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A TYRANNOSAURUS-REX APTLY NAMED "SUE": USING A DISPUTED DINOSAUR TO TEACH CONTRACT DEFENSES

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I. INTRODUCTION

In August 1990, commercial fossil hunters from the Black Hills Geologic Institute ("Black Hills") discovered the remains of an almost-complete Tyrannosaurus Rex skeleton located in the Badlands of South Dakota.[1] Named "Sue" after her discoverer,[2] the fossil immediately became the subject of controversy. Although many of the facts were disputed, the collectors gave the purported owner of the land, a Native American rancher named Maurice Williams, a check for $5,000, which he cashed, and the collectors excavated Sue.[3] The fair market value of a T-Rex skeleton with that degree of completeness was over eight million dollars.[4]

Once the discovery began to garner publicity, Williams began a fierce court battle to rescind the contract with Black Hills, claiming that the $5,000 was merely a payment to inspect the property for potential fossils.[5]

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1. Larry McShane, *Museum Pays $8.4 Million for T-Rex: 65-Million-Year-Old Fossil to Go on Display in Chicago in 2000*, WASH. POST, Oct. 5, 1997, at A10. *See also* Phillip Zonkel, *Super Sized Awesome T. Rex Fossil Gets Presented in its Full Glory at Natural History Museum*, L.A. DAILY NEWS, Nov. 29, 2000 at L6 (describing Sue's discovery and the rareness of finding a ninety-percent complete Tyrannosaurus Rex).

2. *See* SUE HENDRICKSON AS TOLD TO KIMBERLY WEINBERGER, HUNT FOR THE PAST: MY LIFE AS AN EXPLORER 23-29 (2001) (detailing how Sue Hendrickson, a sometime fossil collector and treasurer hunter, spotted the fossils embedded in a cliff). Hendrickson has authored a children's book about her career and the discovery of the dinosaur. *Id.*

3. *Curse of T. Rex* (Nova television broadcast Feb. 25, 1997). In October of 1997, Sotheby's auctioned Sue off. In the face of intense bidding, the Chicago Field Museum purchased Sue for $8,362,500. *See* McShane, *supra* note 1, at A10 (stating that the Chicago Field Museum "paid a staggering $8.4 million" for the fossil).

4. McShane, *supra* note 1, at A10.

5. Black Hills Inst. of Geological Research v. Dept. of Justice, 812 F. Supp. 1015, 1017 (D.S.D. 1993) ("On August 27, 1990, [Black Hills] issued a check to Maurice Williams for $5,000, alleging that it was 'for title to the fossil and the right to excavate the fossil from his land.'"), *aff'd in part, rev'd in part sub nom.* Black Hills Inst. of Geological Research v. S.D. Sch. of Mines & Tech., 12 F.3d 737 (8th Cir. 1993).

He was not the only one with a bone to pick. At one point, the parties claiming ownership of Sue included Black Hills, Williams, the Cheyenne River Sioux tribe (Williams' land was within the boundaries of their reservation), and the federal government (the government had held the land in trust for Williams so it was not subject to tax forfeiture).[6]

Ultimately, the district court,[7] and then the Eighth Circuit Court of Appeals,[8] ruled against Black Hills. The structure of the trust required government permission to sell land.[9] Holding that Sue's bones were part of the "land," the Eighth Circuit determined that Sue could only be sold if government permission had been granted, and, as Black Hills had never requested permission, it had no claim to the fossil.[10] The Eighth Circuit concluded that the federal government held the fossil in trust for Williams.[11] In addition to the pages of the federal reporter and in the press, Sue's story has also been told in two books,[12] one of which, *Rex Appeal*, was written by fossil hunter and Black Hills founder Peter Larson.[13]

An understanding of contract law and contract defenses is essential to understanding and analyzing the question of Sue's ownership.[14] Sue's case involves the high-stakes world of fossil hunting and collecting, a subject

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6. The government also mounted a criminal prosecution of the fossil hunters for unrelated instances of the theft of fossils from federal land. United States v. Larson, 110 F.3d 620 (8th Cir. 1997). Although the possibility of criminal sanctions for taking fossils from federal or tribal lands is also an interesting subject, the criminal law dimensions are beyond the scope of this article. *See* Patrick K. Duffy & Lois A. Lofgren, *Jurassic Farce: A Critical Analysis of the Government's Seizure of "Sue [TM]," A Sixty-Five-Million-Year-Old Tyrannosaurus Rex Fossil*, 39 S.D. L. REV. 478 (1994) (presenting Black Hills' viewpoint on the criminal charges). While useful, the article is also extremely partisan, as Duffy was Larson's attorney in the criminal trial. *See Black Hills*, 812 F. Supp. at 1016 (listing Duffy as the attorney of record for the plaintiff). The Black Hills Institute later discovered another T-Rex skeleton that they named "Duffy" in gratitude for their lawyer's services.

