

OPPRESSION IN AMERICAN, ISLAMIC, AND JEWISH PRIVATE LAW

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American, Islamic, and Jewish law all limit the enforcement of private law agreements in cases of oppression and exploitation. But each system uses a different justification. The common thread among the three legal systems is the opposition from jurists to enforce contracts with a fundamental aspect of oppression. The reasoning for preventing oppression within the law is distinct to each legal system. The American legal system roots the justification in preserving free will and ensuring actual consent to contract. Islamic law provides justifications based on the divine vision for an equitable and just society articulated in the Quran. Jewish law argues for such protections based on the halachic duties of care that everyone is obligated to uphold toward their fellow humans.

While each system seeks to protect vulnerable parties from oppression and exploitation, they all have weaknesses. This Article, for the first time, puts these legal traditions into conversation with each other to identify how the strengths of each system can create more robust protections within the other legal traditions. Specifically, this Article identifies the development of economic duress in American law, the subjective standard of Islamic law, and the societal duties of Jewish law as providing rich elements of how legal systems can develop to ensure private law is not used as a means of oppression. The Article concludes by applying each doctrine to

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demonstrate the way in which the “juristic chemistry” of comparative legal application can lead to a more just society for all.

INTRODUCTION	150
I. EQUITABLE REMEDIES IN AMERICAN LAW	154
A. Doctrine of Unconscionability	154
B. Doctrine of Duress	160
II. PROTECTION AGAINST OPPRESSION IN ISLAMIC LAW	166
A. Islamic Law Primer	166
B. The Impact of Codification and Colonization on Islamic Law	167
C. Unconscionable Agreements	169
D. Prohibitions Against Coercion	175
1. Balancing Power: The Victim’s Subjective Feelings	176
2. Islamic Law and the American Common Law	180
3. Modern Applications	185
III. DUTY TO AID THE VULNERABLE IN JEWISH LAW	188
A. Jewish Law Primer	188
B. Prohibitions Against Exploitative Contracts: The Jesting Rule	190
C. Duress and the Seruv	198
1. Protections for Chained Women	198
2. <i>Lieberman v. Lieberman</i>	200
3. <i>Greenberg v. Greenberg</i>	203
IV. PROTECTIONS AGAINST OPPRESSION IN CONVERSATION	204
A. Applying the Common Law in Jewish Contexts	205
B. Applying Islamic and Jewish Law in American Contexts	207
C. Applying the Jestng Rule and Economic Duress in Islamic Law	210
CONCLUSION	212
GLOSSARY	212

INTRODUCTION

Do not oppress the stranger for you know the heart of a stranger, as you were strangers in the Land of Egypt.

– *Exodus 23:9*

*Indeed, God orders justice and beauty and giving to relatives
and forbids immorality and abomination and oppression.*

– *The Quran 16:90*

*The principle [of unconscionability] is one of the prevention of
oppression and unfair surprise*

– *UCC Section 2-302, Comment 1*

American law is late in recognizing the need to protect parties from exploitation and oppression in private law. Islamic law began to develop such doctrines fourteen hundred years ago, and Jewish law began to do so over two thousand years ago. The common law traditionally “assumes that the parties freely enter into an agreement or bargain as equals.”¹ The reality, however, is that such perfect bargaining equality does not always exist. Legal systems, secular and religious, protect against the use of oppression and exploitation in legal agreements.

Protections against oppression, exploitation, and coercion in private law have far-reaching implications for protections in the political realm. For example, early in the formation of Islamic law, political authorities recognized that jurists’ regulation of exploitation and oppression in private law would also limit their own ability to coerce and exploit across society.² Although political authorities fiercely resisted the creation of these doctrines, Muslim jurists traditionally enjoyed a great degree of autonomy and were able to develop robust rules against oppression, coercion, and exploitation.³

1. M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, 212 (2013).

2. MAIRAJ U. SYED, *COERCION AND RESPONSIBILITY IN ISLAM: A STUDY IN ETHICS AND LAW* 239–40 (2016).

3. *Id.* (“To rule that coercion undermines the validity of divorce-contingent oaths is also to rule, by extension, that it may undermine an instrument that authorities used to ensure compliance. In view of this connection, it is no wonder that Mālik b. Anas, the founder of Mālikism, was reportedly arrested and tortured for circulating a report that implied that coercion undermined the pronouncement of a divorce. Nor is it surprising that one of the co-founders of Hanafism, Shaybānī, is said to have been questioned by the political authorities simply because he had written a work on coercion.”).

Despite having only begun to recognize the need for such protections about two hundred years ago, the American law doctrines of duress and unconscionability have undergone profound change. American law has formalized the doctrine of unconscionability and begun the move to a more subjective standard in the doctrine of duress. The doctrine of duress initially considered only threats to a party's well-being but has been expanded to include threats to a party's financial well-being. That said, American law remains reticent to fully embrace a subjective standard, especially in the realm of oppressive economic agreements.

While significant formalization and progress have occurred within the common law, both the unconscionability and duress doctrines need continued improvement. E. Allen Farnsworth describes the doctrine of unconscionability as one of "arrested development."⁴ One court stated that "[t]he common law doctrine of unconscionability has proved difficult to define and has been rarely invoked undoubtedly because, other than in exceptional cases, it has been largely viewed as grossly interfering with freedom of contract."⁵ Given that Islamic law and Jewish law provide different underlying reasoning and justifications for prohibiting oppressive contracts, while concurrently prioritizing freedom of contract and the fair market, they offer methods for better protecting vulnerable parties from exploitation in private law.

Islamic law has long recognized the need to limit the ability of more powerful parties to take advantage of vulnerable parties, especially in the realm of wealth disparity. Historically, Islamic law provided the most subjective inquiry into the oppression a vulnerable party may have faced when entering a contract. Rather than holding a "reasonableness standard," as in the common law, Islamic law looked to the particular realities of an oppressed individual. That said, due in part to post-colonial developments, Islamic law has seen little development in these areas of the law in the past century. Furthermore, the contract doctrine, though originally used to protect vulnerable parties in a variety of circumstances, has largely been narrowed in the modern era to a prohibition against interest.

4. See E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 222 (1990).

5. *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 916 (N.J. Super. Ct. Ch. Div. 2002).

Jewish law emphasizes the dynamic understanding of the legal obligations all people in society owe to each other in times of need. Rather than focus on the potentially violated rights of an oppressed person, Jewish law focuses on the duty of care owed to someone in a vulnerable position. Additionally, Jewish law navigates the tension created by Jewish courts' use of the *seruv*—a coercive legal tool often used to protect vulnerable women. While the use of the *seruv* is a means of protecting vulnerable parties, it calls for the use of communal coercion. Furthermore, Jewish law has yet to develop a doctrine of economic duress that would recognize the full range of vulnerabilities a party may experience.

This Article argues that the Islamic, Jewish, and American legal systems each have something to offer each other in the use of private law to better protect parties from oppression and exploitation. Specifically, this Article analyzes the strengths each legal system offers to better protect parties against oppression and exploitation, applying doctrines from the other legal systems to unjust circumstances. The application of these doctrines demonstrates how comparative legal application can lead to a more just society for all.

Part I of this Article provides a description of the historical and modern developments of the doctrines of duress and unconscionability in American law. Part II then briefly describes the history of Islamic law and the development of the doctrines against coercion and unconscionability in Islamic law. Part III then introduces the history of Jewish law and explains the legal framework against taking advantage of vulnerable parties. Finally, Part IV provides several examples of how the strengths of other systems could lead to more just outcomes by demonstrating ways each respective legal system could better protect vulnerable parties and limit oppression within private law. This Part applies the common law doctrine of unconscionability within the Jewish context of divorce and argues that the common law doctrine could bolster existing Jewish law to better protect *agunah*, Jewish women unable to religiously divorce due to a recalcitrant husband. Next, this Part applies the Jewish jesting rule and the Islamic subjective standard of duress to a case to demonstrate how those standards could have achieved justice where the American legal system failed. Finally, it applies the American common law doctrine of economic duress and the Jewish law standard of necessity to

Islamic law to expand the conception of necessity, especially in commercial contexts. While it may prove challenging to adopt doctrines from outside an existing legal system, foreign legal concepts may direct the law towards more just outcomes.

I. EQUITABLE REMEDIES IN AMERICAN LAW

A. *Doctrine of Unconscionability*

Classical contract law “assumes that the parties freely enter into an agreement or bargain as equals.”⁶ It further assumes that parties “will be able to bargain equally because they have similar resources and all contracting parties are rational adults.”⁷ The reality is, however, that such “perfect contracts do not exist, and vulnerable contracting parties such as consumers, tenants, the poverty-stricken, and employees often suffer as a result.”⁸ The law of contracts attempts to “balance the upholding of the traditional market liberalism with the need to protect” vulnerable parties through the doctrine of unconscionability.⁹ Rather than override the freedom of contract, the doctrine of unconscionability seeks to ensure that a contract is an actual product of “real bargaining between parties who had freedom of choice and understanding and the ability to negotiate in a meaningful fashion.”¹⁰ While there is a balancing between traditional market liberalism and the need to protect vulnerable parties, the two concepts are not necessarily in tension. Although “many libertarians, devoted to the right to make contracts, hold the contract itself to be an absolute . . . [they fail to] realize that the right to contract is strictly derivable from the right of private property.”¹¹ If a contract is negotiated in such a way that a vast difference in bargaining power leaves one party innocently unaware of the actual agreement, then “the more powerful party is taking possession of the other’s property without the party’s explicit consent”—which is an act of theft.¹²

6. Browne & Biksacky, *supra* note 1.

7. *Id.* at 213.

8. *Id.*

9. *Id.*

10. *Id.* at 214.

11. MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 133 (N.Y. Univ. Press 1998) (1982).

12. Browne & Biksacky, *supra* note 1, at 214 n.14; CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 103–04 (2d ed. 2015).

The doctrine of unconscionability is fundamentally concerned with whether a contract is unfair. Unconscionability, while related to duress, “is a vaguer notion, which concentrates rather on the imbalance, the substantive unfairness of the agreement itself.”¹³ The concept traces its roots to a doctrine of Roman law, *laesio enormis*, which held that a contract was voidable “if the disproportion between the values exchanged was greater than two to one.”¹⁴ Prior to the adoption of the Uniform Commercial Code (UCC), recognition of the unconscionability doctrine came through the courts.¹⁵ However, the doctrine of unconscionability varied widely between courts. While the doctrine served as an underlying reasoning for rescinding contracts,¹⁶ courts rarely refused to enforce a contract on grounds of unconscionability alone.¹⁷ In rare circumstances, some courts limited a finding of unconscionability to an agreement “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”¹⁸

Procedural unconscionability undergirds findings of unenforceability of contract due to issues raised in equity ranging from undue influence to misrepresentation to mistake.¹⁹ Likewise, the concept of substantive unconscionability underlies relief in equity for mortgages, trusts, and penalties courts found unfair.²⁰ Prior to the adoption of the UCC, courts would generally not outright find a contract unenforceable due to unconscionability, but rather would refuse to enforce a contract on grounds of “failure of consideration, lack of consideration,²¹ lack of mutual assent, duress or

13. FRIED, *supra* note 12, at 92.

14. CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 599 (7th ed. 2012); *see also* John P. Dawson, *Economic Duress: An Essay in Perspective*, 45 MICH. L. REV. 253, 276 (1947).

15. *See* Browne & Biksacky, *supra* note 1, at 216.

16. Chief Justice Stone described unconscionability as the fundamental basis for “practically the whole content of the law of equity.” Harlan Fiske Stone, Book Review, 12 COLUM. L. REV. 756, 756 (1912).

17. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.37, at 383 (5th ed. 2003).

18. *See id.* (citing *Hume v. U.S.*, 132 U.S. 406 (1889)); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (AM. L. INST. 1981).

19. PERILLO, *supra* note 17, § 9.38, at 383.

20. *Id.* at 382.

21. *Id.* at 383. For instance, an Indiana court voided a contract provision “which required that a borrower pay the lender, a bank president, \$100 monthly so long as the borrower remained in business in addition to 8% interest” on the

misrepresentation, inadequacy of pleading, lack of integration in a written contract or a strained interpretation after finding ambiguity where little or no ambiguity existed.”²² While these cases achieved justice individually, the precedent they established was “highly unreliable and unpredictable.”²³

The drafters of the UCC provisions sought to: “(1) encourage courts to openly strike down provisions of the type which had previously been denied enforcement at law largely through covert means; (2) achieve a substantive merger of equity doctrine into law.”²⁴ The official commentary to the UCC explained the purpose of this provision as follows:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policy has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clauses therein and to make a conclusion of law as to its unconscionability.²⁵

The achievement of the UCC provision transcends contracts for goods. The UCC provision “has entered the general law of contracts and has been applied to numerous transactions outside the coverage of Article 2 of the UCC.”²⁶ The American Law Institute accepted the UCC provision as general contract doctrine, citing directly to section 2-302 in the official

grounds “that the \$5000 loan was consideration for the interest and that there was no consideration for the promise to pay the \$100 monthly.” *Id.* at 383–84 n.18 (discussing *Stiefler v. McCullough*, 174 N.E. 823 (Ind. App. 1931)).

22. *Id.* at 383–84 (footnotes omitted).

23. *Id.* at 384.

24. *Id.* (footnote omitted).

25. U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM’N 1977).

26. PERILLO, *supra* note 17, § 9.39, at 385. Indeed, courts have applied the doctrine of unconscionability, as conceived under section 2-302, in a wide variety of cases, including “cases involving a contract to construct asphalt plants, home improvement contracts, equipment leases, real estate brokerage contracts, hiring a hall for a Bar Mitzvah, a contract opening a checking account, an apartment house lease, a release, a contract for a motion picture idea, an arbitration provision in a contract of employment, a security transaction, a filing station lease, the settlement of a will contest dispute, and, coming full circle to its equitable origins, to a problem relating to a spendthrift trust.” *Id.* at 385–86.

commentary of section 208 of the Second Restatement of Contracts.²⁷ Section 208 states:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.²⁸

This section and the UCC provision allow for “courts to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation.”²⁹

The UCC provision on unconscionability is perhaps one of the most well-discussed UCC provisions³⁰ and reads as follows:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.³¹

Generally, courts have found unconscionability in cases involving “gross overall one-sidedness or gross one-sidedness of term disclaiming a warranty, limiting damages, or granting procedural advantages.”³² The one-sidedness of the contract also often involves some degree of procedural unconscionability in the way of buried terms, fine print, or legalese, such that a party could take advantage of someone of “moderate education.”³³

27. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (AM. L. INST. 1981).

28. *Id.* § 208.

29. *Id.* § 208 cmt. a.

30. PERILLO, *supra* note 17, § 9.37, at 380.

31. U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM’N 1977).

32. PERILLO, *supra* note 17, § 9.40, at 389.

33. *Id.*

While a gross imbalance in consideration will not in and of itself be determinative of unconscionability, “gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable.”³⁴ Furthermore, unconscionability is “normally assessed by an objective standard: (1) one party’s lack of a meaningful choice, and (2) contractual terms that unreasonably favor the other party.”³⁵ This objective standard does not account for the subjective experience of individuals outside of the reasonable person standard. While an imbalance in bargaining power is not solely determinative of unconscionability, “together with terms unreasonably favorable to the stronger party, [it] may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative.”³⁶

On the other hand, courts may decline to refuse unconscionable terms, such as large liquidated damages or limitations on a debtor’s right to redeem collateral, regardless of whether or not the contract involved other unconscionable elements.³⁷ Finally, courts determine unconscionability in conjunction with implied contractual terms. For instance, the UCC requires that “every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance or enforcement.”³⁸ Likewise, the Second Restatement of Contracts section 205 states: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.”³⁹ Although the duty of good faith and fair dealing speaks to the performance of a contract rather than its negotiation, some courts have “dwelled on the element of lack of good faith” when “attempting to define unconscionability.”⁴⁰

The official commentary describes the following two-pronged test for courts to make an unconscionability determination:

34. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (AM. L. INST. 1981).

35. *Unconscionability*, BLACK’S LAW DICTIONARY (11th ed. 2019).

36. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (AM. L. INST. 1981).

37. *Id.* at cmt. e.

