



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

2004

Outsider Jurisprudence and the “Unthinkable” Tale: Spousal Abuse and the Doctrine of Duress

Deborah Waire Post
Touro Law Center, dpost@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Law and Gender Commons](#), and the [Legal Education Commons](#)

Recommended Citation

26 U. Haw. L. Rev. 469 (2003-2004)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

Outsider Jurisprudence and the “Unthinkable” Tale: Spousal Abuse and the Doctrine of Duress

Deborah Waire Post *

I. INTRODUCTION

I am tempted to refer to 2003 as the Year of the Voice, or perhaps the Year of Voice Revisited. In February, the women law students at New York University School of Law sponsored a conference on voice in the classroom (inspired by Carol Gilligan, a recent addition to the faculty at NYU).¹ In May of 2003, Harvard Law School hosted Celebration 50, Fifty Years of Women Graduates (if not faculty) at Harvard.² In June of 2003, the Association of American Law Schools midyear conference was aptly titled Taking Stock: Women of All Colors in Law School.³

This issue of the Hawaii Law Review features a symposium on contracts law with papers presented at the January 2004 Annual Meeting of the American Association of Law Schools (“AALS”). While the topic of that section meeting was not “voice,” the presentations offered a sampling of the different perspectives that have transformed the way contracts is taught

* Professor at Touro College Jacob D. Fuchsberg School of Law. I would like to thank Maureen Quinn, my research assistant, Stephanie Shaw, whom I met as a fellow at the Center for the Advanced Study in the Behavioral Sciences, and the faculties of St. Thomas Law School and Florida International University College of Law who listened and provided helpful comments when this article was in its early stages.

¹ The NYU conference was called *Paths to Success: The Diversification of Voice and Style in Law School and the Legal Profession*, February 27, 2003, the name echoing the title of Gilligan’s influential classic. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (Harvard Univ. Press, 1982). I was on a panel devoted to “voice in the classroom.”

² If we were being accurate, women have been at Harvard 53 years, but as the name of the celebration suggests, this is not a school that takes any chances. Women were counted only after they graduated, not when they arrived. The event was also an inaugural event for the new dean, Elena Kagan, class of ’86. One of the break-out panels was called “*Making a Difference in the Law School Classroom*.” I moderated a spirited panel discussion of the significance of gender in the classroom with participants Lynn Blais, Rieko Nishikawa, Radhika D. Rao, Joan C. Williams and Patricia Williams. For articles describing Celebration 50, listing distinguished alumna, and discussing the situation of women on the faculty at Harvard Law School, see HARVARD LAW BULLETIN, Summer 2003, available at <http://www.law.harvard.edu/alumni/bulletin/2003/summer>.

³ Joint AALS/ABA Workshop, *Taking Stock: Women of All Colors in Law School*, June 15-17, 2003.

including insights gained from critical race and feminist theories. What we make note of and celebrate in this collection of articles from the section meeting, therefore, is the importance of voice in scholarship and the classroom, and the remarkable transformation of the academy in the relatively recent past, much of which I witnessed in the twenty years I have been teaching contracts.

The case I have chosen to discuss in this essay, *United States ex. rel. Trane Co. v. Bond*,⁴ will lead some readers to conclude that the theory and perspective featured in this article is feminist. I don't object to this characterization, although it is incomplete and so inaccurate. As a practitioner of feminist theory,⁵ I am heir to a tradition that was considered radical as recently as ten years or so ago. I was sitting in the audience at the 1989 "shadow" contracts section meeting organized by the Section on Women and Legal Education of the AALS and the Society of American Law Teachers.⁶ Certainly I would be proud to include in the provenance of Contracting Law⁷ the inspiration gained from the Mary Joe Frug's feminist reading of a contracts casebook.⁸ Contracting Law, the contracts casebook I wrote with Amy Kastely and Sharon Hom, is an attempt to achieve the goals articulated by those feminist contracts scholars in 1989, an important part of which was to consider the way the canon could be changed.⁹ It is also an attempt to expand on this principle—to make visible the way the law affects other subordinated communities.

It was in furtherance of this project, I confess, that I unilaterally changed the terms of the bargain proposed in the e-mail from Professor Beh announcing the topic for the 2004 contracts section meeting. Having *volunteered* to participate

⁴ 586 A.2d 734 (Md. 1991).

⁵ Deborah W. Post, *Which Wave are You? Comments on the Collected Essays from the Seminar "To Do Feminist Theory,"* 9 CARDOZO WOMEN'S L.J. 471 (2003). Of course, one of the places where theory is put into practice is the classroom. See, e.g., Maria Grahn Farley, *Forward: To Do Feminist Theory*, 9 CARDOZO WOMEN'S L.J. 197 (2003).

⁶ The controversy that inspired the section meeting is recounted in Mary Joe Frug, *Essay: Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992). The meeting was prompted by a comment by the then chair of the contracts section that feminist theory had nothing to contribute to contract jurisprudence since male bias "had not had important consequences for contract law."

⁷ AMY KASTELY ET AL., *CONTRACTING LAW* (2d Ed. Carolina Academic Press, 2000).

⁸ Mary Joe Frug, *A Symposium of Critical Legal Study: Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

⁹ The program was described in the schedule in the following way:

In this program feminist legal scholars who teach and write about contracts will explore the implications of feminist theory for contract doctrine. We have two goals. One is to identify contracts issues of particular interest to women *which are often overlooked by the traditional contracts canon*; the other is to suggest ways in which feminist theory can illuminate contract doctrine's treatment of these issues.

Proceedings of the Annual Meeting, 1989 ASS'N. OF AM. LAW SCH. 21.

on a panel, in what might legitimately be considered a consummate act of ingratitude, I immediately rejected the proposal that we all choose a case from the canon and teach it using a different voice, theory or perspective.¹⁰ Admittedly, it would have been a daunting exercise to teach other contracts teachers from a critical race or feminist perspective, but I was fortunate to have a justification, for my rejection of this format. Critical theories and critical perspectives require more than reflection on the content of the canon.¹¹ Critical perspectives require us to reconceive and reconstruct the canon.