7. *Black Hills*, 812 F. Supp. at 1022.

8. *S.D. Sch. of Mines & Tech.*, 12 F.3d at 739.

9. *Id.* at 741.

10. *Id.* at 743-44.

11. *Id.* at 744.

12. The first book, written by Steve Fiffer, a former journalist and attorney, is a well-written account that provides a multi-faceted and balanced view of the case, including the point of view of many of the participants. STEVE FIFFER, TYRANNOSAURUS SUE: THE EXTRAORDINARY SAGA OF THE LARGEST, MOST FOUGHT OVER T. REX EVER FOUND (W.H. Freeman and Co. 2000).

13. The second book, written by fossil-hunter Peter Larson and his ex-wife, former journalist Kristin Donnan, is, unsurprisingly, a partisan re-telling of the case from Larson's perspective. PETER L. LARSON & KRISTIN DONNAN, REX APPEAL: THE AMAZING STORY OF SUE, THE DINOSAUR THAT CHANGED SCIENCE, THE LAW, AND MY LIFE (Invisible Cities Press 2002).

14. *See* Dana G. Jim, *Great Property Case: Johnson v. M'Intosh and the South Dakota Fossil Cases*, 46 ST. LOUIS U. L.J. 791 (2002) (suggesting that Sue's case could be used to teach property law). Property law and Native American law are vital to analyzing Sue's ownership, and it was on these grounds that the actual case was decided. Therefore, in this Article I concentrate solely on the contracts questions that Sue's case raises and how law professors can use Sue's case to teach contracts defenses.

matter that students find appealing. Besides piquing student interest, Sue's case also allows for a far-ranging discussion of many contract defenses. When discussing the contract between Maurice Williams and the Black Hills Institute, students begin formulating arguments based on the doctrines of unilateral mistake, unequal bargaining power, capacity, unconscionability, and the failure of a condition.

I provide this description of the teaching module I use for contract defenses as one possible alternative to the Socratic method. As described in the final portion of this Article, the Socratic method has come under attack in recent years.[15] In response to such criticisms, the lesson that I describe provides a constructive alternative to the Socratic method, based on the theory of problem-based learning and the appropriate incorporation of technology in the classroom. However, unlike other problem-based learning approaches, this particular lesson can be adopted without having to change the entire structure of an already-existing course, and does not mean the utter extinction of a traditional casebook.[16] Rather, the exercise supplements the typical coverage of contract defenses in the major casebooks.

II. TEACHING CONTRACT DEFENSES: REWARDS AND CHALLENGES

Teaching contract defenses is one of the more difficult parts of the basic contracts course. During the first portion of the course,[17] I spend a great deal of time on basic concepts—the rules of offer and acceptance, consideration, and promissory estoppel—as well as helping students become familiar with basic legal skills, such as how to discern the holding of a case from dicta; how to master the standard arguments about bright line

15. *See infra* Part IV (citing numerous scholars and authors who are critical of the Socratic method).

16. *See* Douglas L. Leslie, *Approaches to Teaching Contracts: How Not to Teach Contracts, and any Other Course: Powerpoint, Laptops, and the Casefile Method*, 44 ST. LOUIS. U. L.J. 1289 (2000) (advocating adoption of the author's case files in lieu of traditional casebook).

17. My first-year contracts class at Cumberland Law School, Samford University, is a year-long course. Currently, I employ the casebook compiled by Randy Barnett, as it includes almost all of the "casebook classics" that are studied widely at law schools around the country. RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE (3d ed. 2003). Choosing a contracts casebook is a somewhat daunting task for a new law professor. For several reviews of contracts casebooks, *see* Kellye Y. Testy, *Intention in Tension*, 20 SEATTLE U. L. REV. 319 (1997) (reviewing Barnett casebook); Michael B. Kelly, *Reflections on Barnett's Contracts, Cases and Doctrine*, 20 SEATTLE U. L. REV. 343 (1997) (same); Geoffrey R. Watson, *Reviews: A Casebook for All Seasons?*, 20 SEATTLE U. L. REV. 277 (1997) (reviewing Alan Farnsworth's casebook); Lenora Ledwon, *Storytelling and Contracts*, 13 YALE J.L. & FEMINISM 117 (2001) (reviewing Kastely, Hom and Post's casebook, *Contracting Law*). One influential article by Mary Joe Frug has had an impact on the way casebooks are structured and the way that I teach my contracts class. *See* Mary Jo Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

rules versus legal standards; and how to discern the various sources of contract law. Despite the oddity and strange amusement value in the cases of dissolute smoking and drinking nephews,[18] sick children at sea who run up medical bills,[19] and loyal employees who dive off platforms to save their bosses,[20] the first part of the course must necessarily focus on teaching basic legal skills.