38. U.C.C. § 1-304 (AM. L. INST. & UNIF. L. COMM’N 1977).

39. RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981).

40. PERILLO, *supra* note 17, § 9.40, at 391 n.21.

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise . . . and not of the disturbance of allocation of risks because of superior bargaining power.⁴¹

Scholars and courts have interpreted the oppression and surprise elements of the test as substantive and procedural unconscionability. If a court finds oppression in the substance of the contract, then a court may find substantive unconscionability.⁴² The process by which the parties found themselves entering into a contract with the offending terms is substantive unconscionability or procedural surprise.⁴³

Though courts generally require that both substantive and procedural unconscionability be found,⁴⁴ courts have recognized unconscionability in a wide range of cases. These include:

[A retailer] in a low-income, inner-city area offers major appliances for sale at much higher prices than are available at department stores and discount houses. [The retailer] offers credit to customers many of whom are not regularly employed and would not be granted credit through normal channels. The credit terms are exorbitant: interest rates are high, security is retained in all goods purchased, and the goods are repossessed after even trivial defaults. A welfare recipient, who has purchased furniture, a stove, a refrigerator, and an air conditioner and paid more than two-thirds of the charges, defaults, and the retailer seeks to repossess everything. The resale value of the used items is too low that it will not even cover the remaining debt.⁴⁵

41. U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 1977).

42. PERILLO, *supra* note 17, § 9.37, at 381.

43. *Id.* (citing Arthur A. Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967)).

44. *Id.*

45. FRIED, *supra* note 12, at 103–04 (first citing *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S. 2d 264 (Sup. Ct. 1969); and then citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)).

A small contractor specializing in exterior repairs offers jobs at low wages to young men in a time of high unemployment. He explains that the work is dangerous and that he has limited safety equipment and limited insurance coverage. Each employee signs an undertaking to accept the full risk of the work and under no circumstances to sue for injuries. An employee falls from a shaky ladder, of whose condition he was clearly aware, and is seriously injured. He sues, claiming that the employer was negligent and had not furnished a safe place to work.⁴⁶

All automobile manufacturers agree among themselves to offer a standard warranty, excluding any liability for personal injuries caused by defective manufacture or design. A purchaser is injured by a poorly designed steering wheel and seeks recovery.⁴⁷

In these cases, and cases like them, courts have refused to enforce the underlying contracts because the courts found terms unconscionable.⁴⁸ While the doctrine of unconscionability has become formalized through the UCC and Second Restatement of Contracts, courts' unconscionability decisions often demonstrate: "a mix [of] radical rhetoric with conservative actions. The courts often sound like they are doing something extreme, but their actions do not bear this out."⁴⁹ Even in instances where a contract appears particularly egregious, unconscionability serves as "a supplement to traditional contract defense[s]."⁵⁰

B. Doctrine of Duress

In the context of duress, although a party knowingly enters into the agreement, they do not do so freely.⁵¹ A commitment made under duress "is a promise induced by the threat of force (as contrasted to fraud); and by extension it is a promise made

46. *Id.* at 104 (citing N.Y. Workmen's Compensation Laws §§ 10-11 (McKinney)). Today, workers' compensation laws render such cases moot.

47. *Id.* (citing *Henningesen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)).

48. *Id.* at 104.

49. Daniel T. Ostas, *Predicting Unconscionability Decisions: An Economic Model and an Empirical Test*, 29 AM. BUS. L.J. 535, 583 (1992).

50. *Id.*

51. FRIED, *supra* note 12, at 92.

in response to any improper pressure.”⁵² In the American common law tradition, the concept of duress emerged as a “by-product of the law of crime and tort and still retains some implications of violent or injurious wrongdoing.”⁵³ As such, within the context of duress, “[t]here are essentially three forms of duress recognized universally by courts and law.”⁵⁴ These three forms are “duress to person, duress to property and economic duress.”⁵⁵ While courts have long recognized duress against persons and property, economic duress is a relatively new development in contract law.

The law of duress underwent significant development in the nineteenth and twentieth centuries.⁵⁶ In the eighteenth century, the law of duress was limited to agreements wherein one party coerced the other to enter into the agreement due to causing “actual (not threatened) imprisonment or fear of loss of life or limb.”⁵⁷ The doctrine at the time was narrow and did not accommodate threats to property or battery not resulting in loss of life or limb. William Blackstone justified this position, stating that this should be the law “because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made of the loss of life, or limb.”⁵⁸

Over the following centuries, courts revised the scope of the doctrine of duress to apply to “any wrongful act or threat which overcomes the free will of a party.”⁵⁹ Courts have also shifted their stance in regard to the application of a subjective versus an objective test. Historically, courts used an objective standard to determine “whether a brave person would be put in fear or whether the will of a person of ordinary firmness would be overcome.”⁶⁰ Today, courts are more likely to apply some degree

52. *Id.*

53. John P. Dawson, *Duress Through Civil Litigation: I*, 45 MICH. L. REV. 571, 571 (1947).

54. Sri Bala Murugan, *Economic Duress: Present State and Future Development in England, Australia, and Malaysia*, in THE FUTURE OF THE LAW OF CONTRACT 185, 185 (Michael Furmston ed., 2020).

55. *Id.*

56. PERILLO, *supra* note 17, § 9.2, at 315–16.

57. *Id.* at 316.

58. *Id.*

59. *Id.* at 337; *see also* E. ALLEN FARNSWORTH, CONTRACTS 258 (4th ed. 2004) (first citing *Kaplan v. Kaplan*, 182 N.E.2d 706, 709 (Ill. 1962); and then citing *Austin Instruments v. Loral*, 272 N.E.2d 533, 535 (N.Y. 1971)).

60. PERILLO, *supra* note 17, § 9.2, at 316.

of a subjective test to see whether the particular coerced party's will was overcome.⁶¹ Courts are most likely to apply a strictly objective test in cases involving an economic rather than a physical threat against the party.⁶² This is partially due to the more limited protection courts are willing to entertain for instances of economic duress.

Under economic duress, a party uses "illegal economic pressure to force a party to agree to demands that such party would not have agreed to otherwise."⁶³ Such economic pressure includes actions like demanding higher payments to perform a contract and threatening to breach a contract (partially or fully). A defense of economic duress is mostly like to succeed "if the applicable court, applying a good faith and fair dealing standard, determines that the party seeking modification unfairly coerced the vulnerable party to its own advantage."⁶⁴ In order for a party to prevail, the coerced party must prove: "(1) an ongoing contract exists between the aggrieved party and the aggressor party; (2) the aggressor has threatened to cancel . . . the contract . . . ; and (3) the aggrieved party involuntarily accepted the aggressor's new terms as there were no reasonable alternatives available . . . at the time."⁶⁵

In instances of economic duress, courts are more likely to be strictly objective. Some courts continue to refer to this standard, testing the coerced party's action against the "mind of a person of ordinary firmness."⁶⁶ Courts will allow "[e]vidence showing whether a reasonable person would be put in fear" insofar as it is relevant to "circumstantial evidence of whether the person's free will was overcome."⁶⁷

In the past, courts discussed duress in regard to a lack of "free will."⁶⁸ The courts premised the doctrine of duress "on the idea that an agreement made under duress lacks 'real consent'

61. *Id.*

62. *Id.*

63. *Excuses for Nonperformance: Conditions Preceding Contract Formation*, LEXIS+ (Dec. 9, 2021), <https://plus.lexis.com/api/permalink/2e9ab185-8d80-476c-9a05-4b0f92ce91f7?context=1530671> [<https://perma.cc/WDS6-8SMH>].

64. *Id.*

65. *Id.*

66. *Bata v. Central-Penn Nat'l Bank*, 224 A.2d 174, 180 (Pa. 1966); see *Young v. Hoagland*, 298 P. 996, 998 (Cal. 1931); *Strickland v. Univ. of Scranton*, 700 A.2d 979, 986 (Pa. Super. Ct. 1997).

67. PERILLO, *supra* note 17, § 9.2, at 316.

68. *Id.* at 317.

and produces only apparent assent.”⁶⁹ The modern doctrine of duress reflects a move away from this justification, as there are instances wherein the coerced party may be expressing their “most genuine, heartfelt consent,” such as when parents meet the demands of a kidnapper.⁷⁰

Fundamental to every duress case is an inquiry into wrongfulness. Courts are unlikely to apply the doctrine of duress “unless the party exercising the coercion has been unjustly enriched.”⁷¹ Similar to the doctrine of unconscionability, courts may look to whether an economic power imbalance exists between the parties.⁷² This imbalance can factor into the sufficiency of consideration. As articulated by one court, “where there is adequacy of consideration, there is generally no duress.”⁷³ Therefore, while the consent “is real enough; the view of it is that it was coerced in a manner that society brands as wrongful and is therefore not deemed the product of free will.”⁷⁴

Similar to the doctrine of unconscionability, courts may look to see whether an element of bad faith is at play in the agreement. For example, where a court finds the following: “[T]he oppression is no greater than that which is . . . typical . . . but the claim is made in bad faith, a finding of duress is generally indicated if the evidence shows that the pressured party was indeed coerced . . . and had no reasonable alternative but to agree to the offered terms.”⁷⁵ While courts have moved to a subjective test more generally in the doctrine of duress, as noted above, courts are more likely to apply a “reasonable person’s” objective standard in duress cases involving threats to the coerced party’s property and economic well-being.

69. *Id.*

70. *Id.*

71. *Id.* (first citing *First Data Res., Inc. v. Omaha Steaks Int’l, Inc.*, 307 N.W.2d 790 (Neb. 1981); and then citing *Andreini v. Hultgren*, 860 P.2d 916 (Utah 1993) (wherein a surgeon refused to proceed with surgery until the plaintiff agreed to sign a release)).

72. *Id.*

73. *Campbell Soup Co. v. Desatnick*, 58 F. Supp. 2d 477, 492 (D.N.J. 1999) (quoting *Cont’l Bank of Pa. v. Barclay Riding Acad., Inc.*, 459 A.2d 1163, 1176 (N.J. 1983)).

74. PERILLO, *supra* note 17, § 9.2, at 309–10.

75. *Id.* at 322 (first citing *First Na. Bank v. Pepper*, 454 F.2d 626 (2d Cir. 1972); then citing *Lepper v. Beltrami*, 347 P.2d 12 (Cal. 1959); and then citing *Kilpatrick v. Germania Life Ins.*, 75 N.E. 1124 (1905)).

Additionally, courts now recognize duress in the context of coerced settlements and contract modification.⁷⁶ Historically, courts did not consider threats to breach a contract as duress “except in coercive situations in which the government, a common carrier, or a public utility made a threat.”⁷⁷ Today, courts recognize that a threat to breach a contract may constitute duress if, when the threatened breach is carried out, no adequate legal or equitable remedy would result in irreparable injury. In effect, such situations rise to the level of duress because the power imbalance between the two parties leads to the coercer effectively enjoying monopolistic power.⁷⁸ As in the case of threats to property, the parties’ obligation to a duty of good faith and fair dealing applies.⁷⁹

The UCC expounds upon the application of the duty of good faith and fair dealing in the context of duress. The official commentary to UCC section 2-209 states: “Extortion of a ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith.”⁸⁰ For example, consider the case of a subcontractor who refused to deliver the goods promised under a contract (goods that a general contractor needed to fulfill an agreement with the government).⁸¹ The subcontractor refused to deliver the goods unless it was awarded a second contract and a higher price for the goods. The court determined that this rose to the level of duress, in part because the subcontractor violated its obligation of good faith and fair dealing.⁸² This case also established the precedent of applying the doctrine of duress to instances of economic threats.

In addition to the UCC, the Second Restatement of Contracts also addresses duress. Section 175 states: “If a party’s

76. *Id.* at 323–34.

77. *Id.* at 324.

78. *Id.* at 325.

79. FARNSWORTH, *supra* note 59, at 259.

80. U.C.C. § 2-209 cmt. 2 (AM. L. INST. & UNIF. L. COMM’N 1977). The official commentary continues: “The test of ‘good faith’ between merchants or as against merchants includes ‘observance of reasonable commercial standards of fair dealing in the trade’ (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make a legal excuse from performance under Section 2-615 and 2-616.” *Id.*

81. *Austin Instrument v. Loral Corp.*, 272 N.E.2d 533, 536–37 (N.Y. 1971).

82. *See id.*

manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”⁸³ While the Restatement discusses a subjective test in the commentary, the test laid out in section 175 still uses a reasonableness standard. The official commentary to section 175 states that “although it is not essential that a reasonable person would have believed that the maker of the threat had the ability to execute it, this may be relevant to determining whether the threat actually induced assent.”⁸⁴

Typically, the remedy for duress is “limited to the amount paid by the party to the coercing party in excess of the amount that was fairly owed.”⁸⁵ This is primarily because of the relationship between duress and unjust enrichment—“the principal economic function of duress has been to redress unjust enrichment.”⁸⁶ In circumstances where the coerced party provided property or services, the court will provide the remedy of the fair market value of such property or services, less any money already paid by the coercer.⁸⁷ However, courts distinguish between duress caused by physical versus economic threat in regard to remedies provided. When duress is caused due to physical compulsion, then the court may find that there “is not contract at all or is . . . a ‘void contract.’”⁸⁸

One of the remaining circumstances the doctrine of duress does not cover is when a party threatens to use a legal civil process, such as threatening to sue someone. Because of a general public policy “that favors free access to the judicial system,” the doctrine of duress “militates against characterizing

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

84. *Id.* § 175 cmt. c. The commentary further describes the test as follows: “A party’s manifestation of assent is induced by duress if the duress substantially contributes to his decision to manifest assent The test is subjective, and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress. Threats that would suffice to induce assent by one person may not suffice to induce assent by another. All attendant circumstances must be considered, including such matters as the age, background, or relationship of the parties. Persons of a weak or cowardly nature are the very ones that need protection; the courageous can protect themselves. Timid and inexperienced persons are particularly subject to threats, and it does not lie in the mouths of the unscrupulous to excuse their imposition on such persons on the ground of their victims’ infirmities.” *Id.*

85. PERILLO, *supra* note 17, § 9.8, at 328.

86. *Id.*

87. *Id.*

88. FARNSWORTH, *supra* note 59, at 255.

such threats as improper, even if the claim involved later proves to be without foundation.”⁸⁹ There are, however, a few instances when the doctrine of duress may apply: “[i]f the person who made the threat did not believe that there was a reasonable basis for the threatened process, knew that the threat would involve a misuse of the process, or realized the demand was exorbitant.”⁹⁰ For instance, “[w]age garnishments, particularly through suit in foreign states, provide abundant opportunities for effective coercion,” yet courts are reticent to find duress in such cases.⁹¹

The need for “remedial doctrines” in this area remains, and if the factors of the “risk and uncertainty” a party faced “were adequately considered it would be easier to conclude that surrender to pressure is not necessarily a mark of hysteria or timidity but may be the prudent course for the ruggedest business man.”⁹² As demonstrated in the next two Parts, the subjective focus of Islamic law on duress, as well as the obligation of duties from Jewish law, better recognize the subjective realities of a party facing duress within a civil process.

II. PROTECTION AGAINST OPPRESSION IN ISLAMIC LAW

A. *Islamic Law Primer*

“Sharia law” is often used to mean the laws Muslims worldwide follow. However, this usage fails to correctly capture the meaning of “Sharia” understood in Islamic jurisprudence, philosophy, and theology.⁹³ The term “Sharia” is better understood as the actual divine will. Classical Islamic law scholars interpreted the Sharia from a position of acknowledging that they would never actually know if they correctly interpreted the Sharia, as that knowledge is God’s alone. These scholars understood that they were fundamentally engaged in a human endeavor. As such, they used terminology to differentiate between the actual Divine Will (the Shariah), and the human attempt (*fiqh*) to understand it.⁹⁴ The term “fiqh” in Arabic

89. *Id.* at 258.

90. *Id.* at 258–59.

91. Dawson, *supra* note 53, at 595.

92. *Id.* at 597.