There are two concepts that are central to critical perspectives and these are “voice” and “stories” or “narrative.” This is not something that should be relegated, as Professor Beh has stated, to a note after a case.¹² Voice does not refer simply to my presence in the front of the classroom. There will be no appreciable shift in our students’ understanding of how the law operates as long as the materials we use in the classroom, against which my “voice” is heard as a contrapuntal, omit the stories of Outsiders. Voice, my individual voice, is seen as just that—idiosyncratic, personal, anecdotal, unscientific.

Before Amy Kastely, Sharon Hom and I began writing our casebook, we read an essay, *What Was Penelope Unweaving?* from Carolyn Heilbrun’s book, *Hamlet’s Mother and Other Women*.¹³ Heilbrun concludes that Penelope was doing something that had not been done before. She was “writing her own story.” This imagery seemed particularly apt for three women

¹⁰ E-mail from Hazel Beh, Chair, Contracts section, to the AALS Contracts Listserv (January 17, 2003) (“My idea, for example, is to invite a contracts teacher with an economic perspective to demonstrate how (by more or less conducting a mini-class and providing participants with teaching notes to introduce economics concepts into our classes—*using a case we generally know*)” (emphasis added)).

¹¹ The shared work is to recover other traditions—women who have written, spoken, acted, claimed, judged. The shared work is to uncover and admit the complexities of making “women’s” claims, the comforting moments of recognition and commonality, the pleasures and risks of essentialism, the pain and necessity of age, class and racial division, the tensions generated from a diverse set of perspectives, all spoken with women’s voices. The shared work is to explore texts other than those already read, to learn narratives other than those already told, and to understand more about the function of the canonical works. Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L. J. 1913, 1919 (1990).

I have heard colleagues, mostly women, talk about the fact that they teach against the casebook. I do not consider that an effective pedagogical strategy, if, as Professor Beh put it so eloquently in her description of the panel, the point is to give students the knowledge they need to work to “achieve justice.” E-mail from Hazel Beh, Chair, Contracts section, to the AALS Contracts Listserv (January 17, 2003).

¹² *Id.*

¹³ CAROLYN G. HEILBRUN, *What was Penelope Unweaving*, in *HAMLET’S MOTHER AND OTHER WOMEN* 103-111 (Columbia University Press, 1990).

writers, two women of color, entering a market dominated by white men. Heilbrun cautioned us:

[O]ne cannot make up stories: one can only retell in new ways the stories one has already heard. Let us agree on this: that we live our lives through texts. These may be read, or chanted, or experienced electronically, or come to us like the murmurings of our mothers, telling us what conventions demand. Whatever their form or medium, these stories are what have formed us all, they are what we must use to make our new fictions.¹⁴

A casebook might not be the “murmuring of our mothers” but it is certainly a text. It is the text that tells our students what legal conventions demand. Traditional texts “silenced” Outsiders.¹⁵ The task for us, as we wrote our own story, women law professors challenging patriarchy and the hegemony which made us “Other,” was to give voice to those whose stories are missing or peripheral in the traditional law school setting, in the usual law school casebook.¹⁶

We used fiction and poetry because sometimes in fiction the voices are stronger, the grievance more clearly stated. In some cases we “recovered” stories that seemed to be forgotten, stories that recall a tradition within the dominant culture of resistance or opposition to oppression.¹⁷ This is the advantage of an interdisciplinary approach; provided that those who use it are cognizant of the exclusionary practices at work in the construction of canons in other disciplines.¹⁸ Excerpts from novels, short stories and poetry, properly selected, enhance efforts to teach students to be good lawyers,¹⁹ and they can, as I have discussed elsewhere, reveal the normative assumptions that are implicit in many appellate decisions.²⁰

¹⁴ *Id.* at 109.

¹⁵ In 1989 an article, Mari Matsuda described “outsider jurisprudence” as a methodology that consults “sources often ignored” to describe a social reality, that of oppressed people, missing in most legal scholarship. See Mari J. Matsuda, *Public Response to Racist Speech; Considering the Victims' Story*, 87 MICH. L. REV. 7320 (1989).

¹⁶ I want to qualify this statement to make it clear that I am not accusing all white male writers of contracts casebooks of “silencing” outsiders. Even before we wrote our book, several books were conscientious about including cases that introduced issues of race, gender and class in contracts. Since our book was written, women and people of color have been added as co-authors on contracts casebooks.

¹⁷ See, e.g., excerpts from JOHN STEINBECK, *THE GRAPES OF WRATH*; ARTHUR MILLER, *DEATH OF A SALESMAN*; CHARLES DICKENS, *BLEAK HOUSE* IN *CONTRACTING LAW*, *supra* note 7 at 74, 118 and 1033, respectively.

¹⁸ See Heilbrun & Resnik, *supra* note 11, at 1930.

¹⁹ See Robin West, *The Literary Lawyer*, 27 PAC. L.J. 1187, 1188 (1996) (describing the good lawyer as one who is “humanistic and literary rather than either autonomously professional or tied to scientific or economic ideals”).

²⁰ See generally Deborah Waire Post, *Approaches to Teaching Contracts: Teaching Interdisciplinary: Law and Literature as Cultural Critique*, 44 ST. LOUIS U. L.J. 1247 (2000).

Most important to a casebook, though, are cases where the stories of women and other Outsiders are central to the story of the law. These cases illustrate what it means to apply a neutral rule in a world where power and resources are distributed unevenly and inequitably. As distorted as appellate decisions are—stripping from the stories of human conflict the passions that motivated the contestants; substituting in their place a passion for rules, reason or logic²¹—it is sometimes still possible for students to hear a voice or voices demanding justice.

