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## The Young Astronomers

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### I

Oliver Wendell Holmes and Richard Posner are the two dominant judge-scholars in the American legal tradition. They share much in common. They were born with a clear, effortless prose style that allowed them to capture subtle ideas with a few brushstrokes. Both enjoyed liberal educations (at Harvard and Yale, respectively). Thereafter, each continued to read the classics (in their original languages) and remain in tune with the intellectual currents of their time. They served on distinguished law faculties (Holmes at Harvard; Posner at Stanford, then Chicago) before going on to spend most of their careers on the bench. And, as scholars, each started as a pragmatist who made his mark by producing a single volume that tried to make sense of the common law. The task was accounting for the outcome of discrete cases. What mattered was what courts did, not what they said. They were both young astronomers who looked skyward and devoted all their energy to giving an account of the heavens.<sup>1</sup>

Holmes was the young astronomer who, while a careful observer, doubted there was any inner logic to the movement of the legal heavens:

[W]hile, on the one hand, there are a great many rules which are quite sufficiently accounted for by their manifest good sense, on the other, there are some which can only be understood by refer-

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<sup>1</sup> This metaphor has, of course, long been associated with Oliver Wendell Holmes, Jr. See Oliver Wendell Holmes, Sr., *The Poet at the Breakfast-Table* (Osgood 1872).

ence to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs.<sup>2</sup>

He cautioned against expecting too much wisdom from old cases:

[J]ust as the clavicle in the cat only tells of the existence of some earlier creature to which a collarbone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.<sup>3</sup>

By contrast, the young Richard Posner believed in an internal logic to the movement of the spheres. Economic principles explained the outcome of decided cases and hence do much to help one decide new ones.

For this reason, when Posner joined the bench, it might seem his ambitions were greater than those of Holmes. If there were an inner logic to common law decisionmaking, the judge who understood it should be able to decide cases more easily. Posner not only had a distinctive vision of the common law, but implicitly claimed that this vision could assist judges in deciding cases. In this Essay, I examine one of Richard Posner's opinions—*Oxford Clothes XX v Expeditors Intern of Washington, Inc*<sup>4</sup>—to show whether, over one domain, he has been able to realize that promise.

## II

Oxford Clothes made expensive suits for men out of imported cloth. It defaulted to its largest creditor, one that had a lien on all of its assets. This creditor foreclosed on the assets and transferred them to a newly formed corporation (Oxford Clothes XX, Inc). To the outside world, the business operated as before. The new entity, however, was not liable for the debts of the old, and hence Oxford Clothes's old general creditors were left out in the cold. One of these was Expeditors, a firm that specialized in clearing goods through customs. The new entity—one that appeared to the outside world the same as the old—asked Expeditors to clear new cloth through customs. Expeditors cleared it through customs, but then refused to turn it over until the company was paid everything that the old entity (Oxford Clothes, Inc) owed it.

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<sup>2</sup> Oliver Wendell Holmes, Jr., *The Common Law* 5 (Belknap 1967) (Mark DeWolfe Howe, ed).

<sup>3</sup> *Id.* at 31.

<sup>4</sup> 127 F3d 574 (7th Cir 1997).

Oxford XX sued Expeditors in federal court. Because it could not meet its obligations to major retailers without the cloth, Oxford XX sought a preliminary injunction, but the district judge refused to issue it. At this point, Oxford XX concluded it had no choice. It gave in to Expeditors' demands and paid what the old corporation owed. After it got possession of the fabric, Oxford XX went back to court demanding that Expeditors return the money on the ground that the payment had been extracted from it under duress. The case finally made its way to the Seventh Circuit and Judge Richard Posner.