93. See Rabea Benhalim, *The Case for American Muslim Arbitration*, 2019 WIS. L. REV. 531, 531 (2019).

94. *Id.*

means comprehension and understanding. “Sharia” on the other hand originates from the word for path to water, meaning a source of knowledge. Herein, when the term “Islamic law” is used, it indicates *fiqh*. The term “Sharia” is reserved to mean divine knowledge and in some instances is used to reference official court titles. This difference between the Divine Will itself (the Shariah) and human endeavors to understand the Shariah (*fiqh*) is important to understanding differences of opinion in Islamic law and how those differences of opinion are viewed as legitimate. Because *fiqh* is a human endeavor, scholars recognize that human interpretations of divine text might result in different understandings.

Islamic law today is broadly found within five Sunni and Shia schools of jurisprudence or thought.⁹⁵ The four Sunni denominations are the Maliki, Shafi, Hanafi, and Hanbali schools. The main Shia school is the Twelver, or Jafari, school.⁹⁶ Each school’s name follows its own eponym and a unique jurisprudence established through a diverse range of scholars. Each denomination has its own “body of law and a legal methodology, as well as an extensive literature produced by a robust community of dedicated students.”⁹⁷ Furthermore, intra-denominational differences exist that result in majority and minority opinions among historical and contemporary scholars of a particular denomination that can lend flexibility to the application of Islamic law.

B. The Impact of Codification and Colonization on Islamic Law

Beyond the Sunni-Shia divide and denominational differences, Islamic law was further complicated by its

95. Other minority denominations of jurisprudence also exist, such as the Zaydi and Isma’ili denominations. There have also been calls for the revival of the Mu’tazila denomination, which was known for its reliance on reason and rationalism.

96. Throughout Islamic history, many schools of jurisprudence have existed, with at least nineteen schools existing in the historical record. However, due to various historical circumstances, the five major schools dominate almost all of Islamic law today. See Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional Notions of American Justice?*, 28 WIS. INT’L L.J. 108, 118–19 (2010).

97. Mariam Sheibani et al., *Classical Period: Scripture, Origins, and Early Development*, in THE OXFORD HANDBOOK OF ISLAMIC LAW 403, 420 (Anver M. Emon & Rumee Ahmed eds., 2018).

codification in the European colonial era. The codification of Islamic law was both an endeavor that colonial powers imposed upon Muslims and an internal movement of Muslims advocating for modernization, which, at the time, meant following the European trend of codification. One of the most prominent internal codification projects occurred in the late Ottoman Empire. Jurists codified most of Hanafi jurisprudence on civil transactions into a code book known as the *Mejelle*.⁹⁸ The *Mejelle* serves as an accurate representation of late Hanafi jurisprudential norms and doctrines.⁹⁹

Although the movements for codification of Islamic law occurred over a two-hundred-year period, they all shared “the legalistic methods associated with it.”¹⁰⁰ Prior to codification, classical Islamic law was “by its very nature a common law system of jurisprudence.”¹⁰¹ Islamic law created under the colonial and post-colonial framework lacks the inherent flexibility that was an integral feature to the body of law. While codified Islamic law certainly invokes the same texts as classical Islamic law, namely the Quran and Hadith (the recorded sayings and actions of the Prophet Muhammad), the relationship of those sources to the doctrine is fundamentally changed, as the legal methodology differs significantly.¹⁰²

During the colonial and post-colonial periods throughout Muslim-majority countries, the “highly localized, flexible, and dynamic” qualities of Islamic law were “seen as antithetical to the modern legal system, which by its nature requires a centralized government capable of providing a sole legitimate

98. Mohammad Fadel, *Al-Qadi*, in THE OXFORD HANDBOOK OF ISLAMIC LAW, *supra* note 97, at 319.

99. Samy Ayoub, *The Mecelle, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and Twentieth Centuries*, 2 J. OTTOMAN & TURKISH STUD. ASS'N 121 (2015).

100. Richard Potz, *Islamic Law and the Transfer of European Law*, EUR. HIST. ONLINE (Nov. 21, 2011), <http://ieg-ego.eu/en/threads/europe-and-the-world/european-overseas-rule/richard-potz-islamic-law-and-the-transfer-of-european-law> [https://perma.cc/67N8-LP5P].

101. Kristina Benson, *The Moroccan Personal Status Law and the Invention of Identity: A Case Study on the Relationship Between Islam, Women, and the State*, 12 UCLA J. ISLAMIC & NEAR E.L. 1, 3 (2013).

102. Furthermore, the broader lists of sources are often also lacking in codification. For instance, like the majority of the schools, “the Maliki school explicitly endorses the use of analogical reasoning (*qiyas*), opinion (*ra'y*) and public interest (*istislah*) as possible sources of law, giving rise to laws that constantly change along with ever evolving perceptions of (for example) the ‘public interest’ or ‘justice.’” *Id.* at 4.

source of coercive authority.”¹⁰³ For instance, during the classical period of Islamic law, Imam Malik, the eponym of the Maliki denomination, “twice refused requests . . . to make his treatise on *fiqh* (Islamic jurisprudence) into state law. He did so on the grounds that Muslims had a duty not to obey such laws if they found them ‘incorrect’ or inconsistent with what their consciences might dictate.”¹⁰⁴ During this period, Islamic courts often ceased operating independently of the State. This contrasts with the trend of many modern Muslim-majority governments to fully embody strong State enforcement of religious law, which is primarily a post-colonial phenomenon.

The codification of Islamic law and the appropriation of Islamic courts by the State have limited the development of Islamic law in the modern era, derailing Islamic law from the classical tradition that provided greater diversity of opinion and customization to the particular circumstances of litigants. For instance, Islamic law has traditionally offered subjective tests to assess whether a party may have experienced oppression when entering a contract. It does so through a variety of principles within the law that limit injustice. As discussed below, Islamic law has a variety of principles, which, when applied, may lead to the voiding or voidability of any agreement.

C. Unconscionable Agreements

While a doctrine of unconscionability does not exist in Islamic law per se, there are certain corollary principles in Islamic law derived from verses of the Quran. Based on these verses, a court may “invalidate or alter a contract in the interest of justice.”¹⁰⁵ If oppression is somehow present within a contract, a judge or arbitrator may invalidate a contract under Islamic law.¹⁰⁶ Islamic law prioritizes the freedom of contract to support the importance of free trade and commerce, which is intended to bolster a just society that also protects its citizens against oppression.¹⁰⁷ The Quranic verses Muslim legal scholars ground their reasoning in include:

103. Benson, *supra* note 101, at 4.

104. *Id.*

105. Asifa Quraishi, *From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV. 187, 206 (1991).

106. *Id.*

107. *Id.*

- “Oh you who believe, fulfill your contracts/covenants.”¹⁰⁸
- “Oh you who believe, do not consume each other’s wealth/property between yourselves illegitimately, unless you undertake trading with mutual consent between you.”¹⁰⁹
- “Do not devour one another’s possessions wrongfully – but rather by way of trade based on mutual agreement – and do not destroy one another.”¹¹⁰

Given these Quranic verses, Muslim legal scholars have generally condemned bargains they deem “oppressive and unfair.”¹¹¹ To achieve such ends, certain principles exist within Islamic law to “help society guard against unjust practices.”¹¹² These principles include the following: “the doctrines of unjust enrichment (*fadl mal bil ‘iwad*), unfair dealing (*ghabn fahish*), contracts of necessity (*bay’ al-mudtar* or *bay’ al madghut*), and excessive speculation (*gharar*).”¹¹³

The concept of *riba*,¹¹⁴ commonly translated to mean “usury” but literally meaning an “increase,” became “an umbrella doctrine to incorporate all the above concepts” and served as a general prohibition on “contracts in which one party received an undeserved profit.”¹¹⁵ Within the modern context, *riba* is often discussed in terms of Islamic finance and the methods Islamic finance scholars have developed to technically avoid *riba*. However, *riba* historically had a much broader application in Islamic law. Classical scholars differentiated between two types of *riba*: “*riba al-fadl*, in which a contracting party acquired an unlawful excess profit, or *riba al-nasi’a*, in

108. Quran 5:1.

109. *Id.* at 2:188.

110. *Id.* at 4:29.

111. Quraishi, *supra* note 105, at 206.

112. *Id.*

113. *Id.* at 207.

114. See MASUDULALAM CHOUDHURY, CONTRIBUTIONS TO ISLAMIC ECONOMIC THOUGHT: A STUDY IN SOCIAL ECONOMICS 133 (1986).

115. Quraishi, *supra* note 105, at 189; Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 177, 189 (Lynn Welchman ed., 2004) (describing American Muslim initiatives addressing legal issues relevant to Muslim women).

which a party used contract terms to gain an unlawful advantage by speculating on uncontrollable risks.”¹¹⁶

Early Muslim jurists promoted *riba* as a broad category of unearned income, which considered “not only loans on commodities, money and cattle for increases in them with time extensions (*riba al-nasia*), but also unequal direct sales and exchanges from hand-to-hand in which an increase or surplus (*fadl*) occurred.”¹¹⁷ Scholars applied the prohibition of *riba* on a wide range of contractual relationships. These relationships included:

- [T]he usurer who loaned scarce money.
- [T]he person who bought crops and fruits in advance, hoarded them, and sold them at higher prices in times of scarcity, famines, and wars.
- [The] landlord who leased his land to the serf-tenants and farmers on the basis of share-cropping or for fixed amounts of money or foods grains paid to him in advance.
- [The] tax-farmer who loaned money to powerful tribes, lords or kings and exploited the poor tenants and serfs through excessive imposts, levies and taxes.
- [A person in power over enslaved people or serfs] who seized the appropriated earnings of his slaves and serfs.¹¹⁸

Scholars base the prohibition of these behaviors on descriptions in the Quran of the “Oppressors,” a term found twenty-four times in the Quran.¹¹⁹ During the time of Quranic

116. Quraishi, *supra* note 105, at 189.

117. Ziaul Haque, *The Nature and Significance of the Medieval and Modern Interpretations of Riba*, 32 PAKISTAN DEV. R. 933, 936 (1993).

118. *Id.*

119. *Id.*; see also *Occurrences of “Oppressors” in the Quran*, THE QUARANIC ARABIC CORPUS, <https://corpus.quran.com/search.jsp?q=lem%3AZaAlim+pos%3Aadj> [https://perma.cc/KFP7-AHD8] (search results produced by using the search term “pos:adj lem:ZaAlim” in the database, which lists each instance of a particular term in the Quran).

revelation, early Muslims understood the term “Oppressors” to refer to the wealthy oligarchy in Mecca who used their power to exploit others.¹²⁰ This exploitation occurred via “unequal exchanges, sales, loans, and mortgages [of] the entire possessions and properties of the weak individuals and tribes.”¹²¹

This prohibition on oppression is the fundamental basis for invalidating a contract. *Riba al-fadl*, an agreement leading to an excess profit, does not de facto lead to the invalidity of a contract. Rather, such a contract involving *riba al-fadl* becomes impermissible when “it forms the basis of some type of unjust enrichment or oppression.”¹²² Islamic law has a doctrine of unjust enrichment (*fadl mal bil ‘iwad*) more expansive than the common law doctrine. Islamic law allows for a judge to rule a “contract invalid when the enriched party manipulated the circumstances to her advantage and to the other party’s detriment in a way that either social customs or market norms would find oppressive.”¹²³ Within Islamic law, there are two key elements to determining unjust enrichment. Similar to the concepts of *gharar* (excessive speculation) and *riba*, the unjust enrichment must somehow involve “getting something for nothing . . . but only in a narrow sense—not some sort of lack of consideration.”¹²⁴ Additionally, the disadvantaged party must establish that oppression is a key element of the unjust enrichment.¹²⁵

Likewise, the Islamic law doctrine of unfair dealing (*ghabn fahish*) can be used to prevent oppression.¹²⁶ The focus of the doctrine within Islamic law is to prevent “one party’s manipulation of the bargaining process in order to put the other party in a position of being unfairly surprised.”¹²⁷ Article 286 of the *Mejelle*, the codification of Hanafi jurisprudence, captures the role that the element of surprise plays in contract repudiation:

120. Haque, *supra* note 117, at 936.

121. *Id.*

122. Quraishi, *supra* note 105, at 211.

123. *Id.* at 207.

124. *Id.*

125. *Id.* at 207.

126. *Id.* at 208 n.146.

127. *Id.* at 208.

If at the time of the sale the purchaser did not know where the thing sold was, but received information thereof after the conclusion of the contract, he has an option. He may either cancel the sale, or take delivery of the thing sold at the place where it was at the time the sale was concluded.¹²⁸

Foundational to the prohibition on unfair dealing is the concept that unfair dealing has an element of deception, insofar as one party prevents the other party “from being fully aware of the true nature of the transaction, especially with regard to the value of the subject matter.”¹²⁹

Islamic law limits the ability to contract the unknown. Contracts involving deception in the form of “speculation . . . will not be upheld.”¹³⁰ For example, Islamic law will not allow for the “sale of milk in the udder of a cow,” as the amount of milk (if any) is speculative.¹³¹ While the law does not prohibit speculation in all contexts, Islamic law prohibits unfairly taking advantage of such speculation that then causes excessive speculation.¹³² Such excessive speculation typically involves some deferment of time between contract formation and full performance.¹³³

The prohibition on *riba al-nasi'a* (*riba* by way of deferment) focuses on the limits on speculation.¹³⁴ Speculation alone does not lead to the invalidity of a contract. Islamic law recognizes that routine elements of a contract may lead to speculation. For instance, speculation in everyday life may include “the speculation that one will not lose an item immediately after purchase, [and] the speculation that a purchased item will hold

128. C.A. Hooper, *The Mejlle: Book I: Sale*, 1 ARAB L.Q. 525, 544 (1996).

129. Quraishi, *supra* note 105, at 208 (citing ABDUR RAHIM, *THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE ACCORDING TO THE HANAFI, MALIKI, SHAF'I AND HANBALI SCHOOLS* (Hyperion Press 1981) (1911)).

130. Quraishi, *supra* note 104, at 208. This is not to say that Islamic law prohibits involving unknown quantities. *Bai al-salam*, ISLAMICMARKETS, <https://islamicmarkets.com/dictionary/b/bai-al-salam> [https://perma.cc/28UN-RGXY]. For instance, goods paid to be delivered on a future date that are not in existence at the time of entering into the contract are permissible, provided the date of delivery is fixed. *Id.* Furthermore, Islamic law requires definiteness as regards “quantity, quality and workmanship.” *Id.*

131. Muhammad Asif Ehsan, *Future Contracts in Islamic Finance: An Analytical Approach*, 1 GLOB. REV. ISLAMIC ECON. & BUS. 1, 26 (2013).

132. *Id.* at 32.

133. Quraishi, *supra* note 105, at 211.

134. *Id.* at 212 n.168.

its value or will not turn out to be a 'lemon[]'."135 While Islamic law puts limits on speculation not found in the common law, the underlying principles behind both *riba* and the American common law doctrine of unconscionability serve the same purpose: "to prevent oppression, and protect the weak against exploitation by the strong."136 While some Islamic law jurists use the category of *riba* as an umbrella category for determining the validity of all contracts, some categories, such as contracts of necessity (*bay' al-mudtar*), are "more properly categorized under duress," which are discussed below.¹³⁷

Scholars in the different schools of thought historically held a range of opinions as to when *riba* (unearned profit) would invalidate a contract.¹³⁸ For instance, the majority opinion in the Hanafi school "focuses on the norms of the marketplace as a major factor in evaluating a contract's validity."¹³⁹ Maliki scholars, while still looking to market custom, determined that local custom was insufficient to establish a market custom, which Maliki scholars "defined according to widespread practice."¹⁴⁰ The *Mejelle* likewise reflects a combination of the Hanafi and Maliki standards.¹⁴¹

The Shafi'i and Hanbali schools, on the other hand, often focused their evaluation on contract formation (i.e., offer, acceptance, and consideration). In particular, Shafi'i and Hanbali scholars would find a lack of valid consideration as a means of invalidating a contract.¹⁴² In contrast, the Ja'fari school, the predominant Shia school, focused on "the essential fairness of a transaction in order to determine its validity."¹⁴³

135. *Id.* (citing Saba Habachy, *Property, Right, and Contract in Muslim Law*, 62 COLUM. L. REV. 450, 465 (1962)).