During the next portion of the course, the focus is on the interpretation of contracts, issues of parole evidence, and the intent of the parties as contrasted with legal background norms. At this point, the students begin to realize that many of the legal "rules" they are learning, such as parole evidence, are actually things that I like to describe as "rules with a hole in the middle of them," capable of being categorized and argued either way.[21] By the time we reach promissory estoppel, students begin to realize that some aspects of law are indeterminate or are subject to argument, and are not just a clean list of rules that one may easily memorize. This concept, along with the idea that the common law might provide one way of resolving an issue, while the Uniform Commercial Code may provide an entirely different, and sometimes contrary approach,[22] is one that confuses students until they have had enough time to digest it.

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18. *See* Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891) (holding that an uncle's promise to his nephew to reward him if he abstained from drinking and smoking was supported by consideration).

19. *See* Mills v. Wyman, 20 Mass. 207 (1825) (holding that a father was not liable for reimbursing a good Samaritan for his grown son's medical care under contract theory).

20. *See* Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1935) (holding that, despite doctrinal problems with past and moral consideration, an employer's estate was responsible for periodic payments to its employee who earlier had saved the employer's life by diving off the upper floor of a mill to stop a pine block from falling on the employer).

21. GRANT GILMORE, THE DEATH OF CONTRACT 60-61 (1974) (describing the doctrines of consideration and promissory estoppel as "matter and antimatter" and "Restatement and anti-restatement").

22. *Compare* the common law mirror image rule in Ardente v. Horan, 366 A.2d 162 (R.I. 1976) (holding that acceptance had to be "mirror image" of offer, or else it functioned as counter-offer), *with* U.C.C. § 2-207 (2003) (stating that the response of adding or subtracting terms could still function as counteroffer, unless the differences constitute a "material alteration" of the terms or the offer was conditioned only on that particular set of terms); *compare* the common law rule requiring consideration to keep an option open as in Dickenson v. Dodds, 2 Ch. D. 463, 466 (1874) (stating that the "postscript" on a contract, without consideration, is void) *with* U.C.C. § 2-205 (2003) (allowing merchants to hold options open without consideration so long as there is a signed writing and the period of time does not exceed three months); *compare* Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102-03 (9th Cir. 1902) (describing the common law requirement of additional consideration to make a contract modification binding) *with* U.C.C. § 2-209 (2003) (permitting contract modification without additional consideration); *compare* the common law requirement of the duty to mitigate damages under the common law, as articulated in Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929) (holding that, upon breach, the other party must stop performing duties under the contract so as not to increase the harm), *with* U.C.C. § 2-704 (2003) (allowing seller, after breach of contract, to complete the manufacture of the good so as not to waste work already in process).

It is only during the third portion of the course, contract defenses, that the first-year students have cut their teeth enough as legal thinkers so that we can have an intelligent discussion of the legal issues. But the defenses are often tricky for students to learn. Far too often students are willing to accept what the contract says at face value and conclude that the analysis is over, just assuming the validity of an ostensible arm's-length transaction.[23] Beyond teaching my students how to read the contract carefully and understand what it says, I am also interested in teaching them to anticipate any problems with the contract that may arise. But beyond forcing a student to question the validity of the written word, a student must also learn to distinguish between the theoretical basis for each contract defense, for example, the difference between unconscionabilty and undue influence. Additionally, students also must learn how to deploy the contract defenses on behalf of a client.

Despite being "difficult," I find that contract defenses are one of the more interesting parts of the course. Although contract law typically involves parties who voluntarily assume a duty and are responsible for that duty,[24] with defenses the law acknowledges that there are some circumstances, either because of a flaw in the assent process, harshness of the terms, or for some other equitable reason, that a voluntary duty will not be enforced. Often where there is a question regarding duress, undue influence, or unconscionability, courts must draw a fine line between insulating individuals from their own "bad deals" and preventing business practices that are sharper than a T-Rex tooth.

III. TEACHING MODULE: APPLICATION OF CONTRACT DEFENSES

To begin the teaching module, I show the class the video *Curse of T. Rex*, part of the Nova television series that airs on the Public Broadcasting Service.[25] The video features the story of Sue's discovery, and includes interviews with Peter Larson, Maurice Williams, tribal members, and prominent paleontologists. At approximately fifty minutes, the video is the

23. An arm's-length transaction with a T-Rex would be an interesting arrangement, given their tiny forelimbs.

24. The idea that contractual duties are, in a sense, a form of strict liability is an old one, tracing back to the 1600s. *See* Paradine v. Jane, 82 Eng. Rep. 897, 897 (1647) ("When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.").