In deciding this case, Posner had to identify the essential elements of contractual duress. It is not easy. Renegotiations during the course of a contract may reflect raw opportunism. A party who demands changes to an existing deal may simply be taking advantage of the other party's vulnerability. Consider the following. One manufacturer makes specialized radar sets for the Navy.<sup>5</sup> Another promises to supply a crucial component for a fixed price, but at the last minute demands a higher price knowing that no one else can deliver the needed parts on time. It extracts a better deal even though nothing justifies it. A willingness to enforce new terms under such circumstances ultimately makes both parties worse off. When I cannot prevent you from holding me up, I cannot rely on your promise as much in the first instance and it is therefore less valuable. Equipment makers will pay less, use less efficient means of production (such as vertical integration), and make fewer supplier-specific investments:

It undermines the institution of contract to allow a contract party to use the threat of breach to get the contract modified in his favor not because anything has happened to require modification in the mutual interest of the parties but simply because the other party, unless he knuckles under to the threat, will incur costs for which he will have no adequate legal remedy.<sup>6</sup>

But at other times, renegotiation is in the mutual self-interest of both parties. The Great Depression brought with it deflation and made it impossible for an existing tenant to pay the old rent, yet no business could enter the same premises and pay more. The old tenant remained the highest-valued user, but neither the current tenant nor anyone else could survive at this location with the current rent. It was in the tenant's interest *and the landlord's interest* to renegotiate the

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<sup>5</sup> See *Austin Instrument, Inc v Loral Corp*, 29 NY2d 124, 272 NE2d 533, 534 (1971) (describing how subcontractor Austin Instrument refused to deliver necessary parts for a radar system unless they received substantial price increases in a renegotiated contract).

<sup>6</sup> *Selmer Co v Blakeslee-Midwest Co*, 704 F2d 924, 927 (7th Cir 1983) (Posner).

lease and to lower the rent.<sup>7</sup> The law of contracts faces the challenge of distinguishing between mutually beneficial renegotiations on the one hand and opportunistic hold-ups on the other.

Posner starts the inquiry into whether the doctrine of duress is available in a case such as *Oxford* in the same way he begins other inquiries: finding the iconic precedent. For duress, it is *Alaska Packers' Association v Domenico*,<sup>8</sup> an admiralty case decided by the Ninth Circuit at the start of the last century. The case is rarely cited.<sup>9</sup> The young associate or law clerk trolling for binding precedent does not approach such questions in the same way. For them, *Alaska Packers'* is ancient and irrelevant. But for Posner such a case serves rather as an essential benchmark against which the claims before him can be assessed.

In *Alaska Packers'*, the appellate court recounts how a group of fishermen recruited to work for a season in Alaska refused to fish without a pay increase. Their employer gave in to their demands, but then refused to pay once the season was over. The fishermen sued and the court held the renegotiated deal unenforceable. In return for the promise to increase wages, the fisherman gave nothing. They agreed to do only what they were already legally obliged to do. Hence, the employer's promise was not given in exchange for anything. It was without consideration and therefore unenforceable.

It takes little reflection to see that resolving the case using the doctrine of consideration is of little use in separating those situations in which the renegotiation is value-enhancing from those in which it is not. The tenant hit by the Great Depression and the supplier who sees an opportunity to jack up his price are both under a pre-existing duty to perform. The change in contract terms is not in exchange for any new consideration. Moreover, if an absence of consideration somehow distinguished the two cases, the rule is of little use as it is trivially easy to circumvent. If *Alaska Packers'* were indeed merely about consideration, the fishermen could make the same demand the next year, but offer at the same time some small change in their promise (such as

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<sup>7</sup> Courts have sometimes refused to recognize this renegotiated promise on grounds that no consideration exists when one party merely undertakes to do what he already obliged himself to do. See, for example, *Levine v Blumenthal*, 117 NJ L 23, 186 A 457, 458 (1936) ("The principle is firmly imbedded in our jurisprudence that a promise to do what the promisor is already legally bound to do is an unreal consideration.").

<sup>8</sup> 117 F 99 (9th Cir 1902).

