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Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability

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WHY DOES LORD DENNING'S LEAD BALLOON INTRIGUE US STILL? THE PROSPECTS OF FINDING A UNIFYING PRINCIPLE FOR DURESS, UNDUE INFLUENCE AND UNCONSCIONABILITY

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Recently, a workshop in contract law held at the University of Oxford caused me to recall the sense I had some years ago, when I first came across duress, undue influence, and unconscionability in first-year Contract, that these doctrines had much in common despite their described differences. That point, of course, had been recognised before. Lord Denning, in *Lloyds Bank v Bundy*,[1] had gone further, asserting that they were expressions of a common principle of "inequality of bargaining power". Denning's principle did not get off the ground with the House of Lords, despite much discussion of it in lower courts and academic texts. And I myself found the notion difficult to climb aboard. The question that the workshop returned my thoughts to, and which I address in this paper, is whether there is some way to fix Denning's trial balloon—to modify it into something actually capable of taking flight.

I. Introduction

1. The Bundy Opinion: Lord Denning's lead balloon?

To this day, the 1975 English Court of Appeal judgment in *Bundy* remains a staple of first-year Contract courses in law faculties across the common law world. Most lawyers remember well from their student days the sympathetic portrait painted by Denning's minority opinion of "poor old man" Bundy whose fatherly love for his indebted son led him to give security in the family's centuries-long home at Yew Tree Farm to his trusted bank, only to have the bank foreclose and put him out to ruin.[2] Not for this entertainingly colourful description of facts, however, have law professors kept the opinion part of the Contract canon; rather it is because, after surveying doctrines such as duress, undue influence, and unconscionability, Denning posited that they were instances of an underlying principle granting avoidance of a contract for what he called "inequality of bargaining power".[3] Denning's proposition attracted sympathy from the majority, but they declined to state an opinion on it.[4] In later cases, it received negative treatment in the House

* I am grateful to Stephen Smith and Hugh Beale for helpful comments on earlier versions of this paper. All of the remaining errors are my own.

[1] [1975] Q.B. 326; [1974] 3 All E.R. 757.

[2] *Lloyds Bank v Bundy* [1975] Q.B. 326 at 334.

[3] *Bundy* [1975] Q.B. 326 at 339.

[4] *Bundy* [1975] Q.B. 326 at 347. The majority reached the result on the basis of undue influence.

of Lords,[5] leading the author of one popular Contract text to refer to it as "Lord Denning's lead balloon".[6]

2. What explains 40 years of expert fixation?

However, four decades of continued study of Denning's *Bundy* opinion in contract courses, plus prime real estate in Contract textbooks devoted to discussing his supposed principle,[7] suggest that, whatever conclusions are variously drawn as to the balloon's construction, there is at least still some hot air in it. Ewan McKendrick, for instance, says that the "issue of whether a doctrine of inequality of bargaining power exists in English law has been one of some controversy".[8] John McCamus adds that:

> "Lord Denning's suggestion that these existing doctrines can be rationalised and restated in the form of a single principle of 'inequality of bargaining power' is a bold and interesting one."[9]

Others seem to incline towards enthusiasm for it. Sir Jack Beatson, Andrew Burrows and John Cartwright write that while the doctrines remain separate "at present":

> "whether the courts might yet be willing to take the step of unifying the doctrines of duress, undue influence, and unconscionable bargains, as Lord Denning sought to do, remains uncertain".[10]

Stephen Waddams similarly says that:

> "[the] statement is of interest. It openly recognises that behind a number of lines of cases, each formerly explained on different grounds as special exceptions, there lies a common theme".[11]

Indeed, typically one finds in the layout of Contract materials, that these doctrines are studied together as part of a "cluster",[12] separate from other contract-"policing" doctrines like misrepresentation, mistake, and illegality. In *Harry v Kreutziger*, Lambert J.A. stated that Lord Denning's principle was not a "touchstone" but a "demonstration that the categories of grounds for rescission are interrelated and based on a common foundation".[13] Many academic reflections have also commented on Denning's supposed foundation, or proposed alterations. So much has been written on these issues that it is unquestionably impossible to review and respond to it all. Nonetheless, the fact that the conversation continues, both at a level of general engagement, and at a deeper level through ongoing

[5] *National Westminster Bank Plc v Morgan* [1985] 1 A.C. 686; [1985] 1 All E.R. 821 (Lord Scarman); *Pao On v Lau Yiu Long* [1980] A.C. 614; [1979] 3 All E.R. 65 (Lord Scarman).

[6] Neil Andrews, *Contract Law*, 2nd edn (Cambridge: Cambridge University Press, 2015), at p.316.

[7] See e.g., Andrews, *Contract Law* (2015), at p.315 et seq.; Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract*, 29th edn (Oxford: Oxford University Press, 2010), at p.376 et seq.; Ewan McKendrick, *Contract Law*, 11th edn (London: Palgrave, 2015), at p.303 et seq.; Hugh Beale (ed.), *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015), Vol.1, para.8-143; J.W. Carter, *Contract Law in Australia*, 6th edn (Chatswood: LexisNexis, 2012). See also Christopher Carr, "Inequality of Bargaining Power" (1975) 38 M.L.R. 463.

[8] McKendrick, *Contract Law* (2015), at p.303 et seq.

[9] McCamus, *The Law of Contracts*, 2nd edn (Toronto: Irwin, 2012), at p.381.

[10] *Anson's Law of Contract* (2010), at pp.376–377.

[11] Stephen Waddams, *The Law of Contracts*, 6th edn (Toronto: Canada Law Book, 2010), at para.524.

[12] McCamus, *Law of Contracts* (2012), at p.378.

[13] [1978] B.C.J. No.1318; (1978) 95 D.L.R. (3d) 231 at [25].

attempts to accomplish Denning's goal in whole or part, strongly suggests that there is something there, though not quite attained yet. If Denning's "inequality of bargaining power" did not correctly identify the common principle, could it be that sustained scholarly interest in his attempt evinces a collective intuition that one does exist, capable of attracting a reasonable consensus if more accurately articulated?

3. Outline of the paper

i) Thesis

This paper argues that a common principle does exist—properly articulated as exploitation of constrained autonomy. More precisely, each of the doctrines enables a contract to be avoided where the party seeking to uphold it exploited a serious constraint on the other party's free consideration of whether to enter the contract. A unified test should ask: (1) whether such a constraint existed (e.g. as a result of pressure, influence, disability or other factors), and if so, (2) whether it was exploited by the other party in that it (actually or constructively) knew of the constraint, and yet formed a contract with the constrained party.

ii) Structure

This paper proceeds in three parts: Pt II briefly reviews the doctrines of duress, undue influence, and unconscionability, as necessary for the subsequent discussion of whether they reflect an underlying principle. Part III considers Lord Denning's suggestions of a unifying principle, and other subsequent proposals these inspired, examining some apparent flaws which may explain why none has been accepted by the jurisprudence. Part IV outlines the principle I propose, and explains how it underlies duress, undue influence and unconscionability, while rectifying the perceived frailties of previous unifying formulations. The concluding Pt V briefly reinforces why, if an underlying principle exists, it should be openly recognised.

II. The Doctrines

Before considering possible common foundations, it serves to summarise the relevant key features of each doctrine.

1. Duress

Duress is of common law origin. In Contract, it now has three branches: (1) duress to person, founded on violence or threats to the security of a person or family members;[14] (2) duress as to goods, which refers to actual or threatened damage or improper detention of the other party's property;[15] and (3) economic duress, which involves illegitimate pressure or threats against the other party's economic

[14] *Barton v Armstrong* [1976] A.C. 104; [1975] 2 All E.R. 465; *Re Craig* [1971] Ch. 95; [1970] 2 All E.R. 390; *Saxon v Saxon* [1976] B.C.J. No.1309; [1976] 4 W.W.R. 300; *Byle v Byle* [1990] B.C.J. No.258; (1990) 65 D.L.R. (4th) 641.

[15] *Skeate v Beale* (1841) 11 Ad. & El. 983; 113 E.R. 688; *Maskell v Horner* [1915] 3 K.B. 106; *Astley v Reynolds* (1731) 2 Str. 915; 93 E.R. 939; *Pople v Dauphin* [1921] 2 W.W.R. 276; (1921) 60 D.L.R. 30; E. Allan Farnsworth, *Contracts*, 4th edn (New York: Aspen, 2004), at p.257.

interests.[16] In any of these cases, the result must be that the other party had no practical choice but to consent to the contract.[17] Further, there must be a sufficient causal link between the pressure or threat and the consent obtained.[18] Once these requirements have been established, the usual remedy is that the contract is voidable.[19]

2. Undue influence

Undue influence is an equitable doctrine. It renders a contract voidable where one party has abused a relationship with another party to influence the latter's assent to a contract.[20] This need not take the form of pressure, as in duress, but may consist in subtler forms of manipulation, or even passive failure to emancipate the party from dependence or excessive reliance on the other.[21]

Undue influence has been said to encompass two distinguishable streams: (1) actual undue influence, where the party seeking to avoid the contract directly establishes the above elements;[22] and (2) presumed undue influence, where the law presumes influence if a party in a relationship of vulnerability or dependence on another makes a contract with that party which is unfavourable so as to "call for explanation".[23] In *Etridge*, the House of Lords described these as two distinct ways of proving one "doctrine" of undue influence, rather than two different doctrines; nevertheless, the distinction remains extremely useful analytically, precisely because it draws attention to these two distinct ways of proving undue influence, one of which relies on the availability of a presumption under specific conditions, as highlighted later throughout this paper.[24]

[16] *Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Sibeon & The Sibotre)* [1976] 1 Lloyd's Rep. 293 (Kerr J.); *North Ocean Shipping Co v Hyundai Construction (The Atlantic Baron)* [1979] Q.B. 705; [1978] 3 All E.R. 1170; *Atlas Express v Kafco* [1989] Q.B. 833; [1989] 1 All E.R. 641; *Pao On v Lau Yiu Long* [1980] A.C. 614; *R. v Attorney General for England and Wales* [2003] UKPC 22; [2003] E.M.L.R. 24.