136. *Id.* at 213; *see also* CHOUDHURY, *supra* note 114, at 12 ("The abolition of interest in Islam is considered important . . . to end the oppression and exploitation of the labour force . . .").

137. Quraishi, *supra* note 104, at 213.

138. *Id.* at 214.

139. *Id.* at 214 n.179 (citing SOBHI R. MAHMASSANI, *THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM* 19–24 (Farhat J. Ziadeh trans., 1987)).

140. *Id.* (citing SOBHI R. MAHMASSANI, *THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM* 24–26 (Farhat J. Ziadeh trans., 1987)).

141. *Id.*; *see, e.g.*, MEJELLE, arts. 36, 38, 39, 41, 45. Note that the *Mejelle* primarily reflects Hanafi jurisprudence, as it was a product of the Ottoman Empire. The Hanafi school of thought was the predominant school in the Ottoman Empire. However, the *Mejelle* also reflects the influence of some Maliki jurisprudence.

142. Quraishi, *supra* note 105, at n.180.

143. *Id.* at 214–15 n.181.

These doctrines, along with the doctrine of necessity and the doctrine of duress, lead to a general rule under Maliki jurisprudence that “these types of contracts [are] invalid when they amount to oppression.”¹⁴⁴ The concern with oppression closely parallels the treatment of adhesion contracts under the American common law. While the common law focuses on unequal bargaining power as the initial inquiry into applying the doctrine of unconscionability, Islamic law focuses on “appropriating the property of others without justification.”¹⁴⁵ Justifications of preserving the free market, particularly as understood under today’s capitalistic framework, were insufficient to overcome the priority of Islamic law of preventing oppression within legal relationships.

D. Prohibitions Against Coercion

Fundamental to the doctrines of both duress and unconscionability in Islamic law is a dynamic of oppression between a vulnerable party and a party with some degree of power that they leverage over the vulnerable party. While the *concept* of duress overlaps with moral, ethical, and social norms, the *doctrine* of duress is concerned with the legalist approach “to coercion (and ultimately to Victimization).”¹⁴⁶ Doctrines of duress attempt to balance how to protect the rights of vulnerable parties and create a standard of conduct applicable to all of society.¹⁴⁷ Islamic law, like the American common law, addresses the legal ramification of coercion in a wide array of circumstances, ranging from commercial transactions to criminal acts to divorce.

The doctrine of duress in Islamic and the American common law demonstrates an aim “to set a standard of conduct by which people are expected to live.”¹⁴⁸ The two legal systems share a host of similarities regarding duress. For example, both systems differentiate between civil and criminal law, requiring a higher

144. *Id.* at 209.

145. *Id.* at 214.

146. Herbert Fingarette, *Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape*, 42 WASH. & LEE L. REV. 65, 91 (1985).

147. Khalad Abou el Fadl, *The Common and Islamic Law of Duress*, 6 ARAB L.Q. 121, 121 (1991).

148. *Id.*

“standard of conduct in criminal cases.”¹⁴⁹ The differentiating factor of Islamic law is its “methodologically more coherent and systemic approach to duress,” particularly by considering the “subjective feelings of the coerced.”¹⁵⁰ Islamic law also provides “limiting guidelines” in the form of legal principles that help create a more predictable doctrine of duress.¹⁵¹

1. Balancing Power: The Victim’s Subjective Feelings

One of the central questions to the application of the doctrine of duress is how much particularization the law should account for regarding an individual victim of duress. For instance, should the law hold that the “subjective feelings and fears of the threatened person”¹⁵² are determinative? Furthermore, should the reasons for those subjective fears, such as a party being a member of a vulnerable class, be taken into consideration?¹⁵³ Islamic law answers these questions with a “multifaceted approach to duress.”¹⁵⁴ Whereas American common law addresses only human rights, Islamic law accounts for certain divine rights and is unyielding in its protection of those rights. Regarding duress, Islamic law balances the “rights of God and society against the rights of the coerced individual.”¹⁵⁵ While the rights of God and society must be upheld, Islamic law is concerned with the particular, subjective feelings of the coerced individual.¹⁵⁶

The Hanafi scholar Al-Sarakhsi (d. 483/1090) described the importance of considering the subjective feelings of a victim of duress as follows:

[We consider] the preponderance of thought [of the victim] and what he felt because the victim’s belief takes precedence over the reality concerning matters that we have no way of verifying independently . . . The condition of people vary

149. *Id.* at 122.

150. *Id.*

151. *Id.*

152. *Id.* at 124.

153. *See id.*

154. *Id.* at 127.

155. *Id.*

156. *Id.*

according to their ability to withstand pain therefore we have no alternative but to consider what the victim believed.¹⁵⁷

The subjective belief of the victim, however, is not the end of the inquiry for Islamic law jurists. The basic formulation of duress under Islamic jurisprudence requires meeting both a physical and moral criterion.¹⁵⁸ The physical criterion requires that the victim believes they are in danger, although “[a]ctual physical presence of the coercer is not necessary in order for the victim to form the belief that he is in danger.”¹⁵⁹ The determination is based on whether the victim actually believed they had no choice.¹⁶⁰ Jurists disagree as to whether the threat needs to be imminent. For example, the Malikis agreed with the above determination but “added that since the real issue is the formation of the fear in the victim’s mind, there is no need to require that the threatened harm be immediate.”¹⁶¹ Thus, a court would find duress if a truly terrified victim had no recourse to seek aid, even if the event was threatened to occur a month later.¹⁶²

While Islamic law seriously considers the subjective element of the victim’s actual experience of the duress and consistently emphasizes “the preponderance of the victim’s mind,”¹⁶³ Islamic jurists did put limits on the victim’s sensitivity. The subjective experience of the victim is one element used to determine “whether the victim in fact felt threatened” and is evaluated in conjunction with other elements such as “the categorization of the duress, and what acts it can excuse.”¹⁶⁴ The foundational categories of duress under Islamic law are forcible/compelling (*mulji*) and non-forcible/non-compelling (*ghayr mulji*) duress.¹⁶⁵ Forcible duress, for the majority of schools, voids consent and “vitiates free choice, as it

157. *Id.* at 130.

158. See Iyad Mohammad Jadalhaq, *Duress and Its Impact on Contracts in the UAE Law on Civil Transactions: Analytical Study in the Light of Islamic Jurisprudence*, 32 ARAB L.Q. 30, 31 (2017).

159. Abou el Fadl, *supra* note 147, at 131.

160. *Id.*

161. *Id.*

162. *Id.*

163. Khaled Abou el Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study*, 30 ISLAMIC STUD. 305, 313 (1991).

164. *Id.* at 132.

165. Jadalhaq, *supra* note 158, at 34; see also Abou El Fadl, *supra* note 147, at 127.

is [a] grave and imminent danger to person or property, such as the threat to kill a person, break his arm, gouge his eyes out or seriously damage his property.”¹⁶⁶ Non-forcible duress likewise voids consent but does not spoil free choice, “as it involves a lesser threat, such as damaging a small part of a person’s property, beating a person without causing serious harm to him or his bodily organs, or threatening to jail a person or disclose his scandalous secrets.”¹⁶⁷ While the forcible and non-forcible categories are primarily associated with the Hanafi school of thought, the other schools have similar categories for duress.

The Maliki school categorizes what would be forcible duress in the Hanafi school as “total duress” and non-forcible duress as “partial duress.”¹⁶⁸ For instance, the Hanafi scholar Al-Kasani (d. 587/189) categorized duress into *tam* (complete) and *ikrah naqis* (incomplete compulsion).¹⁶⁹ The *Mejelle* likewise codified this conceptualization of duress in section 949. This section states:

[Duress] is of two sorts. The first sort is compelling duress. It leads to destruction of life, or loss of a limb or one of them. It is the compulsion, which is by a hard blow. The second sort is non-compelling duress. This causes only grief and pain. It is compulsion which is by things like a blow or imprisonment.¹⁷⁰

166. Jadalhaq, *supra* note 158, at 34.

167. *Id.*

168. Abou el Fadl, *supra* note 147, at 127 n.25 (first citing al-Jamal, *Hashiyat al-Jamal*, (Cairo: al-Maktabah al-Tujariyah al-Kubrah, n.d.) vol. 5 at p.9; then citing al-Dusuqi, *Hashiyat al-Dusuqi ala al-Sharh al-Kabir* (n.c.: Dar ihya al-Kitab al-Arabi, n.d.) vol. 2 at 368; then citing F. Abu Safiyah, *al-ikrah ft al-Shariah al-Islamiyah* (al- Madina: al-Rashid, 1982) p.41; and then citing M.A. Abdur Rahim, *The Principles of Muhammadan Jurisprudence* pp. 232–37 (1981)). Hanafi scholars have also adopted the total and partial duress categories.

169. al-Kasani, *Bada’i’ al-Sana’i fi Tartib al-Shara’i* (Beirut: Dar al-Kitab al-Arabi, 1974) vol. 7 p. 175.

170. MEJELLE, *supra* note 141, art. 949. This categorization is also captured in several statutes of Muslim-majority countries. For instance, Article 177 of the United Arab Emirates Law on Civil Transactions states: “[D]uress is forcible if it is [a] threat of grave and imminent danger to person or property. It is non-forcible if it involves a lesser threat.” Jadalhaq, *supra* note 158, at 34. Likewise, the Iraqi Civil Code Article 112 stated: “And duress is considered compelling if it poses a serious and imminent threat of loss of life or limb or severe beating or severe harm or great destruction of property and it is not compelling if it’s a threat of imprisonment or beating, and this varies according to the condition of people.” Abou el Fadl, *supra* note 147, at 128 n.28 (citing Iraqi Civil Code, art. 112).

Islamic legal jurists also divided duress into the acts required of the coerced party and the impact of those acts.¹⁷¹ Thus, jurists divided the impact of the acts into two categories: “(1) those acts that only affect the rights of the victim of duress, and (2) those acts that affect the rights of other innocent people and/or the rights of God.”¹⁷² The second category—threats directed at third parties/God—requires complete or compelling duress in order to void the contract.¹⁷³

Within the realm of potential acts a coerced party could make, Hanafi jurists created special rules for verbal acts, such as contractual and marriage-related commitments. In particular, Hanafi jurisprudence’s approach to duress is distinct from the other schools of thought, as special rules apply regarding the “validity of unilateral speech acts.”¹⁷⁴ An example of a unilateral speech act within Islamic law is the pronouncement of divorce by a husband from a wife. Unlike in the common law, this speech act does not require the oversight of a court for it to be legally binding. As marriage under Islamic law is a matter of contract, a husband’s unilateral statement of divorce acts like a unilateral right to contract termination. Other unilateral speech acts under Islamic law include “emancipations [of enslaved persons], marriages, vows, and oaths.”¹⁷⁵ Even if such speech acts are committed under duress, unilateral speech acts are considered valid and binding under Hanafi jurisprudence.¹⁷⁶ The result of this position is that the severity of the duress is irrelevant to the legal validity of the unilateral speech acts. For instance, while the other Sunni schools held that a unilateral statement of divorce made under duress could be void or voidable, Hanafis held that “no matter what the resultant effect on the psychology of the coerced, a pronouncement of divorce is still valid.”¹⁷⁷

These “coercion resistant” categories led Hanafi jurisprudence to conceptualize the laws of coercion according to

171. Abou el Fadl, *supra* note 147, at 134. These acts were typically divided into physical and verbal acts. *Id.* Physical acts would include criminal acts like “murder, rape, and destruction of property.” *Id.* Verbal acts would include contract related acts, such as entering into contract or marriage (a subset of contract under Islamic law). *Id.*

172. *Id.*

173. *Id.*

174. SYED, *supra* note 2, at 99.

175. *Id.*

176. *Id.*

177. *Id.*

“its specific potential effects on different classes of legal acts.”¹⁷⁸ Such categories based on a coercer’s demands include commercial transactions, acknowledgment (e.g., of a debt), divorce, and the emancipation of an enslaved person.¹⁷⁹ The impact of unilateral speech on these categories led to a range of potential remedies. For instance, in the case of divorce, the “[d]ivorce remains valid” as divorce is a unilateral speech act and, thus, non-voidable, “but if [the] marriage [has] not [been] consummated, [the] coerced can claim half of [the] marriage gift from [the] coercer.”¹⁸⁰ In other instances, a defense of duress could completely excuse the coerced action. For example, in the case of a coercer demanding their victim consume a prohibited substance, such as pork or alcohol, the substance would become temporarily permitted.¹⁸¹

2. Islamic Law and the American Common Law

Like the American common law, the Hanafi school of thought holds a higher standard for duress in different contexts. The Hanafi school of thought, however, differentiated between different legal contexts and the application of a duress doctrine.¹⁸² The impact being that what may be considered legally coercive in one context is not conclusively so, as an empirical matter, in another.¹⁸³ Likewise, under American jurisprudence, “[w]hat is legally coercive in contracts is not the same as what is legally coercive in marriages, adoptions, and plea-bargains”¹⁸⁴ American jurisprudence has historically recognized some contexts in which duress still results in non-voidable consequences—“until very recently, courts routinely held that [the] pressures that would normally render a contract voidable do not have the same effect on a marriage.”¹⁸⁵ For example, “shotgun” weddings, despite the threat of imminent violence, resulted in legally valid marriages because courts considered such coercive marriages as serving a public policy

178. *Id.*

179. *Id.* at 114.

180. *Id.*

181. *Id.*

182. *Id.* at 183.

183. *Id.*

184. *Id.*

185. *Id.*

interest, namely the “evils of illegitimate children.”¹⁸⁶ This impacts what may be considered legally coercive—what may be legally coercive in one context is not, as an empirical matter, in another.

Just as American jurisprudence has continued to evolve, duress jurisprudence also did not remain fixed over time. Duress jurisprudence developed “an empirical account of coercion’s impact on human psychology consistent with and supportive of [Hanafi] coercion laws.”¹⁸⁷ Hanafi jurists continued to develop the jurisprudence with the aim of creating “coherent legal formulation . . . that synthesized scriptural interpretation with empirical ideas about the psychology of coercion.”¹⁸⁸

The classical Hanafi legal analysis basis for duress or coercion originated out of the doctrine of necessity. The Islamic legal scholar Muhammad b. al-Hasan al-Shaybani (d. 179/795) looked to a specific verse in the Quran as the basis for his reasoning on coercion’s legal effect.¹⁸⁹ This verse addresses the permissibility of eating otherwise forbidden foods during exigent circumstances.¹⁹⁰ It states:

God has only forbidden you carrion, and blood, and the flesh of the swine, and that over which other than God has been invoked. But there is no sin on one who is driven by necessity, without wanting to or going too far. For God is most forgiving, most merciful.¹⁹¹

Shaybani cited this verse because he viewed acts committed by coercion as done out of necessity.¹⁹² Due to this doctrinal basis in necessity, Shaybani drew the line for excusable acts as only those that arise “from threats against one’s life or limb, or from threats of any act that may result in the loss of either life or limb.”¹⁹³ In regard to the victim’s legitimate fearfulness of the threat, the coerced individual need only have “a probable expectation” that the coercer would act on their threat.¹⁹⁴ In

186. *Id.* (quoting WERTHEIMER, COERCION 76 (1988)).

187. *Id.* at 100.

188. *Id.*

189. *Id.* at 106.

190. *Id.*

191. Quran 2:173.

192. See SYED, *supra* note 2, at 106.

193. *Id.*

194. *Id.* at 107.

particular, Shaybani's analysis focuses on the actual fear experienced by the coerced individual. He wrote that "[w]hat he[, the coerced individual,] ought to do in our view is [to act based upon] what he thinks in his heart will happen (*fa-huwa 'inda-na 'ala ma waqa'a fi 'il-qalb min dhalika*)."¹⁹⁵ Though this subjective standard of duress continued to develop within the Hanafi school of thought, Shaybani's work proved "large and unwieldy" and not especially useful to jurists applying the law.¹⁹⁶

Approximately one hundred years later, Hanafi scholars attempted to create something akin to the American common law's restatements by summarizing the work of Shaybani and another Hanafi scholar, Abu Yusuf (d. 182/798), into a short, single-volume work.¹⁹⁷ Some scholars have argued that these types of summations, popular in the seventh and thirteenth centuries, are a type of early codification of Islamic law.¹⁹⁸ Islamic law students study and memorize this restatement today, and it remains influential in Hanafi jurisprudence on duress.¹⁹⁹ Like Shaybani's original work, the summation only excuses those acts committed when faced with a threat against life or limb "or entails some other form of physical harm that one fears will lead to the likely loss of life or limb."²⁰⁰

While, unlike American law, Hanafi jurisprudence does not generally accommodate instances of economic duress, it does address instances of duress in commercial transactions. In cases involving demands to enter into commercial transactions, "[s]uch as selling or buying property or to acknowledge a debt," any "threats of beatings, amputations, and imprisonment are also deemed legally coercive."²⁰¹ Such threats allow for the coerced party to void the commercial transaction. However, Hanafi scholars differentiate between the context in which the coerced acts occur. For instance, divorce or emancipation, unlike a commercial transaction, are not voidable when coercive

195. *Id.* (quoting Shaybani, *al-Asl*, 7:414.3–5).

