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**Shahar Lifshitz**

**Exploitation and Rescue**

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# **Exploitation and Rescue**

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# ***EXPLOITATION AND RESCUE***

*Shahar Lifshitz\**

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## INTRODUCTION

A fugitive arrives at a river which he must cross without delay. At the river he meets a boatman, whose aid he requests. The regular price for such a service is ten dollars, but the boatman demands one hundred dollars as payment to ferry the fugitive across the river. The fugitive, who faces a ransom demand of one thousand dollars from his previous capture, agrees to pay the one-hundred-dollar fee.

The contract between the fugitive and the boatman is a prototype of Distress Exploitation Contracts [hereinafter DEC]. These are contracts where one party to the transaction exploits the other's distress, for which the exploiter is not responsible, and demands contractual terms that are significantly less favorable than the market price absent such distress. American law does not recognize an explicit contractual doctrine that invalidates Distress Exploitation Contracts [hereinafter DE doctrine]. Yet Distress Exploitation Contracts, even if not recognized explicitly as such, are the main issue in a variety of American cases.<sup>1</sup> In the absence of an explicit doctrine, it is unclear in which, if any, circumstances the contract doctrines of duress<sup>2</sup> and unconscionability<sup>3</sup> would invalidate DEC.

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<sup>1</sup> Prominent examples are cases in which: (1) property that would be lost if not bought immediately was purchased at an extremely reduced price, see *infra* subpart IV.B.1; (2) one party exploited a war or other emergency situation which led to a localized shortage, in order to raise the regular price, see, e.g., *U.S. v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942) and *infra* subpart IV.B.2; (3) extreme economic distress of one party leads her to agree to sell assets at a price considerably below their market price, see, e.g., the cases discussed *infra* subpart IV.B.3; (4) rescue contracts, see, e.g., *The Elfrida*, 172 U.S. 186, 197 (1898) and *infra* subpart IV.C.1; (5) wives agreed to oppressive secular divorce settlements for their husbands' agreement to participate in a religious divorce ceremony, see, e.g., *Golding v. Golding*, 176 A.D.2d 20 (N.Y. App. Div. 1992) and *infra* subpart IV.C.2.

<sup>2</sup> On the distinction between coercion and exploitation and the claim that only the former is considered legal duress, see, e.g., *Urban Plumbing and Heating Co. v. U.S.*, 408 F.2d 382, 389 (Ct. Cl. 1969): "The assertion of duress must be proven to have been the result of the defendant's conduct, and not by the plaintiff's necessities"; *Cheshire Oil Co. v. Springfield Realty Corp.*, 385 A.2d 835, 839 (N.H. 1978): "The coercive circumstances must have been the result of the acts of the opposite party"; *First Texas Sav. Ass'n. of Dallas v. Dicker Ctr.*, 631 S.W.2d 179, 185-86 (Tex. Ct. App. 1982): "It seems to be a settled principle of law that economic duress may be claimed only when the party against whom it was claimed was responsible for claimant's financial distress"; *Ponder v. Lincoln Nat'l. Sales Corp.*, 612 So.2d 1169, 1171 (Ala. 1992): "Merely taking advantage of another's financial difficulty does not constitute duress." See also ALAN WERTHEIMER, *COERCION* 39 (Marshall Cohen ed., Princeton University Press 1987): "In distinguishing between wrongful and nonwrongful proposals, contract law holds that it is one thing for A to *cause* B's dilemma, and quite another for A to take advantage of—to exploit—background circumstances for which A is not responsible." For a more extensive interpretation of the claim of duress that can also be applied to instances of distress exploitation, see *infra* subpart I.A. The law is already different in the case of a demand to change the terms of an existing contract, under the threat of violating the contract if the demand is not met. This is the subject of the fourth alternative of the Restatement The Restatement (Second) of Contracts § 176 (1). See also *Austin Instrument Co. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971)

<sup>3</sup> In modern unconscionability cases, as well as in the legal literature, there have been very few attempts to analyze distress exploitation situations through the prism of unconscionability. But see JOEL FEINBERG, *HARM TO SELF* 249-

This article aims to contribute to the development of a comprehensive DE doctrine in the United States by suggesting innovative rational criteria, limits, and language for such a doctrine.

The conventional discussion regarding Distress Exploitation Contracts is divided between procedural and substantive arguments.<sup>4</sup> Procedural arguments focus on the “subjective” flawed free will of the distressed person<sup>5</sup>. Substantive arguments employ “objective” criteria to measure the unfairness of DEC, such as the disproportionate distribution of the gains among the parties, or the gap between the contractual and regular market terms.<sup>6</sup> Some commentators offer an analysis that combines both procedural and substantive arguments.<sup>7</sup>

This article offers a different approach. Based on a philosophical-legal analysis, I argue that neither the flawed free will of the distressed person, nor the objective unfairness of the contract's terms, or even both, justify invalidating DEC. My approach, which is inspired by Jewish law’s unique attitude to DEC, focuses on the nondistressed party, the exploiter, and bases the proposed DE doctrine on her violation of the moral duty to provide riskless and costless help to the distressed party. I argue that the exploiter's refusal to sell the product at the price she would demand absent the other party's distress, is morally equivalent to the refusal to offer costless aid to the distressed person. Therefore, the ex post invalidation of DEC is derived from the violation of the ex ante duty to not take advantage of the other party’s distress and agree to the normal fee.

It follows from this moralistic version of the DE doctrine that when the refusal to aid the distressed person at the regular price can be morally justified, the contract is valid. This leads to three types of exceptions to the basic rule that invalidates DEC.

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54 (Oxford University Press 1986) (arguing that the combination of the lack of choice of the distressed party [procedural unconscionability] and the unfairness of the contractual terms [substantive unconscionability] justify the invalidation of DEC). Although I, too, argue in this article that DEC can, and should, be viewed as unconscionable agreements, I maintain that this would require a change in the current interpretation of the doctrine of unconscionability that would exceed the conventional categories of procedural and substantive unconscionability. See generally *infra* subpart I.B. For an attitude which goes beyond the procedural–substantive distinction, see Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 754-63 (1980) (based on the considerations of efficiency and fairness, classifying distress exploitation as a type of unconscionability). To my critics on Eisenberg's, view (*see infra*, notes 13, 71 and 180)

<sup>4</sup> To the distinction between procedural and substantive arguments *see* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). For the profound influence of Leff's distinction on the American discourse regarding the doctrines aiming to invalidate flawed contracts in general, and, specifically, the unconscionability doctrine, *see infra* subpart I.B.2.

<sup>5</sup> *See, e.g.*, Sian E. Provost, *A Defense of Rights-Based Approach to Identifying Coercion in Contract Law*, 73 TEX. L. REV. 629, 653-654 (1995) (claiming that a majority of the courts, following their subjective approach, focus on the flawed will of the distressed party).

<sup>6</sup> On the application of general substantive criteria to DEC, *see* James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1631-37 (1991); F. H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33, 40-49, 56-59 (1991); FEINBERG, *supra* note 3, at 249-54;

First, a DEC transaction should be valid when deviation from the market price results from the desire of the service provider (the presumed exploiter) to compensate herself for the loss of alternative profit, or even from the exploiter's authentic psychological experience of the loss of such profit.

Second, deviation from the market price is justified when the distress impacts the service provider, for example, by affecting the level of risk, convenience, or expense that providing the service would entail.

Finally, the refusal to provide service at the market price is morally justified when a prior investment is needed to acquire the knowledge or skill that enables the service provider to alleviate the distress. Under all of these circumstances, the contract is valid .

This article posits that the DE doctrine is consistent with American law's philosophical and moral foundations, as well as its economic logic. Specifically, I will defend the doctrine against three possible objections—philosophical, legal, and economic.

On the philosophical, I will discuss the tension between the proposed doctrine and the liberal-individualistic tendency of American law. I will argue that the DE doctrine delicately balances between libertarian individualism and interpersonal solidarity in a way that can be accepted by both communitarians and liberals. I will also argue that the Duty to Rescue, on which the DE doctrine is based, and which is limited to costless and riskless situations, is consistent with the implicit Duty to Rescue that exists in various realms of American contract law.<sup>8</sup> Finally, I will suggest a surprising parallel between American antitrust and antidiscrimination legislation and the proposed doctrine.

The second challenge to the proposed doctrine is that there is no legal Duty to Rescue in most American jurisdictions,<sup>9</sup> even when the aid is costless, and life and death are at stake

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<sup>7</sup> See, e.g., FEINBERG, *supra* note 3, at 225-29.

<sup>8</sup> See Melvin Eisenberg, *The Duty to Rescue in Contract Law*, 71 *FORDHAM L. REV.* 647 (2002). Surprisingly, although Eisenberg was one of the few writers to address the issue of DEC (see *supra* note 3), he himself did not connect the duty of rescue rule with DEC, neither in his article on the former (see *supra* note 3), nor in his writing on the latter. On the tension between the American No Duty of Rescue rule and DE doctrine, see generally *infra* subpart III.B.; for my critique of Eisenberg's disregard, or even repression, of this tension, see *infra* note 13.

<sup>9</sup> See Liam Murphy, *Beneficence and Liberty: the Case of Required Rescue*, 89 *GEO L. J.* 605, note 23 (2000-2001); see also David A. Hyman, *Rescue without Law: An Empirical Perspective on the Duty to Rescue*, 84 *TEX. L. REV.* 653, 655 (2006): "The common law approach to rescue is clear and straightforward. Absent a limited number of specific exceptions there is no duty of rescue ... [and] the no duty rule may prevail in forty-seven of the fifty states"; see also Restatement (Second) of Torts § 314 (1965): "The fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such an action."

[Hereinafter the No Duty to Rescue Rule, or NDRR].<sup>10</sup> According to the No Duty to Rescue Rule, a provider has no legal duty to aid a distressed person, even if the latter is willing to pay the market price. If one is legally entitled to refuse assisting a distressed person willing to pay the market price, why should one be denied the option of providing such assistance while charging above-market prices? Needless to say, it would be unreasonable for a legal system that does not recognize a duty to rescue to adopt a DE doctrine that does rely on just such a duty.

The literature concerned with DEC contains two main approaches to meeting the challenge posed by the No Duty of Rescue Rule to the development of a DE doctrine: one of **disregard** or **repression**, and the other of **resignation** and **submission**.

The first strategy is pursued by scholars who support the development of a DE doctrine, but ignore the potential threat of the No Duty of Rescue Rule to this doctrine.<sup>11</sup> In some instances, this disregard can be understood as denying the existence of a link between the development of a DE doctrine and the Duty to Rescue.<sup>12</sup> Disregard becomes denial when the argument supporting a DE doctrine explicitly relies on the Duty to Rescue, with no explanation of how this doctrine can be reconciled with a rule that refuses to acknowledge such a moral demand or, at the least, to give it legal import.<sup>13</sup>

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<sup>10</sup> See, e.g., the famous cases of *Buch v. Armory Mfg. Co.*, 44 A. 809 (N.H. 1898); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959); *People v. Beardsley* 113 N.W. 1128 (Mich. 1908). for the few exceptions and limits, see *infra*, note 132

<sup>11</sup> This disregard is shared by almost all of the scholars who supported the development of a DE doctrine in the past, since the current article is the first to attempt to resolve a DE doctrine with the NDRR.

<sup>12</sup> This is usually the position of both procedural approaches that focus on the parties' free will, and of the standard substantive approaches which concentrate on the objective terms of the contract. For the former proposition, see, e.g., *Provost*, *supra* note 5 at 654, claiming that, according to the subjective approach to duress and unconscionability, the morality of the threat, and even its legality, are not relevant to the definition of duress. For the latter, see *Gordley*, *supra* note 6 at 1627-31, supporting the invalidation of rescue contracts due to the unfair results of their terms, without any reference to the moral or legal duty of rescue, and stating explicitly that the rescuer's moral duty is irrelevant. See *Gordley* at 1632. For my criticism of both approaches, see *infra* Part II, especially subpart B.2. The economic analysis of law literature on DEC also tends to ignore the NDRR threat. See, e.g., *Buckley*, *supra* note 6; *William M. Landes and Richard A. Posner, Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1979).

<sup>13</sup> Eisenberg's article, *supra* note 3, might exemplify this tendency to repress the NDRR-DE Doctrine tension. Eisenberg addresses the classic rescue contract of a desperate traveler who is lost in a desert and agrees to pay a huge sum of money to his potential rescuer. Eisenberg justifies the invalidation of such contracts, on the grounds of both efficiency and fairness. He formulates, *id* at 756, the fairness argument against the validation of such a rescue contract as follows: "In terms of fairness our society posits, as part of its moral order, some degree of concern for others." This statement completely ignores the fact that, at least in the existing legal situation, the one refusing to proffer aid who does not express concern for the other is not the subject of legal sanction, neither by criminal law nor by civil law. The continuation of Eisenberg's fairness argument: "In the Desperate Traveler, G [the rescuer] acted wrongly in treating T [the traveler] as simply an economic object," also needs further explanation. If this is an independent argument, that is, it does not rely on the legal or moral sanction against refusal to assist, it is not decisive. For if the law does not require one to aid a distressed person, even when this aid is costless, why should the individual who consents to provide aid beyond the call of duty, for an additional price, be deemed an instrumental exploiter, and not one who takes advantage of a legitimate business opportunity? In contrast, if this is a consecutive claim, that is, the perception as an instrumental exploiter follows from a violation of the duty to aid at the customary

The second approach is taken by the few scholars who are sensitive to the legal and moral links between the Duty to Rescue and DEC. These scholars conclude that as long as No Duty to Rescue is the rule, Distress Exploitation Contracts should be valid.<sup>14</sup>

This article suggests a third approach. Like the first approach, I wish to further the development of a DE doctrine in American law. My approach however, does not deny the connection between the Duty to Rescue and a DE doctrine. To the contrary, the proposed DE doctrine is based on the moral duty to aid a person in distress. Despite the temptation to simply repress the existence of the conflict between the No Duty of Rescue Rule and DE Doctrine, this article assumes the complicated task of reconciling a contractual doctrine based on the legal validation of the moral duty to aid one in distress with the No Duty of Rescue Rule that seemingly refuses to legislate this moral duty.<sup>15</sup> To this end, I will conduct a philosophical analysis of the justifications for the No Duty of Rescue Rule. Based on this analysis, I will explain why even a legal system which does not directly enforce this moral duty can and should support the indirect enforcement of such a duty by invalidation of DEC.

After the ideological and legal discussion, I will analyze the DE Doctrine from an economic perspective. One may argue that even if it is morally justified and legally coherent, the DE doctrine will harm distressed individuals since it will discourage potential rescuers from aiding such unfortunates. However, as Omri Ben-Shahar and Oren Bar-Gill have recently shown,<sup>16</sup> this chilling effect takes place only when the threat of contract nullification is credible. A credible threat in the context of DEC is when the potential rescuer cannot be assured that the agreement struck is legally binding. If the demand for an above-market price is based merely on the other party's distress, then the threat not to aid the distressed party unless he agrees to an oppressive contract is not credible. A rule that invalidates DEC under these circumstances will not harm potential distressed individuals, but removes the incentive for extortion. In contrast, if the demand for above-market prices is based on the potential rescuer's assessment of alternative

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price, then this argument is plausible. In such a case, however, the question arises once again: on what basis in the existing law could one think it proper to develop a DE doctrine and to found it on the moral duty to aid a distressed person?

<sup>14</sup> See *infra* note 40.

<sup>15</sup> The fourth tactic regarding NDRR (besides denial of relevancy, repression, and submission) could be based on its rejection as a fitting rule for American law. I did not adopt this technique, for reasons discussed at length *infra* subpart III.B.

profits, then the threat to deny the service at the market price is credible. Invalidation of the agreement under these circumstances will ultimately harm those potentially distressed party. Thus, an economic analysis supports the moral distinction between a deviation from the market price based on a person's distress and deviation that is founded on the exploiter's assessment of his expected profits from alternative activity. The exception that legitimizes deviation from the market price in cases of prior investment in skills or availability is also founded on the economic logic that investment in knowledge that might aid distressed people furthers the interests of potentially distressed people.

The ideological, legal, and economic analyses will lead to the conclusion that American law is ready to accept the proposed DE doctrine.

The article is structured as follows: *Part I* explores the limitations of the existing doctrines and its conventional normative analysis, which is based on a procedural and substantive examination of distress exploitation situations. This part also points to the initial direction for an alternative approach which focuses on the moral behavior of the exploiter. *Part II* addresses the challenge posed by Part I and suggests a new approach to DEC. This approach, inspired by the unique Jewish law attitude to this question, goes beyond the procedural and substantive approaches, and bases the invalidation of DEC on the moral obligation to aid a distressed person. *Part III* argues that American law should develop a DE doctrine based on the duty to provide costless aid. It further defends this doctrine against potential ideological, legal, and economic objections. *Part IV* applies my conclusion regarding the desirability of developing such a doctrine in American law and offers several extensions. A short conclusion follows.

## I. THE LIMITS OF THE PROCEDURAL AND SUBSTANTIVE APPROACHES

This part analyzes the implications of the contractual doctrines of duress and unconscionability on DEC. This analysis reveals the limitations of conventional procedural and substantive approaches to invalidate DEC, and points to the need for a new approach which focuses on the nondistressed person and on her moral duty to aid a distressed person.

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<sup>16</sup> See Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threat*, 33 J. LEGAL STUD. 391 (2004) [hereinafter Bar-Gill & Ben-Shahar (2004)]; Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717 (2005) [hereinafter Bar-Gill and Ben-Shahar (2005)].

## A. Duress

### 1. Background

Prior to the twentieth century, the defense of duress was limited to coercion by physical force or the threat of such force.<sup>17</sup> More recently, encouraged by the Restatement (Second) of Contracts, the courts have expanded the definition of duress. Modern duress doctrine states that a contract is void or voidable if it was entered into as a consequence of an *improper or wrongful threat* or act that *overcomes the free will* of the other party.<sup>18</sup> Two major questions thus arise: (i) what is free will? and (ii) what is an improper or wrongful threat?<sup>19</sup>

Traditionally, the term "free will" has been interpreted very narrowly. The only threat that was considered duress was one that denied the party to the contract any choice other than entering into the contractual relationship.<sup>20</sup> Even in cases of physical violence however, a party technically has the option of not surrendering and refusing to contract.<sup>21</sup> Consequently, recent court decisions have turned to examine whether the coerced party had a reasonable alternative.<sup>22</sup> Furthermore, while the traditional laws of duress focused on the party under duress, modern judges also consider the coercer when inquiring whether his threat amounted to an improper threat or wrongful act.<sup>23</sup>

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<sup>17</sup> See 28 RICHARD A. LORD, WILLISTON ON CONTRACTS 423-24 (4th ed., 2003).

<sup>18</sup> See, e.g., Kaplan v. Kaplan, 182 N.E.2d 706, 709 (Ill. 1962); Rissman v. Rissman, 213 F.3d 381 (7th Cir. 2000); Matter of Adoption of Male Minor Child, 619 P.2d 1092 (Haw. Ct. App. 1980): duress is a condition in which the victim is induced by a wrongful act or the threat of a wrongful act to do something contrary to his free will; 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS 40 (rev. ed. 2002). See also LORD, *supra* note 17, at 438 (stating that duress is defined as every case in which one party to a contract or transfer was deprived of freedom of will as a result of wrongful conduct by the other party).