[17] *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 A.C. 366; [1982] 2 All E.R. 67 (Lord Scarman); *B&S Contracts and Design v Victor Green Publications* [1984] I.C.R. 419; (1984) 81 L.S.G. 893 (Kerr L.J.); *Restatement (Second) of Contracts* (Washington: American Law Institute, 1981), at para.175(1).

[18] What qualifies as sufficient is a matter of some uncertainty. See McKendrick, *Contract Law* (2015), at pp.294–297; Matthew Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 511; *Restatement (Second) of Contracts* (1981), para.175 comment c.

[19] *IFR Ltd v Federal Trade SpA* [2001] EWHC 519 (Comm); 2001 WL 1677001; *Pao On v Lau Yiu Long* [1980] A.C. 614; *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck) (No.2)* [1992] 2 A.C. 152 at 165; [1991] 4 All E.R. 871 at 878 per Lord Goff; *Restatement (Second) of Contracts* (1981), at para.175. There is some debate whether, in duress to person, the contract is void or voidable. Waddams' argument that consistency demands the latter is persuasive: *Law of Contracts* (2010).

[20] *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44; [2002] 2 A.C. 773; *R. v Attorney-General for England and Wales* [2003] E.M.L.R. 24 (Lord Hoffmann); *National Commercial Bank (Jamaica) v Hew* [2003] UKPC 51 (Lord Millett); *Randall v Randall* [2004] EWHC 2258; [2005] W.T.L.R. 119; *Turkey v Awadh* [2005] EWCA Civ 382; [2005] 2 F.C.R. 7; *Davies v AIB Group* [2012] EWHC 2178 (Ch); [2012] 2 P. & C.R. 19 (Norris J.).

[21] *Etridge* [2002] 2 A.C. 773; *Thompson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P. & C.R. 16; *National Westminster Bank Plc v Morgan* [1985] 1 A.C. 686; *Allcard v Skinner* (1887) 36 Ch. D. 145; Farnsworth, *Contracts* (2004), at p.516; Rick Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 O.J.L.S. 503 at 513.

[22] *Williams v Bailey* (1866) L.R. 1 H.L. 200; *CIBC Mortgages v Pitt* [1994] 1 A.C. 200; [1993] 4 All E.R. 433.

[23] *Royal Bank of Scotland v Etridge (No.2)* [2002] 2 A.C. 773; *Allcard v Skinner* (1887) 36 Ch. D. 145; *CIBC v Rowatt* [2002] O.J. No.4109; (2002) 61 O.R. (3d) 737; Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 514.

[24] *Etridge* [2002] 2 A.C. 773 at [107], [157]–[158] and [219] (framing the distinction as evidential). See also Sir Kim Lewison, "Under the Influence" [2011] R.L.R.1 at 1–3. For the distinction, see *Bank of Credit & Commerce International SA v Aboody* [1990] 1 Q.B. 923; [1992] 4 All E.R. 955; Peter Birks and Nyuk Yin Chin, "On the Nature of Undue Influence" in Sir Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1997). Birks and Chin consider them two different doctrines.

The cases relying on the presumption fall into two further sub-groups:[25] the so-called group "2a" applies to relationships such as solicitor-client, teacher-pupil, spiritual advisor-follower, trustee-beneficiary, formally conceived as relationships of trust, confidence, loyalty, dependence or the like, so that such qualities are deemed to apply. For other relationships within the residual category so-called "2b", it must be proved that, whatever the form of the relationship, it had these qualities in practice.[26] Once a relationship having such qualities is established (deemed under 2a, or proven under 2b), the focus of the inquiry shifts to whether the substance of the transaction favours the stronger party with a disparity that "calls for explanation". If so, unless the party seeking to uphold the contract can prove that influence deriving from the relationship was *not* used to procure the contract, it will be voidable.[27]

3. Unconscionability

The doctrine of unconscionability also derives from equity. Its requirements were summarised by Blair J. in *Strydom v Vendside*:

> "one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive".[28]

The third-mentioned condition means that the transaction must have a substantive disparity that requires explanation.[29]

The moral culpability requirement consists in making a contract with another party whilst consciously exploiting certain disadvantages[30] it may have such as poverty,[31] need,[32] "ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability".[33] Thus, where the benefiting party is unaware of the other's impairment, there is no unconscionability.[34] As with presumptive undue influence, the wrongful conduct

[25] *Aboody* [1990] 1 Q.B. 923; *Etridge* [2002] 2 A.C. 773.

[26] *Aboody* [1990] 1 Q.B. 923; *Etridge* [2002] 2 A.C. 773; *Geffen v Goodman Estate* [1991] 2 S.C.R. 353. For the view that category 2b is not conceptually distinct, but merely a difference in what must be directly proven rather than inferred, see e.g., *Etridge* [2002] 2 A.C. 773 at [107] per Lord Hobhouse.

[27] On whether the transaction "calls for explanation," see *Evans v Lloyd* [2013] EWHC 1725 (Ch); [2013] W.T.L.R. 1137; *Turkey v Awadh* [2005] 2 F.C.R. 7; *Thompson v Foy* [2010] 1 P. & C.R. 16. On disproof: *Hackett v Crown Prosecution Service* [2011] EWHC 1170 (Admin); [2011] Lloyd's Rep. F.C. 371.

[28] [2009] EWHC 2130 (QB); [2009] 6 Costs L.R. 886 at [36]. See also the Australian cases *Blomley v Ryan* [1956] HCA 81; (1956) 99 C.L.R. 362 and *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 C.L.R. 447.

[29] *Alec Lobb v Total Oil Great Britain Ltd* [1983] 1 W.L.R. 87; [1983] 1 All E.R. 944.

[30] J.L. Barton, "The Enforcement of Hard Bargains" (1987) 103 L.Q.R. 118 at 140; *Chitty on Contracts* (2015), at paras 8-133 and 8-135.

[31] *Fry v Lane* (1888) 40 Ch. D. 312; *Strydom v Vendside* [2009] 6 Costs L.R. 886; *Alec Lobb v Total Oil* [1983] 1 W.L.R. 87 at 94–95 per Peter Millett Q.C.; *Blomley v Ryan* (1956) 99 C.L.R. 362 at 415 per Kitto J.

[32] Stephen Waddams, "Unconscionability in Contracts" (1976) 39 M.L.R. 369 at 386; *Blomley* (1956) 99 C.L.R. 362.

[33] *Cain v Clarica Life Insurance*, 2005 ABCA 437; (2005) 263 D.L.R. (4th) 368 at [32]; David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 L.Q.R. 403. For a similar list, see also *Blomley* (1956) 99 C.L.R. 362 at 405 (Fullagar J.) and 415 (Kitto J.). The latter adds "other circumstances [that] affect [one's] ability to conserve [one's] own interests". Mindy Chen-Wishart sums up these areas of intervention by saying that they reflect concerns of "decency and good faith. Unconscionability is a mechanism for imposing on parties the judicial conscience": "Unconscionable Bargains: What are the courts doing?" (LLM Thesis, University of Otago, 1987), at p.146.

[34] *Hart v O'Connor* [1985] A.C. 1000 at 1018; [1985] 2 All E.R. 880 at 887.

requirement of unconscionability need not be proved by the weaker party, but may be presumed to have occurred where substantive disparity is evident.[35] In that case, unless the party asserting the contract can show that the transaction was "fair, just and reasonable", the contract may be voided.[36]

It should be cautioned that in the US, unconscionability doctrine means something different.[37] Across the Commonwealth, unconscionability is not entirely monolithic; but what differences may exist[38] are comparatively modest enough that it is sufficient for purposes of this paper to speak of a Commonwealth case law doctrine of unconscionability.[39] Some unhelpful confusion[40] has resulted from shared terminology between the Commonwealth doctrine, and the US one,[41] as well as statutory "unconscionability" provisions:[42] these are each different matters than the Commonwealth case law doctrine.

[35] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509.

[36] *Anson's Law of Contract* (2010), at p.373.

[37] This resulted from the influence of the Uniform Commercial Code (UCC) "Unconscionable contract or clause" provision (enacted in many states): UCC para.2-302, comment 1. The provision governed sale of goods, and was not meant to codify the case law doctrine of unconscionability, but was a tool for judges to deal with "unfair surprise" clauses more directly than by manipulating rules of interpretation, offer and acceptance, determining clauses as against public order, etc. Further, the consequence differed: non-enforcement of the individual clause, not rescission of the contract as under the case law doctrine. United States courts then extended the UCC approach from sale of goods to general application, effectively superseding the older case law doctrine. This is evident from the description of unconscionability under US law in the leading case *Williams v Walker-Thomas Furniture Co* 350 F.2d 445 (1965) (D.C. Cir.). See also *Restatement (Second) of Contracts* (1981), at para.208; Farnsworth, *Contracts* (2004), at para.4.28. The US unconscionability doctrine is therefore tangentially related to the Commonwealth case law unconsionability doctrine.

Post-UCC, other jurisdictions including Australia and Canadian provinces also enacted statutory provisions different from the case law doctrine but using the term "unconscionability". See Australian Consumer Law ss.21–22, 232, 236–237 and 243; for Canada, see summary in Waddams, "Unconscionability in Canadian Contract Law" (1992) 14 Loy. L.A. Int'l & Comp. L. Ann. 541. Section 20 of the Australian Consumer Law does codify the case law doctrine (to authorise financial penalties as a remedy and curtail case law defences such as affirmation or implied waiver): see Carter, *Contract Law in Australia* (2012), at p.530 et seq.

[38] An example of differences in application of the case law doctrine of unconscionability within the Commonwealth is that Australian courts since *CBA v Amadio* (1983) 151 C.L.R. 447, and perhaps indirectly influenced by the statutory "unconscionability" enactments, are more likely to deal with cases overlapping unconscionability and undue influence using unconscionability where English courts might use undue influence.

[39] Despite the pattern in fn.38 above, the articulation of unconscionability is consistent in England and Australia. And where cases are analysed under unconscionability in these countries' courts, the application is not significantly different.