The case nominated for addition to the canon to illustrate this perspective as pedagogical strategy is *United States ex. Rel. Trane Co. v. Bond*, a duress case decided in 1991 by the Maryland Court of Appeals.²² I also recommend an excerpt from *All God's Dangers: The Life of Nate Shaw*, by Theodore Rosengarten²³ and a *Note on Wife Beating, Financing Practices and Third Party Duress*,²⁴ which we include in our casebook. It is possible using these materials to cover the doctrine of duress, to raise issues about the effect of a neutral rule on a particular class of individuals, to illustrate Outsider jurisprudence or the jurisprudential method called “multiple consciousness” advocated by Mari Matsuda,²⁵ and to engage in what has been called “reconstructive jurisprudence,”²⁶ engaging students in the process of imagining a revised version of the duress doctrine.

II. THE DOCTRINE OF DURESS: A STUDY IN LEGAL EVOLUTION AND LIBERALIZATION

In *Bond*, a woman claims that her husband forced her to sign a surety agreement so that he could get a government contract. The case lays out the doc-

²¹ See generally the discussion of a secular-rational model of the law in HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION*, (Abingdon Press, 1974). “The legal man, like his brother economic man, is conceived as one who uses his head and suppresses his dreams, his convictions, his passions, his concern with ultimate purposes.” *Id.* at 27.

²² *United States ex rel. Trane Co. v. Bond*, 586 A.2d 734 (Md. 1991) (clarifying the doctrine of duress in Maryland for a federal district court).

²³ THEODORE ROSENGARTEN, *ALL GOD'S DANGERS, THE LIFE OF NATE SHAW* 31-32 (Alfred A. Knopf 1974) excerpted in KASTELY ET AL., *supra* note 7 at 560-61. Nate Shaw is the pseudonym for Ned Cobb, a tenant farmer living in Tallapoosa County, Alabama, who joined the Sharecroppers Union, an organization organized in 1931 to oppose the mass evictions and the injustices that were suffered by tenant farmers, sharecroppers and agricultural workers. *All God's Dangers* is an oral history compiled by Theodore Rosengarten from interviews with Cobb.

²⁴ KASTELY ET AL., *supra* note 7 at 561-63.

²⁵ See Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RIGHTS L. REP. 7 (1989).

²⁶ See Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994).

trine of duress in a very thorough way. It cites to sections 174 and 175 of the *Restatement (Second) of Contracts*,²⁷ as well as the predecessor version of the rule in the *Restatement (First) of Contracts*. It includes quotes from *Blackstone's Commentaries*²⁸ as well as citations to and quotations from an early decision written by Oliver Wendell Holmes, *Fairbanks v. Snow*.²⁹

Most casebooks include one or more cases to explain and illustrate the doctrine of duress. The common law dichotomy between duress by physical compulsion and duress by wrongful threat, between void contracts and voidable contracts, is easy enough to teach, especially when we throw in a little history. In the past, we say, the defense of duress was narrowly circumscribed, available only to those victims who could show physical compulsion of such magnitude that the victim was no more than "a mere mechanical instrument."³⁰ This is language that appears in both Restatements, First and Second, inspired, no doubt, by the example of duress by physical compulsion used by Holmes in *Fairbanks*. Holmes wrote, "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."³¹ The instrument or document would be signed

²⁷ Recently there have been discussions and admonitions among contracts faculty about the risks of teaching students from the Restatement. A quick survey of the case law on duress supported my assumption that the Restatement is a text that is often cited and discussed by courts, even when they do not explicitly adopt the rule contained in a particular section. It is useful to think of the Restatement in this way, as an authoritative text to which scholars, practitioners and judges refer in interpreting and applying the law.

²⁸ The excerpt from Blackstone's Commentaries which is cited most frequently in duress cases makes a distinction between the justifiable fear an individual has when "mayhem" is threatened, a threat to "life and limb", which will make a contract void for duress, and a situation where there is simply "a fear of battery or being beaten . . . which is no duress." Nor is a threat to burn a home or destroy or take property from the victim sufficient to establish duress "because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb." SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1938).

²⁹ 13 N.E. 596 (Mass. 1887).

³⁰ RESTATEMENT (FIRST) OF CONTRACTS § 494(b) (1932) ("[I]f the party under compulsion . . . is a mere mechanical instrument without directing will in performing the acts apparently manifesting assent" the contract was void."). This reference to a "mechanical instrument" is not present in Restatement (Second) of Contracts § 174 but is included in Comment A of that section.

³¹ *Fairbanks*, 13 N.E. at 598. This is, in fact, an illustration used in the Second Restatement.

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.

RESTATEMENT (SECOND) OF CONTRACTS, § 174 illus. 1 (1981).

by a person who had been transformed, metaphorically speaking, into an inanimate object is not a contract.

In *Blackstone's Commentaries*, the distinction drawn between threats of battery or property destruction and threats to life and limb is logically dependent on two assumptions: the efficacy of legal remedies in the former case and the belief that the person threatened with "slight injury to the person or with loss of property, ought to have the resolution to resist such a threat."³² It is often suggested that the Restatements First and Second have rejected this distinction since the doctrine of duress is no longer restricted to those cases where there is fear of loss of life, loss of limb, mayhem and imprisonment. Instead a more liberal and expansive description of duress refers to a "wrongful threat."³³ The distinction is preserved, in the requirement that the will of the victim be overborne, in the requirement that the victim show that an action for breach of contract would not be adequate remedy, and most importantly, in the creation of two kinds of duress: one which results in a void contract, and one which makes a contract voidable.³⁴ The person whose will has been overborne, not out of moral weakness but because of physical compulsion, is void, unenforceable by either the party who exerted force or, more importantly for the purposes of this discussion, by an innocent party to the contract even if he or she or it gave "value or materially relie[d] on the transaction." In contrast, when the will has been overcome not by physical compulsion but by a threat of violence, then the contract is only voidable, not void, and duress is no defense against the claims of an innocent party to the contract.³⁵

All law students learn to live with dichotomies, and the doctrine of duress is no exception. They accept such distinctions without probing too deeply into

³² *United States ex rel. Trane Co. v. Bond*, 586 A.2d 734, 737-38 (Md. 1991) (quoting *Brown v. Pierce*, 74 U.S. 205, 215-16 (1868)). See also *Blackstone, Commentaries*, *supra* note 28.