196. See SYED, *supra* note 2, at 109.

197. Ahmed El Shamsy, *Rethinking "Taqlid" in Early Shafi'i School*, 128 J. AM. ORIENTAL SOC'Y 1, at 4, al5 n.21 (2008).

198. See Mohammad Fadel, *The Social Logic of Taqlid and the First of the Mukhtasar*, 3 ISLAMIC L. & SOC'Y 197–98 (1996).

199. SYED, *supra* note 2, at 110.

200. *Id.*

201. *Id.*

threats are used.²⁰² This differs from the other Sunni schools of thought that allow for the voidability of divorce in instances of duress.

Generally, other Sunni schools' approaches to coercion jurisprudence were significantly less complicated than the Hanafi approach.²⁰³ The other schools' "straightforwardness stems from a less complicated body of positive law governing coercion cases."²⁰⁴ Unlike the Hanafi approach, the other schools have not differentiated on the basis of legal speech. Rather, "the vast majority of legal acts, including all varieties of legal speech, were simply invalidated by coercion."²⁰⁵ Furthermore, other schools included the destruction of property as a coercive act with legal implications.

For example, the Shafi'i school of thought divides threats to the destruction of property into three categories. These categories consist of the following:

- [T]hreats directed against a substantial amount of property, to the point that if the property were lost, the material well-being of the coerced would be affected. Threats rising to this level are deemed coercive.
- [T]hreats involving an insignificant amount of property . . . are not coercive.
- [T]hreats against a significant amount of property whose loss would nonetheless not affect the material well-being of the threatened individual because of the latter's vast wealth.²⁰⁶

Two opinions exist regarding the third category. One opinion states that, regardless of the coerced individual's wealth, the sheer amount of property at risk is determinative.²⁰⁷ The other opinion holds that the threatened destruction cannot have been coercive because the substantive threat to the coerced

202. *Id.* at 113.

203. *Id.* at 139.

204. *Id.*

205. *Id.*

206. *Id.* at 138.

207. *Id.*

individual was insignificant to them based on their actual wealth.²⁰⁸

Shafi'i scholars also recognize another category of coercive acts with economic and social implications. Threats of public denigration (*istikhaf*), such as defamation, qualify as potentially coercive. The classical Shafi'i scholar Mawardi identifies two possible types of denigration—one is deemed coercive, and “the other is not necessarily so.”²⁰⁹ If the threat is aimed at “deplorables,” called “rabble (*ru'a*)” or “people who do not condemn such behavior and among whom insults do not lead to a loss of social position,” then the threat is not considered coercive.²¹⁰ Regarding threats of denigration against “people of reputation” (*al-siyanat*) or people knowing of proper chivalry (*dhawi 'il-muru'at*), two opinions exist. The first opinion holds that threats against these categories of people are coercive because of the pain that threats of public denigration would hold for them.²¹¹ The second opinion is that these categories of people would remain unaffected by such threats because others in these categories would be aware that the coerced people were the subject of unjust threats, and therefore such threat is not actually coercive.²¹²

Mawardi holds that, ultimately, in order to determine whether such a threat is coercive, an inquiry must be made as to the background of the coerced individual.²¹³ Like the categories above, he is concerned with which class of people the coerced is from, but reaches a different conclusion based on the class.²¹⁴ For example, if the coerced is “from the class of those who value worldly fame and status,” the threat is coercive.²¹⁵ However, if “she is from the class of those who have their sights on the hereafter and abjure worldly concerns, [the threat is not coercive because] the possibility of denigration . . . does not diminish her social position among her peers and may, in fact, even elevate it.”²¹⁶

208. *Id.*

209. *Id.* at 139.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

Although the Shafi'is show concern for the coerced party's social standing in making a determination of duress, the Shafi'is, for the most part, are not concerned with the psychological interplay between the coerced and the coercer.²¹⁷ Rather, the Shafi'is are concerned with the actual context of a case of duress—"the coercer must be powerful, the threat must be credible, [and] the coerced must lack recourse to aid against the coercer."²¹⁸ Despite not analyzing the psychological interplay like the Hanafis, the Shafi'is take into consideration the subjective impact of the duress on the coerced party through an evaluation of the coerced's social standing and particular fear of the threat (or lack thereof). For instance, if a threat is directed against "people who compete with each other in how much pain they can endure," then a threat of a beating will not be considered coercive against such a person.²¹⁹

3. Modern Applications

While Islamic law has stagnated in some ways, the doctrine of duress is still playing out in several Muslim-majority civil legal systems. For instance, both Jordan and the United Arab Emirates (UAE) have statutes addressing elements of duress, but link them to misrepresentation. The UAE derived legislation on duress from the Maliki and Hanafi Schools of Islamic Law.²²⁰ In regard to contracts, the legislators relied on the Maliki and Hanafi position that duress can render a contract voidable.²²¹ This differs from the Shafi'i and Hanbali positions that "duress renders *any* contract null and void."²²² Hanafis differentiated between a contractual defect caused by duress and other contractual defects caused by something like mutual mistake or fraud. In addition to the contract being voidable by the victim of duress, the contract could also be "invalidated even if handled by an innocent purchaser."²²³

217. *See id.* at 140.

218. *Id.*

219. *Id.*

220. Jadalhaq, *supra* note 158, at 50.

221. *Id.*

222. *Id.* (emphasis added); *see also* SYED, *supra* note 2, at 139 ("For [Shafi'is], the vast majority of legal acts, including all varieties of legal speech, were simply invalidated by coercion.").

223. Abou El Fadl, *supra* note 147, at 140.

However, the statute does not address cases of “negative duress” or “duress in case of necessity.”²²⁴ Such cases arise when the coercer exploits an immediate need of the coerced person. For example, “a physician exploits a patient who needs urgent surgery[] by asking him to sign a document stating that he, the patient, owes . . . a debt that does not, in fact, exist.”²²⁵ Another example is when an individual is in imminent danger, and a potential rescuer refuses to aid unless the distressed person agrees to pay an exorbitant sum.²²⁶ These situations of duress caused by necessity are limited, however, to cases where a person has no option but to agree to the coercer’s demands or face imminent physical danger—danger that would result in, for example, physical disability or death.²²⁷ Some scholars have categorized such cases as “sale under distress.”²²⁸ Applying UAE statutes on duress, the Court of Cassation in Abu Dhabi has ruled that

duress is only present by threatening the victim to inflict serious, imminent danger on him or his property, or by using other means of pressure against him which he can neither bear nor get rid of. In turn, the victim would feel afraid and, hence, would accept something that he would not have accepted if he had been given a chance to make a choice.²²⁹

The Abu Dhabi Court of Cassation’s application of the UAE duress statute does focus on a subjective criterion.²³⁰ This subjective criterion is derived from Islamic jurisprudence “which confirms that duress differs according to the circumstances of each individual.”²³¹ The personal circumstances of the victim are evaluated, such as the specific circumstance the victim found

224. Jadalhaq, *supra* note 158, at 36.

225. *Id.*

226. *Id.*

227. *Id.* (citing Yassin Mohammad al-Jubouri, *Duress in Case of Necessity (Negative Duress) in the Jordanian Civil Law*, 1 AL-MEZAN J. ISLAMIC & LEGAL STUDS. 1, 8 (2014)).

228. *Id.*

229. *Id.* at 38–39 (citing Appeal No. 667/2013 (Commercial), *Legal Provisions and Principles Issued of Cassation of the Departments of Civil, Commercial and Administrative, Fifth Part*, (Abu Dhabi: Judicial Department, 2013), 2154).

230. *Id.* at 39 (citing Appeal No. 1266/2012 (Commercial), *Legal Provisions and Principles Issued of Cassation of the Departments of Civil, Commercial and Administrative*, (Abu Dhabi: Judicial Department, 2012), 508).

231. *Id.* at 39.

themselves in, their personality and sensitivities, and their personal perception of the danger. The court considers elements such as the victim's age, gender, education, and the time and location of the contract's execution.²³² The court will look at the specific ability of the victim to seek recourse elsewhere at the time the parties entered into the contract. Considerations may include the following: whether the victim was illiterate, whether the contracting party was in a remote area, or whether the threat was at night. The relationship between the coercer and the victim may also influence the subjective impact of the duress. For instance, special relationships, such as between parent and child, students and teachers, or husbands and wives, can lead to a determination of a moral influence that can lead to a finding of duress. UAE article 183 of the Law on Civil Transactions provides the following example: "If a husband coerces his wife by beating her or forbidding her to see her family or the like, to cede to him a right of hers or to give him property, the disposition will not be effective."²³³

While Islamic law takes the subjective experience of a coerced party into serious consideration, it does not necessarily recognize all the pressures that might impact a vulnerable party. For example, under classical Islamic law, a power imbalance can exist in divorce, particularly around the ability to unilaterally divorce and the financial impacts of ending the marriage. Beyond threats to property and familial relationships, classical Islamic law does not account for the ways in which economic duress may lead to oppression. Although the doctrine of economic duress is still in development and more limited than other types of duress, its application in the Islamic law context could provide greater protections for vulnerable parties in contractual relationships, ranging from divorce settlements to commercial transactions. Likewise, the prohibition within Jewish law (discussed below) on the voidability of a contract in which a party faces economic distress could serve as a model for expanding the concept of necessity within Islamic law.

232. *Id.*

233. *Id.* at 41.

III. DUTY TO AID THE VULNERABLE IN JEWISH LAW

A. *Jewish Law Primer*

Like Islamic law, Jewish law has a long history—over two thousand years—of limiting the enforceability of exploitative contracts. The prohibition of oppressive contracts originates from the Babylonian Talmud. Jewish law (*Halakha*) derives from three types of sources—literary, historical, and legal.²³⁴ The literary sources include authoritative texts. The foundational authoritative text for all Jewish law is the Torah, which is the first five books of the Bible.²³⁵ The Torah repeatedly highlights oppression as “an extremely immoral and illegal act.”²³⁶ For instance, the Prophet Ezekiel laments: “The people of the land have used oppression, and exercised robbery, and have wronged the poor and needy, and have oppressed the stranger unlawfully.”²³⁷ The Torah also describes oppression (*oshek*) in relation to “theft or withholding of a hired person’s wages.”²³⁸ Speaking to the power differential often present between an employer and employee, Deuteronomy 24:14 states: “You shall not oppress a hired servant that is poor and needy.”²³⁹ The Torah, however, is not the only authoritative text in Jewish law.

The primary source texts for Jewish law include “the books of halakhic *midrashim*, the *Tosefta*, the two Talmuds [Jerusalem and Babylonian], the commentaries and novellae, the responsa, and the codificatory literature.”²⁴⁰ In addition to the written sources of law, the oral tradition supplements the written texts.²⁴¹ Of these texts, the Talmud is the predominant source of rabbinic jurisprudence.²⁴²

234. MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 235 (Bernard Auerbach & Melvin J. Sykes trans., 1994).

235. IRVING A. BREITOWITZ, *BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY* 307 (1993).

236. Shahar Lifshitz, *Oppressive-Exploitative Contracts: A Jewish Law Perspective*, 23 J.L. & RELIGION 425, 425 (2007/2008).

237. *Ezekiel* 22:29 (Jewish Publication Society of America 1917 Version).

238. *Deuteronomy* 24:14 (King James).

239. *Id.*

240. ELON, *supra* note 234, at 235.

241. BREITOWITZ, *supra* note 235, at 307.

242. HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* 110 (1997).

“The Talmud” generally refers to the Babylonian Talmud, which is considered the most authoritative of the two Talmuds.²⁴³ The Talmud is the collection and interpretation of “scripture, traditions, and innovations, discussion and debates of the great religious authorities of approximately [one thousand] years (450 BCE to 550 BCE).”²⁴⁴ The Talmud is structured as the description of a *Mishna*, the teaching of a teacher or a debate between two teachers “as recorded by the first compilation of the Oral Law (edited in 200 CE).”²⁴⁵

The Talmud produced a huge body of texts commentating, summarizing, and applying the law that emerged from it. This post-Talmudic legal literature broadly falls into the following three categories:

1. Commentaries or *novellae* (*hidushim*, creative commentaries) of older authoritative books, notably the Talmud;
2. [C]odes, which are authoritative summations of the law; the definite code of the *Halakhah* to this very day is the *Shulhan Arukh* by R. Joseph Caro of Sefad (d. 1575), an essentially Sephardic code which gained universal acceptance when it was appended by glosses of R. Moses Isserles, Rema, of Poland (d. 1572); and
3. [R]esponsa or *she’elot u-teshuvot* (queries and replies), which are rabbinic decisions in actual cases emanating from a great variety of countries and spanning well over 1,000 years.²⁴⁶

Jurists apply the decisions from these texts in their rulings. When analyzing a specific case, jurists will utilize six legal sources.²⁴⁷ These sources are: tradition (*kabbalah*), interpretation (*midrash*), legislation (*takkanah* and *gezerah*), custom (*minhag*), case or incident (*ma’aseh*), and legal reasoning

243. Jill Jacobs, *Tale of Two Talmuds: Jerusalem and Babylonian*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/tale-of-two-talmuds> [<https://perma.cc/UKU8-SZ6S>].

244. DAGAN, *supra* note 242, at 110.

245. *Id.*

246. *Id.* at 110–11.

247. ELON, *supra* note 234, at 238.

(*sevarah*).²⁴⁸ The last five sources are the means by which the Jewish legal system continues to develop through “creating new legal rules, and changing existing legal rules where necessitated by changes in mores or in economic and social conditions.”²⁴⁹

B. Prohibitions Against Exploitative Contracts: The Jestling Rule

In Jewish law, long-standing doctrines against exploitative contracts exist. These doctrines share some similarities with the American doctrines of unconscionability and duress, though still maintain important distinctions.²⁵⁰ The seminal text addressing these oppressive contracts comes from the Talmudic tractate Bava Kamma, which addresses damages. Within this tractate is a seminal case on exploitative contracts.²⁵¹ The case appears as follows: “If a person running away from prison came to a ferry and said to the boatman, ‘Take a denar [a coin] to ferry me across,’ he would still have to pay him not more than the value of his services.”²⁵² The Talmud concludes that although the fugitive offers a denar for the ferryman’s services, this offer is non-binding due to the exigent circumstances of the offer.²⁵³ This exemption for the distressed party from honoring their offer is called the “jestling rule.”²⁵⁴ The term “jestling rule” is based on Talmudic passages, which explain that the exploited party claims, “I was merely jesting with you [in regards to pricing].”²⁵⁵ A party may avoid exploitative contract terms by invoking this rule.

Curiously, the jestling rule is contrasted with the statement that follows in the Talmud, which states: “But if [the fugitive] said to [the ferryman], ‘Take this denar as your fee for ferrying me across,’ [the fugitive] would have to pay [the ferryman] the sum stipulated in full.”²⁵⁶ This statement seems as though it is in direct contrast with the jestling rule as described above. The

248. *Id.* at 238–39.

249. *Id.* at 239.

250. *See generally* Lifshitz, *supra* note 236.

251. *Id.* at 429 (citing Babylonian Talmud, Bava Kamma 116a).

252. *Id.*

253. *Id.* at 430.

254. *Id.*

255. *Id.* at 436 n.43 (citing Sinai Deutch, *Economic Duress in Contracts Law*, 2 BAR-ILAN LEGAL STUD. 1, 29 (1982) (Hebrew)).