<sup>19</sup> See PERILLO, *supra* note 18, at 40; see also WERTHEIMER, *supra* note 2, at 19-53, describing these two conditions as the "two-pronged theory."

<sup>20</sup> See, e.g., Restatement (First) of Contracts §§ 492-93 (1932); see also Fruhauf Southwest Garment Co. v. U.S., 111 F. Supp. 945 (Ct. Cl., 1953).

<sup>21</sup> See Judge Holmes' argument that "conduct under duress involves a choice." Union Pac. R.R. Co. v. Pub. Serv. Comm'n 248 U.S. 67, 70 (1918). In effect, the only case in which one can absolutely not speak of a willing action is when one party forcibly takes the other party's hand and uses it as an object in order to sign the contract.

<sup>22</sup> See LORD, *supra* note 17, at 427; Andreini v. Hultgren 860 P.2d 916 (Utah, 1993). See also Restatement (Second) of Contracts § 175 & cmt. b (1981); WERTHEIMER, *supra* note 2, at 35.

<sup>23</sup> See PERILLO, *supra* note 18 at 42; The Restatement (Second) of Contracts § 176 (1) presents four alternatives under which a threat is deemed improper: (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property, (b) what is threatened is a criminal prosecution, (c) what is threatened is the use of civil process and the threat is made in bad faith, (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

The terms of the contract constitute an additional criterion that aids us in classifying an improper threat See LORD, *supra* note 17, at 433-34 (regarding some types of threats, whether there is duress will depend not only upon the nature of the threat but also upon the fairness of the exchange); see also Restatement (Second) of Contracts § 176(2) (1981).

## 2. The Application to Distress Exploitation Contracts

The above doctrinal analysis highlights the connection between the duty of aiding a distressed person and the validation of DEC. Under modern duress law, a party's distress, even when it undermines his free will, cannot by itself be considered duress, unless it is accompanied by an improper threat or a wrongful act by the other party. Therefore, the critical legal question concerning the invalidation of DE agreements on duress grounds is whether the threat not to aid a distressed person is an improper threat. This connection clarifies the tension between the No Duty of Rescue Rule and the development of a DE doctrine. In a legal regime like admiralty law<sup>24</sup> which does impose a Duty to Rescue, one could argue that a threat to not aid a person is a wrongful threat. Yet, in most of the states, where No Duty to Rescue is the dominant rule, it is highly doubtful that such a threat would be considered wrongful.<sup>25</sup> If so, the distinction that the common law drew between dry-land rescue contracts, which are legally valid, and maritime rescue contracts, which are subject to judicial review,<sup>26</sup> remains in force.<sup>27</sup> At any rate, the prevalent view in court decisions regarding more moderate forms of distress (in which life is not at stake), such as economic distress, is that the exploitation of distress for which the exploiter is not responsible does not amount to duress.<sup>28</sup>

## 3. A Lesson from Philosophy

Another difficulty in classifying DEC as duress emerges from the philosophical literature that distinguishes between offer and threat.<sup>29</sup> According to this distinction, threats reduce the

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<sup>24</sup> See 46 U.S.C. § 2304(a)(1) (2000), ordering the duty to provide assistance at sea as follows: "A master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost so far as a master or individual in charge can do so without serious danger to the master's or individual's vessel or individual on board." On the sanction against the violator, see 46 U.S.C. §230(b) (2000).

<sup>25</sup> On the dominance of NDRR in American law, see *supra* notes 9-10;

<sup>26</sup> On the distinction drawn by common law between legally valid dry-land rescue agreements and invalid rescue at sea agreements, see Landes and Posner, *supra* note 12, at 118-19; Buckley, *supra* note 6, at 45-49; see also *infra*, subpart IV.C.1.

<sup>27</sup> An exacting analysis of the Restatement, its official comments, and the examples it brings might lead to a similar conclusion, that dry-land rescue agreements are valid, even if their content seems oppressive; see Eisenberg, *supra* note 3, at n. 54; and *infra* note 214. Yet, I believe the new theory for DEC which is suggested in this article enables a reinterpretation of duress law on this subject.

<sup>28</sup> See *supra* note 2. The law is different in the case of a demand to change the terms of an existing contract, under the threat of violating the contract if the demand is not met. This is the subject of the fourth alternative in § 176 (1)(d) of the Restatement. There is extensive literature on this subject. See, e.g., Bar-Gill and Ben-Shahar 2004, *supra* note 16.

<sup>29</sup> On this distinction, see WERTHEIMER, *supra* note 2, at 202-21; Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD, 440, 447-53 (Sidney Morgenbesser et al. eds., St. Martin's Press 1969); CHARLES FRIED, CONTRACT AS PROMISE, ch. 7 (Harvard University Press 1981); FEINBERG, *supra* note 3, at 216-28.

possibilities available to their recipients and are therefore considered duress, while offers expand them and therefore lead to a regular contract.<sup>30</sup> The application of this distinction to DEC shows that the proposal by the exploiter to aid the distressed for an above-market price expands the range of possibilities available to the distressed person, and does not limit them.<sup>31</sup> Accordingly, such contracts should not be invalidated on duress grounds.

Paradoxically, the distinction between threats and offers, which clarifies the difficulties in the classification of distress exploitation as duress, might also lead in the opposite direction, and define distress exploitation as duress. Identifying the baseline against which the threat or offer needs to be measured when determining whether it narrows or expands options can be a complex task.<sup>32</sup> Intuitively, one could argue that the baseline issue is a factual: it merely requires comparison of the situation following the offer or threat, either to the status quo, or to the natural way in which events would develop without the threat. The baseline question has normative aspects, however.<sup>33</sup> To illustrate this, consider an individual who volunteers over an extended period of time to provide a certain service for which he is not duty-bound. At a certain juncture, however this individual starts demanding payment for continuing to provide the service.<sup>34</sup> Consider also an individual who constantly beats his slave, (assuming that legally, the beating can only be stopped by means of an agreement,) but is willing to stop the beating in return for payment.<sup>35</sup> A technical factual test can lead to the conclusion that in the first case (the volunteer), the demand for payment diminishes the array of options available, thus constituting a threat and coercion; by contrast, in the second case (the owner who beats his slave), the options are

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<sup>30</sup> See WERTHEIMER, *supra* note 2, at 204.

<sup>31</sup> Think of the case of the fugitive, in the opening example. The boatman's proposal to ferry the fugitive does not deny the latter of the earlier possibility that was available to him (that is, to deal with his pursuers on his own), it merely added another option, that of crossing the river for an excessive price. In, however, the classic case of duress, when one person threatens to harm another if the latter will not pay him a sum of money, the threat reduces the range of options before the threatened party, since prior to the threat he had the possibility of keeping his money while not being harmed by the threatener. For a similar analysis, see MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 85-86 (Harvard University Press 1993); see also David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFFAIRS 121 (1981).

<sup>32</sup> See WERTHEIMER, *supra* note 2, at 205: "Without some benchmark, there would be better and worse alternatives, but no better and worse off." On different kinds of baselines, see also FEINBERG, *supra* note 3, at 213-68.

<sup>33</sup> On the distinction between a statistical or phenomenological baseline and a normative moralistic one, see WERTHEIMER, *supra* note 2, at 206-21; FEINBERG, *supra* note 3, at 219.

<sup>34</sup> For a similar example, see FRIED, *supra* note 29, at 396-97 (1980).

<sup>35</sup> For a similar example, see Nozick, *supra* note 29, at 450.

expanded, and so this is an offer. I maintain however, that most people think that the case of the volunteer does not involve a threat or coercion,<sup>36</sup> while the beating case does.<sup>37</sup>

This means that establishing a baseline against which to compare an opportunity-expanding offer and an option-limiting threat requires normative criteria. When a person has normative expectations of certain behavior, or abstention from behavior by another, making the demand for a contractual relationship a condition for acting in accordance with the normative expectation constitutes coercion. However, when there is no normative justification for such an expectation, making consent to act or abstention from acting conditional on a contract constitutes an offer, and is not coercive.<sup>38</sup> Applying this reasoning to DE situations implies that if an individual is normatively expected to assist a distressed person, the threat of not aiding absent an oppressive contract is coercive. On the other hand, if an individual is not normatively required to provide aid to the distressed person, then refusing to enter into a contract unless its terms are oppressive is not duress.<sup>39</sup>

How are we to establish the normative baseline to distinguish between threats and offers? Some authors conclude from the NDRR that a distressed person has no right to be saved, and that a person in regular distress is not entitled for aid from strangers. They therefore argue that the threat to deny an individual aid unless an above-market price is paid cannot be classified as duress.<sup>40</sup>

Contrary to these approaches, I believe that even legal systems which are unwilling to directly enforce the Duty to Rescue by means of criminal or tort law can nevertheless recognize the duty to aid a distressed person in contract law. This moral duty may be indirectly legally

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<sup>36</sup> See FRIED, *supra* note 29.

<sup>37</sup> See Nozick, *supra* note 29, at 449-50; *but cf.* Bar-Gill and Ben-Shahar 2005, *supra* note 16, at 729-31, maintaining that despite this intuition, it is in the beaten slave's interest for the contract to be validated, otherwise, the master would continue to beat him.

<sup>38</sup> In support of the normative baseline, see Nozick, *supra* note 29; Joseph Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, 7 *MIDWEST STUD. IN PHILOSOPHY* 108 (ed. Peter French et al. 1982); Martin Gunderson, *Threat and Coercion*, 9 *CANADIAN J. OF PHILOSOPHY* 247 (1979); FRIED, *supra* note 29, at 98-99.

<sup>39</sup> To exemplify the moral criterion in the context of exploitative situations, see WERTHEIMER, *supra* note 2, at 218.

<sup>40</sup> See TREBILCOCK, *supra* note 31 at 85-86, applying the classic distinction between threats that harm the existing rights of the threatened and offers that expand a person's existing options, without harming his rights. Based on this distinction, he assumes that, as the current legal situation stands, we cannot speak of a distressed person's right to receive aid, and therefore DE should not be considered duress. See also Provost, *supra* note 5, at 653, assuming, without explicitly mentioning NDRR, that the rescuee has no legal right to be saved. In the absence of such a legal right, he concludes that the threat of nonrescue is legitimate, and, hence, the rescue contract should be valid. Finally, addressing the classic rescue case. Wertheimer argues that if rescuee has the right of rescue, oppressive rescue contract will considered to be duress while it is valid contract if the rescuee does not possess this right. See

enforced by classifying the threat not to provide aid to a distressed person as a threat leading to duress. This view is supported by precedent from the law in other areas, which shows that while every threat to perform a criminal or tortious act would automatically be regarded as improper, not every threat to perform an act that is not a criminal transgression is proper. Put differently, if I have a theory that defined the threat not to aid a distress person as wrong, it can support a claim of duress.<sup>41</sup> Thus, the central challenge in developing an American DE doctrine is to propose a theory that defines the circumstances in which not aiding a distressed person is wrong, despite the unwillingness to ascribe criminal or tort significance to such refusal. In parts II-III I will suggest a DE doctrine that addresses this issue.

## *B. Unconscionability*

### 1. General Background

The doctrine of unconscionability is relatively new in American law. It was articulated as a rule only in the second half of the twentieth century<sup>42</sup> According to the doctrine, the court may refuse to enforce the contract, if as a matter of law, it finds the contract or any of its clauses to have been unconscionable at the time it was made.<sup>43</sup>

The unconscionability doctrine has challenged contract law.<sup>44</sup> A great deal of ambiguity still remains as to its theoretical basis,<sup>45</sup> as well as its practical content<sup>46</sup> A considerable portion of

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WERTHEIMER, *supra* note 2, at 219-20, 225-28. Although Wertheimer does not expressly relate to the existing legal situation in the United States, it seems from what he says that under the NDRR, a rescue agreement would be valid;

<sup>41</sup> See LORD, *supra* note 17, at 473 "Wrongful acts can also include threatened or actual action that is morally though not legally, wrong, such as imposition or oppression that go beyond mere hard bargaining."

<sup>42</sup> There were, however, some precedents of unconscionability that preceded the U.C.C. See 8 RICHARD A. LORD, WILLISTON ON CONTRACTS (4<sup>TH</sup> ed. 2003), at 5-15.

<sup>43</sup> See Section 2-302 of the Uniform Commercial Code [hereinafter U.C.C. § 2-302] and and Restatement (Second) of Contracts § 208 (1981).

<sup>44</sup> See, e.g., Leff, *supra* note 4; J. A. Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Eisenberg, *supra* note 3; Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. LAW & ECON. 293 (1975); Symposium: *Unconscionability around the World: Seven Perspectives on the Contractual Doctrine, Introduction*, 14 LOY. L.A. INT'L & COMP. L. REV. 435 (1992); E.A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations to the Freedom to Contract*, 24 J. OF LEGAL STUD. 283 (1995); Robyn L. Meadows, *Elder Law: Unconscionability as a Contract Policing Device for the Elder Client: How Useful Is It?*, 38 AKRON L. REV. 741 (2005); Paul B. Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187 (2006) [hereinafter Marrow (2006)]; M. P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L. J. 757 (1969); Paul B. Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11 (2003); Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737 (2003); J. W. Stemple, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. DISP. RESOL. 757; Mary Jane Groff, *Where Can Unconscionability Take Arbitration? Why the Fifth Circuit's Conscience Was Only Partially Shocked*, J. DISP. RESOL. 131 (2005); Russel Korobkin, A "Traditional" and

the discussions of this doctrine center around Arthur Leff's famous distinction between procedural unconscionability and substantive unconscionability.<sup>47</sup>

A contract is procedurally unconscionable if as a result of a flaw in the process of making the contract, the consent of one of the parties does not reflect his true will. In the words of the court procedural unconscionability is the: "absence of meaningful choice on the part of one of the parties."<sup>48</sup> In contrast with procedural unconscionability, substantive unconscionability concerns the terms of the contract. In the words of the court substantive unconscionability is: "contract terms which are unreasonably favorable to the other party."<sup>49</sup>

Although courts' definitions of unconscionability generally refer to both elements<sup>50</sup> the academic legal literature actively debates between procedural and substantive approaches. The former maintain that only problems during the process of the transaction invalidate the contract. According to this approach, the unfair content of the contract cannot by itself make the contract unconscionable,<sup>51</sup> In contrast, the substantive approach maintains<sup>52</sup> that even in the absence of procedural problems, unfair contract terms should be grounds for a contract's invalidation.<sup>53</sup>

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"Behavioral" Law-and-Economics Analysis of *Williams v. Walker-Thomas Furniture Company*, 26 HAWAII L. REV. 441 (2004); Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123 (2005); Horacio Spector, *A Contractarian Approach to Unconscionability*, 81 CHI.-KENT. L. REV. 95 (2006). This obviously is only a partial list; for additional articles, see, e.g., the excellent list of 130 articles in P. Birdwell, *The Philosophical Dimension of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513 note 3 (2003).

<sup>45</sup> On the ambiguity surrounding the unconscionability doctrine, see e.g. Marrow (2006), *supra* note 44; and Birdwell, *supra* note 44.

<sup>46</sup> See *N.E.C. Technologies Inc. v. Nelson*, 478 S.E.2d 769 (Ga. 1996). It has been recognized that unconscionability, as set forth in U.C.C. § 2-302 (2005), is not a concept, but a determination to be made in light of a variety of factors, and not as a set formula; see also 478 S.E.2d 769 at 771: Unconscionability and oppression are broad concepts that might describe an expansive array of cases and situations." See also *Bishop v. Washington*, 480 A.2d 1088, 1094 (Pa. Super. Ct. 1984): "It is impossible to formulate a precise definition of the unconscionability concept."

<sup>47</sup> See Leff, *supra* note 4.

<sup>48</sup> See the seminal case of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

<sup>49</sup> *Id.* The terminology of both "absence of meaningful choice" and "terms which are unreasonably favorable to the other party" was followed in later cases. See, e.g., *Gillman v. Chase Manhattan Bank N.A.*, 534 N.E.2d 824 (N.Y. 1988). See also *U.S. v. Martinez*, 151 F.3d 68, 74 (2d. Cir. 1998): "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party."

<sup>50</sup> See e.g. *Lewis v. Lewis*, 748 P.2d 1362 (Haw. 1988): "It is apparent that two basic principles are encompassed within the concept of unconscionability, one-sided and unfair surprise." See also U.C.C. §2-302 cmt. 1 (2005). Following the famous distinction between procedural and substantive unconscionability, the doctrine of unconscionability includes two main components: an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.

<sup>51</sup> At least at its outset, this was the accepted interpretation of these grounds; see, e.g., Eisenberg, *supra* note 3, at 752. For support of this approach, see Birdwell, *supra* note 44; Epstein, *supra* note 44. For an analysis of procedural unconscionability from the viewpoint of the economic analysis of the law and that of the behavioral economic approach, see Korobkin, *supra* note 44. Even according to the procedural approach, however, gross disparity in the value exchanged might raise the suspicion that the contract does not reflect the free will of the parties.

The disagreement between the procedural and substantive approaches has a profound ideological basis: Libertarian<sup>54</sup> and economic free-market approaches<sup>55</sup> support procedural unconscionability. Modern liberals who uphold the values of distributive justice<sup>56</sup> and freedom in its positive sense<sup>57</sup> support substantive unconscionability.<sup>58</sup> At times, a substantive approach is also justified on the basis of Aristotelian conceptions of corrective justice,<sup>59</sup> or Hegelian<sup>60</sup> and Kantian<sup>61</sup> perceptions of human dignity. The substantive approach has even been endorsed on economic grounds.<sup>62</sup> There are also mixed approaches that incorporate both approaches in one way or another.<sup>63</sup>

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<sup>52</sup> See, e.g., Ellinghaus, *supra* note 44, at 757, 773; and in a later period, Posner, *supra* note 44. This is the dominant approach in the existing law. See, e.g., Eisenberg, *supra* note 3, at 752-53; see also the survey of American court decisions: J. J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE ch. 4 (4th ed., 1995).

<sup>53</sup> See, e.g., Maxwell v. Fidelity Fin. Serv. Inc., 907 P.2d 51 (Ariz. 1995) (holding that under U.C.C. §2-302, a claim of unconscionability can be established with a showing of substantive unconscionability alone).

<sup>54</sup> See, e.g., Epstein, *supra* note 44; see also Birdwell, *supra* note 44, demonstrating how the procedural approach can be based on the liberal value of negative freedom.

<sup>55</sup> These conceptions were prevalent in the nineteenth century in England and the United States, and they gave birth to the classic model of contract law that was limited to review of the precontract procedure. See generally PATRICK. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (Oxford University Press 1979).

<sup>56</sup> See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L. J. 472 (1980); see also Posner, *supra* note 44.

<sup>57</sup> See Birdwell, *supra* note 44.

<sup>58</sup> See, e.g., M. Mautner, *A Justice Perspective of Contract Law: How Contract Law Allocates Entitlements*, 10 TEL AVIV U. STUD. IN LAW 239 (1990).