<sup>9</sup> *Alaska Packers'* has been cited thirteen times in the last quarter century, according to a Lexis Shepard's citation search. Twelve of those citations appeared in cases decided by the Seventh Circuit, of which Posner authored eight. (Of the other four, three were authored by Judge Easterbrook and the other by Judge Ripple). See also Debora L. Threedy, *A Fish Story: Alaska Packers' Association v. Domenico*, in Douglas G. Baird, ed, *Contracts Stories* 335, 342 (Foundation 2006) (describing how Posner has established the prevailing view of *Alaska Packers'* as a classic case of renegotiation under duress).

working one day or one hour or one minute longer) in exchange for the promise of higher wages. *Any* increased burden assumed would itself provide sufficient consideration under classical doctrine.

But for Posner as both judge and scholar, one must go beyond the language of the opinion. The true ground of the decision is duress: “Although the technical ground of decision was the absence of fresh consideration for the modified agreement, it seems apparent . . . that the court’s underlying concern was that the modified agreement had been procured by duress in the form of the threat to break the original contract.”<sup>10</sup> To gain some traction on this question, Posner makes his reliance on economic principles explicit: “Duress, understood most concretely, is the situation in which one person obtains a temporary monopoly that it tries to use to obtain a benefit to which it is not entitled.”<sup>11</sup> It might seem this observation does not take us that much further. How does one show how the other was trying to identify “a benefit to which it was not entitled,” as opposed to asking for something to which it *was* entitled? Why is the tenant during the Great Depression “entitled” to ask for a break from an otherwise binding contact, but the supplier of a crucial part is not?

Economics provides some help here, of course. Some renegotiated deals are value-enhancing and others are not. In our Depression hypothetical, the tenant could not stay in business under the terms of the original lease. The renegotiation did not merely redistribute wealth between the parties, but also ensured that assets would be put to their highest valued use. Even the landlord was better off with the new contract, as no one could operate under the terms of the existing lease. Nevertheless, distinguishing value-enhancing renegotiations from others is hard, at least if the party engaged in opportunism exercises some modest imagination. Even outright extortion is done with a certain amount of indirection. The gangster does not say he will break your shop window unless he is paid off. Instead, he offers you “protection” from such mishaps in return for a fee. Hypocrisy is the deference vice pays to virtue.

Focusing on duress does not make even a case such as *Alaska Packers’* easy, as even a cursory examination of the record in that case makes plain.<sup>12</sup> The fishermen in *Alaska Packers’* may not have en-

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<sup>10</sup> *Selmer*, 704 F2d at 927.

<sup>11</sup> *Professional Service Network, Inc v American Alliance Holding Co*, 238 F3d 897, 900 (7th Cir 2001) (Posner).

<sup>12</sup> Debora Threedy has made a comprehensive study of the record in the case. See Threedy, *Fish Story* at 350–51 (cited in note 9). For the full trial transcript of the case, see Transcript of Record, *Alaska Packers’ Association v Domenico*, No 789, 18–22 (9th Cir filed Feb 4, 1902), online at [http://old.law.utah.edu/faculty/bios/threedyd/threedyd\\_alaska\\_transcript.pdf](http://old.law.utah.edu/faculty/bios/threedyd/threedyd_alaska_transcript.pdf) (visited Sept 29,

gaged in extortion at all. They asserted that the nets they were given were defective. Because their pay was geared to the number of fish they caught, they might well have had legitimate grounds for complaint if the equipment they were given was not what they expected. Indeed, if the packers had promised serviceable nets and these nets were not serviceable, the packers would have been in breach and the fishermen would have been entitled to cease performance. A renegotiated contract in which the fishermen agreed to work with defective nets in return for higher wages would be entirely enforceable.

In rejecting the fishermen's account of conditions in Alaska, the Ninth Circuit relied in part on the intuition that the packer had every incentive to provide good nets. But the judge who wrote *Economic Analysis of Law* cannot accept such intuitions uncritically, and, like many untutored intuitions, this one is flawed. A trade-off must be made between the costs of buying new nets and the costs of fishing with older, less efficient ones. The packer bore all the costs associated with acquiring new nets, but did not enjoy all of the benefits of using them, given that the fishermen were paid on the basis of the number of fish they caught.