[40] Some confusion arises from the name: Cartwright for example says "[t]here is a danger in using such a phrase as unconscionable bargains that … it can be thought that the courts are concerned only with the fairness of the bargain": *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford: Clarendon Press, 1991), at p.216. See also *Chitty on Contracts* (2015), at para.8-130: "it remains doubtful in modern law to what extent there is any general equitable principle entitling the courts to interfere with freedom of contract on the ground that the contract (or a part of it) is, in all the circumstances of the case, a harsh and unconscionable bargain". Confusion is also evident from the markedly different ways in which contract textbooks approach unconscionability. Most treat it as a doctrine alongside duress and undue influence within a related cluster. But some discuss it under the umbrella of inequality of bargaining power. Some do not discuss unconscionability at all. And Waddams includes duress and undue influence within unconscionability.

[41] However, the US position "has not given birth to a body of … Commonwealth authority evolving the case law doctrine along American lines … There is very little evidence [of this] in the decided cases": McCamus, *Law of Contracts* (2012), at p.432.

[42] In Canada, McCamus notes that the Supreme Court's judgments in *Hunter Engineering v Syncrude Canada* [1989] S.C.J. No.23; [1989] 1 S.C.R. 426 and *Tercon Contractors v British Columbia* [2010] S.C.J. No.4; [2010] 1 S.C.R. 69 are seemingly decided under the Commonwealth case law doctrine. Yet, without proposing to alter it, nor to generalise the reach of Canadian specialised statutory provisions as US courts did, they effect an American-style resolution; see McCamus, *Law of Contracts* (2012), at pp.442–445. The term's use in fact goes far beyond those discussed here: see Waddams, *Law of Contracts* (2010). As I see it, overall confusion seems to arise from the case law originally (and still) simultaneously using "unconscionable" simply as an adjective factually to describe exploitative advantage-taking in equity. In certain special kinds of contexts (well-elaborated by Waddams), that factual conclusion suffices to ground a remedy, hence in those contexts it amounts to a legal doctrine. In other contexts, it is merely one consideration (see e.g., Carter, *Contract Law in Australia* (2012), at pp.519–520). And the case law doctrine of unconscionability is one where unconscionable conduct is a necessary but not sufficient condition: a special disability must be exploited, and the result overreaching or oppressive, for the doctrine to apply.

III. Review and Evaluation of Prior Conceptions of the Unifying Principle

I now review Lord Denning's formulation, variations, and related proposals by others, of the perceived common principle uniting duress, undue influence, and unconscionability.[43]

I discuss each formulation's useful insights, as well as apparent shortcomings in seeking to consolidate the individual doctrines—which may explain why none has been accepted by the jurisprudence.

1. "Inequality of bargaining power"

The common principle candidate to be assessed first is "inequality of bargaining power"—the label that Lord Denning gave to his proposed principle in *Bundy*.

An inequality of bargaining power means that the parties stand on relatively unequal footing as they head into the contracting process, as regards the degree of personal freedom they carry into the process of deciding whether to contract and the degree of personal empowerment they carry into the process of negotiating terms.

The concept has played an important role in the quest to identify the common principle uniting duress, undue influence, and unconscionability. Denning's idea that these boil down to circumstances of "inequality of bargaining power" is what got the conversation started about whether a common foundation exists. The suggestion attracted much subsequent attention and reaction, including, in John Cartwright's estimation,[44] Lord Scarman's disapproval of Denning's *Bundy* opinion in the higher courts. And the notion has remained a fixture within other more complex formulations of a common principle.

For two of the doctrines—unconscionability and presumed undue influence—it may fairly be said that inequality of bargaining power describes part of what they require. As detailed in Pt II, within these doctrines, one does not prove unconscionable conduct or undue influence. Rather, such conduct is presumed, absent contrary evidence, from disparity in a bargain made between two parties having highly unequal bargaining power—whether in the nature of the relationship (in presumed undue influence) or from certain kinds of disadvantage of the weaker party (in unconscionability).

Further, while the other two doctrines, duress and actual undue influence, do not require proof of any inequality of bargaining power, it may often be that such an inequality factually attends the circumstances. For example, a case made on the basis of actual undue influence will frequently be one where the doctrine of presumed undue influence could have been invoked, but there was no need to rely on it and its presumption, because persuasive direct proof of the influence was available. Similarly, the broadest category of duress is economic, which can occur

[43] While, as mentioned, an exhaustive account of other proposals is not possible here, surveying some notable attempts will help chart the course from *Bundy* to the thesis this paper advances.

[44] Cartwright suggests this attention distracted from a different, more complex, and more promising principle (to be discussed in Pt III.2, below) that Denning detailed beyond the label, so that "the choice of 'inequality of bargaining power' as the catchword [was] unfortunate": *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991), at p.220. But many commentators, following Denning, were interested in the inequality of bargaining power idea discussed in this section, and to what extent it could work: see e.g., Thal, "The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness" (1988) 8 O.J.L.S. 17 at 26.

where one party is stuck in an economically compromised bargaining position, creating an opportunity for the other party to benefit from applying the improper pressure that causes duress.

Beyond the significance "inequality of bargaining power" actually has within the doctrines, it obviously holds conceptual appeal as a unifying principle candidate due to its simplicity, legitimacy as a phrase found in legal sources,[45] and accessibility to the lay subject of the law of contract.

Despite these facts to commend it and the endorsement of the legendary Master of the Rolls, the attempt to consolidate the individual doctrines using inequality of bargaining power ultimately got, in McKendrick's phrase, a "frosty reception in the appellate courts".[46] In *Bundy* itself, the majority declined to pass judgment on it, instead resolving the case as undue influence. Later revisiting the question in *Alec Lobb*, the Court of Appeal rejected the notion, and made clear that Lord Denning himself never intended that inequality of bargaining power, without more, should be enough.[47] Again in *Morgan*, the House of Lords expressly disapproved it.[48]

There may be good reasons for this. Though relevant in the ways discussed, it is difficult to see how inequality of bargaining power could accurately be said to encapsulate the individual doctrines.

To the extent it might be cast as an underlying legally-required element, it is at most confined to unconscionability and presumed undue influence, where in both cases it plays a limited role. As noted, inequality of bargaining power can be seen as inherent in unconscionability's question of whether one party was under a certain disadvantage,[49] and presumed undue influence's question of whether the parties' relationship was of a kind typified by influence.[50] But in both cases, the presence of such inequality is not enough to answer these questions. In presumed undue influence, it must be found in an existing relationship, of a type where the inequality rose to the level of dependence. And in unconscionability, it must reside within (or analogously to) certain categories of quite serious weakness of the disadvantaged party.

Within unconscionability and presumed undue influence, the role of inequality of bargaining power (in the described forms) is further limited in that it is just one of the necessary elements for relief. Both doctrines additionally require misconduct by the stronger party—*abuse* of the inequality of bargaining position, as Cartwright casts it.[51] To establish this misconduct, the doctrines furthermore seek proof of a striking substantive disparity in the bargain. These additionally-required elements

[45] Friedrich Kessler, "Contracts of Adhesion: Some thoughts about Freedom of Contract" (1943) 43 Colum. L. Rev. 629 at 631–632; UCC para.2-302, comment 1; *Lowe v Lombank* [1960] 1 W.L.R. 196; [1960] 1 All E.R. 611; *Williams v Walker-Thomas Furniture* 350 F.2d 445 (1965) (D.C. Cir.); *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308 at 1316; [1974] 3 All E.R. 616 at 624 per Lord Diplock.

[46] McKendrick, *Contract Law* (2015), at p.303.

[47] *Alec Lobb v Total Oil* [1983] 1 W.L.R. 87 per Lord Dillon: "Nothing leads me to suppose that the course of the development of the law over the last 100 years has been such that … relief will now be granted in equity in a case such as the present if there has been unequal bargaining power, even if the stronger has not used his strength unconscionably … Lord Denning did not envisage that any contract entered into in such circumstances would, without more, be reviewed".

[48] *National Westminster Bank Plc v Morgan* [1985] 1 A.C. 686.

[49] See e.g., *Strydom v Vendside* [2009] 6 Costs L.R. 886 at [36].

[50] *Re Craig* [1971] Ch. 95; *Geffen v Goodman Estate* [1991] 2 S.C.R. 353.

[51] Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991). See also: *Alec Lobb v Total Oil* [1983] 1 W.L.R. 87; Carter, *Contract Law in Australia* (2012), at p.525.

exist because, crucially and appropriately, the law recognises that even where there is an inequality of bargaining power, it will not always be unfairly leveraged in the making of a contract. Inequality of bargaining power creates a *potential* for exploitive dealing. But circumstances ripe for exploitation are not always exploited. Thus the additionally-required elements pursue the separate inquiry of whether the contract at hand shows signs of indeed having been tainted by abuse of the inequality of bargaining power.

Meanwhile, within the other two doctrines of duress and actual undue influence, there is no requirement of inequality of bargaining power at all. They do not inquire into the position of the parties. As noted, an inequality will not uncommonly be factually present. But legally, the two doctrines do not concern themselves with it. What they do share with unconscionability and presumed undue influence is a concern with misconduct, whether improper pressure (in duress) or influence (in actual undue influence). Inequality of bargaining power, as noted, represents only a potential for misconduct. This is why unconscionability and presumed undue influence start with it, but then go on to ask whether the substantive bargain suggests that this potential for abuse materialised. Duress and actual undue influence need not "speculate" via presumptions drawn from a risk and a result as to whether misconduct occurred, for they *directly* pursue positive proof of the misconduct.

It could plausibly be claimed that a person under coercion or influence has diminished bargaining power as a result. This is another example of how inequality of bargaining power often factually attends the circumstances. But it is important to distinguish where inequality of bargaining power is the *result of*, rather than the *opportunity for*, the misconduct which the doctrines require.[52] Further, one can imagine coercion and influence cases where the affected parties do not bargain at all; they are simply doing the will of the exploiting party, or substantially so. In these cases, bargaining power is under-inclusive as a concept for capturing the scope of the doctrines' concerns.