³³ See e.g. *Fox v. Piercey, Chief of the Fire Department*, 227 P.2d 763 (Utah 1951) (comparing the 20th century version of duress with that described by Lord Coke in the 17th Century and Blackstone in the 18th Century "The doctrine of duress has developed through certain distinct steps since the time above referred to. A broader and more liberal view allowed the defense where other acts and threats than those specified by Lord Coke could constitute duress. . . .").

³⁴ See RESTATEMENT (SECOND) OF CONTRACTS §§ 174 (When Duress by Physical Compulsion Prevents Formation of a Contract) and 175 (When Duress by Threat Makes A Contract Voidable).

³⁵ *Bond*, 586 A.2d at 737-38 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981)). The doctrine of duress is no defense where the duress was exerted by one "who is not a party to the transaction." In the case of *Lorna Bond*, both she and her husband were parties to the contracts in question but it was the third party who sought to enforce the contract against *Lorna Bond*. The innocent party to the contract, one who had no "reason to know" of the coercion, may recover if he gave "value or relies materially on the transaction." *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981)).

the justification for them. If students wonder, occasionally, why the law requires that a victim have sufficient will to withstand a threat to burn down his house or punch her in the face, or why a person so threatened would be happy with money damages if the threat were carried out, they simply dismiss such misgivings and soldier on.

We encourage this uncritical attitude. Law professors play an important role in constructing and in instructing our students in a narrative about doctrinal history. The duress doctrine has a long and venerable tradition and the authority of the authors, in this instance Holmes and Blackstone, their prestige and status, lend weight to arguments that do not seem logical or even accurate when compared with what we know of human nature or human relationships. Certainly, no reasonable human being would be comforted by the idea that a lawsuit might bring him or her recompense for lost property or physical injury. The only explanation we offer them is our assurances that although the categories appear to remain intact and the language we use is remarkably similar, the law is very different today. We now have the doctrine of economic duress.

Duress is most often taught using a case illustrating economic duress, like *Austin Instrument, Inc. v. Loral Corp.*³⁶ There is a threat, not to property or physical integrity, but a threat that puts a business in jeopardy. The business might lose money and/or contracts. This kind of threat, the court tells us, “preclude[s] the exercise of free will.”³⁷ The court in *Austin Instrument* also concludes that “the ordinary remedy of an action for breach of contract would not be adequate.”³⁸

“Will” is featured prominently in the doctrine of duress. Anyone who seeks to use this defense must show that his or her will was “overborne.” I have always been troubled by this conception of free will, especially when its invocation deprives the person who is supposed to have “free will” of the right to a remedy for a wrongful act by the other party to the contract. Of the two parties to a transaction where there has been duress, the greater sin is to be weak-willed.

If there is some comfort in *Austin Instrument*, and in the *Restatement (Second)*, it is in their more modest expectations and the more realistic view of human nature. The court in *Austin Instrument* is not holding the victim to a very high standard with respect to its ability to resist the threat. The lowering of expectations—me might see this as further evidence of a general moral decline in the United States, but I do not—moved gradually from that of a “constant and courageous man” to a man of “ordinary firmness” to what

³⁶ 272 N.E. 2d 533 (N.Y. 1971).

³⁷ *Id.* at 535.

³⁸ *Id.*

courts now refer to as a subjective test—was this victim unable to resist the threats.³⁹

The commentary to the current *Restatement* abandons the reference to will, substituting a standard that asks whether there was a reasonable alternative available to the person who claims duress.⁴⁰ The reference to will is rejected as vague and impracticable,⁴¹ but that has not discouraged courts, which continue to use it.⁴²

³⁹ In 1936, the Supreme Court of Virginia in *Ellis v. The Peoples National Bank*, 186 S.E. 9 (Va. 1936), traced the changes in the doctrine of duress with respect to the standard to which the victim was held. The “three well defined periods of development” in the doctrine began with “ancient authorities” that held the victim to the standard of a “constant and courageous man of his free will.” *Id.* at 10. This was followed by a standard that referred to “a person of ordinary firmness or courage.” *Id.* Finally, all standards were abandoned and the question was simply whether the will of the victim was actually overcome. *Id.*

⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (1981).

⁴¹ *Id.*

⁴² New York, the jurisdiction which decided *Austin Instruments*, has seen considerable retrenchment with respect to the issue of will, or the lack of it, at least on the part of the federal courts. *See, e.g., Davis & Assoc. Inc. v. Health Management Services Inc.*, 168 F. Supp. 2d 109 (S.D.N.Y. 2001) (sophisticated commercial actors “can avoid a contract on the basis of duress only in “extreme and extraordinary cases.” Plaintiff must show that the defendant’s wrongful act deprived him of his free will. To prove “preclusion of free will” the party claiming duress must show “irreparable harm”—there are no “adequate remedies at law.”). *See also* *Theissen v. Gen. Elec. Capital Corp.*, 232 F. Supp. 2d 1230 (D. Kan. 2002) (Federal court applying Kansas law held that releases of age discrimination claims were not void because of economic duress. The employees who signed the releases had not been threatened and financial distress on the part of the employees would not be sufficient to overcome the will of person of ordinary firmness.); *BSI Rentals Inc. v. Wendt*, 2004 Ala. Civ. App. Lexis 36 (2004) (Defendant who was sued by a car rental company for damages to a car she rented did not prove duress. “Wendt failed to submit any evidence that indicated that Valieant (sales agent) exerted such pressure as to overcome her will and thereby coerce her into signing the contract.”); *Singh v. Batta Env’t Assoc. Inc.* 2003 Del. Ch. LEXIS 59 (Del. Ch. 2003) (The Delaware court held that a contract with a non-compete clause was not voidable because the employee could not prove duress. There had been no “wrongful act that overcame the will” of the employee and there was no evidence that “he lacked adequate means to protect himself from exploitation.”); *Lundy v. Airtouch Communications Inc.*, 81 F. Supp. 2d 962 (D. Ariz. 1999) (release signed at time of resignation by an employee alleging retaliatory discharge was not signed under duress because plaintiff was “sophisticated” and had extensive business experience. The threat to fire him if he did not resign, which would have caused him to lose stock options, was not sufficient to “preclude the exercise by him of his free will and judgment”).