25. *Curse of T. Rex* (Nova television broadcast Feb. 25, 1997). *See* http://www.pbs.org/ (providing a location where *Curse of T. Rex* is available for purchase). Alternately, used copies may be obtained from other sources, including E-bay.

ideal length for showing to a class. I showed the video to my class after we had finished the entire unit on contract defenses.

During the video, you may want to stop the tape to interpose questions. For example, when the tribal leaders discuss how they have right to the dinosaur, you can stop the tape to ask the class why they think that might or might not be accurate. At other times, when Peter Larson is putting forth his theory of ownership, you can likewise pose questions to the class, asking them whether Larson is making statements that are partisan or otherwise self-interested. Another possibility for stopping the tape is when Maurice Williams is shown on camera with Larson and the fossil hunters. Larson says that Sue will stay in South Dakota as part of the Black Hills museum. In response, Williams states, "[u]nder that you'll say. . . Pete'll say stolen from Maurice Williams."[26] After an awkward moment of silence, both the fossil hunters and Williams begin laughing.[27] Rather than show the whole video, you could stop the tape before the video reveals the outcome of the civil trial over ownership and the criminal charges, which occurs approximately forty minutes into the video.[28]

Once the class has seen the video, I usually spend another class period on discussion. I begin the discussion by asking the class to identify the contracts issues that seemed to be salient in the video. This helps students sharpen their issue-spotting skills.[29] Then, I guide the discussion toward the question of whether or not the students think the contract for the sale of Sue is enforceable. One of the assumptions that I have the class make is that the $5,000 payment is for removal of the dinosaur, not just for an inspection of the land.[30]

If the discussion wanders, the students can be brought back to the central point about contract defenses simply by asking the class to put themselves in the position of Maurice Williams' lawyer. As an attorney for Williams, they have to raise any and all contract defenses that they possibly can, in order to claim ownership of the fossil. If, on the other hand, the instructor wants to help the students with learning how to formulate

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26. *Curse of T. Rex* (Nova television broadcast Feb. 25, 1997).

27. *Id.*

28. Of course, the instructor can also assign the students to read the district court opinion or the Eighth Circuit opinion. Even though I did not assign these cases, many of my students looked them up on Westlaw simply because they were interested in reading what the outcome was and how the court would reach a result.

29. I ask the students to spot the property law issues as well. After viewing the video, several students also wanted to discuss the evidence, privilege, and criminal law issues surrounding the search of the Black Hills' office for records of fossils that allegedly originated on federal lands.

30. Obviously, the hypothetical can be changed to make the facts more or less favorable for Williams.

arguments, the instructor can always ask one group of students to represent Williams, another to represent Larson, and others to represent the Cheyenne River Sioux and the federal government.

No matter whether they are arguing the pros and cons of applying a particular doctrine, I either ask one of the students who is among the "discussion leaders" for the day (or a volunteer)[31] to list the various components of the doctrine. This serves as a review of what the students have previously learned and helps frame the rest of the discussion. If a student raises a defense such as undue influence, I ask the student to list the elements of that defense, and then apply it to the case of T-Rex Sue or a hypothetical I have devised based on the case. I now turn to the contract defenses that my contracts students this year were able to dig up.

A. UNILATERAL MISTAKE

One potentially applicable contract defense that students raise is unilateral mistake. After all, Williams had no idea that he had a dinosaur on his land, and even when apprised of the fact that the team had found a T-Rex there, he had no conception of its value.

The law and economics view of unilateral mistake is that the doctrine is actually a way of analyzing information asymmetries. One party, with superior information, uses that information to "get a better deal" or bargain at the expense of the party without such information.[32] The information can either be gained through careful research, or it may simply be the result of a "windfall" or otherwise casually acquired.[33] Although one party may have less information than another, society has made the decision to reward possession of that information; one party may indeed exploit that information to make a profit.[34] On the other hand, there is certain information that people are not allowed to exploit. As an example of such information, I

31. *See infra* Part IV (discussing the use of the Socratic method).

32. MARVIN CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 130 (2nd ed. 1993) (citing Anthony T. Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978)).