<sup>59</sup> See, e.g., Gordley, *supra* note 6, who discusses the Aristotelian concept of equality in exchange, and argues that the equitable evaluation of the consideration of the contract stems from the Aristotelian perception of corrective justice.

<sup>60</sup> See Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077 (1989), drawing on Hegelian philosophy to validate only a fair contract, that is, one with an equivalence consideration.

<sup>61</sup> See R. Wisner, *Understanding Unconscionability: An Essay on Kant's Legal Theory*, 51 TORONTO U. FACULTY L. REV. 396 (1993).

<sup>62</sup> See, e.g., Buckley, *supra* note 6, supporting the substantive evaluation of contractual terms from the perspective of incentive, screening, and cooperation, and discussing the fairness measure that derives from each perception; see also Korobkin, *supra* note 44, supporting the substantive approach (especially when there are market failures, information asymmetry, or the fear of cognitive bias).

<sup>63</sup> For example some would invalidate contracts due either to procedural flaws or to problematic content. Other approaches point to cumulative conditions. For a description of the variety of stances in the cases, see LORD, *supra* note 42, at 52-69; At times, a pendulum principle comes into play, when a relatively minor flaw in the process suffices, or when the contract's terms are especially problematic, and vice versa; see Spanogle, *supra* note 44; SINAI DEUTCH, UNFAIR CONTRACTS 122 (Lexington Books 1977). Additional approaches distinguish between regular contracts that should be dominated by the procedural approach and standard contracts which should be dominated by the substantive approach. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 284 (1983); W. David Slawson, *The New Meaning of Contract: The Transformation of Contract Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984); John. E. Murray, *The Standardized Agreement Phenomenon in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982).

## 2. Application to Distress Exploitation Contracts

I do not deny the relevance of unconscionability for distress exploitation situations. Rather, I argue that neither procedural nor substantive unconscionability can form the basis for contract invalidation without a moral theory that censures the refusal to aid a distressed person at market price

First, it is necessary to distinguish between procedural unconscionability and distress exploitation situations. The doctrine of procedural unconscionability focuses on the decision-making processes that lead to a faulty economic decision by one of the parties.<sup>64</sup> In distress exploitation situations however, consenting to an exploitative contract is the only alternative for the exploited party. Thus, even if one possessed unlimited time and ability, such party would still be compelled to agree to the transaction. The problem with consent resulting from distress is not flawed or faulty consent, but the prior circumstances that narrow the alternatives of the distressed person. Opponents of enforcing the DEC price could respond by arguing that the consent in distress exploitation situations is flawed since it leaves the distressed party with no choice other than to accept the proposal before him.<sup>65</sup> As I explained above<sup>66</sup> however, the lack of the distressed party's choice can't be considered duress without the normative legal censure of the refusal to aid a distressed person. The expansion of the laws of unconscionability beyond the laws of duress therefore requires a moral theory that explains why the exploitation of a superior bargaining position, and not only its creation, makes the contract invalid.

The need for a moral theory that condemns DE becomes even clearer in the context of substantive unconscionability. This doctrine is usually described as relating to oppressive contract terms that unreasonably favor one of the parties or that are one-sided.<sup>67</sup> The question of what places the terms of such a contract in one of these unfavorable categories still remains. The

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<sup>64</sup> See LORD, *supra* note 42, at 67. This is, of course, true in "unfair surprise" cases which are considered to be the paradigmatic cases of procedural unconscionability. See, e.g., *Lewis v. Lewis*, *supra* note 50.

<sup>65</sup> This kind of argument is sometimes labeled the Doctrine of Inequality of Bargaining Power; see, e.g., M. J. Trebilcock, *The Doctrine of Inequality of Bargaining Power*, 26 U. TORONTO L. J. 359 (1976). It should be noted, though, that this doctrine sometimes seeks to prevent sophisticated parties with grossly unequal bargaining power from taking advantage of less sophisticated parties. See *U.S. v. Martinez*, 151 F.3d 68, 74 (2d. Cir. 1998) (citing *U.S. v. Bedford Assoc.*, 657 F.2d 1300, 1314 [2d Cir. 1981]). Those cases are similar to the classic cases of procedural unconscionability, because they address mistaken decisions, and not a lack of alternatives. The inequality of bargaining power, in certain circumstances, justifies intervention in the content of the contract on the ground of distributive justice. In contrast, as I argued in the body of the article, inequality between the parties, in of itself, does not justify classifying this as invalid consent.

<sup>66</sup> See *supra* subpart I.A.

<sup>67</sup> See *Williams* 350 F.2d 445, *supra* note 48; Restatement (Second) of Contracts § 208.

legal literature on the subject<sup>68</sup> presents two main tests: one that measures the disproportionate distribution of profit from the transaction, while the other compares the price of the transaction with the market price.<sup>69</sup> How are these tests applied to DE situations? Under the first test, it would be extremely difficult to classify a DE contract as unconscionable. Take, for example, the fugitive scenario discussed in the introduction: The fugitive's profit from the transaction is \$1,000 (the ransom that he saves). Even if he pays the boatman \$100 (which is ten times the market price for the service), he still receives ninety percent of the profit attained in the transaction. The fugitive cannot base his claims on the disproportionate distribution of the profit. Under the second test, the differential between the market price and the DE contract price would seemingly classify the contract as unconscionable. But what makes the market price of a nondistress contract a moral criterion for examining the fairness of a distress contract? As any economist can explain, the market price is not a metaphysical price that clarifies the absolute worth of an asset or service. Rather, it expresses the relationship between supply and demand that exist under certain market conditions. When these conditions are met, a deviation from the market price can indicate an irregular situation that led one of the parties to err in his assessment of the transaction.<sup>70</sup> In cases of DE, in contrast, deviation from the market price is not the result of a mistake made by the distressed party. Rather, the increased price derives from the additional benefit derived from the service in the absence of alternatives, and (at times) from different production costs. This difference is responsible for the above-market price under conditions of distress. Due to the difference between a regular transaction conducted under customary terms, and one made in a distress situation, it is necessary to find a compelling reason to prefer the regular price, which does not take into account the specific circumstances of the transaction to the above-market price agreed upon by the parties.<sup>71</sup>

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<sup>68</sup> See, specifically, Gordley, *supra* note 6; Buckley, *supra* note 6; Feinberg, *supra* note 3; Zimmerman, *supra* note; Benson, *supra* note 60. Some of these authors relate specifically to the doctrine of unconscionability, while others, in more abstract fashion, treat the idea of contract justice.

<sup>69</sup> For a similar classification in the literature of the current substantive tests, see WERTHEIMER, *supra* note 2, at 227; cf. Benson, *supra* note 60, at 1090: "According to the doctrine of unconscionability, a necessary condition of contract enforcement is that the consideration exchange be adequate. [...] Equivalence is generally assessed against a normal market price under reasonably competitive conditions."

<sup>70</sup> This is precisely the case in the classic instances of procedural unconscionability, such as unfair surprise or exploitation of lack of experience

<sup>71</sup> Unlike the failure of the classic substantive and procedural theories, the economic analysis of the law might be more successful in explaining why the law should invalidate DEC. First, in economic terminology, DEC are bilateral monopolies. In a bilateral monopoly, the parties to a bargain are unique, and the contractual surplus is unavailable when they deal with other parties and not each other. See SIDNEY SIEGEL & LAWRENCE A. FOURAKER, *BARGAINING*

In order to illustrate the limitations of the lack-of-choice argument and those of the price differential justification, I turn to the famous case of *Post v. Jones*.<sup>72</sup> In *Post*, the cargo of a wrecked whaling ship would be lost if not bought immediately, was purchased at an extremely reduced price. As an admiralty case, (where a Duty to Rescue exists), this is one of the rare instances in which the court applied a semi-DE doctrine and invalidated the contract.<sup>73</sup> I would like to discuss this case, while distinguishing between two hypothetical variants. In the first hypothetical, the purchasers of the cargo were on their way home, and did not miss any alternate opportunity due to the transaction. In the second hypothetical, the buyers forsook another opportunity in order to conduct this transaction.<sup>74</sup> From the perspective of the distressed person and his lack of choice, the buyers' alternate opportunity is irrelevant. Consequently, one who classifies distress-based consent as a lack of choice, and hence as procedural unconscionability, would reach a similar conclusion in this case as well. The difference between the market price and the contractual price also exists in both hypotheticals. Therefore, in both hypotheticals, a conventional substantive approach which tests the fairness of the contract's terms by comparison to the market price should also invalidate this contract as substantive unconscionability. Despite the technical similarity, one can certainly distinguish between the hypotheticals<sup>75</sup> and argue that a deviation from the market price that is based on additional cost or risk is legitimate, while one that results solely from the possibility of exploiting distress is illegitimate. It is however

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AND GROUP DECISION MAKING: EXPERIMENTS IN BILATERAL MONOPOLY 1-16 (McGraw-Hill 1960). In such a situation, when market conditions do not exist, the general economical premise that the contractual price reflects the efficiency price is not relevant (on this argument, see Eisenberg, *supra* note 3). Furthermore, in the absence of a market price, it is difficult to predict the price of the transaction, since, in theory, the seller should agree to any price at which he profits (in our case, one dollar above the market price), while the buyer should agree to a dollar less than the benefit that he derives from the product (in the case of the fugitive, the sum of the ransom less one dollar). Incidentally, the fact that DE situations are bilateral monopolies constitutes a market failure that might prevent the making of a transaction; Consequently, it may provide economic justification for the determination of a cognitive price for a DE transaction. It should be noted that focusing on the market failure resulting from the negotiations being between bilateral monopolies does not explain why the cognitive price must be the distress-free regular price in a manner that leaves all the "rescue" profits in the hands of the rescuer, and no other price in the range between the profits of each party. Eisenberg's theory does not address this question. This article tries to fill the gap by adjusting the ex post price to the ex ante duty to aid a distressed person.

<sup>72</sup> See *supra* note 1.

<sup>73</sup> On the uniqueness of admiralty law, see *supra* note 26.

<sup>74</sup> Indeed, the buyers in *Post v. Jones* argued that this was the real situation, but the court rejected their factual description.

<sup>75</sup> The existing court decisions support my view on this topic, since they unequivocally explain that the differential between the regular price and the contractual price, in of itself, does not define the contract as substantively unconscionable, without broader consideration of the aggregate circumstances of the transaction and the personal characteristics of the parties. See JOHN E. MURRAY, *CONTRACTS, CASES AND MATERIALS* 563 (5th ed., 2005): "The test is not simple nor can it be mathematically implied." See also U.C.C. 2-302 cmt. 1 (2005): The current courts'

specifically this distinction that proves that neither the lack of choice of the distressed person, nor the very differential between the market price and the price demanded of the distressed person, nor even both together,<sup>76</sup> can justify contract invalidation without an additional element. This additional element is the criticism of the exploiting party. What is the nature of this criticism, and what separates improper distress exploitation from taking advantage of a business opportunity? Without an unequivocal answer to this question, neither procedural nor substantive unconscionability doctrines are mature enough to generate a coherent approach that invalidates DEC.<sup>77</sup> Against this background, I will set forth an additional approach and show how the adoption of this approach may make the doctrine of unconscionability a suitable tool for responding to DEC.

### *C. Conclusion*

To conclude, this part explored the limitations of the existing doctrines and its conventional normative analysis, which is based on procedural and substantive approaches to invalidate DEC. My analysis also points towards the initial direction for an alternative approach; one that focuses on the moral behavior of the exploiter. This said, such a development requires a clear moral theory that defines the circumstances in which the exploitation of distress, and specifically, the refusal to extend aid at the market price are morally flawed. Such a theory will enable classifying the threat to deny aid at the market price to a distressed person as an improper threat that leads to duress. The theory also leads to the conclusion that an irregularly priced contract is unconscionable. Current American law has yet to develop such a distinct moral theory. Furthermore, the NDRR seems to indicate the opposite moral theory, which emphasizes the individualistic right not to extend aid. Below, I will attempt to define a moral theory capable of supporting the DE doctrine and reconcile it with the NDRR.

## II. A FRESH JEWISH LAW ATTITUDE: DISTRESS EXPLOITATION CONTRACTS AND THE MORAL

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decision, however, does not supply us with an alternative, more sophisticated, and clear test for the fairness of the contract.

<sup>76</sup> According to one view, the combination of the distressed party's lack of choice with the difference between the contractual price and the customary one justifies the voiding of the contract; see FEINBERG, *supra* note 3, at 249-54. As, however, Wertheimer has observed, if neither the lack of choice nor the differential between the contractual price and the customary price suffices by itself to justify invalidation, why should their combination cause the contract to be set aside? See WERTHEIMER, *supra* note 2, at 230-31.

<sup>77</sup> This might be why we should not be surprised that American law has not yet developed a distinctive doctrine of substantive unconscionability for DE situations.

## DUTIES OF THE EXPLOITER

In order to meet the challenge posed by the legal-philosophical analysis above, American law can benefit from a familiarity with Jewish Law's encounter with Distress Exploitation Contracts. Jewish Law is challenged by DEC in a variety of cases and situations. Some of the approaches which developed in Jewish law parallel current legal thought, which focuses on the procedural-substantive tension. Beside those approaches, Jewish law developed an additional unique approach which deviates from the conventional approaches, and bases the Distress Exploitation doctrine on a moral assessment of the behavior of the nondistressed party.<sup>78</sup> This unique approach has the potential to enrich our legal discourse and contribute to the development of an American DE Doctrine.

### A. The Development of the Distress Exploitation Doctrine in Jewish Law

A case similar to the fugitive hypothetical with which I opened serves as the archetype for the Babylonian Talmud's<sup>79</sup> discussion of Distress Exploitation agreements. The case appears twice in the Babylonian Talmud.<sup>80</sup> In one instance, the agreement is invalid, and the distressed party is only obligated to pay the market price, while in the other, the contract remains in force

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<sup>78</sup> Our discussion of the Jewish law position is based on an innovative research that I conducted on the subject, the conclusions of which are published here for the first time. The current article, however, is primarily concerned with the development of the approaches of American law. Accordingly, I related only to the most central approaches of Jewish law, and I refer only to the main primary sources; I assume that these references will suffice for the reader who is mainly interested in the development of American law. Those readers who wish to further explore the position of Jewish law itself will find a more complete analysis, including a more diverse range of citations and references, in which I relate to methodological problems and potential objections to my interpretation, in an additional article devoted to an examination of Jewish law on this issue. See Shahar Lifshitz *Oppressive Contracts: A Jewish Law Perspective* (unpublished manuscript, a file with the author). The Hebrew edition of the study, that concentrates on the differences between Jewish and Israeli law, will be published shortly. See Shahar Lifshitz, *Oppression Contracts in Jewish Law*, SHENATON HA-MISHPAT HA-IVRI (forthcoming, 2007-2008).

<sup>79</sup> For the convenience of readers not familiar with Jewish law sources, the following is a very brief survey of the Talmudic sources cited and discussed in this subpart. Jewish law consists of the Written Law (the Pentateuch) and the Oral Law. Ca. 200 CE Rabbi Judah ha-Nasi redacted a written version of the Oral Law, known as the Mishnah. This work is divided into six orders, each of which is divided into tractates. The redaction of the Mishnah was the legal apex of the period known as the Tannaitic (70-220 CE). The next three centuries (ca. 200-500 CE) after the Tannaitic period were dominated by scholars called Amoraim (interpreters). At least officially, the Amoraim were subordinate to the authority of the Tannaim, and they often try to support their teachings with the Tannaitic sources, or to reconcile their precepts with these earlier sources. The record of this commentary is the Talmud, of which there are at least two versions: the Palestinian version which, together with the Mishnah, is labeled the Palestinian (or Jerusalem) Talmud; and the Babylonian version (which is much more influential and widespread), that, together with the Mishnah, comprises the Babylonian Talmud.

<sup>80</sup> BABYLONIAN TALMUD, *Bava Kamma* 116a (the translations of texts from the Babylonian Talmud generally follow the Soncino edition, I. Epstein trans. & ed., 1961). Unless otherwise stipulated, the references and commentaries to Talmudic tractates relate to the Babylonian Talmud.

In order to reconcile the disparate rulings, the Talmud differentiates between the identities of the boatman in each case. In the first, the exploiter is a professional boatman, who regularly ferries passengers. In the second case, the boatman is a fisherman who does not regularly ferry passengers. The fisherman claims that by fishing he could earn the sum stipulated in the contract during the time it took him to ferry the fugitive. According to most commentators, the fisherman need not prove this assertion objectively<sup>81</sup>.

The Talmud draws an analogy between the fugitive case and cases in totally different contexts. For example, the Talmud analogizes the fugitive scenario to a case where a man died without any children, leaving behind only a widow.<sup>82</sup> The widow consented to pay a large sum of money to her husband's brother after her husband's death, so that her brother-in-law would agree to participate in the *halitzah* ceremony that would enable her to marry another man<sup>83</sup> [hereinafter the *halitzah* discussion]; The Talmud also analogizes to a person who demands a considerable portion of property that is about to be lost in exchange for his consent to save it;<sup>84</sup> and to a laborer who is hired to bring medicine to a patient for a fee that exceeds the customary one<sup>85</sup> [hereinafter the medicine discussion].

In each of these cases, the combination of; (1) personal, medical, or financial distress; (2) a semimonopolistic situation;<sup>86</sup> and (3) contractual terms which significantly differ from marketplace norms for such a service or transaction absent such distress; lead to the contract's

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<sup>81</sup> See *infra* notes 107.

<sup>82</sup> Jewish law requires the performance of one of two actions in such a situation: the marriage of the dead husband's brother (the *yabam*) to the widow (the act of *yibum*), or *halitzah*, the ceremony that lifts the personal relationship between the brother-in-law and the widow, following which she is free to marry as she pleases. Without either *yibum* or *halitzah*, the widow may not remarry.

<sup>83</sup> *Yevamot* 106a.

<sup>84</sup> See MISHNAH, *Bava Kamma* 10:4 ; see also MOSES MAIMONIDES, MISHNEH TORAH, *Laws of Robbery and Lost Property* 12:6 (H. Klein trans., 1954) (1475), who rules: "If one travels with a jar of honey and the other with empty bottles, and the jar of honey cracks and the owner of the bottles says to the other, 'I will not catch your honey in my bottles unless you give me half of it - or a third of it - or so many denar,' and the owner of the honey agrees to this and says, 'Very well,' the rule is that he is regarded as having spoken in jest and need not give him more than the usual fee, for he has caused the other no loss at all" (hereinafter the jar case). The analogy between life-and-death situations and economic distress is supported by the Talmudic discussion of the fugitive.

<sup>85</sup> See *Bava Kamma* 116a-b, as interpreted by *Tosafot*, *Bava Kamma* 116b, s.v. "*Lehavi Keruv ve-Durmaskinan la-Holeh*." *Tosafot* (supplements) are a collection of comments on the Talmud that follow the order of the Talmudic tractates.