The cases most like *Trane* involve women who allege that their husbands previously beat them and then threatened them with physical harm to get them to sign a contract. *See, e.g., Brown v. Brown*, 863 S.W.2d 432, 434 (Tenn. Ct. App. 1993) (Marriage dissolution agreement was not voidable because husband “had been violent at times during the marriage and she (the wife) was afraid not to sign the documents.” There was no duress because there was no “overt threat of present harm.” Duress requires proof of a “coercive event . . . of such severity, either threatened, impending or actually inflicted, so as to overcome the mind and will of a person of

In a manner consistent with the “dominant legal tradition” as Robert Gordon has described it, history provides a backdrop in duress cases, a point of reference that makes it clear that the law has changed or “evolved.”⁴³ Science, technology and the law march forward in an inexorable linear progression towards perfection. Alternatively, we have a story about the law and its responsiveness to social change.⁴⁴ We cite sections 175 and 176 of the *Restatement (Second) of Contracts*, more expansive and more liberal in its definition of a “wrongful threat,” a change meant to reform the common law rules that produced inequitable and unfair results.

III. THE “UNTHINKABLE STORIES” IN THE HISTORY OF DURESS

This history of duress is, of course, incomplete. As a teacher, a person of African descent, a woman, I think we should consider Carolyn Heilbrun’s admonition. “[W]e must begin to tell the truth, in groups, to one another.

ordinary firmness.” *Compare* *Intravia v. Intravia*, 2003 Conn. Super. LEXIS 2805 (Conn. Super. 2003) (the test for duress in domestic relations matters is that the person claiming duress must show that she was induced to sign the contract “not as an exercise of her own free will, but because she had no reasonable alternative in light of the circumstances as she perceived them.”). *See also* *Jenks. v. Jenks*, 657 A.2d 1107 (Conn. 1995).

Duress is most likely to be found in cases where there is a “hold up” in the sense that gave rise to the problematic and over-inclusive “pre-existing duty rule.” *Kapila v. Guiseppe Am. Inc.*, 817 So. 2d 866 (Fla. Dist. Ct. App. 2002) (Accountant hired to act as expert in litigation submitted an extraordinarily high bill to the client and refused to testify on its behalf, warning that he had been subpoenaed by the opposing side, until the bill had been paid. Court held that although the contract gave him the right to refuse to testify unless his bills had been paid, the size of the bill combined with the client’s imminent trial meant that the threat not to appear was sufficient to “overcome the mind and will of a person of ordinary firmness.” The plaintiff’s payment of the bill was not “voluntary because the “threatened exercise of power” by the defendant left the plaintiff with “no means of immediate relief other than making the payment.”); *Mason v. Arizona Loan Marketing Assistance Corp.*, 300 B.R. 160, (B. Court D. Conn. 2003) (relying on the RESTATEMENT (FIRST) OF CONTRACTS 492(b) (1932) court held that threat by collection agency that debtor would be “subject to arrest and federal incarceration” if she did not sign loan consolidation agreement was sufficient to create “such fear as precludes” the exercise of “free will and judgment.” The contract was void *ab initio* and the test for duress was subjective. Citing the commentary to the RESTATEMENT (SECOND) OF CONTRACTS, the court writes: “The fundamental question is whether the threat actually induced assent, not whether succumbing to the threat was objectively reasonable.”).

Even if the idea of “will” is not introduced, the concept of “voluntariness” is at the heart of most explanations of the duress doctrine. *See* *Richards v. Allianz Life Ins. Co. of N. Am.*, 62 P.3d 320 (N.M. Ct. App. 2002) (Judge Bustamonte writes that the “fundamental issue in duress cases is whether the statement which induced the agreement is of the type of offer to deal that the law should discourage as oppressive and improper.” He reminds the lower court that duress must be “wrongful” so as not to make “hard but truly voluntary bargains” voidable).

⁴³ Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 61-66 (1984).

⁴⁴ *Id.*

Modern feminism," she reminds us, "began that way, and we have lost, through shame or fear of ridicule, that important collective phenomenon."⁴⁵ If Carolyn Heilbrun and the other feminists are right, "power consists to a large extent in deciding what stories will be told . . . [and] male power has made certain stories unthinkable."⁴⁶ For those who subscribe to the principle that half-truths are not truth at all; that material omissions make what has been said misleading, it may be important to revisit and "reinscribe" this tale. As law professors, we should begin by examining the story Oliver Wendell Holmes did not tell when he wrote the decision in *Fairbanks v. Snow*.⁴⁷

Fairbanks was a suit by a creditor against a woman who claimed as a defense that her husband threatened her and forced her to sign the promissory note the plaintiff sought to enforce. The history that Holmes decided to ignore, distinguishing *Loomis v. Ruck*,⁴⁸ a New York case to which I will return to a little later, is discussed in some detail in *Bond*.⁴⁹ It is a different history from the history that is told when we assign and teach cases on economic duress or even cases involving prenuptial agreements. It is a history of the struggle by women to gain civil status and control over their own property. It is a story about marital status and the law of coverture,⁵⁰ an idea that was and is a site of cultural, political and economic contestation.⁵¹ The narratives in these stories, the cases that record the struggle to establish a "public policy" consistent with the "natural laws" that governed the relationship of husband and wife, feature husbands that are "feckless and unlucky," "stingy and cruel," "impecunious and opportunistic, seductive manipulators and/or brutal tyrants."⁵² Marriage might mean the unity of man and woman, but the law, often at the behest of fathers of married women, recognized that this

⁴⁵ CAROLYN G. HEILBRUN, *WRITING A WOMAN'S LIFE* 45 (1988).