33. *Id.*

34. *See, e.g.*, Triana Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1316-26 (1999); Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH L. REV. 508 (1998). Although superior business acumen is rewarded, a defense of unilateral mistake may be available if the non-mistaken party knew or should have known of the mistake or if enforcing the contract would be unconscionable. Jones, *supra* at 1316; Maggs, *supra* at 526.

typically discuss the reasons that insider trading on the stock market is prohibited.[35]

However, after some discussion, the class comes to the conclusion that unilateral mistake is a limited doctrine, and that if a party has entered into a transaction without doing the research that in hindsight seems to have been essential, that party cannot later recover.[36] If Maurice Williams entered the contract in a state of willful ignorance, that normally would not be considered a basis for voiding the contract.

B. UNCONSCIONABILITY

Students initially mention unconscionability as a defense because of the price differential: Williams sold Sue for $5,000, only a tiny fraction of the over eight million dollars that the fossil was worth. This is the perfect time to discuss the factors that might make a contract unconscionable. I ask the students to recall that there are really two components of unconscionability: procedural unconscionability, in which something has gone wrong with the process of obtaining assent to the contract; and substantive unconscionability, in which the terms themselves are so harsh and overreaching that no one would voluntarily enter into the contract.[37]

The students must analyze the situation using both procedural and substantive unconscionability doctrines. Although many times the students only want to talk about the price differential, I remind them that the courts normally do not analyze the adequacy of consideration and that even a peppercorn will normally suffice.[38] Rather, to render a contract unconscionable, there must be something more than just the presence of an "unfair" bargain. In addition, there must be an element of surprise, misrepresentation, or mistake, along with the seemingly one-sided deal.[39] However, the unconscionability doctrine has been narrowly construed by

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35. *See* 17 C.F.R. § 240.10b-5-1 (2003) (describing what "on the basis of" trading on inside material information means). This year, I gave the students the basic facts of the Martha Stewart case as an example of insider trading. *See, e.g.*, Deborah Solomon, *Executives on Trial: Criminal Convictions of Stewart, Bacanovic Aid SEC's Civil Case*, WALL ST. J., Mar. 8, 2004, at C1.

36. RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981) ("A party bears the risk of mistake when. . . he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient. . . .").

37. *See* Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11, 17 (2003-04) (distinguishing between procedural and substantive unconscionability and proposing a new type of tort action, Consequential Procedural Unconscionability, for the victims of unconscionable contracts).

38. E. ALLAN FARNSWORTH, CONTRACTS § 2.11 (3d ed. 1999) ("As a general rule, the adequacy of consideration is not a proper subject for judicial scrutiny.") (citation omitted).

39. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965).

many courts.[40] Of course the students, with perfect hindsight, can say that they would never enter into such a contract. I use this as an opportunity to emphasize the difference between ex post and ex ante decision-making.

C. FRAUD, MISREPRESENTATION, AND CONDITIONS

Larson allegedly made a statement to Williams that the fossil from Williams' land would remain in Hill City, South Dakota, housed in the Black Hills Institute's museum.[41] I present a hypothetical to the students in which the Black Hills Institute representatives make this assertion, but then change their minds and decide to sell it after excavation because the pristine state of the skeleton would fetch millions at auction.

I ask the class whether such a "change" in the facts would make any difference in terms of the validity of the contract with Williams. Although some students initially said "no," many others thought that it might make a difference. This group of students said that if the Hill City location was important to Williams when he assented, and then the location changed, it might be important enough to make a difference in whether the contract was enforceable. I use this opportunity to go over the idea of a "material" misrepresentation, and what would be considered important or not important in terms of inducing someone to assent.

Then, I change the hypothetical to focus on Larson's state of mind. In one version of the facts, Larson knows the value of the T-Rex and has already decided that he will move the T-Rex from Hill City and auction it at the time that he gives Williams the $5,000 check. In the other version of the facts, he has not yet decided what to do with the T-Rex. I then ask the class whether the state of mind matters. Inevitably, the class agrees that the state of mind does matter, and that helps them to distinguish between fraud and misrepresentation. It also helps them understand the concept of scienter.

The hypothetical also presents a good opportunity to work on conditions. The proposition that the T-Rex stays in Hill City could be thought of as a condition to the contract. Then, I ask the students to identify what type of condition it is. They usually come up with the right answer, that it is a condition subsequent. The movement of the dinosaur from Hill City (an event that happens after the making of the contract) would prevent the operation of the contract—just as a true condition subsequent would.

Although I articulate to the students the difference between conditions precedent and conditions subsequent (i.e., the timing), and the impact of the

40. *See, e.g.* Wille v. Southwestern Bell Tel. Co., 549 P.2d 903 (Kan. 1976).