256. *Id.* at 430.

Talmud sages resolve the discrepancy between the two narrations of the fugitive by contextualizing the second part in terms of lost income. The Talmud sages explain that if the ferryman was both a ferryman and fisherman, he would then be able to tell the fugitive that ferrying him at that time caused him to lose income he would have otherwise earned fishing.²⁵⁷ In doing so, the Talmud distinguishes between an individual performing the typical services of their job and an individual who, but for the provided service, would have earned a higher fee. This distinction establishes the basic rule and exception that a contract is unenforceable when “the distressed person agrees to pay in excess of the regular price” unless the other party can justify the higher than usual fee based on the typical labor that they have forgone in aid of the distressed party.²⁵⁸

Several other cases in the Talmud apply the fugitive case and jesting rule to other circumstances. For instance, in the case of a laborer hired to bring medicine to a sick person, the Talmud rules that “the laborer is entitled to full payment, regardless of whether the patient recovered or died.”²⁵⁹ If the payment were higher than typical for such labor, the laborer would still be entitled to full payment “despite the oppressive-exploitative agreement, because they would likely have earned more in some other task.”²⁶⁰ This conclusion relies on the rule established from the fugitive case.

A feature of these cases in the Talmud is that the exploitative contracts involve a person in distress. The Talmud does not differentiate between personal and economic distress.²⁶¹ While the fugitive and patient cases described above entail an individual fearing for their life, other cases in the

257. *Id.* (The Talmud scholar Rami bar Hama specifically states: “[In the second part, the ferryman was] a fisherman catching fishes from the sea, in which case he can surely say to [the fugitive]: ‘You caused me to lose fish amounting in value to a zuz [a monetary value amount].’”). Babylonian Talmud, Bava Kamma 116a.

258. Lifshitz, *supra* note 236, at 430. Note that the higher fee does not need to reflect that actual amount foregone. The aiding party must simply establish that they have experienced a loss, even a slight loss. See Aryeh Leib Heller, *Ketzot Ha-Hoshen*, vol. 3, 264:4 (Makhon ha-Rav Frank 1982) (1788–96) (Ketzot Ha-Hoshen is a commentary on Shulhan Arukh).

259. Lifshitz, *supra* note 236, at 431. (citing Tosafot, *Bava Kamma*, 1 16b, 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.

260. *Id.*

261. *Id.* at 432.

Talmud involve instances of economic distress.²⁶² For instance, the Talmud describes the case of a widow who wishes for her brother-in-law to perform *halitzah*—a ceremony freeing a widow to marry whomsoever she desires. She promises to pay her brother-in-law to perform the *halitzah*. The *halitzah* is a ceremony which should be freely given in Jewish culture but which cannot be compelled by a court. If the widow promises to pay her brother-in-law to perform the *halitzah*, such a promise may constitute both personal and economic distress. If, after the brother-in-law performs the *halitzah*, the widow refuses to pay, the court will rely on the fugitive and jesting rules to accept her refusal to pay.²⁶³

In all instances of exploitative contracts in the Talmud there is a recognition that the distressed person is not “psychologically free to examine other courses of action.”²⁶⁴ For example, due to the exigencies of the circumstances, the widow is unable to freely remarry, and she is effectively in a monopolistic dynamic with her brother-in-law. Likewise, it is presumed that the ferryman is the only available person to carry the fugitive across the water.²⁶⁵ Other exigencies, such as time, can also create a monopolistic dynamic. For example, a time sensitive situation may not allow for the consideration of an alternative provider.²⁶⁶ An additional element to these exploitative contracts is that the consideration in the contract is atypical for the market price.²⁶⁷ Thus, exploitative contracts in Jewish law involve three elements: “a distressed party, a semi-monopolistic supplier, and a price different from the market price.”²⁶⁸

While these three elements are prerequisites to establishing an exploitative contract, the Talmud requires a fourth element regarding the demanded pricing. The atypical market price must result directly from the distress of the other party. If the exploiting party can demonstrate that the higher price is “not

262. *Id.*

263. *See* Yevamot 106a.

264. Lifshitz, *supra* note 236, at 432.

265. *Id.*

266. *Id.* at 432 n.26 (“Rabbi David ben Solomon Ibn Abi Zimra . . . argues that the fugitive is in distress, even if he could avail himself of the services of another ferry, and even if he were ‘imprisoned for a monetary matter,’ because he was in hurry in his distress. Significantly, according to *Radbaz*, this is not an objectively monopolistic situation, but from the subjective viewpoint of the fugitive, the sense of coercion is similar to that experienced by a party facing a monopoly.”).

267. *Id.* at 432.

268. *Id.* at 433.

merely the result of his ability to exploit the other party's distress, the contract is valid."²⁶⁹ Thus, the jesting rule allows for the nullification of contracts if the following four elements are met: "(a) personal or economic distress; (b) a semi-monopolistic rescuer; (c) an above market price; and (d) [actual] exploitation."²⁷⁰ Based on these Talmudic rulings, Jewish law applied the jesting rule to a host of different circumstances that included both personal and economic distress.²⁷¹

The jesting rule eventually resulted in varying interpretations in the Jewish law approach to contracts. One such approach is procedural and seeks to preserve the free will of parties entering into a contract.²⁷² This approach is known as *Gemirat ha-Da'at* (the clear expression of free and finalized will). Therefore, challenges to contract formation rest on establishing that the contract "does not reflect the free and finalized will of the parties."²⁷³ In seeming contrast, another principle within Jewish law allows parties to void a transaction if the price is more than one-sixth above the market price.²⁷⁴

The application of the jesting rule to the procedural requirements of *Gemirat ha-Da'at* is that there is "a flaw in [the] finalization of the party's intent."²⁷⁵ Essentially, a party committing themselves to excessive consideration while in a state of distress cannot have that decision held as their final intent. Another approach, promoted by Rabbi Yom Tov ben Abraham Ishbili (*Ritba*), closely mirrors the American common

269. *Id.*

270. *Id.*

271. *Id.* at 433–34. These situations include "rescuers who demanded an exaggerated price for saving property that would be lost if it were not saved immediately; physicians who took considerable sums for treating patients; a shofar blower who feared that the promise of exorbitant payment for his blowing (on the High Holidays) would not be honored; matchmakers and mediators who demanded a steep fee from their needy clients; a monopolist rabbi who insisted upon an exorbitant payment for writing a bill of divorce; and husbands who demanded compensation for agreeing to divorce their wives." *Id.*

272. *Id.* at 435.

273. *Id.* (citing Sinai Deutch, *Economic Duress in Contracts Law*, 2 BAR-ILAN LEG. STUD. 1 (1982)).

274. *Id.* (citing Joseph Caro, *Shulchan Arukh*, *Choshen Mishpat* 227 (Tal-Man 1978) (1565)). See also Aaron Levine, *Onaa and the Operation of the Modern Marketplace*, 14 JEWISH L. ANN. 225 (1993); Itamar Warhaftig, *Market Value, Prices and Overreaching*, 4 KETER 17 (2004).

275. Lifshitz, *supra* note 236, at 436 (citing Sinai Deutch, *Economic Duress in Contracts Law*, 2 BAR-ILAN LEG. STUD. 1 (1982)).

law doctrine of duress.²⁷⁶ Under this approach, the issue is not that the party did not adequately express their final intent. Rather, it is understood that the distressed party is sincere when agreeing to pay the excessive consideration in order to alleviate their distress.²⁷⁷ However, the distressed party is unable to make a free will commitment because the commitment is made under duress. When a party commits themselves under duress, whether by “vow, handshake, or any other means that proves decisive intent, but not free will, [they] cannot validate the contract.”²⁷⁸

The jesting rule has been expanded in the post-Talmudic period to a variety of cases “where there is a disparity between the proper fee and the stipulated sum [of] fees.”²⁷⁹ This expansion moves beyond the Talmudic application of the jesting rule to include cases where it is not entirely clear that a party suffers from “tangible distress,” and, in some instances, the distress is not “serious enough to impair their free will.”²⁸⁰ Additionally, some of the cases are not evidently monopolistic or even semimonopolistic.²⁸¹ These cases reflect a transition away from a focus on the impaired will of the distressed party to a focus on issues of substantive contractual unfairness.²⁸² Commentators reach this focus on substantive contractual unfairness through identifying the jesting rule with the principle of *ona’ah* (price fraud), which invalidates a contract due to excessive pricing.²⁸³

Other commentators have interpreted the jesting rule as applicable to cases wherein the exploiting party would be committed to aiding the distressed party even absent a contract.²⁸⁴ A feature of contemporary applications of the jesting

276. Yom Tov Ben Abraham Ishbili, *Hiddushei ha-Ritba* vol. 1 (Novellae on the Talmud) (Yevamot: Mossad Harav Kook 1992) (1787).

277. *Id.*

278. Lifshitz, *supra* note 236, at 437.

279. *Id.* These include cases involving “intermediaries, guarantors, exorcists, and matchmakers.” *Id.* (footnotes omitted).

280. *Id.*

281. *Id.* at 437 (explaining that, at least in some of these cases, the rulings involved an issue with flawed *Gemirat ha-Da’at*).

282. *Id.* at 437–38.

283. *Id.* at 438.

284. *Id.* at 439 (“In the case of the jars of honey, the owner of the jars is commanded to offer assistance, by force of the famous Jewish law of ‘returning a lost article.’ In the fugitive and medicines cases, the boatman and the laborer, respectively, are duty bound to rescue. According to these commentators, this duty expands the original law of the return of lost property to include human life. In the

rule is the focus on different criteria than was traditionally used. For instance, *poskim* (decision-makers) have found the jesting rule to apply in cases where neither party is in distress, or at least not distress that would rise to the level of impairing free will.²⁸⁵ These cases have also not necessarily involved monopolistic/semimonopolistic dynamics.²⁸⁶ Rather, this application of the jesting rule has focused on issues of “substantive contract fairness.”²⁸⁷ This focus on substantive contract fairness is a transition away from the procedural rule of *Gemirat ha-Da’at* to a focus on the principle of *ona’ah*.

The principle of *ona’ah* expanded the application of the jesting rule to cases where the non-distressed party has a “clearly enforceable legal duty or, at least . . . a clear religious commandment to aid the distressed person.”²⁸⁸ For example, the jesting rule has been applied to rabbis who charge an exorbitant sum to issue a bill of divorce.²⁸⁹ In these cases, the scholars refer to the rabbi as a “thief and coercer, because he knows that bills of divorce may be given in his city only with his permission, and the one who must give a bill of divorce is forced to give him all he possesses.”²⁹⁰ While this example contains the elements of the traditional application of the jesting rule (i.e., (1) personal or economic distress; (2) a semi-monopolistic rescuer; (3) an above market price; and (4) actual exploitation), the scholars focus on the fact that the rabbi is charging for a service that he is morally obligated to provide.

The focus on substantive contractual fairness helps explain the exceptions to the jesting rule. For example, the jesting rule is inapplicable where the non-distressed party can demonstrate that circumstances of the service provided caused a justifiable increase in the fee, such as a missed opportunity (e.g., the fisherman) or increased danger.²⁹¹ Additionally, the non-distressed party can claim an exception to the jesting rule if they

halitzah case, the brother-in-law is not worthy to be married to the widow, and he therefore is required to perform *halitzah* and not *yibum*.”) *Id.* at 439 n.60 (citations omitted).

285. *Id.* at 437.

286. *Id.*

287. *Id.* at 438.

288. *Id.* at 439.

289. *Id.* at 434 (citing Obadiah Bertinoro, *Commentary on the Mishnah* (1548–49), Bekhorot 4:6).

290. *Id.* at 440 n.62 (quoting Obadiah Bertinoro, *Commentary on the Mishnah* (1548–49), Bekhorot 4:6).

291. Lifshitz, *supra* note 236, at 442 n.73.

have invested in specialized skills, such as medical training, that enable them to “aid a distressed person better than an average person would be able to help.”²⁹² In all of these instances, although a distressed party is still involved, the agreement is no longer deemed exploitative and is therefore valid. The jesting rule creates an obligation to assist distressed parties and a prohibition from exploiting that distress.²⁹³ There are three exceptions that obviate the obligation: “(1) where alternate profits may be lost, or where the serving party actually believes there will be a loss; (2) where the distress changes the type of service or the risk that the service entails; and (3) where there is some prior investment in the required skills or availability.”²⁹⁴

The jesting tradition is consistent with other equitable doctrines in Jewish law.²⁹⁵ In the context of property law, the corollary of the jesting rule is the exemptive rule. The exemptive rule states that where a party derives a benefit from the right of another party, such as a squatter using another’s property, and the other party has not sustained a loss, then the benefiting party is not liable for payment of the benefit.²⁹⁶ Scholars codified the rules as follows: “[I]f B has a legal right and the infringement upon such right by A generates no loss to B and at the same time affords A the opportunity to secure a benefit or avoid a loss, then the advantage-taking (free of charge) of B’s right is (*ex ante*!) allowed”²⁹⁷ The exemptive rule, however, is not without exception. If Party A sustains any loss, then liability attaches.

The exception to the exemptive rule follows the same logic as the exceptions to the jesting rule. In both situations, the providing party can claim an exemption if they have incurred an actual loss.²⁹⁸ Likewise, both rules have an expectation that the providing party will allow a party in need (whether emotional or financial) to secure a benefit if the providing party does not incur a loss. If the providing party will or has incurred a loss, then the

292. *Id.* at 442.

293. *Id.* at 443.

294. *Id.*

295. *See id.* at 449.

296. DAGAN, *supra* note 242, at 114 (first citing ISAAC HERZOG, *Quasi Contract*, in II THE MAIN INSTITUTIONS OF JEWISH LAW: THE LAW OF OBLIGATIONS 54 (2d ed. 1967); and then citing AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW: HALAKHIC ASPIRATIONISM IN JEWISH CIVIL LAW 188, at 190, 204 (1991)).

297. *Id.*

298. Lifshitz, *supra* note 236, at 447.

expectation is that they will engage with the distressed party under fair market terms.²⁹⁹ Hanoach Dagan, in his book *Unjust Enrichment*, contextualizes these equitable doctrines as a reflection of the commitment of Jewish law to the “value of sharing.”³⁰⁰ This value originates out of the “social phenomenon of private responsibility in the Jewish tradition, *tzedakah*.”³⁰¹ *Tzedakah* applies when a defendant is in need and the use of the plaintiff’s property or resource will not cause the plaintiff harm.³⁰² Harm is understood as diminished value through the defendant’s use of the property or resource or prevention to the rightful owner of “capturing some expected gains she would have secured but for the invasion.”³⁰³ He frames this approach as “giv[ing] an owner latitude in striking the appropriate balance between the needs of others and those of her own.”³⁰⁴ He concludes that the underlying social aim of Jewish law is “not an equal distribution of wealth, but . . . providing relief for the needy.”³⁰⁵

Dagan and other scholars sharply contrast this aim of Jewish law with the American legal system.³⁰⁶ Dagan characterizes the American legal system as “preoccupied with the choice between the concomitant measures of recovery of *profits* and *fair market value*,”³⁰⁷ in contrast to the Talmudic values of sharing, such as *tzedakah*. His characterization focuses on the individualistic nature of the American legal system, where the demand of “the duty to aid a distressed person[, as] is typical for Jewish law,” is foreign.³⁰⁸ Another scholar

299. *Id.*

300. DAGAN, *supra* note 242, at 9.

301. *Id.* at 109–10.

302. *Id.* at 110.

303. *Id.*

304. *Id.* at 129.

305. *Id.*; *see also* Lifshitz, *supra* note 236, at 448 n.93 (“A decade ago, Professor Menahem Mautner, a prominent Israeli scholar, described a major difference between Jewish law and liberal secular legal systems. He wrote: ‘The theology on which Jewish law is founded is completely different from the political theory on which modern Western legal systems are based. Jewish law is a legal system of obligations [. . .] while the political theory on which modern Western legal systems operate is the liberalism that perceives man as the possessor of rights, as the possessor of protected interests, and as one who is entitled to act in an autonomous manner.’”).