⁴⁶ *Id.* at 43-44.

⁴⁷ 153 N.E. 596 (Mass. 1887).

⁴⁸ 56 N.Y. 462 (1874).

⁴⁹ *United States ex rel. Trane Co. v. Bond*, 586 A.2d 734 (Md. 1991).

⁵⁰ For a list of sources on coverture see generally Claudia Zaher, *When A Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459 (2002).

⁵¹ The fathers of daughters and the men they married struggled over the married woman's separate property. While coverture reigned, this battle produced inconsistent rules with respect to the ability of the wife to manage and alienate her own property—personal as well as real—with courts siding sometimes with the father and sometimes with the creditors. *Id.* at 459-63. The seventeenth and eighteenth century courts constructed doctrines that enforced contractual agreements transferring income or property to wives, but limited the ability of women to enforce the contracts; to retain the property or to alienate it if they wished. See SUSAN STAVES, *MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833* (1990). For a discussion of this struggle in the United States, see PEGGY A. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* (Paul L. Murphy ed., 1980).

⁵² STAVES, *supra* note 51, at 133-45.

affinal relationship was unequal, and that it could be and often was exploitive or at least adversarial. The nineteenth century saw the enactment of Married Women's Property Acts which were explicit: the "real and personal property of any female who shall hereafter marry . . . shall be protected from the debts of the husband and not in any way be liable for the payment thereof."⁵³

The Maryland court (or counsel for Lorna Bond) retrieved this story from the not so distant past. The court discussed the extraordinary lengths to which legislatures and some courts went to protect women from husbands acting out of a sense of entitlement unaltered by the enactment of legislation. At one point, however short-lived, legislation in Maryland required an acknowledgment that the wife signed voluntarily and freely, and still an early Maryland court found this protection insufficient, the expression of will it considered suspect. If a wife could be forced to co-sign a loan or put her property up as security, she could be forced to sign an acknowledgment that said she was acting freely and voluntarily.⁵⁴

Whether legislative creations such as special acknowledgements or the oversight of courts deterred husbands or merely gave legitimacy to the contracts they forced their wives to sign, is hard to say. Whether courts were conscientious in the enforcement of the letter and the spirit of the law might depend on the judge's political sensibilities and his attitude towards the redistribution of power promoted by such legislation. But in Maryland, there were at least three early cases in which courts dismissed the claims of a husband's creditors against a wife when she claimed that she had been forced by her husband to enter into a contract with the plaintiff.⁵⁵

Bond, and its precedent, the common law cases on which the court relies, are problematic because they are third party duress cases. The one part of the duress doctrine that seems logical or intuitively correct is the treatment of parties to the contract who played no part in acts of coercion or force. Students agree on the innocence of the banker, the buyer, the service provider, and the fact of his injury. In the moral language of contemporary contract law, the plaintiff relied on the promise of the defendant in giving value according to the terms of the contract. The innocent party to the contract cannot and should not be held responsible for the acts of any third person. If he is not allowed to recover, there might be a problem with unjust enrichment, a

⁵³ Acts 1841, 1853, Md. Code Ann. Art 45 § 1 and the Maryland Constitution protect the property of married women from the debts of the husband. A description of the "liberation" of married women from the "strictures of the common law" is described in *Joyce v. Joyce*, 276 A.2d 692, 694 n.4 (Md. Ct. Spec. App. 1970)

⁵⁴ *United States ex rel. Trane Co. v. Bond*, 586 A.2d 734, 736 (Md. 1991) (citing *Central Bank of Frederick v. Copeland*, 18 Md. 305, 318 (1862)).

⁵⁵ See *Copeland*, 18 Md. 305; *Whitridge v. Barry*, 42 Md. 140 (1875); *First Nat'l Bank v. Eccleston*, 48 Md. 145 (1878).

windfall or unearned benefit. As Holmes put it, “[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.”⁵⁶

It is this riff on duress, this variation on the basic facts of duress, eminently fair in its balancing of the interests of two parties, neither of whom has done anything wrong, that is at issue in *Bond*.⁵⁷ The United States District Court for the District of Columbia certified the following question to the Court of Appeals of Maryland: “Whether a party whose consent to entering a contract is coerced may assert the defense of duress against a party who neither knew of nor participated in the infliction of the coercive acts.”⁵⁸

Lorna Bond’s story is familiar. She said her husband Albert “physically threatened her and abused her to coerce her to sign a number of documents, including the payment bond, and would not answer her questions regarding their content.”⁵⁹ 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.”

While most courts honor and confirm the common law distinctions, now restated in *Restatement (Second) of Contracts* sections 174 and 175, between physical duress and duress by wrongful threat, the Maryland court used women’s history to erase this distinction in *Bond*, a case where the wife/woman argued that she had been the victim of domestic violence. The court discussed and then rejected the rules in *Restatement (Second) of Contracts* sections 174 and 175. The distinction between physical compulsion and wrongful threat is explicitly rejected as unnecessarily inflexible. Instead the court adopted the following rule:

[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.⁶⁰

This is reducible to a two part test: (1) the threat must be one of imminent physical force; and (2) the victim’s fear of imminent physical harm must be reasonable.

⁵⁶ *Fairbanks v. Snow*, N.E. 596, 598-99 (Mass. 1887).

⁵⁷ *See Bond*, 586 A.2d at 734.

⁵⁸ *Id.* at 735.