<sup>86</sup> In all the instances discussed in the Talmud, due to the distress, at a given moment the only reasonable choice available to the distressed party is to enter into a contractual agreement, despite the difference from the customary terms. The monopolistic nature of the Distress Exploitation situation is most distinct in the *halitzah* case, in which the brother-in-law is the only person, by the instructions of the law, who can enable the widow to remarry. Similarly to the fugitive, jar, and medicine cases, at the time the contract was made the distressed party had no other options, or, alternately, in light of the pressure on the party, he/she was not psychologically capable of examining other courses of action

invalidation. Yet, as in the case of the fisherman, if the "exploiter" is able to justify his demand for an above-market price, the contract is valid.

Following the Talmud, the post-Talmudic Jewish Law literature<sup>87</sup> applied the fugitive rule and its exceptions to a broad range of situations such as: rescuers who demanded an exaggerated price for saving property that would be lost if not saved immediately;<sup>88</sup> Physicians who took considerable sums for treating patients;<sup>89</sup> a *shofar* (ram's horn) blower who feared that the promise of exorbitant payment for his blowing (on the High Holidays) would not be honored;<sup>90</sup> matchmakers and mediators who demanded a steep fee from their needy clients;<sup>91</sup> a monopolist rabbi who insisted upon exorbitant payment for the writing of a bill of divorce;<sup>92</sup> and husbands who demanded compensation for agreeing to divorce their wives.<sup>93</sup>

The Talmud does not use the explicit terminology of "distress exploitation contract," but taking into account the undeniable similarity between the DEC and Talmudic scenarios, I will label the fugitive rule and its later applications the "Jewish Law distress exploitation doctrine."

## B. Jewish Law and the Procedural-Substantive Approaches

What is the rationale behind the Jewish Law DE Doctrine that enables a distressed person, like the fugitive to be released from his commitment? Similar to Western law, Jewish law first tends to explain the Distress Exploitation doctrine by means of the conventional modern procedural approaches.

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<sup>87</sup> In this article I make use of three types of works characteristic of the post-Talmudic writing. The first type includes the commentaries on the Talmud. The second consists of legal codes that attempt to systematically organize the laws derived from the. The third type is the responsa literature, analogous to case law, in which a sage rules on a specific instance that was either brought before him directly, or described in writing.

<sup>88</sup> See, e.g., MAIMONIDES, *supra* note 84 12:6 and 12:7.

<sup>89</sup> See MOSES BEN NAHMAN (NAHMANIDES), HIDDUSHEI HA-RAMBAN (NOVELLAE ON THE TALMUD) 352-53 (*Yevamot*: Shmuel Dickman ed., Makhon ha-Talmud ha-Yisraeli ha-Shalem 1987) (1740), on *Yevamot* 106.

<sup>90</sup> See the case discussed by JAIR HAYYIM BACHARACH, 2 SHE'EILOT U-TESHUVOT HAVVAT YAIR 186 (Shimon Kots ed., Eked 1997) (1699).

<sup>91</sup> See *infra* note 103.

<sup>92</sup> See the case brought by OBADIAH BERTINORO, PERUSH AL HA-MISHNAH (COMMENTARY ON THE MISHNAH) (1548-1549), *Bekhorot* 4:6.

<sup>93</sup> See, e.g., the case discussed by SOLOMON LURIA, SHE'EILOT U-TESHUVOT MAHARSHAL (Otzar ha-Sefarim 1969) (1599), chap. 24-25; see also the discussion of that case and of a recent Israel rabbinical court case, *infra* subpart IV.C.2.

## 1. The Jewish Law Procedural Perspective:

Deutch maintains that the “fugitive” argument in Jewish law is based on a flaw in the finalization of intent of the party<sup>94</sup> According to this approach, which parallels the modern procedural unconscionability argument, an excessive commitment made in a state of distress can not function as the party's finalization of intent,<sup>95</sup> and therefore is not binding. Working within this approach, post-Talmudic legal decisions held that the DE Doctrine may be overcome by an action that proves the finalization of will despite the distress, such as the implementation of a commitment,<sup>96</sup> an oath, or a handshake.<sup>97</sup>

Another procedural approach that developed in Jewish law brings the Distress Exploitation doctrine closer to a classic *duress* argument.<sup>98</sup> According to this approach, the problem with a commitment made in a state of distress is not the party's lack of decisive intent in the obligation he undertook. To the contrary, a distressed person seriously intends to honor his undertaking in order to extricate himself from his distressed state. However, since the commitment was made under duress<sup>99</sup>, the law does not recognize it as a free-will commitment.. As long as the commitment was made under duress, a vow, handshake, or any other means that prove decisive intent but not free will, cannot validate the contract.<sup>100</sup>

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<sup>94</sup> See Sinai Deutch, *Economic Duress in Contracts Law*, 2 BAR-ILAN LEGAL STUDIES 1 (1982; Hebrew). He uses the Hebrew term *gemirat ha-da'at*

<sup>95</sup> Deutch finds support for this view in the wording of the above Talmudic passages that explain the ability of the exploited party to claim: "I was merely jesting with you." According to Deutch, this attests to the nonserious nature of the commitment made by the distressed person.

<sup>96</sup> For this reason, Deutch supports his view with the position of Rabbi Joseph Caro: JOSEPH CARO, 3 SHULHAN ARUKH (Tal-Man 1978) (1565), *Hoshen Mishpat* 264:8, that limits the invalidation of Distress Exploitation Contracts to the instance in which the distressed person's commitment has not been realized.

<sup>97</sup> On this legal conclusion, see ARYEH LEIB HELLER, 3 KETZOT HA-HOSHEN 264:4 (Makhon ha-Rav Frank 1982) (1788-1796) (*Ketzot Ha-Hoshen* is a commentary on *Shulhan Arukh*).

<sup>98</sup> This seems to be the explanation by Yom Tov Ben Abraham Ishbili (*Ritba*), 1 HIDDUSHEI HA-RITBA (NOVELLAE ON THE TALMUD) (Yevamot: Mossad Harav Kook 1992) (1787), on *Yevamot* 106a: "This case is different, for he agreed due to the compulsion. How so? In the case of the unworthy brother-in-law, she was [under duress, for fear of] being chained to him [i.e., being unable to remarry]. And similarly, in the case of the ferry, this was a case of duress, which led him to agree; and a stipulation under duress is accounted as nothing, and only his [regular] wages are coming to him."

<sup>99</sup> *ones* in Hebrew

<sup>100</sup> See Yom Tov Ben Abraham Ishbili, HIDDUSHEI HA-RITBA (NOVELLAE ON THE TALMUD) (*Kiddushin*: Mossad Harav Kook 1985) (1553), on *Kiddushin* 8a. See also BEZALEL BEN ABRAHAM ASHKENAZI, SHITAH MEKUBETZET (N.P. 1989) (1762), on *Bava Kamma* 116a, who states, in the name of Rabbi Menahem Meiri, that the jesting law applies also in finalized transactions.

## 2. The Jewish Law Substantive Approach

Some commentators identify<sup>101</sup> the Talmudic “fugitive” argument with the principle of price gauging (*ona'ah*).<sup>102</sup> According to the Talmud, a transaction can be terminated when an excessive price is charged. These approaches are part of a general attitude which, similar to the modern substantive unconscionability doctrine, are mainly concerned with the substantive fairness of the contract.<sup>103</sup> Finally, as in the modern approaches that combine procedural and substantive arguments, Jewish law developed an approach that states that only the combination of one party’s distress and an asymmetry between the contractual price and the market price will lead to the voiding of the contract.<sup>104</sup>

### *C. The Limits of the Procedural-Substantive Jewish Law Approaches*

The procedural and substantive approaches that developed in Jewish law are open to the criticism raised above<sup>105</sup> regarding the ability of modern procedural and substantive approaches to contend with Distress Exploitation situations. Beyond the regular critiques, the procedural and substantive approaches have difficulty explaining the Talmudic distinction between the regular boatman and the fisherman. As discussed above, each case involved a distressed person. Consequently, according to the procedural perspective, which focuses on a distressed person's difficulty in expressing his free and final will for the transaction, how is the other party's economic opportunity relevant? In principle, one could envision an expansive substantive

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<sup>101</sup> See, e.g., the opinion of JONATHAN BEN DAVID OF LUNEL (*Bava Kamma*: S. Friedman ed., 1969) on *Bava Kamma* 116a (this view is cited also in ASHKENAZI, SHITAH MEKUBETZET, on *Bava Kamma* 116a, s.v. “*Mi*,” in the name of Rabbi Jonathan)..

<sup>102</sup> On the *ona'ah* rule, see CARO, SHULHAN ARUKH, *Hoshen Mishpat* 127. See also, in the research literature: Aaron Levine, *Onaa and the Operation of the Modern Marketplace*, 14 JEWISH LAW ANNUAL 225 (1993).

<sup>103</sup> On the general approach, see ITAMAR WARHAFTIG, *Market Value, Prices and Overreaching*, 4 KETER 17 (2004; Hebrew). Some Jewish law decisors applied the law of jesting by reviewing the fairness of the contract even in situations in which one party to the contract was not in distress. It seems that, according to these opinions, it is impossible to speak of a distinct Distress Exploitation doctrine in Jewish law. See, e.g., ISAAC ADARBI, SHE'EILOT U-TESHUVOT DIVREI RIVOT 396 (n.p. 1989) (1582) and JOSEPH LEV, SHE'EILOT U-TESHUVOT MAHARI IBN LEV 1:100 (photo. reprint 1960) (1587), who discuss the fee of intermediaries in the prism of the jesting law ; ASHER BEN JEHIEL, SHE'EILOT U-TESHUVOT HA-ROSH 64:3 (photo. reprint 1954 of 1885 ed.) (1517), who applies the jesting law to the fee of guarantors; for a discussion of the fees of matchmakers and exorcists, in the context of the jesting law, see R. MOSES ISSERLES, in his commentary on CARO, SHULHAN ARUKH, *Hoshen Mishpat* 264 (printed together with the SHULHAN ARUKH). On the conflict between these approaches and those that base the fugitive rule on the fugitive’s distress, see SOLOMON COHEN, SHE'EILOT U-TESHUVOT MAHARSHAKH 2:80 (n.p. 1990) (1586), according to whom those who hold the second approach would allow for the voiding of the contract only when the unjustified price is joined by the element of a distressed party.

<sup>104</sup> Such an intermediate approach is taken by NETIVOT MISHPAT, see JACOB OF LISSA, NETIVOT HA-MISHPAT, *Novellae*, 264:19 (Mishor 1980) (1809), who connects the jesting argument with the general *ona'ah* rule, but with the former reflecting the interaction between the terms of the contract and the situation of distress.

approach that reviews contract fairness, not only by a technical comparison of the contractual price with the market price, but also takes into account the specific circumstances of the parties (such as the loss of alternative profits). Such an approach could explain the distinction between the cases of the fisherman and the regular boatman, due to the former's loss of potential profit (as long as the deviation from the market price corresponds to the fisherman's alternative losses). However, the fisherman is not required to objectively prove the claim that he suffered a loss.<sup>106</sup> Furthermore, some decisors of Jewish law have ruled that even without a tangible correlation between the loss of alternative profits and the contractual price, the existence of such a loss,<sup>107</sup> or even the fisherman's authentic feeling of the lost opportunity, is sufficient to validate the contract.<sup>108</sup> The superfluity of a correlation between the loss of alternate profits and the contract price, and the reliance on the fisherman's subjective feeling (instead of objective data), do not harmonize with the substantive approaches that focus on contract fairness.<sup>109</sup> Based on the limitations of the procedural and substantive approaches, an additional approach developed in Jewish law, which I will now examine.

#### D. Changing the Perspective

A group of commentators<sup>110</sup> characterize the Talmudic discussions (*sugyot*) that accept the "fugitive" argument as instances in which the nondistressed party is committed to aid the distressed person even without an agreement. This analysis opens the way for a fresh approach

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<sup>105</sup> See *supra* Part I.

<sup>106</sup> The Talmud formulates the fisherman's claim subjectively: he could have said to him, "You caused me to lose ... a *zuz*."

<sup>107</sup> For the validation of the contract, even if asymmetry exists between the profit that is denied the fisherman and the contractual price, see HELLER, *supra* note 97, at 264:2: "But the statements by *Rosh* [Rabbeinu Asher ben Jehiel] and *Ma'adanei Melekh* explain in that case that, even if this entails a slight loss, he must be given all that was agreed."

<sup>108</sup> See JACOB OF LISSA, *supra* note 104, at 264:17: "Whatever he stipulated, even if it appears that he does not profit so greatly; since he could possibly catch in his net the amount of fish equivalent [in value] to the stipulated amount, he [the second party] must pay him the full [stipulated sum]."

<sup>109</sup> It might be noted, though, that, similar to the conclusion drawn from the substantive approaches Rabbi Moses Isserles permit the fisherman to receive only what he actually lost; and if the contractual price is higher than the sum of the proven loss, he is not entitled to the former. See ASHKENAZI, SHITAH MEKUBETZET, *supra* note 101, at 116a: "*Rema* [Rabbi Moses Isserles], of blessed memory, interpreted this in detail, and this is his wording: [...] When he suffers a loss, he is not allowed to take more than what he actually lost."

<sup>110</sup> See e.g., MORDECAI BEN HILLEL, MORDEKHAI (printed in the standard Talmud editions) (1509) on *Bava Kamma*, para. 174: "The reason is that he [the other party] is in danger and he must rescue him, and take his wages; here, too, one is commanded to bring medicine to the patient." See also MOSES BEN NAHMAN, on *Yevamot* 106a, s.v. "*U-de-Amrinan*": "According to one explanation, the reason for the teaching of the *baraita* is that he must rescue him, on account of [the obligation of] returning a lost article; and for this reason, he is entitled only to the customary price."

to the Distress Exploitation doctrine. Unlike the procedural approach, that focuses on the free and finalized will of the distressed party, and the substantive approach, which is concerned with the terms of the contract, this approach concentrates on the nondistressed party (the “exploiter”) and his obligation to the distressed party. The argument against the exploiter is that since the aid to the distressed party is a routine act which he is commanded to do, he should not demand excessive payment for his actions. This criticism of the exploiter's behavior enables us to accept the distressed party's claim for contract annulment.

Basing the Distress Exploitation doctrine on the duty to aid a distressed person presumably limits the doctrine to instances of a clearly enforceable legal duty to aid the distressed person. This doctrine however, is mainly applicable in instances where the duty to aid a distressed person is not directly legally enforceable.<sup>111</sup> It may even apply in instances where it may be more suitable to classify the duty to aid a distressed person as a moral duty rather than a religious commandment<sup>112</sup> (in the narrow Jewish law sense of the term). This enables us to view the Jewish law Distress Exploitation doctrine as an indirect means of legally enforcing moral obligations, even those that could not be directly imposed.

This new understanding of the Jewish law doctrine explains the Talmudic distinction between the regular boatman and the fisherman. In this approach, the other party's profession is clearly relevant. The boatman who usually ferries passengers at the regular price should view the fugitive's request to be ferried at the market price as a costless request. Consequently, the demand for an above-market price reflects distress exploitation. In the case of the boatman however, the contract is enforceable because the steep fee he charges is compensation for the loss of his alternative income as a fisherman, and reflects a legitimate desire to avoid loss.

The superfluity of a correlation between the loss of alternate profits and the contract price, and the reliance on the fisherman's subjective feeling (instead of objective data), comport with the view that focuses on the exploiting party and his moral obligations. If there is a differential

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See also MENAHEM MEIRI, BEIT HA-BEHIRAH (Makhon ha-Talmud ha-Yisraeli ha-Shalem 1962) (1794), on *Yevamot* 106a.

<sup>111</sup> See LURIA, *supra* note 93, at para. 25: "This issue of *halitzah* speaks of those who cannot be compelled to perform [*halitzah*], for in cases where compulsion is possible, deception is unnecessary."

<sup>112</sup> See SIMEON BEN ZEMAH DURAN, SHE'EILOT U-TESHUVOT HA-TASHBEZ (1891) 4:3:20: "And in both instances, he is not obligated to act for free, for as regards every commandment that is imposed on the entire world, he need not perform it for free. If, however, one asks for more than what is proper for [this act], this is an improper request, since, in the final analysis, this is his duty."

between the market price and the fisherman's loss of alternative profits, or if the fisherman believes this to be so, his refusal to extend aid at the regular price cannot be morally censured. In the absence of such moral disapproval, the contract cannot be voided.

Focusing on a moral assessment of the exploiter's behavior, and his duty to the distressed person can explain two additional exceptions to the Distress Exploitation doctrine that developed in the post-Talmudic literature.

First, the Distress Exploitation doctrine is not applicable when the service increases the cost of the service, or the danger faced by the service provider, beyond the cost or risk absent the element of distress.<sup>113</sup> When the distress of the other party changes the nature of the required service, refusal to provide the service at market price can no longer be condemned. Without moral censure of the service provider, the Distress Exploitation doctrine does not apply.

Second, the DEC does not apply in cases of prior investment in skills (such as medical studies) that enable one to aid a distressed person. In such cases the contract price reflects a legitimate demand for compensation for the considerable time needed to acquire special medical knowledge.<sup>114</sup> Consequently, the contract is valid

#### E. Toward a Moralistic Version of the Distress Exploitation Doctrine

This part presented the development of the Jewish law Distress Exploitation doctrine, which holds that when a semimonopolist exploits personal or economic distress when making a contract whose terms differ from the customary terms, the contract may be voided.

I discussed the practical content of the doctrine, in addition to its philosophical basis. First, I analogized the Distress Exploitation doctrine to concepts from both modern Western and Jewish law that concern the relationship between free will and contract fairness. Jewish law offers an additional view that bases the Distress Exploitation doctrine on a moral examination of the exploiter's behavior. The exploiter is morally obligated to aid the distressed, and is morally

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<sup>113</sup> See BACHARACH, *supra* note 90, at 186, that is concerned with the *shofar* blower who was promised a large sum of money for the danger entailed in traveling. Bacharach explains that the dangers of traveling justifies a higher than customary fee, and therefore the jesting law is not applicable.

<sup>114</sup> See MOSES BEN NAHMAN, on *Yevamot* 106., See also CARO, SHULHAN ARUKH, *Hoshen Mishpat* 336:3; but see DAVID BEN SOLOMON IBN ABI ZIMRA, 3 SHE'EILOT U-TESHUVOT RADBAZ 3:556 (n.p. 1972) (1749), who maintains that if he is the only physician there, then, even according to Nahmanides, we may intervene regarding this physician's excessive fee. See also my argument *infra* VI.A.4 that only in cases of additional investment is the medical doctor allowed to charge beyond his regular fee in emergency situations.

prohibited from gaining from that distress. Demanding above-market terms from the distressed person violates the moral prohibition, and is legal significant: it enables the distressed party to annul his contractual commitment. According to this view, the Distress Exploitation doctrine may be seen as a means to compel the oppressor-exploiter to fulfill his moral duty to the oppressed-exploited. Special attention was paid to limitations of the doctrine, namely situations where there was no strong ex-ante moral duty to aid the distressed person at the regular price, and thus no moral justification for invalidating the contract. These limitations are : (1) instances where alternate profits are lost, or even the exploiter's authentic psychological experience of such loss; (2) the influence of the distress on the type of service or the risk that the service entails; and (3) prior investment in the required skills or availability.