Moreover, while the fishermen had an incentive to catch as many fish as possible, the packer had an upper limit on the number of fish it could use. It had the supplies necessary to can only a given number of salmon and had no use for the excess. Given that the packer needed a certain number of the fishermen to man the ships back and forth, it might have had no need to provide them with decent equipment. It may have needed so many hands to sail the boat that even with substandard nets the fishermen would have caught enough to meet the capacity of the plant.

There is an additional wrinkle. This fishery departed from customary practice. It used old nets in combination with new nets. The packer claimed that unique conditions at this fishery justified this departure from convention. Even assuming that this was true, however, the packers may have had a duty to disclose. When the packer promised to provide nets, it might have been obliged, unless it disclosed otherwise, to provide nets of the type ordinarily used. Even if they had no such obligation, this case might be one of mutual mistake.<sup>13</sup> Each party reasonably thought that the bargain was for the type of net to which they were accustomed. The mutual mistake may have prevented

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2007) (describing one witness's claim that the fishermen demanded increased pay only after finding that the nets supplied by the Packers were defective).

<sup>13</sup> The Posnerian judge would think of *Raffles v Wichelhaus*, 2 H & C 906, 159 Eng Rep 375, 375 (Ex 1864) (holding a contract unenforceable based on confusion between the parties as to which of two ships, both named "Peerless," was to deliver a shipment of cotton).

an objective meeting of the minds and hence forestalled an enforceable contract. If there was no enforceable deal initially, any deal struck in Alaska would be enforceable.

The Ninth Circuit also likely misunderstood the bargaining dynamic. The amount of bargaining power that the fishermen enjoyed may have been modest. The court assumed that a strike would expose the packer to heavy losses. This was not true. First, the packer relied upon native fishermen in addition to those who manned the ship. Even if the fishermen under contract did not work at all, the season's catch would not be entirely lost. Second, the Alaska Packers' Association was a cartel and, as such, artificially limited the supply of salmon produced each year. It was in the process of shutting down its least efficient canneries and would soon close this one. Even if no salmon were caught from this cannery, the packer could make up the deficit either by increasing output or releasing more of the surplus catch from previous years to the market.

By contrast, the fishermen found themselves thousands of miles from home and counted upon the packer to provide food and housing. Their dependence on the packer further constrained them from acting opportunistically. The packer may well have had the ability to control naked opportunism on the part of the fishermen. To be sure, the packer needed to recruit additional fishermen in subsequent years, and no one wants to work for a business that refuses to pay the wages it promises. Nevertheless, as long as others could distinguish situations in which the packer was retaliating against the fishermen for their own opportunistic behavior from those in which it was behaving opportunistically itself, the reputational costs of retaliation might be manageable.

Such messy factual inquiries, however, are quite beside the point. For Posner, the sine qua non of an action for duress is the existence of a temporary monopoly. Whether it actually existed under the facts of *Alaska Packers'* is neither here nor there. With respect to any claim of duress, there must be a situational monopoly. The essential lesson of *Alaska Packers'* is that the packer's claim was plausible only because it had no access to a court at the time the fishermen demanded higher pay. Regardless of the ultimate merits, the case stands for the proposition that every duress case must contain an essential ingredient—a situational monopoly. When it is missing, the claim of duress can be rejected.

A situational monopoly can exist only if the party claiming duress now in court once did not have access to the court: "The hallmark of duress or extortion is that the victim has no feasible legal remedy."<sup>14</sup>

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<sup>14</sup> *Oxford*, 127 F3d at 579.

