance of assent. Without such an appearance, he might lose his life. Whether he desires to assent does not affect the intentional nature of his assent. As noted by Fried, "the vice [of duress] is not the least bit cognitive: The victim of duress is all too aware of what is happening and what will happen to him. Duress relates not to rationality or cognition but to freedom or volition."<sup>189</sup> The problem is not whether there has been knowing assent; rather, it is whether there was a fair choice:

If I am hypnotized into signing a contract or if my hand is moved by another to make a mark signifying assent, I have not promised. Obviously, if the concept of duress covered only such gross instances of involuntary apparent assent it would not be of much interest. In fact duress covers many kinds of situations in which it does not seem right to treat a *knowing* act of agreement as binding because in one way or another it is felt that there was no *fair choice*.<sup>190</sup>

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185. FRIED, *supra* note 32, at 94–95.

186. *Id.* at 94.

187. PERILLO, *supra* note 11, at 274–75.

188. RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. c (AM. LAW INST. 1981).

189. FRIED, *supra* note 32, at 93.

190. *Id.* at 93–94 (second emphasis added).

Take, for example, the buyer who pays an exorbitant price for gasoline because there is a fuel shortage and she needs the gasoline to get to the hospital. No one would argue that her manifestation of assent was not intentional. One might argue that she had little choice but to assent, but her manifestation was not involuntary in the sense that she did not have the intent to lead the other party to believe she was assenting to the deal. Similarly, if the victim in a gun-to-the-head situation was asked, "Did you agree to the contract?" the victim would be more likely to reply, "Yes, but . . ." rather than "No."

The law could, of course, narrow the definition of "manifestation of assent" and exclude from its ambit those choices over which the party has little choice, but such a narrowing would be fraught with difficult line drawing. What does it mean to have little choice? For example, did the woman who paid an exorbitant price for the gasoline have little choice? Does a person with a mental illness who enters into a contract have little choice? What about a person unduly susceptible to persuasion? What about a minor? And why would consent be voluntary and intentional when there is a threat to commit bodily harm tomorrow but not so when there is a threat to commit immediate bodily harm?

Consideration of such matters discloses that the concept of voluntary and intentional consent is set across a continuum, and seeking to create a distinction between threats where assent is not voluntary and intentional and those where assent is voluntary and intentional invites line drawing about which few will agree, and is not a reasoned distinction capable of consistent application. Perhaps an exception could be created that is limited to having little choice when there is a threat of imminent physical harm, but that would create internal inconsistency within the concept of "manifestation of assent."

The other problem is that situations in which a party intentionally manifests assent, but is deemed to have had little choice but to assent, are dealt with by a variety of doctrines whose contours have been established to deal with the specifics of the circumstances. For example, the doctrine of unconscionability has arisen to address whether the woman who paid the exorbitant price for gasoline should be held to the deal.<sup>191</sup> Likewise, the doctrine of duress by threat has been designed to deal specifically with all improper threats.<sup>192</sup> If there is a concern with how the doctrine of duress by threat operates, that

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191. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

192. See *id.* § 175 cmt. a ("[T]he threat need only be improper within the rule stated in § 176.").

doctrine should be revised without manipulating the concept of manifestation of assent.

Chancellor Murray's argument is essentially that there is no promise by a person who assents under threat of physical harm.<sup>193</sup> It is an interesting argument, but it does not withstand scrutiny. "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."<sup>194</sup> Under this definition, the victim makes a promise, even when made in response to a threat of imminent physical harm. With respect to manifesting an intention, the law adopts an objective standard, rather than focusing on undisclosed intention.<sup>195</sup> Thus, "[a] promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct."<sup>196</sup> Surely the victim has reason to believe that the other party will infer an intention to perform. Why else would the other party make the threat, but to obtain such a statement of intention?

The other party is also justified in understanding that a commitment has been made. A *commitment* is commonly defined as "an agreement or pledge to do something."<sup>197</sup> When the other party puts a gun to the victim's head, the other party is justified in understanding that the victim is agreeing to perform the requested act. He might not be justified in the means of obtaining the commitment, and he might not be justified in believing he can legally enforce the resulting agreement, but he is justified in understanding that a commitment has been made.

In some situations, however, the threat is made to obtain the appearance of assent, such that the appearance can then be presented to a third party, such as a lender. An example would be a husband threatening his wife with imminent physical harm if she does not co-sign for a loan from a bank. If the husband knows that the wife is not in fact committing to pay off the loan, he is using her signature to trick the bank into making the loan. Is there still a manifestation of assent when there is such a sham agreement? As long as the bank is a party to the transaction or the wife knows that her commitment will be presented to the bank as a third party, then the wife has manifested

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193. See MURRAY, *supra* note 42, at 511.

194. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (AM. LAW INST. 1981).