41. *Curse of T. Rex* (Nova television broadcast Feb. 25, 1997).

distinction (i.e., the burden of proof),[42] I also inform the students that Restatement (Second) of Contracts has done away with this distinction and true conditions subsequent are rare.[43] Nevertheless, I inform the class that in some jurisdictions the distinction and differential procedural treatment endure, and the doctrine retains its vitality at least for the purpose of the bar examination.

D. ECONOMIC DURESS

Although the doctrine of duress has often been limited to physical circumstances that wrongfully induce a party to enter a contract, i.e., the paradigmatic "gun to the head" that forces a party to agree, there is also a subset of duress cases that depends on economic pressure.[44] As I explain to my students, however, many times the parties are contracting for necessities, such as food, shelter, and medical care.[45] However, these situations are not normally viewed as instances of economic duress, even though one party may desperately "need" the good or service that the seller is providing.

Initially, it is tempting for students to look to economic duress as a doctrine that would serve as a defense to Maurice Williams' performance of the contract. That is because the Nova video tells them that the Pine Ridge Indian Reservation, within a hundred miles of Hill City, is one of the most economically deprived areas of the United States.[46] With unemployment

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42. *See* Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1007 (3d Cir. 1980) ("The generally accepted rule is that the burden of proof in regard to a condition precedent is on the party alleging the breach of the conditional promise."); 13 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 38:26 (4th ed. 2000) ("[I]f the promise is stated in absolute terms so that it stands complete by itself, but is followed by a further statement that the duty will be terminated if a certain contingency occurs... this for... throw[s] upon the defendant the burden of both pleading and proving the proviso...."); *see id.* § 38:9 (defining condition subsequent).

43. RESTATEMENT (SECOND) CONTRACTS § 224 (1981). I give the class a number of examples of a condition subsequent, but the best example I have come across was the example Professor Einer Elhauge gave to my first-year contracts class, based on the facts of *Gray v. Gardner*. The case involved a buyer in Nantucket harbor, who made a contract with a captain to purchase his cargo of whale oil, unless another ship arrived in the harbor within the next week. Gray v. Gardner, 17 Mass. 188, 188 (1821).

44. FARNSWORTH, *supra* note 36, at §§ 4.16-.17.

45. Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1291-92 (1996) (explaining original justification for public accommodations law was access to such necessities while traveling).

46. As described by the Wall Street Journal, "[t]he community has the shortest life expectancy of anywhere in the Western Hemisphere outside Haiti: 48 years old for men and 52 for women.... Nearly half the tribe's population is destitute. The unemployment rate is about 75%. There is no bank, no motel, no movie theater." Jonathan Eig, *Grave Success: Where Poverty, Death Walk Hand in Hand, A Profitable Exception*, WALL ST. J., Mar. 5, 2002, at A1, *available at* 2002 WL-WSJ 3387689. The plight of the Pine Ridge Indian Reservation is also described in

hovering above seventy percent, residents of the reservation are prone to many of the ills associated with poverty: domestic violence, substance abuse, and disease.[47] Surely, if anyone is entitled to a defense based on economic necessity, it would be a Pine Ridge resident.

However, there are problems with the economic duress defense, starting with the point that the doctrine is a narrow one.[48] Generally, individuals are not allowed to escape their contractual obligations merely because their own economic circumstances were dire at the time they entered the contract.[49] In addition, when economic duress is viewed as a valid defense, it is usually because the party who is attempting to enforce the contract had a hand in creating the underlying economic necessity that drove the other party into the contract. In that sense, economic duress involves more of a type of "opportunism" or excessive gouging of the other party rather than one party's dire poverty.[50]

Applying the doctrine of economic duress, it becomes evident that, while a possibility, it is probably not the best choice. Although Williams lived on the reservation in an economically depressed area, there are no facts to suggest that the fossil hunters helped to create the poor conditions only to turn around and exploit them.[51] Rather, a large part of the poverty appears to be the result of years of misguided governmental policies and agency mismanagement, and the residents' reactions to such policies. Under these circumstances, I explain to the students that any attempt to assert a defense of economic duress will likely fail.

E. UNDUE INFLUENCE

Yet another possible defense that a lawyer for Williams could deploy would be the doctrine of undue influence. Doctrinally, undue influence might be seen as a combination of duress, unequal bargaining power, and reduced capacity.[52] There is a multi-factor test that the courts use to

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books too numerous to mention. *See, e.g.*, MARY CROW DOG, LAKOTA WOMAN (1991) (detailing personal experiences of a Native American woman); IAN FRAZIER, ON THE REZ 3-19 (2001) (describing author's observations of the Pine Ridge reservation).

47. *See* Eig, *supra* note 46.