⁵⁹ *Id.*

⁶⁰ *Id.* at 740.

The Maryland court concludes, erroneously, that the Restatement (Second) has abandoned a subjective test that focuses on the fear experienced by the person who has been threatened. While there is no reference to overcoming the will of the person claiming duress, the issues of character and perception have been folded into the requirement of inducement.⁶¹ In contrast, the test constructed by the Maryland court may appear to be a subjective test because it focuses on the perception or state of mind of the victim, but the perception must be "reasonable." Focusing attention on the experience of the victim of duress and denominating it a "subjective test" does not necessarily advance the interests of women. There is a basis for Holmes' comment that "older writers likened duress to infancy."⁶² In earlier cases, in order to prove that her will was overborne, a woman would have to argue that she was physically incapacitated by the duress or that her mind was weakened as she was driven to distraction by the abusive husband.

My argument is not with the focus on what women experience but with our pretense that it is entirely individual and personal or that differences between individuals are simply a matter of character, rather than position or power.⁶³ The test is only subjective if we assume that those who are powerful do not understand or appreciate the effect of their actions on those who are subordinate to them or that they do not intend their behavior to have that effect. That would make oppression an accident rather than an instrument employed by those who use force and threats in order to maintain or retain power. It perpetuates a vision of the law expressed in the commentary to the *Restatement (Second) of Contracts* § 175, that an "under the circumstances" test is appropriate because "[p]ersons of a weaker or cowardly nature are the very ones that need protection."⁶⁴

⁶¹ RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. a (1981).

⁶² *Fairbanks v. Snow*, 13 N.E. 596, 598 (Mass. 1887).

⁶³ The focus on character is amply illustrated by the comment to the section on duress by wrongful threats.

Threats that would suffice to induce assent by one person may not suffice to induce assent by another. All attendant circumstances must be considered, including such matters as the age, background and relationship of the parties. Persons of a weak or cowardly nature are the very ones that need protection; the courageous can usually protect themselves. Timid and inexperienced persons are particularly subject to threats, and it does not lie in the mouths of the unscrupulous to excuse their imposition on such persons on the ground of their victims infirmities.

RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. c.

⁶⁴ *Id.* This same language also appears in RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. a (1932). If an objective test is applied, if the standard is that of a reasonable person, there is no reason why the reasonableness of any perception should not take into consideration the dominant position of an aggressor and the subordinate status of the victim.

Our students find it hard to use the word “oppression.” It does not come naturally to them. That is the advantage of using a case like *Bond*. When we focus on economic duress, we lose a valuable opportunity to explore the meaning of oppression; the social, political and economic aspects of oppression; and the connection between status or position and oppression. The economic exigencies that arise in the performance of a contract invite predatory behavior, but this is exploitation, not oppression. When we discuss only economic duress, we direct our students’ attention away from acts of oppression the law sanctions by its silence. We direct our students’ attention away from the role law plays in creating and maintaining structures of subordination. We do not give them the chance to consider how the law might look if we were serious about creating a law of contracts that grapples with inequalities that exist—not just between individuals, but between groups or classes of people.

The economic duress cases, and the use of *Restatement (Second) of Contracts* section 176(2) in recent cases, flirt with the idea of power. Duress is normative, tainted by tort, and ridiculed by those who believe that behavior in the realm of economic exchange can and should be negotiated or, for those who control the terms of the “bargain” with standard form contracts, a matter of self-regulation.

IV. OUTSIDER JURISPRUDENCE AS A WAY OF KNOWING

According to the lawyer who represented Ms. Bond in this lawsuit, the decision in *Bond* apparently caused a stir in academic circles, particularly among scholars who are concerned with the rights of creditors. Attitudes towards creditors, as a class, vary. The attitude has varied over time and by region. Sometimes it is appropriate to remind students that not everyone sees the actions of creditors or business people as self-interested and rational economic choice.

Critical theory, femcrit and racecrit offer a methodology that is explicitly political. Critical methodology examines the law from the perspective of those who are least powerful in society—the Outsiders who have or had little to do with the creation of legal rules that affect their lives. Some might be tempted to dismiss the *Bond* case as essentialist, which is why we pair it with an excerpt from the autobiography of Nate Shaw that challenges these assumptions about creditors.

As Shaw points out, creditors certainly know their rights. The bankers with whom he dealt were not like the black sharecroppers at the turn of the century, like Nate Shaw, for whom the law was, as Shaw describes it, “a great, dark secret.”⁶⁵ What Shaw has to tell us about the behavior of creditors he learned

⁶⁵ ROSENGARTEN, *supra* note 23, at 32.



Ned Cobb a.k.a. Nate Shaw: a constant and courageous man
Reproduced with permission of Alfred A. Knopf Publishing

from experience, his father's, his own and the experience of the other sharecroppers around him. The banks and the planters who provided the seed and furnishings for sharecroppers always wanted the signature of their wives on the notes. "Well, what was that for?" he asks.⁶⁶

If we look at the behavior of creditors from the perspective of Nate Shaw, we might ask the same question. Why do creditors today routinely ask for the signature of the wife on loan documents and guarantees?⁶⁷ Or we might also ask why any man would want to put his wife's income and property at risk

⁶⁶ *Id.*

⁶⁷ The battle over the use of a wife's property and earning capacity as security for a husband's debts now is fought out in terms of the statutory protection afforded women under the Fair Credit Opportunity Act. A wife can avoid liability if she can show that her husband was creditworthy. This protection obviously does not help the wife with an impecunious and improvident husband. It is also not a defense that can be raised in a suit by a surety company on a personal guarantee. It would not have helped Lorna Bond. *See generally* Andrea Michele Farley, Note: *The Spousal Defense—A Ploy to Escape Payment or Simple Application of the Equal Credit Opportunity Act*, 49 VAND. L. REV. 1287 (1996).

along with his own after we hear Nate Shaw explain why he refused this demand on the part of his creditors. He knew that if his wife signed, it would give the creditor the right to "go in the house and get her (his wife's) stuff."⁶⁸ Nate Shaw understood that his wife's property was her own because he understood the connection between property and human dignity.