195. See *id.* cmt. a.

196. *Id.* cmt. b.

197. See, e.g., *In re Firstcorp, Inc.*, 973 F.2d 243, 249 n.5 (4th Cir. 1992) ("[T]he common definition of commitment is '[a]greement or pledge to do something'. . . ." (quoting BLACK'S LAW DICTIONARY 248 (5th ed. 1979))).

assent to the bank and has made a promise to the bank, even if the wife has not manifested assent or made a promise to the husband.

Accordingly, a victim who agrees to a deal because of a threat of imminent physical harm has manifested assent to the agreement, even if the victim's choice was not a fair one. The resulting agreement is therefore not void at inception for failing to have one of the necessary elements of contract formation.

*B. Should the Victim Have the Power to Ratify?*

If a party's acquiescence to the deal constitutes a manifestation of assent when induced by a threat of imminent physical harm, the next issue is whether the victim should have the power to ratify the contract. The focus here shifts from the theoretical question of whether the victim manifests assent to a policy choice.

The power to ratify provides the victim of duress with the option to enforce the contract. In this sense, the power of ratification benefits the victim; however, the power to ratify is in fact more of a liability than a benefit because ratification can occur unintentionally. For example, conduct deemed inconsistent with a desire to disaffirm constitutes ratification,<sup>198</sup> as does waiting an unreasonable time before disaffirming.<sup>199</sup> Accordingly, the power to ratify is more often a trap for the unwary than a benefit for the knowing. Determining whether a victim of a threat of imminent physical harm should have the power to ratify should thus not focus as much on whether the victim should be given the benefit of intentional ratification, but whether the victim should be saddled with the liability of unintentional ratification.

The concept of ratification has several beneficial effects that support applying it to a contract entered into because of a threat of imminent physical harm. In some cases, whether the underlying events that would make the contract voidable ever occurred may be disputed. For example, the party accused of making the threat of imminent physical harm might deny the allegation. If the alleged victim engages in conduct constituting ratification, including unreasonably delaying disaffirmance, it will tend to show that the underlying events never happened. Ratification thus serves in some sense as an irrebuttable presumption that the events did not happen. This presumption reduces the transaction costs associated with litigation, though, of course, any irrebuttable presumption brings

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198. RESTATEMENT (SECOND) OF CONTRACTS § 380(1) (AM. LAW INST. 1981).

199. *Id.* § 381(1).

with it a risk of error because one fact is presumed to be true from the existence of another fact.<sup>200</sup>

The concept of ratification also protects the other party's and a third party's reliance on the victim's apparent intention to proceed with the transaction. This interest is not, however, strongly implicated with respect to the person making a threat of imminent physical harm. For example, it has been argued that

[i]n cases of duress [unlike other defenses that render a contract voidable] there is no moment of time in which the guilty party is in any doubt as to the desire of the other party to rescind the contract. Even as the "contract" is being made it is clear that the innocent party wishes to rescind it.<sup>201</sup>

The victim might manifest assent, but the party making the threat is usually not justified in believing that the other party would desire the deal were it not for the threat. A situation involving duress is thus unlike some other defenses that render a contract voidable, such as the infancy doctrine,<sup>202</sup> mental infirmity,<sup>203</sup> intoxication,<sup>204</sup> and mistake,<sup>205</sup> because it would usually not be as apparent that the aggrieved party would not enter into the transaction were it not for the particular defect. The reliance interest is stronger, however, with respect to innocent parties who rely on the contract and who had no reason to know of the improper threat.

There is a defense where ratification applies yet the wrongdoer is likely aware that the victim would not assent but for the wrongdoing—the doctrine of misrepresentation.<sup>206</sup> Although the wrongdoing is not as severe as a threat of imminent physical harm, and thus the wrongdoer is not as likely to know that the victim would not have assented but for the wrongdoing, the likelihood is still high. Thus, if ratification did not apply to a threat of imminent physical

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200. See Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1544–45 (1974) (footnote omitted) (“[T]hese presumptions are not evidentiary rules. Rather, they are substantive rules of law not at all related to fact-finding procedures. Their conclusive nature removes them from the realm of fact-finding by requiring that a presumed fact be found if the basic fact is established.”).

201. Lanham, *supra* note 179, at 619.

202. RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981).

203. *Id.* § 15(1).

204. *Id.* § 16.

205. *Id.* §§ 152–53.

206. See *id.* § 164(1) (“If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”).

harm, this type of wrongdoing would be singled out for separate treatment and be inconsistent with the general rules regarding defenses based on defects in the contract formation process.