306. DAGAN, *supra* note 242, at 129.

307. *Id.*

308. Lifshitz, *supra* note 236, at 448 (citing HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* (1997)).

characterizes Jewish law as follows: "In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing."³⁰⁹

Other scholars note, however, that American contract law has moved in a direction similar to the principles of sharing found in Jewish law. Melvin Eisenberg has described this trend in contract law as an implicit duty to aid a needy contractual partner.³¹⁰ Similar to Jewish law, this duty is limited to riskless and costless aid.³¹¹ Likewise, as described in Section on Equitable Remedies in American Law, good faith requirements of American law create duties between contracting parties.³¹² While American contract law has begun to consider an implicit duty to aid a needy contractual partner, Jewish law provides a comprehensive framework of obligations that protects vulnerable parties from oppressive contracts.

C. Duress and the *Seruv*

1. Protections for Chained Women

Although Jewish law has a robust doctrine that works to protect oppressed people, the law also permits coercion in certain circumstances. For example, the Talmud speaks directly to duress in the sale of property.³¹³ In the instance of taking "another's property against his will," the Talmud differentiates between a *gazlan* (someone who does not give money) and a *hamsan* (someone who gives money against their will).³¹⁴ The taking of property by a *gazlan* is considered an invalid sale. The Talmud considers sale of property by a *hamsan* a valid sale, despite the coercion involved in the sale. The Talmud concludes that "where the sale under duress is legally considered to be a sale, [there] is . . . a case where [the duressed party] eventually says: I want to sell the item, despite having been forced."³¹⁵

This, however, is not the end of the analysis. Like Islamic law, while a contract for the sale of property in this instance is

309. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 67 (1987).

310. See Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C. L. REV. 315, 348 (2008).

311. Lifshitz, *supra* note 236, at 450.

312. PERILLO, *supra* note 17, § 9.40, at 391 n.21.

313. Babylonian Talmud, Bava Kamma 62a.

314. *Id.*

315. *Id.*

not void, it is voidable. The coerced seller of property “may lodge a protest, a *moda’ah*, in the presence of two witnesses, to the effect that he is selling the land under duress and not out of his own free will.”³¹⁶ This objection will result in the voiding of the contract for the sale.³¹⁷ The reasoning for making such a contract voidable with proper procedure, rather than void from the outset, is that the sale of land is for the fair market price and that despite the duress, the seller may have “consented to the deal because there was money in it for him.”³¹⁸

Additionally, Jewish law may also call for communal pressures to be exerted on community members. For example, when a community member fails to appear before a Beth Din, or a rabbinical court responsible for overseeing the enforcement of Jewish law, such communal pressure will often come in the form of a *seruv*.³¹⁹ The impact of a *seruv* is communal ostracization that “can potentially result in the failure of one’s business, the inability to have one’s children marry within the community, or the ability to participate in necessary communal activities.”³²⁰ A common example of when a Beth Din may issue a *seruv* is against a recalcitrant husband who, in the event of divorce, refuses to issue his wife a *get*, or bill of divorce. For a Jewish woman to religiously remarry under Jewish law, she needs her husband to issue a *get*, and she does not have the power under Jewish law to issue a *get* herself. A woman stuck in such a situation is called an *agunah*, or chained woman. Jewish law justifies such communal pressure under the theory that the husband’s consent remains intact because the person’s *yetzer hatov* (better self) is, in fact, consenting.³²¹ The theory of the *yetzer hatov* is that a person’s better self “wants to be close to God . . . [but] the ‘other person’ inside of us, the *yetzer hara*,

316. *Id.*

317. Raphael Grunfeld, *Under Duress (Bava Kamma 62a)*, JEWISH PRESS (Aug. 18, 2016), <https://www.jewishpress.com/judaism/halacha-hashkafa/under-duress-bava-kamma-62a/2016/08/18> [<https://perma.cc/UTP4-45Z6>]; see also Louis Ginzberg & Lewis N. Dembitz, *Duress*, JEWISH ENCYCLOPEDIA, <https://www.jewishencyclopedia.com/articles/12695-restraint-of-persons> [<https://perma.cc/35DL-EW5P>].

318. Grunfeld, *supra* note 317.

319. See Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 651 (2004).

320. *Id.* at 652–53.

321. Grunfeld, *supra* note 317.

takes over and overcomes the will of the *yetzer hatov*.”³²² When a Jewish court orders a *seruv*, the court is, in fact, “administer[ing] punishment to the *yetzer hara* within [the recalcitrant person] until it releases the *yetzer hatov* to do what the Torah and the rabbis command.”³²³

2. *Lieberman v. Lieberman*

Lieberman v. Lieberman is a seminal American case of a *seruv* compelling a party to appear before a Beth Din in binding arbitration.³²⁴ The case involved a Jewish divorcing couple (Mr. and Ms. Lieberman) in New York.³²⁵ The parties signed a binding arbitration agreement to settle their divorce before the Beth Din in accordance with Jewish law. The agreement stated that the parties would “settle the arguments, claims and all disputes that are between us before the Rabbinical Court,” and agreed that the decisions of the Rabbinical Court would be obeyed.³²⁶

Prior to signing the arbitration agreement, Ms. Lieberman had initiated divorce proceedings in civil court.³²⁷ Following a motion for *pendente lite* relief, the civil court awarded Ms. Lieberman full custody of the children, as well as the right to remain in the family home.³²⁸ Ms. Lieberman failed to disclose the pending arbitration to the civil court.³²⁹ On the same day as the civil court ruling, the Beth Din reached a different ruling. It awarded the parties joint custody (with primary placement to Ms. Lieberman), ordered Mr. Lieberman to pay Ms. Lieberman \$100 in weekly child support (identical to the civil court’s ruling),³³⁰ and ordered both parties to sell their marital home with the majority of proceeds going to Mr. Lieberman.³³¹ Due to these contrasting rulings, Mr. Lieberman filed a motion in the civil court to have the *pendente lite* award vacated, and Ms.

322. *Id.*

323. *See id.*

324. *Lieberman v. Lieberman*, 566 N.Y.S.2d 490 (Sup. Ct. 1991).

325. *Id.* at 492.

326. *Id.*

327. *Id.*

328. *Id.* at 493.

329. *Id.*

330. *Id.*

331. *Id.*

Lieberman filed a cross-motion to vacate the Beth Din's award.³³²

Ms. Lieberman argued that she was coerced into entering into the arbitration agreement through the use of *seruv*.³³³ The court found that although “the threat of a [*seruv*] may constitute pressure, it cannot be said to constitute duress.”³³⁴ The court stated that any pressure from the Beth Din did not involve the type of behaviors that would vacate an arbitration award, namely that the “rights of the party were prejudiced by corruption, fraud, or misconduct in procuring the award; partiality of an arbitrator; that the arbitrator exceeded his power or failed to make a final and definite award; or a procedural failure that was not waived.”³³⁵ The court enumerated such behaviors to involve “ex parte communications by the arbitrators with litigants; unauthorized independent investigation by an arbitrator; failure to allow a party legal representation or failure to permit a party to introduce evidence.”³³⁶ The court found that none of these circumstances had occurred.

Ms. Lieberman further contended that the Beth Din exceeded its authority. Namely, her expectation in submitting the case to the Beth Din was that they would grant a religious divorce and not rule on “matters of custody, visitation and economics.”³³⁷ The court was unsympathetic to this argument,³³⁸ although issues with *get* issuances are notorious and a common reason for Jewish women to seek a Beth Din ruling.³³⁹ Due to the arbitration agreement language, which extended to “any and all disputes between the parties,” the court found that a “panel of arbitrators will only be restricted by specific limitations explicitly set forth in the arbitration agreement itself.”³⁴⁰

The court found that the Beth Din was warranted in ruling in matters related to the dissolution of the marriage

332. *Id.*

333. *Id.* at 494.

334. *Id.*

335. *Id.* at 493.

336. *Id.* at 494 (citation omitted).

337. *Id.*

338. *Id.*

339. Shulamit S. Magnus, *Agunot*, JEWISH WOMEN'S ARCHIVE (June 23, 2021), <https://jwa.org/encyclopedia/article/agunot> [<https://perma.cc/2LPR-WYFL>].

340. *Id.* (citations omitted).

(i.e., custody, property distribution, etc.), as the civil court had ruled on those matters itself in making the divorce ruling. The court seemed unwilling to entertain that a person may want a civil court to rule on certain matters relating to divorce while concurrently seeking the ruling of a religious arbitration panel for other matters relating to divorce. In particular, the court did not address that a Jewish woman may have cause related to the issuance of a *get* for a Beth Din ruling while not necessarily wanting a religious-based ruling on other issues related to divorce. In effect, the civil court was unwilling to entertain that a petitioner's religious and political identities may need different and concurrent legal remedies.

The civil court found it compelling that the Beth Din "addressed all the relief she requested in her *pendente lite* application and many of the awards were strikingly similar."³⁴¹ One of the lessons from *Lieberman* is that religious people seeking religious arbitration may want to ensure that their arbitration agreements are narrowly tailored to only address those religious concerns they want addressed, such as receiving a religious divorce, without also addressing separate and related, yet non-religious, issues.

In regard to custody disputes, civil courts will uphold an arbitration ruling on custody unless the award "adversely affects the best interest of the children."³⁴² This demonstrates some sensitivity to the need for civil court oversight of vulnerable parties. The civil court vacated the arbitration award regarding custody because the parties had "been embroiled in long and embittered litigation involving the children and there exists severe antagonism towards each other."³⁴³ Furthermore, the court deferred the sale of the marital property until the last child had reached the age of maturity; at such time, the property was to be sold and the proceeds divided in accordance with the Beth Din award.³⁴⁴

The court concluded that "the provisions of the Beth Din award consistent with this decision are confirmed and the provisions of the *pendente lite* order inconsistent with this decision are vacated."³⁴⁵ The court had previously based any

341. *Id.*

342. *Id.* at 495.

343. *Id.*

344. *Id.* at 495–96.

345. *Id.* at 496.

changes to the Beth Din award on the elements of the award that would “adversely affect the best interest of the children” and not on inconsistencies to the *pendente lite* order. The court thus limited its protection of vulnerable parties to children and revised the Beth Din ruling accordingly.

3. *Greenberg v. Greenberg*

Six years after *Lieberman*, the Supreme Court of New York addressed the *seruv* issue again in *Greenberg v. Greenberg*.³⁴⁶ *Greenberg* likewise involved a divorcing couple who had gone before a Beth Din. As part of the Beth Din adjudication, the parties signed releases which discharged each party respectively from “all . . . debts, dues, sums of money[,] . . . judgments[,] . . . claims and demands . . . in law, admiralty or equity.”³⁴⁷ By signing the release, the wife also released her former husband from “his preexisting support obligations.”³⁴⁸ She argued before the court that she had only signed this release under the threat of a *seruv*.³⁴⁹ The court found that because the wife had “freely submitted herself to the jurisdiction of the [Beth Din],” she had then manifested herself as “having voluntarily undertaken obedience to the religious law which such tribunals interpret and enforce.”³⁵⁰

The court again seemed unwilling to recognize that a religious person may not understand their religious identity as requiring adherence to all aspects of religious law, as understood by co-religionists.³⁵¹ While the court did not necessarily find that the wife did not experience any coercion, it found that she had not been subjected to “any particular coercion greater than that which is intrinsic in the case of any member of a religious community . . . who consequently exposes himself or herself to the ecclesiastical sanctions available for the enforcement of such decrees or such law.”³⁵²

Additionally, the court failed to realize that unconscionability may have applied. Mr. Greenberg may have refused to issue a *get* if Ms. Greenberg did not agree to arbitrate

346. *Greenberg v. Greenberg*, 656 N.Y.S.2d 369 (App. Div. 1997).

347. *Id.* at 369.

348. *Id.*

349. *Id.* at 370.

350. *Id.*

351. *See id.*

352. *Id.* (citations omitted).

all aspects of the divorce. The court also assumed that the pressure the wife felt was what one might experience as a member of any religious community “who, as a matter of conscience, feels obligated to obey the laws of his or her religious organization, or to follow the decrees of a religious court.”³⁵³ However, the effect of a *seruv* “can potentially result in the failure of one’s business, the inability to have one’s children marry within the community, or the ability to participate in necessary communal activities.”³⁵⁴

That is not to say, however, that a Beth Din’s issuance of *seruv* always disserves women. The *seruv* can play a vital role in resolving the *agunah* crisis. It can motivate recalcitrant husbands to issue a *get* when they otherwise would not. The American Jewish community has found a solution to the *get* issue without the need of a *seruv*. Major contemporary *poskim* (Jewish legal authorities) have endorsed the use of a prenuptial agreement referred to as “The Prenup.”³⁵⁵ The Prenup ensures that in the “event of divorce, the [Beth Din] will have the proper authority to ensure that the *Get* is not used as a bargaining chip.”³⁵⁶ It does so by legally binding the spouses to “appear before a panel of Jewish law judges (*dayanim*) arranged by the Beth Din of America, if the other spouse demands it, and to abide by the decision of the Beth Din with respect to the *Get*.”³⁵⁷

IV. PROTECTIONS AGAINST OPPRESSION IN CONVERSATION

In his seminal book, *Legal Transplants*, Alan Watson wrote:

Comparative Law – can be very valuable. It can have . . . practical value, for instance when law reformers searching for better law for their own system look at other solutions . . . it can have academic value, for instance when a scholar who has reached particular conclusions about a development in one system can confirm the possibility of such a development

353. *Id.*

354. Fried, *supra* note 319, at 652–53.

355. See Beth Din of Am., *Rabbinic Endorsements*, THE PRENUP, <https://theprenup.org/explaining-the-prenup/rabbinic-endorsements> [<https://perma.cc/8WUF-Q98Y>].

356. Beth Din of Am., *What Does the Prenup Say?*, THE PRENUP, <https://theprenup.org/explaining-the-prenup/what-does-the-prenup-say> [<https://perma.cc/D8BK-NPKE>].

357. *Id.*

by the knowledge that something similar happened elsewhere.³⁵⁸

In line with Watson's sentiment, the purpose of this Article is to determine the strengths and weaknesses of Islamic, Jewish, and American law in protecting parties from exploitative and oppressive contracts and to propose the adoption of the strengths of each legal system to better protect vulnerable parties facing oppression in contractual agreements.

Specifically, this Part first proposes the adoption of the common law doctrine of unconscionability within Jewish law as a means of protecting *agunah*. Second, it applies the Islamic subjective standard of duress to an American civil duress case as an example of how the Islamic standard can better accommodate issues of race, education, and socioeconomic status. Finally, it proposes that Islamic law incorporate the common law doctrine of economic duress and the Jewish law standard of necessity in order to expand the conception of necessity in Islamic law, especially in commercial contexts.

A. Applying the Common Law in Jewish Contexts

While "The Prenup" is an elegant solution to ensure that women are not intractably stuck in a "limping marriage," it does not fully address the power differential that exists under Jewish law regarding divorce and the ways in which that power differential can cause unconscionable outcomes. In a recent article, Yehezkel Margalit suggests that a possible solution to addressing the *agunah* problem is through the application of the common law "unconscionability doctrine in the spousal context."³⁵⁹ The common law doctrine of unconscionability could serve a variety of purposes, including "retroactively cancel[ing] any unconscionable 'get' settlement."³⁶⁰ In particular, the doctrine of unconscionability could be used to address "specific problematic conditions—such as a waiver of spousal entitlements, the marital assets, the continuation of the right of

358. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 9 (Univ. of Ga. Press 1993) (1974).

359. Yehezkel Margalit, *Bargaining in the Shadow of Get Refusal: How Modern Contract Doctrines Can Alleviate This Problem*, 36 OHIO ST. J. ON DISP. RESOL. 153, 175 (2020).