48. FARNSWORTH, *supra* note 38, at § 4.16 (describing strict test for duress).

49. Hackley v. Headley, 8 N.W. 511, 514 (Mich. 1881).

50. I often give my students examples of business practices and ask them to articulate the difference between shrewd business tactics (i.e., examples of good capitalism) versus instances where they think one party is taking an unfair advantage of the other. Unsurprisingly, I get many different responses when I try to get them to articulate precisely where the differences lie.

51. That is, except in the most general way that whites remain the beneficiaries of government policies that have exploited Native Americans for their lands.

52. BARNETT, *supra* note 17, at 996.

determine whether a contract is void on the grounds of undue influence.[53] These factors include the number of individuals attempting to persuade the contracting party, extreme high pressure sales tactics, coercive timing, and the like.[54]

I have the students think about the facts, and they mostly conclude that, although we do not know very much about the process of contract formation between Williams and Black Hills, it likely was not a case of undue influence. However, upon changing the hypothetical around to include a knock on the door in the middle of the night, with ten fossil hunters from the Black Hills present on the doorstep, who all demand that Williams assent, the class reaches a different conclusion.

F. ABILITY TO SELL

The actual court case, however, was decided not on the basis of a contract defense, but rather on a fundamental property and contract law principle: in general,[55] you cannot sell what you do not own.[56] In general, if one owns subject to a restriction, the transferee takes subject to that restriction as well.[57]

Here, Williams did not own the "land," e.g. the dinosaur, in fee simple. Rather, the federal government held the land in trust for Williams.[58] According to the terms of the trust, alienation could only take place with the

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53. Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 539-41 (1966).

54. *Id.* at 541.

55. The reason I add the caveat "in general" is that a colleague rightly pointed out that (1) the concept of adverse possession carries with it some ownership rights, *see, e.g.*, Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419 (2001); (2) people sell or gift property they do not own, often with the intent of acquiring the property later, such as in after-acquired title or deed by estoppel, *see, e.g.*, 23 AM. JUR. 2D *Deeds* § 277 (2002); (3) stock puts and calls, *see, e.g.*, Jerry W. Markham & Rita McCloy Stephanz, *The Stock Market Crash of 1987: The United States Looks at New Recommendations*, 76 GEO. L.J. 1993, 2006 n.71 (1988) (discussing options); and, (4) a finder can sell something and the purchaser gets the right to keep it unless the true owner appears, *see, e.g.*, 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 23 (1994).

56. *See, e.g.*, Moore & Co. v. Robinson, 62 Ala. 537, 543 (1878) ("Mr. Benjamin, in his excellent book on sales of personal property, says: 'In general, no man can sell goods, and convey a valid title to them, unless he be the owner, or lawfully represent the owner. Nemo dat, quod non habit.—Benj. on Sales, § 6.'"); Rocky Mountain Fuel Co. v. George N. Sparling Coal Co., 143 P. 815, 818 (Colo. Ct. App. 1914) ("The general rule of law is that a purchaser of merchandise takes only such title as his seller has and is authorized to transfer; that he acquires precisely the interest which the seller owns, and no other or greater."); Barlow v. Stevenson, C.A. No. 1998-12-118, 2000 Del. C.P. LEXIS 62, *4 (Del. Ct. Common Pleas July 19, 2000); Inmi-Etti v. Aluisi, 492 A.2d 917, 920-922 (Md. Ct. Spec. App. 1985) (holding that "purchaser can take only those rights which his transferor has in the subject goods").

57. *Barlow*, 2000 Del. C.P. Lexis 62, at *5.

58. Black Hills Inst. of Geological Research v. S.D. Sch. of Mines & Tech., 12 F.3d 737, at 742-43 (8th Cir. 1993).

permission of the government.[59] Thus, Williams could not sell the dinosaur when he had no right to alienate it. From a contract perspective, one could also say that the requirement of government permission was a condition precedent to the sale, albeit one that neither party was aware of at the time of the contract.

Ultimately, in deciding the case, the court bypassed, for the most part, common law contract defenses, but the case certainly makes for an interesting classroom discussion, and one that will test students' knowledge of the contract defenses materials.

IV. IMPLICATIONS FOR TEACHING CONTRACT DEFENSES: LAW TEACHING BEYOND THE SOCRATIC METHOD

The teaching module described above (1) uses technology; (2) uses a problem-based approach; and (3) promotes active learning.[60] This is purposeful and represents my belief that a law professor can—and should—teach a basic first year course with techniques that go beyond the Socratic method.[61]

In the past two decades, the Socratic method has come under attack from numerous commentators, although the method certainly also has its defenders.[62] A sampling of the recent scholarship reveals a growing uneasiness about the pedagogical value of the method. In the immortal words of Grant Gilmore, the Socratic method too often results in a classroom where "never is heard an encouraging word and the thoughts remain cloudy all day."[63] Deborah Rhode documents many similar problems, and extensively lists the shortcomings of the Socratic method. [64] Her critique

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59. *See id.* at 742.