Meanwhile in other cases, it is over-inclusive, for it overreaches the sum of the doctrines. Many circumstances of inequality of bargaining power fall outside all of the doctrines. Indeed, there are even cases of *severe* inequality of bargaining power where none of the individual doctrines, with their several criteria, apply.[53] Inequality of bargaining power therefore does not work as a principle which synthesises existing law; rather, it would significantly change it. Conceptually, bargaining power simply does not correspond with the mischief targeted, which

[52] I thank Stephen Smith for spurring an example which helps to illustrate this: assume there is inequality of bargaining power where a man is in necessity, overboard drowning in icy water, whilst offered rescue at an excessive fee. Smith asks whether inequality of bargaining power is not likewise present in a coercion scenario where the "rescuer" threw the man overboard before offering rescue for the fee? There is, but it is a symptom, rather than the cause, of the defect in this contract's formation. To see this, suppose that, as they clasp hands, the man overboard threatens to pull the "rescuer" into the icy water unless the rescuer pays the man overboard double the rescue fee. If the threat is carried out, both men will drown. Their bargaining power is equal. But this contract, like the contract for rescuing the man overboard after throwing him in, will be invalid for duress.

More generally, suppose a weaker party (W) with bargaining power X, and a stronger party (S) with bargaining power X + n. If W engages in some conduct so as to reduce S's bargaining power by n, then W and S now have exactly equal bargaining power, X. Yet a contract formed under these circumstances would be voidable for duress. Thus, at a minimum, the coercion and influence cases are concerned with a diminishment of bargaining power, rather than an inequality.

[53] Namely where there is no pre-existing relationship, no illegitimate pressure, and no infirmity recognised by unconscionability. Consider the modern prevalence of "contracts of adhesion": Kessler, "Contracts of Adhesion: Some thoughts about Freedom of Contract" (1943) 43 Colum. L. Rev. 629. The same would be true of a severe diminishment of bargaining power, unknown to the other, and short of incapacity.

is constraint on a party's autonomy exploited by the other party. For these reasons, inequality of bargaining power must be rejected as the common principle uniting duress, undue influence, and unconscionability.

2. Lord Denning's "mongrel" principle

Beyond this label of "inequality of bargaining power" that captured the interest of others, Lord Denning himself went on to detail a more complex principle in *Bundy* which he proposed to unite duress, undue influence, and unconscionability. He described it thus:

> "[T]hrough all these instances there runs a single thread … [T]he English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."[54]

Neil Andrews refers to the principle as a "mongrel",[55] because it blends together three breeds of requirement: (1) gross substantive unfairness; (2) grievously weak bargaining power; and (3) illegitimate pressure or influence.

It should be evident that this Denning formulation does gather together themes from the different individual doctrines. It takes two steps in the right direction from inequality of bargaining power simpliciter. The first is that mere unequal bargaining power does not suffice. This is implicit in the qualifier "grievous" that he applies to the inequality. And indeed, the two doctrines that may be seen as requiring inequality of bargaining power do so suggest—a relationship of dependence in the case of presumed undue influence, and a disability of the weaker party in unconscionability. The second step is the addition of an element of wrongdoing by the benefiting party, which as discussed, is required by each of the doctrines in some form.

Yet this more nuanced formulation has not gained a foothold in the courts, displacing the individual doctrines, any more than the label of inequality of bargaining power. I would suggest that this is principally because the more complex principle improperly cumulates alternative criteria for rescission. In other words, the problem is not that it is a mongrel, but that it is a two-headed dog.

In particular, Lord Denning's third condition, which refers to undue pressure or influence, should be sufficient on its own, via either duress or actual undue influence respectively, to avoid a contract. Yet in Denning's proposed formulation, the contract is not thereby avoided unless his other two conditions are also fulfilled.

And conversely, Denning's other two conditions of substantive disproportion plus serious inequality of bargaining power, should, via either unconscionability or presumed undue influence (according to the nature of the inequality), support a presumption which substitutes for the need to prove his remaining condition of wrongdoing, absent proof to the contrary.

[54] *Lloyds Bank v Bundy* [1975] Q.B. 326 at 339.
[55] Andrews, *Contract Law* (2015), at p.317.

As it is put in *Anson*:

> "Denning's test requires procedural and substantive unfairness, whereas duress and undue influence require only the former, and presumed undue influence uses substantive unfairness only to place on the stronger party the burden to justify the contract where there is no evidence of actual undue influence."[56]

Similarly for unconscionability.

In Pt III.1, I described two *alternate* approaches to establishing a right to rescind the contract: (1) direct, by proving illegitimate pressure (duress) or influence (actual undue influence) *or* (2) indirect, by proving relative positions comprising a high risk of exploitation, coupled with a suspiciously disproportionate bargain, so that without an alternate explanation, the law presumes that the risk of exploitation materialised. Lord Denning's complex formulation compounds the two, forcing one claimant to satisfy two different guard-dogs with opposing fixations before gaining entry. Cumulating what are supposed to be alternate conditions, Denning's more detailed formulation does not conform to existing law, but would make it significantly more restrictive.

3. Waddams' "unfairness" theory of unconscionability

Denning's attempts in *Bundy* to consolidate the doctrines discussed here also included cases of expectant heirs and salvage agreements—both niche areas where special rules authorise courts to grapple directly with a contract's substantive fairness.[57] The year after *Bundy*, Stephen Waddams proposed effectively to extend Denning's unification effort by including a number of additional special rules with similar import from other niche areas including forfeitures, penalties, deposits, and limitation clauses.[58]

Waddams' approach to consolidation is to elevate one of the doctrines—unconscionability—and stretch it so as to fit the others inside it.[59] He is not alone in suggesting this as a possible way of proceeding; Rick Bigwood and Justice Phang, for example, have also done so.[60] Others such as David Capper suggested that the elements could be treated as non-essential factors, rather than conditions, with the court weighing everything and "making an overall judgment as to whether a transaction can stand".[61] The greater subjectivity inherent in Capper's version brings us close to Waddams' view that "large inequality of exchange, combined with inequality of bargaining power … goes a long way to suggest a case for relief";[62] albeit not determinative, this would burden the benefiting

[56] *Anson's Law of Contract* (2010), at pp.375–376.
[57] *Lloyds Bank v Bundy* [1975] Q.B. 326 at 337–339.
[58] Waddams, "Unconscionability in Contracts" (1976) 39 M.L.R. 369.
[59] Indeed, his text uncommonly organises these subjects in that way: Waddams, *Law of Contracts* (2010), Ch.14. This interestingly differs from Denning's approach of proposing a new meta-principle overarching each individual doctrine. The two approaches might not be so disparate, however: the three conditions in Denning's principle are more or less the same as those in the Commonwealth doctrine of unconscionability; what mainly separates them is Denning's cumulation of all three conditions and omission of a rule alleviating the need to prove wrongdoing when the other two conditions are satisfied.
[60] Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 O.J.L.S. 503; Andrew Phang, "Undue Influence Methodology, Sources and Linkages" [1995] J.B.L. 552.
[61] David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 L.Q.R. 479 at 500.
[62] Waddams, *Law of Contracts* (2010), at para.545.

party with proving, on the contrary, that the disadvantaged party was independently advised or intended a partial gift. Among these factors, the emphasis is on substantive unfairness: Waddams' general principle is that "a contract may be set aside if it produces consequences that are very unfair".[63]

Waddams' proposal makes what seems a key contribution to the search for a common principle by recognising that unconscionability is conceptually the broadest of the doctrines, and a necessary focal point of any attempt at consolidation. Bigwood does not see an enveloping doctrine of unconscionability as the solution, and Cartwright does not view unconscionability as ultimately concerned with substantive fairness rather than wrongdoing, and on both points I agree. However, there is something in Waddams' approach that seems pivotal. Namely, I believe the common principle sought is most likely to be accurately identified by trying better to understand the theoretically-broad unconscionability in relation to the other doctrines, rather than by simply aggregating the conditions of the individual doctrines and eliding duplicate requirements.

Like the two Denning formulations, Waddams' proposal has not been accepted by the jurisprudence, apart from the special areas he cites. He acknowledges this, but counters that there is no principled basis for why relief is confined to these areas, and hence "general recognition of this ground is an essential step in the development of the law".[64]

However, the courts may have sound reasons for their reluctance. One concern may be that the proposal seems indiscriminately to mix general rules and special rules. Another could be that it requires inverting what in existing law appears to be a conscious allocation of the roles of principle and exception.

On the first point, if within the same area, there are both general rules and special rules of law, the assumption would ordinarily be that there is an essential difference in the special rules' vocation and operation, in order to justify their existence. It cannot be assumed that the general and special rules are accidental expressions of a common principle.[65] If they are, something must explain this. Special rules indeed often exist precisely as exceptions to the general rules, in some important respect expressed or implied.

Here, duress, undue influence, and the Commonwealth doctrine of unconscionability are general rules which apply to any type of contract, based on relatively abstract criteria, and are agnostic as to the contract's particular content. Forfeitures, penalties, deposits, and limitation clauses are special rules which apply only in confined circumstances, and which each require specific contractual content which they respectively define. The proposed principle, substantive unfairness, may fit well the special rules, but seems a challenging fit for the general rules: we have already noted the other elements they require. Waddams himself seems to acknowledge unfairness might not be a complete picture, stating that:

> "not every case lends itself to analysis in terms of equality of exchange and sometimes it may be that there is a case for relief even when the values exchanged are approximately equal".[66]

[63] Waddams, *Law of Contracts* (2010), at paras 545 and 542.
[64] Waddams, *Law of Contracts* (2010), at para.443.
[65] At least, aside from a principle so abstract as to be practically meaningless as a rule, e.g. "justice".
[66] Waddams, *Law of Contracts* (2010), at para.545.

Moreover, substantive unfairness is not a requirement for duress or actual undue influence, and within unconscionability and presumed undue influence, its express purpose is only to confirm an apprehended risk of exploited bargaining anomalies.