360. *Id.*

maintenance . . . and other aspects regarding child custody—and in the worst-case scenarios, of entirely invalidating such agreements.”³⁶¹ The nature of traditional Jewish divorce law is that an “unequal power of the contracting parties [in divorce] prevails even where the spouses at the outset of the marriage have privately regulated their spousal relations [to be more equal].”³⁶²

The power disparity between husbands and wives in the dissolution of a marriage often is further exacerbated “when . . . the wife, for several biological, religious, sociological, psychological, and economic reasons is very eager to get divorced and remarried.”³⁶³ The disparity in the power to unilaterally divorce under Jewish law leads to a process that creates an unequal bargaining power between parties contracting to dissolve their marriage. Such an “unequal power of the contracting parties commonly serves as a proxy for procedural unconscionability.”³⁶⁴ Under these circumstances, Margalit argues that American and Israeli courts should review divorce settlements closely for substantively unconscionable terms.³⁶⁵ Domestic violence within the “spousal history . . . may reveal unseen unconscionability underlying the entire contract.”³⁶⁶ While a specific act of violence may not have preceded the dissolution agreement, “the whole agreement should be carefully inspected . . . for any substantive unconscionability.”³⁶⁷ Other common law jurisdictions have begun to recognize the impact

361. *Id.*

362. *Id.*

363. *Id.* at 176 (first citing Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 45–46 (1989); then citing Marcia Neave, *Private Ordering in Family Law Will Women Benefit?*, in PUBLIC AND PRIVATE FEMINIST LEGAL DEBATES 144, 169–70 (Margaret Thornton ed., 1995); and then citing Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 547–51 (1998)).

364. *Id.*

365. *Id.*

366. *Id.* (first citing Lisa Fishbayn, *Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce*, 21 CAN. J.L. & JURIS. 71 (2008); then citing Yael Machtinger, *In the Name of God? ‘Get’ Refusal as Domestic Abuse*, in RELIGION, GENDER, AND FAMILY VIOLENCE: WHEN PRAYERS ARE NOT ENOUGH 209 (Catherine Holtmann & Nancy Nason-Clark eds., 2018); and then citing Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT’L & COMP. L. 279 (2009)).

367. *Id.* (first citing CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); then citing LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME (1st ed. 1984); and then citing Lenore E. A. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525 (1977)).

that *get* refusal can have on bargaining power.³⁶⁸ For example, in a 2015 Australian magistrate court decision, the court agreed that *get* withholding can constitute unlawful “psychological and emotional abuse.”³⁶⁹ Despite the interventions of a rabbi and the Melbourne Beth Din, the husband refused to grant the *get* unless the wife paid him “a substantial amount of money.”³⁷⁰ Margalit suggests that if American courts also recognize unconscionability as potentially present in divorce settlements with *get* refusal, then Halakhic authorities globally will reform existing legal rules to prevent the exploitation of women that *get* refusal can cause.³⁷¹

B. Applying Islamic and Jewish Law in American Contexts

American law could also be improved in the approach to the protection of parties from contractual oppression and exploitation. The Islamic subjective standard of duress and the Jewish standard of the jesting rule both provide examples of how American law could better protect vulnerable parties. The case of *King v. Lewis* provides an example of when the subjective standard in the Islamic law doctrine of duress and the Jewish law standard of the jesting rule might lead to a more just outcome.³⁷² *King* involved a Black farmer, Merritt Lewis, who made statements against the county sheriff, J.C. Gay, that he “had been stealing money” and accepted forty dollars to “release a defendant in a pending criminal prosecution.”³⁷³ There is some indication that Lewis made the statements before a grand jury.³⁷⁴ The sheriff expressed extreme displeasure about Lewis’s statements and had his brother tell Lewis, “[I]f you don’t come

368. *Id.* at 182.

369. Peter Kohn, *Court Ruling Eases Jewish Divorce*, AUSTRALIAN JEWISH NEWS (Mar. 9, 2015, 12:00 AM), <https://www.australianjewishnews.com/court-ruling-eases-jewish-divorce> [<https://perma.cc/6FDG-ZDWS>].

370. *Id.*

371. Margalit, *supra* note 359, at 182. Such halachic reform could be based in the expansion of the Talmudic ruling on the case, as described above, of a widow who wishes for her brother-in-law to perform *halitzah*, promises to pay him, and after completion of the *halitzah*, refuses to perform. See Babylonian Talmud, Yevamot 106a.

372. See Abou el Fadl, *supra* note 147, at 156; see generally *King v. Lewis*, 4 S.E.2d 464 (Ga. 1939).

373. *King*, 4 S.E.2d, at 466.

374. *Id.*

to town and see [the sheriff], trouble will be bad [for] you.”³⁷⁵ Thereafter, Lewis went to town to see the sheriff, and a coordinated meeting later occurred between the sheriff, Lewis, and E.R. King—an attorney to whom the sheriff had referred Lewis.³⁷⁶ Testimony indicates that King told Lewis that “it was a good thing he had come down, and that [the sheriff] was ‘just fixing to come up and attach everything you got for \$3,000 slander, but’ stated that he would compromise the claim.”³⁷⁷ Lewis “protested that he had no money and that there was a debt on his farm.”³⁷⁸ The resolution of the meeting involved King “agree[ing] to settle for \$500, [and] to be represented by two notes each for \$250, one payable the following fall and the other a year later.”³⁷⁹

Thereafter, Lewis hired his own attorney, who brought “a petition in equity against King[] and the sheriff, in which he charged that there had been a conspiracy between [them] . . . to extort money from him upon threats of a criminal prosecution and physical violence.”³⁸⁰ The petition further clarified that Lewis “had not been guilty of circulating any false or untrue reports concerning the defendant [and] . . . was forced, not of his own free will, to execute said notes.”³⁸¹ Lewis sought in the petition to have the court cancel the notes, issue an “injunction against their transfer lest they be acquired by an innocent purchaser, and [to recover] reasonable attorney’s fees.”³⁸² Lewis specifically sought relief on the grounds of a lack of consideration and duress.

The court at first seemed to display some sensitivity as to the particular predicament Lewis found himself in as a person of color in the American South in the 1930s, stating:

With an appreciation for the veneration and sometimes fear in which the “high sheriff” is held, especially by some members of the [Black] citizens in this southern country, we can well understand how the plaintiff, when he began to hear rumblings of the sheriff’s wrath, could have become

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.* at 466–67.

381. *Id.* at 467.

382. *Id.*

frightened and fearful of the consequences to himself. This is especially true when you consider that his two brothers were anxiously prodding him and urging him to make a prompt adjustment.³⁸³

The court, however, quickly changed course, stating that although apprehension on Lewis's part might have resulted in "his signing notes which but for the fear generated he would not have signed, [that] does not measure up to the legal definition of duress as we have hereinabove found it to be stated."³⁸⁴ The court took a distinct stance against the subjective experience of the plaintiff, stating the rule that "[d]uress must come from without, and not from within . . . and can not [sic] be a creation of the mind of the person claiming his will has been restrained by fear."³⁸⁵ Furthermore, the court ruled that "[t]he threat must be sufficient to overcome a person of ordinary firmness."³⁸⁶

The application of Islamic law to this case would lead to a different outcome. First, Islamic law would take into account the power differential between Lewis and the sheriff and would apply Sarakhsi's analysis regarding "commands or requests by superiors known for their injustice or oppression."³⁸⁷ Second, unlike the court's ruling in *King*, Islamic law would require an inquiry as to the subjective feelings of the plaintiff about whether or not he was coerced.³⁸⁸ Rather than taking the perspective of the common law that duress must "come from without," Islamic law considers, as noted earlier:

[T]he preponderance of thought [of the victim] and what he felt because the victim's belief takes precedence over the reality concerning matters that we have no way of verifying independently The conditions of people vary according to their ability to withstand pain therefore we have no alternative but to consider what the victim believed.³⁸⁹

383. *Id.* at 468.

384. *Id.*

385. *Id.*

386. *Id.* at 467.

387. Abou el Fadl, *supra* note 147, at 156, n.140.

388. *Id.* at 156–57.

389. *Id.* at 130 (citing al-Sarakhsi, *al-Mabsut* (Cairo: al-Haji Muhammad Effendi, n.d.) vol. 23 p.49).

In short, Islamic law maintains that “duress differs according to the circumstances of each individual.”³⁹⁰ Islamic law would require a duress analysis that takes into consideration the subjective experience of an older, socioeconomically disadvantaged Black man faced with threats from someone in police authority.

If applied to the case of *King*, Jewish law would look to the duties the sheriff owed to Lewis, given his role as a sheriff. In applying the jesting rule, Jewish law would look to the legal duty, or at least religious commandment, that the sheriff had in upholding justice. The contemporary application of the jesting rule would not require that the distress Lewis felt rose to the level of impairing his free will.³⁹¹ Rather, Jewish law would look to the duty of justice the sheriff owed Lewis and whether the sheriff had a moral obligation to Lewis he failed to provide. Recall the example of the rabbi who is deemed a “thief and coercer, because he knows that the bills of divorce may be given in his city only with his permission, and the one who must give a bill of divorce is forced to give him all he possesses.” Like the coercive rabbi, Sheriff Gay would likewise be deemed a thief and coercer because he knows that, as sheriff, he is the individual in the city who can either maintain Lewis’s peace and safety or take actions which would result in Lewis’s death.³⁹²

Therefore, an application of the jesting rule to *King* would likewise arrive at a different outcome than the court reached, allowing the voidability of the debt the sheriff forced Lewis to give.

C. Applying the Jesting Rule and Economic Duress in Islamic Law

Finally, the jesting rule from Jewish law and the doctrine of economic duress from American law provide ways that Islamic law could expand the concept of necessity in understanding exploitative and oppressive contracts. While Islamic law has a concept of necessity that can lead to the voidability of a contract, necessity is understood as “a distress that causes a person to procure an urgent and necessary thing that he has no option but

390. Jadalhaq, *supra* note 158, at 39.

391. See Lifshitz, *supra* note 236, at 437–38.

392. Lifshitz, *supra* note 236, at 438.

to get, or else encounter serious danger.”³⁹³ Jewish and American jurists conceive of a more expansive notion of necessity. As noted earlier, the Talmud does not differentiate between personal and economic distress.³⁹⁴ Additionally, the doctrine of *ona’ah* (price fraud) allows the application of the jesting rule to cases where the non-distressed party has a “clearly enforceable legal duty or, at least . . . a clear religious commandment to aid the distressed person.”³⁹⁵ While Islamic law recognizes the impact a power differential between parties may have because one party has formal authority over the other,³⁹⁶ Islamic law could benefit from adopting the Jewish legal framework of duties in situations where a religious obligation exists to aid a distressed person. Likewise, Islamic legal limitations on the abuse of authority could be expanded to situations where a party does not necessarily hold authority over another person but does hold a moral right that the other person is due.

Additionally, the American doctrine of economic duress could expand the concept of necessity in exploitative contracts in Islamic law. The type of necessity present in the doctrine of economic duress is more attenuated than in Islamic law. As noted above, Islamic law requires necessity that is “urgent and necessary.”³⁹⁷ While Islamic law does recognize that certain types of economic threats, such as destruction of property, could result in coercion, Islamic law typically requires an immediacy to such threats. Economic duress applies when the coercer’s threat relates to cancelling or breaching an existing contract between the two parties. The incorporation of the doctrine of economic duress into Islamic law would provide important protections for vulnerable parties, as it would also provide the subjective standards of Islamic law. Such a doctrine could both recognize that the threats parties face may extend beyond immediate threats of personal and physical damage and can be particular to the circumstances of an individual (e.g., their socioeconomic status or gender identity).

393. Jadalhaq, *supra* note 158, at 36.

394. Lifshitz, *supra* note 236, at 438.

395. *Id.* at 439.

396. Abou el Fadl, *supra* note 147, at 131.

397. Jadalhaq, *supra* note 158, at 36.

CONCLUSION

*History of a system of law is largely a history of borrowing of legal materials from other legal systems and of assimilation of materials from outside the law.*³⁹⁸

– Roscoe Pound

This Article has just begun the exploration of ways in which Islamic, Jewish, and American law can inform one another on how to best prevent oppression and exploitation in the law. This exploration has been limited to private law, in part because private law has become an important locus for reform in areas of the law ranging from employment to divorce to finance.³⁹⁹ Religious arbitration in the United States has become the predominant means by which American Jews and Muslims can litigate their respective legal traditions, from family to commercial transactions. As members of American society, American Muslims and Jews also have their legal expectations influenced by the legal norms of the political and legal society. That is not to say, however, that the legal influence should be unidirectional. Unfortunately, there is often a presumption that religious legal systems have nothing to offer secular legal systems. But Islamic, Jewish, and American legal systems all have something to offer one another. By adopting aspects of other legal systems, without a presumption of the perfection of a particular system, better legal systems—ones with less exploitation and oppression—can be achieved.

GLOSSARY

Agunah: Under Jewish law, a woman who is stuck in her religious marriage, a “chained wife,” 154, 200, 205–06.

al-siyanat: People of reputation, 185.

bay’ al-mudtar/al madghut: Contracts of necessity, 171, 175.

Beth Din: A rabbinical court of Judaism, 201–205, 208.

dayanim: Jewish law judges, 205.

398. WATSON, *supra* note 358, at 22 (quoting Roscoe Pound).

399. See Margalit, *supra* note 359, at 182 (discussing the influence of modern contract law in recognizing power disparities).

dhawi ‘il-muru’at: People knowing of proper chivalry or morals, 185.

fadl mal bil ‘iwad: The Islamic law doctrine of unjust enrichment, 171, 173.

Fiqh: Islamic scholars’ interpretations of the Sharia. Term used to differentiate between God’s actual divine will (*Sharia*) and the human attempt to understand it, 167, 169.

Gazlan: In Jewish law, someone receiving the money in a transaction involving duress, 199.

Gemirat ha-Da’at: In Jewish law, a procedural approach that seeks to preserve the free will of the parties entering into a contract, 194–96.

Get: A bill of divorce under Jewish law, issued by the husband to the wife, 200, 202–03, 205, 207–08, 212.

ghabn fahish: Under Islamic law, the principle against unfair dealing, meant to help society guard against unjust practices, 171, 173.

gharar: Under Islamic law, the concept of excessive speculation, uncertainty, or ambiguity, 171, 173.

ghayr mulji: Non-forcible/non-compelling duress; a foundational category of duress under Islamic law, 178.

Halakha: Jewish law broadly understood to encompass all the laws and ordinances evolved since Biblical times, 189–190.

Halitzah: A ceremony freeing a widow to marry whomsoever she desires, which the court cannot compel, 192–93, 195, 208.

Hamsan: In the context of taking another’s property against their will, someone who gives money against their will, 199.

ikrah naqis: Under Islamic law, incomplete compulsion in a duress action, in contrast to *tam*, 179.

istikhfaf: Under Islamic law, speech that would qualify as blasphemy, defamation, or public denegration, 184.

The Mejelle: A book codified by Hanafi Muslim jurists on civil transactions; serves as an accurate representation of late Hanafi jurisprudential norms and doctrines, 168, 173, 175, 179.

mulji: Under Islamic law, forcible/compelling duress; a foundational category of duress, 178.

ona’ah: The principle of pricing unfairness under Jewish law, which invalidates a contract due to excessive pricing, 195–96, 212.

pendente lite: A legal term meaning “pending the proceeding,” often a court order that is in effect only until the suit is resolved, 201–04.

poskim: Jewish legal authorities, 196, 205.

riba: Commonly translated to mean “usury,” but literally translating to a general prohibition on contracts where a party received a profit that they did not deserve. In modern contexts, the word is often used when discussing Islamic finance, 171, 174–75.

riba al-fadl: A type of *riba* in which a contracting party acquired an unlawful excess profit, 171–72.

riba al-nasi’a: A type of *riba* where a party gained an unlawful advantage by speculating on uncontrollable risks through the use of contract terms, 171, 174.

ru’a’: The immoral faction of society, unconcerned with social opinion and position, 185.

Seruv: A form of contempt of court issued by a rabbinical court in attempt to compel a certain action by an individual, 153, 199–02, 204–05.

Sharia: Often used to refer to laws followed by Muslims, also more broadly understood to mean the divine will itself, 167.

Talmud: A primary source of Jewish religious law, generally referring to the Babylonian Talmud, which is considered to be the most authoritative of the two Talmuds, 189–95, 198–99, 208, 212.

tam: Under Islamic law, complete duress, 179.

Tzedakah: Commonly used to signify charity under Jewish law, applying when a defendant is in need, and the use of the plaintiff’s property or resources will not cause the plaintiff harm, 198.

yetzer hara: Within Judaism, a person’s evil self, 201.

yetzer hatov: Within Judaism, a person’s better self, 200–01.