This Distress Exploitation doctrine will be at the center of the following parts, where I will propose that American law should also develop a Distress Exploitation doctrine and base it on the moral obligation to aid a distressed person.\

### III. SHOULD AMERICAN LAW BASE ITS DISTRESS EXPLOITATION DOCTRINE ON THE MORAL DUTIES OF THE EXPLOITER?

Should American law develop a doctrine that invalidates DEC, and base it on the duty to extend costless and riskless aid to a distressed person? In this part, I will address the ideological, legal, and economic aspects of this question. A discussion of these perspectives will highlight the advantages of the proposed doctrine and deflect possible objections.

#### *A. The Ideological Perspective*

##### 1. Individualism, Altruism, and Sharing

The proposed DE doctrine is based on the moral duty to aid a distressed person. While this assumption is typical for Jewish law, such a moral demand seems foreign to the liberal individualistic tendencies of the American legal system.<sup>115</sup>

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<sup>115</sup> On the tension between Jewish law as an obligation legal system, and the American legal system, that focuses on the individual's rights, see Robert M. Cover, *Obligation: A Jewish Jurisprudence of Social Order*, 5 J.L. & RELIGION 65 (1987); see also Suzzane Stone, *Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993). In the context of private law, the difference between obligation-oriented Jewish law and the individualistic character of American law was exemplified by Hanoch

I agree that the proposed DE doctrine is not suitable for adoption by extremely individualistic legal systems.<sup>116</sup> However, I believe that contract law is too multifaceted and complex<sup>117</sup> to be characterized as extremely individualistic. Undoubtedly, in some realms, contract law still places great weight on the classic values of individualism.<sup>118</sup> Nonetheless, modern contract law doctrines like good faith<sup>119</sup> reflect the aspiration of American contract law to balance and incorporate these values with the communitarian expectations<sup>120</sup> of interpersonal solidarity<sup>121</sup> and sometimes even of altruistic behavior.<sup>122</sup> One way to achieve this balance is through the principle of sharing, which unlike self-sacrificing altruism, considers the needs of the other contractual partners only where such consideration does not entail loss.<sup>123</sup> In a stimulating article, Melvin Eisenberg exemplified such a balance by identifying a comprehensive, albeit not explicit, duty of aiding the contractual partner. According to Eisenberg, modern contract law demands action from the contractual party on behalf of his needy contractual partner, but limits this demand to riskless and costless actions<sup>124</sup>

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Dagan. See HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* (Cambridge University Press 1987).

<sup>116</sup> On libertarian theories of contract law in this vein, see Epstein, *supra* note 44.

<sup>117</sup> Modern American contract law seeks (at times, highly successfully, and at others, less so) to incorporate a broad range of values and concepts, including freedom in both senses (the negative and the positive). See Birdwell, *supra* note 44; for distributive justice motives, see Kronman, *supra* note 56 and Mautner, *supra* note 58; for welfarism, see Posner, *supra* note 44; for an interesting attempt to encompass the richness of contractual law, see ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (Aleksander Peczenik & Frederick Schauer eds., Kluwer Academic Publishers 1997).

<sup>118</sup> Furthermore, some late twentieth century contract scholars describe a return to the classical contractual values. See, e.g., J.E. Murray, "Contract Theory and the Rise of Neoformalism," 71 *FORDHAM L. REV.* 869 (2002); but cf. Robert Hillman, "The New Conservatism in Contract Law and the Process of Legal Change," 40 *B.C.L. REV.* 879 (1999).

<sup>119</sup> On the penetration of this principle in American law, see the leading article by R. S. Summers, *The General Duty of Good Faith: Its Recognition and Conceptualization*, 67 *CORNELL L. REV.* 810 (1982).

<sup>120</sup> On the communitarian challenge to liberalism, see, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed., Cambridge University Press 1998); ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed., University of Notre Dame Press 1994); *THE COMMUNITARIAN CHALLENGE TO LIBERALISM* (Ellen Frankel Paul et al. eds., Cambridge University Press 1996). On the aspirations of recent liberal thinkers to incorporate communitarians values within liberal values, see WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (Oxford University Press 1989); WILLIAM GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 79-162 (Cambridge University Press 1991).

<sup>121</sup> See Ian R. Macneil, *Exchange Revisited: Utility and Social Solidarity*, 96 *ETHICS* 567 (1986); see also Robert W. Gordon, *Macaulay, Macneil, and Discovery of Solidarity and Power in Contract Law*, *WIS. L. REV.* 565 (1985). For efficiency considerations, see Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 *CAL. L. REV.* 2005 (1987).

<sup>122</sup> See THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* (Princeton University Press 1979) (supporting the moral legitimacy for demanding altruistic behavior). On altruism and individualism in modern contract law, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1713 (1976).

<sup>123</sup> On sharing as a limited version of altruism, see DAGAN, *supra* note 115 at 25. On the sharing principle in contract law, see Fried, *supra* note 29, at 70-73 and 76-79.

<sup>124</sup> According to Eisenberg, "if, in a contractual context, B is at risk of incurring a significant loss, and A could prevent that loss by an action that would not require A to forgo an existing or potential significant bargaining

## 2. The Duty to Aid a Distressed Person

The duty to aid a distressed person (on which the DE doctrine is based) is limited to costless aid, and as such, satisfies the existing contract law balance between individualism and altruism.

Upon further reflection however, it appears that the DE doctrine goes a step beyond simply recognizing the duty of costless aid. To explain this additional step, classification of extending aid to a distressed person at the market price as “costless” aid. This “costless” classification is not clear-cut. On the contrary: given the distressed party’s willingness to pay an above-market price, the demand to aid this individual at the market price is not costless, and necessitates the altruistic waiver of potential profit.<sup>125</sup> Thus, from the perspective of the “exploiter” forgoing the ability to exploit and its attendant potential profit constitutes a loss.<sup>126</sup> Put differently, according to the DE doctrine, the loss of alternative profit in other transactions justifies deviation from the market price, (such as in the case of the fisherman). However, the loss of profit in this transaction, in which comes as a result of the distressed party’s willingness to pay an above-market price, is not similarly justified.

Interestingly, our distinction between the loss of potential distress-exploitation profit and the loss of alternative-transaction profit is supported by a recent study by Ian Ayres. Ayres

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advantage, undertake a significant risk, or incur some other cost,” American contract law would compel A to take this action. See Eisenberg, *supra* note 11, at 654.

<sup>125</sup> This, according to Dagan, is the meaning of the sharing principle. See DAGAN, *supra* note 115 at 24: “Sharing denies the resource-holder of the benefit she could have gained from a transaction.” Dagan contrasts this with the restitution law of the Anglo-American systems that vigorously subscribes to the liberal individualistic values of the defense of property owners’ control of their property.

<sup>126</sup> It should be noted that, in some of the situations that Eisenberg, *supra* note 8, defined as costless rescue in the context of contract law, the rescuer has the choice of either aiding the distressed party or of not aiding, but the rescuer does not possess the technical ability to negotiate in advance and demand a fee as consideration for his aid. This is typical of the situations in which the rescue is not done by an act, but by sending a message. *Id.* at 661-65 (Eisenberg addresses cases in which, despite the general rule that silence is not acceptance, the one offered had a duty to notify that he rejects the offer, or that he received it too late. This message is meant to save the rescuer from the damage that he would have suffered due to his mistaken thought that a contract had been made). In those situations, the one offered can either prevent the offerer’s loss, by notifying him that the offer is rejected, or not prevent the loss by remaining silent, but he does not have the third alternative of demanding a fee for his notification. In the absence of the ability to gain from the refusal to aid, we can fully understand the classification of the situation as costless. In, however, other situations that Eisenberg defined as costless rescue, besides aiding and not aiding, there is also a third alternative, namely, exploiting the other party’s distress to demand an excessive consideration for the aid. (E.g., in the case of mitigation of losses, *id.* at 655-61, the potential victim of a breach has three alternatives: (a) not mitigating the losses, (b) mitigating the losses, (c) notifying the contract violator that he is ready to mitigate his losses, while demanding a consideration that exceeds his cost, but still decreases the violator’s potential liability for his aid. Similarly, in the “duty to cooperate” cases, *id.* at 672-74, beyond the alternatives of cooperating or of not cooperating, there is the option of demanding additional money beyond the original fee for the cooperation.) Therefore, without distinguishing between direct losses and the loss of profit from the possibility of exploitation, Eisenberg’s very attempt to present the contractual duty of rescue in situations in which the rescuer could do so without cost is meaningless. In that sense, the argument in this paragraph is crucial, not only for a limited DE doctrine, but also to justify much broader trends in contract law.

addresses salary discrimination in two types of employees, as well as price discrimination between two groups of customers.<sup>127</sup> His economic and moral analysis distinguishes between two types of profitability resulting from discrimination. In one type, the discrimination stems from competitive behavior, like differences in productivity, in the context of labor law, or different production and supply costs, in the antitrust law example. When the discrimination reflects competitive behavior, the profitability argument of the discriminator is both efficient and legitimate.<sup>128</sup> The other type of discriminatory pricing ensues from the limited access to information and competitive alternatives for the consumer/employee. Ayres views this type of discrimination, economically, as noncompetitive behavior, and morally, as undesirable exploitation. He maintains that in such situations, the increase in profitability of the discriminatory company is not sufficient justification for such discrimination, even from a purely economic perspective. Ayres shows that, although his approach is still not the dominant one in employment discrimination law, antitrust law has adopted a similar approach.

The differentiation between various types of profits parallels the two losses of profit that the DE doctrine identifies: the fisherman's loss of alternative profit, and the boatman's loss from exploitation of the fugitive. When the fisherman demands an above-market price, the demand does not stem from the fugitive's lack of options, but from competitive considerations. The boatman's demand for extraordinary pay, in contrast, stems from his exploitation of the fugitive's lack of alternatives. This is precisely the situation of profitable but uncompetitive behavior.

To conclude, basing the DE doctrine on the duty to aid a distressed person and the distinction between profit derived from exploitation and other types of profit is consistent with existing trends in our legal system.

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<sup>127</sup> See Ian Ayres, *Market Failure and Inequality: An Anticompetitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified* (forthcoming).

<sup>128</sup> Although it obviously must be balanced against the opposing considerations on which nondiscriminatory policy is founded.

## B. The Legal Perspective

### 1. Reconciling the Distress Exploitation Doctrine with No Duty to Rescue

The previous discussion demonstrated that the moral account of the DE doctrine is consistent with the moral scheme of American private law in a variety of fields. Yet, supporters of the DE doctrine must still explain how this conduct (namely, refusing to supply costless aid to a distressed person) is deemed legitimate, or at least unsanctionable in the context of tort and criminal law, while is a source of legal sanction (contract invalidation) in contract law.<sup>129</sup>

The simplest way of reconciling the NDRR with the implicit Duty to Rescue at the core of the DE doctrine is to claim that the NDRR is mistaken and must be changed. This solution is very tempting. After all, the NDRR has come under heavy criticism in the scholarly literature,<sup>130</sup> and is not accepted in continental Europe.<sup>131</sup> Even within the United States, there is a tendency to chip away at it.<sup>132</sup> This is not the approach I adopt, for two reasons:

First, this article seeks to convince lawmakers of the possibility of applying the DE doctrine under existing American law. Despite the criticism and erosion of the NDRR, it continues to dominate legal doctrine. Therefore, it is important to demonstrate that the DE doctrine can coexist with the existing NDRR.

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<sup>129</sup> After characterizing the existence of the semiduty of rescue in contract law, Eisenberg attempts to resolve this duty with the NDRR. See Eisenberg, *supra* note 8, at 676-93. Notwithstanding this, attention should be paid to the difference between Eisenberg's question and what concerns us. Eisenberg examines the legal significance of similar conduct (the refusal to extend costless aid) in different circumstances: a relationship between strangers in a tort context, as contrasted with relations between two people who already know each other, with prior obligations, in a contractual context. In our discussion, on the other hand, we are concerned with the same behavior in the same circumstances (the refusal to extend costless aid to a stranger), which, we argue, must be afforded importance by contract law, despite the refusal of tort and criminal law to do so.

<sup>130</sup> See, e.g., Murphy, *supra* note 9; Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980); Eisenberg, *supra* note 8, at 677-89.

<sup>131</sup> See F. J. M. Feldbrugge, *Good and Bad Samaritans: A Comparative Study of Criminal Law Provisions concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1996); Alberto Cadoppi, *Failure to Rescue and the Continental Criminal Law*, in THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 93 (Michael A. Menlowe and Alexander McCall Smith eds., Dartmouth Publishing Group 1993); Martin Vranken, *Duty to Rescue in Civil Law and Common Law*, 47 INT'L & COMP. L.Q. 934 (1998).

<sup>132</sup> Currently, duty to aid provisions are in force in Vermont. See Vt. Stat. Ann tit. 12, § 519 (1973); Minnesota: Minn. Stat. § 604.01(a) (1998); and Rhode Island: R.I. Gen Law § 11.56-I (1994). Additionally, there is a tendency in American court judgments to create exceptions to the NDRR, such as the rule of the physician rendering emergency services; see Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligation*, 72 VA. L. REV. 879, n. 49-52 (1986). There also are sets of situations that are classified as special relationships in which there is a duty of rescue. The expanding set of such relationships that are exceptions to the NDRR includes common carrier-passenger; innkeeper-guest; innkeeper-stranger (the duty to protect a stranger from injury by a guest); employer-employee; ship-crewman; shopkeeper-business visitor; host-social guest; jailer-prisoner; school-pupil; drinking companions; landlord-trapped trespasser; safety engineer-laborer; physician-patient; psychologist-stranger (the duty to protect a stranger from harm at the hands of the psychologist's patient); manufacturer-consumer; landlord-tenant; parole board-stranger (the duty to protect strangers from a released prisoner); husband-wife; parent-child; and tavern keeper-patron. See Levmore, at notes 56-75 and accompanying text. On the partial duty of rescue in the United States, see also Hyman, *supra* note 9 at notes 37-42.

Second, critics of the NDRR typically propose imposition of a Duty to Rescue in contract or tort law only in extreme life-and-death situations.<sup>133</sup> In contrast, this article supports a DE rule that would impart legal significance to the refusal to aid even in more moderate instances of distress, such as economic distress. We thus need a more general justification for the distinction between the absence of legal consequences for denying aid in the tort and criminal sphere, and the existence of consequences for denying aid in the contractual realm.

To explain this dichotomy, I will analyze the fundamental justifications of the NDRR and their applicability to DEC. I will distinguish between the libertarian and other justifications. I will argue that while the libertarian justification irreconcilably clashes with the DE doctrine, the other justifications, even if plausible in the tort and criminal sphere, do not preclude a legal remedy (the voiding of an exploitive contract) that is based on the moral condemnation in the realm of contract law.

## 2. The Liberty Argument and the Distress Exploitation Doctrine

The main normative objection to a legal Duty to Rescue is that this duty excessively interferes with individual liberty.<sup>134</sup> As long as the liberty argument reflects an objection to any duty to help<sup>135</sup> another person, the moral basis of the DE doctrine is similarly undermined. But as Liam Murphy persuasively argues, the absolute opposition towards any positive duty to help another (“the duty to benefit another person”<sup>136</sup> in Murphy's terms) reflects an extreme libertarian stance. This viewpoint regards negative liberty, that is, the absence of corrective interference, as an absolute value and an end in itself.<sup>137</sup> Most modern liberals, however, reject

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<sup>133</sup> See, e.g., Murphy, *supra* note 9.

<sup>134</sup> See, e.g., Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL. STUD. 151, 189, 203-4 (1973); Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 168 note 6 (1980). For recent judicial opinion in this direction, see Lord Hoffman's opinion in *Stovin v. Wise* 1996 A.C. 923, 941: "In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect"; see also JOEL FEINBERG, *HARM TO OTHERS* 129 (Oxford University Press 1984): "Unsurprisingly, the arguments against bad Samaritan statutes invoke the liberal ideas of individualism and liberty that infuse the Anglo-American common law generally." For a similar characterization of the current argument in favor of the NDRR, see; Murphy, *supra* note 9 at 605-7; Weinrib, *supra* note 130

<sup>135</sup> Some liberals try to argue that the duty to rescue is a duty not to harm. See, e.g. Feinberg, *supra* note 135, at 130-51. It is very clear, however, that from the perspective of the rescuer who did not cause the other's distress, rescue is a duty that benefits a needy person, and not a duty to him. See Murphy, *supra* note 9, at 625; Weinrib, *supra* note 130, at 266.

<sup>136</sup> See Murphy, *supra* note 9.

<sup>137</sup> On the distinction between different types of perceptions of liberty, see ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (Oxford University Press 1969).

this viewpoint and recognize the duty to benefit others in various legal areas.<sup>138</sup> According to those views, the liberty argument should not prevent the adoption of the duty to rescue.

At this point my analysis diverges with that of Murphy's. Murphy completely denies the relevance of the liberty argument to the Duty to Rescue.<sup>139</sup> As a liberal committed to the value of autonomy,<sup>140</sup> Murphy opposes the corrective interference of the state when it limits an individual's full range of options. The imposition of a Duty to Rescue eliminates the option of not rescuing. In my view, Murphy cannot deny that the imposition of the Duty to Rescue somewhat harms personal liberty, even in the sense of liberty that he accepts. What Murphy *could* argue is that this harm to liberty is sometimes legitimate when properly balanced with the rescuee's well-being.<sup>141</sup> While the values of liberty and autonomy do not justify a comprehensive denial of the tort and criminal legal duty to rescue, the degree of harm to the potential rescuer's liberty and autonomy are definitely a central consideration regarding the imposition and extent of this duty.<sup>142</sup>

This insight can enable us to distinguish between the application of the Duty to Rescue in tort and criminal law, and its application in the contractual realm. The classic version of this duty (both in tort and criminal law) states that one must rescue at the moment she encounters the distressed person. Consequently, the potential rescuer's range of options (i.e. her liberty) is greatly curtailed once she learns of the distress. In contrast, the contractual rule that invalidates

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<sup>138</sup> Indeed, most liberal legislation, at least in the public sphere, that is, tax and welfare law, imposes the duty of benefiting another. Also, a limited duty to benefit another, albeit not a stranger, has developed in contract law. See *supra* subpart III.A.

<sup>139</sup> Murphy, *supra* note 9 at 606-7: "This avowed concern with individual liberty is disingenuous or, at any rate, mistaken. Positive duties, as such, do not raise a significant concern about liberty in particular. What they do arouse, at least for some of us, is the potential for serious diminution of our welfare or wellbeing."

<sup>140</sup> On the emphasis of the value of autonomy in liberal ideology, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* (Oxford University Press 1986). Murphy's discussion is divided into two analytical phases. In the first phase, he examines the relationship between the duty of rescue and liberty according to the opinion of Raz, who views the latter as a means to defend the value of autonomy. In the second phase, he discusses this relationship according to MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW*, ch. 6, especially 262-77 (Oxford University Press 1997), who regards liberty as a value in its own right. Since, however, Moore defines liberty as the diversity of options before a person, which is also Raz's basic definition of autonomy, these two approaches do not significantly differ, at least for our purposes.