This connects with the second point: Waddams says that courts are reluctant to recognise a principle of substantive unfairness due to what he sees as an inflated concern with stability of contract.[67] He therefore seems to accept that the common law privileges stability—reflected in myriad judicial pronouncements in this vein:

> "to make inadequacy of consideration of itself a distinct principle of relief in equity … Courts of Equity … would throw everything into confusion and set afloat all the contracts of mankind".[68]

Forfeitures, penalties, deposits, limitation clauses and other cases Waddams cites where substantive fairness prevails are thus special exceptions to the general rule favouring contractual stability.

Even for these exceptions, there need not be a unified rational explanation, other than that each is limited enough not to upset the general principle of stability. Duress, undue influence, and unconscionability, being general principles, are *not* so limited. To accept substantive unfairness as the underlying principle they apply, and to police contracts on that basis, would turn the exception into the rule and the rule into the exception: stability would be confined to the interstices where courts find no unfairness.

4. Cartwright's "abuse" of inequality principle

Joining the list of experts who perceive that "there may be some common principle which underlies these areas of the law which have developed separately" is John Cartwright. However, Cartwright emphasises that "neither an unfair bargain", as Waddams proposes, "nor an inequality between the parties' bargaining positions", as in the simpler of the claims attributed to Denning, "of themselves vitiate a contract. What is required is an abuse of that inequality". Thus, in seeking what unifies duress, undue influence, and unconscionability, Cartwright uncovers "the key element" as being "the link between the unequal position of the parties and the bargain: the abuse of that position of inequality". Cartwright therefore espouses that "an illegitimate advantage-taking by one party underlies [these] separate areas".[69]

This conception's focus on abuse contributes significantly to the quest for Denning's grail of a common principle, for as Cartwright observes:

> "the principle which underlies the cases in this area is not simply one of public policy against inequality of bargaining power, or the unfair terms of contract. The cases consistently refer to the advantage taken by one party of the other".[70]

[67] Waddams, "Unconscionability in Contracts" (1976) 39 M.L.R. 369.

[68] *Griffith v Spratley* (1787) 1 Cox Eq. Cas. 383 at 388; 29 E.R. 1213 at 1215.

[69] Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991), at pp.215, 220 and 219.

[70] Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991), at p.214; see also Carter, *Contract Law in Australia* (2012), at p.525.

The law "suffers no man to overreach another, [but] helps no man who hath overreached himself without any practice or contrivance of his adversary".[71] Cartwright acknowledges that presumed undue influence and unconscionability do permit inequality of bargaining power together with substantive disparity to support a presumption which can void a contract. But "that presumption is that there has been an abuse",[72] and is rebuttable by proof that the contract was formed in a fair manner. Indeed, an "innocent" party, ignorant that the other party joined the contract through abuse by a third party, may enforce it.[73]

Like the previously surveyed formulations, Cartwright's proposed means of unifying duress, undue influence, and unconscionability has not earned the favour of the jurisprudence so as to displace the individual doctrines.

Again it seems that reasons can be found why this might be so. One reason, detailed in Pt III.1, is that the doctrines do not all require inequality of bargaining position: unconscionability and presumed undue influence do, but duress and actual undue influence do not. Evidently, Cartwright's theory implies that the improper conduct proscribed by duress and actual undue influence be understood as in essence abuse of unequal bargaining position. However, this seems a difficult proposition, since these doctrines do not inquire into the parties' positions; potentially, the court may not even know the positions.

As for the improper pressure or influence they do investigate, these must affect the parties' freedom to decide whether to enter the contract, because of the doctrines' causation requirements. To add that this "interference" sought and found arises from abuse of unequal bargaining position, being the true ground of invalidity, would seem to position the cart before the horse: the foundation of enforceability is freedom of contract, not equal bargaining power. As noted in Pt III.1, unconscionability and presumed undue influence inquire into unequal bargaining position because they pertain to high risk scenarios for the weaker party being unable to bargain freely. Where, as in duress and actual undue influence, constraint on freedom of contract can be directly proven, there is no need to look for risks and results of such as grounds for indirectly inferring its occurrence. This is further supported by the fact that duress and actual undue influence may ignore not only bargaining positions, but also substantive results: they allow avoidance of a contract even where there is no substantive disparity, so long as the required element of "compulsion" is found.

Moreover, compulsion (in the loose sense used in the cases) is a broader notion than abuse of unequal bargaining position, not vice versa. The latter is but one way to effect such compulsion. Holding a gun to someone's head is entirely another. And presumably, the party wielding the gun is normally in the weaker position, otherwise it would not have needed it. In sum, because Cartwright's theory casts the required element of wrongdoing as an abuse *of inequality of bargaining position*, it does not escape the problems noted with that concept.

Alternatively, more amorphous definitions of wrongdoing, as the central element of a proposed formulation,[74] would risk frustrating the reason for uniting the

[71] *Maynard v Moseley* (1676) 3 Swans. 651; 36 E.R. 1009.
[72] Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991), at p.214.
[73] Waddams, *Law of Contracts* (2010), at para.509.
[74] Formulations could be imagined similar to Cartwright's in its focus on wrongdoing, except not pinned to abuse of unequal bargaining position, rather more agnostic as to the nature of the wrongdoing. For instance, Conaglen,

doctrines—to identify what analytically drives them, while making it simpler to predict and explain when a contract can or cannot be avoided.

5. Conaglen's power imbalance "continuum"

Unlike the proposals reviewed thus far, Matthew Conaglen's does not propose to combine duress, undue influence, and unconscionability into one "conglomerate doctrine". He supports their separateness. Responding to renewed calls by others for their union, he allows that the doctrines are "definitely … unified in their general concern … and there is a considerable amount of overlap between them". He even acknowledges that their union "may yet occur in the future". What stands in the way, in his view, is the "important methodological difference" that duress and actual undue influence look only at "procedural" unfairness, whereas unconscionability and presumed undue influence also consider "substantive" unfairness. His formulation is therefore a proposed theoretical *distinction* between these *pairs* of doctrines that explains their methodological difference and supports their separation. If this is not possible, he concedes that "careful consideration would have to be given to discarding the differences among the doctrines in favour of a unified doctrine".[75]

Like most of the theories tracing back to Denning's in *Bundy*, Conaglen's fixates on inequality of bargaining power. But he sees it as a matter of degree: the relationships among the doctrines are explained by locating them along a continuum according to the degree of power imbalance they embody. Specifically, each doctrine "implement[s], at varying levels of strength, the principle of protection against exploitation of those power imbalances".[76]

One pole of his continuum he calls "the contractual end", where parties are equal, and no policing is necessary. Progressing up the continuum, a point is reached where the power imbalance is sufficient that the doctrines of duress and actual undue influence are needed to police transactions to ensure "procedural propriety": that is, "whether the parties have acted in an acceptable fashion towards each other in reaching whatever result they have arrived at". They look only at formation and not substance because of the law's "respect for the autonomous decisions of adult human beings". Progressing still further up the power imbalance continuum to what he calls the "fiduciary end", the doctrines of unconscionability and presumed undue influence police transactions. Here, the parties' relationship is "close to being, if indeed it is not actually, a fiduciary relationship". Hence:

whose overall view will be discussed in Pt III.5, suggests a more general definition of wrongdoing inspired by the Canadian case *Harry v Kreutziger* [1978] B.C.J. No.1318, referencing conduct "sufficiently divergent from community standards of commercial morality that [the contract] should be rescinded". However, this definition offers minimal direction, and is unified only in the conclusory words it uses to mask a vague and unknown analysis. Such are no doubt among the reasons Canada's Supreme Court has shifted Canadian law away from such precepts: see e.g., *R v Labaye* [2005] S.C.J. No.83; [2005] 3 S.C.R. 728 (dealing with indecency). Conaglen, perhaps reluctant to rest so much on that amorphous formulation, adds that "put another way, the [doctrines] are all examples of duties of good faith": "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 541. Yet this only reinforces concerns about vagueness, for good faith is much broader than the aggregate of duress, undue influence, and unconscionability, and it is uncertain what good faith might mean in this context.

[75] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509.

[76] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509.

> "there is greater concern for the inability of the weaker party to exercise his autonomy intelligently and to protect his own interests from abuse by the other [of the relationship's extreme power imbalance]".

In those cases, the law will intervene if it further identifies "a substantive problem in the transaction [because] the weaker of the two parties is not trusted to be capable of exercising the autonomy which the law respects" in cases short of this pole of the continuum.[77]

Conaglen's theoretical grapple with the doctrines is a valiant one: in pursuing nuances between them that might justify their discreteness, he arrives at profound insights into the doctrines' operation, inter-relation, and motivations. Ironically, but as he expressly foresaw as the possible result, these contribute what seem to me the final clues necessary to see why and how the doctrines should be united into a common principle. One of these key insights is his compelling demonstration that the essential *legal* as opposed to merely factual distinction among the doctrines is between the two methodological approaches he identifies. Another is the critical attention brought to the issue of the autonomy of the parties in forming the contract.

But even while preserving the separation of the doctrines, the jurisprudence has not rallied around Conaglen's theory as a way of explaining their overlaps but justifying their distinctions. In my view, there exist good reasons why the jurisprudence has not done so.

To begin with, it seems questionable that existing law's inclination towards party autonomy versus paternalistic policing of contract corresponds to the degree of power imbalance. For example, within Conaglen's formulation, where no doctrine applies is where none is needed because of equal bargaining power. But in reality, as noted earlier, many contracts are made with extreme power imbalances and yet none of the doctrines apply.

In addition, the theory places duress and actual undue influence at a point of significant, albeit not extreme, inequality of bargaining position. But, as discussed, these doctrines do not require inequality, and may apply without any, or ignorant as to whether there is any. If it was a requirement of these two doctrines, one might expect them to require proof of this moderate imbalance, as the other two doctrines require proof of a severe imbalance (in the form each governs). Conversely, one might argue that Conaglen unconsciously but implicitly recognises that duress and actual undue influence need not involve any power imbalance since he agrees they need not look beyond the "procedure" by which contractual consent was obtained: if these doctrines required moderate power imbalances, one might expect them also to examine the substantive bargain, except to assign less weight to what inference should be drawn from it than the doctrines do at his fiduciary end. Conaglen's answer is that the substantive result need not be considered because an allegation of duress or actual undue influence "does not raise concerns about taking advantage of an inability to exercise autonomous distributive power over one's assets".[78] However, it is difficult to imagine a circumstance that should more raise such concern than the duress archetype of having to decide with a gun to

[77] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 538–539.