Also, the victim of a threat of physical harm can be given considerable leeway with respect to what will be considered a reasonable time to disaffirm. Consider the case of *Brown v. Peck*.<sup>207</sup> The court held that several years' delay was not unreasonable because of the continuing concern of physical violence:

But it is further urged, that the complainant, by his delay in asserting his rights, has lost them; that by failing to give earlier notice of his intention to repudiate his deed, by the commencement of a suit or otherwise, he has ratified and confirmed it. There is no doubt, that by long acquiescence in a contract merely voidable, the right to avoid it may be lost. But in order to charge a person with delay or laches, he must be shown to have been in a condition safely to assert and enforce his rights. This deed was executed on the night of the 23d of November, A. D. 1847, and the bill was filed the 20th of September, A. D. 1850. In the meantime, the same reasons might have deterred him from attempting to avoid his deed, which operated to induce him to execute it. If he could not withhold the deed without being subject to midnight attacks and dangerous assaults, he might well hesitate for awhile [sic], about retracting what he had been forced to do. If the feeling of indignation towards him was so rife and so general in that neighborhood, as to lead to such illegal acts and demonstrations, we are far from saying that the complainant did not act wisely in delaying a resort to legal means to compel the cancellation of the deed thus extorted from him.<sup>208</sup>

Thus, the flexible nature of the ratification doctrine enables the court to avoid using it to create injustice. For example, establishing ratification is typically more difficult when there has been duress by a threat of imminent physical harm than in other situations. There would be little reason to believe the party desired the transaction at the time of manifesting assent, and thus there would be little reason to believe the party desired to affirm the contract. Some of the factors in deciding what is a reasonable time to disaffirm will also make the time period lengthy in a case involving a threat of imminent physical

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207. 2 Wis. 261 (1853).

208. *Id.* at 281–82.

harm. For example, relevant factors include whether the delay resulted in justifiable, detrimental reliance by the other party or third parties, and whether the power of avoidance was the result of either party's fault.<sup>209</sup> At least with respect to the person who made the threat, reliance on the delay in disaffirming would typically not be justifiable because that person should know the victim does not desire to proceed with the transaction. Also, the power of avoidance was due to the wrongdoing of the party making the threat.

This flexible nature of the ratification doctrine can be used to ensure that injustice does not occur in the most common situation involving a contract entered into because of a threat of imminent physical harm—a woman threatened by her husband. The court or jury, when deciding whether the victim's actions were sufficient to constitute ratification, can and should be sensitive to the difficulties a woman might have in disaffirming a contract under such circumstances. A reasonable time to disaffirm might be longer (perhaps much longer) than in other types of duress cases. Also, accepting the benefit of performance might not be as easily considered ratification under such circumstances. Expert testimony that puts the defendant's actions (or inactions) in the context of domestic abuse would be relevant to the issue of ratification. When the context is taken into account, the ratification doctrine can provide a balance for the interests of both the victim and the innocent party.

As previously noted, however, a commentator has argued that if duress merely renders a contract voidable it would conflict with the rule that a person acquiring property by theft cannot transfer title to a bona fide purchaser for value,<sup>210</sup> since theft includes obtaining goods by threat or deception.<sup>211</sup> But because the one court to address this argument held that the U.C.C. rule, which permits title to pass, applies rather than the state's stolen property statute,<sup>212</sup> holding that a voidable contract forms would not be inconsistent with other law.

Accordingly, to maintain consistency with the treatment of other defenses, and because the ratification doctrine has the flexibility to avoid injustice in particular cases, ratification should be possible, even when the threat was of imminent physical harm.

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209. RESTATEMENT (SECOND) OF CONTRACTS § 381(3) (AM. LAW INST. 1981).

210. Lanham, *supra* note 179, at 618–19.

211. West v. Roberts, 143 P.3d 1037, 1040 (Col. 2006).

212. *Id.* at 1044.

*C. Should Innocent Parties Be Given Priority Over the Victim?*

Even if the victim has disaffirmed rather than ratified the contract, the next issue will often be whether the contract can be voided if an innocent person was either the other party to the contract or an assignee. This issue is challenging because it requires deciding which of two innocent persons (the victim and the other innocent person) should bear the risk of the loss. Like the issue of ratification, this is ultimately a policy question.

Currently, the interests of the victim are subordinated to those of the other innocent person. For example, as previously discussed, when a third party makes the threat, the victim does not have the power of avoidance if the other party did not have reason to know of the threat.<sup>213</sup> When the document is a negotiable instrument and is assigned to an innocent third party for value, the assignee takes the document free of the defense of duress if the contract is merely voidable.<sup>214</sup> Thus, in such situations, the innocent party's reliance interest is protected over the victim's interest in avoiding the transaction.

There are, however, compelling reasons why an innocent person's reliance interest should not be given priority over the victim's interest. Those courts that follow the modern trend are likely troubled by a rule putting the interests of trade over the victim's interest in avoiding an agreement made under a threat of imminent physical harm. This concern is particularly appropriate when the value given by the innocent party was merely a promise to perform, and the contract remains executory at the time the innocent party is made aware of the duress. In such a situation, the innocent party has not relied in any definite way. Also, the victim might not have had any opportunity to provide notice to the innocent party if the innocent party manifested assent to the transaction before the victim.