<sup>141</sup> For a similar understanding, see Eisenberg, *supra* note 8, at 681. I believe that despite Murphy's statement about the irrelevance of the liberty considerations to the duty of rescue see Murphy, *supra* note 139, his real intention is closer to this understanding, see in this spirit Murphy *supra* note 99, at 631: "Obviously, if the interest of others actually advanced by such a provision were outweighed by the decrease in autonomy caused by the interference with negative liberty, such a provision would make no sense for the Millian version of liberalism."

<sup>142</sup> Here again, Murphy's awareness that the duty of rescue is somewhat detrimental to individual autonomy and liberty leads him to balance this harm to autonomy with the utility ensuing from the establishment of such a duty. Thus, in the final analysis, Murphy does not support a sweeping duty of rescue, but only a limited duty that is restricted to emergencies involving the costless saving of life.

DEC only precludes one mode of behavior, namely, charging an extortionary price for the aid. However, it allows the decision to deny aid to the distressed person, with no legal consequences. The DEC rule imposes less limits on the potential rescuer's choices than the tort and criminal Duty to Rescue, and is therefore less adverse to liberty and autonomy.<sup>143</sup> Furthermore, since the proposed DE doctrine is definitionally limited to actions that the rescuer regularly engages in, the harm to the rescuer's liberty is even more minimal. To summarize, I believe that the criminal or tort Duty to Rescue, that requires a potential rescuer to leave everything and immediately rescue, infringes on the rescuers' liberty to a far greater degree than the contractual rule that enables him not to rescue, but rules that if he chooses to rescue he cannot obtain an oppressive price.

### 3. The Contractual Context as a Means to Identify the Rescuer

An additional objection to the legal Duty to Rescue was formulated almost a century ago by Lord Macaulay in India. He argued that such a duty might obligate the wealthy in India to save beggars in Calcutta from a slow but certain death by starvation.<sup>144</sup> Macaulay's example reveals two interrelated problems which were discussed later with varying degrees of success, by the Duty to Rescue literature.

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<sup>143</sup> The argument that forcing a person to perform a certain action is more severe coercion than denying the possibility of performing that action is well-known. See, e.g., Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908): "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance." See also W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 375 (5th ed., 1984). and KILLING AND LETTING DIE (Bonnie Steinbock & Alastair Norcross eds., 2d ed. 1994). But cf. SHELLY KAGAN, THE LIMITS OF MORALITY 92-101 (1989). Murphy is aware of this claim; see Murphy, *supra* note 9 at 9636: "The popular claim that positive duties are terribly detrimental to liberty, and much more so than negative duties, seems to be based on the thought that while a negative duty merely cuts off one option, a positive duty cuts all options but one." Yet he argues that the claim is too inclusive, and that there are instances in which a positive duty does not significantly limit liberty or, alternately, there are negative duties that limit liberty to a greater degree than positive ones. See *id.*, at 635: "The claim that a duty not to steal is in general not very invasive of liberty is also clearly false." Murphy then explains that while the prohibition against theft harms liberty, the positive obligation to take out the garbage once a week harms liberty to a much lesser degree. See *id.*, at 635-36. Murphy, however, does not provide an example, regarding the same behavior, in which a concrete positive duty harms liberty less than a negative one. Thus, using Murphy's example, I believe that the duty of taking out the garbage every Thursday at 4 p.m. is more detrimental to liberty than the banning of removing the garbage at this hour. The prohibition against stealing in the next hour is less restrictive than the imposition of a duty to steal during this time. If the intuition that the demand to perform a certain action is more detrimental to liberty than negating the ability to act is correct, then I argue that the demand not to extend aid for an excessive price (the contractual duty of rescue) is less limiting than the duty to extend aid (the criminal and tort duty of rescue).

<sup>144</sup> See Thomas B. Macaulay, *Note to the Indian Penal Code*, in THE WORKS OF LORD MACAULAY 316 (Hannah More Macaulay Trevelyan ed., Harper 1900) (relating to the duty of rescue in the Indian Penal Code, with the resulting specific example).

First, one must define the situations in which the Duty to Rescue exists.<sup>145</sup> Second, lawmakers in general, and judges in specific cases, should identify the potential rescuer.<sup>146</sup> These problems, especially that of identifying the rescuer, illustrate the procedural difficulties in imposing a Duty to Rescue,<sup>147</sup> and the consequent social burdens. Even scholars who were not deterred by the analytic difficulties of the Duty to Rescue, conceded that the social and procedural burden resulting from a Duty to Rescue necessitated its significant limitation in tort and criminal law.

How does the DE doctrine solve the challenges of defining the situation and of identifying the rescuer?

The philosophical discussion of the Duty to Rescue holds that although a liberal legal system may demand that a person help another, in regular situations, this demand is made by the state in a methodical fashion that lacks particularity to a specific event. The Duty to Rescue is an exception to this rule, and even its supporters limit this duty to emergency situations.<sup>148</sup> Likewise, in the contractual context, when market conditions exist, it is improper to impose the Duty to Rescue on a specific party. Consequently, the DE doctrine is limited to instances where the distress leads to a semimonopolistic situation that requires the imposition of this duty on a specific rescuer.

The contractual DE doctrine has a much simpler time identifying the rescuer than the tort Duty to Rescue. In torts, the key challenge is identifying the individual who is required to digress from the regular course of his life to rescue the distressed person. The contractual situation, in contrast, definitionally identifies the rescuer. The contractual relationship transforms the potential rescuer from a character who must be identified to a specific individual whose actions may be examined. This situation also alleviates the social burdens generated by the regular Duty to Rescue. While the need to locate the anonymous potential rescuer has a price, this burden is avoided in the contractual setting.

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<sup>145</sup> See, in this context, PETER UNGER, *LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE* ch. 2 (Oxford University Press 1996) (suggesting several possibilities before rejecting them all). See also Murphy, *supra* note 9, at 646-62, who distinguishes between emergency situations, with an urgent need to aid a person in specific and severe distress, and permanent distressed situations, in which the state is expected to maintain a consistent distributive system.

<sup>146</sup> See, e.g., Levmore, *supra* note 132, at 934-35. On the instances of multiple rescuers, see, e.g., KEETON, *supra* note 143, at 376

<sup>147</sup> See Eisenberg, *supra* note 88, at 680, 683-85.

<sup>148</sup> This point is extensively discussed by Murphy, *supra* note 9, at 644-62.

I consequently believe that even opponents of the Duty to Rescue in the context of tort and criminal law should support the implicit duty of rescue that inheres in contractual DE doctrine. Furthermore, while the cost of rescue leads even supporters of the Duty to Rescue to limit it to life-and-death situations, there is no contractual justification for absolutely limiting the DE doctrine to life-and-death situations.

#### 4. The Incompetent Rescuer and the Contractual Context

The third type of objection to the Duty to Rescue is the fear of an incompetent rescuer. For example, a recent empirical study<sup>149</sup> reports that the damage from unsuccessful rescue attempts by nonprofessional rescuers exceeds the damage from refusal to rescue. A duty to rescue is likely to provoke unsuccessful rescue attempts, and is therefore undesirable.<sup>150</sup> Like the previous claims, this argument is also not applicable to the world of contracts. The contractual duty does not sanction those who refuse to rescue. Consequently, there is no need to fear that nonprofessionals who are incompetent would be forced to participate in harmful rescues. On the contrary, thwarting the possibility of an extravagant reward by means of DEC lessens the probability that nonprofessional rescuers will attempt rescues. In sum, the DE doctrine will not encourage nonprofessional rescuers.

#### 5. The Distress Exploitation Doctrine and the Availability of Rescuers

Landes and Posner suggest efficiency-based arguments against the Duty to Rescue. They want to encourage people to engage in “hazardous activity”, that is, activity that creates rescue opportunities, when such activities are efficient. A Duty to Rescue will cause potential rescuers to avoid areas of potentially hazardous activity. Consequently, the availability of potential rescuers will decrease, an undesirable result for the potential rescuee, as well as detrimental to general efficiency.<sup>151</sup>

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<sup>149</sup> Hyman, *supra* note 9

<sup>150</sup> *Id.*

<sup>151</sup> See Landes and Posner, *supra* note 13, at 119-28.

The argument by Landes and Posner has been criticized in the tort and criminal realm.<sup>152</sup> In the context of this article however, I do not wish to enter into the debate over the economic logic of their arguments. For our purposes, it suffices that Landes and Posner's concern that rescuers will be put off is not pertinent to the contractual DE doctrine. Unlike the Duty to Rescue, the DE doctrine does not impose sanctions on a person who does not wish to be involved in any rescue effort. Therefore, it will not cause people to avoid areas where they may become potential rescuers. As these authors themselves observe, if the law is concerned with people being deterred from efficient (albeit dangerous) activity (because they are worried about the availability of rescue services), the DE doctrine increases efficiency, since it decreases the cost of being rescued.<sup>153</sup> The logic that rejects the tort or criminal Duty to Rescue not only does not oppose a DE doctrine, but also provides arguments in favor of it.

To conclude, based on a careful review of the philosophical and economic rationale behind the rule, I demonstrate that the No Duty to Rescue rule does not bar implementation of the DE Doctrine. Hence, even jurisdictions that do not recognize a general duty to rescue can and should invalidate Distress Exploitation Contracts when the conditions specified in the Article are present.

### C. The Law and Economic Perspective

#### 1. Does the Distress Exploitation Doctrine Hurt Distressed People?

DE and kindred doctrines are naturally meant to protect people in distress. Unfortunately, at times they have the opposite consequence. In many instances of distress, the exploitive contract improve the condition of the distressed individual as compared with his pre-contractual state, despite the contract's exploitive terms. Voiding DEC is liable to deter a rescuer from entering into such a contract, and thereby harming potential rescues. The DE doctrine is sensitive to this concern, and utilizes the economic principles that were recently formulated in a series of

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<sup>152</sup> Thus, for example, many scholars doubt that people will refrain from active participation in activity that they desire just because of the fear that they will be asked to rescue someone else. See Levmore, *supra* note 132, at 889-90; Eisenberg, *supra* note 8, at 688-89. Additionally, it has been argued that potential rescuers are also potential rescues who may benefit from the duty of rescue. See Murphy, *supra* note 9, at 687.

<sup>153</sup> See Landes and Posner, *supra* note 12, at 85-93, 100-101. Another question is whether the DE doctrine is not, nonetheless, detrimental to the probability of rescue, since it would harm the incentive to rescue. Fortunately, as we shall see in the extensive discussion *infra* subpart III.C, the DE doctrine is sensitive to this fear, as well as to the need for incentive for professional rescuers.

innovative articles written by Omri Ben-Shahar and Oren Bar-Gill.<sup>154</sup> In the following part, I will present their analysis and its implications for the DE doctrine. I will then deal with the concern that the DE doctrine will, *ex ante*, reduce rescuer availability. In the last subpart I will examine the morality-economics relationship reflected in the DE doctrine.

## 2. The Distress Exploitation Doctrine in Light of the Credibility Test

Ben-Shahar and Bar-Gill examine the question of the proper legal attitude to agreements resulting from duress or threat. Ben-Shahar and Bar-Gill are primarily concerned with threat credibility. In the context of duress a credible threat is one that the threatening party intends to carry out if a valid agreement is not made. A “bluff threat,” that is, one the threat-maker will not realize if a valid agreement is not reached, lacks such credibility.

If the threat is credible, it is in the interest of the threatened to reach a legally binding agreement with the threat-maker, lest he make good on his threat. If the threatener will not carry out threat, his threat lacks credibility, and the potentially threatened party has no reason to enter into valid contract.

According to the creditability analysis, if a rescuer credibly threatened not to extend aid unless a contract with unconventional terms was enforced, it is in the distressed’s interest that such agreements be legally binding. If the threat lacks credibility, such as when the rescuer would eventually agree to provide the service at the market price if he were to know that a commitment to pay in excess of this price is invalid, then it is in the interest of the distressed person that the law not confirm DEC.

This is precisely the difference between the professional boatman and the boatman-fisherman, or, in a broader sense, between a service provider who raises his price without any economic reason, except to exploit the distress of the other party, and a provider who has an intrinsic reason to raise the price.

The professional boatman has no real reason, aside from the rescuee's distress, to diverge from the market price. The threat of denying the service absent a contract that grants him an above market fee is not credible. Accordingly, a legal rule that invalidates DEC in such instances will not harm potential rescuees; on the contrary, it will remove the incentive to demand such an

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<sup>154</sup> See Bar-Gill and Ben-Shahar (2004), *supra* note 16; See also Bar-Gill and Ben-Shahar (2005) *supra* note 16.

exploitive agreement. When the potential profit the rescuer can make from alternate work exceeds the market price of the service required by the distressed party, the threat to not enter into an agreement with the distressed at the market price is credible. If the fisherman cannot make a binding contract that meets his price demands, he will refrain from ferrying the fugitive in favor of his alternative work. Thus, it is in the interest of distressed individuals (such as the fugitive) to impart legal validity to the commitment to pay an above-market price to someone who is unwilling to work for the regular price.

### 3. The Emphasis of the Rescuer's Subjective Perception

The moral account of the DE doctrine accords with the legal and economic analysis that stresses the importance of threat credibility in another aspect as well.

Contrary to the intuition to submit DEC to objective criteria, the DE doctrine maintains that the alternative work test is subjectively focused on the perspective of the potential aid giver and his perception of the expected profits, provided that this assessment is in good faith. The preference of the subjective criterion corresponds closely with the economic analysis of threat credibility. If the threat-maker believes that the alternate work is more preferable than aiding the distressed party at the market price, then if he were to know that his agreement with the distressed party is void, he would choose to engage in the alternate work, even if objectively, that work is not as profitable. The only way to convince a potential rescuer to set aside alternative work that he views as equally profitable is through a legally valid agreement that assures him of compensation for the profits that he seemingly loses.<sup>155</sup>

### 4. The Need to Offer an Incentive for Prior Investment in Rescue Capability

My discussion until now demonstrated the DE doctrine's sensitivity to the concern that potential rescuers will be deterred from rescue. Aside from the fear of deterring chance rescuers, it is in the long-term interest of those in distress that people make prior investments in the capability to aid in distress situations. If however, potential rescuers are compelled to limit the

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<sup>155</sup> The criterion for credibility are personal and subjective, not objective and economic. See Oren Bar-Gill and Omri Ben-Shahar, *Treating an Irrational Breach of Contract* 11 SUP. CT. ECON. REV. 143 (2004). Here, too, DE doctrine follows the most up-to-date economic analysis

price of their services in distress situations to the market fee, they would have no incentive to make this prior investment in the knowledge that enables them to aid the distressed person.<sup>156</sup>

The DE doctrine is sensitive to this concern as well. Therefore, one element of the proposed DE doctrine is that the DE contract is valid in any instance where the price in a distress situation exceeds the market price as a result of prior investment in skill and availability. This exception to the regular rule will maintain the incentive for prior investment.<sup>157</sup>

#### 5. On the Interaction between Economics and Morality

The credibility test is one-sided. If the threat is credible, then the invalidation of the contract will harm future individuals so threatened, and is undesirable. If however, the threat lacks credibility, the contract is not automatically void; it merely allows other considerations (including moral concerns) to enter the picture.<sup>158</sup> This is precisely what happens in the case of the DE doctrine: When the threat is credible, even if there were moral considerations supporting the voiding of the contract, such considerations would not be useful in the long term. If the fisherman knows that he is not entitled to what he perceives as his losses, he simply would not extend aid. If however, the threat is not credible, the *ex post* contract invalidation would not prevent the *ex ante* drawing up of the agreement. In such cases, there is room for moral considerations that define whether the contract is desirable or not.

Put differently, the DE doctrine reflects a fascinating interaction between morality and economics. Economics establishes the boundaries within which moral considerations can be brought to bear.<sup>159</sup>

### IV. APPLICATIONS AND EXTENSIONS

#### A. Towards an American Distress Exploitation Doctrine

Following the discussion in the preceding parts, I recommend that American law develop a DE doctrine, which could be formulated as follows: **When a contract is a product of unjust**

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<sup>156</sup> Cf. Kronman, *supra* note 56 which refers to the prior investment as a curial consideration of setting up the disclosure duty.

<sup>157</sup> See also Eisenberg, *supra* note 3, at 762-63. See also Buckley, *supra* note 6, at 40-48 (criticizing Landes and Posner's argument which missed that point).

<sup>158</sup> See Bar-Gill and Ben-Shahar (2005), *supra* note 16, at 731-32.

**distress exploitation, and the terms of the contract significantly differ from the customary terms of similar contracts in nondistress situations, the contract is voidable.**<sup>160</sup>

According to the proposed doctrine, the following three conditions are necessary for the voiding of a DE contract:

- (a) Distress accompanied by a semimonopolistic situation;
- (b) Unconventional contract terms in favor of the nondistressed party;
- (c) Exploitation.

The content and context of these elements are derived from my previous philosophical, legal, and economic discussion.

The first element, **distress**, relates to the circumstances and state of mind of the party who seeks to invalidate the contract. An emergency situation such as the fugitive case, is a classic example of distress. This category, is not limited to life-threatening situations, and encompasses any personal or economic stress that makes the "oppressive" contract the only reasonable alternative for the distressed person. Thus, the doctrine is limited to semimonopolistic situations. If competition and market conditions still exist, then the doctrine would not be applicable even though one party is distressed.

The second element, **unconventional terms**, refers to the terms of the contract. The market price (the price for similar service in the absence of distress) is used as the benchmark for evaluating the contractual price. One may conclude that the DE doctrine is not applicable to a unique transaction that has no nondistress parallel in the marketplace. My discussion will demonstrate the possibility of applying the DE doctrine to unique transactions too.

The third and most important element, **unjust exploitation**, morally evaluates the behavior of the nondistressed party. This means that the exploiter must be aware of the distress, and of the agreement's unconventionality.

The element of exploitation delineates the three types of cases in which the agreement is validated, despite the presence of distress, and despite the disparity between the market price and the contractual price.

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<sup>159</sup> This part of the analysis thereby differs from the classical economic analyses of distress exploitation that view efficiency as the exclusive criterion for legal rules, and are unwilling to leave any room for non-economic considerations. *See, e.g.*, Landes and Posner, *supra* note 16.

<sup>160</sup> Even if the contract is void the distress person will have to pay the market price of the service according to restitution law.

(1) When deviation from the market price is not a consequence of the distress, but results from the desire of the nondistressed party to compensate himself for the possible loss of profit from an alternative transaction.

(2) When the distress influences the nature of the service or the risk it entails.

(3) When a special investment is required to enable the potential rescuer to extend aid in DE situations.

## B. Applications

Jewish law, and some American court decisions, offers several fascinating examples where the new doctrine can be applied and with which its limitations can be understood.

### 1. The Purchase of Property that would be Lost if Not Purchased

One scenario concerns property that would be lost if not bought immediately, and is therefore offered at an extremely reduced price.<sup>161</sup> *Post v. Jones*,<sup>162</sup> a classic admiralty case, is an example of this. The cargo of a ship that was about to sink was sold at a price far below the market price. The court voided the agreement, and ruled that only the market price was to be paid. According to the court, when the transfer of the property required no extraordinary exertions or hazards, nor any great delay, the gap between the contractual and market price is unjustified and the contract is invalid.<sup>163</sup> The willingness to void a sale at a price that deviates from the market price, on the one hand, and on the other, the consideration of the particular circumstances of risk, the special cost of transport, and the delay that precluded profit from other transactions, accord with the DE doctrine.