This is not a line of reasoning that students, men and women, understand. As they see it, the family is an economic unit, a partnership, the wife benefits in a form of domestic trickle down economics from the husband's business. He supports her and so it is perfectly appropriate for her to co-sign when he negotiates a loan for his business.⁶⁹ This is, I believe, an example of the law of unintended consequences. When we argue that marriage is a partnership, in an attempt to promote the idea that a woman's work in the home has value, do we undermine her ability to protect her own property and her own income from her husband's creditors?

Banks and other creditors argue that the protections afforded the spouse of a debtor under tenancy by the entirety make the signature of a spouse who has no interest in a business necessary even though there has been some erosion recently of those protections.⁷⁰ A judgment against the spouse who does not have an interest in the business much more than the right to foreclose on jointly owned property. It gives creditors like those in *Bond* a judgment that may be satisfied by out of separate property and future wages of the non-owner, non-debtor spouse.

Now here is where the facts in *Bond* come into play. Lorna Bond was sued separately and individually on the contract. She was sued by Wausau for \$171,316.50 already paid out on an indemnity contract and for \$193,106.50 that Wausau set up in a reserve to cover future losses under its bonds.⁷¹ She was also the defendant in a suit, *United States ex rel. H.G. Kogok Co. v. Bond*.⁷² The Trane Company was the third company to sue Lorna Bond. The amount of money at stake here was substantial.

Or we could ask a related but different question about creditors. What do banks know about the risk of violence when a man must have his wife's

⁶⁸ *Id.*

⁶⁹ Their intuition, or rather the meaning they assign to marriage as a social institution, is consistent with the practices of judges and the policies advocated by some bankruptcy judges. See, e.g., A. Mechele Dickerson, *To Love, Honor and (Oh!) Pay: Should Spouses be Forced to Pay Each Others Debts?* 78 B.U. L. REV. 961 (1998) and the criticism of this theory which invokes coverture, Robert B. Chapman, *Coverture and Cooperation: the Firm, The Market, and The Substantive Consolidation of Married Debtors*, 17 BANKR. DEV. J. 105 (2000).

⁷⁰ See Amy B. Broockerd, *United States v. Craft: Pulling the Stakes Out from Under Tenancy By the Entirety*, 71 UMKC L. REV. 731 (2003).

⁷¹ *Employers Ins. of Wausau v. Bond*, CIV.A.HAR-90-1139, 1991 U.S. Dist. LEXIS 951, at *2 (D. Md. Jan. 25, 1991).

⁷² *Id.* at *8 n.7.

signature in order to get a loan or a surety bond? Feminists have been successful in changing public perceptions of domestic violence in part because they have been able to tell this story and to document the prevalence of the problem. We use an excerpt from Congressional hearings⁷³ but you can also take students to the reports issued by the Bureau of Justice Statistics.⁷⁴ The numbers have been declining since 1993, but still the numbers are significant. Excluding homicide, there were about 900,000 violent offenses against women in 1998. About half of these involved a physical injury and forty percent required medical treatment. The rate in 1998 was about 621 women per 100,000 suffering simple or aggravated assault. In 2001 the total number of violent offenses against women declined to 600,000. Of that number 500,000 reported simple or aggravated assault. The rates of violence were significantly lower, for suburban dwellers and for persons with incomes over \$50,000 a year. Given what we have learned about violence against women from these statistics and from other sources, the question we might want to ask is whether the behavior of creditors creates a substantial risk of domestic violence.⁷⁵

V. OUTSIDER JURISPRUDENCE AND REFORM OF THE DOCTRINE OF DURESS

A class that features the stories of Others and the jurisprudence of Others should probably end with a question. Is it possible to imagine a rule that: (1) does not violate the ideal of autonomy and freedom of contract; (2) pays sufficient attention to the history of domination and subordination in this society while promoting the dignity of those who have experienced oppression; and (3) removes incentives for overreaching, exploitive or oppressive behavior.

We could remind our students that they have a number of tools to work with: presumptions, law and economics and the “rational economic actor,” and the doctrine of consideration. I mention consideration because, in *Loomis v. Ruck*,⁷⁶ the court held that the plaintiff creditor, a holder in due course, could not recover on a note executed by a wife when her husband “intimidated her into signing it, by threats of personal violence,”⁷⁷ and where the note was

⁷³ KASTELY ET AL., *supra* note 7, at 583-85.

⁷⁴ CALLIE MARIE RENNISON, PH.D & SARAH WELCHANS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, INTIMATE PARTNER VIOLENCE (2000); BUREAU OF JUSTICE STATISTIC, CRIME DATA BRIEF, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003).

⁷⁵ See David L. Littleton, *Survey: Developments in Maryland Law, 1990-91*, 51 MD. L. REV. 571, 577 (1992) (“Lorna Bond can be perceived as a spousal abuse victim and a person of limited means, being pursued by the United States government for a debt incurred by her husband’s business. When the defendant is described in these terms, the result reached in *Bond* appears to be just.”).

⁷⁶ 56 N.Y. 462 (1874).

⁷⁷ *Id.* at 464.

neither for “the benefit of her separate estate,”⁷⁸ nor did it represent a debt incurred by her “in the course of any separate business carried on by her.”⁷⁹

VI. CONCLUSION

Part of the project of those who bring new voices, perspectives and theories into the classroom is to stimulate students to think creatively and imaginatively. We ask them to listen to the stories they may not have heard in the past, to think of these stories as their own, not just those of someone who is an Other, and to imagine a just society and the role the law can play in creating that just society. To that end, we need new voices, new people in teaching or old teachers speaking with a new voice, and we need to reconsider the content of the canons of contracts law.

⁷⁸ *Id.*

⁷⁹ *Id.*