60. Essentially, in designing the course module, I drew on the literature promoting excellence in law school classroom teaching, including GERALD F. HESS & S TEVEN I. FRIEDLAND, TECHNIQUES FOR TEACHING LAW (Carolina Academic Press 1999); Alexander J. Bolla, Jr., *Reflections from the Total Quality Management Casefile in Legal Education*, 43 EMORY L.J. 541 *passim* (1994); Gerald F. Hess, *Listening to our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941 *passim* (1997).

61. Indeed, some commentators have already been busy describing the demise of the Socratic method. *See* Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113 *passim* (1999).

62. *See, e.g.* James R. Beattie, Jr., *Socratic Ignorance: Once More Into the Cave*, 105 W. VA. L. REV. 471, 484-93 (2003) (setting out the criticisms of the Socratic method, including humiliation of students, hiding the ball, creating combative students, and silencing women and minorities, yet then inexplicably concluding that the Socratic method is valuable); Phillip E. Areeda, *The Socratic Method*, 109 HARV. L. REV. 911, 921-22 (1996) (providing an outline of a talk explaining proper use of Socratic Method).

63. Grant Gilmore, *What Is a Law School?*, 15 CONN. L. REV. 1, 1 (1982).

64. Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1558-59 (1993).

focuses on the fact that the Socratic method teaches law students to divorce legal thought from the interpersonal ways of thinking that most people have before attending law school, which are of vital importance when dealing with clients in the real world.[65]

At the same time, recent critiques have also articulated the psychological harms that prey on students as a result of the Socratic method.[66] Feminists have argued that the Socratic method tends to have a disparate impact on female law students, preventing women from reaching their full potential in the classroom.[67] Critical race theorists use much the same argument, persuasively stating that the Socratic method also silences minority students.[68] Additionally, there are the voices of the students who inevitably discuss the incredible anxiety and pressure that the Socratic Method imposes.[69]

The point here is that a professor has a number of different tools at his or her disposal, and the lesson that I have described above attempts to employ a number of different techniques. The T-Rex Sue module uses technology, problem-based learning, and even humor to get its point across.[70] At the end of the day, the students have learned contract defenses, articulated arguments, and have evolved as legal thinkers.

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65. *Id.* at 1559.

66. For discussion of the effect of the Socratic method on the physiological and psychological health and well-being of law students *see* Suzanne C. Sergerstrom, *Perceptions of Stress and Control in the First Semester of Law School*, 32 WILLAMETTE L. REV. 593, 594 (1996) (documenting, among law students subjected to the Socratic Method, "extreme self-punishing attitudes, obsessive self-doubt, apathy, withdrawal from normal activities, fear, apprehension, a sense of impending doom, and panic attacks"). *See also* Phyllis W. Beck & David Burns, *Anxiety and Depression in Law Students: Cognitive Intervention*, 30 J. LEGAL EDUC. 270, 285-86 (1980); Julie E. Buchwald, *Confronting a Hazard: Do Eating Disorders Plague Women in the Legal Profession?*, 9 S. CAL. REV. L. & WOMEN'S STUD. 101, 117-19 (1999); James B. Taylor, *Law School Stress and the "Déformation Professionelle"*, 27 J. LEGAL EDUC. 251, 253-54 (1975); Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal* Education, 37 U. CIN. L. REV. 93, 121-22 (1968).

67. *See, e.g.*, LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 28 (Beacon Press 1997) (discussing how female law students can feel alienated by the Socratic method); Jennifer Gerarda Brown, *"To Give Them Countenance": The Case for a Women's Law School*, 22 HARV. WOMEN'S L.J. 1, 11-13 (1999) (asserting that women do not speak as frequently or as often in the law school classroom as men).

68. *See* Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 462-65 (1996) (asserting that traditional law school teaching methods segregate minority students and that those methods often reflect "white male values").

69. *See, e.g.*, Paula Garber, *"Just Trying to be Human in this Place": The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165, 201-03 (1998) (describing the author's feeling of being "terrified" and "flustered" to be called on in her civil procedure class).

70. John J. Capowski, *Evidence and the One-Liner: A Beginning Evidence Professor's Exploration of the Use of Humor in the Law School Classroom*, 35 ARIZ. ST. L.J. 877 (2003) (exploring the fairly obvious idea that humor can help students relax and make the doctrine more interesting and memorable).