[78] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 537.

one's head. Indeed, the partial "compulsion" that characterises all cases of duress and actual undue influence directly derogates from that autonomy. It may not fit the label "fiduciary", but what could more clearly justify similar dependence, regardless of bargaining position, than acting under another's compulsion?[79]

Another seeming problem with this theory of the doctrines' distinctions is that a given set of facts could satisfy the requirements of more than one doctrine—putting it in two places of the continuum at one time. Ultimately, Conaglen seems aware that the theory is flawed, acknowledging that distinctions between the doctrines cannot be explained solely by reference to degrees of power imbalance.[80] In light of his theory's penetrating insights plus the additional illumination emanating from gaps in the theory's explanations for what distinguishes the doctrines, I accede to Conaglen's *ergo* that without a viable distinguishing theory, the doctrines should be unified.

IV. A Refined Conception of the Unifying Principle: Exploitation of Constrained Decisional Autonomy

Until now, the courts have not embraced any yet-articulated formulation of the principle many experts believe unites duress, undue influence, and unconscionability. However, as those same experts have often said, it may be that the courts will yet do so in the future. With this in mind, I turn to articulating a refined conception of the common principle—one that seems to avoid apparent flaws of prior formulations, and accurately capture the nature and functioning of each of the individual doctrines. The crucial distinction of this conception from prior formulations is that it focuses not on bargaining power, but on decisional autonomy.

1. Principle and test

Duress, undue influence, and unconscionability all exist and operate according to the following common principle: A contract may be avoided where it is formed by one party exploiting a severe constraint in the other party's decisional autonomy regarding whether to consent to the contract.

This unified principle allows for a single test. The single test should ask:

(1) Was the party which seeks to avoid the contract seriously constrained from exercising its autonomy to decide whether to consent to the contract, as a result of pressure (as in duress), influence (as in undue influence), disability (as in unconscionability), or other factors, at the time it gave the consent?

(2) If so, was its seriously constrained autonomy exploited by the other party (as required by all the individual doctrines), through (actually

[79] Compulsion by the other party in the contract, that is. The label "fiduciary" may have developed in other areas of private law and been used for certain relationship-types but should not obscure the function of identifying circumstances of justifiable dependence.

[80] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 533. Regarding a fact-scenario fitting two spots of the continuum, suppose a litigant has proven that they were the weaker party in a relationship of presumed undue influence, and has evidence proving actual undue influence. The degree of power imbalance the theory supposes existed between the parties would nonsensically change based on the irrelevant fact of whether the litigant elects to adduce the evidence proving actual undue influence or instead evidence of the disparate bargain calling the court to presume influence.

or constructively) knowing of the constraint yet failing to take appropriate steps to ensure the consent received was sheltered from it in forming the contract?

The party seeking to avoid the contract may establish these elements via:

(a) Direct proof (as in duress or actual undue influence); or
(b) Legal presumption, where (as in unconscionability or presumed undue influence) the party: (i) is in a position relative to the other party that the law generally deems or the evidence in the case proves is one where typically a party's autonomy would be constrained and vulnerable to exploitation by the other party; and (ii) proves that the substantive bargain is grossly disproportionate in favour of the other party; unless (iii) the party seeking to uphold the contract proves the contract was not the result of this exploitation.

2. Details and explanations

This account of how the common principle ought to be conceived, and of a test which could apply it, gives rise to questions that must be clarified as to the meaning of its key terms and operational details.

i) Autonomy

In all these doctrines, the commonly-perceived contractual vice is not inequality of bargaining power as the parties head into the formation process, but constraint of one party's autonomy within that very process of deciding whether to consent.

By "autonomy", I mean the party's freedom to consider whether to consent to the contract. By "decisional", I mean autonomy only in respect of deciding whether to join the contract at issue, not autonomy in another sense or in general as in incapacity.[81]

"Constraint" of such autonomy comprises external constraint, be it the illegitimate pressure in duress, the improper influence in undue influence, or desperate circumstances such as poverty or necessity which unconscionability recognises as freedom-constraining. It comprises also internal constraint of the autonomous faculty as a result of impairments such as illness, ignorance, illiteracy, or senility covered by unconscionability. Constraint includes active interference with one's autonomy by the other party, as in duress or in undue influence cases involving manipulation. It also includes impairment deriving from the condition or circumstances of the affected party, as in unconscionability or in undue influence cases where the influencing party merely knew of the other's special vulnerability, and failed to emancipate it in the making of the contract.

By "serious" constraint, I mean, similarly to Mason J. in *Commercial Bank of Australia Ltd v Amadio*,[82] to exclude lesser restrictions on autonomy as a result of

[81] "Decisional" is used similarly, for instance, with regard to decisions of patients in Health Law, of subsidiaries in Company Law, and of adjudicative bodies in discussions of judicial/tribunal independence.

[82] Mason J. there said: "I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties, and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment" (see (1983) 151 C.L.R. 447 at 462).

the ordinary pressures, influences, and adverse external and internal circumstances that bear on every decision, and which would not be covered by any vitiating doctrine. I also mean, conversely, to exclude the more extreme or total lack of autonomy of incapacity.

These notions must be distinguished from related ones such as consent and intent, for Patrick Atiyah is right that:

> "the victim of the modern mugger who surrenders his wallet with a knife at his throat certainly knows what he is doing, and he intends to do it".[83]

The issue is not voluntariness, but deliberative freedom in the process of deciding one's will.

That constrained autonomy animates these vitiating doctrines makes sense given that autonomy is the essential precondition for the consent that creates valid contracts. To borrow Bigwood's phrase, "in our law, [and] in relation to contract law in particular", autonomy is "synonymous with the notion of responsibility".[84]

By contrast, inequality of bargaining power cannot explain the doctrines, for it only indirectly addresses and is insufficient to answer whether there are grounds to avoid a contract. It creates a risk that the stronger party will allow its superiority to constrain the weaker's autonomy in deciding whether to contract, or to affect the terms (i.e. what contract). But the stronger party might not do so. This is why unconscionability and presumed undue influence must go further, and examine the substantive bargain for evidence this risk materialised. Moreover, no matter how extreme the inequality of bargaining power, these doctrines will not apply unless it takes the form of a relationship of dependence (presumed undue influence) or qualifying disability (unconscionability). What do those scenarios have in common? The weaker party actually has constrained decisional autonomy, through disability or influence. Meanwhile, unequal bargaining power is not the only way that autonomy may be constrained: pressure (duress) or proven influence (actual undue influence) are sufficient without any necessary inquiry into bargaining position. Inequality of bargaining power's significance is thus confined to its relevance to constrained autonomy.

Despite the fever around inequality of bargaining power which has dominated debate on these doctrines since *Bundy*, antecedents of the alternate suggestion espoused here of constrained decisional autonomy do seem to exist. Academic intuitions broadly in this vein can be found across a range of prior discussions, marginalised and unperfected perhaps due to distraction with Lord Denning's red herring of bargaining power. Indeed, back in 1876, Sir Frederick Pollock said:

> "The question to be decided in each case is whether the party was a free and voluntary agent. Any influence brought to bear upon a person entering into an agreement, which, having regard to the … nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude

[83] P. Atiyah, "Economic Duress and the 'Overborne Will'" (1982) 98 L.Q.R. 197 at 200.

[84] Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 O.J.L.S. 503 at 506. It is also reflected, for example, in recent Australian case law where courts, in addressing whether the weakness of the party seeking rescission qualifies as a disability recognised under unconscionability, have asked themselves whether the party was able to make a judgment in his best interests; see *Begbie v State Bank of New South Wales Ltd* [1993] ASC 56-254; [1994] A.T.P.R. 41-288; *Teachers Health Investments Pty Ltd v Wynne* [1996] ASC 56-356; [1996] N.S.W. Conv. R. 55-785; *Geelong Building Society v Thomas* (1996) V. Conv.R. 54-545; *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCA 62; (2002) 117 F.C.R. 301.

> the exercise of free and deliberate judgment, is considered by the courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment."[85]

Pollock was speaking only of undue influence, but a similar statement could encompass all of the doctrines. Atiyah later came in range, writing that "in modern times, these defences have sometimes been subsumed under the generic heading of 'cognitive weaknesses'".[86] However, this phraseology suggests a defect within the mental faculty, ignoring the cases where the problem is rather an external constraint. Peter Birks and Nyuk Yin Chin came conceptually near the mark in describing a "capacity to consent [that] is excessively impaired"; but like Pollock, they were speaking only of undue influence.[87] Allan Farnsworth similarly stated that "the ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment"; but in Pollock's footsteps, this again referred only to undue influence.[88] Conaglen perceived that in unconscionability besides presumed undue influence, "the weaker party is not always in a position to exercise autonomy in her own best interests against the other". But he left out duress and actual undue influence where such autonomy is likewise impaired, except by interference rather than position.[89]

The jurisprudence reaches perhaps even closer to autonomy in discussions it has made of the doctrines. For example, of duress Lord Diplock said in *The Universe Sentinel* that the "apparent consent was induced by pressure"; this recognises that there does seem to be a consent, but one unfreely arrived at.[90] Likewise, of undue influence it was said in *Johnson v Buttress* that "the transaction was the outcome of such an actual influence over the mind of the plaintiff that it cannot be considered his free act".[91] And of unconscionability, the High Court of Australia stated in *Amadio v Commercial Bank of Australia Ltd* that: "[t]he weaker party's disadvantage exists precisely because he cannot determine what course of action would be in his best interests in the circumstances"; the doctrine addressed the "question as to the weaker party's ability to make a judgment".[92]

Ample precedential traces of a common principle of constrained autonomy can thus be found in the jurisprudence, besides academic discussions that have come near to it.

ii) Exploitation

Part III disclosed how each individual doctrine requires, under one or another term used in the jurisprudence, wrongdoing: "[t]he cases consistently refer to the

[85] F. Pollock, *Principles of Contract at Law and Equity* (London: Stevens, 1876), at pp.503–504.