Further, as previously discussed, the protection of good-faith purchasers of property when the goods were transferred between the original parties because of fraud is that the victim was in a better position to prevent the fraud than the third party, and thus, as between two innocent persons, the person in a better position to prevent the fraud should bear the risk.<sup>215</sup> But, with respect to this rationale, a contract entered into because of a threat of imminent physical harm is significantly different from fraud. The fact that the

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213. RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (AM. LAW INST. 1981).

214. U.C.C. § 3-305 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

215. 3A ANDERSON U.C.C. § 2-403:8 (3d. ed.).

threat is both imminent and in the nature of physical harm means that the victim is—in reality—in no better position to prevent the harm than the third party. Each is, in essence, equally powerless. Accordingly, the traditional justification for making the victim of wrongdoing bear the risk does not apply.

This positioning of the parties also explains why it makes sense to separate a threat of imminent physical harm from a threat of non-imminent physical harm. In the latter situation, there is greater justification to conclude that the victim is in a better position to prevent the duress. If the threat is of violence to be exacted in the future, or the victim is not asked to assent until sometime after the threat, the victim is arguably in a position to refuse to assent because the victim can contact law enforcement before the threat is carried out.

Thus, the competing interests are reduced to the victim's interest in not being held to a transaction the victim had no real opportunity to avoid and the innocent party's interest in enforcing an agreement when it had no reason to know of the duress. In such a situation, barring reliance by the innocent party of a definite nature (more than just promising to perform), the innocent party should typically bear the risk. The reason is that the third party will usually be an institution who can spread the risk of loss among all of its consumers. The victim, on the other hand, will usually be an individual who would suffer significant harm if the contract was enforced. Also, the drafters of the U.C.C. recognized that extending holder-in-due-course status to a situation in which assent was obtained by the threat of physical harm was unnecessary. As previously discussed, the Official Comment to the holder-in-due-course section states that a threat of physical harm would be a situation in which the resulting agreement was void at inception and thus not covered by the holder-in-due-course doctrine.<sup>216</sup> And it would, in fact, be difficult to argue that failing to provide automatic protection to innocent parties in situations involving a threat of imminent physical harm would disrupt the market much.

The problem is that the innocent-party doctrines, unlike ratification, have no flexibility in their current form. If the innocent party gave value (which includes a mere promise to perform) and had no reason to know of the duress, the innocent party's reliance (despite its lack of definiteness) is given priority over the victim's interest in being free from threats of physical harm. The solution then is to hold that while the ratification doctrine applies, the special doctrines

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216. U.C.C. § 3-305 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

protecting innocent parties do not apply in cases involving a threat of imminent physical harm. By solely applying the ratification doctrine, the court and jury will be able to balance the equities and reach a just result on a case-by-case basis, as previously discussed in the ratification analysis. For example, in some cases the innocent party might be less able to bear the risk of loss than the victim.<sup>217</sup> In such a situation, definite and substantial reliance by the innocent party before the victim's attempt to disaffirm would be a factor in deciding whether the victim had ratified the contract.

This solution can be obtained with respect to innocent parties who are not holders in due course by an appellate court changing the common-law rule. The holder-in-due-course doctrine, however, presents a more difficult hurdle. As a statutory provision, a court would not have the power to disentangle holder-in-due-course status from the issue of whether a contract is voidable. A court could, however, use the U.C.C. Official Comment as evidence that the legislature did not intend holder-in-due-course status to apply in a situation involving a threat of imminent physical harm. For a court disinclined to do this (because the statute itself relies on whether state common law makes the agreement void or voidable, and the Official Comments are not binding), an amendment to the U.C.C. would be necessary.

#### CONCLUSION

The authorities' disagreement over whether an agreement entered into because of a threat of imminent physical harm shows that this issue is in need of a solution that protects all parties involved. The current approaches—either the contract is voidable and thus subject to ratification with innocent persons given nearly automatic protection, or it is a void agreement and thus not subject to ratification and innocent persons given no protection—seeks to offer protection for either the victim or the innocent party, but not both. This Article's proposed solution—that the contract be voidable and subject to ratification but innocent persons not be given automatic protection—protects all parties involved.

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217. See David L. Littleton, *Survey: Developments in Maryland Law, 1990-91*, 51 MD. L. REV. 571, 577-78 (1992) (complaining that "the expanded duress defense [established in *U.S. for Use of Trane Co. v. Bond*, 586 A.2d 734 (Md. Ct. App. 1991)] could be asserted against an innocent party who lacks the means to bear any resulting losses").