This distinguishes *Alaska Packers'* from many other cases—including *Oxford*—in which duress is alleged:

The promise had been made under duress because the defendant had had no feasible remedy against the seamen's demand. It could not have "covered" by hiring substitute seamen on the spot, given the brevity of the Alaska salmon season and the limited supply of seamen in Alaska. And it would not have been feasible for it to sue them, as the filing of many suits would have been necessary and the chances of collecting a significant judgment from each seaman at reasonable cost would have been remote.<sup>15</sup>

*Oxford's* action for duress fails because, unlike the packers, the doors of the courthouse were always open to it. Even if one accepts the allegations of the complaint—that *Expeditors* had utterly no leg to stand on and was acting entirely improperly in holding on to the cloth—*Oxford* had to lose because it had (and indeed invoked) an entirely feasible legal remedy. Its failure to appeal once it lost in the district court was inexplicable.<sup>16</sup>

By zeroing in on the question of whether the aggrieved party has an adequate legal remedy, Posner provides a rule that resolves most of the cases. Only in hard cases, such as *Alaska Packers'*, where going to court is not an option, does one have to engage in the difficult inquiry of whether what is happening is genuine duress or whether it is a reasonable effort to renegotiate in light of changed circumstances.

Under Posner's approach, it is unnecessary to ask whether advantage-taking is going on in the vast majority of cases. Among the various economic principles at work in cases of alleged economic duress, Posner focuses on the one that is both easy to decide and that disposes of most of the cases. For Posner, a case such as *Alaska Packers'* is not so much a judicial opinion where the analysis weaves together fact and law in an intricate web, as much as it is a useful shorthand for an important and simple idea. The facts themselves are not even that important. Indeed, over time, Posner's recounting of the facts of *Alaska Packers'* has become increasingly distant from those in the opinion. The fishermen become sailors on a boat trying to coerce the captain, as opposed to fishermen encamped in a barracks trying to deal with an inexperienced agent.<sup>17</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See, for example, *Trompler, Inc v NLRB*, 338 F3d 747, 751 (7th Cir 2003) ("Seamen on board a ship that was fishing for salmon in Alaskan waters during the short fishing season struck for higher wages. The captain agreed to modify the workers' employment contract to pay them the higher wages they were demanding.").



## III

Posner's approach—as powerful and useful as it is—may partially obscure a problem that is deeply embedded in any system of civil justice.<sup>18</sup> What does it mean to say that an effective judicial remedy is not available? *Alaska Packers'* is a case that lives in a world in which the courts are not available. But when is this ever going to happen today? Technological innovation has reduced the distance to the courthouse for everyone. If someone succumbs to a demand today because there is no effective legal remedy to protect his rights, in what sense can one say that the individual possesses a right in the first instance? For a judge such as Posner, the answer is simple: not very often.

To explain why duress ought to be recognized in a case such as *Oxford*, one needs to explain why preliminary relief was not available. If we accept (as Posner does for purposes of analyzing the duress question) that Expeditors had no right to keep the fabric at all, *Oxford* should have been able to obtain preliminary relief. Expeditors asserted it had only a lien in the cloth. Hence, by its own account, its only right in the cloth was the right to be paid a fixed sum. The judge would need only require *Oxford* to post a bond as a condition of granting preliminary relief to protect Expeditors fully. Moreover, unlike an ordinary contract dispute, this was one in which common law courts had long granted specific relief. In short, there were few costs to granting a preliminary injunction, even if it turned out later to be issued erroneously. There was no harm to Expeditors by denying the injunction and substantial benefit to *Oxford* from granting it. As long as Expeditors had no right to keep the fabrics on the basis of a debt owed by a different corporation, refusing to grant the preliminary injunction seems wrong.<sup>19</sup>

For Posner, however, an error on the part of the district judge makes no difference. Posner appears quite inclined to accept the idea that the district court should have issued the injunction. Without quite saying so, he leaves the impression that the district court blundered: Expeditors made silly noises about having a lien on the fabric, and the judge thought such an argument both meritorious and sufficient when it was likely neither. But error on the part of the district court is irrelevant. *Oxford* could still have sought immediate relief in the Seventh Circuit. Some appellate courts would not be able to respond

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<sup>18</sup> Posner wrote *Oxford* at the time he was Chief Judge of the Seventh Circuit and more interested than usual in problems of judicial administration.