### 2. The Exploitation of a Local Shortage in Order to Raise the Price

The second scenario relates to the exploitation of a local shortage of goods in order to raise the price of goods that the purchaser desperately and immediately needs. Several American court decisions discuss this scenario in wartime circumstances and set forth opposing views: some judges maintained that raising the price when the merchandise was essential for the purchaser

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<sup>161</sup> See, e.g. the Jewish law sources *supra* note 84

<sup>162</sup> *Post v. Jones*, 60 U.S. 150 (1856).

<sup>163</sup> *Id.* at 161.

constituted exploitation and that the contract should be invalidated.<sup>164</sup> Other decisions, honored such contracts.<sup>165</sup> In *United States v. Bethlehem Steel Corp.*,<sup>166</sup> the First World War created a semimonopolistic situation that typifies this scenario. The government was desperate for replacement parts for its ships. Bethlehem Steel, the government's regular supplier, and the only one capable of meeting the deadlines for supplying the merchandise, raised its prices. Based on conventional Procedural- substantive analysis the majority validated the agreement.

The DE doctrine, in such cases suggests the need to inquire whether the supplier would have been willing to conduct the transaction at the adjusted price had he known that the contractual price would not be enforced. If the answer to this is positive, then morally, the demand for the contractual price constitutes illegitimate exploitation of distress. Economically, the enforcement of the contract wouldn't harm distressed people in the future, since the threat not to enter into a contract at a price different from the exploitative contract price is not credible. If, however, the answer is negative, that is, the supplier was unwilling to enter into a contract at the corrected price, then, morally speaking, the demand for the contractual price did not ensue from DE, but from a (possibly incorrect) assessment of legitimate business interests, and therefore, the contract stands. From the economic viewpoint, the threat in such a case is regarded as credible, and therefore the cancellation of the contract would harm people liable to be in distress in the future.

Times of war or risk could justify the enforcement of DEC in an additional sense. If the war increases the risk entailed in providing the goods or service, then the price deviation is justified.<sup>167</sup>

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<sup>164</sup> See, e.g., the dissenting opinion of Judge Frankfurter in *U.S. v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942), invalidating a DE contract that was made during the Second World War, despite the fact that the distressed party was the government.

<sup>165</sup> See, e.g., the majority opinion in *U.S. v. Bethlehem Steel Corp.*, *supra* note 200; see also *Batsakis v. Demotsis*, 226 S.W. 2d 673 (Tex Civ. App. 1949), validating an extremely one-sided financial agreement during wartime. The court disregarded the Distress Exploitation aspect and limited itself exclusively to an objective examination of the contract terms. The court ruled that there is no doctrine in American law that allows intervention in a contract on the ground of unequal consideration.

<sup>166</sup> *Bethlehem*, 315 U.S. 289.

<sup>167</sup> Therefore the verdict in *Batsakis v. Demotsis* could be justified if the war significantly increase the concern that the loan will not be returned. A case discussed in the Jewish case law finely illustrates this point. During wartime, a Jewish community was left without a ritual *shofar* blower for the Jewish New Year (when such blowing is obligatory). They agreed to pay a *shofar* blower an above-market rate so that he would come to their city and perform. In discussing the validity of the contract, Rabbi Jair Hayyim Bacharach distinguished between two scenarios; a higher price that resulted from the blower's knowledge of the community's lack of other options --in which case the agreement would be invalid; and a high price reflecting the special risk that this activity would involve. Rabbi Bacharach held that in this case, the danger of travelling during wartime legitimized the demand for a higher price, and is therefore justified..See *supra* note 90

Finally, the DE doctrine requires us to determine how a specific supplier is able to provide the merchandise to the distressed customer despite the shortage. If this ability results from a prior investment with distress situations in mind, then the economic and moral rationales of the DE doctrine supports the enforcement of the contract. When this ability is fortuitous and does not reflect any prior planning for distress situations, then there is no economic or moral justification for exploiting the localized shortage and charging the excessive price.<sup>168</sup>

### 3. Economic Distress Leads to Bad Agreements

The third scenario concerns situations where the extreme economic distress of one party leads it to sell assets at a price considerably below their market price. The classic example of this is borrowers who took a mortgage, and under pressure by the lenders, agreed to sell their property to a third party (or, sometimes, to the lenders themselves) at an especially low price.<sup>169</sup> In some of these instances, the borrowers could have received a higher price on the open market, even under the pressing circumstances. These cases are more properly be examined through the prism of procedural unconscionability, as they are instances in which the distressed party's agitated state, surprise, and lack of experience resulted in a transaction that does not express his true and complete will.<sup>170</sup> Yet in other cases, the sale at the low price was the best option available to the borrowers at the time of the transaction. In such cases, the DE doctrine comes into play. According to this doctrine, the central question here is what would happen if the exploitative contract had not been made. If the purchaser would purchase the property for a sum

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<sup>168</sup>his criterion enables us to distinguish between street peddlers who sell umbrellas on a rainy day at a price higher than normal and instances of raised prices for transportation during a public transportation strike or for flashlights and batteries during a prolonged blackout. With regard to the former, the availability of the umbrellas for sale on a rainy day ensued precisely from the seller's prediction of the distress situation, and therefore the deviation from the customary price is not grounds for contract invalidation. In instances of strikes, however, the availability of vehicles or batteries is not related to special preparation for a strike, and therefore distress exploitation to raise the price beyond what is customary is unjustified. In this spirit, we can justify the law that was passed in Florida that prohibits the unconscionable pricing of commodities during a state of emergency. See Fla. Stat. § 501.160 (2005)

<sup>169</sup> For some classic mortgage cases, *see, e.g.*, *Vila v. Rodriguez*, 79 U.S. 323 (1879); *Richardson v. Barrick*, 1864 WL 206 (Iowa); *Wagg v. Herbert*, 215 U.S. 546 (1910). In some, the sale at a reduced price was made to the holder of the mortgage. For the legality of such an arrangement, *see, e.g.*, *Humble Oil & Refining Co. v. Doerr*, 303 A.2d 898 (N.J. Super. 1973). It is noteworthy that when the sale was made to the lenders themselves, the case more closely resembles the instances of economic duress, and less that of the DE doctrine, that is usually concerned with the instances in which the exploiter is not directly linked with the creation of the distress. In contrast, when a seller acts independently from the lender, but is aware of the distress and exploits it, this is a DEC. Nonetheless, there is a clear contentual connection between the doctrine of economic duress and the DE doctrine, which led me to mention instances of both types in this note.) For an example of the reverse, in which the borrower was compelled to purchase property at an especially high price due to his economic stress, see *Hough v. Hunt*, 1826 WL 55 (Ohio).

<sup>170</sup> *See id.*, *Vila*, 79 U.S. 323.

much higher than the exploitative price (such as where the purchaser places a high subjective value on the property), then the low-price transaction is to be voided. If however the purchaser is unwilling to buy the land at the regular price, and acts only because of these special circumstances, then the validation of this type of transaction is in the interest of future borrowers.

#### 4. A Medical Treatment Contract

The final scenario deals with contracts to sell medical treatment or medicine at a higher than regular price<sup>171</sup> Despite the undeniable stress generated by illness, medical services usually exist under market conditions. Consequently, an agreement to purchase medicines or medical service would not be regarded as a DEC, even where a physician demands a higher than customary fee for treatment. The situation changes when a higher fee is demanded for medical services that do occur in semimonopolistic situations, such as in remote locales or emergency situations that requires urgent treatment. In such a case, the DE doctrine mandates an examination of the physician's personal circumstances: If this physician's usual fee is higher than the customary price, then the above-market contractual price is to be enforced. If however, this physician charges the going rate, and his demand for a higher price is based solely on his ability to exploit the emergency situation, then his extortionary price is not honored. In this situation, one could argue for the application of the third exception (prior investment) of DE contracts. However, a deeper look leads to a more complex conclusion. Physicians and the pharmaceutical companies invest much time in knowledge and ability, but this investment is already reflected in the regular price of medical services and medicines. The usual investment in medical studies or drug development does not justify an additional increase over the market price, especially when the increase is caused by the unavailability of competing medical services. The DE doctrine justifies such a deviation only in the presence of a special investment that makes the treatment available in emergency situations.<sup>172</sup>

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<sup>171</sup> It should be noted that our discussion in this paragraph is concerned with instances of specific distress that leads a person to agree to receive treatment (that has a standard price), but for a higher than customary sum. In another case type, a physician or pharmaceutical company succeed in developing a unique treatment that has no parallel in the market. In legal terms, the later category falls under the context of antitrust law, and not the DE doctrine. Nonetheless, as we showed in subpart III.B *supra*, the economic and moral principles and rules that should guide antitrust law bear some resemblance to those relating to the DE doctrine.

<sup>172</sup> Nonetheless, I believe that even in such a case there must be some correlation between the prior investment and the deviation from the customary price. I therefore agree with Eisenberg , *supra* note 3, that in cases of professional

## C. Extensions

Thus far, I have assumed the existence of a market price in distressless situations to which the contract price in a distressed situation can be compared. Some contracts however are unique, and have no market parallel. In this subpart I will examine two specific examples: a unique rescue contract, and buying a Jewish bill of divorce (*get* in Hebrew). I will suggest a method of extending the DE doctrine to include such agreements.

### 1. Rescue Contract

In the fugitive case, the exploitative nature of the contractual terms is obvious from a comparison between the regular fee for ferrying across the river, and the price demanded of the fugitive. Similarly, in the decision in *Post v. Jones*,<sup>173</sup> the disparity between the regular price for the ship's cargo and the price at which it was sold under conditions of distress illuminates the exploitative aspect of the transaction. Yet some rescue contracts have no market parallel which reflect the price of the service or product if distress were not a factor. A classic example of this is when one rescues a drowning person. The transaction is not for the purchase of the cargo but for the very act of rescue. Rescue contracts of this type plainly illustrate the difficulty classical substantive approaches have in objectively assessing the contract terms by means of the two popular substantive criteria: disproportional distribution of profit and comparison with the market price. Since the rescuee gains tremendously from being rescued, assessing the correct price via the proportional distribution of the gain might justify a fee that seems excessive, for example, half of the rescued property, or even half of the rescuee's property, when his life is at stake. On the other hand, a comparison with the market price is irrelevant for unique rescue agreements that do not parallel any nondistress transaction. Consequently, the substantive approaches that focus on contract fairness do not offer helpful criterion for the regulation of rescue agreements.<sup>174</sup> Although the regular tests of fairness are inapplicable to special distress

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rescuers, such as an expert physician, the DE doctrine could be applied, although in such an instance, the benchmark to which the contractual price is to be compared is not the market price, but a higher one.

<sup>173</sup> See *supra* note 162.

<sup>174</sup> The article by Gordley, *supra* note 6, might exemplify the difficulty in applying to rescue contracts the substantive approaches that concentrate on contract fairness. Gordley supports the substantive review of contract fairness from Aristotelian corrective justice, a perspective that aims to maintain the pre-existing distribution of . He therefore asserts that, normally, a deviation from the market price that would result in a changed distribution of party resources and one's profiting at the expense of the other is not justified. With regard to rescue agreements, he maintains that only a legal rule that compensates the rescuer for his expenditures will not cause the transaction to

situations, the moral and economic principles of the DE doctrine are easily applicable to rescue actions that have no parallel market value.

From a moral perspective, the doctrine is based on the duty of cost neutral aid to a distressed person. Rescue agreements clearly represent a distressed situation. Once the potential rescuer's expenses (in the broad sense of the word, including a good-faith assessment of the loss of alternative work) have been assured, he is duty-bound to aid the distressed individual. The refusal to do so at cost, and the demand for a higher price leads to the voiding of the contract. Economically, the DE doctrine is also sensitive to the danger of refusal to aid. In the legal world of NDRR, a wicked but rational person might refrain from rescuing if he knew that his extortionary contract would be voided, even if the rescue were costless.<sup>175</sup> Accordingly, the doctrine also validates agreements that,<sup>176</sup> offer a minimal sum beyond expenses that is needed to ensure that the rescuer willingly enters into the contract.<sup>177</sup>

Additionally, the usual exceptions to the DE doctrine must be applied to rescue contracts. Thus, when a rescue is accompanied by the waiver of an alternative transaction, or by a special risk, the payment must compensate for those costs. Likewise, the payment for a professional rescuer must be higher than that to a regular rescuer.

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change the preceding distributive situation. According to Gordley, *id*, at 1622, this explanation justifies the voiding of rescue agreements that demand a sum in excess of the rescuer's expenditures (plus a small incentive for action), even in the absence of a legal or moral duty of rescue. In my opinion, however, Gordley's argument is significantly flawed, since he refers to the parties' situation before the distress as the benchmark that the transaction cannot be allowed to alter. If, however, he would relate to their situation a second before the transaction as the baseline, he would discover that in this situation the distressed person, such as the fugitive, was potentially losing \$10,000, and therefore his situation following the transaction has improved dramatically, even if the rescuer received recompense that greatly exceeds his expenditures. Thus, it is unclear why we should invalidate the contract.

<sup>175</sup> For this reason I think that even if the DE doctrine is accepted, there still would be room for some tort or criminal sanction against those who refuse to rescue, in order to increase their incentive to extend aid. *See also* Levmore, *supra* note 135, who, too, supports a combination of minimal sanction and incentive, or, as he puts it, the carrot and the stick, in instances of refusal to rescue and duty of rescue.

<sup>176</sup> The classic case of costless rescue thereby differs from that of a person who can save by means of his regular occupation. In the first case, a wicked but rational individual would save even if he were to know that the contract with a sum in excess of his regular fee would be invalidated, since he wishes to gain at least his regular fee. Notwithstanding this, when the potential rescuer does not lose by refraining to save by means of his regular work (such as a case like that of the fugitive, in which people are waiting in line and the ferryman can choose the person next in line after the fugitive), economic grounds might justify an agreement with a minimal addition to the customary fee.

<sup>177</sup> On the need to motivate rescuers as a central consideration in determining the compensation for rescue, *see* The Blackwall 77 U.S. 1, 10 (1869): "Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a *quantum meruit*, or as a remuneration *pro opere et labore*, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property." *See also* Eisenberg, *supra* note 3, at 761; Bar-Gill and Ben-Shahar (2005), *supra* note 16, at 777-79.

An examination of the existing court decisions in light of the criteria described above yields mixed result. On the one hand, the common law has developed no contractual doctrine that allows for the voiding of dry-land rescue contracts (absent a criminal or tort duty to rescue). Admiralty law which has a (limited) duty to rescue, contains decisions that invalidate DEC.<sup>178</sup> The calculation of the correct price in these decisions is quite suggestive of the criteria that the DE doctrine supports. These include expenses, consideration of alternative transactions, an increment for risk,<sup>179</sup> and a premium for a professional rescuer.<sup>180</sup>

My analysis demonstrates that the dry-land / open-sea distinction is unjustified. The DE doctrine is to be applied to dry-land situations, as well.<sup>181</sup> Notwithstanding this general statement, I would suggest two improvements to the admiralty law .

First, admiralty law awards compensation to the rescuer according to the criteria of expenses, risk, expertise, and the like, even absent an agreement.<sup>182</sup> This leads some courts to weaken the significance of the formulated contract. If the contract reflects these criteria, it is superfluous; and if it exceeds them, it is invalid.<sup>183</sup> This approach is at odds with the tendency of the DE doctrine to seriously consider the rescuer's assessment of his alternative losses in order to morally evaluate his behavior, and the economic credibility of the threat not to aid. In light of the DE doctrine's emphasis on the subjective, I believe that the agreement that was made is of considerable importance, at least as a point of departure for assessing the expenses, risks, and loss of alternative profit. Additionally, the burden of proof of the difference

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<sup>178</sup> On the distinction between admiralty and common law in these respects, see Landes and Posner, *supra* note 12, at 118-19; Buckley, *supra* note 6, at 47-48; Levmore, *supra* note 132.

<sup>179</sup> See, e.g., *Post v. Jones*, 60 U.S. 150, 159-60 (1856) (considering actual costs and alternative profits); *The Elfrida*, 172 U.S. 186, 197 (1898) (citing "time and labor" expended, as well as "loss of profitable trade," as determinants of the value of the salvage service).

<sup>180</sup> See Eisenberg, *supra* note 3, at 762, and the sources he cites. See *supra* note 60. It should nonetheless be noted that even in the case of a professional rescuer, the court will not honor every contract. See *Magnolia Petroleum Co. v. Nat'l Oil Transp. Co.*, 281 F. 336 (S.D. Tex. 1922).

<sup>181</sup> This is also the opinion of Landes and Posner, *supra* note 13, at 118-19, maintaining that admiralty law is more developed than common law. For an attempted justification of the distinction between dry land and the sea, see Buckley, *supra* note 6 at 47, arguing for the higher probability of professional rescuers on dry land, and therefore that rescue should be motivated by the affirmation of the agreements. I think that, even if Buckley is factually correct, we could still formulate a DE doctrine in both cases, and then establish the difference between the professional rescuer and the amateur, as we have done in the current article. It seems that Buckley himself would agree with this; see Buckley at 48.

<sup>182</sup> See, e.g., The Blackwall, *supra* note 213; and more generally, GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY* 559-72 (2d ed., West Publishing 1975).

<sup>183</sup> See, e.g., *Post v. Jones*, *supra* note 1 at 155: "To allow contracts between parties dependent for salvage service and salvors to be valid, would defeat the jurisdiction of admiralty entirely." See also the precedents from within and outside the United States which are discussed in *The Elfrida* case (*supra* note 179).

between the agreement and the rescuer's assessment of expected loss must rest with the voider of the contract.<sup>184</sup>

Second, one of the parameters established by admiralty law for rescuer compensation is the value of the rescued property.<sup>185</sup> At times the literature presents this criterion as reflecting fairness considerations<sup>186</sup>, since it lacks economic justification.<sup>187</sup> I maintain, that the presentation of this criterion is self-defeating, since it undermines the rationale for the annulment of DEC. If considerations of fairness mean that the rescuer is entitled to compensation in relation to the profit of the party suffering harm, then it is unclear exactly what percentages make the contract exploitative.<sup>188</sup> In contrast, the DE doctrine that is based on the Duty to Rescue, holds that a person must aid another in distress, and therefore is entitled to compensation only for his expenses and losses with a minimal additional incentive to extend aid.

## 2. Purchasing Get Settlement

The last extension of the DE doctrine addresses the purchasing of *get* (Jewish divorce) settlements.<sup>189</sup> A short introduction to the Jewish laws of divorce is necessary in order to understand the dynamics of such a transaction.<sup>190</sup> A *get* is the legal document by which Jews divorce in accordance with the Jewish law. Unlike civil law that authorizes the court to declare

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<sup>184</sup> On this conclusion, see *The Elfrida*, *supra* note 179: "We do not think that a salvage contract should be sustained as an exception to the general rule, but rather that it should, *prima facie*, be enforced, and that it belongs to the defendant to establish the exception." It still should be stressed that the court will not accept every assessment by the rescuer concerning his potential losses. Thus, *e.g.*, *Post v. Jones*, *supra* note 197 at 159, rejecting the rescuers' claim of the loss of alternative profit from fishing when it learned that the fishing season was coming to a close; it therefore was unreasonable to say that the price of the rescue reflected their assessment of the expected loss from not fishing. I believe that, despite the subjective bent of the DE doctrine, this limitation is necessary, otherwise the doctrine would be emptied of all content.