[86] P. Atiyah, *Essays on Contract* (Oxford: Oxford University Press, 1990), at p.330.

[87] Birks and Chin, "On the Nature of Undue Influence" in *Good Faith and Fault in Contract Law* (1997). Oddly, they expressly denied any relation to unconscionability and duress.

[88] Farnsworth, *Contracts* (2004), at para.4.20. See also Peel, *Treitel's Law of Contract*, 14th edn (London: Sweet & Maxwell, 2015), at para.10-014, who interprets undue influence as requiring only that the influenced party entered the contract not as a matter of its own "free will".

[89] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509. Puzzlingly, he also concluded that unconscionability and presumed undue influence, by inquiring into substance, infringe rather than ultimately protect autonomy.

[90] *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 A.C. 366 at 384.

[91] [1936] HCA 41; (1936) 56 C.L.R. 113 at 134 per Dixon J.

[92] (1983) 151 C.L.R. 447 at 461 per Mason J.

advantage taken by one party of the other".[93] From among these terms, why choose "exploitation" in articulating the common principle?

The alternatives to one side—terms like "morally reprehensible" and "unconscionable"—emphasise moral blameworthiness in a way that seems at best a distraction, and arguably a distortion of what the doctrines actually minimally require. Take for example the disagreement between Birks and Chin who argue that the conduct need not be "wicked," and Bigwood and Conaglen who respond that it cannot be innocent. This debate respectfully seems an unnecessary diversion provoked by the aforementioned guilt-focused terms sometimes used. As discussed earlier, the wrongful conduct may range in severity from threatening to murder the other party to mere omission to ensure the party is sheltered from influence or impairment. Once it is realised that constraint of a party's autonomy is behind concern about contracts made in conflict with these doctrines, the meaning of (or at least the minimum of what constitutes) exploitation in this context becomes clear: having (actual or constructive) knowledge of the other party's constraint, failing to take steps to ensure the party is sheltered from it, and nevertheless concluding a contract with the party "improperly" in the sense that its formation therefore lacks the autonomous conditions prescribed by contract law. This explains, for example, why in cases like *Cheese v Thomas*[94] a constrained party was able avoid a transaction despite a court finding that the other party had not acted "in a morally reprehensible way".

Accommodating that reality, the term exploitation does not dwell on the nature of the conduct beyond it being knowing, improper, and a means which contributes to its desired end.[95] This last aspect is useful, for it focuses attention on the critical causal requirement between the conduct (knowledge of the constraint, failure to ensure emancipation from it) and its relevant object: formation of the contract. The relevant object is not advantages in specific terms, for duress and actual undue influence do not so much as inquire of terms. Moreover, although unconscionability and presumed undue influence do, the remedy is not to strike or modify those terms but to rescind the whole contract.[96] Thus, as Bigwood notes, to the extent exploitation suggests an advantage obtained (or disadvantage caused), "the benefit that results from … exploitation is the contract itself".[97]

For this reason, alternate descriptors of wrongdoing to the other side of exploitation—such as "undue benefit" or "unfair advantage"—should be avoided due to the risk of potential misinterpretation as referring to terms: First, the "benefit" or "advantage" could be misunderstood as referring to favourable terms rather than procurement of the contract. And secondly, "undue" or "unfair" could be confused as meaning an imbalance in consideration, so that substantive disproportion might be thought sufficient grounds for rescission, even though none

[93] Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991), at p.214.
[94] [1994] 1 W.L.R. 129; [1994] 1 All E.R. 95
[95] *The Oxford English Dictionary*, "exploitation".
[96] I am again grateful to Stephen Smith for inspiring an example which helps highlight this point. Suppose a party by duress pressures another into a contract whereby the pressuring party actually overpays, relative to market value, for the consideration it obtains. In the substance of the deal, there seems no exploitation. But just as the benefit obtained is not defined by substantive advantage in the terms, yet by the contract itself, likewise exploitation refers not to depriving the other party of substantive value but rather depriving it of its right to enter the contract freely.
[97] Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003), at p.176.

of the individual doctrines will void a contract if the party seeking to uphold it was reasonably unaware of the other's constrained autonomy.

iii) When exploitation should be presumed from substantive disparity

Unlike duress and actual undue influence, the doctrines of unconscionability and presumed undue influence inquire into substantive disparity. However, it is critical to appreciate that they vitiate no contract on the basis of it. Rather, all of the doctrines rescind contracts for impropriety in the formation process, the latter two indirectly and the former two directly.

Specifically, the role of substantive disparity in the latter two is *evidential*. It must first have been proven that the parties' relationship carried a risk of exploitation: this could be because a party was disabled from accessing its decisional autonomy due to an internal condition or external necessity (the case of unconscionability); or it could be because the party's autonomy was invaded by improper influence (the case of presumed undue influence). In either scenario, ordinary self-interested dealing by the consciously stronger party becomes exploitation. As Bigwood notes, "at a certain point, it becomes unrealistic to suppose" that in such a relationship there would *not* be exploitation.[98] Thus, if a striking substantive disparity is also present, the law presumes the contract at issue resulted from materialisation of the apprehended risk of exploitation.[99] That the substantive disparity is but a "forensic tool",[100] and not in itself these doctrines' concern, is further apparent in that the presumption can be rebutted by the benefiting party proving that the contract was *not* the result of exploitation. This could occur, for instance, by showing that the disadvantaged party had effective decisional autonomy, in that it was free from influence with regards to the particular transaction, or had independent legal advice.[101] For these reasons, even unconscionability and presumed undue influence apply, as McCamus says, "essentially to problems of procedural" exploitation: "that is to say, to defects in formation".[102] This again is why the remedy is not to alter terms but to void contracts. All of this is consistent with the foundational principle of freedom of contract.

Each doctrine's focus on cases where exploitation of constrained autonomy marred the formation process is what allows them to be united into a single principle.

What, then, is to be made of the doctrines' split between two different methodologies, identified by Conaglen? The best answer is the simplest: they represent different routes to *proving* the claim. Where, as in duress and actual undue influence, direct evidence is available of misconduct constraining the claimant's autonomy, the mischief is proved. It is to accommodate circumstances where the salient evidence is typically to be found in the hands of the other party that the law alternatively accepts proof of a relation that risks exploitation combined

[98] Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 O.J.L.S. 503 at 507.
[99] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 516–517.
[100] McCamus, *Law of Contracts* (2012), at p.415.
[101] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 523.
[102] McCamus, *Law of Contracts* (2012), at pp.432 and 444.

with proof of substantive disparity which suggests that that risk materialised in the transaction, as presumptive proof that the claimant's decisional autonomy was improperly constrained. The mischief is unchanged; only the onus shifts, as the party defending the claim may resist it through proof that the claimant's decision was autonomous, or effectively so through access to independent legal advice.

For undue influence, this is transparent from recognition of a second avenue employing presumptions plus onus-shifting with regard to direct evidence. The relationships covered are ones deemed or proven to be of general influence, so that if the contract at hand was free of influence, it would be an exception. Meanwhile, a coinciding disparity in the substance of the bargain is compelling evidence that that contract is no exception. In such circumstances, it is logically consistent with the concern for exploitation of constrained autonomy underlying these doctrines to shift the onus to the benefiting party to prove that somehow there was no influence.

In unconscionability, it is because the exploitation takes such a passive form that the onus must shift. The conduct, ordinary self-interested dealing, draws no distinction from a perfectly validly-formed contract. Rather, the exploitation turns on whether there was knowledge of the weaker party's disability. While it is difficult to prove knowledge, the disabilities covered by unconscionability should in most cases be obvious to a bargaining partner. A striking disparity in the substance of the bargain is then strong evidence that this knowledge was exploited to procure the bargain made. Such a disparity is not normal among able parties; these are bargains:

> "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".[103]

In court parlance, they "call for explanation." The benefiting party is the one best placed to explain: what it knew, and what steps it took to avoid taking advantage of the disability. Hence, again it is logically consistent with the concern for exploitation of constrained autonomy underlying these doctrines to shift the onus in this circumstance to the party defending the claim, once the claimant has made the prima facie case it must make, through proof of vulnerability and disparity, of a risk of exploitation that presumably materialised.

3. How the common principle incorporates each individual doctrine

Returning to the elements of the individual doctrines, it can be seen that they are reflected in the common principle described above. It captures the doctrine of duress, because exercising illegitimate pressure to induce consent to a contract is exploitation, and having "no realistic choice but to consent to the contract" means one's decisional autonomy has been seriously constrained. Likewise, it covers undue influence, for improper influence constrains a party's autonomy—seriously if to the point of inducing consent to a contract, and exploitatively if done knowingly. It also encompasses unconscionability, for a party under an applicable disability has seriously constrained autonomy, and if the bargain is sufficiently

[103] *Earl of Chesterfield v Janssen* (1751) 2 Ves. Sen. 125; 28 E.R. 82.

disproportionate to suggest that the other party knowingly took advantage of the disability to procure the bargain, this is exploitation.

V. Conclusion

1. Why unify the doctrines?

There are reasons to think that the law would benefit by consolidating these doctrines, eliminating the individual rules and their differing elements and tests.

One is a broad consensus recognising the doctrines' similarity, interrelation, and overlap: "there are no clear demarcations between the doctrines … The difference is only slight at times".[104] Indeed, several experts see no remaining distinction between actual undue influence and modern duress.[105] Others see no meaningful difference between unconscionability and presumed undue influence.[106] And still others see overlap between unconscionability and economic duress.[107]

Attempting to preserve the doctrines' separation and delimitation by developing each's own definitional niceties has arguably only enhanced confusion: McKendrick, for example, finds that:

> "duress has been bedevilled by conceptual confusion, with the result that it is not easy to identify its limits and it is not obvious that it is ready to play the role which has been allocated to it".