<sup>19</sup> This standard way of thinking about preliminary injunctions as a way of minimizing Type I and Type II error is, of course, another contribution of Posner's. See generally *American Hospital Supply Corp v Hospital Products Ltd*, 780 F2d 589 (7th Cir 1986) (evaluating probability and severity of harm to the respective parties so as to “minimize the costs of being mistaken”).

within the few days that Oxxford needed relief, but the Seventh Circuit under Posner was an exception.<sup>20</sup> Moreover, the ability to appeal should not matter. Duress is not a doctrine that serves to protect litigants from judicial error. The right to bring a duress action in the face of a stupid judicial decision is little more than the right to bring the same civil action again if the first judge decides incorrectly. Finality is an essential feature of all civil justice systems, all of which are imperfect in some degree.

If the district court was correct in denying the preliminary injunction, the case of duress is weaker still. Duress should not be available merely because of the inadequacy of the legal relief available at the time someone succumbed to the pressure of the situational monopoly. The standard remedy for breach of contract—expectation damages—is systematically undercompensatory, at least in practice. But a shortfall in the protection contract law provides for victims of breach of promise cannot be a generic ground for duress. It would essentially allow a promisee to recover the difference between a fully compensatory damage remedy and the one that the law of contracts has chosen to provide. Recognizing duress in such cases undercuts the idea under our law of contract that the promisee's recourse in the event of breach is expectation damages. A promisor has a choice between performing or paying damages. As a practical matter, those who bargain for promises are rarely indifferent between the promise and an action for damages, but the law does not give them more.

It is hard to see how duress can exist as a coherent cause of action when a promisor threatens not to perform and the promisee agrees to provide additional consideration to induce performance. By demanding higher pay in return for performing, the promisor is merely paying a price to induce the promisor to give up one of the rights the law gives her—the right to breach and pay money damages in lieu of performance. At common law, a promisor has the option to pay damages rather than perform and this option has value.

As long as the parties are physically able to get to court and ask for preliminary relief, why should they ever be able to plead duress? Such relief may not be available, but the absence of preliminary relief suggests that the legal system has made the judgment that suing for damages after the fact is sufficient. The mechanism the law puts in place to vindicate a given right cannot be separated from the right itself. Introducing duress as a backstop second-guesses the decision

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<sup>20</sup> See generally *Kolz v Greer*, 1995 WL 231845 (7th Cir) (affirming via expedited review a preliminary injunction entered on March 21, after hearing the case on March 30, and entering judgment on April 3). Posner was the Chief Judge of the Seventh Circuit from 1993 through 2000.

already embedded in the law about the protection afforded someone who calls on the power of the state to enforce a promise. The idea of economic duress should not enter the stage, as doing so alters without justification whatever remedies for breach of contract the law has chosen to give Oxxford.

Posner has never written an opinion in which he found duress available to a litigant. But, for the young astronomer—whether Holmes or Posner—what matters is not what the judge says but the judgments he issues. For them, the job of the legal pragmatist is one of mapping the judgments that emerge from litigated disputes. Hence, to provide an assessment of Posner's approach to duress, we can cast the net more broadly and look at all the economic duress cases in which he was on the panel. When we do this, we can find one case in which he joined an opinion in which a renegotiated agreement was held not to be enforceable.

In *Contempo Design, Inc v Chicago & NE Ill Dist Council of Carpenters*,<sup>21</sup> the employer and the union agreed to abide by the terms of an industry-wide collective bargaining agreement unless either chose to opt out and give the other three months' notice. The agreement included a no-strike clause. Nevertheless, without giving the proper notice, the workers demanded new terms and went on strike to secure them. The strike caught Contempo at a time when it was courting a large new customer and facing financial pressure from its banks. It succumbed to the employee demands to get them back to work and then sought to have the contract rescinded on the ground that it was not supported by any additional consideration. The workers, as in *Alaska Packers'*, were merely promising to do what they were obliged to do anyway.

The court adopted the same rationale as *Alaska Packers'*. It decided the case on the ground that the renegotiated contract was not supported by consideration. The workers were already bound to perform under the collective bargaining agreement. Promising to do what one is already legally obliged to do is not sufficient consideration to support a promise. As noted, however, absence of consideration is not the touchstone for Posner.<sup>22</sup>

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<sup>21</sup> 226 F3d 535 (7th Cir 2000).