<sup>185</sup> See *The Blackwall*, *supra* note 213; GILMORE & BLACK, *supra* note 182, at 559.

<sup>186</sup> See Eisenberg *supra* note 3 at 759, n. 53.

<sup>187</sup> See Landes and Posner, *supra* note 16 at 103.

<sup>188</sup> On the irrelevance of the value of the saved property to the calculation of the rescuer's price, see also Gordley, *supra* note 8, according to whom the rescuer has no legitimate rights to the rescued property, and thus, his fee should not be measured by the property's value.

<sup>189</sup> Buying *get* settlements are distinguished from regular DEC in two aspects. First, similar to rescue, the *get* is a unique item that has no "market" value, and these settlements thereby differ from the classic DE cases. Additionally, while in regular instances of the doctrine, the exploiter is not responsible for causing the distress, in divorce agreements, the husband who refuses to give a *get* creates this distress, and so this is more suitable to the classic category of duress. Yet, as the discussion in the text will show, the moral and economic principles on which the DE doctrine are based could also guide the desirable regulation of buying *get* settlements.

<sup>190</sup> For extensive discussions of Jewish divorce law and the distress they arouse in a secular civil legal environment such as the United States, see MICHAEL J. BROYDE, MARRIAGE, DIVORCE AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA (Ktav Publishing House 2001); IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY (Greenwood Press 1993).

divorce even without the cooperation of one of the spouses, Jewish law recognizes divorce only following a voluntary process<sup>191</sup> in which the husband gives the bill of divorce to his wife.<sup>192</sup> Despite the demand for a freely given *get*, Jewish law empowers the rabbinical court in certain situations to compel the husband to divorce his wife and imposes severe sanctions on him if he refuses to do so.<sup>193</sup> In secular societies such as the United States where the civil courts issue divorces, the rabbinical court does not possess sufficient legal means to enforce the granting of a religious bill of divorce.<sup>194</sup> This leads to an unacceptable situation in which Jewish men<sup>195</sup> who were married in a religious ceremony and obtain a divorce in the civil courts<sup>196</sup> exploit their wives' need for a religious *get*. The husbands make their cooperation in granting the *get* conditional upon a payment [hereinafter *purchasing a get settlement*]. The distress of Jewish women led New York state to enact the famous "Get Law" that imposes civil sanctions on recalcitrant husbands.<sup>197</sup> Yet, the exploitative purchasing of a *get* settlement is still common in New York. One of these exploitative agreements was adjudicated in a New York court in the case of *Golding v. Golding*.<sup>198</sup> In this case, the financial arrangement was voided on the grounds of duress after the *get* had already been given. How would the DE doctrine deal with such situations?

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<sup>191</sup> A compulsory *get* (*get me'useh*) is invalid according to the halakhah. See BREITOWITZ, *id.*, at 20-40.

<sup>192</sup> See, e.g., *id.*, at 6. The issuance of a *get* is a private act, with no need for judicial involvement. Yet, the rabbinical court is needed to ensure procedural formalism.

<sup>193</sup> On the grounds for divorce in Jewish law, see BROYDE, *supra* note 225, at 15-27

<sup>194</sup> Some Jewish couples seek to circumvent this problem by means of a prenuptial agreement that authorizes the rabbinical court to adjudicate any future divorce proceedings for the couple. Such agreements raise several legal problems that exceed the purview of the current article. See, e.g., the decision in *Avitzur v. Avitzur* 446 N.E. 2d 136 (N.Y. 1983); see also *In Re Marriage of Goldman* 554 N.E. 2d 1016 (Ill. App. Ct. 1990), *appeal denied* 55 N.E. 2d 376 (Ill. 1990), considering the standard Jewish law prenuptial agreement (known as a *ketubah*) as an implied contract to appear before and cooperate with a rabbinical court for divorce proceedings, if necessary; *but cf.* *Victor v. Victor* 866 P. 2d 899 (Ariz. App. Div. 1 1993). For a further discussion, see BREITOWITZ, *supra* note 225, at n. 96-106; David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201 (1984).

<sup>195</sup> According to Jewish religious law, the status of a Jewish woman whose husband refuses to give her a *get* is much worse than the parallel situation of a man whose wife refuses to be divorced. A woman in this condition (in *halakhic* terminology, an *agunah*) cannot remarry, and if she has children from someone other than her husband, the offspring are *mamzerim* (the issue of a union between a married woman and a man not her husband and such individuals suffer serious limitations concerning their own ability to marry). A man refused divorce, in contrast, can, in certain instances, receive rabbinical permission to take an additional wife; moreover, the children born out of wedlock to a married man are not *mamzerim*.

<sup>196</sup> See BROYDE, *supra* note 190, at 29-32.

<sup>197</sup> To be precise, there are two "get laws": the first, from 1983 and amended in 1984: N.Y. Dom. Rel. Law §253 (Mckinney 1999) enables the civil court to reject an application for civil divorce when the petitioner was married in a religious ceremony and refuses to remove the barriers to remarriage. The second, from 1992: N.Y. Dom. Rel. Law § 236(b) (Mckinney 1999) enables the court to consider the refusal to cooperate in the obtaining of a *get* in the context of equitable property distribution.

<sup>198</sup> See *Golding v. Golding*, 176 A.D. 2d 20 (N.Y. App. Div. 1992).

One Talmudic case in which the DE doctrine was employed is that of R.. Papa's niece. With the encouragement of the court, she consented to pay a generous sum of money to her husband's brother after her husband's death, so that her brother-in-law would agree to participate in *halitzah*, religious ceremony that would enable her to marry another man.<sup>199</sup> Despite the court's active involvement in making of the agreement, after the *Religious* ceremony had been performed, it applied the Jewish law DE doctrine and cancelled the niece's financial commitment.<sup>200</sup> Following this precedent, several rabbis who ruled on divorce settlements between a recalcitrant husband and his wife cancelled the agreements after the giving of the *get*.<sup>201</sup> To be sure, Jewish law is quite distant from the liberal conception of no-fault divorce. In most instances, the rabbis allow the husband to make delivery of the *get* conditional on financial payment. The DE doctrine is employed only in extreme cases, where the Jewish law does not allow the husband to legitimately oppose the divorce.<sup>202</sup> Secular American law, is not subject to these religious notions concerning divorce. I therefore think that with regard to buying *get* settlements, American contract law must use secular-civil criteria that are based on liberal principles of liberty and equality. According to these criteria, a person who was married in a religious ceremony and has already obtained a civil divorce cannot legitimately oppose giving a *get* in a religious ceremony, without which his wife cannot remarry. Some scholars hold that compelling a husband to appear for religious judgment and to participate in a religious ceremony to be constitutionally<sup>203</sup> and religiously<sup>204</sup> problematic. It is precisely these positions that highlight the superiority of the DE doctrine to the other civil means for dealing with recalcitrant

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<sup>199</sup> See *supra* note 82.

<sup>200</sup> See *supra*, Part II.A.

<sup>201</sup> See LURIA, , *supra* note 93, at paras. 24-25, discussing a case in which a man is said to have ritually betrothed a woman (which imposes on her the limitations of a married woman), and later agreed to divorce her only for payment. Luria validates the *get*, but allows the voiding of the woman's commitment to pay.

<sup>202</sup> Thus, *e.g.*, Luria, *id.*, invalidates the financial agreement in the previous case, *supra* note 201, because the groom did not truly wish to be married, does not desire to remain married, and has no legitimate reason to refuse to give the *get*.

<sup>203</sup> On the constitutional problems, *see, e.g.*, Ilene H. Barshay, *The Implications of the Constitution's Religion Clauses on New York Family Law*, 40 HOW. L. J. 205 (1996); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 810-39 (1998); Edward S. Nadel, *New York's Get Laws: a Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 55-100 (1993); Personally, I do not accept these arguments as exhausting the constitutional discussion, but such an inquiry would exceed the scope of the current article.

<sup>204</sup> According to the *halakhah*, a *get* not given with the free will of the husband (*get me'useh*) is invalid. Nonetheless, in certain circumstances, Jewish religious law permits rabbinical courts to enforce the giving of a *get*, when the coercion is performed by civil means. Some authorities nonetheless feel that this is liable to invalidate the *get*. See Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703 (1995); For an earlier discussion, before these laws were enacted, see Bleich, *supra* note 194, at 287-89

husbands. This doctrine does not require a man to act against his conscience and divorce in a religious ceremony. It merely precludes the possibility of a manipulative refusal to engage in a religious divorce, and then to divorce in such a manner for money. The opposition to the *get* laws based on the principle of religious freedom is not relevant to the application of the DE principle to purchasing *get* settlements.<sup>205</sup> The halakhic concern of the invalidity of a coerced *get* are inapplicable to the voiding of these settlements.<sup>206</sup>

I have demonstrated that the application of the DE doctrine to purchasing *get* settlements accords with the moral component of this doctrine. This doctrine is also sensitive to economic analysis. When the threat not to aid a distressed person is credible, the application of the doctrine will, in the final analysis, harm the distressed people. Applying this line of thought to the case of purchasing *get* settlements leads us to fear that the voiding of such agreements will prevent women from obtaining a *get* due to the husband's apprehension that such an agreement will not be legally confirmed.<sup>207</sup>

A closer look reveals that it is not clear that a policy that allows the purchase of *get* settlements at high prices is correct, even from an economic viewpoint that focuses on threat credibility. The argument that recalcitrant husbands willing to "sell" the *get* would refuse to give the *get* if they knew that such agreements have no validity<sup>208</sup> implicitly assumes that these husbands withholding the *get* really prefer to continue their religious marriages. Therefore, only monetary compensation is likely to induce them to cooperate with the religious divorce procedure. It seems more plausible to me that the decisive majority of couples who married in a religious manner, seek to end their marriage in a religious fashion too.<sup>209</sup> Often, the true reason

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<sup>205</sup> For the distinction between a positive order to perform a certain action (such as saving another person) and the prohibition of the performance of that act for coerced payment, and the argument that the latter prohibition is less harmful to liberty than the positive charge, see our discussion (in the context of duty of rescue) *supra* Part III.B.

<sup>206</sup> For the distinction between the questions of when to compel and when the contract may be voided, and for the argument that the *ex post* invalidation of the divorce contract is a complementary remedy when the giving of the *get* may not be compelled *ex ante*, see LURIA, *supra* note 93 at para. 25: "This issue of *halitzah* speaks of those who cannot be compelled to perform [*halitzah*], for in cases where compulsion is possible, deception is unnecessary."

<sup>207</sup> It is noteworthy that the case of buying a *get* serves as a chilling modern parallel of the transaction in which payment is made in exchange for stopping the beating of slaves; see *supra* note 29;

<sup>208</sup> But see the counter argument of Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: A Pluralist Analysis* and 34 ISRAEL L. REV. 170 (2000) arguing that judicial intervention might change the community's social norms.

<sup>209</sup> This assumption is based in turn on religious, social, and legal assumptions. A man who is religiously married, and even if deemed divorced by the law of the land, cannot remarry in a religious ceremony, and many women would refuse to have a meaningful relationship with him.. From the social aspect, the Jewish communities censure those who refuse to divorce their wives. *But cf.* Michael S. Berger & Deborah E. Lipstadt, *Women in Judaism from the Perspective of Human Rights*, in HUMAN RIGHTS IN JUDAISM: CULTURAL, RELIGIOUS, AND POLITICAL

for the refusal to divorce in a religious ceremony, despite the religious, social, and legal pressures to do so, is the knowledge that refusal might pay off during the pre-divorce negotiations. Consequently, a legal policy that declares the unenforceability of exploitative buying *get* settlements would not reinforce the husbands' inclination to refuse, but to the contrary: It would show them that such refusal is pointless, thus leading to their cooperation. Despite the noncredibility, in most cases, of the threat not to divorce without an exploitative *get* purchasing settlement, I cannot ignore the instances of those who would prefer to leave their wives without a *get* for emotional reasons<sup>210</sup> but are nevertheless capable of overcoming such feelings when financially compensated. In such instances, a sweeping policy of voiding *get* settlements would indeed harm the wives. Out of an awareness of the severe anguish of *agunot*, it therefore would not be acceptable to indiscriminately void such settlements. Rather, the court must be afforded the discretion to enforce these settlements when faced with a credible threat not to divorce. Even in these cases, however, we need not agree to the exact sum set forth in the settlement. Corresponding to my analysis of rescue agreements, the court should affirm only the minimal sum that it assumes would cause the husband to agree to the divorce, if he knew that this was the maximum he would be awarded by the court. Unquestionably, confirmation of exploitative divorce settlements makes decent people queasy. But, as this article has demonstrated, moral considerations do not exist in a vacuum, and in this context, economics determine the boundaries within which moral considerations can be given full play.

#### D. The New DE Doctrine and the Existing Contractual Doctrine

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PERSPECTIVES 77, 101 (Michael J. Broyde & John Witte jr., eds., Jason Aronson 1998). Legally speaking, at least in a state like New York, in which the *get* laws, despite the constitutional questions, still remain in force, a man who refuses to consent to religious divorce can look forward to financial sanctions, and at times, the option of obtaining a civil divorce, as well, may be withdrawn.

<sup>210</sup> Significantly, some husbands are uninterested in a religious divorce, not for financial reasons, but for other considerations: revenge, the perception of divorce as humiliating, anticipating the wife's return, and the like. For such husbands, the offers to "buy a *get*" by the wife will be of no avail, and they will continue to leave their wives in limbo. Since they are not motivated by financial reasons, the courts' policy regarding divorce agreements will have no influence on them. The attempt to alter divorce dynamics by financial means is therefore limited to those individuals who act out of financial motives. According to our economic analysis, the knowledge that the exploitative buying *get* settlement will be invalidated will likely predispose these men to cooperate in religious divorce proceedings.

Contract law in several modern Western legal systems contains clauses dealing specifically with DE situations.<sup>211</sup> Even within the current state of the law, that lacks an explicit DE doctrine, this article supplies the analytic steps necessary to work out such a sub-doctrine from the existing doctrines of duress and unconscionability.

My discussion helps to overcome the philosophical and legal obstacles facing the application of duress to situations of distress exploitation. From a philosophical viewpoint, I have shown that in order to classify the demand for excessive payment as a threat and not an offer, one needs a normative criterion according to which the service must be provided at the normal price.<sup>212</sup> My moral analysis, based on the moral duty to provide costless aid to a distressed person, presents such a norm. This paves the way to classify the exploitative demand as a threat and to the making of DEC as duress.

In terms of legal doctrine, this article supplies reasoning to counter the consistent opposition found in current court decisions<sup>213</sup> and the Restatement.<sup>214</sup> to the application of duress to DE situations. Modern law defines duress as an illegitimate threat that significantly limits a party's ability to choose, similar to DE situations. My analysis distinguishes between the lack of direct enforcement of the duty to aid a distressed person by means of the criminal and tort NDR doctrines, and the legal and moral censure of such inaction<sup>215</sup> that enables us to define the threat not to make a contract with a distressed person at the market price, as illegitimate, which amounts to duress.

Additionally, my discussion precipitates the application of unconscionability to DE situations. I have shown that such situations do not exactly correspond to either procedural or

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<sup>211</sup> See, e.g., in Germany: [BGB][Civil Code] § 138 (2); On a DE doctrine in Italy, see Article 1448 of the Italian Civil Code; for the Israeli version of such a doctrine, see Article 18 of the Israeli Contract Law.

<sup>212</sup> See *supra*, Part I.A.3.

<sup>213</sup> See *supra*, note 2

<sup>214</sup> The opposition to the application of the law of duress to DE situations might be supported by the examples brought in the Restatement (Second) of Contracts (1981), in the interpretation to § 176 (Illus. 12 & 13). These two examples speak of the following situation: A, who has sold Goods to B on several previous occasions, threatens not to sell the goods greatly in excess of that charged previously; B, being in urgent need of the goods, makes the contract. According to the author of the examples, if A intentionally misleads B into thinking that he will supply the goods at the usual price (and thereby cause B to delay in attempting to buy them elsewhere until it is too late), the contract is invalid. If, however, A merely discovers that B is in great need of the goods, that are in short supply, but does not mislead B into thinking that he will supply them at the regular price, the contract is valid. That is to say, according to the author, only distress for which the other party is responsible will lead to contract invalidation on grounds of duress. In contrast, the exploitation of distress not caused by the other party would not void the agreement.

<sup>215</sup> See *supra*, Part II.B.

substantive unconscionability.<sup>216</sup> I do not believe that the analysis that delineates the existing boundaries of the unconscionability doctrine (that focus on the procedural-substantive tension) completely negates the possibility of applying unconscionability to such situations. To the contrary, I maintain that my analysis that focuses on the moral flaw in exploitation could serve as the key to expanding unconscionability by merging the subcategory of distress exploitation to the accepted categories of procedural and substantive unconscionability. This would revive the original meaning of the doctrine that existed in the early decisions<sup>217</sup> that preceded the U.C.C. and the Restatement, and that was pushed aside in recent years by the attention lavished on the procedural-substantive tension.

### CONCLUSION

Law professors usually delight in provocative articles advancing a counterintuitive claim or a thesis that undermines the reader's preconceived notions. This Article does not belong to that genre. To the contrary, I hope and believe that the moral intuitions of most readers oppose the enforcement of Distress Exploitation Contracts. Yet, American contract law has not developed a doctrine that invalidates such contracts. This Article discusses the profound doctrinal, philosophical, ideological, and economic difficulties faced by anyone seeking to invalidate such contracts. I have proposed a novel doctrine to bridge the gap between prevailing moral intuitions and the legal status quo.

Existing legal scholarship focuses either on procedural arguments concerning the free will of the party to the contract, or on substantive claims concerning the contract's terms. This Article offers a new approach based on one's moral duty to aid a stranger in distress. The analysis illustrated how such a duty, when limited to costless and riskless aid, can be reconciled with the individualism of American law. Moreover, such doctrine comports with the aim of modern American contract law that combines the values of liberal autonomy with communitarian values of solidarity and sharing. I demonstrated that the duty to aid a distressed person in the Distress Exploitation doctrine is consistent with the prevailing No Duty to Rescue rule. A doctrine that

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<sup>216</sup> See *supra*, Part. I.B.2.

<sup>217</sup> See, e.g., the dissenting opinion of Judge Frankfurter in *United States v. Bethlehem Steel Corp.* 315 U.S. 289, 325 (1942): "Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?"

invalidated all contracts entered into under distress conditions might discourage people from aiding distressed individuals, or from investing in the skills that would enable them to aid these unfortunates. Drawing on an economic analysis, I delineated the limits that are necessary to prevent the Doctrine from ultimately harming individuals in distress. The language, criteria, application, boundaries, and expansions of the doctrine all emerge from the interaction between moral and economic reasoning.