Likewise, he concludes that "although undue influence is a well-worn phrase, its precise meaning is unclear; there are a number of obscurities".[108] Sir Kim Lewison has similarly said that many misconceptions persist regarding it, even within the upper echelons of the profession.[109] And of unconscionability, Conaglen declares that "one cannot gainsay the proposition that exact delimitation of the concept … is no easy task".[110]

This theoretical mess has carried over into practice. McCamus notes that for claimants it is common and, given the theoretical situation, arguably "appropriate to consider the application of two or even all three of the doctrines".[111] The present editors of *Anson*, among others, have even argued that several cases dealt with as undue influence should have been cases of unconscionability.[112] McCamus believes *Bundy* itself might be such a case.[113] Indeed, the articulated terms of unconscionability are so broad as to make its ambit vague—which may explain

[104] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 524.

[105] See e.g., Bigwood, *Exploitative Contracts* (2003), at pp.384–385; Farnsworth, *Contracts* (2004), at para.4.20; Waddams, *Law of Contracts* (2010), at para.520. McKendrick at minimum sees overlap: *Contract Law* (2015), at p.300.

[106] See e.g., Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991), at p.215; McCamus, *Law of Contracts* (2012), at p.379; Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 O.J.L.S. 503 at 514. Chen-Wishart also sees overlap: "Unconscionable Bargains: What are the courts doing?" (1987), at p.158.

[107] *Chitty on Contracts* (2015), at para.8-130; *Borrelli v Ting* [2010] UKPC 21; [2010] Bus. L.R. 1718.

[108] McKendrick, *Contract Law* (2015), at pp.293 and 299.

[109] K. Lewison, "Under the Influence" [2011] R.L.R. 1 at 23.

[110] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 521.

[111] McCamus, *Law of Contracts* (2012), at p.378.

[112] *Anson's Law of Contract* (2010), at p.374.

[113] McCamus, *Law of Contracts* (2012), at p.380.

how it could be applied faithfully but restrictively in England, and equally faithfully but expansively in Australia (with Canada in between). Recalling the diversity of situations which it has been said to cover, it could be argued that it is conceptually incoherent, except as a residual category intended to capture vitiation cases "missed" by the other doctrines, or as a conclusory label affixed to reasoning that proceeded along undisclosed lines. But this begs the question, "missed" or "conclusory" of analysis according to what rule embodying what logic of the law of contract?

And so, conversely, it may be that replacing the individual rules with their common underlying principle would improve the law's conceptual clarity and simplify litigation and adjudication. As Cartwright says:

> "Lord Scarman may be right that it is not possible or desirable to abandon the existing categories in favour of a single category … But once it is realised that there is a general principle at work, underlying the several categories … it helps to explain the coherence of the law."

So long as the common principle is correctly identified, he adds, it would allow for "a more sensible examination of the ways in which vitiating factors should—or should not—be developed".[114]

Presently, the various individual doctrines are excessively preoccupied with particularised factual conditions that could lead to, but are not necessary for, the result that matters legally: constrained autonomy exploited in the making of the contract. Escaping the current confusing doctrinal distinctions tied to distracting factual fixations reflecting the rules' pre-convergence histories, and focusing attention instead on the common principle that causes and explains the vice in formation of contracts in all these cases, would achieve the aspirations Cartwright described.

The unifying principle is not too abstract to provide an intelligible legal standard, for (appropriately) it mirrors the freedom that is the fundamental condition for valid formation of a contract. The individual doctrines depict fact-scenarios illustrating how that defect could occur. While the common principle reveals the rationale behind them and uniting them, it simultaneously distinguishes these from other cases where different doctrines like mistake and misrepresentation vitiate contracts—namely where the defect is not constraint of the ability to exercise decisional autonomy, but unreliability of the informational field upon which that autonomy is deployed. Grouping the doctrines into "clusters" relatable to these two categories is already the norm in Contract treatises; the further step called for is to recognise the implicit expert intuition that the group is linked by accurately articulating the rationale that unites the members and animates their fact context-specific operation.

An argument can always be made for precautionary further investigation before action. But this seems a case that is "timely in the sense that the various lines of cases are sufficiently well-established to support the generalisation".[115] Courts could proceed incrementally: the common principle might at first be recognised merely as an organising rationale for the existing doctrines; cases would be analysed

[114] Cartwright, Unequal Bargaining : A Study of Vitiating Factors in the Formation of Contracts (1991), at p.220.
[115] Waddams, *Law of Contracts* (2010), at para.520.

and discussed in its terms, but officially decided under the subsisting sub-doctrines. Over time, as it became apparent that the principle could deliver the same results, whilst offering a cleaner analysis and clearer justification, the second step might be seen as unnecessary and confidently laid away. The praiseworthy judicial instinct towards caution is often well-served by such incrementalism.

But sometimes, cautionary concerns cut both ways. Reasons exist why this could be one of those scenarios. Multiple experts perceive risks in delaying the step of unifying the doctrines. For example, Capper says that, faced with the current mess, "there are definite signs of the courts manipulating the … doctrines to ensure that someone who should win does'.[116] The common principle, whose inquiry is less distracted with descriptive facts and more directly targeted to the criteria which underlie the law's determination in each case of when a contract should be voidable, may offer judges a sharper tool for deciding these cases. In addition, McKendrick worries that if a genuine common principle is not recognised, Commonwealth law may instead go the US route, expanding and deforming unconscionability, which "should not be encouraged".[117] An encompassing version of unconscionability could absorb the other doctrines, but at the cost of being too unbounded to be consistently applied without eviscerating freedom of contract, or else undermining the rule of law if applied more sparingly than its terms suggest. The risk that a judge, dissatisfied with the current doctrinal knot, might resort to this rough-but-ready solution if delay in recognising the doctrines' common principle deprives him of a better-rationalised and substantively more faithful solution, is what worries McKendrick. The Supreme Court of Canada's most recent discussions on unconscionability may lend support to McKendrick's concern.[118]

2. Possible apprehensions?

Are there other reasons to be concerned about unifying the doctrines? Central to Lord Scarman's unfavourable response to the "inequality of bargaining power" idea was worry about uncertainty, and hence, inconsistency, because there is always inequality, so how much is enough?[119] If the principle proposed here were simply constrained autonomy, the same concern would arise. But the term "decisional" narrows the focus to that which affected the formation process. The "exploitation" requirement excludes voiding a contract where the party seeking to uphold it was innocent. And the need for the constraint to be "serious" restricts the rule's application to a relatively small number of egregious cases. In truth, neither the standard for avoidance nor the degree of uncertainty should differ from under the existing individual doctrines. In duress, it is uncertain which pressures are illegitimate, and how much leaves no realistic alternative. In undue influence, what amounts to undue is notoriously uncertain. In unconscionability, it is uncertain what disabilities are covered, and how great an imbalance is "overreaching". Unconscionability and undue influence are equitable doctrines, and modern duress has expanded to be, in *Bigwood*'s phrase, "coterminous" with actual undue

[116] Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 L.Q.R. 479 at 501.
[117] McKendrick, *Contract Law* (2015), at p.304.
[118] See fn.42 above.
[119] *Pao On v Lau Yiu Long* [1980] A.C. 614. See also Thal, "The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness" (1988) 8 O.J.L.S. 17.

influence, so the individual doctrines themselves are all open-ended and requiring of subjective determinations.[120] In this context, a common principle actually *enables* more certainty and consistency, for besides obviating conceptual and procedural pitfalls arising from doctrinal overlap, the principled version of the open-ended question at least directly addresses that which in every case must justify or not the vitiation of a contract: the degree to which freedom of contract was improperly constrained.

Lord Scarman criticised the bargaining power suggestion also on grounds that people must be held to their promises.[121] The advantage, as common principle, of decisional autonomy is that it is the very foundation of which promises the law of contract recognises. Thus, inquiring into its presence or absence should minimise the risk of the law improperly enforcing un-free promises, and of it voiding properly-free promises.

Some, like Conaglen, favour the doctrines' continued separation because:

> "[t]o combine them into a single unified doctrine will cause us to lose sight of the policy considerations which underlie each of the doctrines".[122]

Bigwood similarly observes that duress and undue influence deal with "deflected volition" while unconscionability concerns "deficiency in rational or judgmental capacity".[123] However, that distinction in fact highlights how both essentially concern the autonomy to decide whether to enter the contract, being the fundamental policy consideration regarding contract validity, and the only one underlying these doctrines that is determinative of contract validity. Whether this occurred by deflected volition or defective judgmental incapacity, whether caused by illegitimate pressure, influence, or exploited disabilities, are facts irrelevant to the ultimate question of contractual validity.

A final suggestion, again from Lord Scarman, is that because Parliament has restricted freedom of contract in several areas, its restriction is the legislature's task.[124] But this ignores that the existing case law doctrines already each operate to restrict it. If these do embody a common principle, one which mirrors the foundation of why courts enforce contracts *lacking* that formative defect, surely it would be better for the case law to make that clear. Further, as Waddams notes, legislation "tends, in practice, to be in particular fields [and] varying among different jurisdictions".[125] Hence, not legislation but the common law is best placed to recognise a general principle, and such that it will transcend all the boundaries of statutory jurisdiction—especially helpful in core private law areas of daily activity like Contract.

3. The Bottom Line

A single principle which rescinds a contract made by a party exploiting seriously constrained decisional autonomy of the other would unify yet faithfully preserve

[120] Bigwood, *Exploitative Contracts* (2003), at p.385.
[121] *Pao On v Lau Yiu Long* [1980] A.C. 614.
[122] Conaglen, "Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh" (1999) 18 N.Z.U.L.R. 509 at 544
[123] Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 O.J.L.S. 503 at 515.
[124] *Pao On v Lau Yiu Long* [1980] A.C. 614 at 634.
[125] Waddams, "Unconscionability in Contracts" (1976) 39 M.L.R. 369 at 393.

the rationale and operation of the discrete doctrines of duress, undue influence, and unconscionability. Recognising it would enhance the law's coherence, clarify and streamline invalidity claims, and facilitate their consistent adjudication. ☞

☞ Contracts; Duress; Unconscionability; Undue influence; Validity