<sup>22</sup> Of course, one cannot say this with complete confidence. There is, as noted above, case law that focuses on the unenforceability of a contract in which there is no modification of the original duties, however trivial. Posner, as a judge bound by state court interpretations of the common law, is bound to follow such precedents, however silly he might think them. Alternatively, he might think that those engaging in a hold-up, even one that the law might tolerate, should at least cut square corners if they hope to enforce their deal.

Why then does Posner find such duress in *Contempo Design*, but not *Oxford*? The difficulty the employer faced in *Contempo* was different from the one in *Oxford*. Under the Norris-LaGuardia Act, federal courts lack the power to issue such an injunction. It might seem that this should make no difference. If the employer was not entitled to an injunction, retrieving the money it gave to end the strike is no different from having a damage remedy for the difference between the value to it of an injunction and its ordinary damage recovery for breach of contract. It would seem that the inability to obtain a preliminary injunction reflects a judgment that the ordinary damage remedy was adequate.

But there may be a difference. The inability of a court to enforce the employer's rights stems from a congressional decision to put a limit on judicial power in order to bring about labor peace. It is not a judgment about the ultimate balance of power between labor and management. The inability to stop the strike derives from a legislative decision that is unconnected with the remedy to which an employer is later entitled after the fact. It is different from a decision to limit the beneficiary of a legally binding promise only with a right to sue for expectation damages.

Put differently, the postmodern doctrine of duress, as shaped by Posner, ultimately turns on the availability of the judicial remedy, and more specifically on the nature of what is constraining its availability. Distance from the courthouse or an inability to appear before the court once might have created the situational monopoly that the doctrine requires, but few parties will ever find themselves out of touch of a court today. Little else remains. Duress should not be available merely because the legislature protects a substantive right with a modest remedy. Duress is not an avenue to expand on legal rights. Someone claiming duress must show that the court's inability to grant preliminary relief and the inadequacy of the remedy arise from a circumstance or policy unconnected with the legal right itself. These do not exist very often as the limits on the power to enjoin are rarely subject to special constraints analogous to those in the Norris-LaGuardia Act.

Under this view, a case such as *Austin Instrument, Inc v Loral Corp*<sup>23</sup> may not be rightly decided. The supplier threatened to hold up the shipment of parts the buyer needed to meet its own contractual obligations. But the hold-up power arose only because the buyer's damage remedy was undercompensatory. But this is not a problem that duress is designed to fix. If specific relief (and a preliminary injunction) were not available, it would seem the buyer's problem was

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<sup>23</sup> 29 NY2d 124, 272 NE2d 533 (1971).

with the modest remedy the law chose to give, not with an inability to go to court.

A claim of duress should not be available to compensate someone for the benefit she would have received if a preliminary injunction had been available. If one were entitled to a preliminary injunction, one should have asked for it. If one asked for it and relief was denied in error, it should still make no difference. Such errors are part of any legal system. And if one were not entitled to it in the first place, granting a claim of duress makes even less sense. Unless the court is denied the power to act for reasons unconnected with the legal right, recognizing a claim of duress merely becomes a backdoor way of obtaining more relief than the legal system has deemed appropriate. Such is the way Posner has made sense of the doctrine of economic duress.

#### IV

*Oxford* illustrates the way in which Richard Posner has harnessed the tools of economics to make him a common law judge of great distinction. By focusing attention first on such questions as whether the purported victim of duress had access to the court, he ensures that lower court judges can resolve disputes in ways that both make sense and are consistent with decided precedent. Ironically, he is not using the tools of the young astronomer, or at least not in the same way. Instead of being the objective observer trying to understand the deep structure of the legal cosmos, he is immersed in the quotidian task of supervising dozens of lower court judges of sometimes-limited competence. Posner as judge is a pragmatist in an altogether different sense.